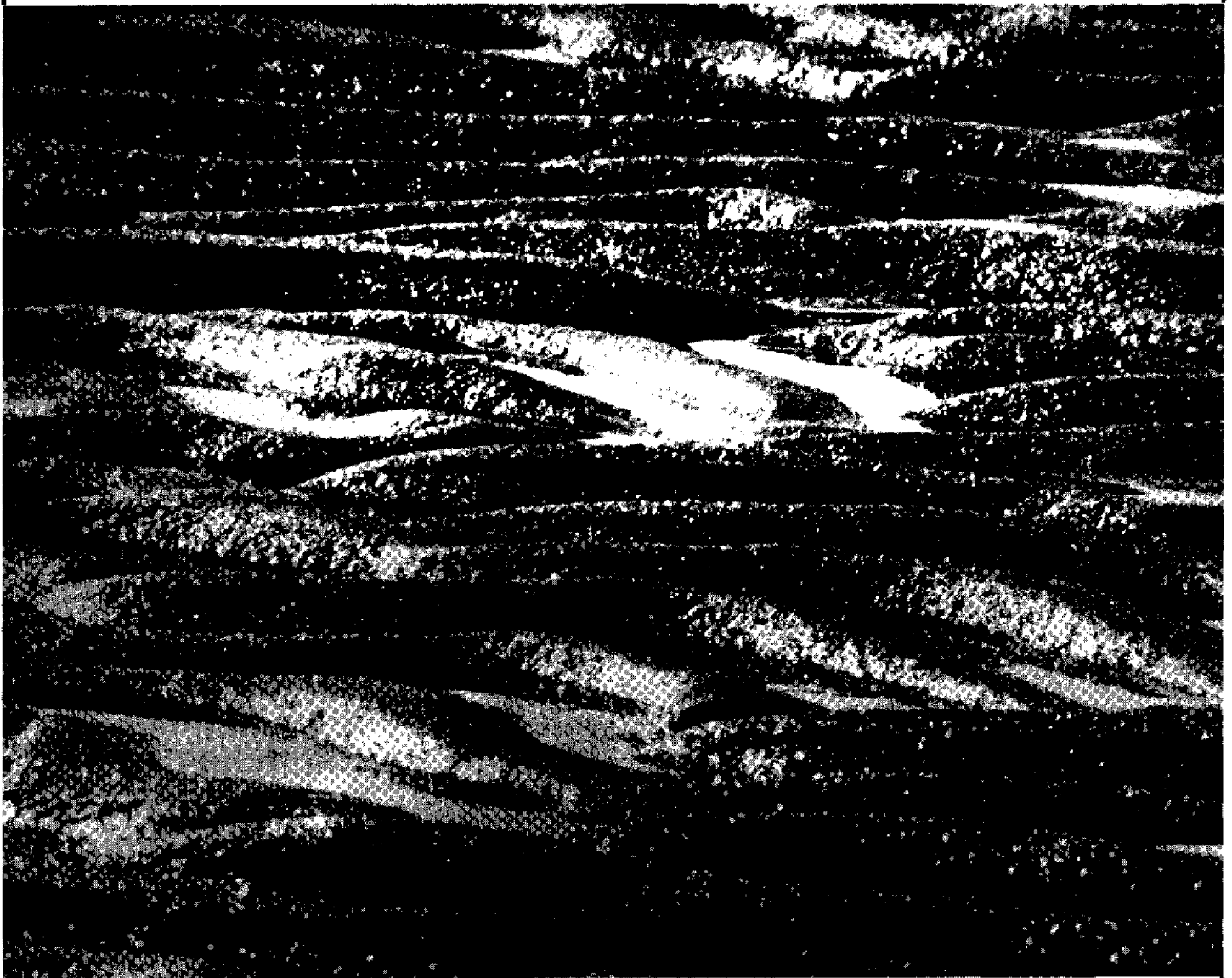


LOAN COPY ONLY

Florida Coastal Law and Policy: Cases and Readings

Donna R. Christie



FL569-T-85-004 23

CIRCULATING COPY
Sea Grant Depository

FLORIDA COASTAL LAW AND POLICY: LOAN COPY ONLY,
CASES AND READINGS

By

Donna R. Christie
Assistant Professor of Law

Florida State University
College of Law
Tallahassee, Florida 32306

Copyright 1985 by Donna R. Christie
and
Florida Sea Grant College Program
ISBN 0-912747-01-3

Sea Grant Project No. IR-83-5
Grant No. NA80AA-D-00038

Report Number 75
Florida Sea Grant College
August 1985
Price \$6.00

NATIONAL SEA GRANT DEPOSITORY
PELL LIBRARY BUILDING
URI, NARRAGANSETT BAY CAMPUS
NARRAGANSETT, RI 02882

TABLE OF CONTENTS

PREFACE	ix
COASTAL LAW: AN OVERVIEW.....	1
PART ONE. THE COAST: AN INTRODUCTION.....	5
Section 1. COASTAL ECOSYSTEMS AND IMPACT OF COASTAL DEVELOPMENT.....	5
Department of Commerce, <u>Who's Minding the Shore?</u> <u>A Citizens Guide to Coastal Zone Management</u>	5
Section 2. FEDERAL COASTAL ZONE MANAGEMENT.....	19
The Coastal Zone Management Act of 1972, S. Rep. No. 753.....	19
Belsky, Book Review.....	24
Section 3. FLORIDA'S COASTAL ZONE.....	25
The Citizen Advisory Committee on Florida's Coastal Resources Management, <u>The Water's Edge,</u> <u>A Guide to Florida's Coastal Management</u> <u>Program</u>	25
Livingston, <u>The Apalachicola Experiment: Research</u> <u>and Management</u>	33
Section 4. RECOMMENDED READINGS.....	38
PART TWO. PUBLIC AND PRIVATE RIGHTS IN THE COASTAL ZONE.....	40
Section 1. STATE OWNERSHIP OF SUBMERGED AND TIDAL LANDS.....	40
SHIVELY v. BOWLBY.....	40
STATE v. GERBING.....	42
NOTES.....	47
Section 2. THE BOUNDARY BETWEEN PUBLIC AND PRIVATE LANDS.....	48
BORAX CONSOLIDATED LTD. v. LOS ANGELES.....	48

NOTES.....	51
ST. JOSEPH LAND AND DEVELOPMENT CO. v. FLORIDA STATE BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT FUND.....	53
FLORIDA BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND v. WAKULLA SILVER SPRINGS CO.....	54
NOTES.....	55
Section 3. AMBULATORY BOUNDARIES.....	59
Maloney and Ausness, <u>The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping</u>	60
HUGHES v. WASHINGTON.....	61
STATE v. FLORIDA NATIONAL PROPERTIES, INC.....	65
OREGON EX REL. STATE LAND BOARD v. CORVALLIS SAND AND GRAVEL CO.....	68
CALIFORNIA EX REL. STATE LANDS COMMISSION v. UNITED STATES.....	77
NOTES.....	82
BOARD OF TRUSTEES, ETC. v. MEDEIRA BEACH NOM., INC.....	83
NOTES.....	87
Section 3. THE SIGNIFICANCE OF PUBLIC OWNERSHIP.....	88
A. The Public Trust Doctrine.....	88
ILLINOIS CENTRAL RAILROAD COMPANY v. ILLINOIS.....	89
MARKS v. WHITNEY.....	94
STATE v. GERBING.....	97
NOTES.....	97
B. State Divestiture of Public Trust Lands.....	98
CONSTITUTION OF THE STATE OF FLORIDA ART. X, Section 11.....	98
ODOM v. DELTONA CORP.....	99

STATE v. CONTEMPORARY LAND SALES.....	102
NOTES.....	105
C. Public Rights in Navigable Waters.....	114
THE DANIEL BALL.....	114
BROWARD v. MABRY.....	117
NOTES.....	117
CLEMENT v. WATSON.....	118
KAISER AETNA v. UNITED STATES.....	120
NOTES.....	128
Section 4. PUBLIC ACCESS TO BEACHES.....	128
GION v. CITY OF SANTA CRUZ; DIETZ v. KING.....	128
STATE EX REL. THORNTON v. HAY.....	136
CITY OF DAYTONA BEACH v. TONA-RAMA, INC.....	139
Maloney, Fernandez, Parrish & Reinders, <u>Public</u> <u>Beach Access: A Guaranteed Place to</u> <u>Spread Your Towel</u>	144
NOTES.....	145
Section 5. RIGHTS OF RIPARIAN OWNERS.....	151
BOARD of TRUSTEES v. MEDEIRA BEACH NOM., INC.....	152
GAME & FRESH WATER FISH COM'N v. LAKE ISLAND.....	153
UNITED STATES v. CHANDLER-DUNBAR WATER POWER CO.....	162
COLBERG, INC. v. STATE.....	165
Section 6. THE TAKING ISSUE.....	169
GRAHAM v. ESTUARY PROPERTIES, INC.....	171
KEY HAVEN ASSOCIATED ENTERPRISES, INC. v. BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND.....	179
NOTES.....	185

PART THREE. FLORIDA'S COASTAL ZONE PLANNING: A STUDY IN GOVERNMENTAL RELATIONS.....	186
Section 1. INTRODUCTION.....	186
Section 2. FEDERAL AND STATE BOUNDARIES.....	186
The Tidelands Controversy.....	186
UNITED STATES v. CALIFORNIA.....	188
The Submerged Lands Act of 1953.....	192
UNITED STATES v. FLORIDA (1960).....	194
NOTES.....	196
UNITED STATES v. FLORIDA (1976).....	197
NOTES.....	199
Section 3. FISHERIES MANAGEMENT.....	203
A. State Fisheries Management.....	203
<u>Schoenbaum & McDonald, State Management of Marine Fisheries After the Fishery Conservation and Management Act of 1976 and Douglas v. Seacoast Products, Inc.</u>	203
DOUGLAS, COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION v. SEACOAST PRODUCTS INC.....	207
B. Federal Fisheries Management.....	216
<u>Greenberg & Shapiro, Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform.</u>	215
NOTES.....	219
C. State Fisheries Management After The MFCMA.....	219
SOUTHEASTERN FISHERIES ASSOCIATION v. DEPT. OF NATURAL RESOURCES.....	220
PEOPLE v. WEEREN.....	222
ANDERSON SEAFOODS, INC. v. GRAHAM.....	226
NOTES.....	229

Section 4. THE COASTAL ZONE MANAGEMENT ACT of 1972.....	231
NOTES.....	237
AMERICAN PETROLEUM INSTITUTE v. KNECHT.....	238
NOTES.....	259
Section 5. THE FEDERAL CONSISTENCY REQUIREMENT.....	264
Federal Consistency Matrix.....	267
SECRETARY OF INTERIOR v. CALIFORNIA.....	269
NOTES.....	279
KEAN v. WATT.....	279
CAPE MAY GREENE v. WARREN.....	283
NOTES.....	294
Section 6. FLORIDA'S COASTAL MANAGEMENT PLAN.....	298
Section 7. FLORIDA'S COASTAL ZONE BOUNDARIES.....	304
Section 8. COMPREHENSIVE PLANNING.....	305
Finnell, <u>Coastal Land Management in Florida</u>	305
The 1984 State and Regional Planning Act.....	311
Rhodes & Apgar, <u>Charting Florida's Course: The State and Regional Planning Act of 1984</u>	311
NOTES.....	319
Local Government Comprehensive Planning.....	320
Arline, <u>The Consistency Mandate of the Local Government Comprehensive Planning Act</u>	322
NOTES.....	331
Regional Planning Councils.....	337
Section 9. DEVELOPMENTS OF REGIONAL IMPACT.....	341
GRAHAM v. ESTUARY PROPERTIES.....	341
Florida Statutes, Section 380.06.....	345
NOTES.....	348

Section 10. THE AREA OF CRITICAL STATE CONCERN PROGRAM..	357
ASKEW v. CROSS KEYS WATERWAYS.....	357
THE CRITICAL AREA PROGRAM SUMMARIZED.....	364
Section 11. SPECIAL MANAGEMENT AREAS AND LAND	
ACQUISITIONS PROGRAMS.....	369
FLORIDA'S AQUATIC PRESERVE SYSTEM.....	369
FLORIDA'S STATE WILDERNESS SYSTEM.....	371
CONSERVATION AND RECREATION LANDS:	
ENVIRONMENTALLY ENDANGERED LANDS.....	373
Section 12. PROTECTION OF BEACHES, DUNES, AND	
BARRIER ISLANDS.....	377
Maloney and O'Donnell, <u>Drawing the Line at the</u>	
<u>Oceanfront: The Role of Coastal Construction</u>	
<u>Setback Lines in Regulating Development of the</u>	
<u>Coastal Zone.....</u>	377
NOTES.....	387
CONCLUSION: THE FUTURE OF COASTAL ZONE MANAGEMENT	
IN FLORIDA.....	383

PREFACE

The 1985 session of the Florida legislature produced landmark legislation in the area of coastal land use and resources management. The Growth Management Act and the Coastal Zone Protection Act of 1985, following on the heels of major water resources and wetlands protection acts in 1983 and 1984, can again make Florida a leader in environmental protection and coastal management. This year is, therefore, particularly appropriate for the publication of a book on Florida coastal law.

Coastal law courses are becoming common in graduate programs and law schools, and they are different because they focus on a place rather than a generally recognized field of law. The important interrelations of water, habitat, wildlife, and land use, the jurisdictional conflicts, and even the difficulty of establishing a boundary make the coast unique. Coastal law involves aspects of land use law, water law, natural resources law, property law, and even constitutional law, but in the perspective of the special needs of the coast. This book is intended to provide a text for coastal law courses in Florida, as well as provide a general reference book for attorneys, legislators, agencies, and the public.

For sake of brevity and to keep the text relatively uncluttered, footnotes and citations are omitted except where considered particularly significant. The original number of a footnote in the quoted text is indicated in parentheses.

Acknowledgements

This book was developed under the auspices of the Florida Sea Grant Program with support from the National Oceanic and Atmospheric Administration, Office of Sea Grant, U.S. Department of Commerce, Grant No. NA80AA-D-00038.

This book contains the works of many authors, and I appreciate their cooperation in allowing me to reprint excerpts of their works. I would also like to thank Professor Martin Belsky, University of Florida College of Law, for his support during the development of the manuscript. I owe a debt of gratitude to too many helpful people in the state agencies and legislative committees to name them all, but I want to thank particularly Richard Tucker of the Florida Office of Coastal Management, who not only helped with research, but spent many hours reviewing and proofreading the manuscript as well.

This work is a result of research sponsored by NOAA Office of Sea Grant, Department of Commerce, under Grant No. NO80AA-D-00038. The U.S. Government is authorized to produce and distribute reprints for governmental purposes notwithstanding any copyright notation that may appear hereon.

Donna R. Christie

COASTAL LAW: AN OVERVIEW

During the last two decades, the coasts of the United States have been the focus of increasing attention by scientists, legal scholars, legislatures, developers, and the public. Research on coastal and estuarine systems has established not only the tremendous productivity of these systems and their economic importance, but also their vulnerability, interdependence, and accelerating rate of deterioration. Tourism and coastal development have increased. National legislation has been directed at better management and conservation of the coast, and coastal states have spent the last ten years developing special management plans for their coasts. Why have the coasts been selected for this attention?

In law, the coast has long received unique recognition. The public has special rights of access and navigation in coastal waters. The government owns lands under navigable waters, including the wet sand areas between the low and high tide marks, and holds these lands in trust for the public. This public trust doctrine, traced to Roman times, has been recognized by the Supreme Court as part of United States common law since 1845.

Recreation is an important use of the coast, but the coasts are more than the nation's playground. The nation's largest cities are located on the coasts of the oceans and the Great Lakes. The rate of population growth in coastal areas is almost twice that of the rest of the country: Estimates suggest that by the year 2000 nearly 80 per cent of the United States population will live within 50 miles of the coast. Pollution problems associated with population concentration on the coasts have been aggravated by the filling in of coastal wetlands - natural water cleansing areas - for residential and recreational development. Coastal estuaries are also a favorite site for industry because they provide access to water transportation systems and convenient waste disposal.

The term "coastal zone," which refers to the area where land meets water, was coined by the Commission on Marine Science, Engineering, and Resources. This commission, also known as the Stratton Commission, was created by Congress in 1966 to investigate and make recommendations concerning major issues of United States marine law and policy. The coast was a focal point of the Commission's three-year investigation. The Commission's 1969 final report, The Nation and the Sea, emphasized the importance of the coastal zone to the nation:

The coast of the United States is, in many respects, the Nation's most valuable geographic feature. It is at the juncture of the land and sea that the great part of this Nation's trade and industry takes place. The waters off the shore are among the most biologically productive regions of the Nation.

The Commission found, however, that the value of the coast as a vital natural system and as a focal point for trade and recreation was threatened by increasing population concentration and commercial, recreational, and residential development.

Management and use of the coast has traditionally been a matter of local interest. Indeed, the trend prior to 1970 had been toward the transfer of such functions from state to local governments. The Stratton Commission's report, however, identified the coast as a national resource and concluded that the federal government had a direct responsibility for navigation and commerce in coastal waters and a shared interest in conservation and economic development in coastal areas. The report also recognized that "[r]apidly intensifying use of coastal areas already has outrun the capabilities of local governments to plan their orderly development and to resolve conflicts."

The conclusion of the Stratton Commission that our coasts were in jeopardy was bolstered in 1970 by the Department of Interior's National Estuary Study. The study documented the accelerating rate at which estuaries and coastal wetlands were being destroyed or altered and made recommendations concerning coastal wetland management.

The Stratton Commission report and the National Estuary Study spurred Congress to introduce a series of bills and proposals which culminated in the Coastal Zone Management Act of 1972 (CZMA). The Act enunciated a national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." This policy was not implemented, however, by imposing a federal land and water management scheme on the coastal zone. The Congressional findings stated:

Section 301.(g) The key to effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

The CZMA provides federal funding for states to develop and administer coastal programs according to guidelines set out in the act. State participation is voluntary, and the states are given great flexibility in their approaches to coastal management. Acceptable federal models range from direct state control of land and water use regulation to state review of locally or regionally implemented programs. In addition, the CZMA only generally defines the coastal zone to include the territorial sea and adjacent lands "to the extent necessary to control shorelands, the uses of which have a direct and signifi-

cant impact on the coastal waters." Each state defines the limits of its coastal zone in its management program.

Federal funding for coastal management programs is a traditional incentive for state participation in the process. The CZMA provides, however, an additional incentive for state participation - the so-called federal consistency requirement. Section 307 of the CZMA requires that federal activities directly affecting the coastal zone be consistent with approved state management programs to the maximum extent practicable. States are still in the process of testing the usefulness of the federal consistency requirement in creating a role for the states in federal decision making for activities affecting the coastal zone.

The Washington coastal program was the first to receive federal approval in 1976. Florida's program, approved in 1981, was among the last. All eligible states (as well as Puerto Rico, the Northern Marianas, the Virgin Islands, Guam, and American Samoa) participated in the federal program during the program development period. Only Georgia, Virginia, Ohio, Illinois, Indiana, Minnesota, and Texas do not have federally approved coastal management plans. The degree of participation by the states and the fact that approximately 80 per cent of the United States coast is now governed by coastal management plans indicate successful implementation of the CZMA and, presumably, better management of the coasts. Coastal programs are now, however, at a major turning point.

Most state coastal programs are approaching a crisis in funding that is primarily attributable to an impending loss of federal support. The research, the experts, the public participation, the staffs, and the planning and development of administrative frameworks for state coastal programs have been supported by federal funding of up to 80 per cent of the costs. The legislative history and debate concerning the 1980 amendments to the CZMA indicate, however, that at least some members of Congress intended that federal funding for state coastal programs be limited to the development and initial implementation stages. Even without specific action by Congress to limit CZMA grants, the Reagan administration has drastically cut allocations for the federal coastal management office and state programs. Most states cannot afford to internalize the costs of supporting the programs they have created in their cooperative effort with the federal government. A coastal regulatory framework without the funds or personnel to implement it would waste a decade of effort to improve the quality of the nation's coasts.

* * * *

There is little doubt that Florida is in a unique situation with regard to coastal management. When Florida was admitted to the union, wetlands constituted nearly two-thirds of the state. Even today, there is very little of the state that could not arguably be characterized as "coastal zone." Florida also has a strong economic dependence on the recreational use of its 1200-

mile coastline. More than 75 per cent of Florida's population is now located in the coastal counties, and projections indicate that 82 per cent of the population growth between 1980 and 1990 will be in the coastal area.

The law of Florida's coast has been closely tied to the development policy of the state. Historically, Florida's policy promoted draining and filling coastal and interior wetlands to encourage agriculture and economic development. Today, however, the importance of those areas to water management and storm protection, to commercial and recreational fisheries, and as wildlife habitat is well appreciated and reflected in Florida law. Although Florida has always attempted to attract tourists and residents to its beautiful beaches, there is a growing realization that, unless future growth is better managed, the beaches may be lost. Of greater importance is the possibility of loss of human lives if the natural protection of dunes, wetlands, and barrier islands is destroyed or if development proceeds without consideration of coastal storm hazards or provision for emergency evacuation of coastal inhabitants.

This book presents the development of Florida's coastal law. Because this area of the law is dynamic and reflects evolving state policies, materials from federal law and other states are included for comparison and analysis of alternative approaches to management issues.

Part One provides an introduction to the coast and coastal management. The initial selections explain the nature of coastal ecosystems and the scope and intensity of coastal uses. Further readings discuss the past and future of coastal management and Florida's special management issues.

Part Two traces the development of private and public rights in the coastal areas and wetlands. Historically, the common law is the source of individual rights in navigable waters and the shoreline and has been the basis for much of the regulation of these areas. This section presents the evolution and interpretation of Florida and federal common law of the coast and contrasts Florida law with that of other states.

Part Three examines the legal regulatory framework of coastal management. Intergovernmental relations are, perhaps, the key to effective coastal management. The fragmented management of the coast, with little or no coordinated planning among agencies or levels of government, is often a more significant problem than lack of management. Florida's management strategy of integrating applicable law and coordinating agency action provides a case study in intergovernmental relations.

PART ONE. THE COAST: AN INTRODUCTION

Section 1. COASTAL ECOSYSTEMS AND IMPACT OF COASTAL DEVELOPMENT

Because public understanding of coastal issues and the purposes of the Coastal Zone Management Act was an important step toward development of state coastal programs the federal Office of Coastal Zone Management commissioned the Natural Resources Defense Council to prepare an educational and informational booklet. The publication was intended to increase public awareness of the problems of the coastal zone, explain the federal coastal legislation, and serve as a primer for development of state coastal management plans. The following excerpt provides an excellent introduction to coastal ecosystems and the impact of coastal uses.

Department of Commerce, Who's Minding the Shore? A Citizens' Guide to Coastal Zone Management 21-32 (1976).

COASTAL ECOSYSTEMS

Principles of Ecosystem Management

A coastal ecosystem is a geographical unit comprised of all of the various forms of life and their physical environments in the coastal waters and adjacent shoreland -- each component interacting with the others. It includes the coastal water basin or basins and the coastal watershed or drainage basin adjacent to coastal waters.

It is a basic principle of ecology that the forms of life and physical components in an ecosystem are interdependent; what happens to one affects the others. For example, a decline in the number of fish in an estuary will force the birds that feed on them to move elsewhere. The coastal management program must recognize this interdependence and strive to preserve the natural balance. Otherwise, important resources (which have tremendous economic value) will be lost.

Certain physical processes are extremely important to coastal ecosystems. If one of them is altered, a chain reaction can occur that will disrupt all the species living there. The pattern of water circulation within the basin, together with the volume, pattern, and seasonal rate of fresh water flowing into the sea, are key factors. Also, in coastal waters, the presence of nutrients, the penetration of sunlight, and the temperature of the water are important factors.

