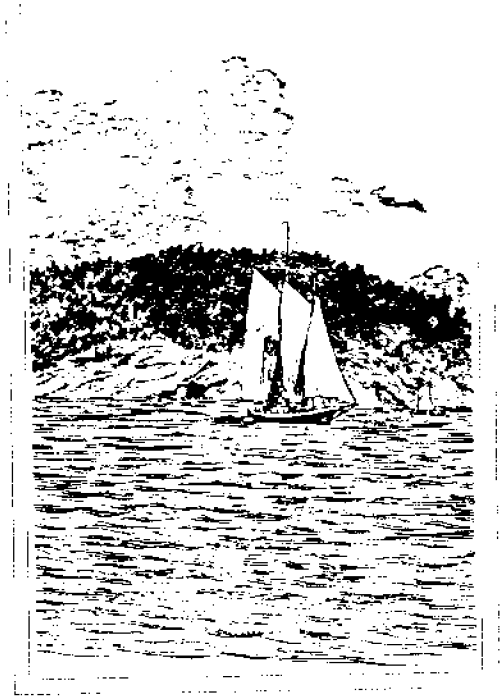
Proceedings
National Conference on the States and an Extended Territorial Sea



Coastal Law and Policy

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The **Sea Grant Legal Network**, or SeaNet, is composed of attorneys from university-based law programs that are affiliated with the National Sea Grant Program. SeaNet was organized in 1983 to ensure that Program attorneys are able to explore marine resource policy issues collectively, and to make this information readily available to the marine communities in their respective states.

The **National Sea Grant Program** was established in 1966 to encourage research, education and advisory service to help those individuals who must make decisions about the future use of the nation's marine resources and those who depend on the coastal environment for jobs or recreation. Texas A&M University is the Sea Grant College for Texas, providing leadership for the State's research, education and extension activities. For more than a decade, this effort has ranged from aquaculture to biomedicine, minerals recovery, coastal management, pollution studies and fisheries research.

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Introduction

One result of the long and intricate negotiations leading to the United Nations Law of the Sea Treaty in late 1982 was a growing international consensus on a 12-nautical mile territorial sea. The United States refused to sign the treaty and has held firm to its three-nautical mile territorial sea. The prospect of an expanded territorial sea was, however, left open as a result of President Ronald Reagan's March 10, 1983, Proclamation of a 200-mile Exclusive Economic Zone for the United States. This pledge to abide by all but the deep seabed mining terms of the treaty appeared to leave open the prospect of harmonizing the United States' territorial boundaries with the 12-mile limit accepted by the majority of coastal nations.

Contemplation of such an extension would include an assessment of the implications for the relations between the states and the federal government, particularly in terms of management responsibilities, allocation of wealth, and international relations. To explore this issue, the Texas A&M University Sea Grant Program and the Sea Grant Legal Network convened a National Conference on the States and an Extended Territorial Sea in San Antonio, Texas, on December 9-11, 1985. Marine law specialists and representatives from state and federal agencies were invited to analyze and speculate on the political and legal implications of extending the United States' territorial sea from three to 12 miles. The goal was not to defend the status quo, or to advocate an extension, but to compile and present the legal, historical, scientific and political background required for any future consideration of such a change. This volume provides the record of the presentations made at that Conference.

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The Law of the Sea Conference and National Jurisdiction

Thomas A. Clingan, Jr.*

In the time available to me today, I wish to address the subject of national jurisdiction in the oceans, and how the 1982 Convention on the Law of the Sea[1] reflects changing attitudes with respect to coastal State[2] jurisdiction. I will not address the question of how a coastal State, being a federation of individual constituent units, could or should distribute the benefits of increased jurisdiction between itself and those constituent units, because much will be said on that subject in later presentations. My purpose is to review the Law of the Sea Convention, in light of historical developments, to provide a basis for examining modern law with regard to resource and non-resource management problems. With regard to resource jurisdiction, I shall briefly discuss the treaty's codification of the concept known as the Exclusive Economic Zone (EEZ), and the treatment accorded to the continental shelf. As to non-resource questions, my major emphasis will be placed on the protection and preservation of the marine environment, and marine scientific research.

In evaluating what I am about to say, please keep in mind two important points. First, the Law of the Sea Convention is not yet in force, not having received the required number of ratifications. Even if it were in force, the United States, not being a party to the treaty, could not claim any benefits arising solely by reason of the treaty, although it would be the beneficiary of any treaty provisions that could be said to represent rules of customary international law. This is not to denigrate the importance of the treaty provisions. The nature of the negotiating process in the Third United Nations Law of the Sea Conference was such that all rules contained in the treaty were designed to achieve consensus among the more than 150 participants. To the extent that this process was successful, the provisions of the treaty, except those relating to deep seabed mining, clearly represent a global view of what rules would be desirable with respect to ocean usage, and thus will be influential in the international community whether the treaty does or does not enter into force. For that reason, they are worth our attention.

Before addressing the issue of the exclusive economic zone, we should turn our attention to the territorial sea, because it was the uncertainty existing in international law with regard to the breadth of the territorial sea that created pressures to convene the conference in the first place, and it was these same pressures that operated within the conference to result in the creation of the EEZ concept. In the early 1900's, evidence was

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abundant to support the proposition that the internationally accepted limit to the territorial sea was three nautical miles.[3] As time passed, however, this unanimity was eroded because the major use of ocean space was steadily shifting from trade and transportation–although these remained important–to the exploration for and the extraction of the natural resources, both living and non-living, on the seabeds and in the vertical water column. A limit of three nautical miles clearly favors marine transport and the military uses of the oceans, but is insufficient with regard to coastal State resource needs. Subsequent to World War II, U.S. technology had advanced to the point where the extraction of oil and gas from submerged lands was feasible, and internal political pressures to obtain federal protection for offshore extraction activities resulted in the now famous Truman Proclamation on the continental shelf in 1945, whereby the U.S. unilaterally declared that the continental shelf contiguous to its coast appertained to the United States and was subject to its jurisdiction and control.[4]

This proclamation did not indicate the extent of the jurisdiction claimed but the accompanying press release indicated that such control could extend to a depth of at least 100 fathoms, or 600 feet[5]. As history records, the U.S. procalamation was followed shortly by similar claims elsewhere[6] and these emerging claims created a pattern for the generation of a rule of customary international law. As is well known, this law was codified by the 1958 Geneva Convention.[7] But oil and gas was not the only problem. As it was clear that these resources could not be managed by restricting coastal State jurisdiction to within a three-mile territorial sea belt, it was equally clear that fisheries could likewise not be managed rationally or successfully within such a narrow margin. Claims to extended jurisdiction for fisheries management began to proliferate, most of them extending only to an inadequate 12 nautical miles, but some States sought to solve the problem in a more direct way by extending their territorial seas as far as 200 nautical miles.[8] Truman's continental shelf proclamation was used as a basis for justification for these extended claims--what is good for oil is good for fish.

The first and second United Nations Conferences on the Law of the Sea were held in 1958 and 1960, respectively. In both conferences, the maritime powers, particularly the United States, sought to achieve agreement on a narrow territorial sea, preferably three miles, but in no case more than six.[9] They were, however, willing to concede increased fisheries jurisdiction to the coastal State over an additional, equally narrow belt. This effort failed in both instances because the package was just not adequate to solve the fisheries management problem. Claims to extended territorial seas continued to proliferate. By 1965, the problem had become so worrisome that suggestions were being made by the Soviets, and others, that it was time to consider a third conference to once and for all fix the limits of the territorial sea on a global basis. By this time, the number of nations claiming at least a 12-mile territorial sea made this number negotiable. It

was the view of the United States, however, that before agreement could be reached on 12 nautical miles two important problems would have to be addressed and solved. First, an extension of territorial seas to 12 nautical miles would have the effect of placing straits used for international navigation that were 24 miles in width or less under coastal State jurisdiction.[10] Keep in mind that under a three-mile territorial sea, all those more than six miles in width would have a high seas corridor in them, through which ships and aircraft could pass unimpeded. The right of aircraft to overfly these straits and the right to submerged transit would be lost if a 12-mile limit were to be adopted without further protections. Consequently, the U.S. made its agreement to a 12-mile limit contingent upon agreement on an acceptable regime of passage through international straits. The second problem seen by the U.S. is that it could not conceive of coastal State agreement to the package unless the fisheries problem were successfully addressed. Since the 1960 conference made it crystal clear that this problem could not be solved by manipulation of the limits to the territorial sea, a new approach was required. The result of the search for a new approach is the chapter contained in the LOS Convention regarding the exclusive economic zone.

The EEZ concept is a compromise, very delicate in balance, that assigns to coastal States sovereign rights over the living and non-living resources of the seabed and superjacent waters to a distance not to exceed 200 nautical miles. It also gave to the coastal State specified jurisdictions with regard to the establishment of artificial islands, installations and structures, and with regard to pollution control and the conduct of marine scientific research.[11] At the same time, however, the maritime interests were accommodated by preserving in this new zone the freedoms of navigation, of overflight, and of the laying of submarine cables and pipelines, and of all internationally lawful uses of the sea related to those freedoms.[12] Thus, the area between 12 nautical miles and 200 nautical miles from the coast represents a new legal construct. This area is not high seas, because the coastal State may regulate resources in a way that it could not before the agreement. Nor is the area a zone of national jurisdiction, as it would be in the territorial sea. The zone has been referred to as *sui generis*, meaning that it is unique in the law. The rules by which resource and non-resource uses are to be governed are spelled out in the treaty. The resources of the seabed of the zone are governed by the same rules that had been developed for the continental shelf.[13] And while coastal States gained major new concessions with regard to their ability to manage fish, these concessions were qualified to assure that proper conservation measures were followed, and to assure that to the extent that any coastal State was unable to fully utilize fishery resources in the EEZ, the surplus be made available to others.[14] Likewise, treaty provisions circumscribed coastal State powers with respect to pollution, marine scientific research, and control over artificial islands, installations and structures.[15] In sum, the resource problem was resolved in a way to maintain a relatively narrow ter-

ritorial sea, and at the same time preserving the most critical high sea rights with respect to navigation within the EEZ. This new concep became a cornerstone of the final treaty.

I now revert to the fact that the United States did not sign the treaty because of dissatisfaction with the provisions concerning deep seabed min ing. So where does that leave us with respect to the state of the law Were it not for one factor, it could be argued that as a non-party, the U.S could claim no rights under the treaty. This is certainly true, provided that the rights referred to are created by the treaty and the treaty alone One cannot claim the benefits of a contract without being a party thereto But during the long course of the conference, many coastal States began to implement the economic zone provisions of the treaty through nationa legislation or decree. This practice is so widespread that I believe that it would be futile to now argue that the principle (although perhaps not the detailed rules) of coastal State jurisdiction over resources to a distance of 200 nautical miles is now a rule of customary international law upon which the U.S. may rely. This clearly is the belief of the administration On March 10, 1983, the President of the United States, relying on customary law, issued a proclamation, claiming for the United States an exclusive economic zone extending to a distance of 200 nautical miles. In that proclamation he claimed for the United States precisely the same kinds of jurisdiction provided for in the convention.[16] The proclamation makes clear that there would be no change in U.S. policy concerning the continental shelf, marine mammals or fisheries.[17] This proclamation has brought only mild comment from other nations, and thus it appears that the right of the U.S. to rely on customary law in this regard has been recognized. In documents accompanying the proclamation, it was made clear that the U.S. did not intend to exercise any jurisdiction it may have over scientific research in its EEZ, although it would do so with regard to pollution to the extent of existing legislation.[18] In addition, these documents, and this is directly of interest to this meeting, make clear that the U.S. would not modify its claim of three nautical miles for the territorial sea.[19] It seems that the President had the problems of federalism clearly in mind.[20]

The general acceptance of the U.S. claim resolves the rights, under international law, of the U.S. to the living and non-living resources of the continental shelf and the water superjacent thereto to a distance of 200 nautical miles. What can be said about the area beyond? For that we turn to continental shelf doctrine. This doctrine leads us only to conclusions regarding the resources of the shelf itself, and not to the living resources of the water column, since the area beyond 200 miles remains high seas with respect to the latter. The new convention accords to coastal States the same rights to resources of the shelf as was accorded by the 1958 Geneva Convention on the Continental Shelf.[21] That convention accorded the coastal State exclusive jurisdiction over the non-living resources of the shelf, as well as over living resources of the sedentary species.[22] The

difference between the two conventions is reflected in the extent seawar from the coast that this jurisdiction may be exercised. The 1958 convention was extremely ambiguous on this issue. The coastal State could exercis jurisdiction over the shelf "to a depth of 200 meters or, beyond that limit to where the depth of the superjacent waters admits of the exploitation o the natural resources of the said areas." This combination of depth an exploitability criteria provided no clear guidelines for identifying th legal outer limit of the shelf. But in 1958 none was needed. It was no anticipated that for the foreseeable future exploitation in much deepe waters would be either possible or desirable. By the late 1970's thi theory was destroyed. OPEC had changed the name of the game. A clearer idea of the extent of coastal State jurisdiction was required. Fur thermore, the new treaty creates, should it go into force, an Internationa Seabed Authority to govern the extraction of polymetallic nodules fron the area beyond national jurisdiction, thus it was important for the new convention to specify with some clarity where that jurisdiction ended much the same as it is necessary to have clear land boundaries betwee nations.

The negotiations over this issue were complex and long, and it woul serve no purpose today to review the compromise reached in the new texts in detail.[23] Suffice it to say that these new texts provide a formula fo broad, but not unlimited, coastal State jurisdiction over the shelf wit some degree of preciseness. In order to achieve agreement on broad coasta State jurisdiction, however, it was necessary to agree to the payment of a portion of the revenues received from minerals extracted from the shel beyond 200 nautical miles. The percentages are low, however, and there is a five-year moratorium before any payments are made at all, thus the concession is not a serious one from the coastal State point of view.[24] The formula in the treaty would permit the U.S. to exercise jurisdiction over almost all, if not all, of its oil bearing formations on the shelf. Questions have been raised by some whether, unlike the provisions regarding the EEZ, the provisions dealing with the continental shelf limits are reflecting existing rules of customary international law. If not, the U.S. would not be able to rely on them in setting its own limits, and would be forced to rely on the 1958 convention, of which it is a party. If the U.S. were claiming to rely on the limits contained in the convention, the next question would be whether it must also adhere to the revenue sharing requirement which was very much a part of the overall shelf package negotiated in the treaty. This would be quite difficult, I believe, for the Congress to swallow, but if the U.S. has as an objective the acceptance of the non-seabeds provisions of the treaty into customary international law, it must be careful about claiming rights under some provisions while rejecting others. This deserves serious study at some point, but because existing exploitation patterns presently do not at extend beyond 200 miles of U.S. coasts, the issue need not now be addressed. This is clearly the view of the administration, which has announced that it intends to rely on existing continental shelf legislation.[25]

Before summarizing the jurisdiction perspective from the international point of view, let me address briefly the questions related to pollution control and marine scientific research. Since the general thrust of the new treaty is toward greater control over resources to an extended distance from the coast, it was only natural that these two subjects would invite scrutiny as well. Successful exploitation of natural resources is inextricably linked to research. Two theses are fundamental with respect to the conduct of marine scientific research in a resource zone. First, research is necessary and to be encouraged if the coastal State is to be able to assess its resource potential in the oceans. But the corollary to this is that the coastal State must have some element of control over what research is being conducted and by whom, if it is to protect itself from unwanted exploitation. Under the 1958 conventions, lacking the economic zone concept, research beyond the territorial sea was viewed as a freedom of the high seas, with one exception. The Continental Shelf Convention provided that the consent of the coastal State must be obtained "in respect of any research concerning the continental shelf and undertaken there."[26] With the creation of the EEZ in the new treaty, it was natural that coastal States demand a similar element of control with respect, not only to the continental shelf, but with respect to the water column as well. Accordingly, the new treaty provides that coastal States have the right to regular marine scientific research in their EEZ's, that such research shall be conducted only with the consent of those States, which they normally shall grant.[27] The decision whether to grant or withhold consent is within the total discretion of the coastal State. As part of the consent process, the researching institution has the duty to provide the coastal State with certain specified information to aid in the evaluation process,[28] and to comply with certain conditions, such as the right to participate, the submission of reports, and the assessment of data.[29] It can be seen, therefore, that the coastal State has considerable control over the kind of research to be conducted in the zone, by whom, and under what conditions. A slightly modified rule applies to the continental shelf beyond 200 nautical miles.[30]

The question of the protection and preservation of the marine environment is also obviously linked to resource exploitation. Prior prescription and enforcement authority was essentially limited, except for the control that flag States had over their own vessels, to the limits of the territorial sea and a contiguous zone of limited size. The new treaty both extends and circumscribes this authority. First, with respect to the power to prescribe rules, the treaty creates an obligation on coastal States to adopt laws with respect to pollution from land-based sources, from seabed activities subject to national jurisdiction, from dumping, and from vessels.[31] But for most purposes, these laws must be consistent with generally accepted international standards, to ensure uniformity on a global scale. With respect to enforcement, the treaty provides a number of options. Flag State enforcement remains.[32] It adds, however, limited enforcement powers on behalf of the coastal State within its economic zone,[33] and a new concept

known as port State enforcement, which gives States a circumscribed jurisdiction to enforce against offending vessels within their ports for incidents that occurred elsewhere, even beyond the exclusive economic zone.[34]

The United States, as mentioned previously, has decided not to exercise jurisdiction over marine scientific research in its exclusive economic zone, in the hope that other coastal States might reciprocate in favor of U.S. research vessels. With respect to pollution, the existing laws remain in effect, and are deemed for the moment to be adequate. As an aside, the maritime powers were persuaded to accept the sweeping new rules with regard to pollution control by coastal States on the understanding that those States would be subject to compulsory dispute settlement should they attempt to provide controls in excess of that permitted by the treaty.[35] Not being a party to the treaty, the U.S. loses this protection.

To summarize, then, we can see that from the perspective of international law, coastal States have been accorded sweeping new sovereign rights and jurisdictions to at least 200 nautical miles by the treaty, and, beyond that limit where the legal limits of the continental shelf occur further seaward. These rights, so far as shelf resources are concerned, are exclusive to the coastal State, and no other State may exploit them without its consent. Rights in the water column, particularly regarding the fish therein, are subject to the condition that if the coastal State may not fully utilize the resource, it should be made available to others.[36] Furthermore, we note that the treaty, whether it enters into force or not, has probably resolved the maximum breadth of the territorial sea at 12 nautical miles. Again, the United States, as it is permitted to do, has declined to make any claim to such a belt greater than three nautical miles, while at the same time recognizing the right of others to claim more, up to 12 miles.

What does all this mean to the coastal states of the United States? That, of course, is the subject of this meeting. Present rights to resource revenues of the continental shelf are governed by the Submerged Lands Act[37] and the Outer Continental Shelf Lands Act.[38] The division between the states and the federal government contained therein, while basically tied to the three-mile limit, is essentially arbitrary, reflecting a political compromise. There is no inherent connection between the territorial sea claim, which is a matter of international law, and the way in which any given nation decides to allocate revenues within components of a federal system. As the Supreme Court made clear in the cast of *United States v. Louisiana et al*,[39] the Congress of the United States is the constitutional body having the power of disposition of public lands. This power is thus entrusted to the political branch of government and the means by which it chooses to allocate or divide those lands between political entities is a political decision. This means, in my view, that whether the U.S. does or does not choose to extend the limits of the territorial sea is not particularly relevant to the issues being discussed here. Political allocation of revenues is a matter for the political process to resolve. I am sure that you can conceive of a number of alternative approaches to this problem. The status

of international law on this subject can provide no insights to this process, except to underscore the resource gains to all coastal nations regardless of their internal structures.

[1]*The conference document containing the final treaty is cited as A/CONF.62/122, dated 7 October 1982. Hereinafter cited as "**Treaty**."*

[2]*The term "coastal State" as used herein does not refer to individual states of the United States, but is used in the sense of "coastal nation." The term appears throughout the Law of the Sea Convention.*

[3]*By 1900, the three-mile limit had been accepted by 20 of the 21 States claiming a territorial sea. By the time of the Hague Conference of 1930, only eight of the 38 participants claimed more than three miles. This represented more than 70 percent of the merchant tonnage of the world. Whiteman, **Digest of International Law**, p. 14 et seq.*

[4]*Proclamation No. 2667, Sept. 28, 1945, 10 Fed. Reg. 12303.*

[5]*XIII **Bulletin**, Department of State, No. 327, Sept. 30, 1945, pp. 484-85.*

[6]*For examples of claims made between 1945 and 1950, see Knight, **The Law of the Sea; Cases, Documents, and Readings**, 1980 ed., at 9-28.*

[7]*Convention on the Continental Shelf, 471 T.I.A.S. No. 5578, In force, June 10, 1964, article 2. The 1958 convention was unclear, however, as to the extent of coastal State jurisdiction.*

[8]*At the opening of the 1958 Geneva conference Chile, Ecuador, El Salvador, Korea and Peru claimed zones of up to 200 nautical miles. Whiteman, **supra** note 3, at 17. By 1977, the number had increased to 14. Knight, **supra** note 6, at 7-39.*

[9]*For example, on April 8, 1960, the U.S. and Canada tabled a joint proposal suggesting a six-mile territorial sea, and a contiguous fishing zone extending for an additional six miles. Fishing was to be phased out in the outer zone after 10 years. The vote was 54 in favor, 28 against, and 5 abstentions. Thus, the proposal failed lacking the necessary two-thirds majority by one vote. Whiteman, **supra** note 3, at 135.*

[10]*It was estimated that there were more than 100 such straits around the world, including such critical straits as Malacca and Hormuz.*

[11]***Treaty**, article 56.*

[12]***Treaty**, article 58.*

[13]***Treaty**, article 55(3).*

[14]*For this scheme, see **Treaty**, articles 61 and 62.*

[15]*For the rules with respect to pollution, see Part XII of the treaty. Marine scientific research provisions appear in Part XIII. The rules governing installations are found in article 60.*

[16]*Proclamation of President Reagan on the Exclusive Economic Zone of the United States, March 10, 1983. This proclamation was accompanied by a White House press release and a fact sheet. They should be read together.*

[17]*It is of interest that the policy of the United States with regard to coastal State jurisdiction over tuna is not in accord with the convention.*

[18]*See the fact sheet accompanying the President's proclamation, **supra** note 16.*

[19]*The "Fact Sheet" states:*

The President has not changed the breadth of the United States territorial sea. It remains at three nautical miles. The United States will respect only those territorial sea claims of others in excess of three nautical miles, to a maximum of 12

nautical miles, which accord to the U.S. its full rights under international law in the territorial sea.

[20]*I.e., the existing division of submerged lands between the states and the federal government.*

[21]*Compare Geneva Convention, article 2, with* **Treaty**, *article 77.*

[22]*The term sedentary species is defined, more or less, in paragraph 4 of article 2 of the Geneva Convention. It is also notable that coastal State jurisdiction over these species is exclusive, whether they are exploited by it or not. There is no requirement for sharing any surplus.*

[23]*The various limits imposed upon the seaward extent of the continental shelf are to be found in* **Treaty**, *article 76. The mechanics by which these limits are confirmed are found in* **Treaty**, *annex II.*

[24]**Treaty**, *article 82.*

[25]*Fact sheet accompanying the presidential proclamation.*

[26]*Convention on the Continental Shelf,* **supra** *note 7, article 5(8).*

[27]**Treaty**, *article 246.*

[28]**Treaty**, *article 248.*

[29]**Treaty**, *article 249.*

[30]*Article 246 permits free research on the shelf in this area, provided that the coastal State has not publicly designated the area as one in which exploitation is occurring or will occur within a reasonable time period. If such a declaration is made, the consent regime applies to that area.*

[31]**Treaty**, *articles 207 to 211, inclusive.*

[32]**Treaty**, *article 217.*

[33]**Treaty**, *article 220. There are, however, limitations and safeguards on the exercise of this authority to prevent arbitrary enforcement having the effect of unnecessarily interfering with navigation.*

[34]**Treaty**, *article 218.*

[35]*For the dispute settlement provisions, see, especially, article 297 of the Treaty.*

[36]*For a discussion of the application of this concept, see Clingan,* **An Overview of Second Committee Negotiations in the Law of the Sea Conference**, *63 Ore. L.Rev. 53 (1984).*

[37]*See, especially, 43 U.S.C. 1312.*

[38]*43 U.S.C. 1331, et seq.*

[39]*363 U.S. 1 (1960).*

The States and the Territorial Sea

by Milner S. Ball*

In talking about federalism and the territorial sea, I will offer an account of the historical and conceptual context of the law of the subject. I will conclude with a sermon on the subject of the territorial sea as singular opportunity for an experiment in Madisonian federalism. With respect to the sermon, I promise only: no choir, no collection.

History of the Law

The present law is that the first three miles of the sea belong to the respective coastal states and that the stretch from three to 200 miles falls under the jurisdiction of the federal government. Let me briefly say how it got to be that way, and then address a word to the juridical confusion that lies beneath the three-mile, 200-mile rule that appears, falsely, to be so plain and placid.

The Territorial Sea to the States

The exact origin and nature of the three-mile standard for territorial seas are obscure.[1] The first formal, national claim to a three-mile territorial sea was made on behalf of the United States by Secretary of State Thomas Jefferson in 1793.[2] Three miles has remained our territorial limit in the strict sense. Through the years, however, that measure has expanded and contracted depending on the jurisdictional requirements or resource needs involved.[3] Customs jurisdiction, military defense zones, claims to the continental shelf, and fishery zones have caused jurisdiction to move in and out--a rubber band--to distances much greater than three or even 200 miles.

The question of whether the coastal states or the national government would rule the three-mile territorial sea did not arise until after the Truman Proclamation of 1945 laying claim to the continental shelf and coastal fisheries.[4] Those proclamations deliberately avoided the state-federal question. But the question was shortly raised, and two years later--in 1947 in the case of **United States v. California**[5]--the Supreme Court held that the federal government, not the states, was paramount in the territorial sea.

What they lost at law, the states very quickly won back in politics. In a show of strength, they wrested from Congress the 1953 Submerged Lands Act ceding the three-mile territorial sea to the states.[6]

Three-Mile Theories

Coastal states have never been content with the three-mile restriction

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on their seaward aspirations, and the federal government has not been content to withdraw its coastal interests behind a line three miles at sea. The three-mile division is no more than what it is, a line drawn on water.

The states have not been satisfied with the three-mile limit because of the beckoning wealth beyond and because the reasons given for denying that wealth have not been persuasive. The chief source of wealth has been oil and gas. From 1953 to 1980, national receipts from outer-continental shelf leasing totalled more than $41 billion.[7] There has also been the wealth represented by fisheries. And the future has always held out new possibilities: ocean thermal energy conversion, titanium, polymetallic sulfides, phosphate, sand, etc.

There have been various arguments for denying the states offshore resources beyond the three-mile limit. One argument has been that the sea belongs to all the people of the United States so that the federal government, as the instrument of all the people, is the appropriate recipient of its riches on their behalf. There is some truth to the point, but it suffers infirmities. On the one hand, coastal states may sustain disproportionate negative impacts from development of the continental shelf. Therefore, they may be due either compensation or a larger share of the revenue than the states generally.

On the other hand, inland practice has a different outcome. Federal lands in the interior also belong to all the people of the United States, but half of the revenues from leasing of federal dry lands are shared with those states within whose borders they lie.[8] Moreover, on top of this 50 percent revenue share, states are also, in addition, allowed to impose state severance taxes on mining on those same lands.[9] Coastal states have been denied both revenue sharing and the right to impose taxes on mining on the submerged lands off their shores.[10] So all the people own both the dry and the submerged federal lands, but states are allowed to profit from the dry lands and not the submerged lands. Symmetry is lacking.

So the fact that all the people own the sea might support federal priority and the three-mile limit. But it is not strong support.

The Supreme Court has tried a couple of other arguments.

In 1947 the Court found that the territorial sea belonged to the federal government. It has continued to honor federal priority, and the states have continued to challenge it. They have not been persuaded by the Court's arguments. And rightly so.

The Court has basically used two grounds for its decisions. One is history. The Court said that the national government had been the first to accomplish dominion over the territorial sea. The evidence in support of this contention is mixed, and the states have been unmoved by it. So in the 1975 case of United States against Maine[11], the Court abandoned the argument from history and relied solely on the second ground, what it called principle, the principle of "national external sovereignty."

National external sovereignty is a legal fiction. It tells us what the Court has done, not why. But even if national external sovereignty has real meaning, it lacks power to part the seas at the three-mile limit.

Let me give two sets of examples. The first illustrates that there is nothing about national external sovereignty that prevents states from having interests and acting on those interests in coastal waters beyond the three-mile limit. By act of Congress, when it is not inconsistent with federal law, the law of the adjacent state applies beyond the three-mile limit to activities associated with the outer continental shelf.[12] When recovery was sought for the deaths of two workmen killed on a drilling rig in the Gulf of Mexico, the Court said that the case must be decided according to Louisiana law.[13] With some 13,000 rigs on the shelf in the Gulf of Mexico, state law potentially applies to a sizable population on the far side of the three-mile limit.

Or, Alaska's measures restricting the king-crab season in the Bering Strait have been held to apply beyond the three-mile limit.[14] Or again, when Maine imposed a license fee on petroleum products transferred over water, this action was held to apply to petroleum terminals and ships within a zone extending nine miles beyond the three-mile limit.[15]

The point is that national external sovereignty does not cut off state interests three miles from shore. Correspondingly, it does not prohibit federal interests from being exercised within the territorial sea. Let me give a second group of examples of this fact.

When Congress ceded the tidelands to the states, it reserved certain rights. The courts have recognized these rights and have said that the federal government has power, for example, to regulate dredging and filling within the area ceded to Florida.[16] A federal statute has also been found to prevent Virginia from enforcing certain of its fishing laws.[17] Moreover, federal admiralty law is preeminent in governing surface uses of the territorial sea.[18]

So the states have legally acknowledged interests beyond the three-mile limit, and the federal government has legal interests within it.

Legal Standards in State-Federal Conflicts at Sea

The line drawn on water three miles from shore is not an effective division between state and federal interests in our coastal waters and continental shelf. It has not prevented or decided federal-state conflicts.

Nor has litigation produced a satisfactory alternative to the three-mile, geographical measure as a way of resolving these controversies. The Supreme Court has tried two tests as means for deciding between conflicting state-federal interests.

According to the first, the further seaward the contested marine zone lies, the more preponderant the national over the state interest. But this test sinks before it carries us very far. Nautical distance does not assign degrees of relative weight to opposing state and national interests. For example, Alaska's interest in crabs does not wane with distance as some national crab interest waxes. Similarly, the prominently cited national defense interest[19] is not greater further from shore. If anything, national defense needs increase as the focus moves landward.

The Court's other method is no more successful. According to this second test, where there is need for national uniformity, federal interests prevail; where there is need for diversity and local approaches, then state interests are to dominate.[20] This solution is no more than a restatement of the problem. The question is exactly: which are the circumstances requiring national uniformity and which diversity. Practically, there is no way to differentiate between the two, and federal agencies may well have far more narrow, parochial, provincial interests than any state might wish to pursue. Theoretically, the national interest warranting federal priority may lie in diversity rather than in uniformity. For example, it is in the national interest for navigation to be different in Puget Sound than in Chesapeake Bay (tanker size, traffic, etc.).

In sum, then, the three-mile limit does serve as a divide between state and national territory for some purposes, but neither it nor any of the Court's tests have proved suitable for division of state and federal interest in the sea.

State-Federal Forms

In this context of uncertainty and confusion, state-federal relations have taken a variety of offshore forms.

Let me remind you of the vast array of structures that have been attempted or proposed for structuring state-federal relationships in the coastal waters.

The National Environmental Policy Act[21] was not intended as a mechanism of federalism, but its environmental impact statements with scoping at the beginning and the potential for judicial review at the end have given the states a voice if only one of protest.

The Coastal Zone Management Act[22] provides a positive role for the states with its consistency provision. (At times, like NEPA, its chief value to state-federal relations may have been to serve as a mechanism for buying delay until political forces could be mounted.)

The Outer Continental Shelf Lands Act provides for state access, information, consultation, and, in some instances, concurrence.[23]

The Fishery Conservation and Management Act provides for regional councils and interaction between the councils and the federal Secretary of Commerce.[24]

The Deepwater Ports Act allows states a veto over superports on the continental shelf.[25]

And there have been various coalitions of coastal states and coastal governors organized to bring political, lobbying pressure at the federal level.

Moreover, we have seen a variety of proposals for mechanisms that have never–or not yet been attempted–including one for a public corporation for the Sea on the model of COMSAT,[26] another for a public authority on the model of the New York Port Authority,[27] and others for a kind of 51st state of the sea,[28] as well as for something called a Federal Oceania.[29]

James Curlin has recently called for a national ocean policy commission,[30] and Gary Magnuson for a state-federal partnership that would include joint state-federal management entities and regional ocean management authorities.[31]

In sum, the first three miles of the sea belong to the coastal states, but the three-mile limit does not really divide state from federal interests. The Supreme Court has attempted a couple of other means for distinguishing state and federal marine rights, but the Court's tests are unsatisfactory. They are no more determinative than the three-mile limit. Given this uncertain context, diverse institutions have been attempted and proposed for state-federal relationships in the territorial sea.

That is how the matter stands. My description has been brief to the point of caricature.

But now to the sermon.

Federalism

The Latin root of the word "federal" is foedus, fides: faith.[32] The word "federalism" signifies a type of community, those bound by trust or faith.

We have fallen into the bad habit of thinking that federalism concerns only the relation between state and national governments. In its rich and original American sense, however, federalism meant a certain kind of political community of which the state-national relationship is only a secondary part.

Aristotle observed that man is by nature a political animal, i.e. a participant in a community.[33] We frequently translate the world "polis" as "city-state." That robs the word of its fascination. For Aristotle, the polis–from which we get our word "politics"–was the ideal form of human community. (The related term in the biblical tradition is koinonia, which we translate badly as "church.") To be fully human, according to Aristotle, was to be a political animal, a participant in the polis.

The polis, however, did not hold such attraction for the American founding fathers. They were fearful of democracy because of its capacity for mob rule. "Had every Athenian citizen been a Socrates," Madison observed, "every Athenian assembly would still have been a mob."[34] Moreover, he understood that the larger number of people a pure democracy embraced, the more likely and more devastating would be its tendency to become a mob.

Instead of a polis, therefore, the men of the 18th Century invented a federal republic or what Madison carefully described as "a judicious modification and mixture of the federal principle."[35] Federalism connoted the American polis–the American improvement upon Greece–a political community that would enhance participation through representation and that protected the powerless through diversity.

Because this system, as compared to democracy, could comprehend a vast territory with large numbers of people, it was intended to produce social and political diversity. Madison thought this multiplicity to be

the salvation of the body politic. It would achieve "the great desideratum" of preserving popular government while securing minority rights.[36]

Federalism--in theory, although it has not worked out this way in fact--is the American way of structuring, expressing and participating in the polis, the ideal form of human community.

States and Federalism

In this communal, political reality, a state-national division was for Madison no more than a subsidiary supporting component.

In fact, Madison was unperturbed by the possible atrophy of state government. He was adament in pointing out that both state and national governments were to depend upon "the sentiments and sanction" of "the people alone."[37] If, he added, "the people should in future become more partial to the federal than to State governments, the change can only result from such ... better administration" as will approve itself to them. "And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be the most due."[38]

The states must earn the confidence of the people. They do so by protecting and encouraging the people's participation in the government of affairs. States have several capacities for such protection and encouragement of the people.

Structure -- A primary purpose of the states in the constitutional system is structural protection. Power was to be spread through the state and national governments and further dispersed within the governments among the executive, legislative, and judicial branches. The dissemination of power was designed to protect the people: the "different governments will control each other, at the same time that each will be controlled by itself."[39]

By providing a robust counter to the national government and each other, the states allow an isometric muscle-building exercise for the body politic. No nautilus machine is necessary. The mechanism is built into the government. If it works power is generated without being able to overgrow and expand to the detriment of other centers of power.[40]

Daily Government – The second way in which states have the capacity for gaining the confidence of the people is through bearing the burden of daily, local government. The business of the states is the common, daily affairs of the people. For example, more cases are tried in "Georgia State courts than in all the federal courts in the nation."[41] As Charles Black says:

"The state governments are omnicompetent ... To Congress, this has the immense meaning that Congress need never deal with a subject simply because it must be dealt with somehow, and nobody else is empowered. Each state can, and does, fill in for felt need. Thus, Congress is free to pursue national priorities at a pace less than frantic, with the confidence that all housekeeping that is thought needful can be and will be done by somebody else."[42]

There is another way in which "the state is still that government which most affects citizens in their daily lives."[43] It does not only operate on citizens but also gathers up choice and participation from them. This is the sense of Chief Justice John Marshall's observation that, when the proposed constitution had been submitted to the people for ratification, the vote was received through conventions assembled in the several states: "No political dreamer," he said, "was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States."[44] Accordingly, it is fit that the President, the most national officer of all, is elected through the Electoral College's use of states; it is "a dramatic re-affirmation that the states are the basis of American political life."[45] Given the opportunity, we may express and fulfill ourselves as national citizens through our states.[46]

Experimentation -- Besides earning our confidence by the way they provide structural counterweight and by the way they conduct the daily affairs of the people, states gain our support by seizing occasions to experiment.

States do the research of government. "It is one of the happy incidents of the federal system," Justice Brandeis said in a famous dissent, "that a single courageous state may serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[47]

The states can do the innovative "spadework"[48] of government, those things "wherein national uniformity is not for the moment needful, and where variety may thus have play."[49] No-fault insurance has been offered as an example: "We may end up with a uniform federal system or minimum federal standards, but we should never have had anything save for experimentation by the states." States serve as laboratories.[50]

Federalism and the Sea

All of this is to say that extending the American experiment of government to the control of offshore areas is a greater, altogether different task than extending state and national lines of jurisdiction, or extending more state-federal bureaucracy, or extending a struggle of interests. The real object is to extend federalism–the American polis–to extend the experimental capacities of the states as laboratories, to extend the means whereby popular government is preserved at the same time that minority rights are secured, to extend the forms for participation, representation, opinion, dialogue, diversity, and fruitful conflict.

Earlier I talked about methods for distinguishing conflicting state-federal interests in coastal waters: the three-mile limit and the Supreme Court tests of seaward distance and local diversity--national-uniformity. I also talked about a number of different structural forms that state-federal relationships have taken: consistency, vetoes, regional commissions, etc.

Let me suggest that federalism might mean something altogether different. Let me give an example. It is defective, but it is an example.

Continental shelf oil and gas leasing was run out the back door of the Department of the Interior for a long time. Now, continental shelf activities have been worked into a shape with much greater capacity for federalism of the sort I am talking about. Offshore oil development has been drawn into an elongated, open process. It is composed of rolling administrative judgments, public and state participation, permits providing political checks and vents at critical stages, and judicial review adding weight to the influence of public participants, especially the minor parties. The critical implementing factors are the permits and the courts.

We have seen this process taking shape in the Baltimore Canyon litigation that utilized the National Environmental Policy Act[51]; in the California litigation revolving around the Coastal Zone Management Act[52]; in the Georges Bank litigation employing the Outer Continental Shelf Lands Act[53]; and in Puerto Rico's use of the Federal Water Pollution Control Act to halt the Navy's practice bombing of the coast of Vieques island.[54]

I have said that courts and permits have proved beneficial, perhaps critical. Starting with **Brown v. Board of Education**,[55] the courts have been drawn ever more deeply into agency activities. The structural remedies granted in response to public-interest litigation require long-term judicial oversight and involvement.[56] There is no terminal point. One purpose of such litigation is exactly to prevent termination and to keep the process open and moving.

Litigation in support of public participation and minorities has led to continued judicial supervision of school boards, hospitals, prisons, and universities. The cases invoking such ongoing, structural remedies have been argued as precedents for judicial oversight of oil and gas leasing. In one case, plaintiffs urged the court "to place the Secretary of the Interior in virtual receivership to make certain that he does not subordinate the interests of the fisheries to the interests of those seeking to tap undersea oil and gas deposits."[57] So far the argument has been rejected: "The Secretary cannot be likened to a municipality bent on violating the civil rights of citizens."[58] The civil-rights-receivership analogy has not provided a winning argument, but it is instructive and may have helped to achieve the oversight of offshore activity that has been granted and that has provided some protection to the powerless.

So the courts have been important to the creation of this elongated, open process. And so have permits. To some people permits for offshore activities appear as obstacles, blasphemies of bureaucratic irrationality and inefficiency. I suggest that permits are ends as well as means and that they are part of an importantly political event. Deregulation, at least in this circumstance, is an assault on the politics of federalism.

The larger potential of permits was seized upon several years ago by the artist Christo when he erected the Running Fence, continuous panels of 18-foot-high white fabric that stretched across 24.5 miles of rolling hills in Sonoma and Marin counties, California.[59] (Since then he has wrapped islands in Biscayne Bay and, most recently, Pont Neuf in Paris.) Christo's

project required numerous permits. It also required an environmental impact report, hearings before 15 governmental agencies, the permission of many private landowners, and the services of nine lawyers. One of the permits required was a Coastal Development Permit for the last leg of the fence as it crossed the coast and ended, submerged, in the Pacific. The permit was first issued and then revoked; that Christo proceeded without it was an independent source of controversy.[60]

Even though the expected life of the fence was only two weeks, it took two years to obtain all the necessary permits and agreements. These preliminaries were no diversion. Christo could have built the fence in another country where no permits were required, but he chose the place he did because of the permits. He embraced them. As a commissioner observed, "The entire process was the work of art ...."[61] Or, as Christo said at one hearing: "It's hard to explain that the work is not only the fabric, steel poles, or Fence. Everybody here is part of my work."[62] The permit process allowed Christo to gather maximum public involvement in the act.

Permits for outer continental shelf activities from five-year plan to environmental impact statement, to exploration plan, to water discharge permit--can also generate public involvement. The preparation for and aftermath of permit issuance render the system a continuing political event, as I think it should be. Permits are not simply tickets of entry; they are part of the performance, potentially a performance of federalism. Permits are a political art form of federalism.

I have suggested that our marine territory may serve as occasion for the extension of federalism. James Madison discovered in "a judicious modification and mixture of the federal principle" the future of "a government which will protect all parties, the weaker as well as the more powerful."[63] He envisioned American federalism as a political community preventing majority, as well as minority, tyranny. I think that the continental shelf leasing program, as courts and permits have drawn it into an open, elongated, participatory process, is a medium of Madisonian federalism--much more so than any of the other forms attempted or suggested for state-federal management of marine resources.

I do not mean that Madisonian federalism has been achieved through this process. There are defects. The scheme is predicated upon challenges to agencies and subsequent judicial review. Citizen participants are dependent upon legal counsel. In our society, a distribution of wealth and opportunity that would enable all concerned citizens to be equal participants is missing. For federalism to have meaning and to survive, it cannot consign any powerless minority's survival to a balancing test. But exactly that has happened to the Inupiat in the Beaufort Sea litigation in north Alaska.[64]

Nevertheless, I propose that the outer continental shelf process--with its supervisory role of the courts and its permits--does indicate how an experiment in federalism might emerge in our territorial waters.

12-Mile Seas

If we assume that international law recognizes 12-mile territorial seas and that the United States subscribes to such a width for its own territorial waters, then formal extension from three to 12 miles would itself provide an occasion for federalism.

You will be far better acquainted than I with the potential costs to the states of such an extension: state navies, regulation, etc. And you will also know better the potential benefits: revenues from mineral development, control over the environment, etc.

I also do not presume to say what is the best point of attack for such a move. One possibility would be litigation in the Supreme Court. One could argue, for example, that, although the Submerged Lands Act uses the three-mile standard, its real intention was to turn over to the states the territorial sea of whatever width. In addition, it could also be argued that the Court's reasons for supporting federal priority in the territorial sea have been especially weak. However, I do not believe the Court would rule in favor of the states. But, I can also imagine that there would be reasons for the states to bring a suit on the issue.

If the territorial sea is to be extended formally and if the states are to become the owners of the extra nine-mile stretch, then, I assume, it is Congress that will have to do it. And it is Congress, I assume, that the states will have to address.

I do not pretend to offer advice on such issues. What I do offer is the assessment that moving the boundary from three to 12 miles would be a rare occasion for federalism. What is the sense of marine divisions between one state and another and between coastal states and the federal government? Rethinking this question and many more, informing the citizenry, and making the requisite choices would allow the three-mile limit itself to become occasion and subject for federalist dialogue.

The issue of boundaries and uses of the territorial sea, about oceans policy and about federalism can always be removed from the public judgment so that we may have decision-making of and for the people, but by, at best, an elite. Even the process of informing and making the requisite public decisions about boundaries, uses and ends could itself be momentous.

To have any prospect of success, such a process would necessarily engage the public, and engage the public as citizens rather than as interest groups.

Our federalism is an order for making and giving effect to citizen decisions in the government of their affairs. An experiment of citizen engagement in the structured, dialogic process in governing the territorial sea might produce not only a legitimate oceans policy but also a renewal of the state-national enterprise. Working clean the model I have described–shaped by permits and judicial review–would be one possibility for renewed Madisonian federalism.

Be that as it may, Alexander Hamilton proposed that it had been reserved to the American people to decide "whether societies of men are

really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend ... on accident and force."[65] I think the territorial sea and the development of a fit oceans policy offer again the unique possibility of good government from reflection and choice.