The natural circulation of water serves to disperse and dilute pollutants, transport nutrients, and maintain the level of salt concentration in the water to which various species have adjusted. Tides, wind, and rainfall all affect the circulation, but are beyond the control of the management program.

Human activity can disrupt the circulation pattern. For example, if a highway is constructed on a solid causeway in a wetland area, the flow of water between the inland marsh and other coastal waters will be cut off, and the inland side can become a stagnant breeding ground for mosquitos while the other coastal waters lose their main source of nutrients. Plant life may decline, and the fish and birds that depend on the plants may dwindle. What was an attractive, productive resource would become an unproductive nuisance.

Any change in fresh water run-off directly affects circulation. Accordingly, human activities which involve short-cutting the natural drainage pattern -- such as dredging, digging channels, flood control projects, paving, or the removal of vegetation -- will disrupt circulation. After a rain, if fresh water run-off travels, via a canal, for example, into coastal waters too rapidly and is undiluted, the sudden drop in the salt concentration in the water can kill shellfish and other types of coastal life. Water quality will also be adversely affected, as the pollutants and sediment loads are not absorbed or otherwise filtered. Flood control projects, such as levees that keep river waters from spreading into natural flood plains, can also speed run-off and damage coastal environments.

Nutrients are another basic element of every coastal ecosystem. Substances like nitrogen, phosphates, sulfates, carbonates, calcium, sodium, and potassium aid the growth of marine plants and other coastal species. Normally, these are supplied by decayed plant matter and minerals washed down streams into coastal waters. If the inflow of streams is altered, the nutrient level can decline and entire ecosystems can be injured.

It is also possible to have an excess of nutrients. In particular, an excess of nitrogen, contained in sewage and fertilizers, can stimulate too much plant growth in coastal waters. Aquatic plants like algae flourish, and a process called eutrophication soon occurs. Thick growths of algae cut off light to other water plants; as the algae and other plants die, they sink to the bottom where microorganisms decompose them into a layer of silt. The decomposition process requires large amounts of oxygen which the microorganisms draw out of the water. The level of dissolved oxygen soon drops below the level required by fish and other types of aquatic life, and the waters can become dead and stagnant.

Sunlight is another essential factor in the operation of the ecosystem. Through photosynthesis, plants capture and store solar energy. Activities such as dredging stir up silt and increase the turbidity of the waters. The decline in light penetration results in a decline in plant growth.

Temperature is also a factor in maintaining an ecosystem. A reduction in water circulation can raise or lower the water temperature, depending on the season. The discharge of heated water from power plants and industries raises the water temperature. Some species of coastal life are extremely sensitive to temperature changes.

Temperatures greater than 90 degrees F will deplete the populations of most key estuarine animals. Subtropical and tropical waters approach this level during the summer, and even slight additions of heat from man-made sources may push the temperature past the tolerance of marine life. Changes in temperature may also affect aquatic life in other ways. For example, salmon will not spawn if water temperatures are over 55 degrees F.

Vital Natural Areas

A state's coastal zone management program must take into account the physical processes at work in coastal ecosystems to ensure that they are not disrupted. When a state designates geographic areas of particular concern as part of its program, it may identify prime recreational and development areas, but it should also include critical or vital natural areas and ensure that they are adequately protected. These areas include estuaries, wetlands, sand beaches and dunes, coral reefs, shellfish beds, drainage ways, kelp and sea grass beds, tidal flats, barrier islands, and the breeding, nursery, wintering, and migratory areas of wildlife. Below we discuss the functions performed by certain of these vital areas.

Estuaries. One of the most important areas in the coastal zone is the estuary -- defined in the Act as "that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage." Basically, estuaries are the waters at the mouths of coastal streams and rivers.

Estuarine environments are rich because of the abundant mineral and organic nutrients contributed by both the coastal sea waters and fresh water run-off. This richness is aided by tidal and wind mixing that brings nutrients to estuarine habitats. These processes combine with the shallow, sun-bathed nature of the waters and reduced tidal and wave stress to provide ideal conditions for growth of marine plants and animals. The young of many species of fish develop in these waters.

For many of the same reasons that estuaries are productive, they are also vulnerable: because they already have a high level of natural nutrients, they are vulnerable to excess nutrients and the associated problem of eutrophication; because of their shallowness and semiconfined character, pollutants can be trapped in their waters. Indeed, almost 75 percent of the nation's estuaries have already been damaged by dredging or pollution.

Wetlands. Wetlands may be generally defined as those areas between the mean low tide mark and the yearly high storm mark. Because upper wetlands are occasionally flooded, they are naturally vegetated with wet-soil, salt-tolerant plants. They usually take the form of grass meadows or marshes. Lower wetlands -- found in areas between the mean low and high tide marks -- are similar in character. Salt marshes and mangrove forests are examples.

These areas serve many critical functions: they cleanse runoff; they regulate the flow of run-off and silt; they reduce flooding and maintain the navigability of waterways; they take up and store basic nutrients; and they provide essential food and shelter for coastal fish and wildlife. The vitality of these areas depends upon the quantity and quality of the fresh water flowing into them. To function optimally, they must not be overloaded with contaminants, nor have their drainage patterns disrupted by dredging or development.

Sandy Beaches and Dune Systems. These constitute a buffer between the open ocean and the shorelands. The drifting waves of sand, anchored in place only by a fragile plant community of rapid-growing grasses, protect inland areas from storms and provide a source of sand to replace that lost in erosion. Dunes are important because they are able to shift and thereby absorb storm waves. Construction on beaches or dunes interferes with and often destroys the delicate pattern that maintains the dune system. It destroys the grasses and allows winds to blow dune sands away, or it interrupts currents that bring more sand. The inevitable result is erosion, flooding, and destruction. Dunes should not be altered in any way. They should be designated for complete preservation.

Barrier Islands. Similar considerations apply to barrier islands such as those off the Atlantic and Gulf coasts. These islands serve as important buffers against the open ocean, providing the shoreland's frontal defense against storms. They also have important tidelands on their inland side. The preservation of barrier islands depends on protection of their dune systems.

* * *

LAND AND WATER USES IN THE COASTAL ZONE

The coastal management programs must resolve the often competing demands placed on coastal resources by a wide variety of uses, activities, and developments. This chapter will discuss some of the most common uses of the coastal zone and identify the ecological and other considerations that citizens should urge their states to take into account in setting priorities of uses and establishing controls on coastal development. A more extensive discussion of these can be found in John Clark's book, Coastal Ecosystems.

Recreation. Recreation is the most direct use that most of us make of the coastal zone. The average time spent per capita in recreation on the coast is 10 days per year. Much of this time is spent vacationing on the sandy beaches of Florida or southern California, or the coastal headlands of Oregon, as examples. Sport fishing, another major form of coastal recreation, attracts over 9.5 million salt water anglers annually, and amounts to a billion-dollar-a-year business. Hunting, surfing, boating, skindiving, and nature studies are other popular coastal activities.

But the alarming fact is that while the demand for public recreation has been increasing, the opportunities have been declining. Only two per cent of the coastline is now available for public recreation, and many of the finest and most accessible areas are rapidly being walled off by private development. Recreational uses should be a high priority of concern in the planning process. States should be urged to consider the acquisition of property, developer exactions, and other techniques for protecting and enhancing public recreational opportunities.

At the same time, management programs should recognize that excessive recreational use may damage certain fragile coastal resources. The organisms in tidepools may be depleted by collectors, or fish and wildlife populations may suffer from excessive fishing and hunting. Marshes and dunes may be damaged by too much foot traffic. The management program should tailor recreational use to the carrying capacity of the area.

Finally, certain types of recreational uses may unduly limit the variety of recreational experiences or the people who can enjoy them. Large-scale beach front hotel or condominium developments may limit access to a privileged few in an area which should be available to all and for a variety of uses.

Agriculture. Many coastal regions are prime agricultural areas. This is due in part to the fact that rivers and streams have left rich soil deposits along their deltas. In addition, along the Pacific coast, the climate is particularly well suited for certain crops such as artichokes. However, due to competition from subdivisions, industry and other uses, substantial amounts of agricultural land have been lost. This acreage is not replaceable, and the coastal programs should take care to conserve it.

Besides being an important economic use, agriculture, if properly controlled, is a desirable use of the coastal zone from an environmental perspective. It preserves open space and does not present the danger of property damage and loss of life from flooding that more intensive types of development do.

Uncontrolled agricultural use can have serious adverse affects on the coastal zone, however. Run-off can contaminate coastal waters. Indeed, crop lands account for almost two billion tons of the sediment washed into public waters each year, four times as much as the next major source. Farm run-off also frequently contains pesticides, fertilizers, and animal wastes, causing eutrophication and pollution.

To prevent damage to coastal ecosystems, shoreline farms --

--should not alter the natural drainage system that cleans run-off of contaminants;

--should contain buffer areas to allow natural treatment of run-off;

--should use short-lived biodegradable pesticides instead of "hard" chemicals like heptachlor and chlordane;

- should use methods of cultivation that minimize erosion;
- and
- should collect and treat large concentrations of animal wastes.

Commercial Fisheries. Commercial fishing is a billion-dollar-a-year business. The harvesting, processing, and marketing of coastal fish is a major economic activity, particularly in certain regions of the country. The shrimp industry is a major component of the coastal economies of the South Atlantic and Gulf states; oysters and clams are important to the Chesapeake Bay region; and salmon is of critical importance to the Pacific Coast. The harvest of menhaden, a fish used extensively for animal feed and industrial purposes, has made major contributions to the Chesapeake Bay, Atlantic, and Gulf regions. All of these fish species are in some way linked to coastal waters.

Disruption of the natural ecosystems by the filling of wetlands or pollution of coastal waters can directly threaten fisheries. For example, clams and oysters feed by filtering water through their bodies. Bacteria, pesticides, and toxic metals present in coastal waters are trapped and concentrated in their tissues; and people or animals who eat them can be exposed to dangerous concentrations of harmful substances. Because of pollution, millions of acres of estuarine shellfish beds have been closed to harvesting. If management programs adequately control pollution discharges, protect vital areas like breeding and nursery grounds, and prevent over-fishing, this acreage can be returned to production, and many species now dwindling in numbers can rebound to their former abundance.

Shipping. Always a major use of the coastal zone because of the location of ports and vessel traffic through coastal waters, shipping today is experiencing several transformations that have major implications for coastal areas. Foreign and domestic shipping moves well over a billion tons of material a year.

An increasing share of this tonnage is petroleum. Oil spills, which appear to be an inevitable by-product of petroleum transport, have major deleterious effects on coastal ecosystems. In addition to their direct toxic effects on birds and fish, they can disrupt physiological and reproduction processes in a variety of species. At present, there are no adequate means to prevent, police, or clean up oil spills. Nonetheless, management programs should strive to reduce spills and their impacts to a minimum.

An associated trend in the shipping industry is the increased size of tankers. Their average size is expected to double between 1970 and 1980; at the same time, their maximum draft will increase from 70 to 100 feet. Few ports will be able to handle supertankers unless harbors are dredged. Dredging channels and filling wetlands with the spoils have already caused significant damage to estuaries. Between 1950 and 1969, over 500,000 acres of estuarine habitat were lost through dredging and filling. According to Clark, "dredging activity is the greatest single threat to coastal waters."

Dredge and fill activities can create short- and long-term changes in circulation and salinity by altering water flows. Sediments from the operations add to turbidity. Dredging can also stir up deposits of pollutants from the bottom and decrease the oxygen in coastal waters. In addition, plant and animal life such as shellfish are directly destroyed by dredging and spoil disposal operations.

To avoid destruction of critical habitat, navigation channels through coastal waters should be located so as to avoid vital areas -- wetlands, shellfish beds, grass beds, etc. The channels should also be dredged no deeper than is necessary for safe passage of ships. Dredged spoil should not be disposed of in areas of environmental concern. Rather, the spoil should be hauled inland or to an ocean site far from inlets and vital areas.

Another trend in water-borne commerce is toward "containerization" -- where cargo is shipped together in enormous crates rather than by individual item. Unlike supertankers, containerization has comparatively little impact on existing depths of channels and docking areas. The major impacts are likely to be felt onshore over a wide area, including the Great Lakes region, through an increased demand for expanded shoreline storage and handling areas. Expansion should be directed away from critical environmental areas. The filling of wetlands for such purposes should be particularly discouraged. To the greatest extent possible, the creation of impervious surfaces, in the construction of storage areas, should be limited and the natural drainage maintained.

Industrial Use. Fifty percent of the manufacturing facilities in the United States are located in the coastal zone. Some industries are sited on waterfronts of necessity, because of a need for access to water transportation or cooling water. Most, however, do not require waterfront locations. They are there because of the low cost of coastal lowlands, easy access to markets, or the inexpensive site for waste disposal afforded by coastal waters. Wetlands are frequently filled to provide waterside locations for industry, thus cutting into estuarine and coastal productivity. In addition, the continued siting of industry in the coastal zone results in impacts from extensive secondary development, the generation of pollution, and waste water and heat.

The pollutants and waste water from industry frequently endanger aquatic organisms and water quality. The threat varies from industry to industry. For example, the pollutants associated with paper and allied industries include nitrogen, phosphorous, oil, grease, and other chemical effluents. Petroleum refining results in the significant discharge of phosphorus, heated water, heavy metals, cyanide, sulfides, oil, and grease.

The effects of these pollutants can be curbed by the application of effluent control technology. The Federal Water

Pollution Control Act Amendments of 1972, which are to be implemented in each state management program, set as a national goal the elimination of all industrial discharges by 1985. Management programs should contain standards to meet the strict requirements of that Act.

In addition, all new industrial development should be directed away from vital natural areas or other areas of environmental concern on the coast. Industries which are not "coastal-dependent" should be required to site their facilities inland.

Mining. Extractive industries mine an array of ocean resources, including oil, natural gas, phosphate, sand, metals, and biological resources, such as oyster shell. Many of these activities take place within shallow coastal waters; others operate in deeper waters on the outer continental shelf. Offshore petroleum and natural gas production has the greatest impact on the coastal zone among these activities. This topic is discussed in the next chapter.

Of the other extractive operations, the most significant are sand and shell dredging, salt evaporation, and phosphate strip mining, all of which take place in shallow, nearshore waters. About 100 million tons of sand and gravel, 10 percent of the national total, are mined annually from submerged coastal beds. Oyster shell, used for cement, poultry grit, and other products, is one of the principal minerals mined in estuaries. Its production from beds in San Francisco Bay and along the South Atlantic and Gulf coasts is valued at \$50 million annually. Close to \$400 million worth of chemicals or chemically-related materials such as salt or magnesium compounds are processed from sea water each year. Significant quantities of phosphate are mined for fertilizer.

The problems produced in the coastal zone by these latter industries vary. Removal of sand, gravel, and shells from coastal waters damages valuable spawning, nursery and feeding sites for fish, increases turbidity and destroys essential bottom life. Shoreline mining can undercut beaches and cause erosion. Some extraction facilities discharge brines containing concentrations of copper, zinc, and other materials harmful to aquatic life.

Because of these problems, other sources for minerals should be explored before mining takes place in the coastal zone. It should be prohibited in particularly sensitive or fragile areas. Where mining occurs, it should be carefully regulated. The preferred course would be to require reclamation of mining areas and to set standards to control discharges and spoils disposal.

Power Plants. Coastal sites are often chosen for power plants because marshland prices are low, water for cooling is abundant, and no large population centers are nearby. However, during both their construction and operation phases, these facilities pose significant problems for coastal ecosystems.

Construction of the plant itself may destroy important estuarine habitat and generate run-off and sedimentation in adjoining waters.

Graver problems, however, are associated with open cooling systems. Plants fitted with this type of system draw water through the plant and discharge it 10 degrees to 34 degrees F hotter than it was when it came in. The thermal discharge can disrupt an ecosystem for a distance of 35 miles. Grass beds may be damaged, and the behavior patterns of those marine species that are keyed to specific temperature levels can be disrupted. In addition, the dredging necessary for the intake and discharge pipelines increases turbidity and produces the other environmental impacts associated with channel dredging or mining in coastal waters.

The greatest problem from [an] open cooling system is the impingement and entrainment of fish. Multitudes of aquatic forms are drawn in with the cooling water and either killed against the screens that protect the intake pump (impingement), or, for those organisms too small to be screened out, exposed to extremes of heat, turbulence, and abrasion on passage through the plant (entrainment). Up to 30 percent or more of an annual brood of estuarine-spawning fish can be killed by the operation of a 1,000 megawatt plant located in a semi-enclosed ecosystem or breeding area, like the Indian Point plant on the Hudson River. A million fish are killed on the screens of this plant each winter.

To prevent serious damage to coastal ecosystems, the following considerations should be applied to power plant sitings:

- Plants should not be located in vital natural areas of the coast;

- Closed cooling systems which recycle water through a cooling tower or spray canal should be required, particularly for all plants sited on estuaries; and

- Safeguards should be employed in the design and location of any open cycle cooling system already in existence to minimize their impacts on coastal species.

The uses and developments discussed above and in the next chapter do not constitute an exhaustive list. Citizens should work to ensure that coastal zone management programs are based upon a thorough evaluation of every use which deserves protection or is likely to have a significant impact on the coastal zone.

OFFSHORE OIL AND SUBURBAN SPRAWL

While the emphasis given to any particular issue will vary greatly from state to state, two broad topics in particular will require comprehensive, thorough treatment in almost every state's coastal zone management program -- industrial and energy developments and suburban sprawl.

A complete analysis of these issues is beyond the scope of this handbook. Energy and industrial developments will have a tendency to be located in the coastal zone, because of required access to water transport, or for cooling water. To exemplify the potential impacts from these kinds of developments, we have chosen the offshore oil drilling program on the Outer Continental Shelf. This program will have a broad range of impacts in the coastal zone, many of which are typical of industrial and energy development activities.

* * *

The "energy crisis" has also greatly increased pressures for deepwater ports in the coastal zone to handle supertankers transporting imported oil and for nuclear and fossil fuel electric power plants on the coast, among other things.

* * *

In a similar vein, the causes and potential solutions of suburban sprawl are too complex to be dealt with extensively in this handbook. We discuss only the immediate outcropping of the problem in proposals for new subdivisions and the build-out of existing lots. One cannot ignore, however, the impetus to such development created by the deterioration of inner cities, the construction of highways and other public facilities, energy developments, and our tax laws. In many instances, the changes required may be too far-reaching to be dealt with handily in the management program, but the recognition of the magnitude of the problem should begin there.

Coastal Impacts of Offshore Oil Drilling

In 1974, the President proposed that an additional 10 million acres per year of the Outer Continental Shelf be leased to oil companies for the discovery and production of oil. Under this accelerated leasing program, the United States Department of the Interior plans to lease vast tracts, not only in regions where offshore oil production already exists, but also in so-called "frontier" areas off the Atlantic and Alaskan coasts.

Many coastal states have urged the federal government to defer these lease sales until the states have an opportunity to consider and plan for the impact of offshore oil production in their coastal zone programs. Nevertheless, the leasing program is proceeding. Congress has authorized \$3,000,000 for fiscal years 1975 and 1976 in addition to that provided in the original CZMA, to be used specifically for planning for the impacts resulting from the leasing program.

Whatever happens on these fronts, it is clear that the impact of offshore oil developments should be a prime concern of the coastal zone planning in all affected states. Moreover, the

impacts of the OCS program will cross state boundaries -- particularly in the Atlantic states -- and the states must jointly plan for the areas which may be significantly affected by the program.

The impacts from OCS development are both environmental and socio-economic. Oil pollution is, of course, a major issue raised by offshore oil drilling. Massive oil spills are clearly the most dramatic incidents associated with offshore drilling in the public mind. But little noticed leaks from pipelines and platforms are more constant and may have a more devastating effect on the marine environment in the coastal zone. Therefore, some contamination of coastal waters appears inevitable -- even if no large spills occur.

Too little is known about the effect of oil contamination on aquatic life. It varies with the marine environment and the species affected. Shellfish have been repeatedly proven to be the most susceptible of marine organisms to oil contamination. In coastal areas which support substantial commercial and sport fisheries, particular attention should be devoted to the potential impact of oil contamination, and efforts should be made to prevent leasing of tracts if fisheries would be unduly threatened.

Transporting the oil to shore requires facilities which also impact the environment. Pipelines are one of the proposed means to bring oil and gas onshore from the offshore rigs. The construction of pipelines disrupts the habitat of ocean bottom organisms. If pipelines are laid across wetlands, they may disturb grass flats and marshes and disrupt water circulation patterns. In addition, their presence may impair the desirability of heavily used recreation beaches or residential areas. The management program should contain specific recommendations concerning the routing of pipelines and the siting of pipeline terminals and their construction, maintenance, and design in order to mitigate environmental damage.

Additional tanker terminals may be required in conjunction with increased offshore drilling in order to transport crude oil from areas not served by pipelines. In addition to the impact of the terminal itself, channels may have to be dredged to accommodate the tankers. This activity has a significant adverse impact on the fisheries and benthic organisms of estuaries. Dredging also requires substantial spoil disposal sites. A state's management program should identify areas which would suffer the least impact from dredging and from the siting of tanker terminals. The subsequent program should contain the necessary teeth to restrict tanker terminals to the identified locations.

Citizens should urge that their states develop policies which require that oil companies and all energy and industrial developers employ the best available technologies and construction and operational practices -- to the extent the state has authority over the matter. Concrete platforms, a new technique, are one example of developing technology. They must be fabricated in sites of deep water with accompanying onshore acreage. If the water at the fabrication site is not naturally quite deep, a large amount of dredging will occur. In addition,

if platforms are constructed of concrete (as opposed to steel), as much as 100,000 tons of sand and gravel may be required for one platform; and in turn, large surface mining operations may be necessary to obtain the necessary sand and gravel. If this is planned, companies should be required to undertake accompanying reclamation programs.

Of equal or perhaps greater significance are the onshore growth and development which will result from the OCS leasing program. In rural areas, in particular, the growth may be enormous and may severely strain services and facilities which are not prepared for it. A substantial work force may be required for the construction and operation of the necessary facilities, including the drilling rigs, tank farms, harbors, pipelines, and supply bases. Additional development and population growth will occur in order to provide food, housing, transportation, and entertainment for this work force.

* * *

It is apparent that in many areas, development associated with offshore drilling will be of such a size as to require regional or statewide supervision, since the local planning bodies will often have difficulty in supervising and processing development applications.

* * *

To conclude, OCS development is one example of industrial development located in the coastal zone. The coastal zone management programs must evaluate the potential impacts from these developments, and include procedures to mitigate the impacts resulting from the industrial facilities themselves, as well as the secondary impacts of those facilities.

Residential Subdivisions In the Coastal Zone

Unlike offshore oil production, residential development is not water-dependent. It may frequently be enhanced by a coastal location, at least in the short term. Coastal subdivisions offer natural amenities, recreational opportunities, and access to urban centers. But the adverse impact of such development along the coast often outweighs its benefits in the long term.

The pressure for residential development is particularly acute in the coastal zone. Over half of the population lives within fifty miles of the coast, and the growth rate in coastal areas is three times the national average. Citizens should, therefore, be aware of the problems that uncontrolled subdivision development can pose, and they should make sure that their state's management program addresses these problems.

At a time when energy consumption and the costs of government are leading popular concerns, the traditional subdivision makes a poor showing. A federal study reveals that the total investment costs, borne ultimately by occupants and taxpayers, are 44 percent less for a high-density planned community than for low density sprawl. Sprawling subdivisions impose higher municipal costs for roads and utility services, and they consume more energy for heating and transportation -- up to 44 percent more than high-density developments.