[1]*For example, the cannon-shot rule (a marine league was the distance a ball could be fired) had currency before cannon balls could be fired that far.*

[2]*1 Wait's State Papers 195-96 (1817)*

[3]*For example, fishery jurisdiction was first set at three miles, then 12, then 200. Customs jurisdiction has varied from four leagues to 62 miles. Wartime security zones have been established several hundred miles seaward of the coast.*

[4]*Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Comp.).*

[5]*332 U.S. 19 (1947).*

[6]*Submerged Lands Act of 1953, 43 U.S. SS 1201 1303, 1311-1315.*

[7]*U.S. Department of the Interior, U.S. Geological Survey, Conservation Division, Outer Continental Shelf Statistics, Oil, Gas, Sulphur, Salt, Leasing, Drilling, Production, Income, 1980 at 87 (1981).*

[8]*30 U.S.C. S 191.*

[9]*Commonwealth Edison v. Montana, 453 U.S. 609 (1981).*

[10]*Maryland v. Louisiana, 451 U.S. 725 (1981).*

[11]*429 U.S. 515 (1975).*

[12]*43 U.S.C. S 1333.*

[13]*Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).*

[14]*State v. Bundrant, 546 P.2d 530 (Alaska 1976), appeal dismissed, 429 U.S. 806 (1976).*

[15]*Portland Pipe Line Corp. v. Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U.S. 1035 (1973).*

[16]*Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 410 (1971).*

[17]*Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).*

[18]*See Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).*

[19]*See United States v. California, 332 U.S. 19 (1947).*

[20]*See California v. Zook, 336 U.S. 725 (1979); Cooley v. Board of Wardens, 53 U.S. (12 How.) 229 (1851).*

[21]*42 U.S.C. SS 4321-4369.*

[22]*16 U.S.C. SS 1451-1464.*

[23]*43 U.S.C. SS 1331-1343.*

[24]*16 U.S.C. SS 1801-1882.*

[25]*33 U.S.C. SS 1501-1524.*

[26]*Outer Contiental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Joint Hearings Before the Senate Comms. on Interior and Insular Affairs and Commerce, 94th Cong., 1st Sess., pt. 1 t 124 (1975). See 47 U.S.C. SS 731-744.*

[27]*Cf. Goldstein, "An Authority in Action — An Account of the New York Port Authority and its Recent Activities," 26 Law & Contemp. Prob. 666 (1961).*

[28]*Gaither, "A Public Authority to Manage the Atlantic Outer Continental Shelf," 2 Coastal Zone Mgmnt. J. 59 (1975).*

[29]99 Cong. Rec. 2578 (1953).

[30]Coastal Zone Mgmnt., No. 40, Oct. 24, 1985, at p. 2.

[31]Magnuson, "The Coastal State Challenge," speech presented to N.C. Coastal States Ocean Policy Conference, Oct. 31, 1985 (preliminary report on CSO study).

[32]See Diamond, The Federalist on Federalism, 86 Yale L.J. 1273, 1280 (1977).

[33]Aristotle, The Politics, Bk. I, ch. 2, at 28 (T. Sinclair trans. 1962).

[34]The Federalist No. 55, at 374 (J. Cooke ed. 1961) (Madison).

[35]Id., No. 52, at 353.

[36]Id., No. 10, at 61.

[37]Id., No. 46, at 315-16.

[38]Id. at 317.

[39]Id., No. 52, at 351.

[40]See H. Arendt, On Revolution (1964).

[41]Bell, Some Concluding Reflections, 9 U. Tol. L. Rev. 871 (1978).

[42]Black, Foreword: The Myth and Reality of Federalism, 9 U. Tol. L. Rev. 615, 617 (1978).

[43]Diamond, supra, at 1283.

[44]McCulloch v. Maryland, 4 Wheat. 316 (1819).

[45]Diamond, supra, at 1284.

[46]*In recent years we have been troubled about keeping our government one of and for the people. So have attempts been made to scale it down, render it more efficient, less expensive and more responsive, and to invest it with integrity and competence. The more intractable problem is to recapture it as a government by the people.*

[47]New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[48]Bell, supra, at 812.

[49]Black, supra, at 617.

[50]Friendly, Federalism: A Foreword, 86 Yale L. J. 1019, 1034 (1977).

[51]County of Suffolk v. Secretary of the Interior, 434 U.S. 1064 (1978); id., 7 Envtl. L. Rep. (Envtl. L. Inst.) 20230 (E.D.N.Y. 1977).

[52]Secretary of Interior v. California, U.S. (1984).

[53]Massachusetts v. Andrus, 8 Envtl. L. Rep. 20187 (D. Mass. 1978); Conservation Law Foundation v. Andrus, 14 Env't Rep. Cas. 1229 (1st Cir. 1980); Massachusetts v. Andrus, 11 Envtl. L. Rep. 20203 (D. Mass. 1980).

[54]Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

[55]347 U.S. 483 (1954).

[56]See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Fiss, The Supreme Court, 1978 Term: Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979).

[57]Massachusetts v. Andrus, 594 F.2d 872, 886 (1st Cir. 1979).

[58]Id. at 888.

[59]See Christo, Running Fence (1978).

[60]See id. at 34-35.

[61]Id

[62]Id. at 152.

[63]The Federalist No. 51, supra, at 353.

[64]North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978).

[65]The Federalist, supra, No. 1 at 3 (Hamilton).

Existing and Potential Resources in Offshore Waters of the United States

by Donald F. Squires*

My objective is to set the stage for the remainder of the conference: To provide a conceptual framework for understanding the resources of the Exclusive Economic Zone, to provide you with a working vocabulary of the current buzzwords, and, to the extent possible, identify those resources that are located within an extended territorial sea.[1]

On March 10, 1983, President Ronald Wilson Reagan signed the Exclusive Economic Zone Proclamation claiming sovereign rights and jurisdiction over an area of 3.9 billion acres. This effectively extended the nation's boundaries and territories from its shores out to 200 nautical miles. Of those 3.9 billion acres, 2.787 billion are adjacent to the contiguous states, Alaska and Hawaii. The remaining 1.138 billion acres are related to the Commonwealth of Northern Mariana Islands and other Pacific territories and possessions (NACOA, 1984). By this action, the United States more than doubled its size (that of the 50 states and the territories) from 2.3 to 6.2 billion acres—it is for this reason that the EEZ Proclamation is likened to the Louisiana Purchase of 1803. The coastal states did not share in this largesse as their share of offshore lands remained the 30.7 million acres of the Territorial Sea--about 1 percent of the total of offshore lands.

With this addition to its piece of the planet, the United States has acquired 3 million square nautical miles of submerged lands and rights to the living and non-living resources on and below its surface. Although the living resources of this area have been extensively studied, many of the mineral occurrences have never been systematically mapped. While mankind has harvested the fishery of this region for centuries and exploited its fossil hydrocarbons for decades, the value of its mineral potential is barely appreciated. It is in the potential of the EEZ to provide new sources of scarce or strategically important minerals that its future lies.

The Exclusive Economic Zone extends the Nation's ocean interests from the three-mile Territorial Sea out across the physiographic regions known as the continental shelf, and, in some areas, the continental slope and the continental rise. The geological significance of these regions of the

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[1]*This lecture was accompanied by slides of illustrations from Mapping and Research in the Exclusive Economic Zone published by the U.S. Geological Survey and the National Oceanic and Atmospheric Administration, 1984. The slides were furnished by Bonnie A. McGregor, U.S. Geological Survey. Those illustrations are not reproduced here.*

Table 1. Continental Seabeds Adjacent to the United States
(in thousands of square statute miles)

Region	**State Lands	Between State Limit and 200 Meter Depth	Between 200 and 2,500 Meter Depth	Total
Gulf Coast States	13.5	121.0	84.2	218.7
Atlantic Coast States	7.1	129.1	102.5	238.7
Pacific Coast States	4.5	15.0	76.2	95.7
Alaska	22.9	560.0	212.2	795.1
Hawaii	–	0.4**	3.6	4.0
Total Statute Miles	48.0	825.5	478.7	1,352.2
Acreage		559,040,000	306,368,000	865,408,000

**Areas within 3 nautical miles of coastline, except for Texas and the Gulf Coast of Florida, whre the boundaries are 3 marine leagues distant.*

***Includes State areas.*

From: MMS, 1984, Table 6.

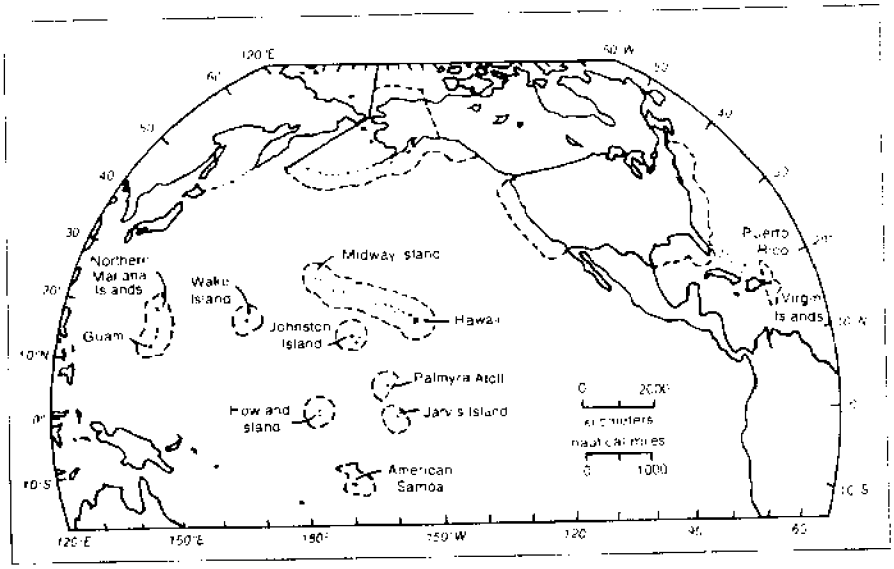

Figure 1. The Exclusive Economic Zone of the United States and its Territories and Possessions

Source: U.S. Department of State

ocean floor did not become fully apparent until the development of the plate tectonics theory or the concept of mobile plates of crustal material which, through their banging around, cause continents to form and spreading centers to appear. Because the Pacific Coast of the U.S. is on the leading edge of the North American Plate its continental shelf is narrow, and spreading centers are near the continent. The Atlantic Coast, on the other hand, is on the trailing edge of the North American Plate and is a passive margin. Its shelf is broad, and spreading centers are far removed. These fundamental positional differences create significantly different geological frameworks, and thus the mineral resources to be found.

In fact, until modern geological concepts and deep submersible technology appeared, the continental shelves were thought by many to be largely devoid of "interesting" minerals other than petroleum hydrocarbons. Because the exploration of the EEZ has just begun, and because the distribution of the resources of that region does not respect lines drawn on maps, it is difficult to assess their value in, say, the Territorial Sea or its possible extension to 12 miles. Some generalizations may be drawn, and even some data supplied, however. The latter part of this paper will survey that information, first for the living and then the non-living, or mineral, resources of the EEZ. But first, how are the EEZ resources being mapped, and what is the status of that exploration?

Exploration Methods

Technology for exploration for EEZ minerals is rapidly evolving. In the beginning–and still today–oceanographic ships serve as the platforms for exploration. From the ships are deployed a wide variety of instruments designed to grab, scoop, dig, drill, and otherwise dislodge parts of the ocean floor which are then brought to the surface for study. This is the classical way of mapping ocean resources, deriving broad generalization from the data collected by these techniques at a series of points.

The basic products of exploration geology are detailed maps and sections that display the bathymetric and geologic data obtained. Of these, bathymetric charts are most fundamental. In the past these were done by logging transects of depth soundings and inferring what happened between transects. New technologies include the Bathymetric Swath Survey System (used in waters of less than 650 meters depth) and Sea Beam (used at depths of 500 meters or more) which consist of a multiple array of sonar beams. These systems rapidly produced, as their names suggest, broad swaths of data in great detail.

These incredible bathymetric plots, produced almost instantaneously through computer analysis, reveal many new facets of the continental shelf. When coupled with information derived from a unique, British-developed, sidescan sonar system, a three-dimensional view of the ocean floor can be produced. GLORIA (Geological Long Range Inclined Asdic), a one-of-a-kind instrument loaned to the U.S. Geological Survey by the Oceanographic Institute of Great Britain, forms a plan view of the sea

floor in water depths from 150 meters to the deepest trench. With GLORIA an area the size of New Jersey can be mapped in a single day. The sonographs produced are computer enhanced, just as those of planetary exploration, and then are formed into a photomosaic allowing geologic interpretation of a kind not possible before. The entire West Coast EEZ has been mapped by GLORIA; mapping the Gulf of Mexico is in progress. The East Coast is next.

Other, established mapping techniques are combined with these new technologies. Gravity and magnetic anomalies acquired from towed, shipboard or airborne instrumentation infer buried rock formations. Seismic reflection and refraction profiles show rock layering through the crust. These profiles are derived from recordings of sound energy penetrating the sediments to various depths and being reflected to the vessel.

And, deep submergence vehicles permit geologists to visually inspect the actual geologic sites identified from maps as being of interest and to sample them with a variety of remote gear operated from the submersible. With all of this information, geologic maps can be assembled– equalling in detail those developed on the land.

Still newer technologies are coming to hand. Satellite imagery is increasingly used to map ocean surface characteristics. The abundance of phytoplankton, temperature of the water, and many other features of the ocean surface may be observed and displayed by color scanner imagery. While water is generally opaque to visible radiation wavelengths, the ability to map surface phenomena over areas of thousands of square miles in a synoptic fashion permits new interpretations of the dynamics of the ocean environment within the EEZ.

The Resources

Living Resources

The states have a particularly large stake in the living resources of the continental shelf. National Marine Fisheries Service data (NMFS, 1977) suggest that an extended Territorial Sea would yield nearly 90 percent of the weight of U.S. landings and 70 percent of their total value of those landings (See Table 4).

Commercial fishery history is a sad chronicle of ever more advanced technologies applied to location and capture of fish increasing fishermen's efficiencies at cost to a finite and non-expanding resource. New gear introductions have resulted in decimations of populations, one after the other. Various political actions have been taken to conserve the fishery resources. Most important among these is the 1976 Fisheries Conservation and Management Act, which claimed priority rights for domestic fishermen within 200 miles of the coast, the FCZ or Fishery Conservation Zone. But this legislation has served primarily to redistribute the finite resource among nations and harvesters.

As we have become more adept at catching the fish, the concept of "feeding the teeming populations of the world from the unlimited resources of

Table 2. Commercial Landings of Fish and Shellfish Caught by U.S. Commercial Fishermen (in percentage of total FCZ catch--1976)

	Miles Offshore			
	0-3	3-12	12-200	0-12
Shellfish				
Weight	52.5	27.5	20.0	80.0
Value	47.8	19.5	32.7	67.3
Finfish				
Weight	70.3	19.4	10.3	89.7
Value	60.4	16.8	22.8	77.2
Total				
Weight	66.6	21.1	12.3	87.7
Value	53.2	18.4	26.4	71.6

(Shellfish weights are for meats only; finfish are given in round weight. The category 0-3 miles includes Great Lakes and other inland waters. Data include catch from U.S. FCS landed outside U.S.)

Source: National Marine Fisheries Service

Table 3. Commerical Fishery Landings (edible and industrial), 1980-1984

	World-Wide Catch Weight	U.S. Landings Weight	U.S. Landings Value	U.S. Caught Landed in Foreign Ports or Vessels Weight	U.S. Caught Landed in Foreign Ports or Vessels Value	U.S. Catch in FCZ Weight	Foreign Catch in FCZ Weight
1984	n.a.	2.90	$2.4	0.84	$0.26	1.25	1.25
1983	76.5	2.47	$2.9	0.58	$0.23	1.1	1.1
1982	74.8	3.02	$2.4	0.36	$0.18	1.1	1.4
1981	72.2	2.80	$2.4	0.22	$0.18	1.1	1.6
1980	71.3	2.95	$2.2	0.12	$0.10	0.9	1.6

Weights are in millions of metric tons; values are in millions of U.S. dollars.

Source: National Marine Fisheries Service

Table 4. Recreational Fishery Landings, 1982

Coastal Area	Total Catch	Caught Within 0-3 mi	Caught Within 3+ mi	Coastal Residents	Non-coastal Residents	Non-Residents
Atlantic	216	178	57	27	2.9	10.4
Gulf	154			12.4	1.6	6.5
Pacific	53	30	7	9.3	5.1	1.0

Catch is in millions of fish; fishing trips in millions of fishermen.

Source: National Marine Fisheries Services

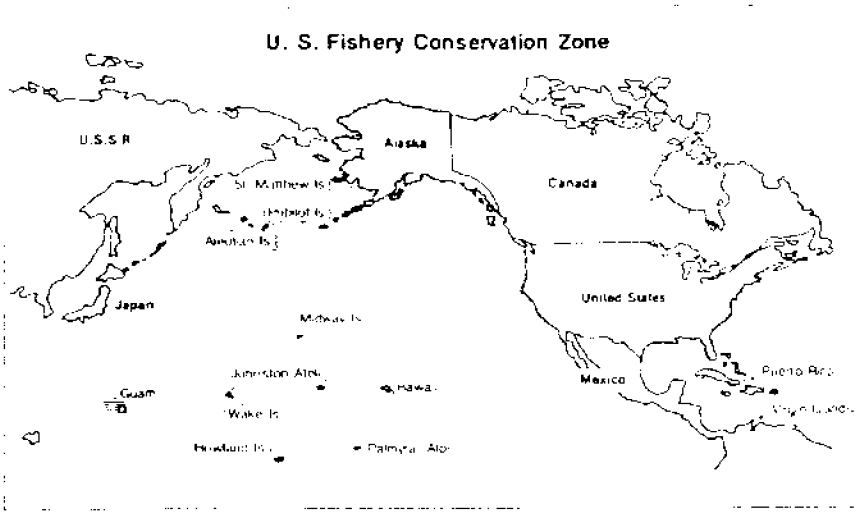

Figure 2. U.S. Fishery Conservation Zone

From: NMFS, 1977, Cover Page

the sea" has faded. Fishermen, led down the garden path of unlimited resources, have found the chafing regulation of allocation of finite resources less than satisfactory. As one fishery collapses after another it is recognized that there are no "under-utilized" species. It is now believed by many fishery scientists that the world harvest of the wild fishery has peaked at something less than 100 million metric tons.

Despite the fact that the United States coastal waters incorporate the fishing grounds which produce the major portion of the world fishery take, our nation runs a persistent trade deficit in seafoods. In 1984 imports of edible and non-edible fishery products amounted to $5.9 billion--a figure that has been steadily increasing for more than a decade (NMFS, 1985).

Some believe that the only way in which fishery production will be increased will be through the cultivation or farming of the desired species. Aquaculture, the aquatic equivalent of agriculture, is an evolving applied science directed toward that goal. Aquaculture is at once inhibited by state policies constraining the private use of public waters and bottomlands, yet stand, in the longer term, to offer greater economic rewards to the states. At present all aquaculture in the United States is practiced on land (in ponds or tanks) or in coastal waters.

Recreational fishing is a very large business in the United States and one to which the states are paying increasing importance. In 1984, in the contiguous 48 states (and not including the Pacific salmon catch), 17 million fishermen took 72.8 million fishing trips, catching 420.6 million fish weighing 653.3 million pounds. This take was 30 percent of the 1984 total U.S. finfish landings used for food (NMFS, 1984a). The great majority of

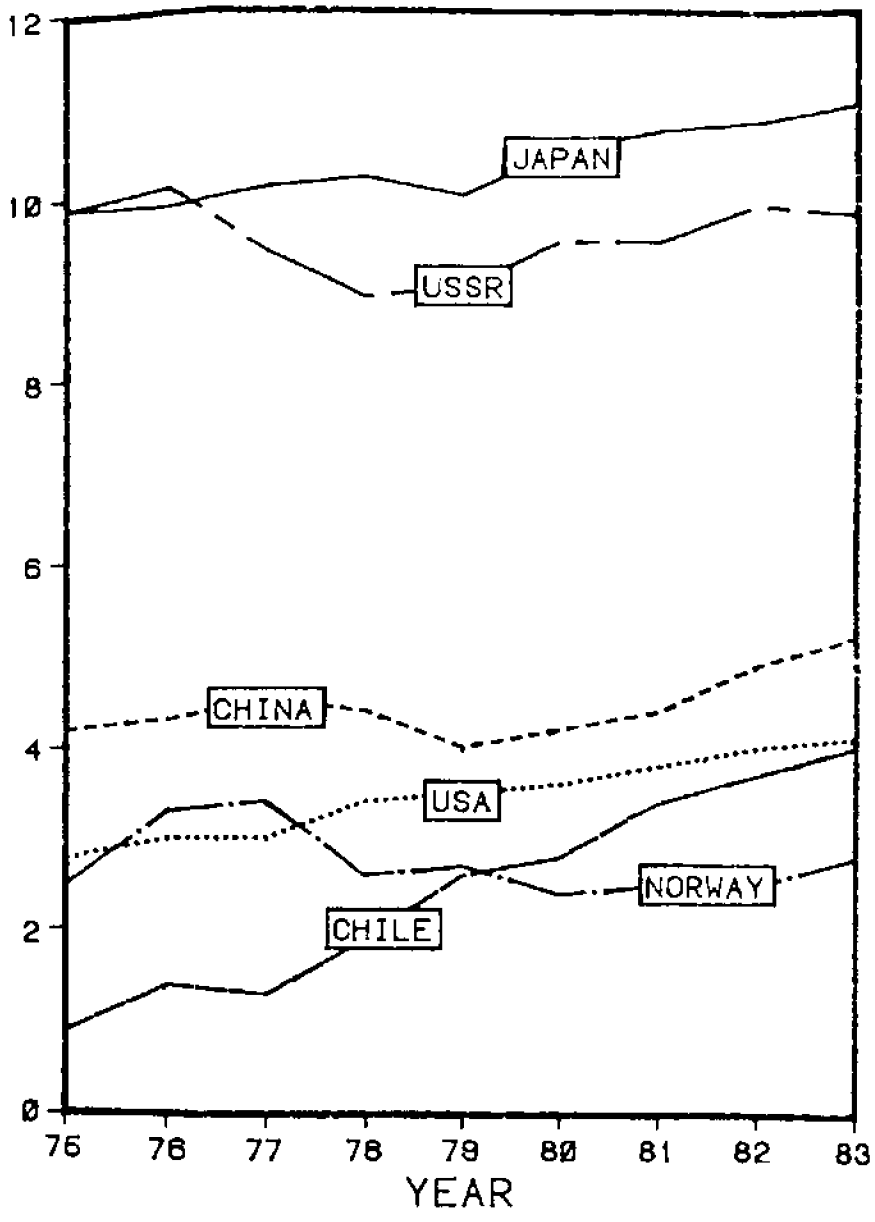

Figure 3. World Commercial Fishery Catch by Leading Nations (live weights in millions of metric tons)

From: NMFS, 1985, p. 31

the recreational fishing occurs within the present Territorial Sea. More than 40 percent of the recreational catch is from private or rented boats.

States have an additional interest in sportfishing beyond the revenues produced from licensing and permitting. Thereis an increasing capital investment being made by, and in behalf of, sportfishermen in the construction of artificial fishing reefs and other fish aggregating devices such as trolling lanes.

No discussion of the living resources of the continental shelves would be complete without mention of the problem of the highly migratory species. The U.S. declaration of the fishery conservation and management zone, and the later designation of the EEZ, did not deal with the problem of management and conservation of species that range widely through the oceans. Just as the various states have difficulty in regulating migratory species such as the striped bass, so, too, do nations when it comes to the tuna.

Non-Living Resources

Oil and Gas

Most of our experience with non-living resources of the EEZ derives from the exploration for oil and gas from offshore sources. It was this search that brought the term "OCS" (Outer Continental Shelf) into the public vocabulary. Domestic production of petroleum hydrocarbons has been primarily from terrestrial sources, but the "energy crises" of the 1970's and the national goal of energy "self-sufficiency" accelerated exploration of U.S. offshore potentials. The situation today is essentially that of pre-crisis days. In 1985, the U.S. consumed 16.1 million barrels of oil daily but produced only 10.9 million barrels (API, 1985). Using 1983 data, the American Petroleum Institute (Ibid) projected:

Proven reserves at start of year	+	**Reserve revision, extension and discoveries**	-	**Production**	=	**Total**
27,858,000		2,897,000		3,020,000		27,735,000

(data in Kbbl)

This provides an indicated supply for 9.2 years from domestic production.

A generalized cross-section of a continental shelf would show many sedimentary and structural situations ideal for the formation and entrapment of oil and gas. While in 1983, about one-third of the world's production of petroleum was from offshore sources (API, 1985), only about 11 percent of U.S. oil and 24 percent of its natural gas, in the current supply system, is from the OCS. We are still largely a fuel-importing nation in which domestic production remains primarily land-based.

There are many promising areas for hydrocarbon production in the U.S. OCS, but to date few have lived up to expectations. Drilling has proceeded in most of these areas despite litigation and regulatory roadblocks.

Table 5. U.S. Geological Survey Estimates of U.S. Oil and Gas Reserves

	Petroleum Region	Crude Oil (billion barrels) Identified resources: Measured reserves	Indicated reserves	Inferred reserves	Undiscovered recoverable resources: Low $^1F_{95}$	High $^1F_5$	Mean	Standard deviation	Natural Gas (trillion cubic feet) Identified resources (3): Measured reserves	Inferred reserves	Undiscovered recoverable resources: Low $^1F_{95}$	High $^1F_5$	Mean	Standard deviation
						Onshore								
1.	Alaska	8.7	0	5.0	2.5	14.6	6.9	4.3	30.0	4.4	19.8	62.3	36.6	14.0
2.	Pacific Coast	3.2	1.6	1.2	2.1	7.9	4.4	2.0	4.2	3.8	8.2	24.9	14.7	5.5
3.	Colorado Plateau and Basin and Range	0.3	Negl.	1.0	6.9	25.9	14.2	8.0	11.4	4.5	53.5	142.4	90.1	29.7
4.	Rocky Mountains and northern Great Plains	1.1	0.2	2.9	6.0	14.0	9.4	2.6	7.1	5.5	29.6	69.0	45.7	12.6
5.	West Texas and eastern New Mexico	5.4	1.3	4.0	2.7	9.4	5.4	2.2	15.9	18.1	22.4	75.2	42.8	17.8
6.	Gulf Coast	3.8	0.2	5.3	3.6	12.6	7.1	2.8	45.3	74.3	56.5	249.1	124.4	63.6
7.	Mid-continent	1.5	0.2	1.4	2.3	7.7	4.4	1.8	32.0	18.8	22.9	80.8	44.5	18.4
8.	Michigan Basin	0.2	Negl.	0.8	0.3	2.7	1.1	0.8	1.1	1.1	1.8	10.9	5.1	3.1
9.	Eastern Interior	0.2	Negl.	0.1	0.3	1.9	0.9	0.6	Negl.	0.1	1.2	5.0	2.7	1.3
10.	Appalachiana	0.2	Negl.	0.1	0.1	1.5	0.6	0.5	6.2	5.9	6.4	45.8	20.1	13.2
11.	Atlantic Coast	Negl.	0	0.1	0.1	0.8	0.3	0.3	Negl.	Negl.	Negl.	0.4	0.1	0.3
Entire Onshore		24.7	3.6	21.8	41.7	71.0	54.6	10.5	153.3	136.5	322.5	567.9	426.8	78.5
						Offshore - Shelf								
1A	Alaska[2]	0.2	0	0.1	3.8	22.0	10.8	6.4	2.0	1.2	28.5	99.0	57.4	23.6
2A	Pacific Coast	1.2	0	0.5	0.6	3.0	1.5	0.8	1.9	0.4	0.9	5.2	2.5	1.5
6A	Gulf of Mexico	1.7	Negl.	1.0	1.3	7.9	4.0	2.1	34.4	39.5	22.0	79.2	45.3	18.5
11A	Atlantic Coast	0	0	0	0	3.9	1.3	1.4	0	0	2.2	17.9	8.2	5.0
Entire Shelf		3.1	Negl.	1.5	9.2	30.2	17.6	6.9	38.2	41.0	72.0	166.8	113.4	30.4

Offshore -- Slope													
1A Alaska[2]	0	0	0	0	52.0	1.4	2.3	0	0	0	20.2	7.2	12.3
2A Pacific Coast	0	0	0	0.6	6.0	2.4	2.0	0	0	1.9	10.2	4.4	3.0
6A Gulf of Mexico	*	0	*	0.9	5.2	2.5	1.4	*	*	11.1	51.8	26.5	13.8
11A Atlantic Coast	0	0	0	0	10.7	4.1	3.6	0	0	5.1	34.5	15.4	9.6
Entire Slope	0	0	0	4.2	19.2	10.4	4.9	0	0	28.6	87.1	53.6	21.0
Offshore -- Combined Shelf and Slope													
1A Alaska[2]	0.2	0	0.1	4.6	24.2	12.2	6.8	2.0	1.2	33.3	109.6	64.6	26.6
2A Pacific Coast	1.2	0	0.5	1.7	7.9	3.8	2.2	1.9	0.4	3.7	13.6	6.9	3.3
6A Gulf of Mexico	1.7	Negl.	1.0	3.1	11.1	6.5	2.5	34.4	39.5	41.7	114.2	71.8	23.1
11A Atlantic Coast	0	0	0	1.1	12.9	5.4	3.9	0	0	9.2	42.8	23.7	10.8
Entire Slope	3.2	Negl.	1.5	16.9	43.5	28.0	8.5	38.2	41.0	117.4	230.6	167.0	37.0
Combined Onshore and Offshore													
Entire United States	27.8	3.6	23.4	64.3	105.1	82.6	13.4	191.5	177.5	474.6	739.3	593.8	86.8

[1] F_{95} denotes the 95th fractile; the probability of more than the amount listed is 95%; F_5 is defined similarly.

[2] Includes quantities considered recoverable only if technology permits their exploitation beneath Arctic pack ice--a condition not yet met.

[3] Does not include gas in storage.

Source: API, 1985, Section XI, Table 4.

Table 6. Total Offshore Wells Drilled in the U.S.[1] on Federal and State Leases (all-time to January 1, 1985)

	Exploratory Well				Development Wells				Total Wells			
	Oil	Gas	Dry	Total	Oil	Gas	Dry	Total	Oil	Gas	Dry	Total
Alaska												
State	19	7	54	80	259	13	32	304	278	20	86	384
Federal	1	--	19	20	00	00	00	00	1	00	19	20
Total	20	7	73	100	259	13	32	304	279	20	105	404
California												
State	20	10	139	169	3152	22	309	3483	3172	32	448	3652
Federal	24	0	155	179	364	3	18	385	388	3	173	564
Total	44	10	294	348	3516	25	327	3868	3560	35	621	4216
Oregon												
Federal	--	--	8	8	--	--	-		--		8	8
Washington												
State	--	--	2	2	--	--	--	--	--	--	2	2
Federal	--	--	4	4	--	--	--	--	--	--	4	4
Total	--	--	6	6	--		--	--	--	--	6	6
Pacific Coast												
Federal	--	--	38	38	--	--	--	--	--	--	38	38
Pacific Ocean												
State	39	17	195	251	3411	35	341	3787	3450	52	536	4038
Federal	25	00	224	249	364	3	18	385	389	3	242	634
Total	64	17	419	500	3775	38	359	4172	3839	55	778	4672
Florida												
State	--	--	15	15	--	--	--	--	--	--	15	15
Federal	--	--	9	9	--	--	--	--			9	9
Total	--	--	24	24	--	--	--	--			24	24
Louisiana												
State	61	96	920	1077	1851	538	757	3146	1912	634	1677	4223
Federal	206	253	3979	3538	6293	3745	3723	13761	6499	3998	6802	17299
Total	267	349	3999	4615	8144	4283	4480	16907	8411	4632	8479	21522

Texas												
State	35	182	700	917	51	145	121	317	86	327	821	1234
Federal	10	91	1032	1133	53	309	579	941	63	400	1611	2074
Total	45	273	1732	2050	104	454	700	1258	149	727	2432	3308
N. Gulf of Mexico												
Federal	--	--	241	241	69	19	58	146	69	19	299	387
Gulf of Mexico												
State	96	278	1635	2009	1902	683	878	3463	1998	961	2513	5472
Federal	216	344	4361	4921	6415	4073	4360	14848	6631	4417	8721	19769
Total	312	622	5996	6930	8317	4756	5238	18311	8629	5378	11234	25241
Alabama												
State	--	2	--	2	1	1	1	3	1	3	1	5
Atlantic Ocean												
Federal	--	--	36	36	--	--	--	--	--	--	36	36
Grand Total												
State	135	297	1830	2262	5314	719	1220	7253	5449	1016	3060	9515
Federal	241	344	4621	5206	6779	4076	4378	15233	7020	4420	8999	20439
Total	376	641	6451	7468	12093	4795	5598	22486	12469	5436	12049	29954

[1]Offshore wells are defined as those producing from beyond natural shore lines.
From: API, 1985, Section XI, Table 7.

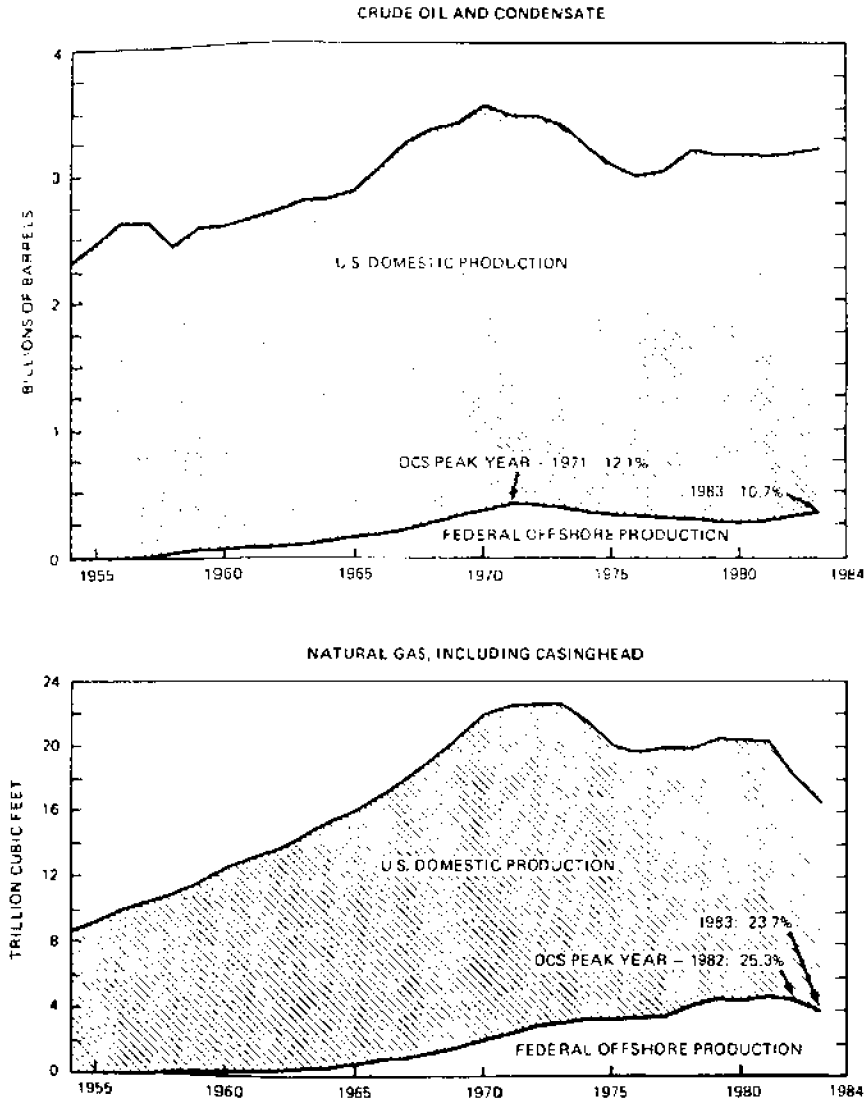

Figure 4. Production of Crude Oil and Natural Gas from Federal Lands as a Percentage of Total U.S. Production, 1954-1983

From: MMS, 1984, Figures 6, 7

As shown in Table 5, the entire offshore potential of the U.S. is significantly less than that of the onshore--something like 50 percent. Some of the offshore regions are downright disappointing. Even after oil boom fever gripped suave and sophisticated Wall Street brokers, none of the wells drilled on the Atlantic Coast have produced more than a whisper.

There are, however, very important regional differences in oil and gas potentials. As shown in Table 6, 89 percent of our measured reserves, all of the indicated reserves and 93 percent of the inferred reserves of crude oil are in terrestrial locations in the U.S. Taking the high estimates of undiscovered recoverable resources, one-third are from offshore locations. The picture for natural gas is only somewhat better for offshore sources.

Considerable differences exist between the Pacific, Gulf Coast and Atlantic regions in numbers of wells drilled in state (Territorial Sea) versus federal waters (see Table 5). On the West Coast, exploratory wells are about evenly divided between state and federal lands, but 91 percent of the development wells are within the Territorial Sea. Off the Gulf Coast, on the other hand, 71 percent of the exploratory and 81 percent of the development wells are in federal waters. The economic significance of this, of course, to local governments is considerable.

It might be argued that the U.S. offshore region has only recently been exploited and that the relatively low offshore production is merely a reflection of the stage of development of the OCS. While this is undoubtedly true, more than 38 percent of the offshore (shelf and slope) area of the nation has been offered on lease; 4.3 percent of that area was at some time leased (through August 1984), and 2.1 percent is under current lease (as of December 1984). Thirty-eight percent represents a respectable portion of the OCS, particularly when some large areas of the shelf have been proscribed from drilling because of environmental sensitivity, national security, maritime commerce or other conflicts in use. It is also certain that leases will be picked up with greater avidity when productive strikes are made.

Of the 7.1 million acres leased since 1954 for oil and gas exploration, 79 percent have been in developed areas and only 21 percent in frontier areas. Table 7 shows the distribution of those leases.

Other Minerals Obtained by Drilling

Salt and sulfur are produced as by-products of the petroleum industry and by processes of extraction directly from deposits. Production in the U.S. is primarily from the Gulf Coast region. Some of the salt domes in the Gulf of Mexico have been mined by solution with the product being sold as brine. Sulfur, removed by the Frasch Process, may also be from offshore locations. Production of both these minerals is variable and greatly affected by the national economy. In 1983 there were two producing salt and five producing sulfur wells in federal lands off Louisiana. That number has been static for almost a decade (MMS, 1984, p. 17).

Placer Deposits

Blanketing the continental shelves are sands and gravels of relatively

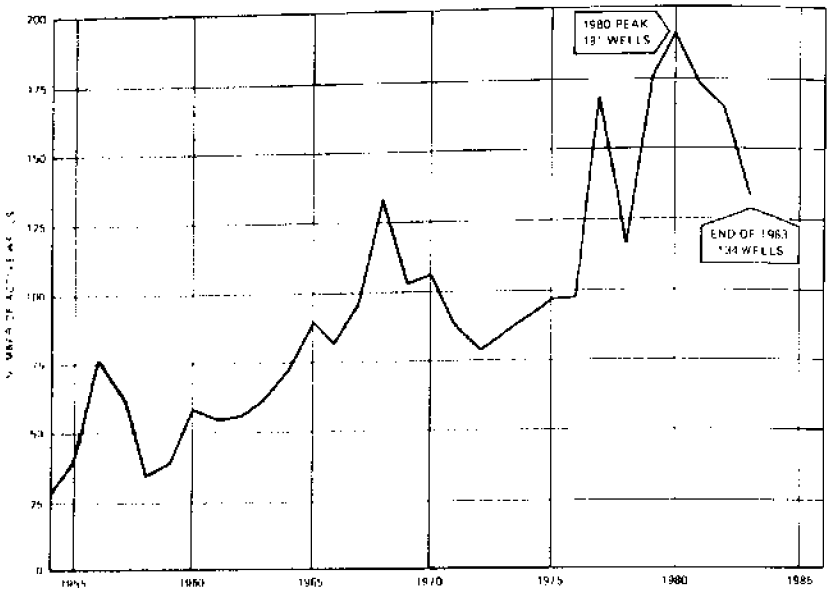

Figure 5. New Wells Drilled in Federal Waters, 1954-1983
From: MMS, 1984, Figure 3

Table 7. U.S. Offshore Leases Offered and Taken -- All-time to 1984 (in millions of acres)

	Acres Offered	Acres Leased	Under Lease in 1984
Alaska	467	4.9	3.9
Pacific	64	2.4	0.8
Gulf	2226	27.4	19.3
Atlantic	496	2.2	1.2

Source: API, 1985.

recent origin. These may have been deposited by the continental glaciers or may have been transported to the shelf region by rivers and wave action. As post-glacial sea level rise occurred, these deposits were worked and re-worked by wave action into underwater sand ridges. These ridges are being further modified by present day wave action. Where the terrestrial sources of these sands and gravels contained heavy metals, such as gold, tin, platinum, and chromite, concentrations may have been formed by the winnowing action of the waves. These are "lag" or "placer" deposits. Most heavy metal deposits are found on the Pacific Shelf, but there are some potentially valuable minerals associated with East Coast shelf sediments. None are presently being mined.

One of the more prosaic of placer minerals is sand and gravel for use in construction aggregate. But, when it is considered that the average single-family dwelling contains about 8 tons of sand and gravel, we begin to think of it in more concrete terms. Construction aggregate is a high-volume, low-cost commodity highly sensitive to transportation costs, doubling in price with each 20 miles of trucking.

At present, most construction aggregate is taken from terrestrial mines, but as these sources are built over, abundant offshore sources will be more heavily utilized as they are in Europe, Great Britain and Japan. Research undertaken on both coasts has shown the economic potential of exploitation of the offshore resource, but entrenched suppliers are reluctant to abandon established and proven sources for the new, possibly litigious offshore environment. The major problems faced by potential offshore suppliers arise from use conflicts between recreational fishermen and boaters, commercial fishermen and coastal property owners.

New York Harbor was, in the early 1970's, the largest single sand mine in the nation, possibly the world. Most of the material removed was used for fill in the construction of highways for the metropolitan complex of New York City and northern New Jersey. Shut down in the early '70's because of flagrant mining violations and environmentalists' concerns, mining of the Harbor remains one of the few "get rich quick" schemes one can find. But, despite favorable economics, offshore mining has not recommenced because of the concerns stated above. Sporadic mining of offshore sand and gravel deposits has occurred, but never in a sustained fashion.

Another nearshore placer deposit once mined extensively along the Gulf Coast was "shell." Used as construction aggregate, old oyster reefs and other biogenic calcium carbonate deposits were extensively mined. These activities were also affected by environmental concerns, and few shell-mining activities continue today.

Of all the underwater resources within the Territorial Sea and accessible by existing technology, sand and gravel offer the greatest potential to the states. By moving the locus of mining out of the estuaries where competition among users is most intense, but remaining within an extended Territorial Sea, many of the environmental concerns can be alleviated. Several states have established policies governing underwater mining for aggregate and initiated schedules of royalty fees.

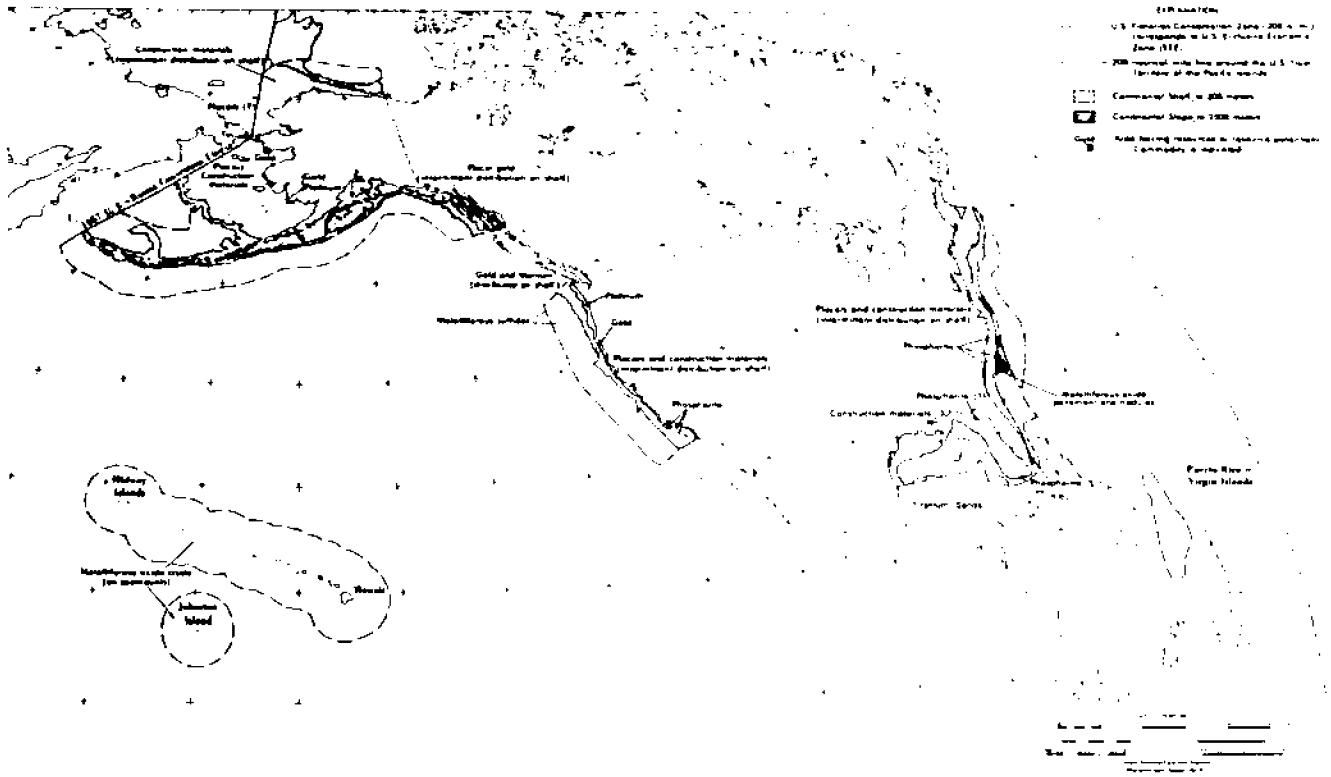

Figure 6. Promising Marine Mineral Resources on the U.S. Continental Shelves.
From: NACOA, 1983, Figure 2.