In turn, coastal subdivisions may induce additional

development. Stores move in to be close to their customers. Roads get widened, extra utility services are provided, and further development becomes easier. Once the momentum for suburbanization has begun, it is difficult to stop.

Coastal residential development creates other problems as well. It may obstruct scenic vistas or wall off access to publicly-owned beaches. Heavy use of local roads by coastal residents can also jam traffic and make it more difficult for non-residents to enjoy the coastal environment.

The grading, paving, and removal of vegetation that accompany development are in themselves cause for concern. They may decrease the capacity of the land to absorb rain water. The result may be faster and larger run-off, increased sedimentation and turbidity, and higher flood peaks in streams; erosion along stream channels and on bluffs; and a lowering of the ground water table. Sedimentation can choke stream beds and estuaries and may contain toxic chemicals. Construction of housing and the facilities that accompany it, such as roads, bridges, piers, and jetties, can have adverse effects on dunes and beaches by increasing or exacerbating beach and shore erosion. They can also displace wildlife and destroy important breeding areas of fish and waterfowl.

If subdivisions are sited in rural coastal areas -- particularly "second-home" developments -- the provision of adequate sewage disposal and water supplies may prove difficult. Septic tank systems, for example, have a limited life expectancy, even if installed under optimal circumstances and regularly maintained. Often neither condition is met, and there are dangers of wastes being leached through the soil, contaminating ground water or coastal waters. In addition, if a coastal subdivision uses individual wells for its water supply, it may overdraw the supply of ground water and draw salt water into the underground aquifer or change local stream flow to the detriment of fish and vegetation.

* * *

Although many states today have some type of law that attempts to regulate subdivisions, too often these statutory schemes have provided inadequate safeguards against the abuses of poor development. Concepts such as planned unit development, clustered housing, development rights transfer, phased development, developer exactions, and other innovative improvements in subdivision regulations should be considered as devices to reduce the costs and impact of residential sprawl in the coastal zone.

In addition, local planning officials often lack access to the sophisticated techniques and larger perspective necessary to assess properly the potential impacts of a large subdivision project.

* * *

[S]tates should not overlook the problems which may be created by subdivisions that already have been approved under pre-existing law and are partially developed. In these instances, the developer may have already spent substantial sums for roads and infrastructure, and individual lot purchasers may intend to construct homes in the near future. Halting such

development is a harsh step. But if the project is particularly ill-conceived, the problems should be dealt with now rather than allowing unnecessary environmental damage to occur. In this way lot owners will also be spared unnecessary future costs that may be required to remedy the problems.

In a partially developed project, it may be possible to force the developer to resubdivide the lots it still holds in a less damaging manner. The development might, for example, be clustered with some land left open for scenic vistas and public access to beaches. An alternative approach in particularly egregious situations would be for the state to acquire the undeveloped property, replan the area, and retain or sell the property as replanned.

Finally, states must come to grips with the so-called problem of "incrementalism." It often happens that a local land use agency will be presented with a proposal from a small land holder to develop his or her property into a higher intensity use or subdivide it into three or four parcels. Subdivision statutes typically exempt such developments, and they are often approved because the problems which they create may be minimal when considered individually.

At the next agency meeting, the neighbors are there with proposals to do the same thing with their properties. Since the local officials are understandably reluctant to deny similarly situated owners equal rights to develop, the neighbors' projects are approved, and then their neighbors' projects. And so on, until an entire area has been "urbanized" by increments, while no one ever took an overall look at the desirability of the change. The resulting development may be a hodgepodge of problems -- inadequate roads, sewage problems, a shortage of schools and other facilities.

The problem of incrementalism arises in urban areas as well as in rural areas. In Redondo Beach, California, for example, the state's coastal commission routinely approved numerous multi-story buildings one at a time. When confronted with a later aerial photograph of the area, the chairperson of the commission exclaimed: "We suddenly realized that we were planning another Miami Beach."

If properly prepared, the state's coastal zone program should anticipate the effects of build-out in areas where development pressures may be more intense, and impose restrictions accordingly. The program could impose restrictions on the density of development in rural or largely undeveloped areas and encourage high-density development in appropriate areas.

If this task cannot be completed in the time allotted for initial coastal planning, then environmental impact reports could provide a means for judging the cumulative effects of development in the context of particular development proposals. Regulations governing the preparation of federal and most state impact reports require that the cumulative effects of a series of likely developments be carefully considered. If a state adopted a similar requirement for developments in the coastal zone, decision-makers could be more far-sighted in their review of these developments.

Section 2. FEDERAL COASTAL ZONE MANAGEMENT

The Coastal Zone Management Act of 1972, S. Rep. No. 753, 92d Cong., 2d Sess. 1488, reprinted in 1972 U.S. Code Cong. & Ad. News 4776-81.

Purpose

[The Coastal Zone Management Act] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. The bill authorizes Federal grants-in-aid to coastal states to develop coastal zone management programs. Additionally, it authorizes grants to help coastal states implement these management programs once approved, and States would be aided in the acquisition and operation of estuarine sanctuaries. Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.

Need for New Legislation

The United States is currently experiencing in its coastal zones a phenomenon prevalent in most coastal nations in the world. This phenomenon is well expressed in the recent report, "Man in the Living Environment":

About 70% of the earth's population lives within an easy day's travel of the coast, and many of the rest live on the lower reaches of rivers which empty into estuaries. Furthermore, coastal populations are increasing more rapidly than those of the continental interiors.

* * * * *

Settlement and industrialization of the coastal zone has already led to extensive degradation of highly productive estuaries and marshlands. For example, in the period 1922-1954 over one-quarter of the salt marshes in the U.S.A. were destroyed by filling, diking, draining or by constructing walls along the seaward marsh edge. In the following 10 years a further 10% of the remaining salt marsh between

Maine and Delaware was destroyed. On the west coast of the U.S.A. the rate of destruction is almost certainly much greater, for the marsh areas and the estuaries are much smaller. ("Man in the Living Environment", Report of the Workshop in Global Ecological Problems, The Institute of Ecology, 1971, at p. 244).

The problems of the coastal zone are characterized by burgeoning populations congregating in ever larger urban systems, creating growing demands for commercial, residential, recreational, and other development, often at the expense of natural values that include some of the most productive areas found anywhere on earth. Already 53% of the population of the United States, some 106,000,000 people, lives within those cities and counties within 50 miles of the coasts of the Atlantic and Pacific Oceans, the Gulf of Mexico, and the Great Lakes. Some estimates project that by the year 2,000, 80% of our population may live in the same area, perhaps 225,000,000 people.

The space available for that increased population will not change significantly in the next thirty years. The demand for that limited space will increase dramatically. But here are only 88,600 miles of shoreline on our Atlantic, Pacific and Arctic coastlines, and another 11,000 miles of lakefront on the Great Lakes. And with that population will come increased demand for recreation. Over 30,000,000 people now turn to the coasts annually for swimming; 40,000,000 are projected by 1976. Sport fishing absorbs the interest of 11,000,000 people today in coastal areas; 16,000,000 are estimated by 1976. Pleasure boating today engages over 10,000,000; by 1975 this will be 14,000,000. By 1975 our park and recreation areas will be visited by twice as many as they are today; and by the year 2000, perhaps a tenfold increase.

Seventy percent of the present United States commercial fishing takes place in coastal waters. Coastal and estuarine waters and marshlands provide the nutrients, nursing areas, and spawning grounds for two-thirds of the world's entire fisheries harvest. And these areas may be even more important for aquaculture in the future, for they are among the most productive regions of the world. Most estuarine areas equal or double the production rates of the best upland agricultural areas; from 15-30 times the productivity of the open oceans.

* * *

[R]ecently the National Governor's Conference adopted a strong policy on coastal zone management, stating in part:

The coastal zone presents one of the most perplexing environmental management challenges. The thirty-one States which border on the oceans and the Great Lakes contain seventy-five percent of our

Nation's population. The pressures of population and economic development threaten to overwhelm the balanced and best use of the invaluable and irreplaceable coastal resources in natural, economic and aesthetic terms.

To resolve these pressures....an administrative and legal framework must be developed to promote balance among coastal activities based on scientific, economic, and social considerations. This would entail mediating the differences between conflicting uses and overlapping political jurisdiction.

* * * * *

The ultimate success of a coastal management program will depend on the effective cooperation of federal, state, regional, and local agencies****. ("Policy Positions of the National Governors' Conference, September 1971, at p.34).

* * *

The fact is that the waters and narrow strip of land within the coastal zone is where the most critical demands, needs and problems presently exist. These demands will grow even more critical in the years ahead. There is an ever increasing commercial and recreational demand for utilization of wetlands, beaches and other prime areas in the coastal zone. As a result many of the biological organisms in the coastal zone are in extreme danger. These organisms are important, not only economically, but aesthetically, ecologically and scientifically as well. Man's utilization of the coastal zone may have a profound impact on our future well being. The Vice-Chairman of the National Advisory Committee on Oceans and Atmosphere, Dr. William Hargis, has stated:

"The coastal zone is the 'key' or gate to the oceans. Effective management in the coastal zone almost automatically assures control over quality of ocean environment and quality of resources." Dr. Hargis, who is also Director of the Virginia Institute of Marine Sciences and chairman of the Coastal States Organization of the Council of State Governments, made that comment during hearings by the Committee on Commerce (Coastal Zone Management, Serial No. 92-15 at page 262).

The coastal zone also represents a sharp contrast with general land utilization when viewed from a social aspect. Most people in the United States either live near the coast or on the coast and many of them are directly involved in this contest between public and private interests. Because of global

transportation patterns and the availability of population, most of our great commercial land industrial development is taking place in or near the coastal zone. Additionally, the coastal zone is a politically complex area, involving local, state, regional, national and international political interests.

At present, local governments do possess considerable authority in the coastal zone. However, frequently their jurisdiction does not extend far enough to deal fully and effectively with the land and water problems of that zone. Additionally, there have been numerous examples of commercial development within the coastal zone taking precedent over protection of the land and waters in the coastal zone. There has been an understandable need to create revenues to provide governmental services demanded by a growing population, thus creating pressures for commercial, residential and other economic development. Local government does have continuing authority and responsibility in the coastal zone. Local government needs financial, planning, political, and other assistance to avert damage to natural values in the coastal zone. Whenever local government has taken the initiative to prepare commercial plans and programs which fulfill the requirements of the Federal and coastal state zone management legislation, such local plans and programs should be allowed to continue to function under the state management program.

Until recently, local government has exercised most of the States' power to regulate land and water uses. But in the last few years a transition has been taking place, particularly as the States and the people have more clearly recognized the need for better management of the coastal zone. There have been many problems arising from the failure of the State and local governments to deal adequately with the pressures which call for economic development within the coastal zone at the expense of other values.

Some States have taken strong action. Hawaii undertook the first and most far reaching reform of land use regulation in 1961, placing statewide zoning power in its State Land Use Commission. The entire State is divided into four zones, urban, rural, agricultural and conservation. County agencies have considerable authority to delineate allowable uses within the boundaries of some zones subject to the general regulation of the Commission. The Commission has no enforcement arm of its own. Enforcement of use restrictions in all zones remains with the counties. Hawaii's action however is predominately [sic] land related and full consideration must be given to its surrounding marine environment. Similar situations exist in other states which have attempted to manage utilization of their land and shore areas. The American Law Institute has estimated that at least 90% of the current land use decisions being made by local governments have no major effects on state or national interests. Local governments should maintain control over a great majority of matters which are only of local concern. The range of

problems that arise in the coastal zone, however, often calls for wider jurisdictional range.

It is the intent of the Committee to recognize the need for expanding state participation in the control of land and water use decisions in the coastal zone. However, the State is directed to draw on local, regional, state, federal and private interests in the planning and management process. The States may delegate to local governments, areawide agencies, or interstate agencies some or all of the management responsibilities under this Act. The Committee has adopted the States as the focal point for developing comprehensive plans and implementing management programs for the coastal zone. It is believed that the States do have the resources, administrative machinery enforcement powers, and constitutional authority on which to build a sound coastal zone management program. However, there may be instances where a city or group of local municipalities, or areawide agencies of interstate agencies may contain sufficient resources to be delegated this authority by the coastal State with the approval of the Secretary.

Coastal zone management must be considered in terms of the two distinct but related regimes of land and water. The law of land use management is highly developed. But, as to economic development and preservation of open space and other environment and conservation interests, management of underwater lands and their related waters is a much less developed area of law. But it is one in which the States have considerable constitutional authority. The proposed Act provides methods by which the state may comply with the provisions of this legislation, varying in degrees of state involvement and control. The several coastal States need assistance in assuming responsibility for management of the coastal zone. This bill is designed to provide just this kind of assistance. The Committee hopes that the States will move forthrightly to find a workable method for state, local, regional, federal and public involvement in regulation of nonfederal land and water use within the coastal zone. In light of the competing demands and the urgent need to protect our coastal zone, the existing institutional framework is too diffuse in focus, neglected in importance and inadequate in the regulatory authority needed to do the job. The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the various alternatives. The aim of this legislation is to assist in this very critical goal.

* * *

The Coastal Zone Management Act like the National Environmental Policy Act, the Clean Air Act and the Clean Water Act was the product of the "environmental decade," beginning in the early 1960s. The following excerpt illustrates how recent changes in governmental policy have affected the philosophy of environmental regulation and may be endangering the effectiveness and even the existence of coastal management programs.

Belsky, Book Review, 11 Coastal Zone Mgmt J. 249, 252-3 (1983) (reviewing R.G. Hildreth & R.W. Johnson, Ocean and Coastal Law (1983)).

* * *

Until recently, the environmental focus of ocean and coastal laws and policies was a given. The burden of proof was on the developer, the fisherman, the oil company, or the waste disposer to demonstrate that the activity was safe and, to be specific, not environmentally harmful.

This has now changed. Through a series of policy pronouncements, litigation tactics, regulatory changes, and proposed statutory amendments, the federal government is attempting to change this burden of proof. Activity is now to be permissible unless it can be shown to be environmentally harmful. Moreover, satisfying this burden of proof has been made more difficult. Less money and other resources are being made available to answer the scientific questions so the risk can be demonstrated in any cost-benefit analysis.

Two other recent changes in federal policy will also affect the field of ocean and coastal law. The "new federalism" assumes a continuing responsibility by government for management and protection. However, those responsibilities are to be transferred from the federal bureaucracy to the state bureaucracy....

* * *

With recent developments, however, there is some question as to whether state programs will continue. Many states have indicated that the proposed elimination of federal funding or the transfer of funding to more general block grants will mean the end of their programs. Others have indicated that they will have to be scaled back. What will this mean?

Finally, the Reagan Administration has been promoting increased reliance on the private sector to manage and pay for its own activities. Responsibility for research and information, for example, on the geohazards effect of offshore drilling is now to be the responsibility of the oil companies. Similarly, more discretion is to be given to fishermen to manage the fisheries themselves, in the belief that they will act to protect their own "marketplace." Government is to become more cost conscious and necessary services might have to be paid for by assessments against users. How will such policy changes affect ocean and coastal law?

* * *

Section 3. FLORIDA'S COASTAL ZONE

The Citizen Advisory Committee on Florida's Coastal Resources Management, The Water's Edge, A Guide to Florida's Coastal Management Program 7-9, 17-24 (1983).

ISSUES OF SPECIAL FOCUS

Florida's Coastal Management Program is built around ten primary issues which provide a focus for the future direction of the program. The issues are identified within three broad areas -- resource protection, coastal development, and coastal storms.

Resource Protection Issues

Coral Reefs. South and west of the Florida peninsula lies the Florida Reef Tract, the most extensive living coral reef system in the continental United States. This coral ecosystem is not only beautiful but functional as well. The reefs help cement the foundation of the Florida Keys, form a critical breakwater to lessen the impact of coastal storms, and provide a primary source of sand for Florida's glistening beaches.

Coral reefs are a phenomenon of the tropics. The Florida Reef Tract is at the northernmost limit for reefs, which means that it is constantly under natural stresses, such as the influx of cold water. The effects of additional external stresses are poorly known. The heavy commercial and recreational use of the reefs, their proximity to the dense population centers of south Florida, and man's shoreline activities are all factors which make the coral reefs highly vulnerable.

Some problems and issues concerning this fragile reef community have recently been identified. The issues illustrate the jurisdictional and scientific complexities involved in any attempt to regulate and manage coral reefs. Some of the environmental concerns include dredge and fill activities, channelization, land development, water pollution, diving, fishing, anchoring and boat groundings, and oil tanker traffic, all of which can adversely affect coral reefs.

* * *

Estuaries. The most productive coastal area is the estuary, a semi-enclosed water body with an open connection to the sea. An estuarine ecosystem includes not only the coastal water basin but also the adjacent shorelands and water flowing into the estuary. The estuary is a zone of transition between freshwater and saltwater systems and an important nursery for numerous marine animals. Historically, estuaries have fostered many important commercial and recreational activities, such as ports, marinas, and commercial and recreational fisheries. Balancing the diverse environmental, economic, and social interests in estuarine areas is essential to coastal management.

While people benefit from estuaries, the use of these areas often brings changes. Development in and around estuaries usually requires dredging and filling, which disturbs the water storage and purifying capability of vegetated wetland and damages the estuary.

Changes in the quality, quantity, and timing of freshwater flow into estuaries are also problems. Pollutants from stormwater runoff, aerial spraying, and sewage outfalls, for example, are washed into estuarine waters, degrading the water quality. Development often causes changes in the natural water flow patterns. In order to drain areas for development, a channel is often built to divert excess water, causing an increase in freshwater flow which changes the salinity patterns and adversely affects estuarine plants and animals.

A number of issues are addressed by the program in order to provide a balanced approach to using and protecting estuarine areas. For example, the program is assisting the development of administrative rules and cooperative management programs for state owned submerged lands and aquatic preserves, and working to improve the consistency of the decision-making process among the various state management and regulatory programs. The Coastal Management Program also helps to establish rules to define flow rates on major river systems and to improve the Department of Environmental Regulation's water quality monitoring and enforcement programs in estuarine areas.

Florida also uses new techniques and approaches to manage critical estuarine areas such as the "Geographic Areas of Special Concern" program, which assists the Conservation and Recreation Lands Program (CARL) in its efforts to purchase important estuarine areas.

Research provides the information essential to developing management and regulatory approaches. The Coastal Management Program helps to improve the coordination between research and decision-making by improving coordination between programs.

Barrier Islands. A dominant geographic feature along much of Florida's coastline is the barrier island. Shaped by wind, waves, and tidal action, barrier islands often occur in long chains, separated from the mainland by estuaries and saltwater wetlands.

Barrier islands form the first line of defense for the mainland against coastal storms. This protection also encourages the development of low-energy tidal wetlands and marshes, while the semi-enclosed lagoons behind the islands create estuaries. The barrier islands are a unique microsystem in themselves.

Because barrier islands are extremely mobile and dynamic systems, they are constantly changing. This dynamic nature is necessary for the existence of barrier islands, but it may frustrate man's desire for development. This conflict is the basis for the issues and problems concerning man's use of barrier islands.

Erosion of beaches is a natural phenomenon which is often accelerated by man's development. This erosion threatens the

stability of established developed areas. The response to this threat is, often, an attempt to stabilize the area, which may only cause further erosion and interfere with natural processes. The stabilization methods include building bulkheads, seawalls, and groins, or beach renourishment and dune stabilization. With the possible exception of dune stabilization, these alternatives are costly and provide only temporary solutions.

Barrier islands are fragile coastal resources, and Florida has more barrier island acreage than any other state. Development is often begun without any understanding of the environmental values and changing characteristics of barrier islands. In addition, much of the development has been directly or indirectly subsidized by state and federal government agencies. Because the State of Florida does not have a comprehensive policy for barrier islands, conflicting goals between state programs often result.

One of the goals of the Florida Coastal Management Program, through the IMC [Interagency Management Committee], is to develop a comprehensive program for managing Florida's barrier island system. These islands are currently being identified and environmental and development information is being collected. Based on this data, an overall barrier island policy will be developed which will include policies specific to individual islands and their special needs. These policies will then be used to guide state agencies in such issues as reviewing permit requests relating to coastal construction setback lines, establishing priority areas for beach renourishment, reviewing requests for new causeways, water and sewage construction grants and permits.

In addition, the Coastal Management Program recognizes that the prime responsibility for land management rests with local government. The state is developing a program to assist local governments in managing barrier islands. Basically, the state will establish a broad strategy concerning these islands, use the existing budgetary and management tools to implement the adopted strategy, and provide assistance to local governments for development of site-specific plans for the islands.

Coastal Development Issues

Ports. Ports have played a major role in Florida's history and will continue to be important to the economic vitality of the coastal area. The conflict between the various demands for the use of the coastal area is recognized by port authorities. As Florida's coastal population increases, the 27 existing ports will find development opportunities shrinking as people seek to use the coastal area for other activities. In addition, there is a growing recognition of the value of fish, wildlife, and other living resources. As a result, a number of laws and regulations now deal with port development and its relation to the natural environment.

Several issues relating to ports need to be considered in a successful coastal management program. Water quality, one of the

most important elements among our coastal resources, is affected by a number of port activities, such as dredging and filling, spillage, and discharges from vessels. In addition, air quality is a concern since activities in and around a port add to the area's air pollution problems. A final problem is location since space is becoming scarce. Expansion opportunities depend on the availability of adjacent land. This problem increases if the port activity and other land uses are not compatible.

The Florida Coastal Management Program recognizes that ports are water dependent coastal users and that ports make substantial contributions to local, regional, and national economies. The needs of ports must be met in ways which are least damaging to other resources and activities. The environmental, economic, social, and administrative problems associated with port requirements can be addressed through an improved management system. The Coastal Management Program encourages a port planning process which seeks to resolve the conflicts over port development and to assure predictability in siting decisions. The program also encourages major state agencies that deal with port facility development to maintain an adequate staff to work on the complex, long-range issues associated with ports.

Disposal of Dredged Material. Both dredging and the associated spoil disposal are major coastal issues. The environmental, economic, and administrative issues relating to the disposal of dredged material are complex. In the past, spoil was disposed of without regard for any consequences other than cost. More recently, dredging projects have been restricted, delayed, or stopped because of the possibility that spoil disposal would degrade water quality or create adverse impacts on fisheries, wildlife, and vegetation.

Dredging and spoil disposal are essential if Florida's commercial and recreational ports, harbors, channels, and inlets are to be improved and maintained. A major problem is finding suitable sites for the disposal of dredged material.

The Coastal Management Program assists with the development of a program for the long-range consideration of dredged material disposal needs. Development of comprehensive spoil disposal management strategies must include the early identification of the location, estimated volume of spoil, and the environmental characteristics of areas to be dredged. The strategy also includes an assessment of the condition of spoil areas used in the past and an assessment of the ecological and other land use implications of alternate courses of action for potential sites. Other tasks involve providing information on direct and indirect costs of disposal, improving coordination of planning among all agencies and parties involved, and developing strategies for acquisition of disposal sites selected.

The Coastal Management Program also assists in evaluating the cumulative impacts associated with spoil disposal in the design of solutions to spoil disposal problems.

Marina Siting. It is estimated that Florida has more than 800 marina and boatyard operations, making them a major shorefront commercial activity. The large number of facilities is an indication of the popularity of recreational boating in Florida beyond the traditional needs for commercial fishing. To meet the varied and increasing demands of the boating public, marina operations range from small boat rental and launching facilities to major berthing and servicing facilities for offshore vessels. This great diversity means a corresponding variety of physical requirements for marina siting.