In New York, a policy coupling the mining of aggregate, which creates underwater "borrow pits," has been merged with use of the holes for disposal of contaminated dredge spoils. This policy sets double royalties: one for digging the hole (and selling the aggregate); the other for filling of the hole (disposal of contaminated spoil)!

This becomes a promising option for coastal metropolitan areas. Combining harbor maintenance dredging and sale of clean spoil from that dredging as aggregate or fill will help to alleviate the economic burden of maintenance dredging. Evolving federal practices will increasingly place the burden of harbor maintenance on local governments. As less than 20 percent of most harbor spoils are actually contaminated, what is required is good dredging practice and surge storage for the spoils because dredging production will exceed demand. At least one such arrangement has been worked out; more probably will be in the future. Another factor that may enhance the economics of offshore aggregate mining is the recovery of heavy metals. While these may be present (quantities of up to 20 percent locally), an effective economic recovery system coupled with existing dredging practices will be required to make the process of marginal interest.

Phosphorite deposits are on the Atlantic Coast, and also off southern California. Phosphorite rock is extensively mined for fertilizer, among other uses. At present, the nation's principal supply is from Florida and North Carolina. Slurries of phosphorite lie off the coast, and the deposits beneath them offer great potential. These are now being studied for the technology of mining and for the environmental impacts of mining.

Cobalt-Enriched Manganese Crusts

Manganese nodules are also a part of the public mythology of the oceans. Law of the Sea debates of a decade ago brought nodules and their potential mining to the television screens of the nation. Nodules, together with cobalt-enriched manganese crusts, occur widely in water depths of 1000 to 2500 meters. Found off both the East and West Coasts in areas of low sedimentation such as the tops and flanks of seamounts, on the Blake Plateau, or in deep central ocean basins, manganese crusts are formed by a process somewhat like metal plating–the manganese-rich material comes out of seawater solution and is deposited on rocks and calcarous skeletal materials. Manganese nodules seem to be associated with the low oxygen layer of the oceans. Cobalt content of the material increases generally toward the equator. In addition to manganese, cobalt, nickel and platinum, copper and molybdenum may be present. Despite favorable concentrations of metals and economic projections for recovery technology (given a reasonable metals market), the nodule recovery program ran into environmental problems, inability for a stable political regime to form, and a depressed metals market.

Polymetallic Sulfides

One of the most exciting new developments has been the finding of polymetallic sulfide deposits off the coast of Washington and Oregon on the crests of the Gorda and Juan de Fuca Ridges. Here, where plates are pull-

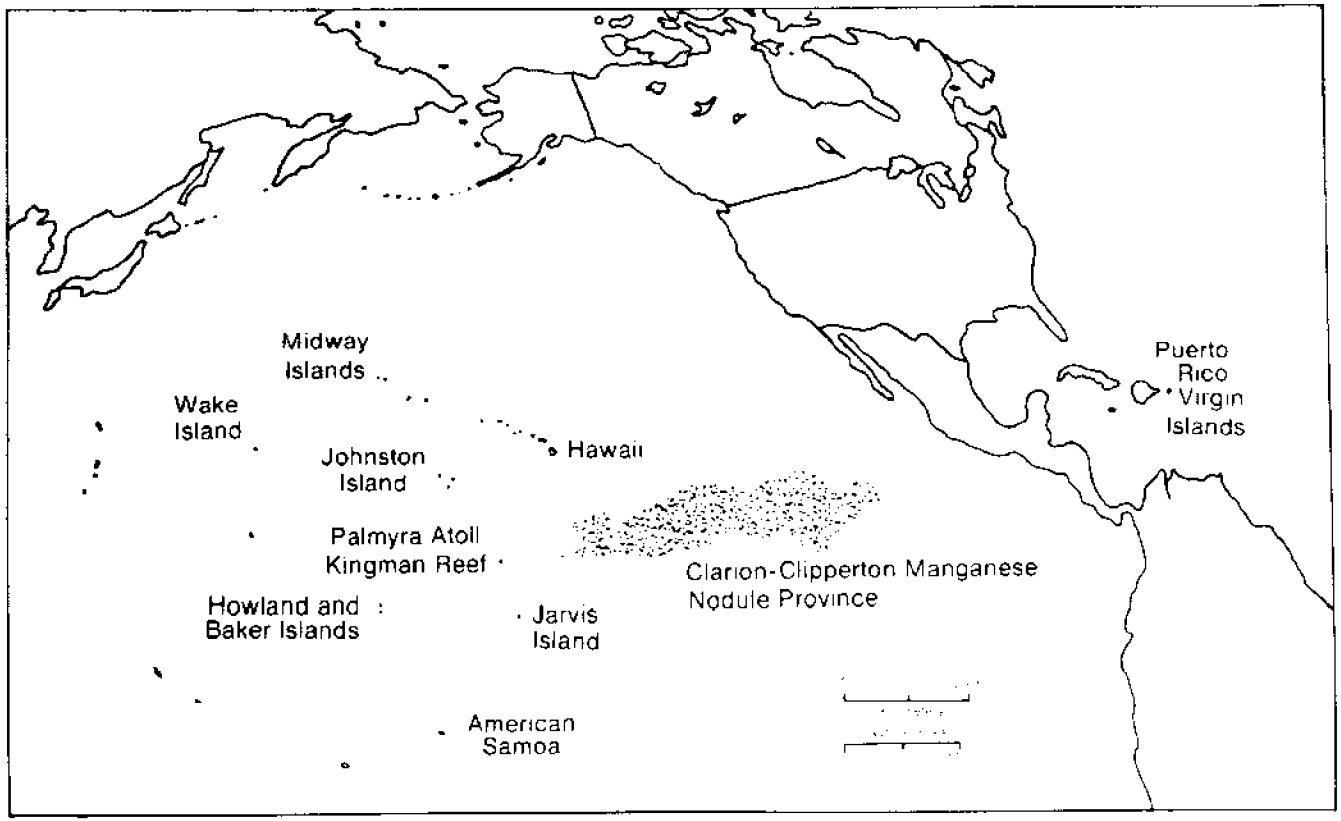

Figure 7. The Clarion-Clipperton Manganese Nodule Provine, Site of Maximum Commercial Interest.
From: NACOA, 1983, Figure 3.

Table 8. Potential Contribution of Manganese Nodule Resources from the Pacific Region to U.S. Primary Mineral Demand (in millions of acres)

Mineral Resource	Pacific Region Resources	Estimated U.S. Demand in 2000	Estimated U.S. Cumulative Demand 1978-2000
Nodules	2,100.00	--	--
Nickel	26.00	0.440	6.700
Copper	22.50	3.527	60.160
Manganese	504.00	2.000	38.000
Cobalt	5.00	0.180	0.300

**Primary demand is the demand for new metal and does not include demand satisfied by scrap or recycled metal.*

Source: NACOA, 1982, Table 3.

Table 9. Comparison of Average Ore Grades Between Components of Manganese Nodules and Land Deposits (percentage by volume)

Mineral	Percentage by Volume Manganese Nodules	Land Deposits
Nickel	1.5	0.8-1.3
Copper	1.3	1.2-28.8
Cobalt	0.24-0.35	0.1-0.5
Manganese	25.0	5.0-30.0

Source: NACOA, 1983, Table 4.

ing apart forming a spreading center, molten rock rises, erupting as lava flows forming new crustal rock. Faults along these ridges allow sea water to percolate downward and to react with the molten rock at depth. Sulfur, manganese, zinc, copper, silver and cadmium, among others, are leached from the magma and boil upward in an underwater geyser.

And, just as geysers create a cone of materials, so, too, do these underwater geysers. Upward moving hot water coming in contact with the cold seawater cools rapidly, causing the minerals to precipitate out. These hydrothermal plumes, or "smokers," allow us to study the active formation of mineral deposits, the terrestrial analogies of which have been mined for centuries. Additionally, wholly new communities of animals have been discovered in association with these "smokers." These organisms derive their energy and nutrients through chemical reactions with the upwelling solutions. While the vents are rich in minerals, their unique biological situation suggests that they will probably not be mined. But many suggest that future technology will capture the upwelling brines for refinement.

In addition to the active "smokers," there seem to be deposits derived from the plumes of metal-rich waters being vented. These massive sulfide deposits have terrestrial analogies. These deposits are thought by some to provide an almost endless supply of many strategically important minerals.

Summary

Although the living and mineral resources of the Exclusive Economic Zone are diverse and offer much potential to the nation, their exploitation awaits a more conducive economic and political environment. Only the fisheries and hydrocarbons of this regime are currently being significantly exploited. An extended Territorial Sea would give the states jurisdiction over more of those resources, although the fisheries are now largely under state control. Sand and gravel, as aggregate material, are a highly accessible resource, about which much is known. Stimulating an offshore mining industry for that resource remains a challenge.

Table 10. Forecast for U.S. Primary Mineral Supply and Demand (in thousands of short tons)

Commodity	Demand 1978	Production 1978	Estimated Demand 1990	Estimated Demand 2000	Estimated Land Production (from U.S. sources) 1990	Estimated Land Production (from U.S. sources) 2000
Aluminum	6,162.0	386.0	10,200.0	15,200.0	600.0	1,300.0
Antimony	19.0	13.0	32.0	36.0	1.0	2.0
Asbestos	682.0	103.0	683.0	683.0	44.0	66.0
Barite	2,702.0	2,112.0	3,950.0	3,000.0	2,300.0	2,000.0
Bismuth	1.2	w	1.5	1.8	0.2	0.1
Cadmium	5.0	1.2	6.2	7.4	1.8	2.3
Cesium	0.0	0.0	0.1	0.2	0.0	0.0
Chromium	544.0	0.0	810.0	1,100.0	0.0	0.0
Cobalt	9.7	0.0	13.8	17.5	3.0	5.0
Columbium	3.3	0.0	6.1	11.0	0.0	0.0
Copper	2,071.0	1,497.0	2,756.0	3,527.0	2,205.0	3,153.0
Graphite	55.0	w	80.0	98.0	0.0	0.0
Manganese	1,363.0	38.0	1,780.0	2,000.0	30.0	0.0
Nickel	181.0	11.0	300.0	440.0	35.0	150.0
Potash	6,837.0	2,484.0	8,818.0	11,133.0	1,764.0	1,764.0
Selenium	0.5	0.3	0.8	1.1	0.5	0.7
Silver**	123.1	39.4	170.0	230.0	57.0	82.0
Strontium	21.0	0.0	25.0	28.0	0.0	0.0
Tantalum	0.5	0.0	1.0	1.5	0.0	0.0
Thorium	0.0	w	0.1	0.2	0.1	0.1
Tin	44.6	w	49.7	54.6	0.2	0.3
Titanium	556.0	218.0	802.0	1,080.0	323.0	450.0
Tungsten	9.7	3.5	16.5	25.5	4.5	4.5
Vanadium	8.2	5.2	12.7	18.4	9.3	9.7
Zinc	1,270.0	334.0	1,433.0	1,819.0	595.0	772.0

Note: Figures reflect rounding

*Primary demand is the demand for new metal and does not include demand satisfied by scrap or recycled metal; primary production is the production of new metal and does not include reclamation of scrap metal.

**In millions of troy ounces.

w - Withheld by the U.S. Bureau of Mines; company proprietary data.

From: NACOA, 1983, Table 2

Table 11. Reliance of U.S. on Some Metals and Minerals Found on the Ocean Floor.

Mineral	Application	Percentage of Supply Imported	Major Sources of U.S. Supply (1978-1981)
Barite	Oil and gas well drilling	52	China, Peru, Chile, Morocco
Cadmium	Coatings, platings, batteries	69	Canada, Australia, Mexico, Republic of Korea
Chromium	Stainless steel, alloys, heat and corrosion resistant materials	88	Republic of South Africa, Soviet Union, Philippines, Brazil, Zimbabwe
Cobalt	Aerospace	91	Zaire, Zambia, Belgium-Luxembourg, Finland
Copper	Electrical, plumbing	7	Canada, Chile, Peru, Zambia
Manganese	Steel	99	Republic of South Africa, Brazil, Australia, Gabon, France
Nickel	Iron and steel, aerospace, alloys	75	Australia, Canada, Norway, Botswana
Platinum-Group Metals	Catalysts, electrical, electronics, dentistry, medicine	85	Republic of South Africa, Soviet Union, United Kingdom
Silver	Photography, sterlingware, electrical	59	Canada, Mexico, United Kingdom
Tin	Coatings, solders, pipes, transportation, electrical	72	Bolivia, Indonesia, Malaysia, Thailand
Titanium	Pigament, paper coatings, paper fillers, plastics, aerospace, chemical	w	Japan, China, United Kingdom, Soviet Union
Vanadium	Steel alloy agent, chemical catalyst	14	Republic of South Africa, Chile, Canada
Zinc	Galvanizing, brass, bronze, castings, chemical pigments	53	Canada, Peru, Spain, Mexico, Australia

w - Withheld by the U.S. Bureau of Mines; company proprietary data.
From: NACOA, 1983, Table 1.

Acknowledgements

Maynard Silva of Woods Hole Oceanographic Institution pointed me toward offshore petroleum statistics that would otherwise have been overlooked. Richard Rowe and Daphne White, National Marine Fisheries Service, provided information on the values of fishery landings by segment of the EEZ. Nancy Moore, University of Connecticut, assisted in preparation of the manuscript.

Literature Cited

API, 1985. Basic Petroleum Data Brook. Petroleum Industry Statistics. Vol. 5, No. 3, September 1985. American Petroleum Institute.

Hargreaves, D. and S. Fromson, 1983. World Index of Strategic Minerals. Production, Exploitation and Risk. Facts on File, Inc. New York, N.Y. 1983.

NACOA, 1982. Fisheries for the Future. Restructuring the Government-Industry Partnership. National Ocean Goals and Objectives for the 1980's. National Advisory Committee on Oceans and Atmosphere, Washington, D.C. July 1982. NACOA, 1983. Marine Minerals: An Alternative Mineral Supply. National Goals and Objectives for the 1980's. Ibid. July 1983.

NACOA, 1984. The Exclusive Economic Zone of the United States: Some Immediate Policy Issues. A Special Report to the President and the Congress. Ibid. May 1984, p. 37.

NMFS, 1977. Fisheries of the United States, 1976. Current Fishery Statistics No. 7200, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce. April 1977.

NMFS, 1985a. Fisheries of the United States, 1984. Current Fishery Statistics No. 8360, Ibid, April 1985.

NMFS, 1985b. Marine Recreational Fishery Statistics Survey, Atlantic and Gulf Coasts, 1981-1982. Current Fishery Statistics No. 8324, Ibid. April 1985.

NMFS, 1985c. Marine Recreational Fishery Statistics Survey, Pacific Coast, 1983-1984. Current Fishery Statistics No. 8325, Ibid. August 1985.

MMS, 1984. Federal Offshore Statistics. Leasing Exploration Production Revenue. OCS Report, MMS 84-0071. Minerals Management Service, U.S. Department of the Interior. September 1984.

USGS, 1984. A National Program for the Assessment and Development of the Mineral Resources of the United States Exclusive Economic Zone. Symposium Proceedings of November 15-17, 1983. United States Geological Survey, U.S. Department of the Interior, Reston, VA. 308 pp.

Observations on a Twelve-Mile State Fisheries Jurisdiction

by Charles R. McCoy*

Florida's location and varying geographic jurisdiction over saltwater fishing causes unusual enforcement problems. Florida separates two Fishery Conservation Zones (FCZ), the South Atlantic and the Gulf. The state's territorial waters extend nine miles into the Gulf and three miles into the Atlantic. These jurisdictions converge in the Florida Keys, and application depends on "which side of the island" fishing takes place.

An extended territorial sea is an incomplete vehicle to enhance any state's role in saltwater fishery conservation and law enforcement. A more effective method would be to amend the Coastal Zone Management Act to expressly require that federal fishery management plans be consistent with state law. Such consistency would at least require federal prohibition of fishing gear prohibited by state law.

Extending federal recognition of state regulatory jurisdiction to 12 miles will not present "undercutting" of enforcement of state law in state waters. One alternative is amending the Magnuson Act to establish minimum federal standards (size and catch limits, gear specifications) that apply in federal and state waters, while allowing more restrictive state regulations (gear prohibition, etc.) to apply in federal waters also.

A 12-mile limit will be moderately beneficial in the Atlantic Ocean, prohibiting virtually all use of purse seines for king mackerel. Fishing that occurs beyond 12 miles will not be affected. Florida will benefit little from extension of its regulatory jurisdiction from nine to 12 miles in the Gulf.

Case Studies

Potter v. State of Florida, Department of Natural Resources

Plaintiffs are shrimpers arrested for violating Florida's prohibition of shrimping (s. 370.151(2), **Florida Statutes**), in the Tortugas Shrimp Bed. The Shrimp Bed, as described in the statute, lies generally to the west and north of Key West, extending about 43 miles into the Gulf. It extends beyond the federal Tortugas Shrimp Sanctuary to the northwest and to the south. The federal sanctuary, in turn, lies beyond Florida territorial waters. The effect is to sandwich an attenuated band of federal sanctuary water between Florida territorial waters and the northwesterly extreme of the Tortugas Shrimp Bed (see Figure 1).

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On one hand, extending Florida's jurisdiction to 12 miles would narrow, but not eliminate, the band of federal waters. On the other hand, a 12-mile limit is certainly more uniform than limits of 3 and 9 miles.

Bethell v. Gissendanner, Florida Department of Natural Resources, etc.

Bethell was arrested about 3.5 miles from shore for possession of fish-traps, which is prohibited by s. 370.1105(2), Florida Statutes. The issue of federal preemption was raised, but declared moot by the Eleventh Circuit Court of Appeals in Bethell v. State et al., 741 F.2d 1241 (11th Cir. 1984). The controversy was mooted by the Florida Supreme Court's decision in Southeastern Fisheries Association v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984).

If state jurisdiction had extended to 12 miles at the time of Bethell's arrest, he would have been subject to Florida law, regardless of whether preemption had otherwise been effected.

The Southeastern Fisheries case raises an interesting question on the nature of the 12-mile extension. The Florida Supreme Court held that the challenged provision, on its face, was not intended to apply outside state waters. Given that a state court has limited the law's geographic reach to the state's territorial waters, can federal law extend that reach? A possible resolution is for federal statutes to declare that the federal law, out to 12 miles, is the same as the law that would apply within the appropriate state's territorial waters.

The Baldridge Cases

The **Baldridge** cases were brought by Florida against the U.S. Department of Commerce to prevent implementation of parts of the federal management plans addressing mackerel and grouper fisheries in the Gulf and Atlantic. Florida's principle challenges were that certain provisions of the plans were in direct conflict with Florida law, thereby violating the consistency provisions of the Coastal Zone Management Act, 16 U.S.C. s. 1456; and that the plans violated several national standards imposed by the Magnuson Act. (See Appendix, excerpted from the purse seine case.)

Specifically, Florida challenged use of fishtraps and purse seines to take grouper and mackerel, respectively. Purse seines cannot be used to take food fish "within or without" state waters pursuant to s. 370.08(3), Florida Statutes. Fishtraps are prohibited by s. 370.1105. The cases were resolved by stipulated agreements.

The **Baldridge** cases illustrate why a geographical extension of the state's regulatory jurisdiction is an incomplete vehicle for management of saltwater fish. As long as federal regulations allow use of gear prohibited by state law, the state will be unable to enforce its prohibition, absent actual, observed use of prohibited gear in state waters.

Ironically and unfortunately, Florida's allegations in the purse seine case have come to pass. Reported king mackerel catches in the Gulf have declined far below federal limits; collapse of the fishery has been pre-

dicted. Both state and federal agencies have proposed or adopted restrictions on catch. While the use of purse seines alone does not account for declining mackerel catches, the use of such devices certainly did nothing to maintain maximum sustainable yield.

Conclusions

Federal recognition of state jurisdiction over saltwater fishing out to 12 miles will be moderately beneficial to Florida in the Atlantic, and of marginal benefit in the Gulf. The 12-mile limit begs the questions of whether federal law should preempt more restrictive state regulations, and cannot solve enforcement problems attending federal leniency. Other devices, such as changes to consistency provisions of the Coastal Zone Management Act, appear to be better methods of saltwater fisheries conservation.

A 12-mile limit may have positive effects on evidentiary problems and burdens of proof associated with prosecution of saltwater fishing violations. In the Florida Keys, for example, fishtraps are most commonly used within six miles on the Atlantic side. The fish caught are seldom found in water depths or habitats beyond 12 miles. Consequently, the defense that fish were trapped in waters subject to federal law is more easily refuted.

A 12-mile limit would bring the great part of Atlantic king mackerel fishing within Florida's jurisdiction.

As illustrated by the **Potter** case, the convergence of Florida's Gulf and Atlantic jurisdictions will be made uniform by a 12-mile limit. Pockets of federal jurisdiction, analogous to "intrusions" of federal jurisdiction into state waters of southeastern Alaska, would remain in the vicinity of the Tortugas shrimp beds northwest of Key West. (See Figure 2.)

Florida's queen conch will be much better protected by a 12-mile extension. Conch cannot be taken from Florida waters; however, their native reef is "split" by the boundary of Florida's territorial waters. As the conch replenish themselves in Florida waters, they are depleted in federal.

Similarly, Florida's spiny lobster fishery will be brought largely within state jurisdiction. Currently, most lobsters are taken from reefs about six miles offshore on the Atlantic side.

Appendix

[Excerpt]

First Claim for Relief
The Fishery Management Plan and Implementing Rule Violate the National Standards Imposed by the Magnuson Act

20. Plaintiffs incorporate by reference the allegations in paragraphs 1-19 with the same force and effect as if set forth in full herein.

21. National Standard Number 1 (16 U.S.C., Section 1851(a) (1), pro-

vides that "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." The FMP and implementing regulations, in fact, promote overfishing of king and Spanish mackerel stocks. The FMP improperly sets the "maximum sustainable yield" and the "optimum yield" for both species at a grossly high level. This fundamental error permits the harvesting of fish in numbers greater than that which the species can endure and still survive. (The "maximum sustainable yield" is an estimate of the maximum number of a given species of fish which may be caught year after year without causing a decline in the stock; "optimum yield" is the ideal number of fish which may be caught, given best scientific, sociological, economic and other factors.)

22. The FMP and implementing regulations authorize the use of purse seines to take king and Spanish mackerel. The purse seine is a large and highly efficient, small-mesh net deployed by two vessels. The use of purse seines is effectively prohibited for taking mackerel by every coastal state affected by the FMP. The introduction of this gear into the mackerel fisheries does not prevent overfishing; rather, the demonstrated capacity of purse seines to capture targeted and non-targeted fish in great numbers fosters excessive fishing pressure, attainment of fishing quotas too early in the season to ensure safety of the stocks, and capture of undersized fish.

23. National Standard Number 2 (16 U.S.C. Section 1852(a) (2)), provides that "Conservation and management measures shall be based upon the best scientific information available." The Defendents violated this standard in at least two important respects:

A. The text of the FMP acknowledges that in the developmental stage of the plan, there was only scanty scientific information available as to the condition of the mackerel fisheries. From this virtual dirth of information, the Defendants nonetheless formulated figures purporting to demonstrate the maximum sustainable yields of the species. Such formulations were undertaken without a valid scientific basis and using scientifically invalid methodology.

B. At the time the FMP and regulations became effective, and for several years prior thereto, there existed scientific evidence indicating that the premises upon which the FMP were based were erroneous. Catch data relied on to determine maximum sustainable yield were shown to be an unreliable index to assess the condition of the stocks. Further, tagging data indicated that king mackerel consisted of at least two separate stocks and that such stocks should be managed separately. The Defendants wholly ignored this scientific information in the development and implementation of the FMP.

24. National Standard Number 3 (16 U.S.C., Section 1851(a) (3)), provides that "To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination." The FMP treats king mackerel as one stock throughout the South Atlantic and Gulf of Mexico

regions. Scientific information developed as early as the mid-1970's indicates that there are at least two separate and distinct stocks of king mackerel in these regions. This information further indicates that the separate stocks should be managed separately and differently. The Defendants violated this national standard by purporting to manage king mackerel as a single stock.

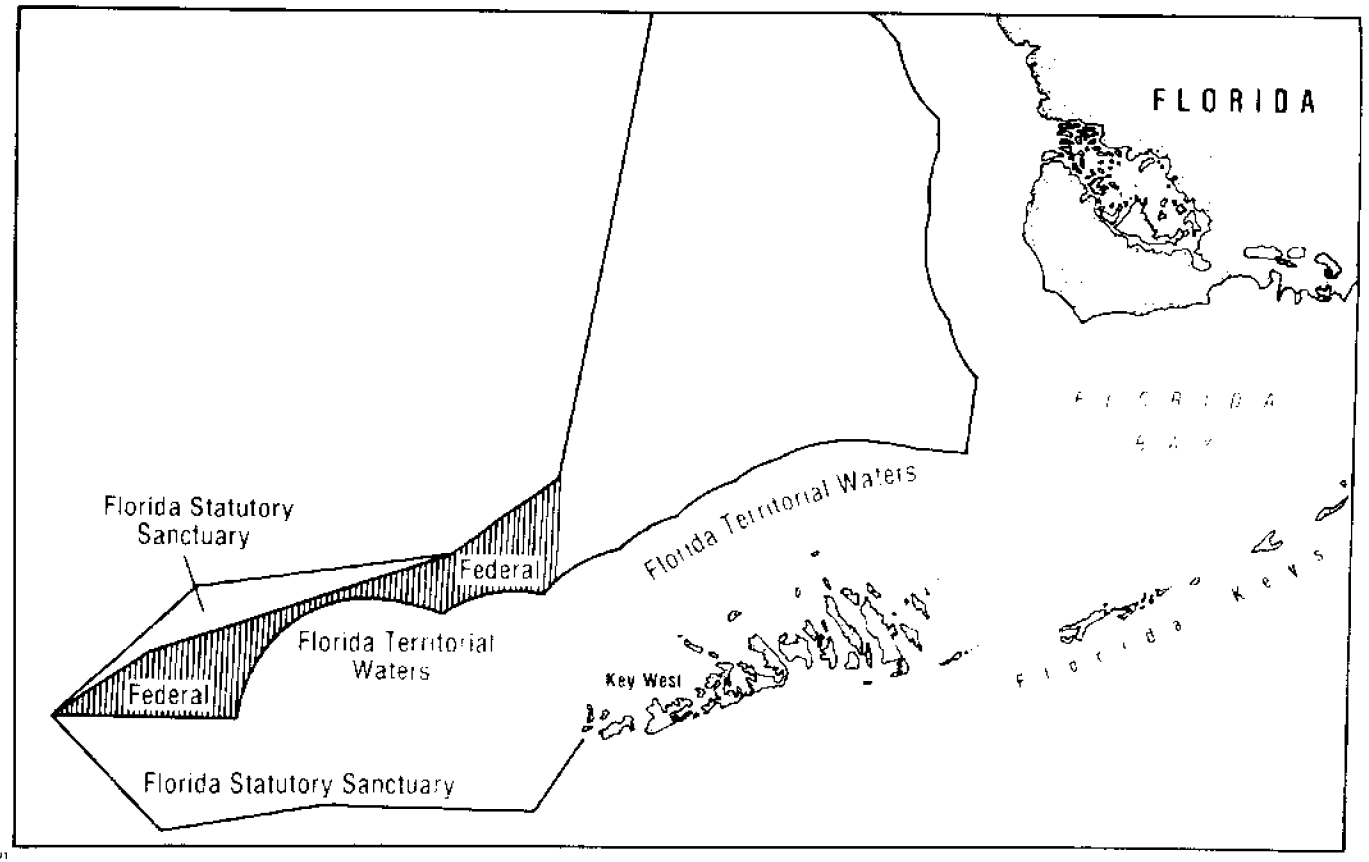
25. Defendants further violated Standard No. 3 in that by allowing purse seining for mackerel in federal waters, the mackerel are not managed as a unit since all states concerned effectively prohibit use of purse seines to take mackerel in state waters.

26. National Standard Number 5, (16 U.S.C., Section 1851(a) (5)), provides that "Conservation and management measures shall, where practical, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." The FMP provides for the introduction of a new, efficient, non-discriminatory gear which can adversely impact targeted and non-targeted fishery resources. A portion of the allowable fishing catch for king and Spanish mackerel is allocated to purse seiners. The Defendants violated this national standard in that this measure impairs efficient resource utilization and has economic allocation as its sole purpose.

27A. National Standard Number 6 (16 U.S.C., Section 1851(a) (6)), provides that "Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." The best scientific information indicates that the abundance of harvestable fish fluctuates from year to year. The FMP does not provide for this contingency. Instead, the FMP sets an artificially high maximum sustainable yield which remains constant from year to year. The Defendants have violated this national standard by adopting a measure which does not allow for annual or periodic variations in harvestable fish.

B. Best scientific information indicates that the catch from purse seines and the impact upon fisheries resources from such catch will vary depending on migratory patterns and incidental harvest. Defendants have violated this national standard by failing to account for these variations and contingencies.

28. A controversy presently exists between the Plaintiffs and the Defendants concerning the legal rights and duties imposed by the Magnuson Act, 16 U.S.C., Section 1801 *et. seq.* Plaintiffs desire a declaration that the Defendants have failed to comply with the national standards and accordingly that the FMP and implementing regulations are invalid.


FLORIDA
Florida Statutory Sanctuary
Federal
Florida Territorial Waters
Florida Territorial Waters
Federal
Key West
Florida Statutory Sanctuary

A New Jersey Perspective on Issues Involving Ocean Waste Management

by Lawrence Schmidt*

I have been asked to speak on the political and legal implications of extending the state's territorial sea to 12 miles and how that could relate to state and federal relations in the area of ocean waste management. In particular, the conference organizers have asked me to speculate on the issue of ocean incineration, the current state of relations between New Jersey and the federal government, and potential changes that might occur in that relationship if the territorial sea were extended to 12 miles. I have pondered that questions for the past two months, and I regret to say that I cannot develop a scenario where it would make the slightest difference.

The Environmental Protection Agency's proposed North Atlantic Incineration site is generally described as being approximately 140 nautical miles east of Cape May, New Jersey. Two weeks ago, Governor Mark White of Texas wrote to Governor Tom Kean of New Jersey to offer technical support on what is considered an ill-advised initiative by EPA to issue a permit for a research burn of hazardous wastes "off our coast." We sincerely appreciated the offer of support and the excellent technical work that the State of Texas has produced in challenging EPA's ocean incineration program. However, I wondered to myself if we would have received the same letter if the State of Virginia were about to permit a hazardous waste incinerator in the City of Richmond. Probably not --although the City of Richmond is some 140 nautical miles southwest (and parenthetically downwind) of Cape May, New Jersey. My point is the issue of perception, what is perceived to be "off our coast" becomes a negative portrayal of the State of New Jersey. The political response is immediate and defensive. New Jersey's coastal waters will not become the dumping grounds for the entire East Coast. For the record, the proposed North Atlantic Incineration Site is due east of the coastlines of Delaware and Maryland, not New Jersey. Alternately, so as not to offend those two states, let us just say the proposed site is 160 nautical miles south of Long Island.

In a few minutes, I will continue my remarks on the substantive aspects of state-federal relations on the issue of ocean incineration. However, at this time, I would like to talk about issues that more directly affect the question of an extended territorial sea.

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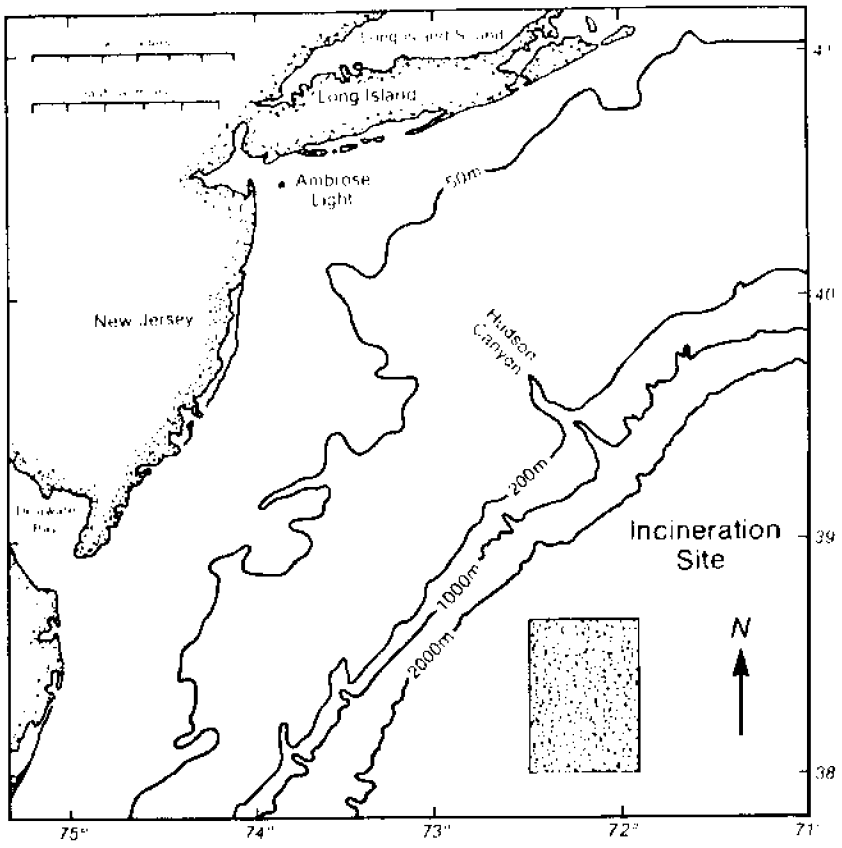

Figure 1. Location of Proposed North Atlantic Incineration Site Bounded by 38°00' to 38°40'N Latitudes and 71°50' to 72°30'W Longitudes. Distance from Ambrose Light to Center of Site is 155 miles.

Nearshore ocean dumping has been a two-edged sword that has strained relations at the state-federal level, between states, and even between regions of the state. The two primary activities that have caused the controversy are the federally authorized and permitted disposal of sewage sludge and dredged material. Both New York and New Jersey have historically utilized ocean disposal as the only practical way to get rid of these waste materials. New Jersey has often taken aim at New York City for polluting our coastal waters and beaches. More people are now starting to look at the issue of the New York Bight in a wholistic fashion with no single activity or governmental entity being the culprit. The New York Bight is the depository, either directly or indirectly, for a significant portion of the pollution burden from the New York Metropolitan area supporting a total population in excess of 20 million people. In addition to barge dumping of sludge and dredged material, coastal waters are also

impacted by the Hudson-Raritan effluent plume consisting of several billion gallons per day of treated and undertreated wastewaters, urban and agricultural runoff, coastal discharges and runoff and atmospheric fallout of pollutants. The majority of the nearshore pollution can be addressed by the states themselves. Upgrading of municipal treatment works, stricter regulation of industrial discharges, and programs to control non-point sources of pollution all can be accomplished by the states with resultant benefits to the coastal ocean.

The remaining issues are that of barge dumping of sewage sludge and dredged material, both of which are regulated by the federal government. The sewage sludge from New York and Northern New Jersey is currently being relocated from a 12-mile site to a deepwater site off the continental shelf. Therefore, the question of an extended territorial sea becomes moot and spares you the agony of hearing all the details of what has become known as a "cause celebre" among ocean dumping aficionados.

Dredged material from the Port of New York and New Jersey continues to be dumped at the so-called Mud Dump Site, approximately six miles off New Jersey's coast. The Corps of Engineers maintains that this practice is environmentally acceptable. The Corps not only regulates dumping under authority in the Marine Protection, Research and Santuaries Act (MPRSA), but also has the mission of maintaining federal navigational channels. Here is a case where the Corps has a vested economic interest in continuing the least costly disposal alternative. More than three-fourths of the annual disposal at the Mud Dump is from Corps projects.

The State of New Jersey has advocated a phase-out of the Mud Dump site and the designation of a new ocean disposal site that could meet environmental and economic criteria. The EPA designated the Mud Dump primarily on its historical use and not on factors that would support continued long-term use. EPA and the Corps are currently studying the designation of a new offshore site in response to New Jersey's concerns that future expansion of the site would be detrimental to our commercial and recreational fisheries. If the State's territorial sea were extended to 12 miles, there is no doubt that our posture with EPA and the Corps would be strengthened both in terms of the timing of the move and environmental considerations on the management of the current site. For example, under State control, there could be more rigid requirements for permitting disposal of certain classes of contaminated dredge spoils. This, in turn, would force the siting of non-ocean facilities for disposal of unacceptable dredged material. Currently the Corps studies these alternatives *ad nauseam*, but does little to implement them.

Before I return to the issue of ocean incineration, I would like to briefly depart from my primary topic to scan a few issues where state-federal relations could be affected by an extension of the State's territorial sea. In the area of fisheries management, the State could gain significantly in the management of shellfish resources. More than one-quarter of the world's harvest of clams from the sea comes from New Jersey, with the ma-

jority of the resource found within 12 miles of our coast. State ownership and management of this resource could provide the State with significant revenues that it currently does not receive.

In a second area, the issue of a National Artificial Reef Program is one that is becoming fraught with controversy with respect to state-federal relations. It appears that the draft plan calls for the states and localities to shoulder the cost of building the artificial reefs while the management would rest with federal authorities if the reefs were located in federal waters. Because of depth considerations, most reefs off the coast of New Jersey would be beyond the limits of the state's jurisdiction. An extended territorial sea could be one approach to resolve this apparent inequity.

Finally under the category of miscellaneous ramblings, I must report on state relations with the Department of the Interior regarding OCS oil and gas issues. New Jersey does not have an "8g" pot of gold at the end of its rainbow, so I will defer to my fellow panel members from Texas and Louisiana on that issue. However, much activity has occurred on the OCS since 1976. Most of it has been in the "dry hole" department. New Jersey is currently enjoying very good relations with the Minerals Management Service. We suspect that the agency is still trying to recover from the damage inflicted by Secretary Watt in the early 1980's when state-federal relations were at an all-time low. We brought suit when tracts were to be offered right up to coastal boundary and our concerns were virtually ignored. And to make matters worse, there was no prospect of finding oil and gas on the nearshore tracts. Today, the Department of the Interior seems to be much more sensitive to the state's interests in striking its required balance. Interior's current process of consultation with the states on OCS matters is a model that should set the standard for other federal agencies.

Finally, here are some of my thoughts on the EPA's ocean incineration program. Many people have been rightfully critical of the management of this program with respect to strategic errors that may, in the long run, doom the technology of this waste disposal alternative. Three years ago EPA got battered by the Gulf Coast states when it proposed a "special" research/operational permit prior to developing regulations. EPA was again battered, earlier this year. This time the criticism spread coast to coast when the draft regulations were issued without benefit of public availability of the scientific studies that provided the basis for the proposed regulations. Now we are faced with the prospect of a research burn that may, or may not, fully resolve scientific questions and fill the data gaps. Throughout this process, the level of consultation with affected coastal states has been woefully inadequate. The result appears to be EPA having little or no support from coastal states in spite of a general consensus that the technology may have promise as one alternative to the nation's hazardous waste disposal dilemma.

Public hearings on the research permit have been scheduled for January, but the affected coastal states have yet to formally receive copies of the

permit applications and draft permits. In addition, the timing of the research burn is currently scheduled to coincide with the peak of our shore tourism season, a fact that makes the proposal even more difficult to accept.

However, our greatest concern at this time is not the research burn per se, but rather a separate action pending before EPA; one that is not directly related to the ocean incineration program. EPA Region III and the State of Pennsylvania are considering a Part B RCRA permit for an existing chemical transhipment facility in the City of Philadelphia. As we understand it, the permit, if issued, will allow this marine terminal to be a permanent homeport of an incineration vessel.

Both New Jersey and Delaware have expressed concerns about the consequences of a marine accident with a resultant loss of cargo in state waters. The State of Delaware has urged EPA to prepare an environmental impact statement to analyze the risks and consequences of such an accident in the Delaware River or Delaware Bay before an operational permit is issued. Although EPA has indicated that an operational permit will not be issued until its regulations are finalized, the issuance of the RCRA permit could "back door" the entire process and leave both New Jersey and Delaware without the assurances that are necessary before the risk is accepted. One of the flaws in the proposed EPA regulations is that the issue of landside siting is omitted.

Unfortunately, I cannot tell you how this issue will be resolved as it is still unfolding. However, New Jersey is committed to ensuring that its interests will be protected. We will take whatever actions we deem necessary to make the process work in the public interest. This will no doubt end up as one additional chapter in federal-state relations involving the management of marine resources.

Offshore Oil and Gas

by Mary Ellen Leeper*

These remarks are prefaced by a statement that I do not deal regularly in the more theoretical aspects of state and federal relations. I am an Assistant Attorney General assigned to the State Mineral Board in Louisiana, and hence, I deal in the every-day practical aspects of oil and gas leasing. My involvement with the federal government in offshore oil and gas has been chiefly from two perspectives: first in solving development problems with the federal-state adjacent leases, amicably if possible; and second with litigation involving federal leasing, and in particular, with the presently pending litigation over the interpretation of Section 8(g) of the Outer Continental Shelf Lands Act (OCSLA) Amendments of 1978. Therefore, I will be speaking today neither from an academic nor an objective viewpoint. Because I have been actively involved in the 8(g) litigation, my remarks regarding that case will present Louisiana's position.

Oil and gas exploration and production in the offshore is a relatively recent phenomenon. Prior to the 1940's, there was little oil and gas production or exploration. The first lease of waterbottoms in Louisiana was granted in 1915, in Cross Lake, near Shreveport. However, no major leases of offshore waterbottoms were granted until the mid-1930's. Even onshore leasing and production did not progress rapidly until the 1910's and 1920's.

Consequently, there was not much law governing oil and gas. Louisiana passed its Mineral Leasing Statutes, which created the State Mineral Board, in 1936 (La. R.S. 30:121, et. seq.), which set up a procedure for oil and gas development on State-owned lands. A number of cases affecting oil and gas development developed gradually, and became codified in 1974 as the Louisiana Mineral Code (La. R.S. 31:1, et seq.). There also were few codified laws or regulations in the federal offshore at the time. While law was borrowed from other areas, such as contract law, real property law, and, in Louisiana, the Civil Code, many of the pre-existing laws did not fit oil and gas development.

Unlike coal or other mined minerals, oil and gas were fugacious, capable of migrating from beneath the lands of one property owner to those of another. It therefore differed from those other items of property, such as hard minerals or crops, that were attached to the land. There still was a sense that the property owner owned the oil and gas beneath his land, or at least had the right to explore for it and reduce it to possession. Since these minerals were susceptible to "escaping" from beneath one parcel of land through wells drilled on neighboring property, early oil fields were developed with wells spaced so closely that it was said of the East Texas Oil Field that one could walk across the field from derrick to derrick

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without setting foot on ground. The economic waste in such a system is apparent, and the early "Rule of Capture" was soon modified to avoid the necessity of each and every landowner drilling a separate well to protect himself from drainage by his neighbor. In 1940, Louisiana passed its Conservation Statutes, which gave the State the authority to regulate well spacing, production rates, unitization and other necessary powers to avoid both wasteful practices and the capture of minerals from neighboring property without compensation.

World War II created a much expanded market for oil and gas. In the late 1930's and early 1940's there was a rapid increase in oil and gas production. Onshore wells were produced at maximum production levels, and the offshore area began to develop. By the time of the Truman Proclamation in 1945, the federal government had embarked on an offshore leasing program, as had Louisiana and other states.

Early in the offshore exploratory program the technology did not exist to drill in water more than ten or fifteen feet deep. But technology followed demand, and, by the mid-1940's, there were a number of offshore sites that had been leased by both the State of Louisiana and the federal government. Oil companies were buying "protective leases"--they purchased leases from both entities for the exact same acreage so that, no matter which government ultimately was successful in asserting jurisdiction, the oil company would have a valid lease. This is identical to present and past onshore leasing practice, where there may be multiple landowner-claimants to the same piece of property. In several cases, Louisiana leased vast tracts of many thousands of acres where the leases were described merely as two points on the shoreline and all property seaward between these two points.

As technology and oil and gas production progressed in the offshore, it became apparent that a decision had to be made concerning the limits and the nature of federal sovereignty and state sovereignty. When production occurred in areas leased both from the federal and the state government, oil companies complained that they did not want to pay double royalties on the same oil and gas. It was this conflict that originated the series of "Tidelands Cases" that are still in litigation today.