In order to operate, marinas have several basic needs related to the site. These include adequate protection from storms, depths to accommodate vessels, the absence of strong currents, room for expansion, land access, compatible adjacent uses, proximity to popular boating and fishing waters, the ability to perform routine maintenance, and size to make the operation economically feasible. Marinas also share many environmental and economic problems with ports, but on a smaller scale.

The state Coastal Management Program recognizes certain problems and issues associated with marina siting. First, there is no effective mechanism for assuring that marina regulatory practices under the Department of Environmental Regulation are consistent or coordinated with management principles of the Department of Natural Resources State Lands Plan. In addition, there is no adequate information for determining long-term cumulative environmental impacts of marina sites. Another problem is the lack of an effective forum for communication between the state regulatory agencies and the marina industry to reduce misconceptions and unnecessary conflicts. Finally, local land use and zoning plans generally do not recognize marina needs and do not adequately provide for their siting.

There are a number of possible actions that can be taken to improve the state's ability to deal with marina siting questions. State Coastal Management Program funds are being used to examine these issues and make recommendations for their resolution. The program also established a closer coordination between local comprehensive planning required under state and federal programs and a closer working relationship between the Florida Sea Grant Program and the Coastal Management Program.

Water Related Energy Facilities. Two major water-related coastal activities involved with energy are electrical generating facilities and Outer Continental Shelf oil and gas operations. Many OCS facilities, such as service bases and pipelines, must have shoreline locations. Florida electrical power companies often must look to the coast for cooling water because of constraints on freshwater consumption. Careful siting and design of these facilities is a necessary part of our efforts to meet energy needs.

The Florida Coastal Management Program assists in energy facility siting by coordinating existing management processes more effectively, promoting efficient and clear implementation of existing processes, and promoting consistency in site plan review

and decisions.

Energy will be a major issue in the future, yet the energy outlook is unclear. In terms of OCS-related oil and natural gas activities, the state must do its part to reduce uncertainty in the development of energy facilities and to assure that the protection of the natural and human environments is balanced with the development of energy resources. The OCS represents one of the keys to the country's energy independence, but major oil and gas operations will create environmental, fiscal, social, and administrative problems. The search for energy resources off Florida's coast will continue. If the resources are found, they must be recovered and developed in a way which protects the quality of life enjoyed by Florida's citizens.

The Coastal Management Program seeks to establish a smoother energy management process. For example, it supports the state OCS Advisory Committee in its efforts to strengthen state decision-making capability and coordination with the petroleum industry, local government, and affected interest groups. The Coastal Management Program also assists in developing a coordinated state level approach to OCS-related activities and assesses the consistency of federal license and permit activities. Finally, a coordinated effort is made with the Department of Community Affairs, Coastal Energy Impact Program, in refining Development of Regional Impact guidelines for onshore OCS-related facilities.

Commercial and Recreational Fisheries. Both commercial and recreational fishing are important in Florida. Recreational fishing makes a large contribution to the state's economy because millions of tourists who visit here each year come to fish. In addition, many residents support themselves by recreational fishing. The commercial seafood industry provides jobs, tax revenues, and other benefits while providing a nutritious and desirable food for many people.

A major part of the nation's ocean resources lies within the areas under state jurisdiction. As stewards for these national resources, states have a responsibility to look after the well-being of the fishing industry and the resources it depends upon.

The problems confronting Florida's commercial and recreational fishermen are not simple. They are closely linked with coastal issues such as loss of access to the shore, pollution, and loss of habitat. Most fish and shellfish are dependent on the state's sheltered estuaries, bays, and other nearshore areas during all or part of their life cycles. Yet some of the worst examples of estuarine pollution (dredging and filling, alteration of normal freshwater flow into estuaries, and sewage disposal) are found in Florida's nearshore waters. These events have all affected the health of fishery stocks. Legislation enacted in the 1970's has reduced but not halted the habitat loss. The remaining habitat is under stress and the long-term survival of many ecosystems cannot be assured. Even the untouched ecosystems yield only a limited amount of resources, which must be divided among a growing number of fishermen.

The Coastal Management Program seeks ways to maintain, promote, and enhance the fishing industry in ways consistent with the long-term productivity of our living marine resources. The program is assisting the Department of Natural Resources in establishing and maintaining an information program directed to fishermen and consumers and in collecting data on habitat loss and fishery decline. These efforts are particularly important since fishery management must integrate the restoration or creation of habitat with a working relationship between the various public and private groups responsible for fisheries.

Recreation. The extraordinary lure of Florida's coast is obvious. Millions of residents and tourists visit the coast every year. Tourism is the largest industry in the coastal area, so the challenge to provide opportunities for recreation must be met for economic reasons, if for no other.

The primary responsibility for providing local recreational opportunities lies with cities and counties, which in turn depend on assistance from state and federal governments. State government assumes the responsibility for promoting and coordinating these efforts and bridging the gap between national parks administered by the federal government and neighborhood parks provided by local governments. Recreation is related to several of the coastal issues already discussed. In addition, public perceptions of problems are an important consideration in decision-making. Some of the common perceptions include a belief that there is a lack of recreational areas, that development is threatening valuable resources, that environmental problems like water pollution are affecting the quality of outdoor recreation, and that land use and management programs are not coordinated to maximize the recreational value of Florida's coastal resources.

The Coastal Management Plan, through the Department of Natural Resources Florida Outdoor Recreation Plan and other activities of state and local agencies, pursues several avenues relating to recreation and access. The state is realizing that demands on the coast are increasing, while opportunities for access for swimming, fishing, boating, and the general enjoyment of the coast are diminishing. Under the Coastal Management Program, the IMC examines access issues, including those addressed in the Florida Outdoor Recreation Plan, and makes recommendations for coordinating the activities of public agencies which affect access and recreation. The program also encourages the redevelopment and revitalization of urban waterfronts for recreational purposes.

Coastal Storm Issues

Coastal storms are not abnormal events but are natural phenomena which occur periodically over the same areas. Damage occurs when structures are built in areas vulnerable to storm hazards such as flooding and high wind. At one time coastal structures were built on stilts and wet areas were avoided, since

access was difficult and other land was available. This practice tended to reduce the impact of storms but was reversed as new construction techniques were used and a rising population increased the demand on the limited coastal areas available for development. As a result, newer structures tend to be more vulnerable to the hazards of coastal storms and the population at risk is much greater.

Coastal storm hazards are created by one or more natural occurrences, including wind, tidal surge, heavy rainfall, and wind-driven waves. Several factors influencing the severity of hurricane impacts combine to make Florida a highly vulnerable state. The state is located in an area with a high probability of storms, has low-lying coastal areas which offer little protection from the dangers associated with a hurricane, and has nearly 80 percent of the state's population living in coastal counties.

Development in coastal areas is already extensive and continues to increase. Yet development in the floodplain subjects both individuals and property to hazards. New development in coastal areas is often begun with little concern for natural hazards. The most effective way to minimize risks from storms is through proper location of development in relation to flood hazards. However, state law, through the Local Government Comprehensive Planning Act, places little emphasis on including flood protection in plan elements. Also, Florida's building codes typically are deficient, and the monitoring of existing building codes is inadequate.

Government management and regulatory programs generally do not take hazard protection into account. For example, hazard mitigation usually is not considered by land acquisition programs as a criterion for selecting land for purchase nor is it considered by permitting programs in their evaluation of wetlands and water quality permit requests.

The state is using the IMC to develop a program to minimize loss of life and property due to coastal storms, including developing coordinated evacuation plans and developing coastal storm hazard awareness programs for property owners. Florida can also reduce future losses from storms by supervising the development of high hazard areas using existing statutes and regulations.

The state, working through the regional planning councils, helps local governments develop and implement local comprehensive plans which address the hazards associated with coastal storms. The state encourages these efforts by providing legal, financial, and technical assistance, identifying research needs, and working with local governments to educate the public about coastal storms.

* * *

The Apalachicola River and Bay are located on the Florida panhandle. The bay and river estuary form one of Florida's most productive natural systems -- and one of its most fragile. Until recently, the area could be characterized as relatively pristine, but intensifying pressure from development and pollution has put the estuary in jeopardy. The Apalachicola Experiment describes the efforts of scientists and the local community to preserve an important Florida resource, and reflects not only the pride of achievement, but the frustration often related to attempts to resolve the problems associated with conflicting uses in the coastal zone.

Livingston, The Apalachicola Experiment: Research and Management, 23(4) Oceanus 14 (1980)

Despite considerable publicity in this "Year of the Coast," consistent coastal resources management is still an elusive goal. In fact, although real gains have been made in applying research to practical decisions concerning our major drainage systems, there are growing problems with long-term planning and management initiatives. Effective resource management requires more than a superficial understanding of the ecological system in question. Unfortunately, few environmental scientists are willing to participate in the long-term, multidisciplinary research programs, which are necessary for such understanding. There are several reasons for this situation. Funding for systems-oriented projects in coastal and marine areas is almost nonexistent. The handful of federal agencies that have the funds and the mandate to carry out such research have often discouraged long-term investigation. There are usually few publications during the early years of a project, and universities, with the tenure system and the publish-or-perish ethic, do not encourage such work.

Our coastal systems, central to the productivity of the seas, remain under intensifying pressure from development and pollution. Millions of acres of productive coastal shellfish beds have been condemned or destroyed because of pollution. Public education and general knowledge of the environment are still lacking. In short, despite a vague public perception of the importance of the environment, the underlying ecological mechanisms of our major drainage areas are still poorly understood. Consequently, the systematic application of such understanding to the administration of this dwindling resource is haphazard and fragmented.

Since 1971, a continuous, multidisciplinary research program has been carried out in two bay systems in northern Florida, Apalachee Bay and Apalachicola Bay.

The Apalachicola Drainage System

The Apalachicola system is located along the sparsely populated Gulf coast of northern Florida. It is an anachronism

in the sense that it remains relatively free of the municipal and industrial waste discharges that characterize many of our major drainage systems. The upland drainage area (19,500 square miles) includes three major rivers (the Flint, the Chattahoochee, and the Apalachicola) in three states -- Alabama, Georgia, and Florida.

As part of the tri-river system, the Apalachicola River is one of the last major "unimproved" rivers in the country. The flood plain is an extensive network of freshwater and brackish wetlands. The particular hydrological features of the system, together with the almost unbroken wetlands, form the ecological basis for the incredible natural productivity of the Apalachicola estuary. This bay system provides 80 to 90 percent of Florida's oysters. It serves as a nursery for the bulk of the "Big Bend" (northern Florida) shrimp, crab, and finfish fisheries. The river wetlands provide habitats for various freshwater, brackish, and marine species. Freshwater runoff from upland wetlands and the physiography of the area (for example, the barrier-island system) provides the basis for various sports and commercial fisheries. In a sense, the Apalachicola River provides the cultural and economic basis for the entire region.

Although the Apalachicola flood plain is largely intact, it is not uniformly pristine. Six miles above the bay, a 33,000 acre cattle ranch was established during the early 1970s. Massive clearing, ditching, and diking projects altered the wetlands, and the effluents were routinely pumped over the dikes without meaningful interference from state or federal regulatory agencies. Any attempts to rectify the problem were somehow blocked. However, industrial and commercial land use remained minimal (around 0.2 percent) in the valley, with forestry as the dominant local industry. Our long-term research indicated that forestry activities in wetlands, including clearing, draining, and associated processes, had adversely affected hydrological and water-quality features of receiving systems. However, with appropriate controls and safeguards, such impact could be minimized. Forestry contributed in a positive way to maintaining aquatic productivity since it prevented widespread municipalization and industrialization of the flood plain, which almost certainly would have permanently altered the natural system.

Shipping and industrial interests in Georgia and Alabama, subsidized by state and federal funds have applied continuous pressure to maintain the authorized 9-foot navigation channel from the Gulf of Mexico to upland ports in Georgia and Alabama. Such efforts led to proposals for massive damming projects along the Apalachicola River. So far, the projects have been blocked by various Florida interests since changes brought about by damming the river system would have had negative economic effects in Florida. In fact, the application of hundreds of millions of federal dollars to damming and navigation of the tri-river systems has been found to be neither economically feasible nor environmentally sound according to a series of studies on the

subject. The 13 established hydroelectric dams on the Chattahoochee River, together with industrial and municipal waste disposal, have already taken a toll on the water quality in this region. The rapid growth of metropolitan Atlanta has become a threat to the water supply of the entire system, and remains the single most important concern to all interests. Yet, despite the importance of the tri-river system to the region, not one comprehensive study has been carried out to weigh the overall impact of ongoing and proposed projects, and to provide an objective basis for future development. Although a "Level B" study has been proposed, the controversial issue of water use will play an increasingly important role in maintaining the natural productivity along the tri-river system.

St. George Island, forming the gulfward perimeter of large areas of Apalachicola Bay, is of critical importance to the productivity of the estuary. This barrier island, as a physiographic feature of the system, controls the water quality and salinity regime of the bay. However, considerable portions of St. George are privately owned.

High-priced island real estate was created by another publicly financed project, the construction of a bridge in 1965 linking the island to the mainland. The entire range of problems associated with the development of barrier islands is related to the spectacular increase in land values after construction of bridges. Road and marina construction, dune destruction, septic tank wastes, and sheer overpopulation of an exceedingly fragile island system may soon affect the Franklin County oyster industry. This, together with continuing sewage and storm water runoff problems in other areas of the county, makes the need for a comprehensive land management plan even greater.

The chief difference between the Apalachicola system and many other similar areas is that, despite some environmental problems, no single form of land use has seriously affected its natural environmental processes. Thus, there is time for solutions to growth problems since the region is still in the initial phases of what seems to be an almost inevitable cycle of economic development. It is within this context that the potential value of scientific research to resource management will be tested.

Research Goals and Problems

The Apalachicola project originated as a routine, baseline assessment of the Apalachicola estuary. The research included monthly assessments of water-quality parameters and biological associations, and was designed as a comparative analysis with Apalachee Bay, an adjacent, though very different, coastal system. In 1973, the author was contacted by a group of local fishermen and county representatives who, through their common interests in the seafood industry, were aware of the failing fisheries in populous southern Florida. These people were worried about their future and needed help. Thus began a unique

association of fishermen and scientists. For the next eight years, the Franklin County residents provided vital matching funds for the federal grants provided by the Florida Sea Grant program of the National Oceanic and Atmospheric Administration to study the Apalachicola system. Scientists provided continuing guidance and advice for local environmental problems. High school students were taken on scientific field trips. Strong support by the Apalachicola Times, a local newspaper, aided in dissemination of scientific information. The proposal by the U.S. Army Corps of Engineers to dam the Apalachicola River galvanized the community and provided the stimulus for the continued cooperative effort to understand and protect the Apalachicola system. The Apalachicola project now includes the work of more than 750 people, and has been in operation for more than nine years. Each piece of information was added to a central data file so that a multidisciplinary core of information is now available to provide an important basis for the Apalachicola research and management effort.

* * *

Acquisition of Ecologically Sensitive Lands

As a multidisciplinary research program was developed, the purchase of ecologically sensitive land was emphasized as an effective way to overcome some of the problems inherent in the system. Based on studies linking upland nutrients and organic matter to the aquatic food webs of receiving systems, an ecological connection was made between the hardwood forests of the lower Apalachicola flood plain and the productivity of the Apalachicola River-Bay system. These data were used to justify the purchase of 28,044 acres of the lower Apalachicola flood plain for \$7,615,250 as part of Florida's environmentally endangered land program. In 1977, the Florida government authorized the purchase of little St. George Island for \$8,838,000, again in response to data concerning the ecological importance of barrier islands to the system. Portions of the eastern end of St. George Island were added to the existing state park under this program. St. Vincent Island was already a national wildlife refuge. Dog Island and other ecologically sensitive parts of St. George Island are still the subject of negotiations for public purchase.

With the establishment of the Apalachicola Estuarine sanctuary, additional wetlands (12,467 acres) surrounding the East Bay system will be purchased for 33.8 million. Various state and federal agencies, and the combined efforts of local government officials and scientific input from the sustained research program, were instrumental in this series of land purchases.

The Apalachicola Estuarine Sanctuary

In itself, public acquisition of land is not enough for system-wide management of an important resource. In the winter

of 1975, Robert Howell, the Clerk of the Franklin County Circuit Court, and the author addressed representatives from state and federal agencies in Washington, D.C., under the auspices of John Clark and the Conservation Foundation. From this meeting, a series of reviews led to the establishment in September, 1979, of the Apalachicola River and Bay Estuarine Sanctuary. This estuarine sanctuary, set aside by law as a natural field laboratory "for long-term scientific and educational purposes," is the largest (192,758 acres) and most ambitious of its kind in the country. The scientific data base from this program led various groups -- including state and federal agencies, the Apalachee Regional Planning Council, the Conservation Foundation, Florida State University, and the Florida Sea Grant program -- to develop a comprehensive management plan for Franklin County and the Apalachicola Valley. If successful, this combined effort could serve as the basis for the estuarine sanctuary and assure the continued productivity of the Apalachicola system.

Problems with the Apalachicola Experiment

In the winter and spring of 1980, the Florida Department of Natural Resources (under direction from the Food and Drug Administration), closed most of the Apalachicola oyster beds because of high coliform bacteria counts in the water. Such action followed reports of sickness from eating oysters. Ironically, most of the contaminated oysters came from other areas, but because of widespread publicity, the damage was done. Regulatory agencies found that it was easier to shut down an industry than to protect or manage it. Consequently, even though the origin of the bacteria remains unknown, every time the river floods, the industry will be shut down. In addition, the Franklin County Board of Commissioners, so active in protecting Apalachicola Bay, is being sued by various developers who wish to build in the area. Legal questions have been raised concerning how far a community can go to protect a natural industry.

Despite the efforts of so many people over the last decade, the estuarine sanctuary has been in a continuous state of confusion, threatened on all sides by a lack of funds, bureaucratic ineptitude on the part of state agencies, and interstate politics. Shipping and industrial interests in Georgia continue to apply pressure for the massive alteration of the Apalachicola River. There is an increasing awareness by all parties that municipal water use by areas such as Atlanta will place increasing pressure on free-flowing water in the tri-river system. Thus, despite various successful applications of science and management, there are serious threats to the natural system that could ultimately bring an end to the Apalachicola experiment.

The Future

The long-term research effort has provided a platform for the overall multidisciplinary effort, which includes engineering

studies, physical-nutrient modeling, economic evaluations, and comprehensive planning. Such results have led to an experimental ecology program, and will now serve as the basis for the development of a comprehensive management program and local educational initiatives. Such a sustained effort is the bridge to public use of research information through education and the news media. Concentration on both macro- and microscale problems has allowed a broad application of the results. In addition, long-term work allows the most effective measure of an environment's stability and response to stress. Gradual environmental deterioration, which is the fate of so many natural systems, is usually undetectable unless a long-term data base is available.

The Apalachicola experiment is an attempt to develop an area, while retaining an important, sensitive natural resource. The Franklin County fishermen, who financed much of the research, are now helping to fund the final phase -- analysis of the data and development of a local educational program to teach the children of Franklin County about their bay. This final step is often overlooked, but education is the only real way to sustain the momentum of current management programs. The scientist has an obligation not only to interact with the public but also to make sure that important information gets into our educational processes, because herein lies the future.

There are many explanations for the dwindling coastal resources in this country. It is an unfortunate truth that people tend to accept environmental deterioration if it occurs over a long enough period of time. What appears unacceptable in the short run remains inevitable as urbanization of our coasts continues. There is something very wrong with a government that cannot or will not protect those who are dependent on natural productivity. It is possible that our society really does not care about such resources as long as the perception remains that we have unlimited natural abundance. Regardless of the cause, if the Apalachicola experiment fails and an endangered culture becomes extinct, no place in this country will be safe from the progress that erodes. The Apalachicola experiment is a clear test of the application of scientific principles to resource management.

Section 4. RECOMMENDED READINGS

The preceding excerpts provide a limited introduction to coastal ecosystems, coastal zone uses, the history of coastal zone management, and particular coastal issues of special interest in Florida. Although this book is about coastal zone law and policy, it is essential to attempt to understand the economic, social and political issues that affect coastal development and the effects of coastal development on the ecology. The following books and publications are highly recommended for further reading.

J. Clark, Coastal Ecosystems (1974).

J. Clark, Coastal Ecosystems Management (1977).

Coastal Zone Institute, The Process of Program Development (1974).

B. Ketchum, The Water's Edge (1972).

A. Simon, The Thin Edge: The Coast and Man in Crisis (1978).

Teal and Teal, The Life and Death of a Salt Marsh (1969)

For a historical view of Florida's land and water policy:

G. Carter, The Florida Experience (1974).

N. Blake, Land Into Water--Water Into Land (1980).

PART TWO. PUBLIC AND PRIVATE RIGHTS IN THE COASTAL ZONE

Where land and water meet is a point as important in legal terms as it is in ecological terms, because that point historically marks the dividing line between private and public property. Defining the dividing line, however, is no easy task, and physically locating it may be even more difficult. Simply demarcating a boundary, however, does not serve to allocate all public and private rights in the coastal zone.

State ownership of lands under navigable waters has long been recognized, Martin v. The Lessees of Waddell, 41 U.S. 367 (1842). The state holds such lands in a special capacity -- in trust for the public. The public, in turn, has recognized rights in navigable waters. Moreover, the government may regulate private property through the police power to protect the welfare and rights of the public. Private landowners whose property borders navigable waters have all the rights of the public in the waters and additional rights attributable to littoral or riparian ownership.

The law concerning the definition of navigable waters, the demarcation of the boundary between private and public property, and the relative rights of the public and private landowners has had a long and complicated evolution at both the state and federal levels. This chapter sets out the development of the law and identifies the questions that remain unanswered.

Section 1. STATE OWNERSHIP OF SUBMERGED AND TIDAL LANDS

SHIVELY V. BOWLBY
152 U.S. 1 (1894)

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

This case concerns the title in certain lands below high water mark in the Columbia River in the State of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the State of Oregon; and is in substance this: James M. Shively, being the owner, by title obtained by him from the United States under the act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, of a tract of land in Astoria, bounded north by the Columbia River, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high water mark; and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the State of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counter-claim, asserted a title, under a subsequent conveyance from Shively, to some of the tide

lands, not included in his former deeds, but included in the deeds from the State.

The counter-claim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia River and of the conveyance from Shively to the defendant, as against the deeds from the State to the plaintiffs. The Supreme Court of Oregon, affirming the judgment of a lower court of the State, held the counter-claim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. The only matter adjudged was upon the counter-claim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court.

* * *

By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, jus publicum, is vested in him as the representative of the nation and for the public benefit.

* * *

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

The donation land claim, bounded by the Columbia River, upon which the plaintiff in error relies, includes no title or right in the land below high water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.

Judgement affirmed.

STATE v. GERBING
56 Fla. 603, 47 So. 353 (1908)

WHITFIELD, J. Stated briefly, this is a quo warranto proceeding, brought in the circuit court for Nassau county by the Attorney General to ascertain by what warrant or authority Gustav Gerbing has marked and staked off certain portions of the bed of Amelia river, a navigable stream in Nassau county, Fla., and claims and usurps the exclusive right to the use, benefit, and enjoyment of natural or maternal oyster beds upon the designated land below high-water mark and extending to the channel of said navigable river.

By answer the respondent denies that he has staked off a portion of the bed of Amelia river below high-water mark, and avers that the only lands marked and staked off by respondent are certain salt marsh lands, known and designated as lots and parts

of sections; that the salt marsh lands near the rivers, inlets, and bays in the state of Florida were never treated and considered by the United States or the state of Florida as a part of beds of the navigable streams, inlets, and bays in said state, which vested in the state by virtue of its sovereignty, but were treated and considered by the state and the United States as part of the swamp and overflowed lands which belonged to the United States, and were granted to the state by Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519 [the Swamp and Overlands Act]; that the lands marked and staked by respondent and planted by him with oysters are owned by him in fee simple by virtue of a chain of title, to wit: (1) The act of Congress of 1850, granting to the state the swamp and overflowed lands; (2) a selection by the state of these lands as part of the lands inuring to the state under said act of Congress; (3) a patent from the United States to the state of Florida; (4) a deed from the state by the trustees of the internal improvement fund to Samuel A. Swann, and a deed from said Swann to respondent; that the lands, being marsh, were not surveyed in the original survey made by the United States, but by request of the state the lines of surveys were by the United States authorities protracted over said lands as marsh lands, and said marsh lands were patented to the state as swamp and overflowed land; that the lands staked by respondent do not extend to the channel of Amelia river; that respondent has not without authority or warrant of law claimed and usurped the exclusive right to the use, benefit, and enjoyment of any natural and maternal oyster beds within the bed of Amelia river, but has only claimed the exclusive right to the use and benefit of the oyster beds planted by him on lands owned by him as aforesaid; that respondent received from the county commissioners under the statute the exclusive right to plant oysters in such places along the Amelia river where the lands of respondent border on said river, but the lands so marked, staked, and planted by respondent were upon the lands owned by respondent as before stated.

* * *

The cause was by agreement tried by Hon. D. U. Fletcher, a practicing attorney, as referee, who found that the respondent claims to own the lands described, or at least that portion thereof not in the channel of Amelia river, and has run a line of stakes along the easterly edge of the navigable portion of Amelia river within the lines protracted over the lands; that most of the stakes are set below low-water mark, but are not in the channel of Amelia river; that there are natural or maternal oyster beds along the edge of the navigable portion of Amelia river, where some of the stakes extend below low-water mark, and some such oyster beds are between the stakes and high-water mark; that the land is marsh or mud flats, extending between the channel and shore of Amelia river, all of which is usually covered with water at high tide, and exposed, or not covered, except to a limited extent, at low tide; that the respondent has planted oysters above the stakes, and has forbidden any one to go upon or to get oysters from the beds above the stakes on land below high-water mark, and insists that he owns exclusively as his private property, as stated in the answer, the said land and everything on it, including the oysters. The conclusion of the

referee was that the locus in quo is swamp and overflowed land, and flats, not a part of the bed of the Amelia river, and the proceedings were dismissed.

The original 13 states, that formed the federal Union as the United States of America, were distinct and independent sovereignties, and as such severally owned and held in trust for the whole people within their respective borders the navigable waters in the states and the lands thereunder, including the shore or land between high and low water marks. Proprietary rights in the lands of this character within the states were not passed to the United States by the federal Constitution, under which the Union was founded, and no power to dispose of such lands was delegated to the United States. Therefore all proprietary rights in and power to dispose of lands under navigable waters in the states, including the shore between high and low water marks, were reserved to the states severally or to the people thereof. The powers of the United States as to matters of navigation, interstate and foreign commerce, post roads, and eminent domain are not pertinent here.

The navigable waters in the states and the lands under such waters, including the shore or lands between ordinary high and low water marks, are the property of the states, or of the people of the states in their united or sovereign capacity, and are held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the states, respectively for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters in common to and for the people of the states. The title to the lands of this character were withheld by the original states of this Union as essential to the sovereignty of the states, to the welfare of the people of the states, and to the proper exercise of the police powers of the states. A state may make limited disposition of portions of such lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The states cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good.

By treaty of February 22, 1819 (8 Stat. p. 254, art. 2), the kingdom of Spain ceded "to the United States, in full property and sovereignty, all the territories * * * known by the name of East and West Florida," with an expressed provision that all the grants of land made by Spain before January 24, 1818, in said territories, shall be ratified and confirmed to the persons in possession of the lands. Articles 2 and 8 of treaty, to be found in Fuller's Purchase of Florida, pp. 372-374.

The lands in controversy are within the ceded territory, but it is not claimed that they had been granted to any one by Spain.

After the United States acquired by treaty of cession from Spain the territory known as East and West Florida, such territory was held subject to the Constitution and laws of the United States. The lands under navigable waters, including the

shores, were held by the United States for the benefit of the whole people, to go to the future state for the use of the whole people of the state.

The Constitution of the United States provides that "new states may be admitted by Congress into this Union." The territory known as East and West Florida, ceded by Spain to the United States, was by act of Congress approved March 3, 1845 (5 Stat. 742, c. 48), under the name of the state of Florida, "admitted into the Union on equal footing with the original states, in all respects whatsoever," "on the express condition that [the state] shall never interfere with the primary disposal of the public lands lying within" it.

The admission of the state of Florida "into the Union on equal footing with the original states, in all respects whatsoever," gave to the state of Florida all rights and powers as to property and sovereignty possessed by the original states of the Union, except such as were withheld by the act admitting the state.

Among the rights thus acquired by the state of Florida is the right to own and hold the lands under navigable waters within the state, including the shores or space between ordinary high and low water marks, for the benefit of the people of the state, as such right is as essential to the sovereignty, to the complete exercise of police powers, and to the welfare of the people of the new states as of the original states of the Union.

The condition or restriction expressed in the act of admission as to "the primary disposal of the public lands lying within" the state has reference to lands within the territorial limits of the state, the title to which was in the United States for its own purposes, as distinguished from lands held in trust for the people, such as lands under navigable waters, including the shore between high and low water marks, which passed to the sovereign state, to be held by it in trust for the people thereof when the state was "admitted into the Union on equal footing with the original states, in all respects whatsoever."

The rights of the people of the state in the navigable waters and the lands thereunder, including the shores or space between ordinary high and low water marks, in the state, are designated for the public welfare, and the state may regulate such rights and the uses of the waters and the lands thereunder for the benefit of the whole people of the state as circumstances may demand, subject, of course, to the powers of the Congress in the premises. The shores of a navigable river are the spaces between high and low water marks, and the bed of a river includes the shores. Tide land is that daily covered and uncovered by water by the ordinary ebb and flow of normal tides.

* * *

The statute of 1881 authorizes the granting of limited exclusive privileges for planting oysters in the public waters of the state, where there are no natural or maternal oyster beds, if the rights of the people in navigable waters are not thereby impaired; but this statute does not authorize the conveying of title to land, and expressly provides that the natural or maternal oyster beds in the waters of the state shall remain for the free use of the citizens of the state.

The referee finds that at least some of the lands upon which respondent claims exclusive oyster privileges are under the waters of a navigable river in the state, that there are natural and maternal oyster beds thereon, and that respondent claims title to the land and the oysters thereon under conveyances from the state since the date of the act providing that all natural or maternal oyster beds in the waters of the state shall remain for the free use of the citizens of the state.

* * *

The act of Congress of September 28, 1850, granted to the state "the whole of the swamp and overflowed lands therein." This grant did not include lands the title to which was not then in the United States. As the admission of the state of Florida into the Union, "on equal footing with the original states, in all respects whatsoever," gave to the state in trust for the people the navigable waters of the state and the lands thereunder, including the shores or space between ordinary high and low water marks, the title to such lands was not in the United States when the act of 1850 was passed granting swamp and overflowed lands to the state. A patent issued by the United States to the state, purporting to convey swamp and overflowed lands under the act of 1850 covering lands under the navigable waters of the state, does not affect the title held by the state to the lands under navigable waters by virtue of the sovereignty of the state. The general act of Congress granting swamp and overflowed lands to the states does not cover tide lands.

The respondent's claim is grounded on an alleged title deraigned through the act of Congress of September 28, 1850, granting swamp and overflowed lands to the state. If the lands in controversy are not such swamp and overflowed lands as passed to the state under the stated act of Congress, and they are lands under the bed of navigable waters below the normal high-water mark of the particular navigable waters, the state holds them in trust for all the people of the state, and the defendant has no exclusive rights as claimed.

Lands within the limits of the state of Florida that are covered and uncovered by the ordinary daily tides of public navigable waters are shore or tide lands, and the title to them is held by the state, because of its sovereignty, under its admission into the Union.

Swamp and overflowed lands within the state of Florida, not under navigable or tide waters, that became the property of the United States by the treaty of cession from Spain and had not been previously granted, were by the act of Congress approved September 28, 1850, granted to the state for purposes of drainage and reclamation. Within the meaning of this act of Congress, swamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by nonnavigable waters, or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require

drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation. When the lands are not covered by the waters of navigable streams or other bodies of navigable waters at ordinary high-water mark, and drainage, reclamation, or leveeing is necessary to render the lands suitable for the ordinary purposes of husbandry, they are within the terms of the act of Congress, and the title passed to the state, if the lands were the property of the United States at the date of the act of Congress making the grant to the state.

The referee finds that most of the stakes set by the respondent, and at least a part of his claim of exclusive privilege as to oyster bed, are below low-water mark, though not in the channel, of the navigable river.

As the respondent shows no legal claim to exclusive rights on lands under the navigable waters of the river, including those lands between ordinary or normal high and low water marks, the referee should have entered a judgment against the respondent as to such lands below high-water mark in which he claims exclusive privileges.

The judgment is reversed, and the cause is remanded, for proper proceedings to ascertain and adjudge definitely the rights of the parties under the principles here in stated.

NOTES

1. Florida, like Oregon, cannot claim submerged lands through a grant from the King of England. Florida acquired lands under navigable waters "by virtue of its sovereignty" and because under the United States Constitution new states entered the Union on "equal footing" with the original colonies. Millions of acres of other submerged lands were granted to the state by the Swamp and Overflowed Lands Act of 1850. Lands acquired under the Swamp and Overflowed Lands Act are not part of the public trust. See Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). Note the definitions in State v. Gerbing of navigable waters, swamplands, and overflowed lands.

2. Florida was admitted into the Union in basically the same manner as the western states -- through acquisition by the United States, territorial status, and finally statehood. Substantial portions of the western states, however, are still owned by the federal government. The federal government is not a major landholder in Florida. The Swamp and Overflowed Lands Act of 1850, 43 U.S.C. 982-4, was enacted by Congress to transfer to the states for purposes of drainage and reclamation "swamp and overflowed lands" owned by the federal government. Because about two-thirds of the state of Florida was made up of lands within the category, the Act transferred more than 20 million acres to state ownership.

3. Private title to lands in Florida has diverse sources because of Florida's history. Title to lands, including submerged lands, can derive from Spanish grants prior to United States acquisition

of the territory, federal grant or patent to individuals prior to statehood, federal grant to the territory or state of Florida, or state grant of lands. The source of the title to submerged land has significant legal consequences.

4. The Effect of Spanish Grants. When Spain acquired territory in East and West Florida by discovery, conquest, and occupation, Spanish sovereign dominion and Spanish civil law were recognized as controlling conveyances of land to individuals and to Indian tribes. Under Spanish civil law navigable waters "were held by the crown for public common usage," such as, "fishing, bathing and navigation," Apalachicola Land and Development Co. v. McRae, 86 Fla. 393, 420-21, 98 So. 505, 514 (1923). Lands under such waters could not be converted to exclusive, private ownership except by grants expressly authorized by the crown.

Ownership of submerged lands under navigable waters passed to the United States under the Treaty of Cession of the Floridas to the United States. Article 8 of the Treaty expressly provided, however, that "all grants of land ... by lawful Spanish authorities ... shall be ratified and confirmed to the persons in possession of those lands." Florida courts have recognized the prima facie validity of such grants, but have concluded that such grants must be interpreted according to the civil law of Spain before the Treaty of Cession. Therefore, unauthorized grants of submerged lands by Spanish officials are not recognized, Sullivan v. Richardson, 33 Fla. 1, 14 So. 692 (1894), and grants by the crown are not interpreted to include lands below the high tide line unless expressly conveyed, Apalachicola Land and Development Co. v. McRae, supra.

Section 2. THE BOUNDARY BETWEEN PUBLIC AND PRIVATE LANDS

BORAX CONSOLIDATED LTD. v. LOS ANGELES 296 U.S. 10 (1935)

Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.

The tideland extends to the high water mark. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. But

by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails."

The range of the tide at any given place varies from day to day, and the question is, how is the line of "ordinary" high water to be determined? The range of the tide at times of new moon and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low as on the average." At such times the tides are known as "neap tides." The view that "neap tides" should be taken as the ordinary tides had its origin in the statement of Lord Hale. *De Jure Maris*, cap. VI; Hall on the Sea Shore, p. 10, App. XXIII, XXIV. In his classification, there are "three sorts of shores, or *littora marina*, according to the various tides," (1) "The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials"; (2) "The spring tides, which happen twice every month at full and change of the moon"; and (3) "Ordinary tides, or nepe tides, which happen between the full and change of the moon." The last kind of shore, said Lord Hale, "is that which is properly *littus maris*." He thus excluded the "spring tides" of the month, assigning as the reason that "for the most part the lands covered with these fluxes are dry and maniorable," that is, not reached by the tides.

The subject was thoroughly considered in the case of *Attorney General v. Chambers*, 4 De G.M. & G. 206. In that case Lord Chancellor Cranworth invited Mr. Baron Alderson and Mr. Justice Maule to assist in the determination of the question as to "the extent of the right of the Crown to the seashore." Those judges gave as their opinion that the average of the "medium tides in each quarter of a lunar revolution during the year" fixed the limit of the shore. Adverting to the statement of Lord Hale, they thought that the reason he gave would be a guide to the proper determination. "What," they asked, are "the lands which for the most part of the year are reached and covered by the tides?" They found that the same reason that excluded the highest tides of the month, the spring tides, also excluded the lowest high tides, the neaps, for "the highest or spring-tides and the lowest high tides (those at the neaps) happen as often as each other." Accordingly, the judges thought that "the medium tides of each quarter of the tidal period" afforded the best criterion. They said: "It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore therefore is about four days in every week, i.e. for the most part of the year, reached and covered by the tides." *Id.*, p. 214.

Having received this opinion, the Lord Chancellor stated his own. He thought that the authorities had left the question "very

much at large." Looking at "the principle of the rule which gives the shore to the Crown," and finding that principle to be that "it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil," the Lord Chancellor thus stated his conclusion: "Lord Hale gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is for the most part not dry or maniorable. The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line." The Lord Chancellor therefore concurred with the opinion of the judges "in thinking that the medium line must be treated as bounding the right of the Crown." Id., p. 217.

* * *

In California, the Acts of 1911 and 1917, upon which the City of Los Angeles bases its claim, grant the "tidelands and submerged lands" situated "below the line of mean high tide of the Pacific Ocean." Petitioners urge that "ordinary high water mark" has been defined by the state court as referring to the line of the neap tides. We find it unnecessary to review the cases cited or to attempt to determine whether they record a final judgment as to the construction of the state statute, which, of course, is a question for the state courts.

In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be a "a periodic variation in the rise of water above sea level having a period of 18.6 years," the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction.

The decree of the Court of Appeals is Affirmed.

NOTES

1. The excerpt in Note 2 is intended to aid in understanding the nature of tides. Tides, as explained in the excerpt, vary because of variations in a number of forces and hydrographic features. Interestingly, Florida's panhandle west of Cape San Blas usually has only one high and low tide per day, while the rest of the state has two tides per day.

2. Maloney and Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N. C. L. Rev. 185, 195-98 (1974).

The tide is defined, as: "The periodic rising and falling of the water that results from the gravitational attraction of the moon and sun acting upon the rotating earth." This indicates the strong relationship between the sun and the moon and the tides. The individual tide-producing forces vary over the face of the earth in a regular manner, but the different combinations of these forces produce totally different tides. Moreover, the response of various bodies of water to these forces varies because of differing hydrographic features of each basin.

The variations in the major tide-producing forces are a result of changes in the moon's phases, declination to the earth, distance from the earth and regression of the moon's nodes. The variations which occur because of this latter factor will go through one complete cycle in approximately 18.6 years. The other changes have cycles varying from 27 1/3 days (moon's declination) to 27 1/2 days (moon's distance) to 29 1/2 days (moon's phases). These cycles differ in magnitude, and their effect on the tide varies from place to place around the earth. The various combinations of all these changes also result in the daily variations in the tide at a given location.

The forces related to the changes in the moon's phases are strongest twice each month at new and full moon and the tides occurring at approximately these times are known as spring tides. These forces are weakest at the time of the first or third quarter of the moon and the tides occurring then are called neap tides. However, at most places there is a lag of a day or two between the occurrence of the appropriate phase of the moon and corresponding spring or neap tide. The cycle relating to the moon's declination is strongest twice each month when the moon is at the tropics and it is weakest when the moon is over the equator. The tides associated with these changes are called tropic and equatorial tides when they are the strongest and weakest. The tides occurring when the moon is nearest the earth are called perigean tides and those occurring when the moon is farthest from the earth are called apogean tides. A lag of a day or two is also found between the declination and the distance of the moon and the corresponding state of the tide.

There are three characteristic features of the tide at a given place -- the time, range, and type of tide. The time of the tide is related to, and can be specified by, the moon's meridian passage. The range of the tide refers to the magnitude of the rise and fall of the tide, and varies from day to day, at a given place depending on the relation of the tide-producing forces. The type of tide denotes the characteristic form of the daily rise and fall of the tide. The tide is semidiurnal when two highs and two lows occur each day; it is diurnal when only one high and one low occur each day; and it is mixed when two high and two low waters occur in a day with marked differences between the two high or the two low waters.

These tidal characteristics vary from one location to another as a result of variations in the tide-producing forces and in hydrographic features. While some generalizations about tidal characteristics can be made, it must be recognized that tidal characteristics are a local phenomenon and the description of the tide in one area may be inapplicable to another area.

The tide observations required for the determination of a tidal datum must be as accurate as possible because the location of the boundary determined from the datum may involve very valuable lands. After the vertical elevation of a tidal datum is established it must be translated into a line on the ground -- the intersection of the datum plane with the shore. An error of only tenths of an inch in the tidal datum may result in the line of intersection moving a considerable distance landward or seaward if the shore has a flat slope. Therefore, the accuracy of coastal boundaries has a direct relation with the accuracy of the original tide observations.

The specific tidal datums that define the coastal boundaries provide the elevation of a stage of the tide on an average basis. For instance, mean high water is an average of the high waters. Because the magnitude of the rise and fall of the tide varies from day to day, tidal characteristics derived from daily observations may differ considerably from the average or mean values over a long period of time. Therefore, the average must be based on long-term observations before it can be considered an accurate value for the tidal datum. When only short-term observations are available, they may be corrected to long-term mean values by comparison with simultaneous observations taken at some nearby location for which mean values have been determined from long-term observations.

Observations over a period of nineteen years are generally used to determine tidal datums because all the cycles related to the phases, declinations and distance of the moon occur within this period. In addition, the seasonal fluctuations of water level will be complete within a year, and the effects of these non-tidal forces can be balanced. When long-term observations are used to determine tidal datums, the datums will be applicable in future years unless the factors producing the tidal character have changed. The primary factor which might change and cause a variance in the datum will be the hydrographic features of the area.

* * *

3. Tides are measured by the height of the water, not the distance on the ground between the low and high tide lines. The amount of "wet sand" area, therefore, is a function of the height of the tide and the topography of the land. In many areas of Florida the slope of the land from the water is so slight that minor discrepancies in tide height calculation can affect hundreds of acres of land. See, e.g., Trustees v. Wetstone, 222 So.2d 10 (Fla. 1969):

At the hearing, a reputable surveyor testified on behalf of Plaintiff. From his testimony it appears that the mean high-tide line subscribing the Island could not be located with any certainty, the allowance for error in its location varying from several hundred feet to a quarter of a mile. The nearest tide gauging station that gave a verticle reference point (i.e. the elevation of the plane of mean high-tide above the zero plane of the mean sea level bench marks) was eight miles away from the Island. This verticle reference point from which a surveyor would normally run his line would be compounded over the course of eight miles to create an excessive tolerance on the almost horizontal plane so that such tolerance would vary from several hundred feet to a quarter of a mile when it reached the Island. The mangrove lands were so gradual in their slope as to be almost flat. Also, there were soft spots and hard spots in the land so that a difference would result when the surveying rod was put down in one spot or another.

* * *

ST. JOSEPH LAND AND DEVELOPMENT CO.

v.

FLORIDA STATE BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT FUND
365 So.2d 1084 (Fla. 1st DCA 1979)

Private landowner filed action for declaratory judgment against Board of Trustees of Internal Improvement Trust Fund seeking a declaration of the boundary between its lands and state's adjacent submerged lands. The Circuit Court, Gulf County, Larry G. Smith, J., entered final judgment from which private landowner appealed. The District Court of Appeal, Boyer, J., held that the line of mean high water was the boundary line.

* * *

...[A] quantity of land indicated in a government survey cannot control the description since the general rule is that the mean high water line is the boundary even where a meander line is also given. This principle is well-stated in Connery v. Perdido Key, Inc., 270 So.2d 390 (Fla. 1st DCA 1973) wherein the court said:

"Where the original government land office plat shows a tract of land to have as its boundary a body of water, such water course is a natural monument which will constitute the boundary of the land, even if distant or variant from the position indicated for it by the meander line, and will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat." (270 So.2d at page 394)

The acreage based on the meander line is merely an estimate of the land involved and is seldom precise in a government survey. The meander line simply defines the sinuosities of the shoreline.

"Meander lines are run in surveying fractional portions of the public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. * * * . . . the watercourse, and not the meander line as actually run on the land, is the boundary." (270 So.2d at pages 393, 394)

* * *

FLORIDA BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND

v.

WAKULLA SILVER SPRINGS CO.,
362 So.2d 706 (Fla. 3d DCA 1978)

This action was filed on November 1, 1971, by appellee against appellant seeking a declaratory judgment as to the location of the boundary line of a tract of land owned by appellee on Key Largo, Monroe County, Florida.

* * *

Appellee admits that the mean high water line (MHWL) is the boundary; however, it alleges that the MHWL cannot be located accurately on these lands because the lands are low, wet, mangrove swamp.

* * *

The Trustees made a tidal study to determine that the elevations of mean high water on Wakulla's lands could be located and a survey to show the location of points that were at that mean high water line. The Trustees' tidal study was performed by personnel of the State of Florida, the United States National Ocean Survey and a private contract firm. The method used was short term method with an inherent error of $\pm .1$ feet to $\pm .25$ feet. John Michel, Wakulla's expert witness, testified that when the rule of probabilities is applied to these results, including the inherent error, there is a probability of a still greater error. The evidence also showed that the inherent error

resulting from the Trustees' use of this short term method could result in an error in excess of 1,000 feet in the location of the boundary line.

The Trustees did not locate a mean high water line, but only attempted to show that mean high water could be located.

* * *

The only courses and distances available are those of the meanderline. The quantity, the acreage referred to on the original plat, is available. Under the circumstances and in the absence of better evidence, the Court must rely on the quantity of land conveyed by the Trustees; thus the meanderline of the original United States survey which was used to determine the quantity of land in Government Lots 3 and 4 is the only boundary line available to the Court.

* * *

NOTES

1. What are meander lines? Are they boundaries? What is the purpose of meandering a body of water? Consider the following excerpt from Maloney, The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line, 13 Land and Water L. Rev. 465, 489-90 (1978).

Meander lines are established by public survey and were traditionally determined by the surveyor actually walking around the shoreline of a navigable body of water to record a line which purportedly followed the sinuosities of the shore. The meander line of a particular piece of land will be a straight line or a series of straight lines connecting points or monuments on the shore for use in determining the quantity of public land in the subdivision being surveyed. It has been held in innumerable cases that unless a clear intent to make the meander line the boundary is shown, it is not the proper line of demarcation for title purposes, but the water whose boundary is meandered is the true boundary. Courts have, nevertheless, occasionally declared the meander line to be the property boundary where the water line was obscured in some way.