The history of the Tidelands litigation is not an issue here, except as it affects the question of possible extension of the territorial sea to 12 miles. In brief, the United States Supreme Court decision in U.S. vs. California, 322 U.S. 19 (1947), and in following cases involving Texas and Louisiana, recognized the federal government's paramount rights to offshore resources in an area that had not yet been proclaimed a "territorial sea." It was not until Congress passed the Outer Continental Shelf Lands Act (OCSLA) and the Submerged Lands Act (SLA), both in 1953, that the states' ownership of the resources of the adjacent shelf was recognized (42 U.S.C. 1301, *et seq.*, Submerged Lands Act and 43 U.S.C. 1331, *et seq.*, Outer Continental Shelf Lands Act.

The extent of state-owned lands continues to be the cause of considerable

litigation between the States and the federal government. And, again, the battles have been hardest fought where oil and gas resources were at stake. The tremendous revenues and the need to clarify ownership in the area of oil and gas reserves have created an adversarial environment in the offshore, particularly in the area of boundary determination. Other areas of significant State concern, such as environmental effects, ocean dumping or fisheries management, have proven equally litigious, but precise boundary lines between the coastal States and the federal government have not been the main issue in those cases.

Following passage of the OCSLA and the SLA, Louisiana brought suit in 1954 to determine its seaward boundary. Louisiana was no longer asserting absolute sovereignty in that case, but, instead, was seeking a determination of where its sovereignty lay. The State did not question whether there should be oil and gas exploration offshore. Exploration was already well underway, it was an expanding frontier, and it created employment, brought in new industry and was a popular idea.

Both the State and the federal government wanted to proceed rapidly with oil and gas development. The first question between the State and the federal government was not whether to allow exploration, but rather how best to set the ground rules for it.

The First Interim Agreement was reached in the Louisiana Tidelands case in 1956. That agreement allowed for oil and gas leasing and production to continue in the offshore while the Tidelands litigation was pending. I do not believe that in 1956 the litigants realized how long that pendency would be. The Louisiana Tidelands case was not finally decided until 1981 and even then it was decided on an interim basis. The Supreme Court granted both parties the right to reopen the question of the boundary because of the ambulatory nature of the Louisiana coastline.[1]

For many years, the Tidelands case represented the only serious dispute between the State of Louisiana and the federal government over the offshore. Except for the boundary dispute there was a cooperative atmosphere between the two. The Interim Agreement designated four zones in which the two had varying shares of responsibility for leasing and development, and the relationship was good on a technical level.

The State's agencies cooperated with the various federal agencies charged with administration of the offshore. There were more than 125 unitization agreements that set productive limits and allocated production between Louisiana and the federal government from wells located near the Zone 1 - Zone 2 boundary (the boundary that approximated the final State seaward boundary). These agreements made clear cross-boundary decisions about how to allocate production from oil and gas.

There was also cooperation in purely regulatory matters. For a period in the 1950's, before the federal government had developed a regulatory framework for its own lessees, the Louisiana Department of Conservation was actually regulating the federal offshore. The Department was setting production allowables and well spacing in what was the federal offshore.

There was no federal agency at the time with sufficient expertise to set regulations, so Louisiana took over the role.

Since then, the U.S. Geological Survey, and now the Minerals Management Service, has a greatly expanded staff, much larger than that of Louisiana's, and have long since assumed this role. But regulation was cooperative for a long time, and to a great extent still is.[2] There is cooperation in circumstances where there are wells located near the State's seaward boundary, to ensure that neither party is harmed by the activities of the other.

Despite this relatively good relationship, new litigation is sparked whenever the question of dividing the massive oil and gas revenues arises. New litigation was begun when the OCSLA was amended in 1978. The 1978 Amendments followed several years of congressional debate on how best to encourage the coastal states to cooperate in federal offshore oil and gas development. These Amendments were passed in a package, with coastal zone and coastal energy impact provisions. Throughout the congressional history and in the enabling language and the introduction to the Amendments, there are myriad references to federal-state cooperation and to the fact that these amendments and their accompanying mandated rules were intended to create a more responsibe position on the part of Interior and to give the States a better opportunity to participate in federal offshore decisions.

Ironically, these amendments ended a period of more than 20 years of cooperation between the federal government and Louisiana and Texas, and became a new source of controversy between the federal government and California, Alabama, Alaska, Mississippi and Florida. The critical section was Section 8(g) (43 U.S.C. 1337(g)) from the perspective of oil and gas development and oil and gas revenues.

Section 8(g) mandated that the federal government would supply the states with a set of geological, environmental and geographical information at the time of the Call for Nominations, which, under the structure of federal leasing as it existed at the time, was about two years before a federal lease sale. This information was to be conveyed to the States for any tract within three miles of the State's seaward boundary that might contain hydrocarbons. With that material in hand, the State, through its governor, was to confer with the Secretary of the Interior to determine which tracts might contain an oil or gas pool for field that was common to both the federal and state sides of the boundary. The governor and the Secretary then were to arrive at a fair and equitable share of all revenues derived from such tracts.

The Amendments passed in November 1978. A federal lease, Sale No. 51, was already scheduled and imminent, and would clearly affect tracts off the Louisiana coast. A number of the deadlines created by the 1978 Amendments, including those of Section 8(g), had already passed. Interior had already held the Call for Nominations, nominations had been received, and Interior had already issued the final Environmental Impact

Statement for the Sale. It was down to the ultimate step of accepting bids and granting leases. Clearly, Interior had not complied with the provisions of the Amendments that had passed midway through the Sale 51 process. Louisiana asked that Interior not proceed with Sale 51, since there was no way that Interior could comply with the Amendments in time for the sale. Interior considered this request, and, as a result, excluded all tracts within three miles of Louisiana's seaward boundary, but proceeded with the rest of the sale.

The next regularly schedule sale affecting Louisiana, Sale No. 58, was scheduled for the following year, July 1979. Louisiana spent three months before the sale corresponding with the Secretary of the Interior in an effort to withdraw the 8(g) tracts again, to reach a determination of the meaning of 8(g), or to obtain the information that the State was supposed to receive under Section 8(g)(1) and to confer with the Secretary to arrive at a fair and equitable allocation of future revenues.

These efforts were to no avail. The Secretary took the position that the requirements of 8(g) that he consult with the states meant only that he must send a letter saying that he had determined which tracts might contain a common pool or field and that he was willing to discuss sharing revenues from those. Further, the share was merely an agreement to agree in the future to unitize in the event of drainage. There was no information provided, no geology, but the Secretary was willing to discuss his unilateral determinations. Louisiana, as well as Texas and later Alaska, Alabama, California, Florida and Mississippi, refused to accept this posture as compliance with the 1978 Amendments.

Therefore, in July 1979, Louisiana brought suit to enjoin the entire Lease Sale 58 for failure to follow the 1978 Amendments, specifically Section 8(g). This suit represented a major departure for the State of Louisiana, and also for Texas, which brought suit the same year. Louisiana and Texas just did not have a history of litigation over development of oil and gas in the offshore. Other states had. There had been various claims made and suits brought involving environmental and coastal zone problems but Texas and Louisiana had not been actively involved in those. It was a major step for a producing state whose economy depended on oil and gas to institute a suit for cancellation of an offshore lease sale.

The state was unsuccessful in its efforts to enjoin that sale, but the federal court ordered that the federal government, although it could proceed with the sale, would be required to escrow all monies received from any tract located within three miles of the States' seaward boundary, regardless of whether the tract contained an oil or gas pool or field. Hence, the huge 8(g) fund was created. That was the inception of it, and it has grown and grown and grown ever since, until now there is in excess of six billion dollars in escrow in the various states. If the states had been successful in enjoining the leasing process in the 8(g) area until the Amendments had been interpreted by the Courts, there would be no six billion dollar fund now. The present problem was created by the failure of the federal govern-

ment to delay leasing until a determination had been made on the meaning of 8(g), how it should be administered, and what a fair and equitable share of the revenues should be.

The main issues that have been pending for some time are the amount and sources of revenue, e.g., royalties, bonuses, rentals, other revenues, the inclusion of taxes, and whether there has been proper deposit by Interior into the escrow; treatment of surface acreage seaward of the 8(g) zone if it represents part of a tract that lies partly within the zone; and the determination of which tracts may contain an oil and gas pool or field. The major point, of course, is what constitutes a "fair and equitable" split of the revenues.

The states have consistently argued that at least 50 percent should be shared with the coastal states since interior states receive 50 percent of all revenues derived from mineral leasing of federal offshore lands enclosed within their borders, pursuant to the Mineral Leasing Act. Interior states receive an additional 40 percent in road funds.

So coastal states have argued that no less than 50 percent would be fair and equitable, and further, that there is a basis in history and other equities that should be taken into account which would result in more than 50 percent.

For example, in Louisiana's case, the first three federal miles represent only about 2 to 3 percent of the adjacent federal offshore, which is 150 miles wide in some areas off Louisiana. (Measured to the 200-meter limit of the continental shelf; recent leasing has extended the OCS leasing further, with leases granted in deeper waters of the slope.) Unlike interior states, which suffer relatively few impacts of federal onshore mineral development, coastal states must supply sites and facilities for construction, transportation, processing and storage, as well as the governmental and social infrastructure for the offshore workers. In Louisiana's situation, the 8(g) share derived from only 2 to 3 percent of the offshore would not represent full revenue support for the much larger federal offshore mineral industry.

Further, there has been a history of good relations between Louisiana and Texas and the federal government in the offshore. This has allowed more rapid and expanded federal development and the accompanying revenues. Much of the 8(g) zone was under federal lease prior to 1978. Louisiana has argued unsuccessfully for inclusion of post-1978 revenues from pre-1978 leases in its 8(g) share, since excluding those revenues would penalize states that cooperated in federal leasing in the past, contrary to congressional intent.

Finally, Texas has argued successfully that the coastal state should receive its fair share (50 percent in that case) of the enhanced value of federal tracts adjacent to state tracts, where the state tracts were leased first, reserves were proven, and the federal lease brought a significantly higher bid as a result of the information obtained from state leasing. Louisiana has also argued the converse of this--that the fair and equitable per-

centage should taken into account the possibility of the state's lands being devalued as a result of unsuccessful adjacent federal exploration.

A resolution to this dispute is pending in Congress. There is an amendment to Section 8(g) pending in the budget reconciliation package that would allocate 27 percent of revenues derived from any tract within the first three federal miles to the coastal states. The requirement of a pool or field has been eliminated; it would apply to any tract within that area.

The proposed legislation also addresses some other concerns, such as the Alaskan Tidelands issue and how to distribute the 8(g) revenues where the boundary is not yet set between the state and the federal government. That proposal has passed both houses of Congress and is now going to conference committee. As of last Thursday, that was the status; it had not yet gone to conference. If that legislation passes, it would do away with this particular litigation.[3]

However, once Texas and Louisiana had taken the hard step of filing suit to enjoin a federal lease sale, it was not long before it happened again. This occurred in 1984 as a result of a change by the Department of the Interior from the Call for Nominations and advertisement of specific tracts, to area-wide leasing. "Area-wide leasing" means that Interior puts all the rest of the tracts in an offshore area on the market. Any tract not already under lease is subject to bid, and there is no predetermined tract identification prior to the Lease Sale.

In 1984 Louisiana brought suit to enjoin the third Central Gulf of Mexico sale based on area-wide advertisement. About a month later Texas also brought suit to enjoin a federal lease sale on the same grounds, that area-wide leasing failed to bring fair market value for the tracts that were being offered, and, hence, the Secretary was acting beyond his mandated duties.

When all of the Gulf of Mexico is put on the market at one time, the lease sale fails to create an environment where potential bidders, having identified areas of industry interest in advance, can center their bidding attention. There is, therefore, reduced competition and reduced prices (bonuses). Studies conducted by Louisiana and Texas found that the bonus money, which is the money bid up front for the right to explore, was reduced by more than half, on a per acre basis, during area-wide sales compared with sales with advertised, identified tracts.

Again, Texas and Louisiana were unsuccessful in enjoining the lease sales, but courts in both states held that, to the extent that the states were injured by Interior's failure to receive fair market value for the tracts within the 8(g) area, appropriate redress would be in the pending 8(g) litigation. If that litigation progresses to trial, the states will assert that they are entitled to a fair and equitable share of the fair market value of those tracts, rather than of the revenues actually received at the area-wide sales.

This is a very brief description of some of the pending litigation affecting offshore oil and gas, but I also wanted to touch on some of the questions

presented by this conference and the other speakers, and the question of an extended territorial sea. It does not appear that it would make much difference in the development of oil and gas if there is a three-mile or a 12-mile territorial sea. There would not be much difference in oil and gas exploration or production.

The 1979 Amendments, in addition to Section 8(g), created yet another layer of permitting in the bureaucracy that Mr. Ball spoke of yesterday, but that change hasn't altered the perception of the States. In response to Mr. Ball's presentation, if that bureaucracy is a drama, if that permitting is an "artistic presentation," I am afraid most states, including Louisiana, perceive that there is an ending to the drama already written. The state might follow the whole process, making known its concerns; it might file 500 pages of comments to the draft environmental impact statement; but what that state will receive back is a paragraph stating that its concerns were noted and rejected. There have not been many changes made in Interior's planning as a result of state comment.

Yesterday someone brought up the question of managing the oil and gas resources and expressed the view that, without such management, the oil companies would take out the last drop of oil. A change in the territorial sea, with or without an extension of state sovereignty to 12 miles, would not change the management scheme much. Much of the OCS, well beyond 12 miles, is already under lease and a change in sovereignty over those leases would not work a change in the rights already in place. Any attempt by the coastal states assuming control over those leases to impose restrictions on the right to explore and produce would almost certainly be met with interminable legal battles.

Even efforts by Interior to enhance production (presumably hastening the extraction of the last drop of oil) have not met with success. The production curve in the offshore varies with the market. Overall rates of production—the total of all wells, not well-by-well allowables--are not "regulated" in the sense of there being firm controls or planning. A lease confers the right to drill and explore 5,000 acres as the company sees fit, for as long as the company otherwise properly maintains the lease.

There were no sudden increases in the number of wells being drilled or in total production even after the area-wide lease sales. The theory there was that if Interior let the companies select any area at cheap prices, there would be additional exploration. But because area-wide leasing was instituted at a time when the price of products was falling this did not occur. The gas and oil had very low prices, and the companies did not move quickly to drill, whether they were able to buy the leases at lowered prices or not. They might buy the leases, but they will not drill them until there is a market for the product. Interior's plan to increase production did not work, and it is unlikely that a master plan to hold down production would work in a rising market.

Considering the environmental and onshore impacts of oil and gas exploration, again, I do not believe that extension of the territorial sea

would directly affect either the problems or the perception of those problems. Louisiana has made quantum leaps in the last ten years in public awareness of environmental problems. This is especially true of the major problem of coastal erosion, which is now estimated to be in excess of 50 square miles a year in land loss. There are also related socioeconomic problems, which have become acute in the last three years with the slowdown in the industry. Again, referring to yesterday's speakers, if you look at an indigenous population, in that case the Eskimos, as a test for the efficacy of a regulatory program, then oil and gas regulation has been a failure in Louisiana.

However, it would probably not be perceived as such locally. There was an indigenous and unusual local community, a hunting and fishing and trapping and agrarian community that is no longer there. Many of the people who relied on those pursuits are now skilled laborers and have generally attained a more comfortable living as a result of oil and gas development. The animals and fish are still there, and are still being exploited, but not exclusively by local residents.

As the industry has slowed there has been massive unemployment. Some people who were satisfied with the trade-off of certain environmental and other problems for increased employment may now perceive that the problems of offshore production are likely to persist after the employment is gone. But there would be few who would choose the rigors of hunting, fishing or farming as their only source of income, over the financial benefits brought by the development of oil and gas.

In conclusion, expansion of the territorial sea would be unlikely to affect offshore oil and gas. However, if the proposal to extend the territorial sea is linked to an extension of the states' ownership of resources to 12 miles, then oil and gas might well be the stumbling block to that proposal. Here the states' experience with 8(g) is instructive. More than six billion dollars has accumulated in just six years from only tracts within miles four through six of the OCS. There are vested contract rights in the oil companies who own leases within that area, as well as vested real rights. The Department of the Interior fought seven coastal states, including Texas and Louisiana, states that had a history of amicable relations with the federal government, to minimize the effects of a Congressional mandate to even share revenues derived from a portion of the OCS, even though that fight cost the very cooperation that Interior had sought. If the states claim or Congress proposes that the states receive title to the additional nine miles of an expanded territorial sea, it appears that there would be insurmountable opposition from the federal government, as well as interior states, to foregoing those massive oil and gas revenues.

[1]*Subsequent to this presentation, Congress enacted legislation that fixed the Louisiana-federal boundary, using the same boundary set by the Supreme Court in the Louisiana Tidelands case. Outer Continental Shelf Lands Act Amendments of 1985, H.R. 3128, Title VIII, Section 8005, passed in April 1986 as part of the Budget Reconciliation Bill, effective October 1, 1985. Section 8005 amended Section*

2(b) of the Submerged Lands Act (42 U.S.C. 1301(b)), as follows. "...any boundary between a State and the United States under this Act which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory."

*[2]Subsequent to this presentation, as a result of the 1985 Amendments to the OCSLA (see Footnote 1), the Department of the Interior has taken the position that it no longer has a duty, or even the authority to unitize production with the adjacent states to avoid drainage of hydrocarbons from beneath state lands through wells located in the federal OCS. Louisiana has brought suit challenging this position, **Louisiana, ex rel., William J. Guste, Jr., Attorney General, vs. United States of America, et al.**, Civil Action No. 860924-L, US. District Court, Western District of Louisiana, which suit has not yet been set for trial.*

[3]This legislation did pass in its proposed form in April 1986, effective October 1, 1985. Outer Continental Shelf Lands Act Amendments of 1985, H.R. 3128, Title VIII, Section 8001, et seq., amending Section 8(g). It provided for lump-sum payments to the various affected states of a total of approximately $1.4 billion, provided for future payments of monies that had been excluded from escrow over a 20-year period, and provided for a 27 percent share of all future bonus, rental and royalty payments. It also continued in place the information-sharing requirements of the former Act, with some modifications, and provided for treatment of common hydrocarbon-bearing areas. It removed the requirement of a determination of a common pool or field as a prerequisite to revenue sharing.

State-Federal Relations in Outer Continental Shelf Leasing: A Perspective of One Regional Technical Working Group Member

by E. G. Wermund*

Many perceptions may describe the relation among states and the federal government regarding oil and gas leasing on the outer continental shelves (OCS) of the United States. The following describes one perspective that results from working on a federal-state working group that meets biannually to examine leasing issues of mutual concern in the Gulf of Mexico.

The foremost issue regarding the development of natural resources on the OCS is the federal leasing policy. Yet states have less input in this leasing policy than in other important, but lesser, issues. Leasing policy must deal with several questions: How fast should development occur? How often should OCS leases be sold? What size of properties should be offered? Who should determine the exclusion of properties? What is a fair price?

In addition to the federal leasing policy, those issues or impacts that the states attempt to resolve with the Minerals Management Service (MMS) and Department of the Interior are principally economic and/or environmental. The economic issues include the division of revenues from sales and development, the impacts of land-based support facilities and transportation on communities, the effects on recreational income, and the limitations imposed by marine structures on commercial fishing. Environmental impacts comprise effects of oil spills (number one) on the marine-land interface and its ecosystems; of drilling on or near coral reefs, hardgrounds, and grass beds; of transportation and land-based service facilities on barrier islands and wetlands; and of all related activities on endangered species. Recently large accumulations of industrial trash have plagued certain Texas beaches. Representative issues will be examined in later descriptions of state-federal meetings.

The national issues are resolved in a different theater than are state issues, which to a degree are regional but also specific. The major issues of both developmental policy and revenue sharing are resolved in the political arena and eventually the courts. The potential drainage of reserves at the state and federal offshore boundaries is the best example. After

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prolonged court battles, Congress now perceives the issue to be resolvable by statute.

Outside the political arena, a formal structure of state/federal committees attempts to resolve other issues. The Secretary of the Interior has appointed three groups with whom the MMS reviews leasing procedures and impacts; they include a policy committee, a science committee, and five regional technical working groups. The policy committee examines national issues, of which the national leasing policy issue is one, and recommends action items to the Secretary via resolutions. That committee is composed of state representatives, recommended by the governors of the 22 states that border federal marine properties, as well as interested federal agencies, impacted industries, and representatives of citizens at large--about 40 persons total. The Secretary also appoints a science committee of about 12 representatives, who advise MMS on studies of scientific issues, principally environmental.

The third committee structure is named a Regional Technical Working Group (RTWG); there are five such groups. The RTWG reviews MMS plans for lease offerings and environmental studies that principally support EPA requirements. The remainder of this paper relates to my experiences in the group negotiating MMS-state relations for the Gulf of Mexico activities during a period of nearly seven years.

Gulf of Mexico RTWG

The bi-annual meetings of the group are co-chaired by the manager of the Gulf of Mexico MMS office and one of the state representatives. Other members of the group include one representative each from Alabama, Florida, Louisiana, Mississippi and Texas, federal representatives from the Coast Guard, Corps of Engineers, Environmental Protection Agency, Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration, and members at large who usually represent oil exploration and production, the gas transmission industry, the drilling industry, port authorities, commercial fishing, and the environmental coalition. Only state members can vote on issues; all other participants are advisory. Additional RTWG contributions to Interior/MMS policy promote action via resolutions. All RTWG members contribute to the formulation of resolutions; only the state members sign the resolutions for transmission via MMS.

For each RTWG, the member states have different positions and attitudes about MMS policy and plans. In the Gulf of Mexico group, one must appreciate the different state attitudes to arrive at agreement, if not unanimity, on issues. The attitudes and experiences of the states are summarized in the following section so that readers can better understand the states' reactions to the diverse issues dependent on federal decisions.

Alabama reactions strongly reflect recent discoveries of major petroliferous resources in Mobile Bay and the high probability of additional discoveries near the shore of Alabama in state-federal boundary blocks.

Alabama has a very small coastline; its only prime recreational beach is Dauphine Island. Commercial and sport fisheries are limited by this small coastline. Only a small populace works in the offshore oil and gas industry. At present, Alabama is enthusiastic about the potential income generated from resource development of this young exploration province, whereas it is conservative about environmental issues.

Florida has a long coastline with continuously and actively occupied recreational areas, beaches, and extensive shallow marine waters that support dense game fish. The sea floor of its OCS supports prolific sea grasses and many hardgrounds composed of benthic invertebrates. Floridians zealously guard the natural treasures of their western shelf. Oil and gas companies have been minimally successful in finding oil and gas in state submerged lands; there is no production from the federal OCS. The region remains a frontier province for exploration.

Louisiana has the oldest offshore leasing program in the United States. It had major discoveries of oil and gas in state marine waters in the 1930's. If not the largest, then one of the largest U.S. work forces in petroleum- and gas-related activities comprises major socioeconomic elements in south Louisiana communities. South Louisiana has more pipelines and canals coming ashore than any other state. Much of the transportation trespasses one of the world's largest systems of freshwater marshes. Commercial fishing is a major element of the Louisiana economy. Here the OCS is a large, mature petroleum province.

Mississippi is one of the very low income states and looks east at the valuable new Alabama production and west at the rich mature Louisiana successes. A modestly successful recreational strip occupies its shoreline. Limited undeveloped barrier islands occur a few miles offshore. Minor commercial and sport fishing is available between the islands and the shore. Adjacent to the beaches, significant wetlands compose the westernmost shoreline near mouths of small rivers.

Texas offshore production ranks third in the United States, behind that of Louisiana and California. Because of its long coastline, about 370 miles, and extensive history of petroleum exploration, its northeastern shelf is a mature province; however, its southern shelf is essentially a frontier area. Like those in Louisiana, explorationists in Texas have been modestly successful in finding oil and gas in state submerged lands, and Texas has a successful leasing operation. Like Florida, Texas owns well-developed recreational beaches, although there remain pristine beaches as well. Commercial fishing and sport fishing are important economic contributors, and many employees of oil and gas companies, including those in supportive services, live in Texas. Texas has extensive wetlands, although not as large as Louisiana, and it has the longest chain of barrier islands in the United States.

As reflected in the courts, discussions with the Secretary of the Interior and recent congressional action, Gulf of Mexico states agree on their exclusive right to lease state property, to share revenue of bordering tracts for

three miles beyond state limits, the 8g tracts, and to admit complete federal sovereignty seaward of potential drainage tracts. The states have employed RTWG meetings to reiterate the positions of their governors on these issues.

The RTWG was more receptive to the leasing of individual Gulf of Mexico tracts in its early history; the groups are now less receptive to area-wide leasing, which Secretary Watt initiated in response to potential shortages of U.S. oil. Before 1981, tract selection was made by the Bureau of Land Management, the Conservation Division of the U.S. Geological Survey (these agencies now constitute the MMS), the petroleum companies, and the federal agencies and states with RTWG membership. Thereafter, the RTWG would review a leasing plan in public meetings and comment principally on exclusions or stipulations. The stipulations required special operating procedures by offshore operators, generally in response to environmental concerns. Limited acreage was offered for leasing at each sale.

Now, area-wide sales are held to lease tracts in the eastern, central and western Gulf at each sale. Florida is less disposed to leasing than other Gulf states and believes it now has less freedom to oppose offerings in environmentally sensitive areas. Louisiana worries that area-wide leasing hastens the depletion of oil and gas off its shores, which leads to a rapid decline in the work force. Texas is sympathetic to the latter view. State views are recorded in RTWG meetings to comment on lease plans and forwarded to Washington.

From the beginning of RTWG meetings, transportation of production in federal waters on the sea has been determined by the Coast Guard and on the seafloor by the Corps of Engineers. States, however, have been able to strongly affect drilling procedures by commenting on leasing stipulations. One example is the Flower Gardens reef about 100 miles south of the Texas-Louisiana shoreline. In an early compromise there, the live reefs at 80 meters and shallower are excluded from drilling. In the surrounding mile, all drillers are required to shunt their cuttings. Companies also are required to monitor their cuttings out to three miles from the reefs. When the MMS Director chose to liberalize these stipulations in 1983, the states unified successfully to lobby for the historical stipulations. In this instance, a resolution carried considerable weight in support of the position of the Governor of Texas.

In addition to criticizing lease plans, the other principal RTWG duty is to assist in the formulation and selection of MMS regional studies. Most regional studies are selected to support environmental impact statements; they also resolve conflicts over lease stipulations. A Flower Gardens Banks study was one regional study that assisted the resolution of an important operational issue. Certain events in the RTWG-MMS interaction to define annual funding of environmental studies best illustrate Gulf of Mexico state-federal relations.

During the first three years of interaction, the Gulf of Mexico states

were required to prioritize regional studies (research) in accordance with a formula provided by the Washington leasing office. The states found the formula lacking, and they argued for both a modified rating system and expanded information. Today's ranking system reflects state demands for change. In another request for more information to assist in ranking studies, the states have requested budget estimates both by year and by project; they remain unsuccessful in learning project budgets.

An improved general knowledge of the budget resulted after one state ranking essentially killed a major physical oceanographic study. The states recognized that such a study would expend most of one annual budget for environmental studies and voted to rank the expensive project last.

Regional studies were formulated without state input in early years. They were developed at the Washington headquarters or at the Gulf of Mexico office. Today, at least half of the environmental studies originate from state recommendations. Furthermore, the studies have greater scope and recognize broader subject matter. For example, Louisiana and Texas persuaded the RTWG and MMS that socioeconomic studies of the impacts of OCS leasing were needed. As a result, ongoing research will document the present situation in Gulf of Mexico communities. The results will be a valuable contribution to planners in frontier areas, and may well give us better predictability in our mature areas. Even Gulf of Mexico operating companies appreciate the results as valuable to their planning and accounting.

Louisiana requests have increased efforts to understand wetlands. Extensive studies of hardgrounds and grassbeds of the marine shelf floor represent active Florida lobbying of the RTWG. Texas expects better quantified studies of barrier islands in the near future.

In conclusion, state-federal relations have been improved through the RTWG in the Gulf of Mexico region. For all participants of the RTWG, a major oil spill remains the most fearful event that could precipitate serious misunderstandings. I wish to think that the absence of a major platform spill represents the quality of state-federal relations in gaining the excellent safety record provided by a responsive industry.

Impact of an Extended Territorial Sea on NOAA's Marine Resource Responsibilities

by Timothy R.E. Keeney*

Although the emphasis of this Conference is on what new responsibilities the states would assume should the United States decide to declare a 12-mile territorial sea--which it has not yet done--other federal officials and I have been asked to address the federal interest in an extended territorial sea. I can only speak to this issue from the perspective of NOAA's resource management and research responsibilities. Even so, the views presented here are my personal views and do not necessarily represent the official position of either NOAA or the administration.

The extension of the U.S. territorial sea from three to 12 miles would not necessarily entail an automatic extension of the states' resource jurisdiction under the Submerged Lands Act from three to 12 miles. Such a change would require amendment of 43 U.S.C. Section 1312, which establishes the seaward boundary of each coastal state at three miles from its coastline (except for Texas and the Gulf coast of Florida, where, due to historic circumstances, it extends three marine leagues or nine miles), or, in the case of the Great Lakes states, at the international boundary. Such an extension also could affect a myriad of separate resource statutes that now authorize the states to manage resources within the present territorial sea limits. The United States would have to examine carefully those domestic federal resource statutes that could be affected by an extension of the territorial sea and decide whether the purpose of these statutes could be met by a simple extension of state authority from three to 12 miles, or whether a new balance of federal and state interests is required. I do not propose to present such an exhaustive analysis here; rather, this is a preliminary review of some NOAA statutes to assess the domestic impact of an extended territorial sea.

To determine the federal interest in an extended territorial sea, I have reviewed NOAA's principal resource management statutes, including:

- the Magnuson Fishery Conservation and Management Act (P.L. 94-265, 16 U.S.C. 1801 *et seq.*);
- the Marine Mammal Protection Act (P.L. 97-389, 16 U.S.C. 1361 *et seq.*);
- the Endangered Species Act (P.L. 97-304, 16 U.S.C. 1531*et seq.*);
- the Coastal Zone Management Act (P.L. 92-583, as amended,16 U.S.C. 1451 *et seq.*);

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- the Marine Protection, Research and Sanctuaries Act (P.L. 92-532, as amended, 33 U.S.C. 1401 et seq.; 16 U.S.C. 1431 *et seq.*;
- the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund," P.L. 95-510; 42 U.S.C. 9601 *et seq.*);
- the Deep Seabed Hard Mineral Resources Act (P.L. 96-283; 30 U.S.C. 1401 *et seq.*); and
- the Coast and Geodetic Survey Act (33 U.S.C. 883a *et seq.*).

In reviewing these statutes, I found that the United States might gain some slight additional benefits and protection vis-a-vis foreign nations from extended territorial sea or contiguous zone jurisdiction. But the national interest in the management of various important resources could be significantly affected should the Submerged Lands Act simply be amended to grant the states 12 miles of jurisdiction under the Submerged Lands Act. If the United States should extend its territorial sea from 3 to 12 miles, I suggest that the purpose of each existing resource statute be reviewed to determine how respective state and federal interests should be aligned. I would hope that in conducting this review we could avoid a repeat of the 1953 "Tidelands Controversy" when the federal and state governments vied for authority over the continental shelf, a dispute Congress resolved by passing the Submerged Lands Act and the Outer Continental Shelf Lands Act. But I am not optimistic. Perhaps this forum can bring some reasonable debate to the subject so the impact of a 12-mile territorial sea and the allocation of responsibility could be considered in advance. A brief discussion of the NOAA statutes involved in such a debate follows.

The Magnuson Fishery Conservation and Management Act

Prior to this Act, the federal role in fishery management was largely limited to preventing foreign fishing in our nine-nautical mile "contiguous zone" adjacent to the territorial sea. The fishery management that did exist was conducted by the states under a wide variety of conflicting arrangements. Cooperative interstate management of migratory fishery resources, though authorized in three interstate compacts, largely failed because each state sought to protect its own fishing industry at the expense of its neighbors. Very few states exercised authority to regulate fishing beyond the three-mile limit through landing laws or regulation of state citizens.

The Magnuson Act radically changed this situation. The Act replaced the nine-mile contiguous zone with a 197-mile wide Fishery Conservation Zone (FCZ). Regulation of fisheries occurring in this zone is a shared responsibility of the states and the federal government acting through eight Regional Fishery Management Councils. Each coastal state appoints one voting member, the federal government appoints one voting member, and the remaining Council members are nominated by the states and appointed by the Secretary of Commerce.

The Councils prepare fishery management plans (FMPs) that address

the fishery resource throughout their range, thus resolving many of the interstate jurisdictional problems from the start. Ordinarily the regulations that implement FMPs apply only to the fishery conservation zone. States are expected to implement complementary programs for the adjacent territorial sea. In exceptional cases involving fisheries found predominantly in the FCZ, the federal government can preempt state authority over the territorial sea. This has occurred only twice since 1976, indicating that relations between the states and the federal government under the Magnuson Act have generally been successful.

Most important fishery resources are found near our coasts. There are about 25 fisheries now under management plans. Many of these reflect major compromises between and among the various states and their fishing industries. If the states were to be granted full fishery management authority in an expanded territorial sea, nearly 90 percent by weight (70 percent by value) of our fishery resources would come under state authority. A return to interstate "beggar thy neighbor" squabbles is a very real possibility. Ultimately, the fishing industry that depends on sound conservation programs may be the ultimate losers. If Congress chose to avoid this result, regional institutions such as Councils that have the power to override state laws, would be required to force states to agree to comprehensive management plans for the entire range of these important resources.

The Marine Mammal Protection Act

With limited exceptions, this Act established a moratorium on the taking of marine mammals. Federal permits are required for scientific research, public display and takings incidental to commercial fishing. The Act applies throughout the United States, including the fishery conservation zone. A special procedure allows states to assume management of marine mammals from the federal government. At various times, Alaska, Oregon and California have expressed interest in seeking return of management, but have not pursued it. An extension of state boundaries from three to 12 miles would not, in and of itself, affect the MMPA, but might prompt a renewal of interest in one or more states.

Endangered Species Act

This Act regulates takings of species listed by the Secretary of the Interior as threatened or endangered. All great whales, sea otters, some seals and several species of marine fish are so listed. Unlike the MMPA, this Act has not been extended to the FCZ. This is of only limited concern, however, since the Act applies to U.S. citizens on the high seas and foreign fishing in our FCZ requires federal permits. Under this Act, the states may adopt regulations equal to, or more protective than, the federal standards. An extension of state authority from three to 12 miles would expand the area in which more protective state regulations might be adopted.

The Coastal Zone Management Act

With one important exception, the CZMA follows the division of re-

sponsibility between the states and federal government set forth in the Submerged Lands Act. The states may participate in the grant program under the CZMA by developing coastal management programs. If the Secretary of Commerce finds that the state's program meets the federal criteria in Section 306 of the Act, the state program can be approved. Federal approval entitles the state to two benefits: federal grants for the administration of the program and "federal consistency," a requirement by which federal actions in and directly affecting the coastal zone must be conducted consistently with those programs. Under current law, the coastal zone extends seaward to the outer limit of the territorial sea. Therefore, if the outer limit of the territorial sea is extended without modification of the CZMA, the outer limit of the coastal zone would similarly be extended. Such an extension would affect federal interests in two ways: the states would assume greater direct responsibility for the management of significant resources, such as oil and gas, and federal activities in a wider geographic band would have to be conducted consistently with state programs.

For example, the extension of the coastal zone from three to 12 miles might have resulted in a different conclusion in the recent District Court decision of *Exxon v. Fischer*, (Civ. No. 84-2362, C.D. Cal.), filed October 11, 1985 (also known as the "thresher shark" case). In that case, the California Coastal Commission objected to Exxon's proposal to drill an exploratory well for gas on Lease OCS-P 0467, located in the Santa Barbara Channel approximately seven miles off the California coast, because the well would interfere with the harvest of thresher shark by commercial fishermen residing in the coastal zone. As an alternative, the Commission proposed that Exxon drill during a five-month window outside the thresher shark fishing season. Exxon challenged the Commission's authority under Section 307(c) (3)(A) and (B) of the CZMA to lodge this consistency objection because the conflict was between oil and gas exploration and an OCS fishery. The District Court, after deciding it had jurisdiction to review the validity of the Commission's objection, agreed with Exxon's substantive challenge. The Court found that the consistency review authority of the Commission for OCS activities was limited to their effects on the natural resources of the coastal zone--which were absent--and did not encompass economic impacts on industries based in the coastal zone. Therefore, the Court invalidated the Commission's objection to the proposed exploratory well. Given the unusual facts in the *Exxon* case, it may well be that a different result would have been reached had the coastal zone been extended to cover this tract.

In summary, I believe the significant national interests in resources between three and 12 miles would require a re-examination of the CZMA should the U.S. extend its territorial sea to 12 miles.

The Marine Protection, Research and Sanctuaries Act

NOAA is directly involved in the administration of Titles II and III of

the MPRSA, and is indirectly involved in Title I (of the Act), which is better known as the Ocean Dumping Act. Each of these titles has a separate jurisdictional provision.

Under the Ocean Dumping Act, administered principally by the Environmental Protection Agency, dumping of materials by any person in the territorial sea or contiguous zone of the United States requires a federal permit, even dumping in state waters. Accordingly, no additional benefits or protection would be obtained should the United States declare a 12-mile territorial sea (although some additional protection against unregulated dumping would be obtained should the United States extend its contiguous zone from 12 to 24 miles).

NOAA conducts most of its research into the effects of ocean dumping, pollution, overfishing and man-induced changes of ocean ecosystems under Title II of MPRSA, 33 U.S.C. 1441 *et seq.* This research authority has no geographic limits; therefore, an expanded territorial sea produces no additional federal benefits. Conversely, there would be no detriment to federal interests in expanding state jurisdiction over a 12-mile territorial sea since research responsibility between the states and federal government is largely shared. On the other hand, the scientific community's interest in freedom of marine scientific research could be harmed if other coastal nations expand their territorial seas and contiguous zones inconsistently with the Law of the Sea Convention.

Pursuant to Title III of MPRSA, the Secretary of Commerce is authorized to designate certain areas of the marine environment, which possess nationally significant conservation, recreational, ecological, historical, research, educational or aesthetic qualities, as national marine sanctuaries. "Marine environment" is defined to include all coastal and ocean waters over which the United States exercises jurisdiction under international law. Under this authority NOAA has, for example, designated as national marine sanctuaries the famed Civil War ironclad, the U.S.S. MONITOR, the Key Largo Reef off the coast of Florida and the Channel Islands off California. Once a particular sanctuary is designated, NOAA promulgates regulations to protect it. Foreign vessels occasionally run afoul of these regulations. For example, a foreign vessel ran aground on Key Largo Reef, some six miles off the Florida coast, in August 1984, doing extensive damage to valued coral formations. We are suing for damages to the reef. Since the vessel is owned by a foreign company, the issue of our jurisdiction over the reef under international law has been raised. We maintain that the Marine Sanctuaries Act, Outer Continental Shelf Lands Act, the 1958 Geneva Convention on the Continental Shelf, and the Presidential Proclamation of an Exclusive Economic Zone (EEZ) give the U.S. sufficient authority on which to base a resource damage claim for resources located more than three miles from its coast but within the 200-mile EEZ. The assertion of a 12-mile territorial sea would resolve the issue.

Relatedly, the Secretary of Commerce must obtain the concurrence of the

governor of a state or territory before the designation of a marine sanctuary can take effect within the "seaward boundary" of any state. The "seaward boundary" of a state is now co-extensive with its territorial sea. Accordingly, should the territorial sea and "seaward boundary" of states be extended, NOAA would continue to consult with and obtain the concurrence of states within whose boundaries particular sanctuaries were designated. We expect that this would have no negative impact on the sanctuary program.

The Deep Seabed Hard Mineral Resources Act

This Act authorizes NOAA to issue licenses and permits to U.S. citizens to engage in exploration for and commercial recovery of manganese nodules in the deep seabed. The "deep seabed" is defined as the area lying seaward of and outside the continental shelf of any nation and the resource zone of any foreign nation (which the U.S. recognizes). A 12-mile territorial sea would have no effect on this jurisdiction since the deep seabed begins where the OCS ends and the outer edge of the OCS would not be extended because of U.S. extension of its territorial sea. Although the OCS may "shrink" because of an expanded territorial sea, the deep seabed would not be affected since its limit would remain the same.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)

As a trustee for natural resources under Superfund, NOAA is authorized to assess and recover damages to natural resources caused by releases of hazardous substances. Sums recovered for such damage are to be used to restore or replace the affected resources.

The jurisdictional scope of CERCLA would not be affected by the extension of the territorial sea since "environment" and "natural resources"--the key definitions--include all resources and waters within the jurisdiction of the U.S., including those of the 200-mile fishery conservation zone.

As to the division of responsibility between the states and federal government, liability for damages to natural resources caused by the release of hazardous substances accrues both to the U.S. government and to any state for natural resources within, belonging to, managed by, controlled by, or appertaining to such state. Accordingly, extended state jurisdiction over territorial sea resources would expand the natural resource responsibilities--and benefits--of the states, and might, therefore, decrease federal responsibilities for those resources formed predominantly within state waters. NOAA has cooperated with states thus far in assessing damages to natural resources, such as we are currently doing with the Commonwealth of Massachusetts for measuring the damages to state and federal fishery resources caused by releases of polychlorinated biphenyls (PCBs) into New Bedford harbor. NOAA may have to re-examine the necessity for joint damage assessments should the territorial sea be extended and federal interests diminished accordingly.

The Coast and Geodetic Survey Act

One of NOAA's principal responsibilities is to survey and chart the waters of the United States and thereby to assist in the determination of the baseline from which the territorial sea is measured and put this information on official U.S. charts. This authority was first given to the Coast and Geodetic Survey by a simple resolution of Congress in 1807, upon the recommendation of President Jefferson. It has since been expanded several times, and now there is no question that NOAA's jurisdiction for surveying and charting is not limited to U.S. waters. Extension of the U.S. territorial sea would change neither the baseline from which its outer limit was derived nor the method for determining that baseline. Therefore, an expanded territorial sea would have no effect on NOAA's ability to conduct geophysical surveys within the new U.S. territorial sea (although the effect on surveying off foreign coasts would have to be examined).

In conclusion, if the seaward boundaries of coastal states were to become co-extensive with a 12-mile U.S. territorial sea asserted under international law, federal authority in coastal waters would generally diminish. Each pertinent marine resource statute should be reviewed separately to determine whether such an alteration of the state-federal balance makes good sense.

A History of Federal/State Conflicts in the Territorial Sea and Anticipated Effects of an Extended Territorial Sea

by Michael W. Reed*

I have spent the last 15 years dealing with state-federal conflicts in the territorial sea. Being asked to take part in this Conference gives me an opportunity to discuss subjects which are dear to my heart, and forces me to contemplate the effects of an extended territorial sea on the issues that have been so hard fought for so many years now.

Let me begin with a proposition that, although self-evident, is essential to an orderly discussion of the subject. The three-mile territorial sea is part of the United States and one of the 23 coastal states. The United States has claimed sovereignty over a three-mile belt of marginal seas almost since our independence from Britain. The claim is recognized through customary international law and treaty. The states typically establish their boundaries–including an offshore belt–through their construction or state legislation.

Each level of government has two kinds of interest in the marginal sea. The first is a governmental interest, typically the police power. Both states and the federal government have laws that apply to the territorial sea that are enforced here. The second is a proprietary interest–who may act as owner of any assets that may be found there.

Governmental interests have usually not created conflicts. Fisheries enforcement provides a good example. The Supreme Court has long recognized the right of coastal states to regulate fishing in the adjacent territorial sea. In most cases, this involves only the coastal state and its own citizens and no federal conflict arises. In fact, the Supreme Court has acknowledged a state's right to control fishing by its own citizens beyond its borders.

Problems have arisen when a state seeks to assert jurisdiction over the activities of out-of-state fishermen either within its boundaries or beyond. The federal government has had occasion to become involved in such cases–usually on the side of the fishermen. It is probably safe to say, as a rule of thumb, that states may regulate out-of-staters in the territorial sea so long as there is no discrimination in favor of their own citizens but that such regulation on the high sea requires some additional tie–or nexus–between the state and the out-of-state fishermen involved. Alaska has been particularly aggressive in such high seas enforcement and has been able to establish sufficient nexus where vessels from Washington and

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Oregon make extensive use of Alaskan ports. Whether the regulations being enforced are truly non-discriminatory is often a more difficult question than one would expect.

Finally, states have, on occasion, sought to enforce their laws against foreign fishermen within what they contend to be their boundaries. Foreign fisheries enforcement has typically been the job of the federal government–particularly Mr. Keeney's agency (the National Oceanic and Atmospheric Administration) and the Coast Guard--but in extremely close coordination with the State Department. Until 1964, there was little foreign fishing near our shores and no federal law that provided a penalty for foreign fishing in our territorial sea. Any who were found were simply told to leave. In the mid-1960's, distant water fleets began to arrive off our coasts with tremendously efficient means of catching and processing seafood. In 1964, Congress passed legislation prohibiting foreign fishing in our territorial sea, including severe penalties for violations. Two years later, similar prohibitions were extended to a "contiguous fisheries zone" that ran an additional nine miles offshore.

As is probably apparent, enforcement against foreigners involves not only conservation but also the foreign affairs interests of the United States. Almost never did states seek to enforce their regulations against foreigners. However, one incident resulted in a particularly nasty confrontation between the federal government and the State of Florida. Cuban fishermen were found fishing near the Florida Keys in an area that the state considered inland waters. (It happened that the United States and Florida were, at that time, litigating in the Supreme Court over the location of that boundary.) The federal government considered the area to be high seas and open to foreign fishing. When Florida officials set sail to apprehend the Cubans, the Coast Guard was dispatched to intervene. A temporary restraining order was obtained that resolved the immediate problem while the boundary question was being litigated.