See, e.g., Trustees of the Internal Improvement Trust Fund v. Wetstone, 222 So.2d 10 (Fla. 1969), in which the Florida Supreme Court used the meander line as the boundary even though the line clearly extended into navigable waters, and the state offered no evidence as to the location of the mean high tide line.

2. In 1974, the Florida legislature adopted The Coastal Mapping Act to standardize mapping procedures and govern the

admissibility of maps and surveys in court. The act was intended to prevent results such as the one in Wetstone.

177.26 Declaration of policy. -- The Legislature hereby declares that accurate maps of coastal areas are required for many public purposes, including, but not limited to, the promotion of marine navigation, the enhancement of recreation, the determination of coastal boundaries, and the implementation of coastal zone planning and management programs by state and local governmental agencies. Accordingly, a state coastal mapping program is declared to be in the public interest. The Legislature further recognizes the desirability of confirmation of the mean high-water line, as recognized in the State Constitution and defined in s. 177.27(15) as the boundary between state sovereignty land and uplands subject to private ownership, as well as the necessity of uniform standards and procedures with respect to the establishment of local tidal datums and the determination of the mean high-water and mean low-water lines, and therefore directs that such uniform standards and procedures be developed.

* * *

177.30 Authorization of coastal mapping program. -- The Department of Natural Resources is authorized and directed to conduct a comprehensive program of coastal boundary mapping with the object of providing accurate surveys of the coastline of the state at the earliest possible date.

177.31 Mapping standards. -- All maps produced under the provisions of this part shall conform at least to minimal national map accuracy standards.

177.32 Approval of maps by department. --

(1) Upon completion of a map or series of maps, the department shall transmit a copy of the map or maps to the clerk of the circuit court for the county in which the land shown on the map is located. In addition to any other notice required by law, the department shall publish in a newspaper of general circulation in the affected area at least once a week for 4 consecutive weeks a notice that a copy of the proposed map or maps is on file in the said clerk's office and that a public hearing shall be held at a specified time and place as provided in subsection (2).

(2) Before a proposed map shall become effective, the department shall hold a public hearing in the county or counties in which the land shown on the map is located.

(3) After such public hearing, the department may approve the proposed map with or without amendments or may withdraw it for further study.

(4) The decision of the department shall be

subject to judicial review as provided in chapter 120.

(5) Upon approval by the department, these maps shall be known as "approved coastal zone maps," and copies thereof shall be filed among the public land records of all affected counties.

177.33 Revised and supplemental maps. --

(1) The department shall endeavor to maintain the accuracy of its mapping program by reviewing its data at least every 25 years and, when necessary, issuing revised approved coastal zone maps.

(2) Any private person or government official may advise the department in writing of any instance in which significant shoreline alteration has occurred as the result of natural conditions or human activities. Upon notification thereof, or on its own initiative, the department may investigate such cases and, when appropriate, authorize the production of a revised coastal zone map of the affected area.

(3) When appropriate and when needed or desirable for particular areas, the department may publish supplemental maps of a scale larger than the standard scale.

(4) Revised or larger scale maps shall become approved coastal zone maps following approval by the department in accordance with procedures set forth in s. 177.32.

177.34 Coastal boundary line location. -- Where approved coastal zone maps do not designate the mean high-water line but instead depict an apparent shoreline, the apparent shoreline is not intended to represent the mean high-water line. Mean high-water or mean low-water lines, whether or not represented on approved coastal zone maps, may be located precisely on the ground by field surveys made in accordance with the standards and procedures set forth in ss. 177.37-177.39.

177.35 Standards and procedures; applicability. -- The establishment of local tidal datums and the determination of the location of the mean high-water line or the mean low-water line, whether by federal, state, or local agencies or private parties, shall be made in accordance with the standards and procedures set forth in ss. 177.37-177.39 and in accordance with supplementary regulations promulgated by the department.

177.36 Work to be performed only by authorized personnel. -- The establishment of local tidal datums and the determination of the location of the mean high-water line or the mean low-water line shall be performed by qualified personnel licensed by the

Florida State Board of Professional Engineers and Land Surveyors or by representatives of the United States Government when approved by the department.

Note. -- The Florida State Board of Professional Engineers and Land Surveyors was abolished by ch. 79-243, and a Board of Land Surveyors was created to regulate the profession of surveying.

177.37 Notification to department. -- Any surveyor undertaking to establish a local tidal datum and to determine the location of the mean high-water line or the mean low-water line shall submit a copy of the results thereof to the department within 90 days after the completion of such work, if the same is to be recorded or submitted to any court or agency of state or local government.

177.38 Standards for establishment of local tidal datums. --

(1) Unless otherwise allowed by this part or regulations promulgated hereunder, a local tidal datum shall be established from a series of tide observations taken at a tide station established in accordance with procedures approved by the department. In establishing such procedures, full consideration will be given to the national standards and procedures established by the National Ocean Survey.

(2) Records acquired at control tide stations, which are based on mean 19-year values, comprise the basic data from which tidal datums are determined.

(3) Observations at a tide station other than a control tide station shall be reduced to mean 19-year values through comparison with simultaneous observations at the appropriate control tide stations. The observations shall be made continuously and shall extend over such period as shall be provided for in departmental regulations.

(4) When a local tidal datum has been established, it shall be preserved by referring it to tidal bench marks in the manner prescribed by the department.

(5) A local tidal datum may be established between two tide stations by interpolation when the time and mean range differences of the tide between the two tide stations are within acceptable standards as determined by the department. The methods for establishing the local tidal datum by interpolation shall be prescribed by regulations of the department. Local tidal datums established in this matter shall be recorded with the department.

(6) A local tidal datum properly established through the use of continuous tide observations meeting the standards described in this section shall be presumptively correct when it differs from a local

tidal datum established by interpolation.

(7) The department may approve the use of tide observations made prior to July 1, 1974, for use in establishing local tidal datums.

177.39 Determination of mean high-water line or mean low-water line. -- The location of the mean high-water line or the mean low-water line shall be determined by methods which are approved by the department for the area concerned. Geodetic bench marks shall not be used unless approved by the department.

177.40 Admissibility of maps and surveys. -- No map or survey prepared after July 1, 1974, and purporting to establish local tidal datums or to determine the location of the mean high-water line or the mean low-water line shall be admissible as evidence in any court, administrative agency, political subdivision, or tribunal in this state unless made in accordance with the provisions of this part by persons described in s. 177.36.

3. In fresh, nontidal lakes, the ordinary high water mark creates the public - private ownership boundary if the lake is a "navigable" water body. In determining the ownership of lakes, the fact of meandering changes the burden of proof as to whether the lake is navigable, and therefore, owned by the state. See, Odom v. Deltona, 341 So.2d 977, 988-89 (Fla. 1976):

Appellants contend that the trial court made a distinction between meandered and non-meandered fresh water lakes without a factual or lawful basis for such distinction. Nevertheless, as the trial court observed, at this late date we are not in a position "to evaluate the work of those surveyors of many decades past" and can merely accept their work as correct, particularly since the state itself has relied upon it constantly since it was completed. In Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof. The logical converse of this proposition, noted by the lower court, is that non-meandered lakes and ponds are rebuttably presumed non-navigable. The lower court's treatment of meandering is also in accord with the proposition that a water body should be regarded as being non-navigable absent evidence of navigability.

4. The dividing line between state and private ownership of the beach is not the mean high tide line in all states. To encourage commerce and development, several states have allowed private ownership of the wet sand area by the adjacent upland owner. These states include: Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, and Virginia. See, D. Brower, Access to the Nation's Beaches: Legal and Planning Perspectives 21 (1976).

Section 3. AMBULATORY BOUNDARIES

Shorelines are rarely stable and are subject to constant, gradual change from erosion, accretion, and reliction. Storms and flooding may drastically change the character of the coast in a very short period. Gradual changes in the shoreline have been generally recognized as changing the legal boundary, also. Sudden, avulsive change, however, may have no effect on the legal boundary.

The following excerpt explains some of the terms associated with ambulatory boundaries:

Maloney and Ausness, The Use and Legal Significance
of the Mean High Water Line in Coastal Boundary Mapping,
53 N.C. L. Rev. 185, 225-26 (1974).

Before discussing the problem of ambulatory versus fixed boundaries, it may be helpful to consider the meaning of a number of terms commonly used in legal discussions of this problem. Accretions or accreted lands consist of additions to the land resulting from gradual deposit by water of sand, sediment or other material. The term applies to such lands produced along both navigable and non-navigable water. Alluvion is that increase of earth on a shore or bank of a stream or sea, by the force of the water, as by a current or by waves, which is so gradual that no one can judge how much is added at each moment of time. The term "alluvion" is applied to the deposit itself, while accretion denotes the act, but the terms are frequently used synonymously.

Reliction refers to land which formerly was covered by water, but which has become dry land by the imperceptible recession of the water. Although there is a distinction between accretion and reliction, one being the gradual building of the land, and the other the gradual recession of water, the terms are often used interchangeably. The term "accretion" in particular is often used to cover both processes, and generally the law relating to both is the same.

Erosion is the gradual and imperceptible wearing away of land bordering on a body of water by the natural action of the elements. Avulsion is either the sudden and perceptible alteration of the shoreline by action of the water, or a sudden change of the bed or course of a stream forming a boundary whereby it abandons its old bed for a new one.

HUGHES v. WASHINGTON
389 U.S. 290 (1967)

Mr. Justice Black delivered the opinion of the Court.

The question for decision is whether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. Prior to 1889 all land in what is now the State of Washington was owned by the United States, except land that had been conveyed to private parties. At that time owners of property bordering the ocean, such as the predecessor in title of Mrs. Stella Hughes, the petitioner here, had under the common law a right to include within their lands any accretion gradually built up by the ocean. Washington became a State in 1889, and Article 17 of the State's new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean. This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. The trial court upheld Mrs. Hughes' contention that the right to accretions remained subject to federal law, and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned these lands. 67 Wash.2d 799, 410 P.2d 20 (1966). We granted certiorari. 385 U.S. 1000 (1967). We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions.

While the issue appears never to have been squarely presented to this Court before, we think the path to decision is indicated by our holding in Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that

"[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U.S., at 22.

No subsequent case in this Court has cast doubt on the principle announced in Borax. See also United States v. Oregon, 295 U.S. 1, 27-28 (1935). The State argues, and the court below held, however, that the Borax case should not be applied here because that case involved no question as to accretions. While this is true, the case did involve the question as to what rights were

conveyed by the federal grant and decided that the extent of ownership under the federal grant is governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See United States v. Washington, 294 F.2d 830, 832 (C.A. 9th Cir. 1961), cert. denied, 369 U.S. 817 (1962). We therefore find no significant difference between Borax and the present case.

Recognizing the difficulty of distinguishing Borax, respondent urges us to reconsider it. Borax itself, as well as United States v. Oregon, *supra*, and many other cases, makes clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. Borax holds that there has been no such choice in this area, and we have no difficulty in concluding that Borax was correctly decided. The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In Jones v. Johnston, 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland, this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean.

The judgment below is reversed, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Stewart, concurring.

I fully agree that the extent of the 1856 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors -- including Mrs. Hughes -- a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "[l]ittoral

rights of upland owners were terminated." 67 Wash.2d 799, 816, 410 P.2d 20, 29. Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. The Washington court insisted that its decision was "not startling." 67 Wash.2d 799, 814, 410 P.2d 20, 28. What is at issue here is the accuracy of that characterization.

The state court rested its result upon Eisenbach v. Hatfield 2 Wash. 236, 26 P. 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The Eisenbach court declined to resolve the accretions question presented here. This question was resolved in 1946, in Ghione v. State, 26 Wash.2d 635, 175 P.2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in Ghione and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its Ghione decision, the Washington Supreme Court reached a different conclusion. The state court in this case sought to distinguish Ghione: The water there involved was part of a river. But the Ghione court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash.2d 635, 645, 175 P.2d 955, 961. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make

law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property -- without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

STATE v. FLORIDA NATIONAL PROPERTIES, INC.
338 So.2d 13 (Fla. 1976)

BOYD, Justice.

This cause is before us on appeal from the Circuit Court, Highlands County. The trial court in its final judgment passed upon the constitutionality of Section 253.151, Florida Statutes, giving this Court jurisdiction of the direct appeal.

Section 253.151, Florida Statutes, reads as follows.

"253.151 Navigable meandered fresh water lakes

* * *

"(3) The boundary line shall be established by, or under the supervision of, the board by use of one or more of the following procedures:

"(a) Where physical evidence exists indicating the actual water's edge of any navigable meandered fresh water lake as of the date such body came under the jurisdiction of the state, regardless of where the water's edge exists on the date of the determination of the boundary line, the water's edge as evidenced on the former date shall be deemed the boundary line."

* * *

The facts of this case are as follows.

Appellee-Plaintiff is a riparian owner of certain lands in Highlands County bordering Lake Istokpoga, a navigable lake. The ordinary high-water mark of Lake Istokpoga was meandered at different points and different times by U.S. Government surveyors in the late 1800's and early 1900's. Lake Istokpoga was meandered in the area of Appellee's property in 1928. Appellee derails its title back to certain warranty deeds issued by Appellant-Trustees of the Internal Improvement Trust Fund, the Trustees having previously received the lands by a swamp and overflow lands grant from the U.S. Government. The land was acquired by Appellee for the purposes of development and of resale as a residential community on the shores of Lake Istokpoga; because of this, a need to do some work in the

navigable waters of Lake Istokpoga arose. Approximately four years prior to the filing of this action, a dispute arose between the Trustees and Appellee as to the location of the boundary lines between the sovereignty bottom lands of the Lake and Appellee's upland property.

* * *

Following a two-day trial the lower court ruled that the boundary line between Appellee's upland property and the sovereignty bottom lands was the present ordinary high-water mark of Lake Istokpoga. The trial judge specifically found that in the disputed area the 1928 Government meander line was at all points coordinate with or upland of the present ordinary high-water mark of Lake Istokpoga; consequently, the court set aside Appellants' claim to all property upland of the 1928 meander line in the area of Appellee's property. The court also found that Appellants' claim to the 41.6 feet contour had been based on Section 253.151, Florida Statutes, and adjudged the statute to be unconstitutional both on its face and as applied by Appellants, as follows:

"The Court . . . finds that the [Appellants'] claim to the 41.6 contour is based on Fla.Stat. Section 253.151. The record is replete with evidence which clearly shows that the Trustees have repeatedly asserted this Statute as their authority for the State's claim to the 41.6 contour line. Although during the course of this proceeding the Trustees have retreated from the Statute as the basis for the State's claim, this change in approach is not convincing. Other than Section 253.151, the Court can find no authority whatsoever for fixing the boundary line at a particular elevation as urged by the Trustees.

"A provision in the State of Washington's Constitution similar to Section 253.151 which purported to fix the boundary line between sovereignty lands and private ownership as of the date Washington was admitted to the Union was struck down by the Supreme Court in Hughes v. Washington, [389 U.S. 290, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967)] as a violation of Art. VI, Sec.2, the Supremacy Clause, of the United States Constitution. It is apparent from Bonelli [Bonelli Cattle Co. v. Arizona] [414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973)] and Hughes that Federal, not State, law governs the resolution of boundary line disputes between the sovereign and private owners whose lands border navigable bodies of water. In Hughes the Supreme Court stated:

"A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. [389 U.S. at 292, 88 S.Ct. at 439,] 19 L.Ed.2d at 533."

This principle was extended in Bonelli to include artificial accretions where the accreted land served no navigational

purpose. Rejecting the same approach taken by the Defendants in this case, the U.S. Supreme Court stated in Hughes:

Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harrassing litigation challenging the location of the original water lines. [389 U.S. at 293, 88 S.Ct. at 440,] 19 L.Ed.2d at 534.

Fla.Stat. Section 253.151 which purports to fix the public/private boundary line as of the date of Statehood, suffers from the same infirmities as the constitutional provision under consideration in Hughes; and it is likewise unconstitutional.

"Furthermore, Fla.Stat. Section 253.151, as applied by the Trustees in the instant case, violates the due process clauses of both the Federal and Florida Constitutions. By relying upon Section 253.151, the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction. Both Federal and Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation. By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat. Section 253.151 as applied by the Trustees in the instant case, constitutes a taking of Plaintiff's property, including its riparian rights to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of Art. I, Sec. 9, of the Florida Constitution.

"The Court also finds that Fla.Stat. Section 253.151 is unconstitutional in its entirety. Subsection (3), which requires the Defendant Board of Trustees to establish the boundary line between the sovereignty bottom lands of navigable meandered fresh water lakes and riparian uplands, cannot be separated from the remaining portions of the Statute, which are closely connected with and refer to the boundary line established pursuant to subsection (3). Without subsection (3), the other provisions of the Statute are meaningless since they serve no purpose independent of the establishment of the boundary line. Hence, the Statute, which contains no severability clause, is invalid in its entirety."

It is from this final judgment that this appeal is taken.

* * *

Upon careful consideration of both the record and arguments of counsel, we conclude that the trial court correctly held the efforts of the State to fix specific and permanent boundaries were improper, and we hold that Section 253.151, Florida Statutes, is unconstitutional.

It is our opinion, and we so hold, that the property line separating sovereignty and riparian property rights is the ordinary high-water mark in meandered fresh water lakes. In doing so we recognize that such line is subject to change from natural causes or with joint consent of the State and private riparian owners. Furthermore, as stated above, we sustain the learned trial court in holding Section 253.151, Florida Statutes, unconstitutional in its entirety. An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society.

Accordingly, the judgment of the trial court is affirmed.

OREGON EX REL. STATE LAND BOARD
v.
CORVALLIS SAND AND GRAVEL CO.
429 U.S. 363 (1977)

Mr. Justice REHNQUIST delivered the opinion of the Court.

This lawsuit began when the State of Oregon sued Corvallis Sand & Gravel Co., an Oregon corporation, to settle the ownership of certain lands underlying the Willamette River. The Willamette is a navigable river, and this land is located near Corvallis, Oregon. The river is not an interstate boundary.

Corvallis Sand had been digging in the disputed part of the riverbed for 40 to 50 years without a lease from the State. The State brought an ejectment action against Corvallis Sand, seeking to recover 11 separate parcels of riverbed, as well as damages for the use of the parcels. The State's complaint alleged that by virtue of its sovereignty it was the owner in fee simple of the disputed portions of the riverbed, and that it was entitled to immediate possession and damages. Corvallis Sand denied the State's ownership of the bed.

Each party was partially successful in the Oregon courts, and we granted cross petitions for certiorari. 423 U.S. 1048, 46 L.Ed.2d 636. Those courts understandably felt that our recent decision in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 36 L.Ed.2d 526 (1973), required that they ascertain and apply principles of federal common law to the controversy. Twenty-six States have joined in three amicus briefs urging that we reconsider Bonelli, supra, because of what they assert is its significant departure from long-established precedent in this Court.

The nature of the litigation and the contentions of the parties may be briefly stated. Title to two distinct portions of land has been at issue throughout. The first of these portions has apparently been within the bed of the Willamette River since Oregon's admission to the Union. The other portion of the land underlies the river in an area known as Fischer Cut, which was not a part of the riverbed at the time Oregon was admitted to the Union. The trial court found that prior to a flood which

occurred in November 1909, the Willamette flowed around a peninsula-like formation known as Fischer Island, but that by 1890 a clearly discernible overflow channel across the neck of the peninsula had developed. Before 1909 this channel carried the flow of the river only at its intermediate or high stages, and the main channel of the river continued to flow around Fischer Island. But in November 1909, a major flow, in the words of the Oregon trial court, "suddenly and with great force and violence converted Fischer Cut into the main channel of the river."

The trial court, sitting without a jury, awarded all parcels in dispute, except for the Fischer Cut lands, to the State. That court found that the State had acquired sovereign title to those lands upon admission into the union, and that it had not conveyed that title. The State was also awarded damages to recompense it for Corvallis Sand's use of the lands.

With respect to the Fischer Cut lands, the trial court found that avulsion, rather than accretion, had caused the change in the channel of the river, and therefore the title to the lands remained in Corvallis Sand, the original owner of the land before it became riverbed.

The Oregon Court of Appeals affirmed. That court felt bound, under Bonelli, to apply federal common law to the resolution of this property dispute. In so doing, the court found that the trial court's award of Fischer Cut to Corvallis Sand was correct either under the theory of avulsion, or under the so-called exception to the accretion rule, announced in Commissioners v. United States, 270 F. 110 (CA8 1920).^{1/} The

^{1/} (2) The court quoted the language from Commissioners in support of that rule:

"[The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. . . ." 18 Or. App. 524, 539-540, 526 P.2d 469, 477 (1974).

court, finding that preservation of the State's interest in navigation, fishing, and other related goals did not require that it acquire ownership of the new bed, rejected the argument that the State's sovereign title to a riverbed follows the course of the river as it moves.

In this Court, Oregon urges that we either modify Bonelli or expound "federal common law" in such a way that its title to all the land in question will be established. Corvallis Sand urges that we interpret "federal common law" in such a manner that it will prevail. Amici, as previously noted, urge that we re-examine Bonelli because in their view that case represented a sharp break with well-established previous decisions of the Court.

The dispute in Bonelli was over the ownership of the former bed of the Colorado River, a bed which the river had abandoned because of a federal rechanneling project. The Bonelli land was not part of the actual riverbed, however, either at the time Arizona was admitted to the Union, or at the time of suit. Before Arizona had been admitted as a State, Bonelli's predecessor in title had received a United States patent to the land. Over a period of years the Colorado River had migrated gradually eastward, eroding its east bank and depositing alluvion on its west bank in the process. In the course of this movement of the river the Bonelli land, which had at the time of patent been on the east bank, was submerged, and, until the rechanneling project, most of it was under water. After the completion of the rechanneling project the bed of the Colorado River was substantially narrowed, and the Bonelli land re-emerged.

The Supreme Court of Arizona held that Arizona owned the title to the beds of navigable rivers within its borders, and that Arizona therefore acquired title to the Bonelli land when it became part of the riverbed as a result of the eastward migration of the Colorado. That court went on to hold that under state law the re-emergence of the land was an avulsive change, which did not divest the State of its title to the exposed land. This Court granted certiorari and reversed the Supreme Court of Arizona.

We phrased the critical inquiry in Bonelli in these words:

"The issue before us is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act -- whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters." 414 U.S., at 319-320, 94 S.Ct. at 523. (Emphasis added.)

We held that federal common law should govern in deciding whether a State retained title to lands which had re-emerged from the bed of a navigable stream, relying in part on Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9 (1935). That case held that the extent and validity of a federal grant was a question to be resolved by federal law, and in Bonelli we decided that the nature of the title conferred by the equal-footing doctrine set forth in Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845), should likewise be governed by federal common law. Under the equal-footing doctrine "the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. 423, 436, 18 L.Ed. 756 (1867). Pollard's Lessee held that under the equal-footing doctrine new States, upon their admission to the Union, acquire title to the lands underlying navigable waters within their boundaries.

We went on to discuss the nature of the sovereign's interest in the riverbed, which we found to lie in the protection of navigation, fisheries, and similar purposes. We held that under federal common law, as we construed it in that case, Arizona's sovereign interest in the re-emerged land was not sufficient to enable it to retain title. We found the principle governing title to lands which have been formed by accretion, rather than that which governs title where there has been an avulsive change in the channel of the river, to be applicable. We chose the former because it would both ensure the riparian owner access to the water's edge and prevent the State from receiving a windfall. We therefore decided that Bonelli, as riparian owner, was entitled to the land in question.

Our analysis today leads us to conclude that our decision to apply federal common law in Bonelli was incorrect. We first summarize the basis for this conclusion, and then elaborate in greater detail.