However, the event made it apparent that state fisheries enforcement might result in international incidents. This was thought to be especially likely with respect to Texas and the Gulf Coast of Florida, since those states have boundaries that extend up to nine nautical miles–thereby encompassing a six-mile belt considered by the United States to be high seas even though within the states' boundaries. Moreover, Congress had--through the Submerged Lands Act–granted those states authority to regulate fisheries out to those boundaries.

The federal government took the position that, with respect to foreign fishing, the foreign affairs authority of the Constitution overrode any apparent conflict in the Submerged Lands Act. To establish this principle, it filed an original action in the Supreme Court against Florida and Texas (**United States v. Florida and Texas**, No. 54 Original). The case was eventually resolved with a stipulation that the governments would cooperate on enforcement in the six-mile belt and Texas and Florida would not interfere with foreign vessels without first contacting the Coast Guard.

In this day of 200-mile fisheries and exclusive economic zones, there is little likelihood of a foreign fishing problem within nine miles of shore, but the potential remains–at least theoretically.

These, then, are some random comments on the history of state and federal governmental interests in the territorial sea. Generally, there have been few conflicts.

Not so when the governments are protecting their proprietary interests in the territorial sea. The question here has been who owns the seabed and the wealth of mineral resources that are now known to exist there. The matter received almost no attention until it became apparent in the 1930's that California's coastal oilfields extended offshore. The federal government had no statutory authority specially designed to deal with offshore minerals so potential lessees began to file applications for leases under the 1920 Mineral Leasing Act. For ten years these applications were routinely rejected by the Department of the Interior with the explanation that it was California and not the federal government that had title to the resources seaward of the coastline. California obliged and issued leases.

By 1944, the Secretary of the Interior had changed his mind. He was persuaded that the federal government might have a claim to offshore lands. The Justice Department brought a quiet title action against one of California's lessees–that suit was later dropped and replaced with an original Supreme Court action against the State of California. The latter litigation was filed in 1945, the same year that the United States showed even greater offshore interest–and began a snowball of international claims–by asserting the exclusive right to resources of our entire continental shelf.

In 1947, the Supreme Court ruled–holding that the United States and not the individual states held exclusive rights to the resources of the territorial sea. It reasoned that the concept of a territorial sea had not evolved in international law at the time of American independence. The original states could not, therefore, have entered the Union with territorial seas and subsequently acquired rights to that belt went to the federal government, not the states. California was said to have entered the Union on an equal footing with the original states and did not acquire rights in the territorial sea. The Court also decided that the territorial sea was important in the areas of international relations and defense, subjects particularly suited to federal jurisdiction. Similar actions against Louisiana and Texas did little more than affirm the proposition in the California case. The Supreme Court ruled that Louisiana was governed by the California decision. Texas was in a different situation because it entered the Union as an independent republic–with an established territorial sea. Nevertheless, the Court determined that Texas also entered on an equal footing with the original states–that is, it gave up its territorial sea rights.

The decisions were not popular in the coastal states. Bills to return the

resources of the territorial sea to the states were passed by Congress and vetoed by President Truman. The issue took on some significance in the 1952 election and General Eisenhower promised, if elected, to sign such legislation. He was- and in 1953 the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, became law. The Act gave all states exclusive rights to resources of the seabed within three miles of their coasts. In addition, states bordering on the Gulf of Mexico were given an opportunity to prove that they entered the Union with boundaries more than three miles offshore, in which case their grants would extend up to nine miles.

Alabama and Rhode Island filed Supreme Court cases challenging the constitutionality of the Act, alleging discrimination against those states who got only three miles. The Court was not convinced, holding that the land belonged to Congress and it could dispose of it as it pleased.

The next round of cases was instituted to determine which of the Gulf states had historic boundaries of more than three miles. It concluded with what must be a record 13 hours of oral argument, in four days, in the Supreme Court. As discussed earlier, Texas and the Gulf side of Florida were found to qualify, based primarily on their historic Spanish backgrounds. The other Gulf states were limited to the three-mile grants just like everyone else.

As the same time, litigation began over the question of how to measure the Submerged Lands Act grant. It is variations on this theme that have kept a few of us occupied ever since.

The story returns again to California where the original Supreme Court action was reopened for purposes of determining just what was the "coastline" from which the three-mile grant would be delimited. That question always involves two parts–the actual low-water line and the closing line across the mouths of inland waters. The first part is less interesting. California has two low tides a day. The United States argued that its "low-water line" should be the average of these two tides. The state argued, and the Court agreed, that the low-water line is to be computed only with reference to the lower of each daily low tide. Since this is the line that is charted as low water on the National Ocean Service charts, the decision seems entirely reasonable.

As to the limit of inland waters such as bays, rivers and harbors–the United States argued that they should be closed with the principles employed by the United States at the time the Submerged Lands Act was passed, its being reasonable to assume that those principles would have been intended by Congress when it used the term "coastline." California, on the other hand, contended that the term should be fluid–changing in definition as the international definition might change. The state was well aware that in 1958, the United States had signed an international agreement that, among other things, contained provisions for coastline delimitation which generally established more seaward lines than would have been used by the United States in 1953.

The Court accepted neither position. It adopted the 1958 Convention's

definitions of inland waters but said that to avoid the instability that would result from changing principles, the definitions being sued would be continued for Submerged Lands Act purposes.

Since 1965, the federal and state governments have probably litigated over every coastline provision of the Convention. Louisiana's unusual shore offers an unlimited opportunity for imaginative lawyering. It took 20 years of Supreme Court litigation to determine the location of that state's coastline. The low-water line itself had to be located–in an environment that sees substantial accretion and erosion almost daily.

Dozens of bay closing lines were disputed. The parties often disagreed about whether a proposed closing line was on the mainland or on an island. (By definition, a bay is an indentation into the mainland, but the Court has said that portions of the Mississippi, although surrounded by water and therefore technically islands, are to be treated as part of the mainland.) There was never agreement on what tributary waters, if any, should be included for purposes of determining whether the "bay" contained a water area equal to that of a semicircle whose diameter is the mouth of the "bay"–another requirement of the Convention.

A controversy arose over what artificial coastal structures could be used to measure the state's grant, a question that arose again on the California coast.

Louisiana also argued that the United States should be required to employ straight baselines, a system of artificial coastlines recognized by the Convention but not required, and that we had historically claimed certain of the waters in the dispute. The Convention recognizes that historic waters are retained by the coastal sovereign even though they do not meet the Convention's inland waters criteria. These two theories remain popular today among advocates for coastal states who are not content to accept the largess of the Submerged Lands Act grant as delimited through the principles typically employed by the United States in its international relations.

The question of how to close a river mouth and how to construct a lateral offshore boundary between adjacent states arose in **Texas v. Louisiana**, No. 36 Original–a case in which the United States intervened to protect its own interests. Supplementary proceedings in **United States v. California** established that coastal piers are not baselines under the Convention but that the inland water of harbors could extend to the limits of their use as harbors–without reference to the principles employed for delimiting bays. California prevailed on the latter issue only after acquiring the assistance of an expert from Texas.

Supreme Court cases have also been litigated with Massachusetts, Rhode Island, New York and Florida dealing primarily with the Submerged Lands Act consequences of historic actions and positions taken by the United States and those states.

We are presently embroiled in a controversy with Alaska that raises an interesting question about the effect of a formation that may sometimes be

above water and most of the time is not. That action also has given the state a forum to recycle straight baseline and state boundary questions that are long since resolved by the Court. The matter is now being argued before a Special Master of the Court, who, we hope, will agree with that interpretation.

All of which brings me to some thoughts about future conflicts. Extending the territorial sea will not, of necessity, create additional conflicts in the areas that I have been discussing. However, I assume that the 23 coastal states would immediately extend their boundaries to the 12-mile limit. With respect to activities under the states' police power, this might reduce the potential for conflict slightly. It would certainly give them clearer jurisdiction over out-of-state fishermen within the area in which most problems are likely to arise.

It might also lead to the resolution of a problem with which I once had a particular interest. As most of you are probably aware, the remains of ancient Spanish galleons lie off certain portions of our coasts. Many of these contained valuable cargoes of new world treasure. The search for such treasure has become a popular, though seldom successful, enterprise. A number of coastal states have attempted to regulate such activities, both to assure that valuable archaeological information is not lost in a helter-skelter race for riches and to preserve historically interesting artifacts in public ownership. Attempts by the federal government to provide similar protection beyond the territorial sea have met with little success. An expanded state boundary may provide additional protection for such sites either under existing state laws or an amended version of a proposed federal statute that would lay claim to historic vessels and pass that claim on to the states. I do not suggest this as an area of potential conflict--but one of possible increased federal-state cooperation toward a common goal that is made possible by an expanded territorial sea.

I do not believe that proprietary interests will be greatly affected by an expanded territorial sea. I expect that most here today will agree with this. A 12-mile territorial sea does not mean a 12-mile Submerged Lands Act grant. That grant is limited to three miles from the baseline from which the territorial sea is measured (with the Texas and Florida exceptions mentioned earlier. It is not a grant to the limits of the territorial sea. If the territorial sea is extended there will undoubtedly be a suit that argues the contrary but that should not be a difficult question.

More likely, the coastal states will seek to amend the Submerged Lands Act to extend their grants to 12 miles. If such legislation is passed, there should be fewer, rather than more, tidelands controversies. As the relevant line falls farther offshore, it is affected by fewer and fewer coastal points. This is particularly obvious in drawing our 200-mile economic zone limits, where only the most prominent coastal points affect the 200-mile limit. Even with 12 miles, many of the issues that were tried in the past would have been unnecessary. This is not to say that I am advocating a 12- or 200-mile grant to the states (or territorial sea, for that matter).

I do not suggest that an extended territorial sea would affect delimitation under the present Act. As I warned earlier, inventive counsel have been known to concoct issues that I would certainly not have anticipated. For example, Alaska is now arguing that areas of high seas that are nevertheless surrounded by state submerged lands must themselves belong to the state because they are "within" its boundaries. This happenstance occurs in certain areas with a three-mile territorial sea and state boundary. It would occur in others if both boundaries were extended to 12 miles. If the state is successful in its present argument–or if the boundaries are extended before the conclusion of the present litigation–Alaska might be so bold as to suggest that the new enclaves also belong to it.

Having said all of that–I must admit that I foresee few domestic conflicts arising from the extension of our territorial sea. The most serious, I believe is additional state influence over outer continental shelf leasing through the Coastal Zone Management Act, an issue raised by Mr. Keeney.

I should note that my comments have been my comments. They may or may not be consistent with opinions held elsewhere in the Justice Department or the federal government.

United States Foreign Policy and National Security Interest in a Twelve Nautical Mile Territorial Sea

by David A. Colson*

I have been asked to discuss the foreign policy and national security aspects of an extension of the United States' territorial sea from three to 12 nautical miles in breadth.

Several years ago, one might have listened to a spokesman from the State Department address this matter from the perspective of adverse precedent. The presentation would have said that it was vitally important that the United States not take such an action. That spokesman would have said that such an extension was fundamentally inconsistent with maintaining our traditional position that the United States was not required to recognize in international law territorial seas greater than three nautical miles in breadth. The spokesman would have explained that the U.S. interest in maintaining its right to freely navigate world straits could not countenance an extension of coastal state territorial seas to 12 nautical miles. Thus, we had to resist such extensions by others and we had to lead by example.

But, as you know, the United States position on the breadth of the territorial sea changed in 1983. On March 10, 1983, the President proclaimed that the United States was establishing a 200-nautical mile exclusive economic zone. In addition, on the same date, the President issued an Ocean Policy Statement. That statement is quite relevant in this discussion. It states:

The United States is prepared to accept and act in accordance with the balance of interest relating to traditional uses of the oceans–such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.

Since the Convention contains a provision in Article 3 providing for a 12-nautical mile territorial sea, the Ocean Policy Statement had the intended effect of changing the long-standing United States policy of rejecting claims to territorial seas greater than three nautical miles in breadth. From that day forward the United States has taken the position that 12-nautical mile territorial seas are generally lawful in international law, so long as the passage rights of other states are recognized therein.

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The views expressed are those of the author and do not necessarily represent the views of the United States Government.

Accordingly, there is no spokesman from the Executive Branch at this Conference indicating that the United States should not extend its territorial sea to 12 nautical miles because other States might do likewise and thereby harm United States interests. The government has already evaluated and accepted the consequences of a globally accepted 12-mile territorial sea. It believes those consequences are acceptable on the grounds that international law requires that states claiming a 12-mile territorial sea recognize the passage rights of other States in that area. The United States foreign policy and national security perspective, therefore, is different now than it was previously, in at least two ways.

First, the United States' willingness to accept 12-nautical mile territorial seas is inextricably linked to the recognition of international passage rights in those seas--meaning innocent passage in the territorial sea; transit passage in straits used for international navigation; and, archipelagic sea lanes passage in archipelagoes. While accepting the 12-nautical mile breadth, the United States remains committed to protecting its global navigation interests by ensuring that the passage rights side of this arrangement is respected by others--in other words, that coastal States respect international passage rights in their territorial seas.

There are two basic ingredients in accomplishing this goal successfully. One is to promote and exercise these rights. The other is to ensure that U.S. domestic practice is consistent with and affirmatively supports our international position. So, from a foreign policy and national security standpoint, it is essential that any United States claim to a 12-nautical mile territorial sea reinforce the passage rights element of the arrangement. This is best accomplished by an express statement in recognition of the passage rights of other States in the waters off the United States coast.

Our orientation differs in a second way, as well. By expanding United States jurisdiction to include a 12-nautical mile territorial sea, the interests of other States are quite naturally affected. These interests need to be examined in detail to determine if there is a foreign policy or national security aspect that should be taken into account in United States decision-making on this question. Perhaps another way of looking at it is whether as a factual matter foreign interests would be affected, or if those interests would only be affected in a theoretical sense.

Now, let me return to the matter of including an express recognition of passage rights in any declaration, by either the Congress or the President, of a United States 12-nautical mile territorial sea. When one reviews the maritime claims of other countries, one often finds that many of those countries make general claims to maritime jurisdiction in their national law without protecting the interests of other States in that national law. Our experience tends to indicate that, unless the international interest is specifically recognized in the national claim, the respect for that international interest by that country slips away over time. In other words, if non-Law of the Sea lawyers see a 12-nautical mile territorial sea in their

national law, they understand only the national jurisdiction aspect, not that the territorial sea carries with it certain international rights as well. Thus to protect that international right over time, it should be expressly stated in the national claim itself. To the extent that the United States has had the opportunity to do so, it has encouraged States to include such an express statement in their national laws in recognition of the international passage rights so that this important aspect is not overlooked.

The United States should do no less than it encourages others to do. For this reason, you will note that in both the 1945 Truman Proclamation and the 1983 Exclusive Economic Zone Proclamation, there is an express recognition of the rights of the international community in the Proclamations themselves. For instance, the 1983 Exclusive Economic Zone Statement says:

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territorial sea of the United States in which all States enjoy the high seas freedom of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

Thus, these assertions of coastal State jurisdiction contained in the Truman and Exclusive Economic Zone Proclamations clearly establish that they are not intended to affect the high seas rights and freedoms of other States in the areas in which new rights are claimed. A United States 12-nautical mile territorial sea proclamation should be expected to do no less. It would need to recognize the right of innocent passage in the territorial sea, and the right of transit passage in straits used for international navigation. Since the United States is not an archipelagic State, as that term is used in the 1982 Law of the Sea Convention, it would not need to address the archipelagic sea lanes passage issue.

Let me now examine the specific international interests that could be affected, and what the United States might gain internationally by an extension of the United States territorial sea from three to 12 nautical miles. First, let me address resource issues, namely fisheries and mineral resources.

Generally, the interests of the international community in the resources off United States coasts would be only marginally affected by an extension of the United States territorial sea to 12 nautical miles. The fact that the legal character of the sea bed would change from continental shelf to territorial sea in the three- to 12-mile band would not affect the international community's interests, since it has no rights to the shelf resources in any event.

The same may be said for fishing, although not quite so categorically. Except for tuna fishing, all foreign fishing within 200 nautical miles of the United States is closely controlled under U.S. law. While in general law a licensed foreign vessel may fish for an allocated species up to three miles from our coast, under the fishery management plans that govern

these fisheries foreign vessels are seldom allowed to do so. I might note that it is now open under U.S. law for a foreign tuna vessel to fish up to three miles from the coast without any authorization by the United States. A 12-mile territorial sea would have the effect of keeping such fishermen further from the coast. This could be of some interest to our states and territories, especially in the Pacific Ocean. But the bottom line is that, as far as the international community's resource interest goes, an extension of the territorial sea to 12 miles would largely go unnoticed.

Let me turn to marine scientific research. Marine scientific research in the United States territorial sea requires United States permission, while such research in the Exclusive Economic Zone does not. Therefore, an extension to 12 miles would, in concept, mean that a greater amount of scientific research would be subjected to a requirement to receive United States permission. While I have not researched the facts, it is my impression that this would not create much of a concrete burden since foreign vessels that conduct scientific research close to the United States coast normally enter the United States territorial sea and thus request and receive United States permission in all events.

I come now to marine pollution. Any extension of the United States territorial sea would give the United States greater authority under international law than we presently exercise to regulate shipping for the purpose of preventing or reducing marine pollution. It is submitted, however, that the combination of existing laws, and the characteristics of foreign flag shipping off the United States coast, give the United States full protection in this regard and that there is little practical effect that could be gained in the area of marine pollution control over foreign shipping by a territorial sea extension.

In the area of law enforcement, the United States presently exercises customs, fiscal, sanitary and immigration authority in a 12-mile contiguous zone. There would not be significant increases in U.S. law enforcement authority by expanding the territorial sea to 12 miles. Nonetheless, there could be some concomitant benefits of an extension of the territorial sea to 12 nautical miles if that extension were accompanied by an extension of the contiguous zone to 24 miles from the coast. The concept of such an extension is recognized in Article 33 of the 1982 Convention. The extension of the territorial sea to 12 miles would incorporate the police powers presently exercised in the 12-mile contiguous zone, and would not add greatly to those powers. An extension of the contiguous zone to 24 miles, however, would add broad customs enforcement authority that would be of significance in protecting the U.S. border, and would be of great assistance in the area of maritime interdiction of drug trafficking. The United States legal right, without flag State consent, to stop, search and arrest foreign shipping off our coast in the 24-mile zone would be significantly expanded. As well, a 24-mile contiguous zone is a handy tool for the international lawyer who is faced with an unusual, unexpected international crisis. I am thinking, for instance, of the Mariel boatlift. Had we been able to take

action in a 24-mile band off the Florida coast, some aspects of that problem might have turned out differently. I note that under international law the United States could claim a contiguous zone up to 24 miles from the coast, without expanding its territorial sea claim.

Finally, I turn to the basic navigation and national security issues. In the modern world, United States antagonists normally do not need to station themselves within a few miles of our coast to do their work. But the extension of the territorial sea from three to 12 miles breadth could have some benefit in hampering of surveillance activities conducted close to the coast. I remember stories of the Russian trawler that sat just outside the three-mile territorial sea off Guam counting B-52s that took off from there during Vietnam. The legal ability to move that vessel beyond a 12-mile limit could have had some marginal benefit at that time.

The fact that there would be an area off the U.S. coast in which freedoms of navigation and overflight would be reduced means specifically that foreign submarines would have to surface and that overflight could be prohibited in that area. This could again have some marginal benefits, particularly in sensitive U.S. coastal areas.

In conclusion, it is fair to say that the national decision whether to expand the U.S. territorial sea to 12 nautical miles is not a crucial issue from a foreign policy and national security perspective. There is no adverse foreign policy or national security aspect to such a decision. There could be some marginal benefits. All of this assumes that such an extension would strictly respect the passage rights of other States and not affect the traditional standards for determining our national baselines for measuring the breadth of the territorial sea.

The Coastal Decision-Making Framework as a Model for Ocean Management

by Marc J. Hershman*

There are a great many important ocean management problems facing the U.S. today, and a public management regime has evolved to deal with most of these problems (e.g. fisheries, oil and gas). However, as Cicin-Sain and Knecht have noted, the regime is not working satisfactorily in many instances and if ocean uses grow in frequency and importance there will be a need for reform.[1] The purpose of this paper is to look ahead 10 or 20 years. In what direction should reform of the ocean management regime proceed? What are the tough issues of the future and what type of regime will handle them best?

One type of issue that will arise with increasing frequency is the long-term commitment of ocean space to a particular use: oil and gas exploration and development; mineral extraction; marine sanctuaries; ocean research stations; mariculture; recreation sites; waste disposal sites; energy production; and others. Each of these uses requires that a site be selected, and that alternative uses be excluded or limited. Making site selection decisions requires finding a balance among use opportunities, trading off development and preservation values, and ensuring predictability and fairness in the decision-making process.

Site selection is the primary output of a decision-making framework now in place for coastal waters. Thousands of decisions are made each year allocating uses along the coast that affect bays, estuaries, lagoons and other nearshore waters. There are two important reasons why this coastal decision framework, which has been evolving for close to 20 years, can be a model for ocean management in the future.

First, the coastal decision model reflects our federalist system. The roles of many governmental levels are institutionalized. The courts, Congress and the executive branch have adjusted the respective boundaries and scope of authority of federal, state and local jurisdiction in coastal waters, and a relatively stable and predictable regime has emerged. This regime respects the paramount powers of the federal government over navigable waters, but provides a considerable role for state and local governments.

Second, the coastal decision model reflects the pluralistic interests of American society and provides for multiple access points to the decision process. Many diverse uses of coastal waters are considered, and, for the

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most part, accommodated through site selection procedures. The system is complex and multi-tiered, but it may be the best we can expect in contemporary American society given the democratic values we wish to preserve and the sheer numbers of interests competing for space in the coastal zone.

The coastal decision framework has developed in response to many of the same factors that will be present in ocean development in the future. A regime for ocean development will have to accommodate many levels of government and reflect our Constitutional tradition of federal predominance where navigable waters and interstate commerce are involved. Ocean development in the future will increasingly face the tough problems of site selection and trade-off among competing users and environmental impact issues will predominate. Ocean development will involve many of the same interest groups and agencies who are involved in coastal decision-making: for example, federal and state resource agencies, and environmental interest groups, will likely be the same whether the development issue is in a bay or 20 miles offshore.

For these reasons, the coastal decision model can be a useful tool in evaluating the current ocean management framework. It is a more highly refined and time-tested framework for multiple-use decisionmaking, yet involves many of the same issues, players and Constitutional standards.

The remainder of this paper characterizes the structure and norms of the coastal decision framework and uses these characterizations as criteria for determining the adequacy of the current ocean management regime. A number of "deficiencies" of the current ocean management system are noted that suggest areas where institutional reform are needed.

The Coastal Decision Framework

The structure of the coastal decision framework involves decisionmaking at all three levels of government, and involves multiple agencies within each level. The federal level centers on the Corps of Engineers, which has ultimate decision authority, but also includes a variety of other federal and state agencies whose views must, by law, be considered by the Corps. At the state level of government, coastal zone management program officials normally play a lead role in decision-making, applying one or more coastal management laws. In addition, state fisheries and wildlife agencies, as well as water quality and submerged lands offices, will participate in the review process. At the local level, land use and zoning laws of various types, as well as traditional health, safety and police powers, are administered by county and city governments.

The coastal decision framework involves, therefore, more than a dozen different agencies, each administering its own law and regulations. These laws have been passed at different times and in response to widely varying needs. They contain different standards of review and divergent procedures. Certain agencies will have primary power over certain aspects of a decision, but only a secondary role in other aspects of the decision.

The coastal decision framework can be characterized as highly com-

plex. Congress and state legislatures have been liberal in creating new agencies with considerable power to protect or advance selected interests. Because of the many laws and agencies involved, and the ability of some agencies to veto or delay projects they dislike, a kind of balance of power has emerged.

The Corps of Engineers facilitates the balance of power in an important way. No project can proceed without the permits issued by the Corps. They are the ultimate decision authority. They will issue permits only after ensuring that the concerns of all the participating agencies have been considered. The Corps has been characterized as a "clearinghouse" requiring participants in the process to try to resolve their differences through negotiation and project modification.[2]

This balance of power brought on by a multiplicity of laws and the "clearinghouse" role of the Corps of Engineers creates pressure for informed negotiation and bargaining among the many parties. This had led in some cases to streamlined procedures, joint permit processing, and multi-agency meetings to discuss project issues. In some cases, new forums have evolved to facilitate the review and resolution of controversial projects (e.g. scoping, ad hoc task forces, mediation). These forums force mutual education and trading of information. In some cases they form the arena for reaching trade-offs, and establish guidelines for addressing problems that may arise in the future. In effect, a new process is emerging, based on an integration of agency interests that is leading to a more comprehensive and streamlined arrangement for decision-making. It is ironic that this new process is arising out of a cumbersome, overlapping legal structure, and that it is being fashioned within the administrative machinery and not by the Congress or state legislatures.

The structural component of the coastal decision framework is only half the story. There is, in addition, the normative component--the outcomes that result from the coastal decision framework.

Experience in coastal decision-making in the past 15 years has led to norms that provide guidance when making decisions. These norms have grown out of Constitutional, public trust and environmental principles and have reflected the prevalent societal values of our day. Thus, we see the laws, regulations and court decisions at all levels of government reflecting a similar set of principles:

1. Preference for water-dependent or water-related uses at the water's edge.
2. Protection to wetlands and intertidal areas, and to the habitat for endangered species of wildlife.
3. Provision for public access to the shore whenever possible.
4. Reduction of losses from natural hazards by control of development.
5. Compensation to the environment for unavoidable losses in natural resources.
6. Minimizing pollution of the aquatic environment.[3]

In addition to the articulation of these norms within laws and regula-

tions, management plans and information documents are being produced that translate the norms into specific guidance for decision. For example, important wetland and wildlife habitats are noted on maps and atlases. Lists of water-dependent and water-related uses are adopted and incorporated into ordinances, thus reducing ambiguities in the definition of terms. Environmental habitat values are determined to calculate appropriate mitigation measures.

Thus, the development of norms and the translation of the norms into specific decision guides reflect the growing sophistication of the coastal decision process. It is becoming more rational because the policy goals and the tools of decision have become more logically connected and sharply focused.

Deficiencies in the Ocean Decision-Making Framework

Given this maturation of the coastal decision process, and recalling the similarity of issues, players and Constitutional framework between coastal and ocean resource arenas noted above, it is useful to observe that today's ocean decision framework differs from the coastal decision framework in three fundamental ways. There is no single federal agency with general jurisdiction such as the Corps of Engineers; no agency has the responsibility for multi-use spatial designations; and there are no general principles to guide multi-use decision-making and trade-offs in the ocean arena. Each of these will be discussed in turn.

Lack of a single agency with plenary jurisdiction

The Corps of Engineers is the federal agency with general jurisdiction over coastal waters. It reviews all "work in navigable waters," which is broadly defined, and reviews all discharges of dredged or fill materials.[4] The standard of review applied is the all-encompassing "public interest" review that requires consideration of diverse factors of the public interest that may be relevant in a given context. No one factor predominates; rather a balancing test is applied to ensure that the benefits of a proposed action outweigh the foreseeable detriments. In carrying out a review, the process is open to all public and private organizations and individuals with an interest in the action. By law, the Corps must integrate the objectives of a wide range of laws in carrying out its mandate, thus forcing a comprehensive review of particular actions. And, as noted above, the Corps acts as a clearinghouse to ensure that conflicts are identified and resolved among the real parties at interest.

There are strengths to this system that could be especially useful in an emerging ocean management regime. The legal basis on which the Corps acts is general--in effect a grant of power to review any action that might obstruct navigable waters. It is neutral with respect to the type of use that might be proposed. This "generalness" has facilitated the incorporation of other values into the decision equation as they emerged, such as environmental protection and historic preservation. It is thus flexible to respond

to new issues and adaptable to differing circumstances around the country. Since ocean management demands will evolve slowly over time, a general and flexible system will allow regional experimentation and trial and error, and lead to a system that arises out of real decisions and real circumstances. A general system also allows new agencies and interest groups to enter the decision arena freely, facilitating a more comprehensive process.

At the present time no federal agency has general jurisdiction beyond the three-mile territorial sea. Power is distributed among a variety of agencies, and each agency is limited to a particular sector of ocean use. There have been attempts by the Courts and Congress to broaden the mandate of the Department of the Interior (DOI) to require that decisions regarding oil and gas leasing, exploration and development consider other resource values.[5] But the statute under which DOI operates is clearly designed, in its entirety, to advance oil and gas resource extraction goals. Congress has also considered an organic law for NOAA, but such a bill has never advanced very far.

The lack of a plenary law for ocean decision-making creates an organizational vacuum in the ocean arena. There is no organized way to reconcile conflicts among agencies with narrow, sectoral missions. An important policy objective should be to fill this vacuum, and the Corps of Engineers public interest review process is the closest model we have in U.S. natural resources law. Consideration should be given to extending the definition of "navigable waters of the United States" to the Exclusive Economic Zone (EEZ), with appropriate reservations that protect international interests, the effect of which would be to establish the Corps of Engineers as the agency with general jurisdiction in the EEZ.

Lack of multi-use spatial designations

It was stated previously that site selection is the emerging issue of ocean management because it implies long-term commitment of ocean space and thus requires a choice among alternatives. A mature site-selection process must be based on a good inventory of environments, habitats, resources and uses that are accessible, such as in published atlases. Site selection decisions must also be preceded by goal-setting; an articulation of preferred uses, and development and preservation objectives.

It is within the bays and estuaries that some of the best inventories and atlases have been produced. Through a combined effort of federal and state resource agencies, knowledge of habitats, resources and uses are known, and choices among objectives for particular areas can be listed. Choosing the site for a particular use, and thus excluding or burdening other uses, is still a difficult social and political decision. However, information exists on which to base such choices.

Extending this information base to the ocean arena is central to the evolution of a sound ocean decision framework. Here, state government action can be an important catalyst in two ways. First, many states have

developed coastal zone management programs and have relied on compilations of environmental and resource inventories as a first step in the design of a management system. These inventories are area-specific (e.g. done for a particular bay, estuary or stretch of coastline) and normally management oriented (e.g. emphasizing indicator species or environmental processes affected by types of physical development). In addition, they combine data from a wide range of specific agencies, universities and interest groups. The experience of states in producing management-oriented information packages can be helpful for ocean decision-making.

Second, and more important, state government can help articulate goals for ocean decision-making. Being a government of general jurisdiction, with experience at making allocative decisions based on broad police powers, some states have made hard choices in decisions about use of submerged lands, or choice of sites for large-scale development. For example, Oregon has classified its 21 estuaries so that some will grow and others will be preserved. Florida and Massachusetts have designated aquatic preserves and sanctuaries that are limited to specified uses and protected from water quality degradation. Some states identify marine zones where development is encouraged, such as Hawaii's Natural Energy Laboratory and Louisiana's offshore terminal site and pipeline corridor.

Federal agencies alone cannot do an adequate job of multi-use spatial designations. DOI can identify oil and gas or mineral lease sites, EPA can designate dump sites and the Coast Guard can determine shipping lanes. But each of these site selections has implications for allocation of coastal waters and shore uses, and the constituencies that gain or lose from these decisions are based in state and local communities. Also, the combined effect of these designations, and their timing, will be of great interest to local communities because of their concern for the place, and the nature of its growth, rather than a particular resource use activity.

Fortunately, a combined federal-state process has evolved within DOI that may be a model for inventory, spatial designations and goal-setting. For oil and gas development issues, MMS has established Regional Working Technical Groups, a federal-state task force advising on technical solutions to conflicts among ocean uses. In the Gulf of Mexico, this group was able to resolve problems relating to oil and gas drilling adjacent to unique reef formations being considered for designation as the Flower Gardens Marine Sanctuary.[6] For hard mineral development, MMS has established joint task forces with Oregon and Hawaii to evaluate a wide range of information relating to mineral deposits off the shores of the two states.[7] The task forces have wide latitude to consider environmental, engineering and socio-cultural factors, and the product of their effort includes spatial information based on inventories. Encouraging as these developments are, they are limited to information useful to the decision to lease for extraction of non-living resources. If a similar mechanism could be forged, but with a mandate to consider a broader set of proposed uses, it might better serve the long-term interests of an ocean decision-making framework.

Lack of principles that guide ocean decision-making

As noted above, 20 years of experience in decision-making about use of shorelands and coastal waters has resulted in a set of principles that guide decision-making. These principles are reflected in laws and regulations at the federal, state and local levels of government. They are the common denominators of the coastal decision framework.

No such common principles are apparent as yet for multiple-use decision-making in the ocean environment. But, a mature management system will need principles so that decisions among alternative uses can be made with some rationality and predictability. For example, in the coastal setting, the water-dependency concept suggests that certain uses are more appropriate than others at the shoreline; i.e., those that need to be there for physical or economic reasons. Similarly, the public access principle suggests that the shoreline and nearshore waters should be available to the general public as a matter of right, based on ancient public trust common law. And, the environmental compensation principle suggests that the severe loss of aquatic environments in this country has reached its limit and any new development into water areas must be matched by creation or restoration of other aquatic areas of equal value.

What principles conceivably could emerge that would parallel the breadth of the coastal principles and aid the process of decision for EEZ ocean uses? A few candidate principles can be listed, each of which will need fuller analysis and explanation in subsequent research. First, historical uses of the sea (fishing, navigation) might be preferred over newer uses, a principle that respects tradition, recognizes a notion of "first in time, first in right" and has some parallels in international law. Second, given that the EEZ is an emerging international concept that recognizes some rights in the international community, a principle might prefer uses most in concert with international interests of the U.S. Third, recognizing the public and international character of the EEZ, a principle requiring compensation for exclusive use or negative externalities might be stated, and incorporated into specific decision procedures. Fourth, borrowing from principles established in public lands management, a multiple-use principle might be articulated in which no activity is automatically excluded from consideration, but must be designed and managed in a way not foreclosing or unreasonably limiting other beneficial uses.

A broad-based dialogue is needed to further examine decision principles for the EEZ. The proposed high level ocean policy commission (dubbed Stratton II) would be an ideal setting in which to initiate such discussions.[8] A better articulation of principles, and their successes and failures in other contexts, can aid the drafters of new laws and the judges and administrators searching for a basis on which to make ocean use decisions.

Summary

The decision framework that has emerged to control development in coastal waters is not perfect. However, it is what we have, and may re-

flect all that we can expect in a pluralistic society and under a federalist system of government, where democratic principles prevail. In fact, indications are that it is becoming more refined and sophisticated, and new procedures and institutions are emerging to deal with the cumbersome nature of overlapping and sometimes conflicting jurisdictions.

The decision framework for ocean uses in the EEZ will likely be similar to the coastal decision framework because the players, issues and Constitutional structure of government is the same. For this reason a study of the characteristics of the coastal decision framework can help evaluate the strengths and shortcomings of the ocean decision-making structure.

Applying the characteristics of the coastal decision framework (which is farther along the evolutionary track than the present ocean decision framework), three deficiencies are noted in the ocean system that will require policy attention in the future. First, a federal agency is needed with plenary authority that can provide the forum for integrating the preferences of many special purpose agencies and interests. This agency may be similar to the Corps of Engineers. Second, greater federal-state collaboration is needed in the preparation of inventories and specification of goals for ocean areas. Until objectives for a range of uses are identified and linked to particular ocean regions, multiple-use decisions cannot be made. Efforts in this arena should recognize the efforts of working groups and task forces established by MMS. Third, ocean-use principles are needed that establish a basis for multiple-use decision-making. A broad-based dialogue is needed to articulate and evaluate such principles.

The development of a decision-making framework for ocean uses of the future needs no boundary changes. Such boundary lines separating state and federal waters and submerged lands are "lines drawn on water."[9] They have no meaning because the interests of the federal government remain paramount over navigable waters within state boundaries, and state interests extend far offshore because state citizens, vessels, environmental and economic interests are at stake. Boundary lines are important for purposes of ownership of resources, but this is a separate issue from control over new development.

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[1]*Cicin-Sain, B. and Knecht, R. "The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone," **Ocean Development and International Law**, 1985, 15, No. 3/4, pp. 289-320.*

[2]*Power, G. "The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers." **Va. Law Review**, 1977, 63, pp. 547-556.*

[3]*The objectives of the federal Coastal Zone Management Act reflect these principles. (16 U.S.C.A. Sect. 1452) as well as the rules and regulations guiding the Corps of Engineers regulatory program (33 C.F.R. Sect. 320, et seq.).*

[4]*Power, G. "The Fox in the Chicken Coop."*

[5]*See* ***Massachusetts v. Andrus****, 594 F. 2d 872 (First Circuit: 1979). Als amendments to the Outer Continental Shelf Lands Act being considered at th end of 1985 would require the Secretary of the Interior to pay more attention t non-energy objectives when weighing comments from states on a proposed lease sale offering.*

[6]*Comments made by Dr. E.G. Wermund of the Bureau of Economic Geolog The University of Texas, at the Conference on the States and the Extended Terri orial Sea, December 9-11, 1985, San Antonio, Texas.*

[7]*See Wiltshire, J.C. "Innovative Trends in Marine Management: Hawaii Manganese Crust Work Group," in* ***Proceedings of Oceans*** *'84, IEEE, Sept. 1(12, 1984, pp. 884-889, and McMurray, G. "The Gorda Ridge Technical Task Force: Cooperative Federal-State Approach to Offshore Mining Issues," paper presente at the Underwater Mining Institute, October 1985.*

[8]*Knecht, R.W. and Westermeyer, W.E. "State vs. National Interests in an E panded Territorial Sea,"* ***Coastal Zone Management Journal****, 1985,* ***11****, pp. 31 333.*

[9]*Ball, M.S. "Good Old American Permits: Madisonian Federalism on the Terr torial Sea and Continental Shelf,"* ***Environmental Law****, 1982,* ***12****, pp. 623-628.*

The Coastal Zone Management Experience as a Model for Collaborative Resource Management

by Nan Evans*

As the nation looks forward to emerging ocean management needs and to a consideration of whether changes are needed in our current governance scheme for the territorial sea and the exclusive economic zone, a step back in time to the early 1970's and the development of this nation's coastal zone management system can provide important insights, possible comparisons, and demonstrated realities. In a very broad sense coastal zone management is a comprehensive, multiple-use, collaborative planning system for the management, beneficial use, protection and development of coastal zone resources.

In the late 1960's and early 1970's the movement to develop a national coastal zone management system was driven by the concerns of special interest groups for providing an increase in recreational opportunities and public access to beaches and coastlines; protecting the environmental quality of coastal ecosystems; and enhancing the nation's use of the ocean environment through residential, commercial and industrial development. Although such special interests sometimes differed in their value judgments and opinions about specific resource uses and needs, most agreed on two things. First, the public goals for coastal resource use, development and protection were not well-defined. And, second, the lack of coordination between government agencies often resulted in fragmented, unpredictable and short-sighted decisions. The Coastal Zone Management Act of 1972 (CZMA, Pub. L. 92-583) was born out of these dissatisfactions.

The CZMA, like any approach to management of a natural resource that involves multiple users, common and private property interests, and numerous governmental jurisdictions, had to devise specific, yet flexible, systems for planning, decision-making and implementation.

The CZMA, as passed in 1972 and subsequently as amended, envisioned a truly collaborative planning process between the federal, state and local governments. The CZMA and the National Oceanic and Atmospheric Administration's (NOAA) regulations established national criteria and standards for state coastal management program development and administration. Upon meeting these national standards and achieving federal approval from the Secretary of Commerce, the states would then imple-

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ment their programs subject to federal administrative review and monitoring for compliance. State coastal management planners were to work jointly with federal agencies in the planning process to address federal agency concerns. This same collaborative scheme was reflected in state-local interactions where state criteria, standards and policies were implemented through local planning and/or zoning activities.

This collaborative effort resulted in federal approval of 28 state coastal management programs (including territories and Great Lakes states) and measurable improvements in state and local government planning capabilities and improvements in communications among federal, state and local levels of government. Although undocumented in any formal sense, this effort has almost certainly resulted in more effective coastal resource management.

However, participation by any particular interest in a coastal planning effort was often more a function of specific concerns about effects of the coastal management program on specific, forseeable projects or activities than interest in a collaborative planning process--or "good government." Thus, the actual development of state coastal management programs was not truly collaborative: coordination may have been broad, but it was rarely deep. Federal agencies, in particular, often participated as reviewers, not partners. Furthermore, when disagreements did develop between federal and state agencies over provisions of a proposed coastal program, there was little incentive to resolve these disputes and develop mutually acceptable alternative approaches.

A general complaint that has developed since the early 1970's is that the vague, non-specific policies of the CZMA are reflected in vague state policies. Although amendments to the CZMA in 1980 attempted to identify specific policy objectives, the complaint is still often heard that vagueness in state policies results in unpredictable and often arbitrary decisions, which, in some cases, sacrifice national interests for parochial politics–or vice versa. Thus, when the balancing of concerns or uses becomes difficult–as it often does in large or complex projects–the national coastal zone management scheme has been criticized as being unable to prioritize concerns or develop reasonable alternatives.

Although the CZMA recognizes and is built on traditional, existing federal, state and local government authorities and jurisdictions, the coastal zone management system, through the federal consistency requirements, fundamentally affected decision-making by federal, state and even local governments. The federal consistency provisions of the CZMA generally require that federal agency activities that affect the coastal zone be conducted in a manner consistent with the federally approved coastal zone management programs. Section 307 of the CZMA establishes standards and procedures for state consistency review of four basic types of activities: direct federal agency activities, including development projects (Section 307(c)(1) and (2)); federally licensed and permitted activities (Section 307(c)(3)(A)); Outer Continental Shelf (OCS) exploration, devel-

opment and production plans (Section 307(c)(3)(B)); and federal assistance to state and local governments (Section 307(d)). The federal consistency regulations at 15 CFR 930 describe the procedures and responsibilities of federal and state agencies and for private parties seeking federal approval for proposed projects. The legislative history shows that Congress created the federal consistency process in an effort to advance the national interest in the effective management, beneficial use, protection and development of the coastal zone while acknowledging that the key to effective coastal zone management was to encourage the states to exercise their full authority over land and water in the coastal zone through effective consultation and coordination.

NOAA recently published a study examining the implementation of the federal consistency provisions of the CZMA (Federal Consistency Study-Draft, April 1985). Statistical documentation revealed that for the vast majority of proposed activities the states concurred (sometimes with conditions) that the project was consistent with their federally approved coastal zone management program. In only a relatively few cases did state objections result in litigation, Secretarial appeal under the CZMA, Congressional intervention or termination of the proposed project. However, reliance on statistical information hides the fact that the federal consistency requirement has been highly controversial as a national policy and as applied to specific cases. The area of greatest controversy has been oil and gas development activities on the Outer Continental Shelf, especially with regards to lease sales (e.g., **Secretary of the Interior et al. v. California et al.**, 104 S. Ct. 656).

The federal consistency process appears to work well in cases where the project is non-controversial and/or there are easy technical fixes to avoid or mitigate potential environmental damages and in cases where the state or local jurisdiction has clear, separate decision-making responsibilities through such mechanisms as state permits and local zoning. In highly controversial cases, the federal consistency review has been equally controversial. (For example, oil and gas development and production in the Santa Barbara Channel and the Beaufort Sea; ocean incineration of toxic wastes; and allocation of limited fishery resources between highly competitive commercial and recreational users.) A common feature of these highly controversial cases is that they involve cases where the states have used the federal consistency provisions to reach beyond traditional state permitting or land-use planning authorities into issues where the jurisdictional boundaries of decision-making roles between the federal and state governments are much less clearly defined.

The implementation of any program, coastal or otherwise, will, of course, be limited by the availability of funds and the political commitments and priorities of the involved government agencies and can often only be evaluated on a case-by-case basis. The successes of implementation of coastal zone management programs can perhaps be mostly clearly seen in activities that can be categorized as permit coordination and simplifi-

cation: one-stop permitting, joint permitting arrangements (especially involving the Corps of Engineers and individual states), and general permits. The basic reasons for these successes are probably the existence of clear statutory and regulatory state and federal authorities, the recognized redundancies in the information needed to make decisions on similar state and federal permits and the existence of standard engineering or technical fixes to avoid and/or mitigate potential adverse environmental impacts. The limitations of such permitting simplification schemes are often a function of the problems of assuring adequate monitoring and enforcement.

Another approach to streamlining shoreline and water development permit procedures in specific locations that has been encouraged by the CZMA is a process called "special area management planning," or SAMPs. The SAMP process attempts to implement a general state coastal management program through location-specific, multiple-use, intergovernmental criteria and standards. The goals of SAMPs are uniform and consistent regulatory policies, balanced and comprehensive consideration of long-term economic and environmental needs, increased predictability in permit decision-making and expedited review of permit applications. The SAMPs process seeks to achieve these goals through a collaborative planning process involving representatives of all affected agencies and groups. A completed SAMP is designed to guide development in a specific area in advance of actual project applications. The history of the development of SAMPs is characterized by both successes and failures. The limitations to success appear to be the identification and inclusion in the process of all the significant actors and the ability of government agencies to compromise, to decide, and to commit to future courses of action.

In another example of approaches to program implementation, the State of Alaska Coastal Management Program has developed a project-based, state and federal consistency review process that operates on the basis of consensus decision-making. The state resource agencies with permitting jurisdiction and/or a resource-based interest in a specific project jointly participate in the project review and the development of any conditions necessary to meet the concerns of individual agencies. A consensus must be reached between all the agencies before state approval is granted. Upon receipt of state consistency concurrence, all the necessary state and federal permits, licenses or other authorizations are issued. In the event of disagreements between the agencies or on the part of the project sponsor, an elevation or appeals process to the agency heads is available with the Governor having the final decision-making authority. This consensus-based decision-making system has been in place for two years and has generally alleviated problems with repetitious or redundant review, varying and contradictory decisions on a project's consistency rendered by separate state resource agencies, and unnecessary delays in the permitting process. Very few cases have been elevated to the agency heads and no cases have gone to the Governor for a decision. Routine administrative problems of

assuring that the process functions, as designed, do exist. And, projects that are fundamentally controversial remain so. The major potential weaknesses of this process is its dependence on the commitment of the Governor and his executive officers to abide by consensus decision-making and a potential to render politically motivated or "least common denominator" decisions.

In summary, if the experiences of coastal zone management are to offer guidance to those considering the development of governance schemes for oceanic areas (regardless of where boundary lines are drawn), the critical requirements for success are probably (1) clear, specific goals and objectives; (2) discrete decision-making authorities; (3) meaningful collaboration and search for consensus; and (4) an acceptance of controversy.

Intergovernmental Approaches to Cross-Jurisdictional Problems

by Charles W. Wiggins*

As serious discussion and debate is directed toward the possible extension of the U.S. territorial sea to the 12-mile limit in the next several years, a number of major and potentially conflictual questions will be raised.[1] Which level of government, national or state, should exercise primary governance over the activities occurring in the new area? How should the new area be managed and by what level? What changes, if any, should occur in the governance and management within the present three-mile territorial limit? Overall, what governance and management options are available, and which will satisfy most affected interests, or not disenchant most affected interests?

This paper describes and analyzes alternative intergovernmental approaches to problems and issues that cross governmental jurisdictional boundaries. Special emphasis is given to interstate compacts, including their legal bases, organizational characteristics, and strengths and weaknesses. In addition, the prospects for the adoption of intergovernmental approaches within the contemporary U.S. political context is examined briefly.

Intergovernmental Relations Complexity

Although on the surface intergovernmental relations in the United States may appear simple, a closer examination reveals its complexity and elusiveness. If anything, U.S. intergovernmental relations have grown more complex; while the individual different levels of government (national, state and local) have remained relatively simple to examine, their relationships and interactions have become much more complex. For example, the organizational nature of this relationship varies from very formal to very informal. Some relationships involve legally constituted and highly bureaucratized entities, while others involve mere face-to-face or telephone contacts between intergovernmental actors on a daily or weekly basis.

This paper focuses on the more formalized and organized interactions between actors at the national and state levels, as well as those between states. This emphasis is deemed appropriate considering this Conference's theme. National-state relations through the years have been characterized as federal in nature, especially in a legal sense. Yet scholars and practitioners have differed greatly through time and at given points in time on the nature of federal-state relations. For example, how should one characterize the extent of cooperation and conflict between the two

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levels?[2] What is the most accurate way to describe the flow of influence from one level to the other (superior-subordinate or partnership-bargaining)?[3] What exactly are the relative competencies of the two levels to undertake difficult tasks to solve public problems?[4] The fact that more than 300 metaphors or heuristic models have been devised by scholars of American federalism strongly suggests that it is a multifaceted, complex phenomenon.[5]

As far as relations between states are concerned, a new concept has recently entered the vocabulary of intergovernmental relations specialists--horizontal federalism. This concept duly recognizes the **potential** importance of relationships among the 50 states to the making of public policy and the delivery of public services.

Interstate Compacts and Agreements: Legal Bases

For the most part, the legal bases for formal multistate arrangements in the U.S. have been interstate compacts, or agreements.[6] It should be emphasized at the outset that not all compacts provide for the establishment of new organizational or administrative entities to implement their provisions. Instead, some merely establish the legal framework for cooperative activities of already existent agencies in state governments. Yet, a brief discussion of all compacts will probably be meaningful and useful in light of the focus of this Conference.

Types of Compacts

Two general types of compacts have been established through the years: (1) federal interstate compacts and (2) interstate compacts. The first, or federal interstate compacts, has been used far less frequently than the interstate compact and is probably the least understood. It is established when Congress and member state legislators pass statutes providing arrangements for its operations. Thus, unlike normal interstate compacts, the national government is a full participant and signatory member of the arrangement, and all relevant federal agencies, as well as state governments, are bound to comply with the arrangement. Thus, federal interstate compacts presumably encourage closer coordination between national and state political and administrative agencies than is the case with other devices. Today, three federal interstate compacts are operational: (1) Delaware River Basin Compact; (2) Susquehanna River Basin Compact; and (3) Agreements on Detainers Compact. The first two, of course, establish special commissions for water planning and operations within their respective river basins, while the third is an agreement entered into by the national and 46 state governments on the handling of criminal charges in one state against an individual who is already incarcerated in another state. In a study released in 1981, the Comptroller General concluded that federal interstate compacts were especially useful in dealing with water basin problems.[7]

The bulk of interstate compacts, of course, have been those entered into

by two or more states. Before examining them in greater detail, it should be noted that a new type of interstate compact--a state-local interstate compact--may be on the horizon in the near future. A few years ago, Wisconsin and Minnesota entered into a compact that authorized the establishment of a joint study commission to examine the feasibility of a Wisconsin-Minnesota Port Authority on Lake Superior. The compact provided for the mayors of Superior and Duluth to serve on the study commission. Information is not readily available as to whether or not this study commission has become operational.

Through the years, interstate compacts have been established with varying frequencies as their popularity has increased and waned. The number of compacts approved for various periods since the founding of the Republic is shown below. Generally, these data indicate that more than twice as many (122) compacts have been approved since 1941 than were approved during the previous 150-year period (57). The high water mark during recent decades appears to be the 1960's, when states entered into 48 agreements to resolve cross-jurisdictional problems. Although the propensity for such agreements slowed during the 1970's, the number of states entering into them actually increased.

1789 - 1900	25
1901 - 1920	9
1921 - 1930	7
1931 - 1940	16
1941 - 1950	24
1951 - 1960	32
1961 - 1970	48
1971 - 1980	18
	179

Through the years, the trend has been away from bistate compacts (many dealing with border disputes) and toward multistate agreements on a regional basis. Some agreements in recent years, such as those dealing with education, the supervision of parolees and probationers, and the supervision of juvenile offenders, have been entered into by all states, plus perhaps a few territories. The number of compacts entered into varies from state-to-state, with New York a party to most (40) and Hawaii the least (12). Canadian provinces have also been parties to a few recent compacts.

Congressional Consent?

A provision in Article I, section 10, of the U.S. Constitution stipulates that: "No state shall, without the consent of Congress...enter into any agreement or compact with another state, or with a foreign power." A strict, or rigid, interpretation of this provision would lead one to conclude that Congress must give its explicit consent (via a joint resolution) in order for a compact to become effective, or operational. However, such is not the case.

In 1893, in the border dispute case of **Virginia v. Tennessee**, the U.S. Supreme Court interpreted the wording of Article I, section 10, to mean that Congress could give its implied consent to a particular compact by declining to take action on it.[8] The Court's ruling in this case established the doctrine that Congress must give its explicit consent to a compact under only two conditions: (1) when a compact affects the powers delegated to the national government, or (2) when the compact impacts the "balance of power" between the national and state governments. Congress has generally followed these "rules of thumb" in its disposition of new interstate compacts.

Thus, Congress has not explicitly consented to a number of interstate compacts in operation today. For example, the Education Commission of the State (ESC), an interstate compact agency established to study educational problems and provide information and training to state education officials and to which all 50 states belong, has never been explicitly recognized by Congress. Of course, the U.S. Congress always retains the power to explicitly disapprove an interstate compact if problems arise in federal-state relations as the result of its operations.

Functions of Compacts

In the most comprehensive and detailed analysis of interstate compacts to date, Weldon V. Barton has concluded that each one can be considered as falling into one of four functional categories: (1) regulatory, (2) metropolitan, (3) river basins and (4) service compacts.[9]

Regulatory compacts are those such as the Interstate Oil Compact and the Ohio River Valley Sanitation Compact. When established by compacts, the regulatory commissions involved serve in either an advisory or operational capacity. For example, the Interstate Oil Compact, to which 33 states are signatories, created a commission with major responsibilities in the regulation of oil; its creation allegedly stemmed mainly from a desire on the part of interested parties to avoid federal control. The Ohio River Valley Sanitation Compact also established a commission with a meaningful operational capacity to regulate water use in that particular river basin.

Metropolitan compacts have been established to plan and administer programs in urban areas that spill across state boundaries. The bulk of these compacts involve single purpose programs, such as the Delaware River Joint Toll Bridge Compact between Pennsylvania and New Jersey. On the other hand, at least a few are multi-purpose in character, such as the Port Authority of New York and New Jersey and the Bi-State Development Agency in Missouri and Illinois. These agencies frequently enjoy much autonomy compared to general purpose governments and often are eligible for federal grants-in-aid.

Interest in the third type of compacts, or **river basins**, has increased in the past several decades. These compacts range in scope from those that allocate water among member states to those that establish federal-state

authorities to determine all or most water resource policies for a given basin. The Delaware River and Susquehanna River Basin commissions are prime examples of the latter. Most, however, have been formed to avoid national level involvement and action in the determination of solutions to problems confronting river basin areas.

Finally, some compacts fall into the category of **service compacts**. Such compacts exist in many functional areas (education, health, welfare, crime control, etc.) and are designed to promote uniformity and cooperation among the states, as well as stimulate better service delivery and discourage the duplication of services. Two examples of compacts in this category, both involving all 50 states, will suffice. First, the Supervision of Parolees and Probationers Compact approved in the 1970's provides a framework for the supervision of parolees or probationers from one state who for one reason or another desire to relocate in another state. This particular compact established no new agency, or organizational entity, to administer the program; instead, it was an agreement among the states regarding procedures and responsibilities in a particular service delivery area. The Education Commission of the States Compact (ECS), on the other hand, established a special commission to carry out its activities. Organized in 1966 with the support of former Harvard President James B. Conant, Carnegie Foundation President John Gardner, and North Carolina Governor Terry Sanford, ECS operates from offices in both Denver and Washington, D.C., and has 150 employees and a $9 million budget, as least half of which is usually derived from federal largess (although Congress has never explicitly consented to the compact that formed ECS in the first place). ECS performs several service functions for its member states: (1) policy research, (2) information clearinghouse, (3) policy forums, (4) technical assistance/training, and (5) lobbying.

Generally, the establishment of a new agency is the exception to the rule with regard to service compacts. When agencies are established, they are more often than not underfunded, unlike the ECS. Finally, the effectiveness of such service agencies varies a great deal, with state officials having a major impact in this area.

Regional Organizations

As indicated previously, the establishment of an interstate compact has not necessarily meant the formation of a new organizational entity to govern and/or administer its provisions. Although some 177 compacts have been approved through the years, only 56 agencies have been formed by and operate today as the result of such agreements. They range from those that are well organized and have much authority, as well as many resources and staff (i.e. the two federal-interstate river basin commissions and the Port of New York and New Jersey Authority, for example) to the more informal associations with limited authority, resources and staff. Professional associations of state governmental leaders (i.e. Midwest Governors Associaiton, Southern Governors Association, various state

administrative department head associations, etc.) would fall into this latter category.

Falling into the middle of our well organized/less organized continuum would be the multi-state development commissions and multi-state river basin commissions first established during the 1960's by federal statutes. The initial and present status of these commissions deserve special recognition since, in many ways, they reflect the changes in the extent of the national government's interest in dealing with major problems and issues that cross state jurisdictional boundaries.

The first federally recognized and supported multi-state development commission was the Appalachian Regional Commission (ARC). Established by the Appalachian Regional Redevelopment Act of 1965, the program was a pet project of President Lyndon Johnson. The Act, which covered portions of 14 states with less than 10 percent of the nation's population, was a joint effort by the national and relevant state governments to assist with development of the region. The program has been governed by a joint federal-state commission, with representatives and co-chairs from each level. It has a fulltime staff, headed by an executive director, whose main function has been to broker more federal grant-in-aid funds toward the region. In addition, ARC has had its own line item in the federal budget, with most funds dedicated for highways and public health. The 1965 Act also directed all federal agencies to give special attention to the many problems present in this depressed region of the country.

In order to gain congressional support for his Appalachian measure, President Johnson allegedly promised several other state congressional delegations that additional regional development commissions would be organized and funded. The end result was passage of the Public Works and Economic Development Act of 1965. Title V of this act provided for additional interstate development commissions. The original act authorized the Department of Commerce to establish five commissions (Ozarks, Four Corners, New England, Upper Great Lakes and Coastal Plains). Subsequent actions established and funded three additional commissions (Pacific Northwest, Old West and Southwest Border). In 1979, three other regional entities were designated (Mid-Atlantic, Mid-South and Mid-American) to complete blanket coverage; however, for reasons to be discussed later, these entities were never actually funded. The eight Title V commissions authorized and funded functioned in a manner similar to ARC; they were primarily planning-oriented and proposal-generating entities.

In addition to regional economic development activities, much attention was directed toward water resource planning efforts in river basins. Joint river basin planning commissions were authorized under Title II of the Water Resources Planning Act of 1965. By 1971, six commissions had been established under this measure (Pacific Northwest, Great Lakes, New England, Ohio, Souris Red-Rainy and Susquehanna).

After an initial period of popularity and success, the regional economic development and water resource planning commissions became controversial. President Nixon, for example, eventually opposed them, arguing that they were just another layer of bureaucracy and red tape between national and state governments. Except for ARC, President Reagan has dismantled them as federal interstate entities. In late 1981, as a part of the Budget Reconciliation Act, federal support was withdrawn from all Title V and Title II commissions. The ARC budget was also substantially reduced and scheduled for phase out.

Although the withdrawal of federal support did not culminate their organizational existences in most cases, such withdrawal has resulted in making these regional interstate agencies less active and visible.[10]

Regional Organizations: Strengths and Weaknesses

At least a few close observers of regional organizations through the years have attempted to assess their strengths and weaknesses, usefulness and deficiencies, or pros and cons. Although some of these perspectives are directed at pure interstate compact agencies, others apply primarily to federal interstate entities. They can best be summarized as follows:

The **strengths, usefulness, pros:**

1. Interstate entities are useful devices for resolving, or settling, interstate disputes. Although interstate involvement may at times merely elevate conflicts between private parties, or special interests, to the interstate level, such parties may feel more comfortable with and respond more to state level decision-makers and decisions.
2. Interstate organizations can be used to promote coordination of efforts in order to solve common problems and reduce duplication of effort.
3. Regional organizations provide a mechanism for areawide solutions to available problems in the face of several jurisdictional boundaries.
4. States can use interstate compacts to protect their powers in the federal system. Such efforts alleviate the pressure for transfer of authority over a problem to the national government.
5. Interstate compacts have the potential for disrupting or negating direct national-local relations. Too much "by-passing" of state government has been occurring in intergovernmental relations.
6. Federal interstate compacts in particular can address the fiscal, administrative and political difficulties emerging in certain regions more effectively.
7. Federal interstate compacts further nationally oriented programs and policies, but also provide a means for states to impact federal policies and administrative decisions in given program areas.
8. Federal interstate arrangements normally provide for the infusion of federal funds and, thus, greater program support.

The weaknesses, deficiencies and cons:

1. Interstate compacts can seriously delay coordinated national action in dealing with nationwide problems.

2. Interstate compacts may allow parties subject to regulation the opportunity to play states against each other in order to retain control in their own hands.

3. Interstate entities may be created without careful study, be devoted to improper spheres of activity, and not be systematically evaluated by impartial observers after being operational for a period of time.[11]

4. Interstate organizations may become too independent of public and state control. Autonomous governing agencies, whether commisions, nonprofit corporations, or other arrangements, may become too unresponsive to the public and states that established them in the first place. Highly paid professional bureaucracies may dominate their activities. They may make a complex system of government even more complex.

5. The representation of states in interstate organizations may be problematical, since representation on governing commissions is usually not based on "one man-one vote" in terms of member state populations.

6. A basic problem with regional approaches is that geographical problems and issues are united spatially and then usually divided functionally. This is illogical.

7. Federal interstate compacts raise concerns about federal control. Such arrangements may be used to abolish state boundaries and create regional governments, with federal law prevailing.[12]

Parting Reflections

Might some type of intergovernmental arrangement be employed in the government and management of the various activities associated with an extended territorial sea? To say the least, this is a very difficult question to answer. We have already documented the cyclical changes with regard to general interest in such arrangements.

The projected position of the current Reagan administration on just such an issue is most certainly unclear. On the one hand, we can think of reasons why the President might be supportive of state-level involvement, whether individual or joint. His general ideology is one that favors a greater state governmental role vis-a-vis the national government. Being a former governor, he also appears to be more sympathetic toward the role of the elected chief executives of states as opposed to appointed administrators. His "new federalism" policies provide for a devolution of national programs to state governments, block granting of categorical grants-in-aid to provide state officials with more flexibility, and the significant reduction of federal red tape in both intergovernmental and private regulatory programs.

On the other hand, there are other clues that lead one to the opposite conclusion, or that President Reagan might not be all that sympathetic toward a significant joint or individual state role in the extended territorial sea. For example, he has not been all that consistent on the national versus state power issue (witness his position on national product liability standards, raising the legal drinking age to 21 in all states, etc.).[13] Some

also argue that Reagan's brand of federalism might best be described as "Austerity Federalism," or really directed at reducing the size of governments at all levels. His support of the withdrawal of national encouragement for interstate cooperation in the case of Title V and Title II commissions, as well as ARC, certainly doesn't make one too optimistic about the prospects for concerted state or federal-state actions in the near future. Furthermore, the budget deficit crises at the national level may lead the President, as well as other national leaders, to oppose any efforts on the part of state government officials to obtain a "fair share" of the oil and gas revenues involved in an extended territorial sea.

But the President won't be president forever, and, as we have seen, interest and support for regional governments varies with time!

[1]*For background information on this issue, see Robert W. Knecht and William E. Westermeyer, "State vs. National Interest in an Expanded Territorial Sea," **Coastal Zone Management Journal**, Vol. XI, No. 4 (1984).*

[2]*For an overview of this subject, see Daniel J. Elazar, et. al., eds., **Cooperation and Conflict: Readings in American Federalism**, (Itasca: F.E. Peacock Publishers, Inc., 1969).*

[3]*Helen Ingram, "Policy Implementation Through Bargaining: The Case of 'Federal-Grants-in-Aid,'" **Public Policy**, Vol. XXV, No. 4 (1977), pp. 499-526.*

[4]*David B. Walker, "A New Intergovernmental System in 1977," **Publius**, (Winter 1978), pp. 101-116; Walter D. Broadnax, "The New Federalism: Hazards for State and Local Government," **Policy Studies Review**, Vol. 1, No. 2 (1981), pp. 231-235.*

[5]*William H. Stewert, "Metaphors, Models, and the Development of Federal Theory," **Publius**, Vol. XII (Spring 1982) pp. 5-24.*

[6]*The following discussion of interstate compacts and regional organizations draws heavily upon: Paris N. Glendering and Mavis Mann Reeves, **Pragmatic Federalism: An Intergovernmental View of American Government**, 2nd ed., (Pacific Palisades: Palisades Publishers, 1984), especially Chapter 7; and Deil S. Wright, **Understanding Intergovernmental Relations**, 2nd ed., (Monterey: Brooks/Cole Publishing Company, 1982), especially Chapter 10.*

[7]*Comptroller General of the United States, **Federal-Interstate Compact Commissions: Useful Mechanisms for Planning and Managing River Basin Operations**, CED-81-34, (Washington, D.C.: General Accounting Office, Feb. 20, 1981).*

[8]*148 U.S. 503 (1893).*

[9]*Weldon V. Baron, **Interstate Compacts in the Political Process**, (Chapel Hill: University of North Carolina Press, 1967).*

[10]*Five of the Title V agencies (Ozarks, Four Corners, Great Lakes, New England and Southwest Border) were incorporated as council of governors, or non-profit organizations. The Coastal Plains agency merged with the Southern Growth Policies Board, while the remaining two (Old West and Pacific Northwest) were in transition at last information. Three Title II river basin commissions (Missouri, Ohio and Upper Mississippi) were incorporated as non-profit corporations, while a third (Great Lakes Basin) was merged with Great Lakes Commission. Responsibilities of the New England Commission were assumed by the New England Governors Conference, while the Pacific Northwest Commission ceased*

to exist. See: Bruce McDowell, "Regional Organizations Hang On," ***Intergovernmental Perspective***, Vol. 18, No. 4/Vol. 9, No. 1 (Winter 1983), p. 15.

[11]Marian E. Ridgeway, ***Interstate Compacts: A Question of Federalism***, (Carbondale: Southern Illinois University Press, 1971).

[12]John W.C. Kohr, "The Hidden Danger of These Bills: Interstate Compacts," ***The Pennsylvania Crier***, Vol. 8, No. 2 (1979).

[13]Timothy J. Conlan, "Federalism and Competing Values in the Reagan Administration," paper presented at 1983 Annual Meeting of the American Political Science Association, Washington, D.C.

Going to Court for the States: What the States Might Expect from a 12-Mile Territorial Sea

by John Briscoe*

You will note that the title of my little apres-chicken talk contains the obligatory colon. Unsurprisingly, it is at neither end, but in the middle of the title. It is the second part of the title to which I wish to give my greater attention. (If you wish, you may give yours to the first part and thereby ignore what I am about to say.) For the second part states the question put to me several months ago by your distinguished chairman, Dr. King, when he called me. He asked, "Distinguished Dr. Briscoe (we speak to each other that way), what might the states expect were the United States to proclaim a 12-mile territorial sea?"

"Nothing," I replied.

To which he said, "Then you don't get to come to my conference."

I thereupon rejoined, "...Nothing—if we states do nothing. Let me think about it." And so I have.

Jon Charney has written that the United States "most certainly will," in time, adopt a system of straight baselines.[1] Likewise, those who had a hand in composing The President's Exclusive Economic Zone Proclamation in 1983 (and in composing its explanation of it for the I.C.J. [International Court of Justice] in 1984) have stated that those documents evince our full acceptance of the claims of other nations to a 12-mile territorial sea.[2] Is it then just as "sure" that we will adopt a 12-mile territorial sea? I think I know. As Reginald Arkell wrote in 1916:

> *Actual evidence I have none,*
> *But my aunt's charwoman's sister's son*
> *Heard a policeman, on his beat,*
> *Say to a housemaid on Downing Street,*
> *That he had a brother, who had a friend,*
> *Who knew when the war was going to end.*[3]

Nevertheless, I will refrain from discussing **whether** the United States will adopt a 12-mile territorial sea; others are better prognosticators than I. Rather, I will address the consequences if it should.

To put the subject into perspective, we should consider its ethical and cosmological overtones. But they are singularly uninteresting, compared to its financial overtones. To take the Outer Continental Shelf alone (which now means the Exclusive Economic Zone), the government expects revenues

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in 1985 of $6 billion and in 1986 of $8 billion.[4] After income taxes, these monies are the second largest source of federal revenues. So the financial consequences are manifest.

I am told I am to presuppose that the U.S. presently holds to a three-mile territorial sea, so that a proclamation of a 12-mile territorial sea would represent an extension of our territorial sea. I'm told we've held to a three-mile territorial sea since the time of Thomas Jefferson. Well, I'm not sure he would agree. In 1782 we were asserting nine miles as a reasonable territorial sea breadth.[5] In 1793, to be sure, we declared a three-mile territorial sea for neutrality purposes,[6] but several months later, on November 8, 1793, Jefferson wrote both the Spanish and French ministers to the United States that the United States was entitled to "as broad a margin ... as any nation," and reserved "the ultimate extent of the (territorial sea) for future deliberations."[7] He later explained that we had been forced to accept three miles, and, in 1805, suggested that the Gulf Stream would be a good outer limit.[8]

But I will take it, as I must, that we have always held to a three-mile territorial sea. That certainly, though, must have come as a surprise to Spain in the 1860's, when we complained of her claim to a six-mile territorial sea off Cuba. In reply to a letter from Secretary of State Seward, Spanish Minister Tassara wrote on December 30, 1862, that the United States' claim to a "much more extensive" territorial sea claim of four leagues was quite notorious in the international community.[9] Poor fellow must have confused our customs, neutrality, fiscal, immigration and navigation jurisdiction for a territorial sea.

I will, nevertheless, accept the idea that we have always had but a three-mile territorial sea. At the very least, though, it cannot be said that we have been like Caesar's wife in our adherence to a three-mile margin. During World War II we declared defense zones of several hundred miles[10]; in 1945 we broke with the rest of the world and proclaimed sovereignty over the continental shelf[11]; in 1958 and 1960 we sought international agreement on a six-mile territorial sea[12]; in 1970 we proposed a 12-mile territorial sea[13]; and in 1976 we declared a 200-mile exclusive fisheries zone,[14] at a time when the International Court of Justice had just recently suggested that 12 miles was the maximum permitted breadth for such a zone.[15]

And today, of course, we have a 200-mile Exclusive Economic Zone.[16] But I will take it that we have a three-mile territorial sea.

To consider how the states might fare with a 12-mile territorial sea, we should consider what they presently have. Contrary to a common misapprehension, the rights of the states are not co-extensive with the territorial sea. That is, an extension of the territorial sea from three to 12 miles would not automatically work an extension of states' rights. And what are those states' rights? We can talk about the right to regulate water pollution under the Clean Water Act,[17] to regulate fisheries under the Magnuson Act,[18] and to demand consistency under the Coastal Zone

Management Act.[19] But so far as the territorial sea is concerned, the states' rights that have, geographically speaking, received the most play in the Supreme Court are the property rights in the submerged lands off their coasts. Under the Submerged Lands Act of 1953,[20] coastal states own the resources of the seabed and subsoil off their coasts to a distance of three miles from the coast line (in the cases of Texas and Florida's Gulf Coast, to a distance of nine nautical miles). Those limits are found in sections 2(a) and 2(b) of the Submerged Lands Act, and there is no provision for an extension of state jurisdiction should the United States proclaim a 12-mile territorial sea.[21]

Again, in considering what a 12-mile territorial sea might portend for the states, it may be useful to consider how easy it was for the states to get what they got. The effort to confirm the states' titles to the offshore submerged lands began as early as 1937. It was during this period, legend has it, that the great and long-lived Secretary of the Interior Harold Ickes, depressed over the unruliness of the states, penned these words:

> *It little profits an idle king,*
> *By this still hearth, among these barren crags,*
> *Match'd with an aged wife, I mete and dole*
> *Unequal laws unto a savage race,*
> *That hoard, and sleep and feed, and know not me.*[22]

So disgusted was he that he later prevailed on President Truman to veto a congressional quitclaim resolution in 1946, and, acting through his shade, another version of a Submerged Lands Act in 1952.[23]

It was not until 1953 that President Dwight Eisenhower, having campaigned on a pledge to sign a submerged-lands bill into law, did so. And ever after, as you undoubtedly know, the Supreme Court has engaged in a systematic conspiracy with the federal government to take back what Congress had sought to give the states.

Notwithstanding the Supreme Court's efforts, where do the coastal states stand today? So far as the revenues are concerned, they have their submerged-lands grants; what else?

Way back in 1972, when it passed that much-heralded experiment in federalism, the Coastal Zone Management Act, Congress concocted the Coastal Energy Impact Program, for the purpose of compensating the coastal states for "impacts" it suffered from federal offshore activities, such as oil production. That program is moribund and so there's not much use talking about it.

"8(g)" is the hot topic today, and I think a review of that issue makes it all the more clear that, considering their submerged lands grants, the coastal states are not about to secure any great sympathy in Congress for a piece of an expanded territorial sea.

"8(g)" is the section of the Outer Continental Shelf Lands Act,[24] as amended in 1978, that provides that a coastal state shall receive a "fair

and equitable" share of bonuses, royalties and other revenues from OCS leases within three miles of a state's seaward boundary--the so-called "8(g) zone." The section has no other criterion, and so virtually invites litigation. Since 1978, while there have been negotiations with California, Alaska, Alabama, Mississippi and Florida, there has been litigation between the federal government and Texas, and between the federal government and Louisiana. In the escrowed accounts now are $6 billion; $1.5 billion alone is from leases offshore California.[25]

As Mary Ellen Leeper reported earlier, Louisiana brought suit in 1979, followed shortly by Texas. In 1984 the Texas federal district court entered judgment in favor of Texas for 50 percent of the bonuses plus interest. The Louisiana federal court shortly followed suit.[26]

Thereafter, the Department of the Interior offered all the coastal states 16 and two-thirds percent of all escrowed bonuses, rents and interest. (California would have received, for example, $216.8 million from this offer; royalties were excluded.)[27]

The governors demanded 50 percent, and early this year, Rep. John Breaux, D.-La., introduced legislation that would have given the states what they wanted.[28] (Fifty percent is what the states receive as their portion of onshore federal mineral leases, as of 1976.)[29] Thereafter, all of the affected coastal states, excluding California, offered to compromise their claims at 37.5 percent.[30]

At present, a House and Senate 8(g) bill that would each give the states 27 percent have passed their respective chambers, and are awaiting the selection of conferees to iron out the differences.[31] I am told that the bills have a good chance of being compromised and signed into law, notwithstanding the gathering momentum for a bill to eliminate the federal deficit by 1991; the 8(g) bills, you see, would distribute as much as $12 billion to the states by 1990.

Given how difficult it was for the coastal states to get their paltry little Submerged Lands Act grants, and given how jealously the interior states will regard the 8(g) funds and the proposed 27 percent compromise, who in his right mind thinks the coastal states will gain, as by an extension of their submerged-lands grants, from a proclamation of a 12-mile territorial sea? Qualifications aside, I do.

The impetus will come principally, however, not so much from an extended territorial sea, as Dave Colson suggested, as from the new 200-mile EEZ. Or, the 200-mile OCS, as the Department of Interior decreed last May. Or, the 350-mile OCS. (I mention 350 miles only because Chile has recently declared a 350-mile continental shelf, our State Department has not, to my knowledge, objected, and our Department of Interior is mulling legislation that would provide for an outer limit of the continental shelf that may extend as far as 350 miles.) Three hundred and fifty miles is heady stuff. Let's stick to 200 miles. In the Chamber-of-Commerce rhetoric of the Department of Interior, the United States' 200-mile EEZ comprises an area 170 percent the size of the total land area of the United

States and its territories.[32] One observer has questioned whether the founding fathers could have intended the federal government to own and operate an area of land, "outside the territory of the United States," of such a size.

I said that the impetus will come principally from the EEZ, and not from a 12-mile territorial sea. If so, given that the EEZ Proclamation is three years old, why have we not yet heard from the states--heard of their proposals for a sequel to the Submerged Lands Act? Certainly the Coastal States Organization, with the very able intellectual guidance and energy of Bob Knecht, has been studying, and assaying, the situation for the coastal states, but no serious legislative proposal has emerged. I believe that, until the ball game has been appreciably changed from what it was prior to 1983, a true "seaweed rebellion" will not coalesce. That is, until there are new discoveries within the EEZ of hydrocarbons in banks and undersea plateaus previously thought to have been beyond the U.S. continental shelf; or until substantial deposits of gold are found there; or (perhaps the likeliest scenario) until commercially exploitable deposits of cobalt are found and Zaire has a revolution--that is, until there is much new money to be had from the EEZ--the present situation will abide, and any movement to extend the Submerged Lands Act will not galvanize. The EEZ Proclamation was, by itself, not enough, and a declaration of a 12-mile territorial sea will not be either.

So for now I suggest you mill about in the corridors and anterooms of the American ocean-politics scene. But reserve yourself a seat in the gallery for what will be a delightfully blustery chapter in American federalism, when one of these precipitating events occurs. There will be cascades of states-rights rhetoric on one hand, and, on the other, effusions of non-sequiturian tracts on the need for federal control of offshore areas, and of the greed of the coastal states. And in the end, the states, as is only just, will prevail, for (in the words of the poet)

> *Though much is taken, much abides; and tho'*
> *We are not now that strength which in old days*
> *Moved earth and heaven, that which we are, we are,--*
> *One equal temper of heroic hearts,*
> *Made weak by time and fate, but strong in will*
> *To strive, to seek, to find, and not to yield.*[33]

[1]*Charney, The Offshore Jurisdiction of the States of the United States and the Provinces of Canada, in* **The Law of the Sea and Ocean Industry: New Opportunities and Restraints,** *Law of the Sea Institute (1984), p. 426, 432. Professor Charney was, for a number of years, a trial attorney in the Justice Department, concentrating on the submerged lands litigation. He was also an original member of the Baselines Committee.*

[2]*Oceans Policy Statement, I Public Papers of the President - Ronald Reagan, 1983, p. 378, March 10, 1983. Statement of United States Agent Davis Robinson to the International Court of Justice, May 9, 1984, in the case between the United States and Canada concerning the Gulf of Maine.*

[3]*From All the Rumors (1916).*

[4]*Coastal Revenue Sharing Blocked, 42 Cong. Q. Weekly Rep. 2640 (1984), [15 Current Developments] Env't. Rep. (BNA) 1630 (Feb. 8, 1985).*

[5]*Crocker, Extent of the Marginal Sea (1919) p. 630; Jessup, The Law of the Territorial Waters and Maritime Jurisdiction (1927) p. 50; 7 North Atlantic Coast Fisheries Arbitration, 46.*

[6]*President's Proclamation of Neutrality, April 22, 1793.*

[7]*Letter from Secretary of State Jefferson to George Hammond, British Minister to the United States, November 8, 1793, reprinted in Swartztrauber, The Three-Mile Limit of Territorial Sea (1972), p. 57.*

[8]*Conversation between President Jefferson, J.Q. Adams and Mr. Gaillard, as related in Memoirs of J.Q. Adams, Vol. I, p. 375-376.*

[9]*Defendant's exhibit 85-027, **United States v. Alaska**, U.S. Supreme Court, Original, before the Special Master.*

[10]*See, e.g., Department of State Bulletin, 1, No. 15, (Oct. 7, 1939), Foreign Relations of the United States, V, pp. 36-37.*

[11]*Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884.*

[12]*At the First and Second United Nations Conferences on the Law of the Sea, held in Geneva. See generally, 1 Shalowitz, Shore and Sea Boundaries (1962) pp. 269-70.*

[13]*1970 Public Papers of the Presidents-Richard Nixon; Statement About United States Oceans Policy, p. 454, May 23, 1970.*

[14]*Fishery Conservation and Management Act of 1976, 16 U.S.C. §§1801 et seq.*

[15]***United Kingdom v. Iceland**, (Fisheries Jurisdiction) [1974] 1 C.J. 3, 130 Cf. Magnuson, The Fisheries Conservation and Management of 1976: First Step Toward Improved Management of Marine Fisheries, 52 Wash. L. Rev. 427, 438-441, and esp. 441 fn. 46 (1977).*

[16]*Proclamation 5030--Exclusive Economic Zone of the United States of America, I Public Papers of the President Ronald Reagan, 1983, p. 380, March 10, 1983.*

[17]*33 U.S.C. §§1251 et seq. The states may regulate water pollution within the territorial sea if it has a "certified" water quality program under section 402 of the Clean Water Act.*

[18]*See note 14 above.*

[19]*16 U.S.C. §§1451-1464.*

[20]*67 Stat. 29, 43 U.S.C. §§1301 et seq.*

[21]*Cf. **United States v. California**, 381 U.S. 139, 166-167 (1965).*

[22]*Sometimes erroneously attributed to a British poet, Tennyson.*

[23]*The veto of H.J. Res. 225 is recorded in 92 Cong. Rec. 10660 (1946) (sustained, 92 Cong. Rec. 10745); the 1952 legislation, S.J. Res. 20 was vetoed on May 29, 1952, 98 Cong. Rec. 6351-53.*

[24]*67 Stat. 462, 43 U.S.C. §§1331 et seq.*

[25]*See California State Lands Commission, Assessment of the Provisions of 8(g) Outer Continental Shelf Lands Act Amendments of 1978 on California's Share of Bonuses, Royalties and other Revenues (1984), p. 2.*

[26]***Texas v. Secretary of the Interior**, 580 F. Supp. 1197 (E.D. Tex. 1984), appeal filed, No. 84-2422 (5th Cir. July 20, 1984); **Louisiana v. Department of the Interior**, Civ. No. 79-2965 (E.D. La., May 16, 1984).*

[27]*Update, Interior Meeting with Representatives of Seven States on 8(g) Issue, Pacific Outer Continental Shelf Current Events (Minerals Management Service, Pacific OCS Region), Dec. 1984-Jan. 1985, p. 1.*

[28]*H. 641, 99th Cong., 1st Sess.*
[29]*30 U.S.C. §191.*
[30]*L.A. Times, April 18, 1985, at 3, 35.*
[31]*H.R. 3500, 99th Cong., 1st Sess., S. 1730, 99th Cong., 1st Sess.*
[32]*See Symposium Proceedings, A National Program for the Assessment and Development of the Mineral Resources of the United States Exclusive Economic Zone, U.S. Department of the Interior (1984), p. 1.*
[33]*Tennyson, Ulysses, lines 65-70.*

An Extended Territorial Sea: Red Herring, or New Spark for Federalism?

by G. Thomas Koester*

As a practicing attorney, primarily a litigator, I rarely have the opportunity to come to conferences of this type and step back from the issues and the facts that are being addressed in a particular case–i.e., to get a broader perspective of the context in which issues in litigation arise. I appreciate this opportunity to take that step back and look at the broader tapestry.

I must confess to some apprehension, however, in that I am not accustomed to addressing a group of such distinguished scholars who focus on policy matters as a matter of course. It is a far cry from appearing in court.

I feel, in fact, rather like the Texas A&M University Aggie "cheechako"[1] who went for a sail with an old sourdough and an Eskimo whaling captain. As they were traveling offshore in their umiak, or skin boat, the umiak sprang a leak. As a big storm was coming up, the sourdough and the whaling captain looked at each other, jumped out of the boat, and appeared to just skip across the water. The poor Aggie cheechako had no idea what was going on, but he felt, if it was good enough for the sourdough and the whaling captain, it was probably good enough for him, too. So he jumped out and immediately started floundering in the water–at which point the sourdough turned to the whaling captain and said, "Do you think we should tell him where the rocks are?"

In that light, if I appear to be missing the rocks, perhaps some of you that are more experienced at this can point them out to me. In fact, given that I was originally scheduled to speak for an hour and 45 minutes, I would urge that you interrupt with any comments or questions you may have and bring them forward at the time they arise.

My basic assignment was to come unprepared rather than have a prepared paper; listen to the several presentations and extract certain kernels, ideas and thoughts from them; weave them into a broader fabric; pull together some thoughts for the future; and, where possible, relate in an anecdotal fashion some of Alaska's experiences that illustrate points made by other speakers.

Upon accepting this assignment, I found that I had volunteered to go where no one else would. It may be symptomatic that Alaskans rush in where even Aggies fear to tread. To carry my analogy of the Aggie cheechako, the sourdough and the Eskimo whaling captain one step further, I may even have trouble finding the mainland once I get there.

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Before I begin, however, as Alaskans always do, I would like to brag a little bit (or bore you, depending on your point of view) with a few facts about Alaska that make clear that Alaska has at least as great an interest in the subject matter of this conference--i.e., what, if anything, the states may expect to gain if the territorial sea is extended from three to 12 miles--as any other state.

Alaska is the largest peninsula on the North American continent. From east to west it spans 2,400 miles; from north to south, 1,400 miles. When it is overlayed on the continental United States, Southeast Alaska touches Florida, the tip of the Aleutian Chain is on San Diego in Califor- nia, and Barrow, Alaska, is on the Canadian border. That may give you a sense, at least, of the geographic scope of our state. It is bounded by two oceans, the Pacific on the south and the Arctic on the north, and two seas, the Bering and Chukchi on the west. Its coastline comes close to equaling the coastline of the rest of the 48 contiguous United States. Its marine shoreline, because of the numerous islands, totals 33,904 miles. The continental shelf offshore Alaska totals 830,000 square miles and, according to the Department of Interior, constitutes 74 percent of the nation's continental shelf. Because of a lack of other means of transportation, approximately 75 percent of Alaska's population lives within 10 miles of the coastline.[2] In brief, coastal issues have a dramatic impact on Alaska, and Alaska is extremely interested in any developments that occur in the coastal zone.

In terms of looking at points that have been brought out at this conference, it is important to identify the purposes for which maritime delimitation exists. Two were identified earlier. The first was a governmental or regulatory interest; the second was a proprietary interest.

I think that there really are three, and in a perfectly rational world each is independent. There are the two mentioned; the third is maritime delimination for purposes of international relations--in effect, determining international rights of navigation.

In international relations, distinctions are made between three types of water areas: (1) inland waters, where a nation has plenary control over maritime transit; (2) the territorial sea, where there is a right of innocent passage for foreign vessels; and (3) the high seas, where there are relatively unfettered navigational rights for vessels of all nations, and all nations also have the freedom of overflight, the right to lay submarine cables and so on.

I would like to address the three in reverse order. The first aspect I would like to address relates to the United States' international relations. In this area, international relations, the states really have no particular interest that is independent from that of the nation as a whole. In that sense, I agree with Tom Clingan's comment that international developments, or developments in international law with respect to these international maritime regimes, are not inherently of interest to states and do not have any inherent effect on states' rights. They simply are not relevant either to the distribution of property between the states and the fed-

eral government or to the allocation of jurisdiction–the regulatory regime–between the states and the federal government.

The second purpose for maritime delimitation, though–the allocation of governmental or regulatory jurisdiction–is one where the states and the federal government are constantly at odds. However, I agree with the several speakers who pointed out that this is not a particularly difficult area, in comparison to property rights, for the states and the federal government to reach some type of accommodation. Many times, where Congress allocates jurisdiction to the states, there simply is a reluctance on the part of federal officials to part with their jurisdiction. On the other hand, if jurisdiction resides in the federal government, the states feel that they have been left out of the decision-making process.

In most instances, the states and the federal government can reach relative accommodation in terms of dealing with one another. Milnar Ball pointed to the federal outer continental shelf (OCS) leasing program as perhaps a model of federalism the way it is supposed to work–an imperfect model, to be sure, but an accurate depiction of the OCS leasing program.

The Alaska experience with federal OCS leasing has shown that it can generally be accommodated with Alaska's onshore interests, primarily environmental protection. Even though Alaska has 74 percent of the nation's outer continental shelf and there have been 12 OCS lease sales offshore Alaska, we have litigated over only one of those. That was the first sale in 1975 in the Gulf of Alaska.[3] That lawsuit may have been brought more from fear of the unknown than a reasoned determination that offshore oil and gas development, without question, would destroy the environment and litigation therefore was absolutely essential. The suit was unsuccessful, the sale was held, and no oil was discovered.

Since then, we have been able to work with the Department of the Interior to add stipulations to the federal OCS leases that have accommodated Alaska's coastal interests in seeking to protect the environment and preserve the lifestyle that we enjoy. One example of a stipulation that we were able to obtain through negotiation with the federal government, and the Department of the Interior in particular, was a seasonal drilling restriction on OCS leases in the Beaufort Sea. The oil companies who bid successfully on the leases were precluded, as a contract term in their leases, from drilling in the Beaufort Sea during the period that the bowhead whale migrated through the leased area. Since the bowhead whale is an endangered species, this satisfied the Endangered Species Act mandate that the Department of the Interior "ensure that any action ... is not likely to jeopardize the continued existence of any endangered species."[4] It also served, in large part, to protect the Inupiat culture that is so dependent on a subsistence lifestyle, and particularly dependent on the bowhead whale when it passes through the area.

If a measure of success of federalism is whether an indigenous population like the Inupiat can retain their cultural lifestyle, this is one area

in which the evidence to date is that the process leading to the OCS lease sales in the Beaufort Sea was successful. The Inupiats still engage in their whaling activity and are a very viable people, although necessarily a dynamic people in adjusting to inevitable change.[5]

Two court cases were mentioned that are particularly distressing to us. One is **Secretary of the Interior v. California**,[6] which held that there is no coastal zone management consistency requirement[7] for OCS lease sales, although there may be such a requirement for subsequent drilling plans. The second case is the **Thresher Shark** case,[8] mentioned by Tim Keeney, where Exxon refused to accept a seasonal drilling restriction for drilling offshore California during the period when California fishermen were harvesting thresher shark.

Those two cases are particularly distressing to Alaska because the federal government and private parties seeking to exploit the outer continental shelf now have less incentive for negotiating with the states; they reduce the leverage states have in those negotiations. The fact that we could argue, during negotiations, that the coastal zone management consistency provisions applied to federal OCS leasing gave us considerable leverage in terms of dealing with the Department of the Interior. The threat of litigation was enough to make Interior listen to our concerns and seriously consider–and ultimately adopt–stipulations that we found appropriate.

That may not be the case in the future, although hopefully we have developed the kind of atmosphere where meaningful negotiations still can go on. However, most negotiators realize that you need to have some type of leverage in order to have an adequate bargaining position, and those two cases clearly reduce the leverage that the states have.

Another example of negotiation leading to compromise and accommodation in regulatory matters is in the fisheries area. A significant example from the Alaska experience is the Pacific Salmon Treaty.[9] The basic issue leading up to the Pacific Salmon Treaty was the allocation of salmon between United States fishermen and Canadian fishermen. The actual situation, however, made it more complex than a simple allocation between two groups of fishermen. Salmon spawn in both Washington and Oregon; they also spawn in Canada and in Alaska. Once they come out of the freshwater streams into the ocean, they migrate for the most part to the north. Washington and Oregon salmon pass through Canadian waters, pass through Alaskan waters, go into the high seas, then return by coming back the same way, migrating back toward the south. They come through Alaska first, so the first interception of returning salmon is in Alaska; then they pass through Canada and more are intercepted there; finally, they cross the United States/Canada border into Washington and Oregon.