The title to the land underlying the Colorado River at the time Arizona was admitted to the Union vested in the State as of that date under the rule of Pollard's Lessee v. Hagan, *supra*. Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.

Bonelli's thesis that the equal-footing doctrine would require the effect of a movement of the river upon title to the riverbed to be resolved under federal common law was in error. Once the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal-footing doctrine enunciated in Pollard's Lessee v. Hagan as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true; in Pollard's Lessee itself the equal-footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.

The equal-footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law in deciding title to the Bonelli land, and state law should have been applied unless there were present some other principle of federal law requiring state law to be displaced. The only other basis for a colorable claim of federal right in Bonelli was that the Bonelli land had originally been patented to its predecessor by the United States, just as had most other land in the Western States. But that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law. Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law.

In Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935), this Court also found a basis to apply federal law, but its rationale does not dictate a different result in this case. In Borax, the city of Los Angeles brought suit to quiet title in certain land in Los Angeles Harbor. Los Angeles claimed the land under a grant from the State of California, whereas Borax, Ltd., claimed the land as a successor in interest to a federal patentee. The federal patent had purported to convey a specified quantity of land, 18.88 acres, according to a survey by the General Land Office. This Court recognized that if the patent purported to convey lands which were part of the tidelands, the patent would be invalid to that extent since the Federal Government has no power to convey lands which are rightfully the State's under the equal-footing doctrine. Id., at 17-19, 56 S.Ct., at 26-27. The Court affirmed the decision of the Court of Appeals to remand for a new trial to allow the city to attempt to prove that some portion of the lands described in the federal patent was in fact tideland.

The Court went on to hold that the boundary between the upland and tideland was to be determined by federal law. Id., at 22, 56 S.Ct., at 29. This same principle would require that determination of the initial boundary between a riverbed, which

the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State. The expressions in Bonelli suggesting a more expansive role for the equal-footing doctrine are contrary to the line of cases following Pollard's Lessee.

For example, this Court has held that subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law. Indeed the rule that lands once having passed from the Federal Government are subject to the laws of the State in which they lie antedates Pollard's Lessee. As long ago as 1839, the Court said:

"We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." Wilcox v. Jackson, 13 Pet., at 517, 10 L.Ed. 264. (Emphasis added.)

The contrary approach would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be constrained by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State. See, Bonelli, 414 U.S., at 332-333, 94 S.Ct., at 529 (Stewart, J., dissenting).

Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.

A similar result obtains in the case of riparian lands which did not pass under the equal footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155, 64 S.Ct. 474, 480, 88 L.Ed. 635 (1944). This is particularly true with respect to real property, for even when federal common law was in its

heyday under the teachings of Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842), an exception was carved out for the local law of real property. Id., at 18.

This principle applies to the banks and shores of waterways, and we have consistently so held. Barney v. Keokuk, 94 U.S. 324, 24 L.Ed. 224 (1877), involved an ejectment action by the plaintiff against the city involving certain land along the banks of the Mississippi River. After noting that the early state doctrines regarding the ownership of the soil of nontidal waters were based upon the then-discarded English view that nontidal waters were presumed non-navigable, the Court clearly articulated the rule that the States could formulate, and modify, rules of riparian ownership as they saw fit:

"Whether, as rules of property, it would now be safe to change these doctrines [arising out of the confusion of the original classification of nontidal waters as nonnavigable] where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, 10 L.Ed. 997; Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565, and Goodtitle v. Kibbe, 9 id. 471, 13 L.Ed. 220. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters." Id., at 338.

In Shively v. Bowlby, the Court canvassed its previous decisions and emphasized that state law controls riparian ownership. The Court concluded that grants by Congress of land bordering navigable waters "leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States." 152 U.S., at 58, 14 S.Ct., at 570. As the Court again emphasized in Packer v. Bird, 137 U.S. 661, 669, 11 S.Ct. 210, 212, 34 L.Ed. 819 (1891):

"[W]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee."

This doctrine was squarely applied to the case of a riparian proprietor in Joy v. St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776 (1906). The land at issue had originally been granted to the patentee's predecessor by Spain, and Congress had confirmed the grant and issued letters patent. This Court held that the fact that a plaintiff claimed accretions to land patented to his predecessor by the Federal Government did not

confer federal-question jurisdiction, and implicitly rejected any notion that "federal common law" had any application to the resolution. Central to this result was the holding:

"As this land in controversy is not the land described in the letters patent or the [A]cts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under laws of the United States." Id., at 343, 26 S.Ct., at 481.

Upon full reconsideration of our decision in Bonelli, we conclude that it was wrong in treating the equal-footing doctrine as a source of federal common law after that doctrine had vested title to the riverbed in the State of Arizona as of the time of its admission to the Union. We also think there was no other basis in that case, nor is there any in this case, to support the application of federal common law to override state real property law. There are obviously institutional considerations which we must face in deciding whether for that reason to overrule Bonelli or to adhere to it, and those considerations cut both ways. Substantive rules governing the law of real property are peculiarly subject to the principle of stare decisis.

Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States. In cases such as this, considerations of stare decisis play a less important role than they do in cases involving substantive property law. Even if we were to focus on the effect of our decision upon rules of substantive property law, our concern for unsettling titles would lead us to overrule Bonelli, rather than to retain it. Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter. We are also persuaded that, in large part because of the positions taken in the briefs presented to the Court in Bonelli, the Bonelli decision was not a deliberate repudiation of all the cases which had gone before. We there proceeded on the view, which we now think to have been mistaken, that Borax, supra, should be read so expansively as to in effect overrule sub silentio the line of cases following Pollard's Lessee.

For all of these reasons, we have now decided that Bonelli's application of federal common law to cases such as this must be overruled.

The judgment under review is vacated, and the case remanded to the Supreme Court of Oregon for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice MARSHALL, with whom Mr. Justice WHITE joins, dissenting.

The Court today overrules a three-year-old decision, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed. 526 (1973), in which seven of the eight participating Justices joined. In addition, as the Court is certain to announce when the occasion arises, today's holding also overrules Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), a nine-year-old decision also joined by all but one of the participating Justices.^{1/} It is surprising, to say the least, to find these nearly unanimous recent decisions swept away in the name of stare decisis.

* * *

The question the Court elects to decide in this case is whether a grant of riparian land by the Federal Government is to be interpreted according to federal or state law. The Court holds that federal law governs only the determination of the initial boundaries of the grant; all other questions are to be determined under state law. This conclusion depends on an unjustifiably limited interpretation of the meaning of a riparian grant.

* * *

1. (1) Although the Court rejects the reasoning on which Hughes is based, it refrains from formally overruling Hughes on the ground that that case was not relied on in Bonelli and not cited by the Oregon courts below. Ante, at 590 n.6. In Bonelli, the Solicitor General urged the Court to find federal law controlling because riparian lands patented by the United States were involved and, under Hughes, federal common law therefore controlled the riparian rights of the landowner. The petitioner took the same position. The Bonelli Court did not reach this contention noting that there was some doubt that the land in question was riparian at the time of the federal patent. In its eagerness to do away with Bonelli's result as well as its approach, however, today's opinion explicitly concludes that had Bonelli relied on the theory advocated by the petitioner there and the Solicitor General, it would now be rejected.

Nevertheless, the majority suggests that Hughes might still control ocean-front property. It is difficult to take seriously the suggestion that the national interest in international relations justifies applying a different rule to oceanfront land grants than to other grants by the Federal Government. It is clear that the States have complete title to the lands below the line of mean high tide. These lands, of course, are the only place where the waters "lap both the lands of the State and the boundaries of the international sea." There are no international relations implications in the ownership of land above the line of mean high tide. See Note, The Federal Rule of Accretion and California Coastal Protection, 48 S. Cal. L. Rev. 1457, 1472 (1975).

Prior to today's ruling, federal grantees of riparian land, and holders under them, correctly understood that their titles incorporated boundaries whose precise location would depend on the movements of the water and on the federal common law.

* * *

[T]he cases refute the majority's contention that the results in Hughes and Bonelli sharply departed from prior law. Today's holding cannot, therefore, be based on interpretation of the meaning of the prestatehood riparian grants under which Covallis Sand & Gravel holds title, since the right to an ambulatory boundary was assumed to be part of the rights of a riparian grantee at the time the grants were made. Moreover, the cases also demonstrate that there is no constitutional basis for today's holding. The only constitutional question discussed in the majority opinion is the law governing the States' title to land beneath navigable waters, and the rights of the riparian holder are independent of that law.

II

Since today's ruling cannot be a matter either of constitutional law or of interpretation of the meaning of federal grants, it must be a choice-of-law decision.

* * *

I am convinced that if the Court had considered the cases on which it relies in the light of an adversary presentation and had invited the Government to explain its interest in the application of federal law, the result today would be different. I therefore respectfully dissent.

CALIFORNIA EX REL. STATE LANDS COMMISSION

v.

UNITED STATES
457 U.S. 273 (1982)

[The Humboldt Case]

JUSTICE WHITE delivered the opinion of the Court.

The issue before the Court is the ownership of oceanfront land created through accretion to land owned by the United States on the coast of California. The decision turns on whether federal or state law governs the issue.

I

From the time of California's admission to the Union in 1850, the United States owned the upland on the north side of the entrance channel to Humboldt Bay, Cal. In 1859 and 1871, the Secretary of the Interior ordered that certain of these lands, which fronted on the Pacific Ocean, the channel, and Humboldt Bay be reserved from public sale. Since that time the land has been

continuously possessed by the United States and used as a Coast Guard Reservation. The Pacific shoreline along the Coast Guard site remained substantially unchanged until the turn of the century when the United States began construction of two jetties at the entrance to Humboldt Bay. The jetty constructed on the north side of the entrance resulted in fairly rapid accretion on the ocean side of the Coast Guard Reservation, so that formerly submerged lands became uplands. One hundred and eighty-four acres of upland were created by the seaward movement of the ordinary high-water mark. This land, which remains barren save for a watchtower, is the subject of the dispute in this case.

The controversy arose in 1977 when the Coast Guard applied for permission from California to use this land to construct the watchtower. At this time it became evident that both California and the United States asserted ownership of the land. The United States eventually built the watchtower without obtaining California's permission. Invoking our original jurisdiction, California then filed this suit to quiet title to the subject land. We granted leave for California to file a bill of complaint. 454 U.S. 809 (1981).

California alleges that upon its admission to the Union on September 9, 1850, 9 Stat. 452, and by confirmation in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. Section 1301 et seq., California became vested with absolute title to the tidelands and the submerged lands upon which, after construction of the jetties, alluvion was deposited, resulting in formation of the subject land. Because the accretion formed on sovereign state land, California maintains that its law should govern ownership. Under California law, a distinction is drawn between accretive changes to a boundary caused by natural forces and boundary changes caused by the construction of artificial objects. For natural accretive changes, the upland boundary moves seaward as the alluvion is deposited, resulting in a benefit to the upland owner. When accretion is caused by construction of artificial works, however, the boundary does not move but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced. It is not disputed that the newly formed land in controversy was created by the construction of the jetty. Therefore, if state law governs, California would prevail.

By its answer, and supporting memoranda, the United States contends that the formerly submerged lands were never owned by California before passage of the Submerged Lands Act in 1953, and that the disputed land was not granted to California by the Act. The United States also submits that the case is governed by federal rather than state law and that under long-established federal law, accretion, whatever its cause, belongs to the upland owner.

* * *

Unless Hughes is to be overruled, judgment must be entered for the United States.

California urges that for all intents and purposes Hughes has already been eviscerated by Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977). Corvallis involved a dispute between the State of Oregon and an Oregon

corporation over the ownership of land that became part of a riverbed because of avulsive changes in the river's course. The Oregon Court of Appeals affirmed the trial court's award of the land to the corporation because that was the result dictated by federal common law, which, under Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), was the proper source of law. A majority of this Court reversed, overruling Bonelli and holding that the disputed ownership of the riverbed should be decided solely as a matter of Oregon law. Bonelli's error was said to have been reliance on the equal-footing doctrine as a source of federal common law. Once the equal-footing doctrine had vested title to the riverbed in Arizona, "it did not operate after that date to determine what effect on titles the movement of the river might have." 429 U.S., at 371. State, rather than federal law, should have been applied.

California urges that in rejecting Bonelli and holding that disputes about the title to lands granted by the United States are to be settled by state law, the Court also rejected Hughes since that case involved land that had been patented by the United States to private owners. We do not agree. Corvallis itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced." 429 U.S., at 371. For example, the effects of accretive and avulsive changes in the course of a navigable stream forming an interstate boundary is determined by federal law. Id., at 375. The Corvallis opinion also recognized that Bonelli did not rest upon Hughes and that the Hughes Court considered oceanfront property "sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship." 429 U.S., at 337, n.6. The Corvallis decision did not purport to disturb Hughes.

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), made clear that Corvallis also does not apply "where the [United States] Government has never parted with title and its interest in the property continues." 442 U.S., at 670. The dispute in Corvallis was between the State and a private owner of land previously in federal possession. In contrast, the riparian owner in Wilson was the United States, holding reservation land in trust for the Omaha Indian Tribe. The issue was the effect of accretive or avulsive changes in the course of a navigable stream. State boundaries were not involved. What we said in Wilson is at least equally applicable here where the United States has held title to, occupied, and utilized the littoral land for over 100 years: "[T]he general rule recognized by Corvallis does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest." 442 U.S., at 670.

We conclude, based on Hughes v. Washington and Wilson v. Omaha Indian Tribe, that a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.

III

Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand. This is not such a case. First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land. The Submerged Lands Act, 43 U.S.C. Section 1301 et seq., vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low-water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5(a) of the Act, however, withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States." 43 U.S.C. Section 1313(a). In light of this provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. In Wilson, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common-law rule.

Moreover, this is not a case in which federal common law must be created. For over 100 years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. "Almost all jurists and legislators, . . . both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions." Jefferis v. East Omaha Land Co., 134 U.S., at 189, quoting Banks v. Ogden, 2 Wall. 57, 67 (1865).

* * *

Applying the federal rule that accretions, regardless of cause, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

IV

Despite Hughes and Wilson, California claims ownership of the disputed lands because all of the accretions were deposited on tidelands and submerged lands, title to which, California submits, was vested in the State by the equal-footing doctrine and confirmed by the Submerged Lands Act. But California's claim to the land underlying the territorial sea was firmly rejected in United States v. California, 332 U.S. 19 (1947), which held that only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine.

* * *

In any event, Section 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States, and both California and the United States agree that the exposure of the formerly submerged lands in dispute constitutes "accretion." This reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States.

We reaffirm today that federal law determines the boundary of oceanfront lands owned or patented by the United States. Applying the federal rule that accretions of whatever cause belong to the upland owner, we find that title to the disputed parcel rests with the United States. Accordingly, California's motion for summary judgment is denied, and the United States' motion for judgment on the pleadings is granted.

* * *

JUSTICE REHNQUIST, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in the judgment.

* * *

I agree with the Court that the Wilson rule applies to oceanfront property as well as riverfront property where the Federal Government is the littoral owner. Wilson should apply to the movement of the high-water mark along the ocean in a fashion similar to the way it applies to changes in the bed of a navigable stream. In the instant case, as in Wilson, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a riverbottom or the ocean tidelands. The fact is that both Wilson and the instant case concern title disputes over changes in the shoreline where the Federal Government owns land along the shoreline.

In Wilson, we held that state law supplied the applicable rule of decision even though federal common law applied to resolve the title dispute. We found no need for a uniform national rule and no reason why federal interests should not be treated under the same rules of property that would apply to private persons. In contrast to Wilson, however, I agree with the Court that Congress in Section 5(a) of the Submerged Lands Act has supplied the rule of decision. Section 5(a) withholds from the grant to the States all accretions to coastal lands acquired or reserved by the United States. I also agree with the Court that California did not acquire the disputed lands pursuant to the "made lands" provisions in Section 2(a)(3).

Consequently, the Court's discussion regarding the continuing vitality of Hughes v. Washinton, 389 U.S. 290 (1967), is dicta. Hughes is unnecessary to the resolution of choice-of-law issues in title disputes between the Federal Government and a State or private person. Reliance on Hughes would be necessary only if we were to hold that federal common law, rather than state law, applied in a title dispute between a federal patentee and a State or private persons as to lands fronting an ocean. The instant case does not present that issue. It is difficult to reconcile Hughes with Corvallis and we should postpone that endeavor until required to undertake it.

In summary, I think this case can be easily resolved as a title dispute between the United States and California concerning the legal effect of movement of the Pacific Ocean's high-water mark. Wilson and the Submerged Lands Act resolve the dispute. The continuing vitality of Hughes should be left to another day.

NOTES

1. It is not at all clear that the Florida Supreme Court in Florida National Properties correctly applied Hughes and Bonelli. That part of the opinion is even more questionable after Bonelli was specifically overruled. Choice of law was not, however, the only basis of the Florida National Properties decision, and the unconstitutionality of the statute still forms a valid basis for the decision.
2. The continuing viability of Hughes is still an issue. It is unclear why the rights of a riparian owner who traces his title to a prestatehood federal grant should be determined by whether the land borders the ocean or other navigable water. An issue not yet addressed is what law controls the rights of riparian owners whose land can be traced to a poststatehood federal grant to a state or to private parties.
3. The following excerpt contemplates the broader implications of Humboldt.

Th[e] long-standing principle [of Shively v. Bowlby] that state property law determines an upland owner's title to and rights in tidelands may be undercut by the Humboldt decision's reaffirmance of Hughes. If Humboldt is construed as requiring the federal law of accretion to be applied to additions along the oceanfront wherever the United States is the source of upland title, even though the lands have been privately owned for many years, then the Shively principle would be illusory.

Moreover, the philosophy of the equal-footing doctrine -- that the newer states should have the same rights, sovereignty and jurisdiction as the original states have in tidal and other navigable waters and the underlying lands -- would be frustrated by such a broad reading of Humboldt. The result: inequality among the coastal states. Those that never had federal public lands along their oceanfronts, the original states, Texas and Hawaii, would be free to apply their own states' laws, while the other states would not be.

Graber, Are State Coastal Rights Being Eroded by the Federal Law of Accretion?, 1 Coastal Zone '83 420, 434-435 (1983).

BOARD OF TRUSTEES, ETC. v. MEDEIRA BEACH NOM., INC.
272 So.2d 209 (Fla.2d DCA 1973)

LILES, Acting Chief Judge.

This is an appeal from a final summary judgment in the Circuit Court for Pinellas County, ruling that the state had no interest in accreted lands and quieting title thereto in appellee.

Appellee, Medeira Beach Nominee, Inc., is owner of a tract of land on Sand Key in the City of Madeira Beach. The property lies between Gulf Boulevard and the waters of the Gulf of Mexico. The deeds conveyed all riparian rights and the westerly boundary was the mean high tide line. In February, 1971, appellee began construction of improvements, including a seawall upon the accreted land. In April, appellant Board of Trustees of the Internal Improvement Trust Fund of the State of Florida sued to enjoin further construction on the property for a distance approximately 115 feet landward of the existing mean high tide line, claiming same to be sovereignty lands.

The lands in dispute, or some undetermined part of them, were accreted in front of appellee's riparian uplands apparently as a result of a public erosion control and beach stabilization program, the first phase of which was completed in 1957 by the City of Madeira Beach.

* * *

The questions: Does a strip of accreted land become the property of the upland riparian owner even where the accretion is the result of a lawful exercise of the police power by a municipality to prevent beach erosion?

Accretion is the gradual and imperceptible addition of soil to the shore of waterfront property. The test as to what is gradual and imperceptible is, that though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. St. Clair County v. Lovington, 90 U.S. (23 Wall.) 46, 68, 23 L.Ed. 59 (1874). Title to accreted lands by the great weight of authority vests in the riparian owners of abutting lands. Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Mexico Beach Corp. v. St. Joe Paper Co., 97 So.2d 708, 710 (1st D.C.A.Fla.1957); cert. den. 101 So.2d 317 (1958).

The fact that the strip of land involved was true accretion is not in dispute. The disagreement between the parties appeared to be whether the established rule of law should be followed or whether there should be recognized or created an exception to the general rule. One exception to the general rule is that accretion does not belong to the riparian owner where the riparian himself causes the accretion. E.g., Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917); State v. Sause, 217 Or. 52, 342 P.2d 803 (1959). The reason for this exception is that since

land below the ordinary high water mark is sovereignty land of the state, to permit the riparian owner to cause accretion himself would be tantamount to allowing him to take state land. Here the defendant riparian owner did nothing to cause the accretion to the uplands. Therefore, under the facts of this case, there is no exception to the general rule as stated above.

Historically, courts have attempted to distinguish between natural accretions and artificial accretions caused by the riparian owner. There is little authority for distinguishing between natural and artificial accretions generally. St. Clair County v. Lovington, 90 U.S. (23 Wall.) 46, 23 L.Ed. 59 (1874). That case holds that whether the accretion is the effect of natural or artificial causes makes no difference. Contra, People v. Hector, 179 Cal. App.2d 823, 4 Cal.Rptr. 334, 343 (2nd Dist.Div.1 1960); South Shore Land Co. v. Petersen, 230 Cal.App.2d 628, 41 Cal.Rptr. 277, 279 (1st Dist.Div.2 1967). The instant case is very similar in that the accretions there were caused by the erection of a dike connecting an island with the main shore of Illinois. The city of St. Louis, exercising its police power, caused the accretion, albeit unintentionally. The United States Supreme Court held that the riparian right to future alluvion or accretion is a vested right similar to the rights of a tree owner to the fruits of the tree.

The state urges that the court make a distinction between artificial accretion and artificial accretion produced by the state or municipality in the exercise of its police power. To do so would be usurping the authority vested in the Legislature to make sweeping changes in property rights assuming constitutional problems are properly avoided.

It would appear at first blush that Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), represents some support of authority for such a distinction. Upon examination the court in that case ruled that land exposed by a state program of draining Lake Okeechobee remained the property of the state even though that land was now upland of the ordinary high water mark. The court said:

"If to serve a public purpose, the state, with consent of the federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high-water mark, the lands so uncovered below such high-water mark, continue to belong to the state." Id.

It therefore appears that decision deprived the upland owner of his status as a riparian. In order for the instant case to be analogous, the groin project of the City of Madeira Beach would have had to be intended to produce the accretion which occurred and the groin system would have to be in fact the cause of the accretion. Even if this were shown, we would not be inclined to follow the court's treatment of reliction in Martin in this case dealing with accretion.

There are four reasons for the doctrine of accretion: (1) de minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water. See, St. Clair County v. Lovington, 90 U.S. (23 Wall.) 46, 67, 23 L.Ed. 59 (1874); Maloney, Plager and Baldwin, Water Law and Administration: The Florida Experience, page 386 (1968).

An additional reason behind the doctrine of accretion relates to the riparian owner's ability to use his land. The ordinary high water mark is well established as the dividing line between private riparian and sovereign or public ownership of the land beneath the water. This dividing line was not chosen arbitrarily.

The use of this dividing line has been reaffirmed in Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), where the court reaffirmed the Lovington accretion doctrine in a contest between the state and a private riparian. There the court said:

"Any other rule would leave riparian owners continually in danger of losing access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines." Id. at 293-294, 88 S.Ct. at 440-441.

It is apparent that the reasoning behind this line is demonstrated in the day to day utilization of the waterfront property by its riparian owner. Although the mean or high water mark is an average over a number of years, the daily mark of a high tide on the shore gives both the riparian and the public notice of their possible use of the land on either side of the mark. Freezing the boundary at a point in time, such as was done in Martin or as is suggested here by the state, not only does damage to all the considerations above but renders the ordinary high water mark useless as a boundary line clearly marking the riparian's rights and the sovereign's rights.