Once they are in Washington and Oregon, as many of you know, they are subject to a further allocation between Indian and non-Indian fishermen under a series of court decisions–known as the "Boldt decisions"[10]– construing a number of Indian treaties. Under those decisions, Northwest

Indian tribes are entitled to 50 percent of the salmon that return to Washington and Oregon waters.

The Indians also claimed, because of their treaty rights to fish and the depleted condition of the Washington and Oregon salmon runs, that the United States was under an affirmative obligation to limit the catch in Alaska to enable more salmon to return to the Washington and Oregon fisheries. The difficulty was that most salmon that are not caught in Alaska are caught in Canada, before they get back to Washington and Oregon. As a result, Alaska fishermen were looking at the elimination of an Alaskan fishery that would not result in any significant benefit to either the Indians or the non-Indian fishermen in Washington and Oregon.

The problem, then, was to allocate first between the United States and Canada. Once that allocation was made, a second allocation would have to be made between Alaska and Washington and Oregon. Once that second allocation was made, then a third allocation between the Indian and non-Indian fishermen in Washington and Oregon would be required. Finally, all of these parties–the Canadians, the Alaskans, the non-Indians and the Indians in Washington and Oregon–had to be satisfied with the mechanism chosen to make these allocations.

The solution was an International Pacific Salmon Commission, composed of representatives from both the United States and Canada, to make the initial allocation between those two countries. The federal legislation implementing the treaty provides that the United States shall be represented on the Commission by four commissioners, including one representative from Alaska, one representing both Washington and Oregon, one from the Indian tribes, and a non-voting representative of the federal government.[11]

The negotiating position taken by the United States' commissioners going into allocation talks with Canada must be unanimous.[12] As an incentive for the three voting commissioners to reach unanimity, a separate agreement embodied in a court order[13] provides that no one in Alaska, Washington or Oregon–Indian or non-Indian–may fish if unanimity is not reached.

This may seem a rather draconian solution, but it ensures that the three voting commissioners reach agreement and move forward to negotiate with the Canadians. I understand from Dave Colson that it seems to be working. In fact, he was quite gratified that the implementation, at least so far, has not required the State Department to take a primary role. The states and tribes in effect said: "These are west coast fisheries, we understand what is going on here, so let us deal with it." According to Dave, this is just fine with the federal government. This is another example of where a very thorny regulatory jurisdiction problem–one with significant international aspects–was dealt with through negotiation and accommodation.

Another example from the Alaska experience is the working relationship that has developed between the North Pacific Fisheries Manage-

ment Council[14] and the Alaska Board of Fisheries. For some time, those two agencies have been meeting in joint session with the goal of developing regulations in both the state's three-mile zone and the adjacent 197-mile fishery conservation zone. This makes for simpler management, more rational management, and more consistent enforcement. In this respect, Alaska's experience has been a much better experience than the one that Charlie McCoy described in Florida, where regulations are different between state waters and the fishery conservation zone and significant conflict has resulted.

I am compelled to make a brief side comment here. Mike Reed asserted yesterday that Alaska even has the "temerity" to enforce its regulations on non-resident fishermen in the fishery conservation zone. I would simply note that there has been no attempt by the federal government to preempt Alaska regulation in the fishery conservation zone, even though the FCMA permits it to do so where state regulation would adversely affect a fishery management plan developed under the FCMA.[15] Alaska does regulate, and will continue to regulate, where there is no federal prohibition because, as we all know, aquatic resources simply do not respect arbitrary three-mile lines. The effects of overfishing are felt on both sides of such artificial boundaries.

The third purpose for maritime delimitation is proprietary, the drawing of specific boundaries to determine who owns the resources of the oceans and the underlying submerged lands. Alaska's experience in this third area unquestionably is the least satisfying. In a nutshell, there is little if any compromise possible once you begin talking about property. This is true whether you have a very nationalistic government (as most Alaskans characterized Jimmy Carter's administration) or a states' rights/federalist approach that (conceptually, at least) the Reagan administration claims to represent. Once you begin talking about property, principles go out the window.

The best examples here are the Submerged Lands Act cases, and I would like to talk briefly about the case in which I am involved later. Before doing so, however, I would like to relate some more Alaskan history.

At statehood, 99 percent of the State of Alaska was owned by the federal government. Less than 1 percent of the land was in private ownership. "To alter the present distorted land ownership pattern in Alaska under which the Federal Government owns 99 percent of the total area,"[16] Congress gave Alaska the right to select more than 104 million acres of the approximately 350 million acres that comprise the State of Alaska.[17] This differed dramatically from earlier grants to western public land states, where the states were given sections 16 and 36 specifically in trust for certain purposes. In Alaska, Congress gave the state the right to select the 104 million acres that it desired to ensure that Alaska got economically valuable lands. Moreover, to ensure that Alaska used these lands to form a stable economy, Congress place no restrictions on Alaska's use of the lands granted.

Subsequently, though, before Alaska had received all of its 104 million-acre entitlement, the federal government withdrew approximately 170 million acres of Alaska in withdrawals and reservations[18] to satisfy native claims of aboriginal title and for federal conservation system units--parks, wildlife refuges, national monuments and so on. As a result of these actions by the federal executive branch, more than half the state was in federal withdrawals and reservations, leaving very little land available for Alaska to select as Congress had contemplated in the Alaska Statehood Act.

Alaska viewed this, and many would say properly, as a direct threat to Alaska's Statehood Entitlement. Alaska felt compelled to sue,[19] a lawsuit that finally was settled with passage of the Alaska National Interest Lands Conservation Act[20] (ANILCA) in 1980. ANILCA confirmed Alaska's right to 104 million acres, confirmed the natives' right to 44 million acres to satisfy their aboriginal title claims, and placed approximately 100 million acres in federal conservation system units–parks, wildlife refuges and national monuments.

Another example of where principle has given way to proprietary interest is in the navigability area. I believe Mike Reed mentioned that, under an 1845 case,[21] the United States holds the title to the submerged lands underlying naviagable waters in a territory in trust for any future state or states that are created out of that territory. The states succeed automatically to that title as an incident of statehood. In effect, it is a state's constitutional right.

The United States has consistently contested Alaska's right to ownership of these submerged lands underlying navigable waters on several grounds. First, the United States consistently has argued that, as a factual matter, the water body at issue is not navigable. They have taken a very, very narrow construction or definition of the term "navigability." Moreover, in any area that was withdrawn or reserved by the federal government, the United States consistently has taken the position that the withdrawal or reservation withheld the submerged lands underlying the navigable water body from state ownership. Even though Congress specifically found that many of these pre-statehood withdrawals and reservations were unnecessary,[22] the United States consistently argues that they defeated Alaska's constitutional right to be admitted to the Union on an equal footing with its sister states. The point is that both the "nationalistic" Carter administration and the "pro-states' rights" Reagan administration have made the same arguments. In other words, political principles lose force when property interests are at stake.

In this context, I appreciated Larry Schmidt's comment that the Department of Interior is still recovering from the "Watt era," when state and federal relations were at an all-time low. This is indicative that principles–specifically, Mr. Watt's principles, prior to becoming Secretary of the Interior, with respect to lands in the west–were essentially forgotten once he became the quasi-landowner as Secretary of the Interior. It is also

noteworthy that Rex Lee, credited by many as the author of the Sagebrush Rebellion, certainly was not in the forefront of efforts to secure public lands for the western states when he became Solicitor General in the Justice Department.

What we find, then, is that there are three theoretically unrelated purposes for delimiting maritime zones: (1) foreign relations, where the states do not have great concerns; (2) the allocation of regulatory or governmental jurisdiction, where there may be tension between the states and the federal government because of their competing interests–for example, environmental protection versus energy development–but solutions may be reached through accommodation and negotiation; and (3) proprietary or property disputes, where compromise is difficult if not impossible and most solutions are reached through either litigation or legislation, almost never a wholly satisfactory approach since ultimately one side feels it won and the other side feels it lost.

Nonetheless, these three regimes are theoretically separate, so theoretically the debate over the extension of the territorial sea from three to 12 miles is purely a foreign policy matter. That is, in terms of freedom of navigation and maritime transit rights, such an extension would implicate no state interests. Several people have made that comment during the Conference, and I agree with it.

The difficulty is that, as a practical matter, territorial sea delimitation has been linked to both regulatory jurisdiction and property division. Here, I must indulge Alaska's view of history.

As was noted earlier, the United States and the states historically agreed that the submerged lands within the territorial sea were subject to the equal footing doctrine of the **Pollard's Lessee** case[23] whereby states gain ownership, as an incident of statehood, of the submerged lands underlying navigable waters within their boundaries. However, in 1945, the United States changed its mind–you may recall Mr. Reed's comment that the United States changed its mind "as it is wont to do"–which, perhaps, should have alerted states to the difficulties they would encounter later.

Somewhat incredibly to most scholars who have studied it, and certainly Milner Ball and Tom Clingan intimated that they felt this way, the United States was successful in persuading the Supreme Court that its new view of ownership of submerged lands was the correct one, and that the pre-existing view that submerged lands underlying the territorial sea belonged to the states under **Pollard's Lessee** was not correct.[24]

The direct result was the passage in 1953 of the Submerged Lands Act,[25] which undid the 1947 Supreme Court decision. In fact, the Supreme Court in a later decision described the effect of the Submerged Lands Act as follows: "The very purpose of the Submerged Lands Act was to undo the effect of this court's 1947 decision in **United States v. California**."[26] It is difficult to think of a clearer example of Congress stepping in to correct what was almost universally viewed as an incorrect decision by the Supreme Court.

The Submerged Lands Act made two independent grants to the states.[27] One was a grant conditioned on a state's previous history, which consisted of all the submerged lands within the state's historic boundaries as those boundaries existed at the time the state was admitted to the Union or as subsequently confirmed by Congress. This historic grant formed the basis for Texas' and Florida's Gulf coast grants out to nine miles.[28]

Alaska's historic boundaries are expressly defined in terms of the territorial sea, so here we have a clear link between the territorial sea and the property grant to Alaska. Section 2 of the Alaska Statehood Act provides that Alaska "shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." So Alaska's historic boundaries are clearly linked to the territorial sea.*

The second grant in the Submerged Lands Act is an unconditional grant of the lands within three miles of the state's coastline. "Coastline" is defined in the Submerged Lands Act as "the line of ordinary low water along that portion of the coast that is in direct contact with the open sea, and the line marking the seaward limit of inland waters."[29]

Even before the Submerged Lands Act was passed, the United States had to delimit the line marking the seaward limit of inland waters. The federal government only owned the lands that were seaward of the line marking the seaward limit of those inland waters. So in 1950, the United States decided to delimit the seaward limit of inland waters in the State of Louisiana.

For those of you who are not familiar with Louisiana's coastline, there are a series of islands that separate Chandeleur and Breton Sounds from the open Gulf of Mexico. The Chandeleur Islands have entrances that are less than ten miles apart. What the United States did in 1950 to delimit the inland waters in the State of Louisiana was to draw straight lines between those islands. The waters that were landward, that is the waters of Chandeleur and Breton Sounds between the islands and the mainland, were characterized as inland waters. The United States submerged land ownership was determined to commence at that point and proceed seaward into the Gulf of Mexico.

This was a manifestation of what the Supreme Court recently characterized as the "ten-mile rule" for delimiting inland waters.[30] That is, if

*[**Question:** Your quotation makes it sound as though it would be the territorial sea at the time of statehood, rather than future extensions.
Answer: I think that is correct. This is what the legislative history of the Statehood Act shows. Of course, I will deny that if Alaska ever decides to litigate the question, but trying to be objective, I think the best reading of the legislative history of the Statehood Act is that Alaska is to consist of the Territory of Alaska and the appurtenant territorial sea, generally three miles in width, and subsequent extensions of the territorial sea would not necessarily belong to Alaska without an additional Congressional grant of additional property rights.]

islands are less than ten miles apart, you connect the islands with straight lines. Landward of those lines, the waters are inland waters belonging to the states; seaward of those lines, the waters are territorial seas and high seas and (at least prior to the Submerged Lands Act) were federally owned.[31]

This process of using islands to delimit inland waters from the territorial sea began, as far as Alaska has been able to determine, in 1863, when Secretary of State William H. Seward[32] recognized Spain's right to delimit its inland water jurisdiction along the keys of Cuba's southern coast. The waters between those islands and the mainland, Secretary Seward stated, were inland waters of Cuba subject to Spain's exclusive plenary control; however, the waters seaward of the islands were territorial sea as that concept of territorial sea was beginning to emerge.[33]

In those early days, the controversy was over the breadth of the territorial sea. It was a time when there were frequent belligerent conflicts in the waters of the Gulf of Mexico. Ships would seek sanctuary in the territorial sea of neutral nations or in their own nation's territorial sea, and it would constitute an act of war for a foreign flag vessel to enter such a territorial sea in a belligerent posture; in a nation's territorial sea, ships of other nations have only a right of "innocent passage." There was very little controversey whether the waters behind island fringes were inland and not even subject to rights of innocent passage; that seemed to be well-understood.

The next significant event was the 1903 Alaska Boundary Arbitration between the United States and Great Britain. In that proceeding, the United States articulated the principle that later was used to delimit Louisiana's coastline: the political coastline is the seaward shore of the islands in Southeast Alaska, and straight lines that connect those islands where the islands are less than ten miles apart.[34]

For several decades after the 1903 Alaska boundary arbitration, the United States adhered to the ten-mile rule with minor variations. In the **Alabama and Mississippi Boundary Case**,[35] the Court characterized this practice of delimiting inland waters in these words:

Prior to its ratification of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and offlying islands that were so closely grouped that no entrance exceeded ten miles. This ten-mile rule represented the publicly stated policy of the United States, at least since the time of the Alaska boundary arbitration in 1903.[36]

We understandably take great comfort from that passage and the Supreme Court's decision since many of Alaska's islands are less than ten miles apart and we are very interested in gaining jurisdiction, both for regulatory purposes and for property rights, in the water areas between Alaska's mainland and the offlying islands.

The Court focused on the United States' ratification of the Convention as representing a change in United States' policy with respect to maritime

delimitation. It should be noted that the Convention provides two methods for delimiting the seaward limit of inland waters, the point at which the territorial seas begin. One method is known as "straight baselines."[37] Straight baselines are lines that are drawn between islands to connect them. Waters landward of the lines are deemed inland waters; seaward of the lines, the water constitute territorial seas.[38]

Straight baselines under the Convention reflect a 1951 decision by the International Court of Justice in the **Anglo-Norwegian Fisheries Case**.[39] Norway had connected its offlying island with straight lines and claimed the waters landward of those islands constituted inland waters, subject to Norway's plenary jurisdiction. British fishermen wanted to fish in those areas, and Great Britain argued in the International Court of Justice that they should be considered territorial seas. On a ten to two vote, the court determined that the Norwegian approach was proper under international law. Article 4 in the 1958 Convention sanctions the straight baseline approach in an international treaty.

The other method of maritime delimitation is what may be called the method of arcs and circles. Under this method, the baseline for delimiting the territorial sea consists of the physical coastline.[40] In other words, the mainland generates its own maritime belt; each island also generates its own maritime belt. Sometimes the belts overlap, but if the islands are more than six miles from the mainland, a small pocket, or enclave, will result where there is no overlap. Under the current United States' position in its international relations, such a pocket or enclave constitutes high seas.[41]

This, in our view, is a marked departure from the earlier United States' position employing the ten-mile rule to delimit inland waters. So far as we have been able to ascertain, the first time this method--i.e., the method of arcs and circles--was discussed was in 1930 by the Department of State geographer S. Whitmore Boggs.[42] Upon applying the method of arcs and circles, Boggs discovered that generating maritime belts from both the mainland and from each island resulted in these small pockets or enclaves of putative high seas. Boggs characterized these areas as "objectionable pockets" of high seas.[43] To eliminate these "objectionable pockets," Boggs recommended that they simply be "assimilated" to the territorial sea.[44] Boggs later stated that the United States adopted his assimilation and simplification proposal and employed it in its international relations (with minor variations, including the ten-mile rule) at least between 1930 and 1951.[45]

What is most interesting for present purposes is that the 1958 Convention did not expressly adopt either of the approaches previously taken by the United States (i.e., the ten-mile rule, under which islands less than ten miles apart are connected by straight lines with water areas landward of those lines deemed inland waters, or the "assimilation and simplification method" in which pockets or enclaves of high seas were "assimilated" to the territorial sea). Instead, under Articles 3 and 10, a nation

may strictly apply the method of arcs and circles[46] or, as an alternative, employ straight baselines under Article 4 to connect islands (at least in the case of Norway) as much as 40 miles or more apart.[47]

Following the United States' ratification of the Convention in 1961, the first Submerged Lands Act case to go before the Supreme Court was a dispute between the United States and California.[48] The United States argued that the principles of the 1958 Convention were irrelevant to construction of the 1953 Submerged Lands Act. In making this argument, the United States had two goals: (1) to prevent California from taking advantage of straight baselines under Article 4 of the Convention; and (2) to prevent California from taking advantage of the provisions of Article 7 of the Convention, which authorize bay-closing lines up to 24 miles in length.[49]

California argued, in part, that its coastline under the Submerged Lands Act should be determined on the basis of straight baselines under Article 4 of the Convention. It is difficult to image a worse fact situation for trying to persuade the Supreme Court that a state should be permitted to use Article 4 straight baselines to delimit its coastline. The line California sought to draw, in its attempt to enclose the Santa Barbara Channel as inland waters, included segments of 21, 35.8, 43 and 56.8 miles.[50]

The Supreme Court held that the definitions contained in the Convention would be adopted for purposes of the Submerged Lands Act.[51] The Court went on to note that the Convention authorized two methods for determining the coastline, straight baselines and the method of arcs and circles. Because the United States did not use straight baselines in its international relations, the Court held that California could not use straight baselines to delimit its Submerged Lands Act grant.[52]

So here we have, for the first time, the Court, in effect, adopting the United States' foreign policy position with respect to the territorial sea, and applying it directly to the property grant under the Submerged Lands Act to which it has no inherent connection. Following this case, however, there is a legal connection.

This legal development must have put the United States in a bit of a quandary. Unquestionably, the United States was aware of its earlier ten-mile rule. However, now the Court had held that states could not use straight baselines unless the United States used straight baselines in its international relations. Did the ten-mile rule constitute the use of straight baselines?

The United States very cleverly finessed this question–i.e., whether its earlier adherence to the ten-mile rule constituted the use of straight baselines–in the first post-California Submerged Lands Act case, that dealing with the coastline of Lousiana.[53] Here, the United States acknowledged to the Court that it had used the ten-mile rule and that it had agreed with Louisiana that the waters of Chandeleur and Breton Sounds, separated from the open Gulf of Mexico by islands less than ten miles apart, constituted inland waters for Submerged Lands Act purposes.

However, it argued that the earlier agreement with Louisiana in that regard was improper following the **California** decision because those lands properly constituted territorial seas and high seas (not inland waters), and that the United States would be justified in claiming those high seas areas as its own. Finally, the United States submitted that it magnanimously would not make that claim, even though there would be "much justification" for doing so, because it would not be in the public interest.[54] One really must admire the deft way in which the United States evaded judicial review of its change in policy.

The United States subsequently tried to convince the Court that Louisiana's neighbor states, Alabama and Mississippi, would have to use the method of arcs and circles for Submerged Lands Act purposes in the vicinity of Mississippi Sound, another area with fringing islands more than six miles from the mainland where enclaves or pockets of high seas would exist under that method. However, the United States was unsuccessful in its effort to persuade the Court to apply a different rule to similar facts.[55] The Court recognized that, from the time of the Alaska Boundary Arbitration in 1903 through at least 1961, the United States had used the ten-mile rule where there were fringing islands offshore and the United States' post-1961 change in position, following ratification of the Convention, could not serve as a basis for divesting Alabama and Mississippi of their rights to the submerged lands underlying Mississippi Sound.[56]

A question posed to both Tom Clingan and Milner Ball was whether they thought the states would prevail if there were no Submerged Lands Act and the 1947 **United States v. California** case[57] were re-litigated today–i.e., would the states prevail under the equal footing doctrine or would the United States prevail under its new position? My recollection is that they thought the result would be the same as the 1947 **California** decison in which the Court held that the United States had "paramount rights" to the marginal area.

I disagree. I think the Court would hold that the states own the submerged lands underlying the territorial sea as historically claimed by the United States. I base my conclusion, first, on the **Alabama and Mississippi Boundary Case** where the Supreme Court did not give effect to a change in the United States' position. In that case, the Court refused to permit the United States to use its abandonment of the ten-mile rule to divest Alabama and Mississippi of the submerged lands underlying Mississippi Sound. The Court held that the United States had employed the ten-mile rule, that Alabama's and Mississippi's rights had vested under that rule, and that the United States' subsequent change in position could not divest the states of their rights.

I also think the reasoning the Court employed to resolve a case in which Alaska was involved, a case I argued to the Court in 1981,[58] would lead to the states prevailing. The Mineral Leasing Act of 1920 contains a revenue-sharing provision under which Alaska receives 90 percent of all federal oil and gas lease revenues from public lands in Alaska.[59] In 1964, Congress

amended a different statute, the Wildlife Refuge Revenue Sharing Act,[60] which provides that 25 percent of all revenues from wildlife refuges go to the local county in which the refuge is located and 75 percent of the revenues go to the federal government. The 1964 amendment added "minerals" to the list of revenue sources subject to this distribution formula.

In 1975, the Solicitor of the Department of the Interior concluded that the 1964 addition of the word "minerals" to the list of revenue sources subject to the 25-75 split between counties and the federal government effectively stripped Alaska of its 90 percent entitlement under the Mineral Leasing Act. In the litigation that ensued, we pointed out that the Department of the Interior had, in the 11 years since the 1964 amendment, not changed its pre-1964 administrative practice of sharing with Alaska 90 percent of all federal mineral revenues from wildlife refuges in Alaska. The Supreme Court agreed with us that the 1975 change in interpretation was not sufficient to change our entitlement to 90 percent of the revenues. The Court noted:

"Finally, the Department of the Interior interpreted the amendments when passed, and for ten years thereafter, as not altering the distribution formula. The Department's contemporaneous construction carries persuasive weight.... The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference. In these cases, we find it wholly unpersuasive."[61]

Similarly, I think today's Court would find "unpersuasive" the United States' change in position from its earlier view that the states owned the submerged lands off their shores, and would go along with the expectations of both the states and the United States if the question arose today.

Nonetheless, in today's world, the 1965 **California** decision makes the United States' territorial sea delimitations in its international relations relevant to the delimitations of state-owned submerged lands under the Submerged Lands Act–i.e., it makes the United States' maritime delimitations in international relations relevant to maritime delimitations for proprietary purposes. In addition, there are at least 17 federal statutes that allocate regulatory or governmental jurisdiction on the same basis that boundaries are drawn for Submerged Lands Act proprietary rights.[62] As a result, all three of the purposes for which maritime delimitation may be necessary–i.e., international relations, proprietary allocation of resources (property rights) and governmental or regulatory jurisdiction–are linked and intertwined.

It is interesting that Dave Colson yesterday said that the states should do what they want in terms of trying to get more jurisdiction, both proprietary and regulatory, but they should not address delimitation of the territorial sea for international relations. It is a little late to be turning back the clock. As a result of the Supreme Court's 1965 **California** decision, maritime delimitations for all three purposes are inextricably intertwined. Any debate over extension of the territorial sea for purposes of international relations is going to involve the other issues–proprietary

rights and governmental or regulatory jurisdiction–because of this intertwining. In fact, that really is why we are here discussing this issue.*

Mike Reed mentioned the Baselines Committee. Few people who have not been involved in maritime delimitation under the Submerged Lands Act are aware of this committee. It is an interdepartmental federal agency composed of representatives from the Departments of Commerce, Interior, Justice and State. Its mission is to delimit the United States territorial sea (and the 12-mile contiguous zone) on large-scale nautical charts so that mariners can know, by positioning themselves on the chart, whether they are within or without the territorial sea (or contiguous zone).

The Baseline Committee's determinations are one of the few federal activities that are not subject to extensive public scrutiny, and there is little public input, or at least little formalized public input. While the Baselines Committee will entertain presentations by states and interested parties, there certainly is not the kind of process that Milner Ball has pointed to as representing true federalism in action with large-scale public involvement, much opportunity for comment, and eventually to policy being made in an open forum with everyone having an equal voice and opportunity, at least at the front end, to get their views known.

One of the directions that the Baselines Committee received when it was formed in 1970 was that it was to use the method of arcs and circles. It was specifically directed not to use straight baselines under Article 4 of the Convention and, at least by inference, not to use the ten-mile rule. As a result, all large-scale United States nautical charts show pockets and enclaves of high seas behind fringing islands if the islands are more than six miles from the mainland.

You will recall that these enclaves and pockets were described by former State Department geographer Boggs as "objectionable."[64] However, the Baselines Committee takes the position that, under its bureaucratic charge, it cannot deviate from strict application of the method of arcs and circles.

In the Submerged Lands Act cases, the United States consistently has

*[**Question**: How much of that intertwining is on the baseline of the territorial sea and how much is on the territorial sea, per se?
Answer: Well, both are implicated. If the baseline is the same as the baseline for delimiting the Submerged Lands Act grant, then the three-mile territorial sea and the three-mile Submerged Lands Act are identical. We have taken the position that the baseline for drawing Alaska's Submerged Lands Act grant does not necessarily have to be the same as the baseline the United States uses to delimit its territorial sea. As far as we are concerned, if the United States wants to use the method of arcs and circles, and use the shore of the mainland and the shore of each island as part of the baseline for delimiting its territorial sea, it is perfectly free to do so. However, Alaska's Submerged Lands Act grant should be delimited on the basis of the ten-mile rule, which was the method used by the United States at the time Alaska was admitted to the Union.[63]]

argued since the Baselines Committee was formed that, because the Baselines Committee charts represent the official position of the United States under the Convention, the Court should simply adopt the lines shown on the charts as the maritime boundaries of the Submerged Lands Act grants to the states under the 1965 California decision.

I should note that a major problem that states have had in these cases is determining the "official" position of the United States. Since the Baselines Committee charts have been published, it is relatively easy because you can look at the charts and the position is cartographically depicted there. At the same time, you cannot be sure that the charts represent the "official" position of the United States until the United States says that they do in a particular case because, at least initially, the charts specifically provided that they were only "provisional" and did not necessarily represent the "official" position of the United States.[65]

Nonetheless, notwithstanding the disclaimers on the early provisional charts, we discovered a letter from Deputy Attorney General Richard Kleindienst to all United States Attorneys and Assistant Attorneys General to the effect that the Baselines Committee charts were to be taken as the official position of the United States in any case involving a question of United States jurisdiction.[66]

Earlier, the United States had drawn charts of Alaska for fisheries purposes that used straight lines to connect the islands. Those charts also carried a disclaimer that they did not represent the "official" position of the United States. However, immediately upon publication, federal officials charged with fisheries enforcement began using them for that purpose.[67]

The difficulty is that this inconsistency on the part of the United States puts the several states and other parties in a position similar to that in which Alice found herself, in conversation with Humpty Dumpty, in Lewis Carroll's **Through the Looking Glass**: "'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean--neither more nor less.'"[68]

It certainly puts states at a significant disadvantage, since the states have the burden in Submerged Lands Act cases of presenting historic evidence that makes "clear beyond doubt"[69] that the "official" United States' position really was different than what the United States asserts it was in the litigation. In this respect, we filed an interrogatory with the United States, asking specifically how one might prove the "official" United States' position in court. The response to that interrogatory was rather revealing. In effect, the United States replied that its "official" position can be determined from the pleadings already on file in the particular case. It all sounds suspiciously like Humpty Dumpty to us.

Dave Colson noted that if the United States had signed the Law of the Sea Treaty, the focus in this country right now would be on how the states could leverage Senate ratification of that treaty into additional submerged lands rights. I think that is an accurate observation and undoubt-

edly is what would have happened. However, the United States did not sign the Treaty, and that is not what is happening now. Instead, the United States again finessed the issue by saying, in effect, that it would go along with the 12-mile territorial sea as long as the United States gets transit passage rights; in that way, Senate ratification will not be necessary.

At the same time, the states must be circumspect in terms of the strategies they use in seeking to expand both their governmental or regulatory jurisdiction and their proprietary rights. One of Dave Colson's observations was that most of these questions boil down to basic greed. In that context, the states are always accused of being greedy. From the federal perspective, the states are always seeking a piece of their pie.

In the early years of the Submerged Lands Act controversy, it might have been accurate to characterize the states as being rather greedy. All of the Gulf of Mexico states wanted three-league (nine-mile) grants. California wanted to use straight baselines to enclose the Santa Barbara Channel as inland waters. Louisiana sought to use the Coast Guard inland water line--which in some places was 27 miles offshore--to serve as the coastline. The states of the eastern seaboard wanted their Submerged Lands Act grants determined on the basis of their historic boundaries, in some cases as far as 60 miles offshore.

Recently, however, I think the states cannot be accused of being greedy (although the accusation is still being made). Alabama and Mississippi only sought a three-mile grant, measured from lines constructed under the same ten-mile rule used to delimit Louisiana's grant. Alaska seeks the same result.

In the meantime, you must remember, the United States in 1945 broke precedent with the rest of the world and, in the Truman Proclamation,[70] claimed all of the resources of the outer continental shelf. Congress ratified the Truman Proclamation in 1953 in the Outer Continental Shelf Lands Act.[71] The 1976 Magnuson Fishery Conservation Management Act[72] established a 200-mile fishery management zone, an approach to fisheries management that (when attempted by other nations) the United States had protested only a short time before. In 1983, the United States adopted the 200-mile Exclusive Economic Zone, embodied in the 1982 Law of the Sea Treaty, without adopting the remaining provisions of that Treaty.[73] At the same time, the United States is arguing vigorously against the states that the ten-mile rule did not exist and should not be used to delimit state jurisdiction under the Submerged Lands Act and other domestic laws.

The result is that the United States is reaching out, as against foreign countries, to maximize its jurisdiction over ocean resources. At the same time, it is attempting to push state resource jurisdiction even farther landward. Under these circumstances, it would appear that the United States is the one being greedy; it is difficult to accept an accusation that the states are being greedy.

So, finally, I come to the topic I was asked to address: Is the possibility of an extended territorial sea a red herring, or is it a new spark for federalism? In my view, it really is a question of what the states make of this possible opportunity. The states perhaps can draw a lesson from the 8(g) experience. As you will recall from Mary Ellen Leeper's presentation, 8(g) is the section of the Outer Continental Lands Act Amendments of 1978[74] providing that the states are to get a "fair and equitable" share of federal oil and gas leasing revenues from the three-mile belt of federally owned submerged lands immediately adjacent to state-owned submerged lands. That phrase--"fair and equitable" share--sounds to me rather like "all deliberate speed," the unfortunate phrase used by the Supreme Court in terms of setting out the time frame within which states had to dismantle their segregated school systems.[75]

Louisiana and Texas were successful in suing the United States to obtain their "fair and equitable" share from federal oil and gas leasing offshore their boundaries.[76] The federal district courts in which those cases were brought held that Louisiana and Texas were entitled to substantial monetary revenues from the 8(g) zone, and set the matters for trial to determine the amount of entitlement.

Normally, you cannot get a Congressional resolution of a matter that is in litigation. In **Watt v. Alaska**,[77] an effort was made to get a Congressional determination of what Alaska's share of federal mineral revenues should be. That effort was unsuccessful, Congress, in effect, refusing to deal with it while it was in litigation.

However, with respect to 8(g), a second thing was going on that resulted in both houses of Congress passing budget reconciliation measures including a legislative fix of the "fair and equitable" question. That second matter was the fact that both Congress and the President were interested in reducing the deficit and were looking for available pots of money to credit as new income. The escrow accounts, set up in anticipation of 8(g) litigation, contained more than $6 billion. If legislation could be enacted under which the states would receive 27 percent of those escrowed funds, the federal government would retain 73 percent, or more than $4 billion of new money that could be credited as income. That, in turn, would result in the federal deficit being more than $4 billion lower.

That was really the motivating factor for the inclusion of an 8(g) resolution in the budget reconciliation measures. The fact that it was also resolving litigation with Louisiana and Texas (as well as disputes with Alaska, California and other states) was so much the better. Clearly, however, the primary motivation from the federal side was that Congressional resolution of the 8(g) problem would result in $4 billion of new money that could be offset against the deficit.

The point that emerges is that the states must be ready to seize on these opportunities when they present themselves. The debate, should it become a debate, on extending the territorial sea from three to 12 miles may be just such an opportunity for states to seize on if they desire additional

jurisdiction, whether it be regulatory or proprietary.

Perhaps the idea of involving inland states also should be considered by the coastal states in seeking support for such a measure. Arguments that could be made would include pointing out that inland states get 50 percent of the revenues from public lands[78] while coastal states feel the primary physical, economic and social impacts of federal offshore leasing, and that the United States currently is maximizing its jurisdiction in the international arena while continuously seeking to restrict state jurisdiction in the oceans.

The fact that states are more efficient, in terms of using limited available funds to implement programs when compared to federal agencies, also could be used in an effort to persuade Congress to transfer more jurisdiction to the states. Marc Hershman was telling me just this morning that the Gorda Ridge, although more than 100 miles offshore Washington and Oregon, is being managed primarily by state officials because the federal government does not have the resources or the expertise to do an effective job. The states are developing the expertise in terms of developing a management regime for the Gorda Ridge. These are all opportunities that are presenting themselves, and the possible extension of the territorial sea may also be such an opportunity.

One of the things that the states must watch out for, however, is the pervasive attitude on the part of federal officials that the states do not really count. One of my good friends is Louis Claiborne, who just retired from the Solicitor General's Office in the Justice Department. His primary job was to advocate the United States' position before the Supreme Court. There is no question that he is one of the premier advocates of our day and, as I understand it, is second only to Daniel Webster in the number of appearances he has made before the Supreme Court.

At the 1984 Law of the Sea Institute, this is the way Mr. Claiborne concluded his paper, which preceded a paper by my friend John Briscoe:

"The truth must be spoken out loud. Currently, at least, the United States, informed only by the light of reason, is always right. The state is always wrong, invariably guilty of outrageously overreaching in the hope of persuading the court that it should receive some portion of its claim. Perhaps the court cannot be expected to put the matter quite so bluntly, but I anticipate more polite language conveying a comparable message. If only the states believed my prediction, they would surrender now, and the accuracy of my preview need never be tested. This, then, is the wholly objective federal perspective. By all means, enjoy Mr. Briscoe's comments, as I always do, but do not take him seriously. His submission, I assure you, is all froth, like whipped syllabub, attractive to the palate but entirely without sustenance. Stick with the simple but hardy federal diet, and all will be well."[79]

Now, I admire Louis' style and I appreciate the "tongue-in-cheek" nature in which comments can be made by federal officials such as Louis, Mike Reed and Dave Colson with respect to state-federal relations at con-

ferences such as this.[80] However, I think one of the problems is that similar sentiments are stated in all seriousness in the places that really count—the halls of Congress and the corridors of the federal bureaucracy in Washington, D.C. The states must be aware of that problem, recognize it and acknowledge it for what it is.

My answer to the question posed in the title to my talk is this: If the states can gain more control of their own destiny, they would do so. Whether it is through additional regulatory jurisdiction so that Alaska can play a greater role in preserving the Inupiat culture on the North Slope or a larger share of outer continental shelf revenues to mitigate socio-economic dislocations on the Gulf of Mexico coast as discussed by Professor Wermund and Mary Ellen Leeper, the states should seize such opportunities when they are presented. A public debate on an extended territorial sea may present just such an opportunity.

I do not know how close I have come to fulfilling my assignment. However, I am feeling almost as fatigued as the Aggie cheechako floundering in the Beaufort Sea. Accordingly, with that I will close. Thank you for your kind attention.

[1]*Webster's Third New International Dictionary defines "cheechako" as a tenderfoot in Alaska or the Pacific Northwest, and claims that it derives from Chinook Indian jargon meaning newcomer. Alaska lore, however, holds that the term originated when an Athabaskan Indian in Alaska characterized all newcomers as coming from Chicago, the home town of the first white man he met. It now refers generally to anyone who has been in Alaska for less than one year.*

[2]*United States Department of Commerce and State of Alaska Coastal Management Program and Final Environmental Impact Statement, pp. 241, 255 (May 30, 1979); for a more detailed general description of Alaska, see id., pp. 241-257.*

[3]*See State of Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), vacated 439 U.S. 922 (1978). Since the conference, the State of Alaska has sued a second time, seeking to enjoin federal OCS Sale 92. Sheffield v. Hodel, J85-037 Civ. (D. Alaska), preliminary injuction granted, Tribal Village of Akutan v. Hodel, Case No. A85-701 Civ. (Consolidated), appeal docketed (9th Cir., Jan. 16, 1986).*

[4]*16 U.S.C. § 1536(a) (2).*

[5]*One such change has been the international movement to ban all whaling under the International Convention for the Regulation of Whaling, signed in Washington, D.C., December 2, 1946. Under federal law, it is a crime to engage in whaling in violation of the Convention. See 16 U.S.C. § 916c. While the International Whaling Commission established under the Convention has consistently authorized the Inupiats to take some bowhead whales, the number of whales permitted has decreased annually and there is increasing pressure to eliminate the Inupiat allocation altogether.*

[6]*464 U.S. 312 (1984).*

[7]*Under the Coastal Zone Management Act, all federal actions in the coastal zone must be consistent with approved state coastal zone management plans. 16 U.S.C. § 1456(c).*

[8]*Exxon Corp. v. Fischer, Civ. No. 84-2362 (N.D. Calif.) (unreported decision, filed October 11, 1985).*

[9]*Treaty between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, signed in Ottawa, Canada, January 28, 1985.*

[10]*United States v. Washington, 384 F. Supp. 312 (D.C. Washington 1974), affirmed 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976); accord Washington v. Passenger Fishing Vessel Association, 443 U.S. 658 (1979).*

[11]*16 U.S.C. § 3632(a).*

[12]*16 U.S.C. § 3632(g) (1).*

[13]*Confederated Tribes and Bands of the Yakima Indian Nation v. Baldridge, Civil No. 80-342 (W.D. Wash.).*

[14]*The Magnuson Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801 et seq., is a comprehensive federal statute addressing fisheries management in the fishery conservation zone, generally from three miles offshore to 200 miles offshore. The North Pacific Fisheries Management Council is the regional federally chartered agency responsible for management in the fisheries conservation zone offshore Alaska. See 16 U.S.C. § 1851(a) (7).*

[15]*See 16 U.S.C. § 1856(b).*

[16]*H.R. Rep. No. 624, 85th Cong. 1st Sess. (1957), p. 6.*

[17]*Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, § 6(a) and (b).*

[18]*Public Land Orders 5653 of November 16, 1978, and 5654 of November 17, 1978, Public Land Orders numbered 5696 through 5711 inclusive of February 12, 1980, Fed. Reg. Doc. No. 34051, of December 5, 1978, and No. 79-17803 of June 8, 1979, and Proclamations No. 4611 through 4627, inclusive, of December 1, 1978.*

[19]*Alaska v. Carter, No. A78-291 Civ. (D. Alaska).*

[20]*P.L. 96-487, 94 Stat. 2371.*

[21]*Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).*

[22]***The Problem of Federal Reservations:** As previously noted, tremendous acreages of land in Alaska have been tied up in the status of Federal reservations and withdrawals for various purposes. The committee feels strongly that this practice has been carried to extreme lengths in Alaska, to a point which has hampered the development of such resources for the benefit of mankind. As a result, a long list of potential basic industries in the Territory, including the forest industries, hydroelectric power, oil and gas, coal, various other minerals, and the tourist industry, can exist in Alaska only as tenants of the Federal Government, and on the sufferance of the various Federal agencies. The committee considers that to be an unhealthy situation.*

With respect to the many other existing reservations, the committee did not find it possible in the brief space of time available to it, to make a detailed survey of the need for each one. The committee is strongly of the opinion that a considerable number of the other withdrawals are either excess in size or totally unnecessary. It is the opinion of the committee that the administrative agencies of the Government, working in cooperation with the Territorial officials of Alaska, should conduct a vigorous program of restudying the needs of the various Federal agencies for land in Alaska.

*H.R. Rep. No. 624, **supra** n. 16, pp. 7-8.*

[23]*See n. 21, **supra**.*

[24]*United States v. California, 332 U.S. 19 (1947).*

[25] *43 U.S.C. §§ 1301 et seq.*

[26]*United States v. California, 436 U.S. 32, 37 (1978) (citation omitted).*

[27]*See United States v. Louisiana, 389 U.S. 155, 156 (1967).*

[28]*United States v. Louisiana*, 363 U.S. 1 (1960) (Texas boundary three leagues from coastline); *United States v. Florida*, 363 U.S. 121 (1960) (Florida's Gulf coast boundary three leagues from coast). Only Texas and Florida prevailed on their claims that their seaward boundaries should be delimited on a historic basis of three leagues. *See United States v. Louisiana*, 363 U.S. 11 (1960).

[29]43 U.S.C § 1301(c).

[30]*United States v. Louisiana* ("Alabama and Mississippi boundary case"), 470 U.S., 84 L.Ed.2d 73, 84 (1985).

[31]*See Figure 1.*

[32]*There appears to be some poetic justic here. This is the same William H. Seward who became famous for "Seward's Folly," the 1867 purchase of Alaska from Russia for $7,000,000. Alaska takes considerable delight in relying on another of Secretary Seward's wise decisions.*

[33]*Letter from Secretary of State William H. Seward to Spanish Minister M. Tassarra, dated August 10, 1863, introduced in United States v. Alaska, No. 84 Original, as Alaska Exhibit AK 85-029.*

[34]*See Proceedings of the Alaskan Boundary Tribunal, Vol. VII, pp. 608-611 (argument by United States Agent Hannis Taylor).*

[35]*See n. 30, supra.*

[36]*470 U.S. at ___, 84 L.Ed.2d at 83 84 (footnotes omitted).*

[37]*See Article 4 of the Convention.*

[38]*See Figure 2.*

[39]*United Kingdom v. Norway, 1951 I.C.J. 116.*

[40]*Article 3 of the Convention provides in part that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast." Article 10.2 provides that "[t]he territorial sea of an island is measured in accordance with the provisions of these articles."*

[41]*See Figure 3.*

[42]*See* Boggs, **Delimitation of the Territorial Sea**, *24 Am. J. Int'l. Law.* 541 (1930).

[43]*Id. at 547 and 552. He also termed them "anomalous," id. at 552 and 553, and "undesirable." Id. at 553.*

[44]*Id. at 552. See Figure 4.*

[45]Boggs, **Delimitation of Seaward Areas Under National Jurisdiction**, *45 Am. J. Int'l. L. 240, 247 n. 19 (1951).*

[46]*As noted by Boggs, this produces "objectionable pockets" of putative high seas under certain geographic circumstances.*

[47]*Water areas landward of these lines are considered inland waters. Because of the plenary control a nation has over inland water, several nations have adopted systems of straight baselines with segments far exceeding 40 miles in length.*

[48]*United States v. California, 381 U.S. 139 (1965).*

[49]*Prior to the United States' ratification of the Convention on March 24, 1961, the United States considered the waters of bays internal waters only if the distance between its entrance points did not exceed ten geographical miles. See United States v. State of Alaska, 236 F. Supp. 388 (D. Alaska 1964) (quieting title to area of Yakutat Bay seaward of most seaward ten-mile line in United States), rev'd on authority of United States v. California, n. 47 supra, in State of Alaska v. United States, 383 F.2d 210 (9th Cir. 1965)). See text infra.*

[50]*381 U.S. at 143 n. 4.*

[51] 382 U.S. at 165.

[52] 381 U.S. at 168.

[53] Louisiana Boundary Case, 394 U.S. 11 (1969).

[54] Motion by the United States for Entry of a Supplemental Decree, and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of Louisiana, filed January 3, 1968, pp. 79-80.

[55] Alabama and Mississippi Boundary Case, n. 30, supra.

[56] Id., 84 L.Ed.2d at 83-84.

[57] See n. 24, supra.

[58] Watt v. Alaska, 451 U.S. 250 (1981).

[59] 30 U.S.C. § 191.

[60] 49 Stat. 383, as amended, 16 U.S.C. § 715s(c).

[61] 451 U.S. at 272-273 (citations omitted).

[62] The 17 statutes are:

(1) The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 et seq.;
(2) The North Pacific Fisheries Act, 16 U.S.C. §§ 1022-1035;
(3) The Sponge Act, 16 U.S.C. §§ 781-785;
(4) The Vessel Documentation Act, 46 U.S.C. §§ 65-65w;
(5) The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 et seq.;
(6) The Marine Protection, Research and Sanctuaries of 1972, 16 U.S.C. §§ 1431 et seq.;
(7) The Oil Pollution Act, 33 U.S.C. §§ 1001 et seq.;
(8) The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq.;
(9) The Submerged Lands Act, 43 U.S.C. §§ 1301 et seq.;
(10) The Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §§ 1801 et seq.;
(11) The Coasting and Fishing Act, 43 U.S.C. §§ 251 et seq.;
(12) The Independent Safety Board Act of 1974, 49 U.S.C. §§ 1901 et seq.;
(13) The Endangered Species Act, 16 U.S.C. §§ 1531-1543;
(14) Atlantic Tuna Convention Act, 16 U.S.C. §§ 971 et seq.;
(15) The Fishermen's Protection Act, 22 U.S.C. §§ 1971-1980;
(16) The Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-966; and
(17) The Communication Act of 1934, 47 U.S.C. §§ 301 et seq.

[63] Pursuant to stipulation, the Louisiana coastline for purposes of the Submerged Lands Act is delimited on the basis of the ten-mile rule. Following the Alabama and Mississippi Boundary Case, see n. 30 supra, that method also is used for delimiting Alabama's and Mississippi's Submerged Lands Act grant. Nautical charts of that area, however, show that the United States delimits its territorial sea through the method of arcs and circles which (apparently) causes no problems. We would be satisfied with the same result.

[64] See n. 43 supra.

[65] Even the most current charts do not explicitly state that the lines depicting the territorial sea and contiguous zone represent the "official" position of the United States:

Note X

Territorial Sea and Contiguous Zone

The lines delimiting the territorial sea and contiguous zone represent inter-departmental committee's interpretation of legal principles as applied to geo-

graphical information. The lines are subject to revision when required by correction of the geographical information shown or by reinterpretation of the legal principles involved. Where differences occur between adjacent or overlapping charts, the lines shown on the most recent chart issue take precedence.

[66]*Memorandum of Richard D. Kleindienst, Deputy Attorney General, to all United States Attorneys, etc., dated May 18, 1971, introduced in United States v. Alaska, No. 84 Original as Alaska Exhibit AK 85-254.*

[67]*See, e.g., December 19, 1963, memorandum from Ronald Naab, Fisheries Management Supervisor, BCF, Juneau, to Regional Solicitor, Anchorage: "As you might expect, the charts supposedly have no 'official standing' but they obviously will be the bases for determining the limits of legal authorities by the Coast Guard and concomitantly by the joint [Bureau of Commercial Fisheries--Coast Guard] fisheries patrol units;" February 4, 1964, memorandum from Harry L. Rietz, Regional Director, BCF, Juneau, to the Director, BCF, Washington, D.C.: "We have been advised that the Department of State claimed the charts provided the 17th Coast Guard District has no 'official standing.' This disclamation seemed somewhat irrelevant for it is obvious and, we believe, was made known to the State Department that the charts will be used for enforcement purposes and therefore may serve as the basis for action by United States patrol vessels against foreign nationals." Introduced in United States v. Alaska, No. 84 Original, as part of Alaska Exhibit AK 85-46.*

[68]*Carroll, **Alice's Adventures in Wonderland and Through the Looking Glass**, (1871) p. 169.*

[69]*United States v. California, n. 48 **supra**, at 175.*

[70]*Proclamation on the Continental Shelf, 10 Fed. Reg. 12303 (1945).*

[71]*43 U.S.C. §§ 1331 et seq.*

[72]*16 U.S.C. 1801 et seq.*

[73]*Proclamation 5030, Oceans Policy Statement, March 10, 1983 (in Weekly Compilation of Presidential Documents).*

[74]*43 U.S.C. § 1337(g).*

[75]*Brown v. Board of Education, 349 U.S. 294, 301 (1955).*

[76]*Texas v. Secretary of Interior, 580 F. Supp. 1197 (E.D. Texas 1984); the **Louisiana** decision is unreported.*

[77]*See n. 58 **supra**.*

[78]*See 30 U.S.C. § 191.*

[79]*Claiborne, "Federal-State Offshore Boundary Disputes: The Federal Perspective," presented to Eighteenth Annual Conference on the Law of the Sea (in press), manuscript p. 47 (1984).*

[80]*At the same time, I have always wondered how they speak so well with their tongues so firmly planted in their cheeks.*

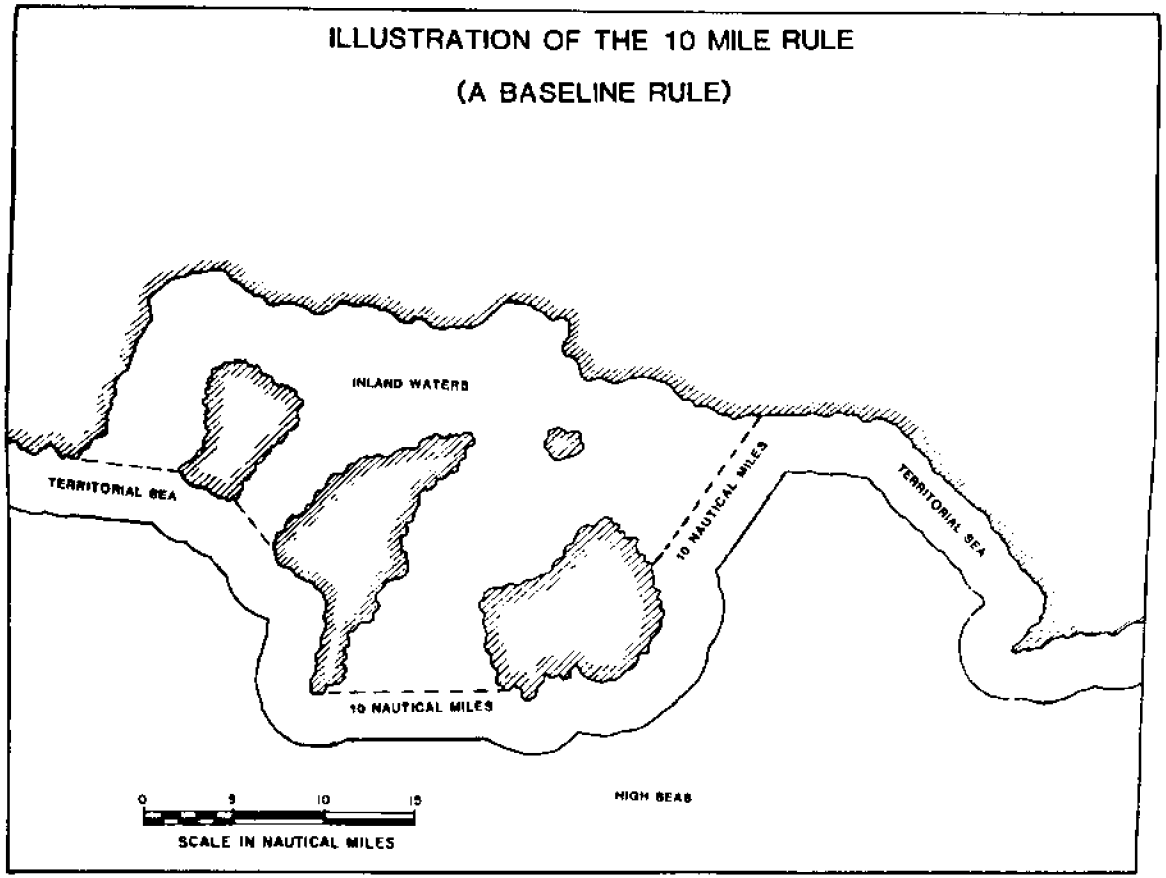
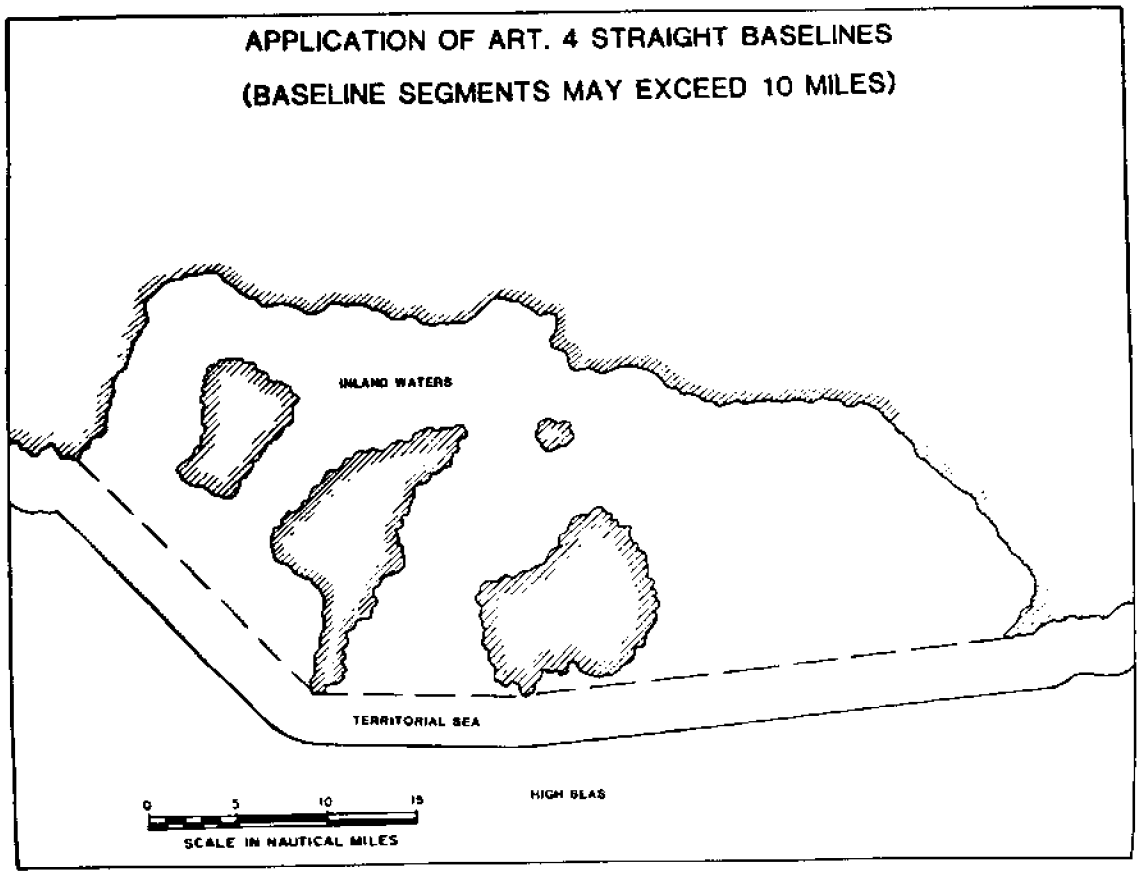
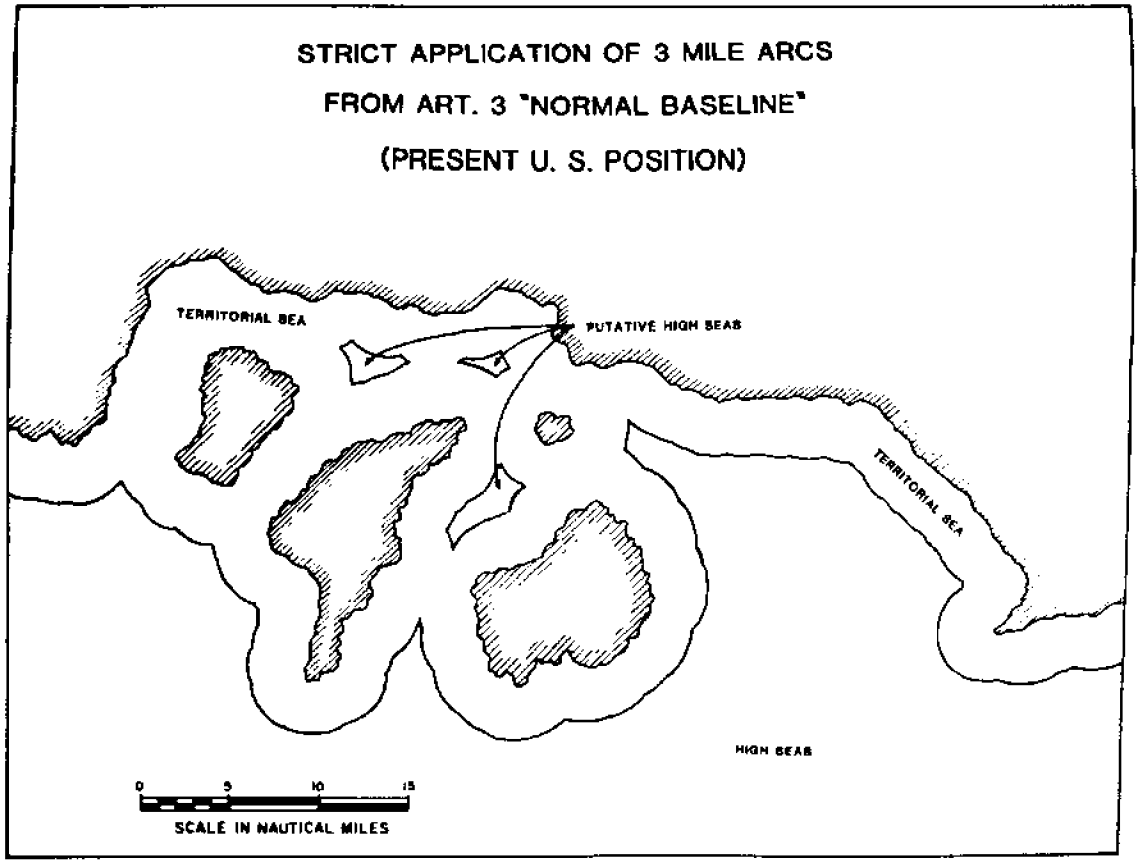
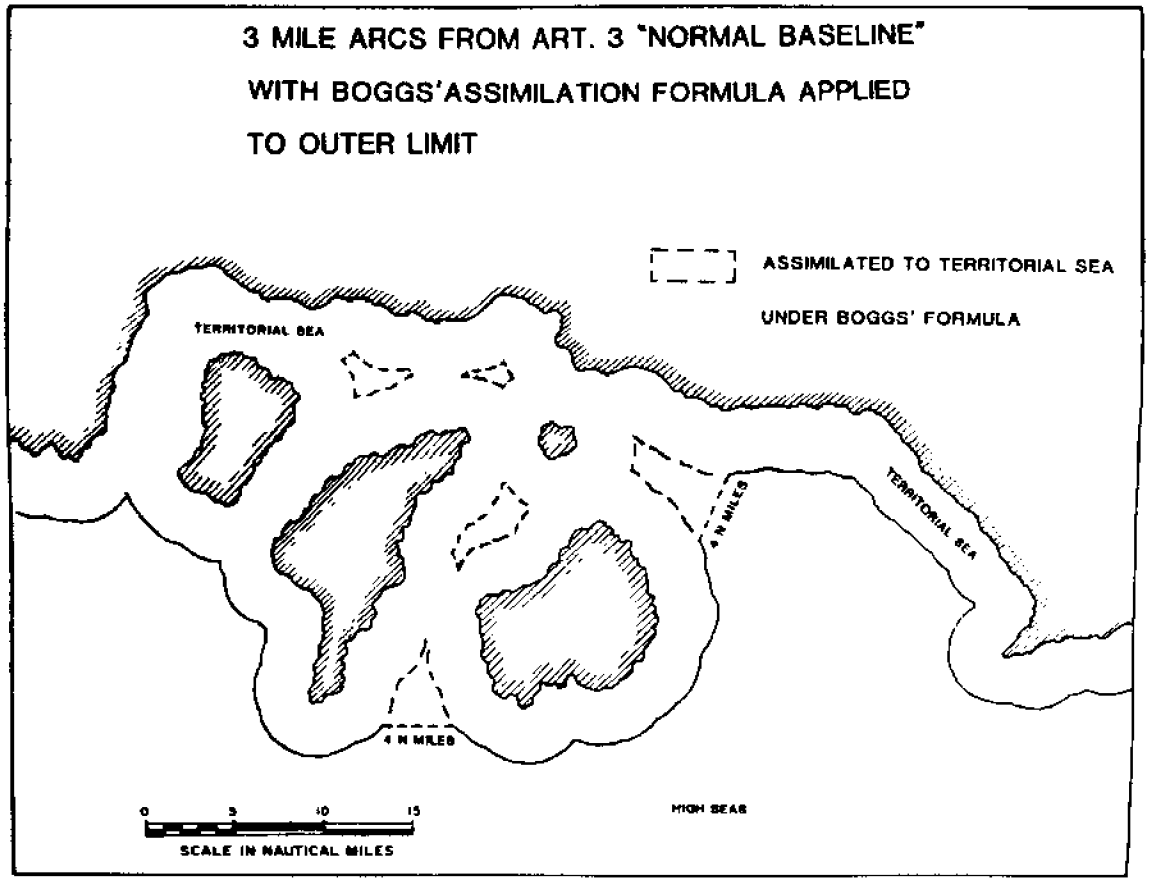


ILLUSTRATION OF THE 10 MILE RULE
(A BASELINE RULE)
INLAND WATERS
TERRITORIAL SEA
10 NAUTICAL MILES
10 NAUTICAL MILES
TERRITORIAL SEA
HIGH SEAS
0
5
10
15
SCALE IN NAUTICAL MILES


APPLICATION OF ART. 4 STRAIGHT BASELINES
(BASELINE SEGMENTS MAY EXCEED 10 MILES)
INLAND WATERS
TERRITORIAL SEA
HIGH SEAS
0
5
10
15
SCALE IN NAUTICAL MILES


STRICT APPLICATION OF 3 MILE ARCS
FROM ART. 3 "NORMAL BASELINE"
(PRESENT U. S. POSITION)
TERRITORIAL SEA
PUTATIVE HIGH SEAS
TERRITORIAL SEA
HIGH SEAS
0
5
10
15
SCALE IN NAUTICAL MILES


3 MILE ARCS FROM ART. 3 "NORMAL BASELINE"
WITH BOGGS' ASSIMILATION FORMULA APPLIED
TO OUTER LIMIT
ASSIMILATED TO TERRITORIAL SEA
UNDER BOGGS' FORMULA
TERRITORIAL SEA
4 N MILES
TERRITORIAL SEA
4 N MILES
HIGH SEAS
0 5 10 15
SCALE IN NAUTICAL MILES

States and Extended Territorial Seas

by Martin H. Belsky*

A number of issues have become clearer as a result of this Conference. First, we have to divide our analysis of the extended territorial sea into two parts: domestic and international. Second, the question of state versus federal responsibility and jurisdiction over the extended territorial sea is more a matter of politics than law. Finally, the political decision to give states increased power over the extended territorial sea will not depend on a swapping of votes between inland and coastal states but rather will depend on the political clout of coastal states and other national issues unrelated to resource management or controls. Let me touch on each of these issues in turn.

International Versus Domestic Law

It is probably already true that the existence of a 12-mile territorial sea is part of customary international law. It has been codified in the LOS Convention. Nations acceding to the Treaty or indicating an intent to do so have, therefore, accepted it. Nations that have not accepted the Treaty, like the United States, still accept the 12-mile territorial sea. In fact, the President's Exclusive Economic Zone Proclamation and official State Department pronouncements assume its existence as part of present international law.

However, the existence of a 12-mile sea for all nations is totally unrelated to any rights of a component part of that nation, like a state, to jurisdiction or control over that extended area. In American law, the grant to states of power over the territorial sea is solely a matter of domestic federal law. As described by numerous speakers, states were unsuccessful in convincing the Supreme Court of any inherent claims to the territorial sea. They only won such rights through specific federal legislation–the Submerged Lands Act and the Outer Continental Shelf Lands Act of 1953.

Thus, the extension of the territorial sea to 12 miles will have no direct impact on state's power over that 12-mile zone. Change can only be effected by legislation–in which Congress gives up clear federal power and turns it over to the states.

There may be, however, some indirect effect of the extension on state-federal responsibility.

Shared Responsibility over the Extended Territorial Sea

The existence and extent of a territorial sea has been an historical basis for arguments by states of "rights" to increased power over that area adja-

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cent to the coast. Thus, although states lost their legal battle in the late 1940's, they turned it into a political issue--the "Tidelands Controversy." As a result, President Eisenhower made it a campaign issue and, when elected, worked with Congress to give states rights over the then three-mile territorial sea.

Similar political and non-legal bargaining occurred in the 1970's. States argued that they had "rights" to controls over and revenues from activities beyond the territorial sea. They lost the legal battle and there was no explicit Congressional grant of powers and revenues to the states. However, they did not totally lose the political battle. Demands for a "veto" over offshore activities led to legislation providing for "consistency" over federal activities with state regulatory schemes. (Although of course, that "consistency" requirement has been redefined and limited in recent years, still the original idea was to increase state power over all activities adjacent to its coast.) Demands for involvement in offshore fisheries led to a new hybrid governing body--the regional councils--that explicitly included states as decision-makers and not merely advisors. Demands for involvement in the OCS leasing process led to new legislation that provided for more information to states and an increased consultation and coordination role.

Obviously, these programs have not worked out to the total satisfaction of the states but there can be no question that the states have more power now than they had prior to their political push in the early 1970's.

As to a "right" to increased revenues, states have continuously "demanded" revenue sharing from offshore resource development. Again they lost the legal and political war but won some concessions. The 1976 Coastal Energy Impact Program was a compromise worked out to give states increased funds--though tied to impacts--that was based on a formula that included geographic proximity as a major criteria for funding.

A similar process has to occur with the extended territorial sea. It is a "red herring," but even herrings can smell up the place and cause action to eliminate the odor. The states have several opportunities at the present time to seek more controls over offshore activities and more revenue from such activities. But, we should look to history to see the path for seizing such opportunities.

Attempts to gain total control over the extended territorial sea are not viable and should be abandoned. Congress and the Executive will never give up all federal rights in that area to the states. They might be willing--on a case-by-case basis--to make adjustments in the present division between the federal and state governments over regulation and resources in that extended area.

What are these opportunities? First, the acceptance of an extended territorial sea in international law might provide a base for states to argue for more responsibility and funds. The "pitch" has to be as follows: The nations of the world, including the United States, have accepted the close tie that ocean areas up to 12 miles from the coast have to the land coast

itself. States have primary responsibility for the coasts. They, therefore, should be given increased responsibility for those activities that are tied to the coasts--which we now accept goes out at least 12 miles.

Second, there may be the need for legislation to implement the President's EEZ Proclamation. Even without such comprehensive legislation, we have been told that numerous federal laws will have to be changed to make them consistent with new federal power over the extended territorial sea. States should attempt to secure changes in laws to provide increased state power and then argue that with such increased responsibility, they are entitled to additional revenues or other funding. The focus has to be on the following questions as to each issue:

1. Who has primary responsibility for activities and regulatory control over such activities? In most cases, this will be the federal government.

2. What are the primary means of decision-making by the federal government? How can and should the states be included in that decision-making?

3. What methods of coordination are provided for state and federal decisions over activities that are subject to state and federal controls or even just federal controls? How should these methods be improved?

4.What procedures are there for states to complain about, or in legal parlance, to "appeal" adverse decisions? What information is essential for states to adequately present their case to reviewing bodies or officials?

5.What funds should be made available to the states to pay for these increased responsibilities?

Third, there is every likelihood that a number of key federal statutes will be coming up for extensive revision in the next few years. Included within this group are the FCMA and the OCSLA. Both these statutes have involved conflict, and conflict demands resolution. Trying to forge a political compromise, Congress and the Executive may be willing to accept more state authority and even funding back to the states.

The Section 8(g) litigation and proposed resolving legislation can be used as a model for such compromise. That section was made intentionally ambiguous so both the federal government and the states could both argue that there is no right to a "share" of revenues from OCS activities in the three-mile zone beyond the state's territorial waters (this is the United States' position, that the only revenues to which a state is entitled are those from common pools overlapping OCS and submerged lands), and that the state has a right to a 50 percent share of all such revenues (this is the states' position, that such resources are part of an overall common pool and in such situations as with onshore minerals, the state is entitled to at least half). Because the legislation is unclear, and because the conflict over interpretation is holding up money that the federal government wants, the federal government is willing to compromise and offer--clear--some share of the escrow money.

A similar scenario could occur with other legislation in the future. The Executive may want legislation that amends the FCMA and the OCSLA

(and possibly the CZMA). It might be willing to accept some increased state role and possibly revenue return to resolve the issue.

My argument so far has been that the extended territorial sea and related issues provides a political opportunity for increased state authority and possibly even for federal revenues to go to the states. The political opportunity should be exercised on a case-by-case basis. But this is not sufficient. This pitch has to be made on a case-by-case and comprehensive basis. It also has to take political realities into account.

Exercising Political Clout

A number of participants at this Conference seem to assume that there has to be a deal cut with inland states to secure more power and money for coastal states. History just does not back up that thesis. The tidelands controversy was just between coastal states and the Executive. The inland states were just not concerned. Still, the Executive felt it necessary to work out a deal. Similarly, the passage of the CZMA and the OCSLA resulted from pressure put on the Executive by coastal states. Inland legislators deferred to their coastal colleagues. There is no reason to believe that these historical precedents are still not valid.

In accepting the validity of these precedents, we must remove our interest blindfolds and recognize the difference between reality and myth in ocean and coastal policy. We in the ocean community often delude ourselves into believing that ocean and coastal policy issues are high on the nation's agenda. They are not. Occasionally, an issue might surface in political and public attention, but it soon dies and other issues such as defense and the budget occupy everyone's attention.

This lack of national interest has been tempered to some extent in the past by a strong ocean and coastal constituency in Congress and the Executive. But as has often been pointed out in recent years, that constituency is now gone.

The ocean policy leaders of the Senate and House have either left, died or established other priorities, and no one has picked up the mantle. Federal executive policy on ocean and coastal issues is splintered and even NOAA, once thought by many (including me) to be the potential focus for development of such policy, has now given up even that claim to being a policy formulator, let alone maker.

In fact, the real ocean and coastal policymakers are now in the states. Through Sea Grant and the CZMA, there is now a large number of people in the states whose job it is to look at ocean and coastal issues in a comprehensive manner. There is an ocean and coastal "constituency" in state governments who can and must seek their governors', congresspersons' and senators' support for a larger state role in national ocean and coastal issues. They must also join together through organizations such as the Coastal States Organization or similar entities to take a unified position and pick apart the federal bureaucracy.

If they act in a coordinated fashion, coastal states have the ability to

identify state-federal conflicts and to propose resolutions of conflicts. As indicated above, the deal must be struck with the federal executive and not with inland congresspersons and senators. The Executive must believe that a new sharing will resolve conflicts and be in the national interest. The states now have the ability to create that conflict and offer solutions that inure to their and the nation's benefit. A declining federal interest in the oceans and coasts and an increasing state attention on multiple use of the oceans and a national ocean strategy provides an opportunity for state action.

The federal government and the inland states consider ocean issues at the periphery of national concerns. The President, therefore, might be more willing to make adjustments in these "non-essential" issues and the inland states more willing to accept those adjustments. But they will do so only if they believe that a strong constituency--unified and coordinated--is pressuring them to do so.

Let me conclude with a note of caution and reality. Don't demand too much money or power. Even if short-term gains are possible, don't be greedy. Attention should be focused on saving existing federal programs supporting states' activities on the coasts and in the oceans. The primary national issue today is the budget and its balance. Under the new budget law, Congress will be drastically cutting domestic programs. If it does not, the President now has the power to do so--unilaterally. Money for ocean and coastal planning, research, or revenue sharing will be less protected than other areas of domestic spending like social security, welfare, and even some environmental programs, such as toxic waste cleanup. Revenues from all sources, including offshore activities, will be protected and defended against state claims. Increases in state aid should be at the margins and no direct attack seeking, for example, all or some of the resource base in the extended territorial sea, should be attempted.

Revenue sharing should not be seen as a realistic option. Even if successful this year, each year appropriations bills or the President, with his new budget-cutting power, will look to this source of revenue and fight for a smaller, or no, state share.

The only real area of potential growth may be for increased state regulatory authority. The federal government will be attempting to cut its size and it might be willing to give up power to save expenditures. Again, several notes of caution. First, states might get more regulatory power but no additional financial support to exercise that power. Second, the federal government will most likely continue to strenuously oppose giving states additional power when it believes such power might retard development or decrease resource exploitation.

Conclusion

My comments are both optimistic and pessimistic. During the next few years, there may be opportunities to use the creation of an extended territorial sea as a basis for political gains by the states in ocean and coastal

policy, including resource management and revenues. On the other hand, increasing national attention to the budget and reduced federal expenditures might mean that states will have to fight to keep whatever federal support there is now for their ocean and coastal programs. In either event, practical evaluations of the risks of action and coordinated state positions on national issues are essential.

Belsky, "Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law," 22 San Diego Law Review 733 (1985).

Belsky, "Legal Constraints and Options for Total Ecosystem Management of Large Marine Ecosystems," in Total Ecosystem Management of Large Marine Ecosystems (AAAS 1985).

Belsky, "Implementing the U.S. EEZ: A Strategy to Avoid Conflicts," Oceanus, 1984/85 at 19.

Belsky, "Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof," 12 Ecology Law Quarterly 1 (1984).

Belsky, "International Law Issues Raised by the Exclusive Economic Zone," in IIEE/MTS, Oceans 84 at 465 (1984).

Summary of Significant Court Decisions Regarding Federal-State Offshore Resource Ownership, Management and Boundary Questions

by Greg Skillman*

President Truman's 1945 proclamation of U.S. jurisdiction over the natural resources of the continental shelf and the Supreme Court's decision in **United States v. California**, 332 U.S. 19 (1947), established the context for modern consideration of federal-state jurisdictional relationships within the present United States three-mile territorial sea. Coastal state licensed extraction of offshore oil and gas conflicted directly with the Truman Proclamation's assertion of federal jurisdiction over all continental shelf resources.

In **California**, the Supreme Court decided this issue against the states, declaring federal government ownership of the submerged lands between the ordinary low-water mark and international waters lying three nautical miles offshore. The Court held that the federal government had "paramount rights in and power over" the three-mile territorial sea.

In **California**, the state asserted that its pre-statehood boundary extended seaward to include the three-mile territorial sea and that the California constitution reflected this jurisdiction when the state was admitted to the Union. California also claimed that each original colony's boundary included a three-mile sea. Therefore, California's entry into the Union on an "equal footing" with other states granted it jurisdiction over a similar sea.

The Court, however, found no recognition of a colonial ownership of a three-mile sea and found that past decisions established state ownership only of internal waters and tidelands. See **Pollard's Lessee v. Hagen**, 44 U.S. (3 How.) 212 (1845). The Court held that national jurisdiction over a three-mile sea was asserted after formation of the Union and that federal control of the marginal sea was an essential element of national security and sovereignty.

Under a 1938 state statute extending its seabed boundaries, Louisiana claimed seabed ownership over the first three miles, plus an additional 24 nautical miles seaward. Following the reasoning in **California**, the Supreme Court rejected Louisiana's claims, holding that the statute had no effect on the federal government's paramount rights. **United States v. Louisiana**, 339 U.S. 699, 70 S. Ct. 914, 94 L.Ed. 1216 (1950). This decision was followed by **United States v. Texas**, 339 U.S. 707, 70 S. Ct. 918, 74 L.Ed. 1221 (1950), denying Texas claims to the bed of the marginal sea. Be-

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cause it was an independent nation prior to joining the Union, Texas asserted its sovereignty over its adjacent sea was retained at statehood. However, the Court held that once Texas became a state, it could have no greater sovereign rights than any other state.

In 1953, Congress overrode the Court's **California** decision by passing the Submerged Lands Act, thus establishing the states' seaward boundaries three miles from the Atlantic and Pacific coasts, and three marine leagues from the Gulf coast. This line was codified "without prejudice" to any state's territorial claim beyond three miles, "if it was so provided by its constitution or laws prior to or at the time such state became a member of the Union." 43 U.S.C. Sec. 1312. In the same year, Congress also ratified President Truman's claim to the continental shelf with the passage of the Outer Continental Shelf Lands Act. The Act asserted U.S. "jurisdiction, control and the power of disposition" over all lands seaward of those granted the states under the Submerged Lands Act.

In **United States v. Maine**, 420 U.S. 515 (1975), the Court reconfirmed **U.S. v. California**, finding original federal jurisdiction over the continental shelf, as modified by the Submerged Lands Act. In **Maine**, the 13 Atlantic states asserted rights beyond the three-mile limit based on historical claims rooted in their original colonial status, and the Submerged Land Act's ambiguity on the question of more expansive, historically based state claims. However, the Court abandoned **U.S. v. California**'s reasoning that the federal jurisdictional claim was historically superior to the states'. Instead, the Court re-confirmed federal "paramount rights" over the marginal seas as a component of external sovereign powers of the federal government, and described the Submerged Lands Act's transfer of those rights as an exercise of that national power.

Boundary Determinations

The Submerged Lands Act measures a coastal state's three-mile zone from the line of ordinary low water and the seaward limit of each state's inland waters. However, the term "inland waters" was not defined by the Act. For its territorial sea claims, California used a straight baseline method where the limit of inland waters is determined by drawing a line from headland to headland. The federal government favored the more restrictive method of defining inland waters by following the sinuosities of the coast.

In **United States v. California**, 381 U.S. 139 (1965), the Court defined inland waters for the purposes of the Act by adopting the provisions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. The Convention allowed bays to be included as inland waters only when they were "closed bays," i.e., the area of the bay was greater than that of a semicircle formed with the distance between the headlands as a diameter. Where a closed bay existed, straight baselines could be drawn from headland to headland from which to measure the three-mile sea. Under this formula, most of California's indented coastline was determined to be

open bays, and the state lost much of the offshore zone it claimed.

U.S. v. Alaska, 422 U.S. 184 (1975), was prompted by Alaska's offer of submerged lands in lower Cook Inlet for an oil and gas lease sale. The United States asserted that the submerged lands were under federal jurisdiction and sought to enjoin the state. Because lower Cook Inlet was wider than the Geneva Convention-prescribed 24 miles, it constituted an open bay. Therefore, it could only be considered inland waters at that point if it met the criteria for an "historic bay." The Court defined this as a bay (1) over which the U.S. exercised authority, (2) where the exercise of that authority was continuous, and (3) where foreign states acquiesced in that authority. The Court held that Alaska's Cook Inlet failed these tests and could not be included as part of the state's inland waters.

In **United States v. Louisiana, et al.** (Alabama and Mississippi boundary case), 105 S. Ct. 1074 (1985) Mississippi Sound was found to be an historic bay. Therefore, it constitutes inland waters and Alabama and Mississippi own the lands submerged under the Sound. The straight baseline approach for determining the seaward limit of inland waters was rejected because it has not been adopted by the U.S.

In **U.S. v. Maine**, (Rhode Island and New York boundary case), 105 S. Ct. 992 (1985), the Court determined that Long Island, although in reality an island, would be considered a peninsula attached to the New York mainland. This decision defined Long Island Sound as a closed bay and part of the inland waters of New York and Connecticut. The baseline drawn from Long Island to Watch Hill on the mainland, however, defeated Rhode Island's claim to Block Island Sound as part of its territorial sea.

The effects of ambulatory coastlines on state territorial seas were considered by the Court in **United States v. Louisiana**, 394 U.S. 11 (1969). The Court held that where erosion causes a state's coastline to recede, the state's three-mile seaward boundary moves landward correspondingly. However, where accretion has extended the state's coastline, the state's seaward boundary does not expand. States thus cannot gain submerged lands through the action of natural forces.

Although natural forces will not augment a state's offshore zone, the Court held in **United States v. California**, 100 S. Ct. 1994 (1980), that some artificial coastal extensions, such as breakwaters and harbor works, may extend a state boundary seaward. For qualifying artificial extensions, the marginal sea is measured from their furthest seaward extent.

The U.S.-Canada maritime boundary in the Gulf of Maine recently was determined by a five-member chamber of the International Court of Justice (ICJ). **Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)**, 1984 ICJ Rep. 246. The century-old jurisdictional dispute over the Gulf's rich fishery resources had grown serious since the 1977 expansion of both countries' fisheries zones to 200 nautical miles. The ICJ based its decision exclusively on geography, disregarding historical fishing patterns, socio-economic dependence on the fishery, or ecological boundaries of various fishery resources. The decision is unique in that it estab-

lishes an identical boundary for the continental shelf and the exclusive economic zone. However, a shoreward portion of this boundary remains unresolved due to the disputed ownership of two small islands. Therefore, the ICJ boundary could not be drawn closer than 30 miles off the U.S. and Canadian coasts.

Like other international tribunal decisions adjudicating offshore boundaries between nations, the **Gulf of Maine** decision becomes part of the jurisprudence referred to by the United States Supreme Court in resolving federal-state offshore boundary questions.

Pollution Control

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), held the Washington State Tanker Act, regulating the design, size and movement of tankers in Puget Sound, was largely preempted by the Ports and Waterways Safety Act (PWSA), 33 USC 1221 et seq. First, the Tanker Act's requirement that all Puget Sound vessels carry state-licensed pilots was found to be partially preempted by the Coast Guard's exclusive statutory authority to license pilots for the coastal trade, although Washington could still impose state-licensed pilots on foreign vessels. Second, the Tanker Act could not impose safety design standards that were "different and higher" than those of the PWSA on oil tankers entering the Sound. The PWSA's federal standards were intended to occupy the entire field of tanker design requirements, and to establish international safety design standards. Third, the Tanker Act's ban on vessels more than 125,000 DWT operating in the Sound was preempted by PWSA's grant of authority to the Coast Guard to regulate vessel size and speed.

However, **Chevron v. Hammond**, 726 F.2d (483 (9th Cir. 1984), found Alaska's statute prohibiting the discharge into state waters of any ballast that had been stored in oil cargo tanks was not preempted by a lower Coast Guard standard. The Coast Guard standard was promulgated pursuant to the PWSA, as amended by the Ports and Tanker Safety Act (PTSA), 46 USC 391(a).

Distinguishing the PWSA's intent to occupy the field of tanker design found in **Ray v. ARCO**, the Court found no intent for the PTSA to occupy the entire field of regulating tanker ballast discharges. Rather, it found Congressional recognition of a need to collaborate with states in such regulation and deferred to Alaska's right to set high environmental protection standards within its waters. Further, it found the objectives of both the state and federal statutes similar, and no physical impossibility to comply with both standards. Alaska's statute was also compatible with the federal Clean Water Act, which permits the establishment of higher state standards for water quality.

Federal Outer Continental Shelf Oil and Gas Development

Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires federal agencies conducting activities "directly affecting" coastal state

offshore zones to act consistently with each state's federally approved Coastal Zone Management Plan (CZMP). **California v. Watt**, 683 F.2d 1253 (9th Cir. 1982), therefore, held that the Interior Department's decision to sell offshore oil and gas leases had to be consistent with California's CZMP. This decision was overruled by the Supreme Court in **Department of Interior v. California (Sale 53)**, 104 S. Ct. 656 (1984). Contrary to the 9th Circuit on this point, the Court held that Interior's decision to sell oil and gas leases is not a decision "directly affecting" the state's coastal zone, and need not be consistent with the state's CZMP.

However, this holding is expressly limited to the lease sale stage of outer continental shelf leasing. Other CZMA consistency provisions will apply to the exploration, development and production stages of OCS leasing. In addition, the Court clearly stated that the lessee does not acquire an immediate right to explore, develop or produce oil or gas without separate, subsequent federal authorization.

Air emissions from OCS operations that can significantly affect state offshore and onshore air quality are regulated by the Interior Department, rather than the federal Environmental Protection Agency, according to **California v. Kleppe**, 605 F.2d 1147 (9th Cir. 1979).

The Outer Continental Shelf Lands Act (OCSLA) anticipated disputes over oil and gas resources located near the federal-state offshore boundary. Therefore, section 7 authorizes the Secretary of Interior to negotiate and enter agreements with coastal states so that oil and gas development can continue pending resolution of these jurisdictional disagreements. See **United States v. Louisiana**, 448 U.S. 253, rehearing denied, 447 U.S. 930 (1980), involving a dispute over the interpretation of such a federal-state agreement.

Section 8(g) of the OCSLA requires federal-state revenue sharing from OCS leases of oil and gas pools spanning the federal-state boundary. Such revenue sharing agreements must be negotiated on a case-by-case basis by the Secretary of Interior and the state governor. Failing agreement, the federal district courts must equitably dispose of the revenues between the parties.

When Interior and five coastal states were unable to reach agreement on the division of $5.8 million held in escrow pursuant to section 8(g), Texas and Louisiana successfully sued to force distribution of these revenues, achieving a 50-50 federal-state revenue split in federal district court. **Texas v. Interior**, 580 F. Supp. 1197 (E.D. Texas 1984). Appeals of those rulings were still pending in 1986 before the Fifth Circuit Court of Appeals.

Living Resource Management

For many years prior to **United States v. California** and the Submerged Lands Act, the coastal states had exercised jurisdiction over fisheries and navigation in United States coastal waters and had done so even beyond three miles. In **Skiriotes v. Florida**, 313 U.S. 69 (1941), the state argued its

fishing regulations applied three marine leagues (nine miles) offshore, while the appellant argued that Florida law had no force beyond three miles. The Court found it unnecessary to determine the seaward limit of Florida's jurisdiction, holding that Florida could legitimately exercise jurisdiction over its own citizens beyond the state's waters, whether three miles or three leagues, until preempted by federal statute.

The **Maine** Court (reconfirming **California**), 420 U.S. 515 (1975), found the Submerged Lands Act's transfer of seabed resources to the states to be an exercise of the federal government's "paramount rights" over the entire marginal sea. Residual federal rights, therefore, were retained within the three-mile sea. Subsequently, in **Douglas v. Seacoast Products, Inc.**, 431 U.S. 265 (1977), the Court defined states' rights within the three-mile zone as the right to exploit offshore resources subject to encumbrances previously created by federal exercise of its commerce, navigation, national defense and international affairs powers. Thus in **Douglas**, federal vessel enrollment and licensing statutes preempted Virginia's imposition of licensing requirements on non-residents pursuing migratory fish within state waters.

PROCLAMATION 2668

Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas by the President of the United States of America

WHEREAS for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international cooperation in this field; and

WHEREAS such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and

WHEREAS the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; and

WHEREAS there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special rights and equities of the coastal State and of any other State which may have established a legitimate interest therein;

"NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

"In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish

conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

HARRY S TRUMAN

By the President:
DEAN ACHESON,
Acting Secretary of State

PROCLAMATION 2667

Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf By the President of the United States of America

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the water above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

HARRY S TRUMAN

By the President:
DEAN ACHESON
Acting Secretary of State

PROCLAMATION 5030
Of March 10, 1983

Exclusive Economic Zone of the United States of America
By the President of the United States of America

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by others States;

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having eco-

nomic purposes, and the protection and preservation of themarine environment.

This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to the United States jurisdiction and require international agreements for effective management.

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN

United States Ocean Policy

Statement by the President
March 10, 1983

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the Convention. Even some signatory States have raised concerns about these problems.

However, the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans--such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of the interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight. My proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States Government agency.

In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when market permits, exploit these resources.

The administration looks forward to working with the Congress on legislation to implement these new policies.

National Conference on the States and an Extended Territorial Sea
Program

Monday, December 9, 1985

2 p.m.

Greetings, Scope and Nature of Conference
Lauriston R. King, Deputy Director
Texas A&M University Sea Grant College Program
Sea Grant Legal Network
Casey Jarman, Sea Grant Legal Program
University of Mississippi Law Center

2:30 - 5:30 p.m.

Historical and Legal Context
Richard Hildreth, Moderator
University of Oregon School of Law
The Law of the Sea Conference and National Jurisdiction
Thomas Clingan, University of Miami Law School
The States and the Territorial Sea
Milner Ball, University of Georgia Law School

Tuesday, December 10, 1985

9-10 a.m.

Resource Management in an Extended Territorial Sea
Fred Whitrock, Moderator
Sea Grant Legal Program, Louisiana State University
Survey of Existing and Potential Resources in Offshore Waters
Donald Squires, Department of Marine Science, University of Connecticut

10:15 - 12 noon

Federal-State Relations in the Management of Marine Resources
Alison Rieser, Marine Law Institute
University ofSouthern Maine
Fisheries
Charles McCoy, Florida Department of Natural Resources
Ocean Disposal
Larry Schmidt, New Jersey Department of Environmental Protection
Offshore Oil and Gas
Mary Ellen Leeper, Assistant Attorney General, Department of Justice, State of Louisiana
E.G. Wermund, Bureau of Economic Geology, The University of Texas at Austin

1:30-3 p.m.	**The Federal Interest in an Extended Territorial Sea** Lauriston R. King, Moderator Texas A&M University Sea Grant College Program **Perspectives of a Federal Research and Resource Management Agency** Timothy Keeney, Deputy General Counsel, National Oceanic and Atmospheric Administration **A History of Federal/State Conflicts in the Territorial Sea and Anticipated Effects of an Extended Territorial Sea** Michael W. Reed, Senior Trial Attorney, Department of Justice **United States Foreign Policy and National Security Interests in a 12-Mile Territorial Sea** David Colson, Department of State
3:15-4:30 p.m.	**Models of Federal-State-Local Collaboration in Coastal Resource Management** Martin Belsky, Moderator Center for Governmental Responsibility, University of Florida **Models of Bargaining and Dispute Settlement in Marine Management** Marc Hershman, Institute of Marine Studies, University ofWashington **The Coastal Zone Management Experience as a Model for Collaborative Resource Management** Nan Evans, Office of Ocean and Coastal Resources, National Oceanic and Atmospheric Administration **Intergovernmental Approaches to Cross-Jurisdictional Problems** Charles Wiggins, Department of Political Science, Texas A&M University
6:30 p.m.	**Going to Court for the States: What the States Might Expect from a 12-Mile Territorial Sea** John Briscoe, Esq., Washburn and Kemp

Wednesday, December 11, 1985

8:45-10:30 a.m.	**An Extended Territorial Sea: Red Herring, or New Spark for Federalism?** G. Thomas Koester, Assistant Attorney General, State of Alaska
10:45-12 noon	Response of Rapportuers

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