In this case the de minimis doctrine does not seem to apply initially due to the extent of the accretion involved. Nevertheless, the holding in this case will affect riparians other than those before us. What of riparians further along the shore where accretion is not a great? Should they be deprived of their status as riparians merely because the state wishes to claim title to one or two or ten feet of accreted land? If true accretion is the subject, i. e., a gradual and imperceptible buildup, the de minimis doctrine is applicable at all times regardless of the particular amount of buildup at a point in time. Were the state to gain title to this accreted land we believe that riparian titles around the state would be in jeopardy of unmarketability.

The second idea that the riparian owner who must risk the losses of erosion should gain the benefits of accretion is applicable here and, although not persuasive, is a fair and reasonable approach. It may be argued that the riparian here risks no erosion loss due to the existence of erosion control programs. Yet, the riparian here has paid for the additional benefits he has gained through the program by special assessment taxes. And, the program could have gone awry and contributed to erosion in which case he would not have been entitled to compensation. Patty v. Palm Beach, 158 Fla. 575, 29 So.2d 363 (1947).

Public policy weighs heavily in this decision as well. The public today stands in danger of losing access to beaches entirely in many places. Yet, quieting title here in the state will not solve the access problem. Nor will quieting title in the upland owner result in any loss of public rights in the foreshore or beach which the public always has a right to use. The foreshore between the mean high and low tide lines is public property.

* * *

[I]t should be evident that quieting title in the state will little benefit the state while causing great harm to the appellee riparians. We see no reason for causing such a result.

* * *

Finally, the state urges a retroactive application to Florida Statute Section 161.051, F.S.A. which purports to vest title to accretions caused by public works in the state. The erosion projects here were begun in 1957 while the statute was enacted in 1965. Even if the statute is constitutional with respect to riparian owners we are not convinced that a legislative intent that the statute be applied retroactively has been shown. Statutes are presumed to be prospectively applied unless legislative intent to the contrary clearly appears. Miami v. Bd. of Public Instruction, 72 So.2d 901 (Fla.1954); State ex rel. Hill v. Cone, 140 Fla. 1, 191 So. 50 (1939). Retroactive statutes may be invalid where they impair vested rights. The title of a statute intended to operate retrospectively should convey notice of that intent. See, Chiapetta v. Jordan, 153 Fla. 788, 16 So.2d 641 (1943). In view of the foregoing we do not believe Florida Statute Section 161.051 should be applied here, especially where no substantial evidence has been taken to show that the erosion project was the cause of the accretion.

If, in fact, the state can show that erection of this seawall will endanger the effectiveness of Madeira Beach's erosion control program we have no doubt that an injunction to prevent the wall is a proper remedy. We see no reason to quiet title in the state merely to prevent the erection of a seawall. Furthermore, we have stated other factors which we believe call for the opposite result.

NOTES

1. The beach and shore preservation provisions of the Florida Statutes, section 161.051, stipulate that although properly permitted jetties, piers, breakwaters, and other "coastal construction" are the property of the person or entity that builds or improves the structure, title to the land around and under the structure below the mean high water mark is not affected and continues to belong to the state. In addition, if the coastal construction causes any addition or accretion, any land accreted or added will belong to the state.

2. Some commentators believe section 161.051 to be unconstitutional. Consider the following excerpt:

Boyer and Cooper, Real Property, 28 U. Miami L. Rev. 1, 25-26 (1973).

By the great weight of authority, title to accreted lands vests in the riparian owners of abutting lands. Exception is made to this rule where the riparian himself causes the accretion; in such instance, title to the accreted land vests in the state. Since land below the high water mark is owned by the state, to permit the riparian owner to cause accretion and gain title to such land would be tantamount to allowing him to take state land.

In Board of Trustees of the Internal Improvement Fund v. Madeira Beach Nominee, Inc., a second exception to the above rule was proposed, i.e., that where accretions are caused by the state, title should vest in the state rather than in the riparian owner. This rule was rejected by the court. Accretions had formed in front of appellee's riparian uplands, apparently as a result of an erosion control program of the state. The trial judge made no findings as to what extent the accretions were the result of natural processes, finding that appellee would hold title to the accreted lands even if no accretion would have occurred but for the state project.

On appeal, the court was therefore presented with the question of whether a strip of accreted land belongs to the adjoining riparian owner, as opposed to the state, where such accretion was the result of a lawful exercise of the police power by a governmental unit to prevent beach erosion.

The court noted that the doctrine of accretion, holding that title to accreted lands vests in the adjoining riparian, is supported by four reasons:

(1) de minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits

they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity of preserving for the riparian the right of access to the water.

These four policy reasons clearly indicate that the interest of the riparian in accreted land is superior to that of the state. Florida, therefore, followed the majority of states in holding that such land vests in the riparian owner.

The legislature has arrived at a result opposite to that above. Florida Statutes section 161.051 (1971) purports to vest title to accretions caused by public works in the state. In Medeira Beach, the court noted that this statute would not be applied retroactively, and since the erosion control projects were begun before the effective date of the statute, the statute was of no effect. Though the statute would apparently supercede the ruling of Medeira Beach as to erosion control projects begun after 1965, its use would appear open to constitutional challenge. The riparian or littoral right to future accretions is a vested right which is an inherent and essential attribute of the original property. By passage of such statute, the state cannot be permitted to defeat the constitutional prohibition against taking of property without due process of law and just compensation. Therefore, the statute could divest riparian owners of their vested right to accretion only if compensation were made for the taking.

[Note: To date, no constitutional attacks on 161.051 have reached the courts.]

3. The Humboldt Case and Hughes v. Washington may also affect section 161.051. If title to littoral land is traced to a federal grant, federal law rather than state law must be applied.

Section 3. THE SIGNIFICANCE OF PUBLIC OWNERSHIP

A. The Public Trust Doctrine

The readings have already indicated that tidelands and lands below navigable waters are owned by the state in a special capacity -- in the public trust. The public trust doctrine is a "natural law" concept that dates back to the Romans. Under Roman law, the waters, sea, and seashore were res communes, that is, common property not subject to private ownership. The doctrine disappeared during the Middle Ages, but reemerged in England as a device allowing the Crown to control the tidelands. The

doctrine was adopted and nurtured by the United States courts after the Revolution. Since its inception, the public trust doctrine has been modified and expanded to reflect economic, political, and environmental influences. It is a versatile, ancient concept that retains its vitality. In The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970), Professor Sax states:

Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.

The development of the public trust doctrine in the United States and Florida is set out in this section. See the notes following State v. Gerbing for recommended readings on the public trust doctrine.

ILLINOIS CENTRAL RAILROAD COMPANY v. ILLINOIS
146 U.S. 387 (1892)

Mr. Justice FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago.

* * *

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers and docks in the harbor.

* * *

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective

States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.

* * *

The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds inlands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and

waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable water, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

* * *

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the

property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in Martin v. Waddell, 16 Pet. 367, 410: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In Arnold v. Mundy, 1 Halsted, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the jus regium, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

* * *

The character of the title or ownership by which the State holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the jura regalia of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the King, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted.

In People v. New York and Staten Island Ferry Co., 68 N.Y. 71, 76, the Court of Appeals of New York said:

"The title to lands under tide waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (p.22) Lord Hale says: 'The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use;' and Mr. Justice Best, in Blundell v. Catterall, 5 B. & A. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' . . .

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right."

* * *

It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same is valid and effective for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

McCOMB, Justice.

This is a quiet title action to settle a boundary line dispute caused by overlapping and defective surveys and to enjoin defendants (herein "Whitney") from asserting any claim or right in or to the property of plaintiff Marks. The unique feature here is that a part of Marks' property is tidelands acquired under an 1874 patent issued pursuant to the Act of March 28, 1868 (Stats.1867-1868, c. 415, p. 507); a small portion of these tidelands adjoins almost the entire shoreline of Whitney's upland property. Marks asserted complete ownership of the tidelands and the right to fill and develop them. Whitney opposed on the ground that this would cut off his rights as a littoral owner and as a member of the public in these tidelands and the navigable waters covering them. He requested a declaration in the decree that Marks' title was burdened with a public trust easement; also that it was burdened with certain prescriptive rights claimed by Whitney.

The trial court settled the common boundary line to the satisfaction of the parties. However, it held that Whitney had no "standing" to raise the public trust issue and it refused to make a finding as to whether the tidelands are so burdened. It did find in Whitney's favor as to a prescriptive easement across the tidelands to maintain and use an existing seven-foot wide wharf but with the limitation that "Such rights shall be subject to the right of Marks to use, to fill and to develop" the tidelands and the seven-foot wide easement area so long as the Whitney "rights of access and ingress and egress to and from the deep waters of the Bay shall be preserved" over this strip.

* * *

Questions: First. Are these tidelands subject to the public trust; if so, should the judgment so declare?

Yes. Regardless of the issue of Whitney's standing to raise this issue the court may take judicial notice of public trust burdens in quieting title to tidelands. This matter is of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property. A present declaration that the title of Marks in these tidelands is burdened with a public easement may avoid needless future litigation.

Tidelands are properly those lands lying between the line of mean high and low tide covered and uncovered successively by the ebb and flow thereof. The trial court found that the portion of Marks' lands here under consideration constitutes a part of the Tidelands of Tomales Bay, that at all times it has been, and now is, subject to the daily ebb and flow of the tides in Tomales Bay, that the ordinary high tides in the bay overflow and submerge this portion of his lands, and that Tomales Bay is a navigable body of water and an arm of the Pacific Ocean.

* * *

It was not until 1913 that this court decided in People v. California Fish Co., supra, 166 Cal. 576, 596, 138 P.79, 87, that "The only practicable theory is to hold that all tideland is included, but that the public right was not intended to be divested or affected by a sale of tidelands under these general laws relating alike both to swamp land and tidelands. Our opinion is that * * * the buyer of land under these statutes receives the title to the soil, the jus privatum, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved, and the private right of the purchaser will be given as full effect as the public interests will permit."

* * *

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. The public has the same rights in and to tidelands.

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

"[T]he state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust -- and if they are not subject to the constitutional prohibition forbidding alienation -- they may be irrevocably conveyed into absolute private ownership." (City of Long Beach v. Mansell, 3 Cal.3d 462, 482, 91 Cal.Rptr. 23, 37, 476 P.2d 423, 437.)

The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters. We are not here presented with any action by the state or the federal government modifying, terminating, altering or relinquishing the jus publicum in these tidelands or in the navigable waters covering them. Neither sovereignty is a party to this action. This court takes judicial notice, however, that there has been no official act of either sovereignty to

modify or extinguish the public trust servitude upon Marks' tidelands. The State Attorney General, as amicus curiae, has advised this court that no such action or determination has been made by the state.

We are confronted with the issue, however, whether the trial court may restrain or bar a private party, namely, Whitney, "from claiming or asserting any estate, right, title, interest in or claim or lien upon" the tidelands quieted in Marks. The injunction so made, without any limitation expressing the public servitude, is broad enough to prohibit Whitney from asserting or in any way exercising public trust uses in these tidelands and the navigable waters covering them in his capacity as a member of the public. This is beyond the jurisdiction of the court. It is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the jus privatum of Marks or upon the jus publicum of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes and unlawful infringement upon the jus publicum therein. It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished, and to take the necessary steps to free them from such burden. In the absence of state or federal action the court may not bar members of the public from lawfully asserting or exercising public trust rights on this privately owned tidelands.

There is absolutely no merit in Marks' contention that as the owner of the jus privatum under this patent he may fill and develop his property, whether for navigational purposes or not; nor in his contention that his past and present plan for development of these tidelands as a marina have caused the extinguishment of the public easement. Reclamation with or without prior authorization from the state does not ipso facto terminate the public trust nor render the issue moot.

* * *

Second: Does Whitney have "standing" to request the court to recognize and declare the public trust easement on Marks' tidelands?

Yes. The relief sought by Marks resulted in taking away from Whitney rights to which he is entitled as a member of the general public. It is immaterial that Marks asserted he was not seeking to enjoin the public. The decree as rendered does enjoin a member of the public.

Members of the public have been permitted to bring an action to enforce a public right to use a beach access route; to bring an action to quiet title to private and public easements in a public beach; and to bring an action to restrain improper filling of a bay and secure a general declaration of the rights of the people to the waterways and wildlife areas of the bay. Members of the public have been allowed to defend a quiet title action by asserting the right to use a public right of way through private

property. They have been allowed to assert the public trust easement for hunting, fishing and navigation in privately owned tidelands as a defense in an action to enjoin such use, and to navigate on shallow navigable waters in small boats.

Whitney had standing to raise this issue. The court could have raised this issue on its own. "It is now well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." (Hendershott v. Shipman (1951) 37 Cal.2d 190, 194, 231 P.2d 481, 483.) Where the interest concerned is one that, as here, constitutes a public burden upon land to which title is quieted, and affects the defendant as a member of the public, that servitude should be explicitly declared.

* * *

STATE V. GERBING
56 Fla. 603, 47 So. 353 (1908)

* * *

The title to lands under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state by virtue of its sovereignty in trust for the people of the state for navigation and other useful purposes afforded by the waters over such lands, and the trustees of the internal improvement fund of the state are not authorized to convey the title to the lands of this character.

The trust with which these lands are held by the state is governmental, and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may by appropriate means grant to individuals the title to limited portions of the lands, or give limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and waters. Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

* * *

NOTES

1. State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893) and Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909) are early cases in which the Florida Supreme Court used the public trust doctrine to negate a riparian owner's claim to lands under navigable waters. The public trust doctrine is firmly entrenched in Florida case law and implicitly recognized in Chapter 253 of Florida Statutes which governs the state's "sovereignty lands."

2. California does not tie the public trust doctrine to its historical origins or limit its scope to the public's traditional

uses of commerce, navigation, and fishing. The approach gives the state's courts the flexibility to recognize the public benefit of new uses of tidelands and navigable waters.

In White v. Hughes, 139 Fla. 54, 59, 190 So. 446, 449 (1939), the Florida Supreme Court expressly recognized swimming and bathing as within the scope of the public trust. The Florida Supreme Court stated:

The constant enjoyment of this privilege (i.e., swimming and bathing in salt waters) of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has.

3. Recommended readings: Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant L.J. 13 (1976); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762 (1970); The Public Trust Doctrine in Natural Resources Law and Management: A Symposium, 14 U.C. Davis L. Rev. 181 (1980); MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, 3 Fla. St. U.L. Rev. 513 (1975); Commentary, The Public Trust Doctrine and Ownership of Florida's Navigable Lakes, 29 U. Fla. L. Rev. 730 (1980).

B. State Divestiture of Public Trust Lands

CONSTITUTION OF THE STATE OF FLORIDA ART. X, Section 11.

Sovereignty lands. - The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

History. - Am. H.J.R. 792, 1970; adopted 1970.

ODOM v. DELTONA CORP.
341 So.2d 977 (Fla. 1976)

BOYD, Justice.

* * *

The complex nature of the whole problem of navigable waters has created much doubt and controversy in attempting to determine what is or is not navigable water and sovereign land. Not only has the Legislature addressed itself to this problem and enacted at various times the statutes referred to by the trial court, but the 1968 Constitution, Article X, Section 11, acknowledges, in pertinent part, that certain sovereign lands have been alienated[.]

* * *

If a standard other than that which has been expressed by statute and by the Constitution is proper, then it is the duty of the people and the Legislature, not the courts of Florida, to make this determination. There still remains much confusion in these matters, as is reflected by the record: for instance, trial testimony of state employees handling the issuance of dredge-and-fill permits indicates that even they are unable to determine what is or is not a navigable body of water, and one witness testified that he might be fired if he offered an opinion on the subject to a landowner seeking a permit. Further clarifying legislation might be appropriate.

Appellants assert that, since Florida became a state in 1845, the Trustees of the Internal Improvement Fund have held title to sovereign lands beneath the navigable waters of Florida, particularly those beneath fresh navigable waters, and that the federal test of "navigability in fact" is the proper test. Navigability at law is generally a question of navigability in fact; and, while differing legal tests of navigability are applied for varying purposes, we agree that the issue of whether a particular lake was navigable at the time of Florida's admission to the Union so as to vest sovereignty title in the state is a federal question which, because of the need for uniformity must be determined under federal standards of navigability: (1) commerce clause test; (2) admiralty jurisdiction test; and (3) the federal title test. A critical distinction between the federal title test and the other two tests is that the title test does not allow for the consideration of reasonable artificial improvements; instead, navigability under this test is based on the water body's potential for commercial use in its ordinary and natural condition. We find that Florida's test for navigability is similar, if not identical, to the federal title test.

Appellants also argue for the application of the "notice of navigability" concept, i.e., that the grantee of swamp and overflowed lands under a Trustee deed takes with "notice" that the conveyance does not include sovereignty land. In the case of a large lake, such as Lake Okeechobee, a 500,000 acre lake, we agree; however, it seems absurd to apply this test to small, non-

meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface.

Appellants contend that the trial court made a distinction between meandered and non-meandered fresh water lakes without a factual or lawful basis for such distinction. Nevertheless, as the trial court observed, at this late date we are not in a position "to evaluate the work of those surveyors of many decades past" and can merely accept their work as correct, particularly since the state itself has relied upon it constantly since it was completed. In Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof. The logical converse of this proposition, noted by the lower court, is that non-meandered lakes and ponds are rebuttably presumed non-navigable. The lower court's treatment of meandering is also in accord with the proposition that a water body should be regarded as being non-navigable absent evidence of navigability.

An examination of the Constitution and statutes indicates that both the people and the Legislature strongly feel that valid federal and state grants of title to real property without any reservation of public rights in and to waters thereon should not be upset because of new standards of value relating to ecology and other matters created by population growth, recreational needs and other issues of current importance to Florida. In fact, the Commission's assertion of regulatory authority does not comport with existing state law; this Court has delineated rather forcefully the absence of public rights, including fishing, in privately owned lakes. It seems logical to this Court that, when the Legislature enacts a Marketable Title Act, as found at Chapter 712, Florida Statutes, clearing any title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act. Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights specifically reserved in such conveyances.

It appears that public officials operating under a color of law have acquiesced in the development of the land surrounding the chain of inland lakes over which this litigation arose, indicating willingness for residential development contiguous to the waters, including necessary modification of lake bottoms. Many private persons have contracted with Appellee relying upon this development, and we feel it highly inequitable and inappropriate for the state at this late date to renounce its earlier action taken under the direction of prior officials. We feel that equitable estoppel is properly invoked in this particular set of circumstances.

* * *

It should be reiterated that, as stated in Sawyer, supra, ancient conveyances of sovereign lands in existence for more than thirty years, when the State has made no effort of record to reclaim same, clearly vests marketable title in the grantees, their successors or assigns and the land may be recovered only by direct purchase or through eminent domain proceedings.

* * *

SUNDBERG, Justice (concurring in part and dissenting in part).

* * *

I concur in the conclusion reached as to title in non-meandered fresh water lakes. I dissent from the conclusion of the trial court and the majority of this Court with respect to application of the Marketable Record Title Act as explicated in [the lower court] judgment. It is inconceivable to me that a marketable record title act which is aimed primarily at quieting title to private lands can be utilized to divest the people of the State of Florida of lands held in public trust for them. Absent the safeguards of statutory notice and hearing to the public and affected parties and of a conclusion after careful study by the Trustees of the Internal Improvement Fund that a limited grant of sovereign lands will do no public or private harm, it should be presumed that all conveyance of submerged land areas by the Trustees are made with implicit reservation to the state of navigable water. This should be the case even when the description in the conveyance includes navigable water areas. What is essentially a curative act could not have been intended by the legislature to provoke divestiture of public trust lands. This issue was squarely presented in Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1974), wherein Judge Walden concluded that the Marketable Record Title Act does operate to cut off claims by the public to sovereign lands after thirty years has elapsed. The Court denied certiorari in Modrall v. Sawyer, 297 So.2d 562 (Fla. 1974). However, Mr. Justice Ervin, dissenting, found conflict on two points and there took issue with the District Court's interpretation of the Marketable Record Title Act. Justice Ervin aptly stated the sentiments which I hold:

"The Marketable Record Title Act (particularly F.S. Section 712.04, F.S.A. thereof) does not by literal interpretation clear title to private persons in open-water sovereignty areas. It is an extreme presumption on the part of the Legislature that by that Act it can expressly invalidate State and Federal public land ownerships by the mere passage of time because of the existence of conflicting private titles thereto which were void ab initio, except where the government title is expressly reserved in its patent or deed. The consequences of such a presumption could create many untoward results highly detrimental to public interests. Presumably thereunder an illegal government deed to a private person covering a sector of any open waterway or harbor would ripen into private ownership after thirty years.

"All conveyances of submerged land areas by the Trustees of the Internal Improvement Fund carry with them implicit reservation to the State of navigable waters, even though the

description of an area encompasses navigable water areas -- and particularly those which continue in use by the public for navigational purposes, as in the case here -- unless contemporaneously with the making of any conveyance it appears after statutory notice and hearing to the public and affected parties and careful study by the Trustees that a limited grant in a sovereignty area will do no public or private harm. Such a reservation by implicit necessity results when the Trustees' deed of conveyance either mistakenly or illegally incorporates sovereignty areas. In such circumstances the deed is void unless there is clear estoppel or inequity. The area covered by the void deed in the instant case has never been filled in, has continued constantly to be in use for boating by the public. Respondent and his predecessors in title have all along been on notice of the sovereign inalienable quality of this open water, navigable area and its obvious public use and status as sovereign land.

"The application of the Marketable Record Title Act when applied to submerged lands must be considered in connection with the case law discussed hereinbefore. Title to sovereignty lands as between the State and private persons must of necessity be determined not on the basis of express reservations in patents or deeds or the length of time of existence of conveyances to private persons, but upon the nature of the particular lands, their navigability and use from the public as well as the private standpoint. The evidentiary circumstances as to the nature of any submerged area must be considered to determine if it was susceptible to alienation.

"The appellate courts ought not in this case to substitute their findings for those of the trier of facts on the question of whether the area is sovereignty land.

"The evils of failure to protect sovereignty areas by the courts where various legal pretexts are resorted to but which have little but technical bases to support them were pointed out by me in a dissent in the case of Trustees of I. I. Fund v. Wetstone, Fla.1969, 222 So.2d 10. The soundness of the views expressed in that dissent becomes more and more apparent as cases of the kind here treated make their appearance with increasing frequency." 297 So.2d 562, at 565, 566.

STATE v. CONTEMPORARY LAND SALES
400 So.2d 488 (Fla. 5th DCA 1981)

COWART, Judge.

This case involves the application of the Marketable Record Title Act (Section 712.01 et seq., Fla.Stat. (1963)) to the title to land exposed by the lowering of the water level of a freshwater lake by a state water control agency.

The original U.S. Government survey, made in 1848, shows Section 18, Township 23 South, Range 26 East, as a fractional section with a couple of hundred acres of land on the west edge

bordered on the east by the meandered shore of the navigable, non-tidal, fresh waters of what is now known as Lake Louisa in Lake County, Florida.

* * *

By various mesne conveyances this property, so described was conveyed to Contemporary Land Sales.

Lake Louisa is part of the Clermont chain of lakes whose water table was artificially lowered by a spillway constructed about August 8, 1956, by the Oklawaha Basin Recreation and Water Conservation Control Authority, an agency of the State of Florida.

At this time the description in the deed to Contemporary covers (a) some land which was original upland, (b) some land which was originally beneath the waters of Lake Louisa but has now been exposed by the lowering of the water level (i.e., land below the original high water mark and above the present lake level or "reclaimed lake bottom"), and (c) some land that is still beneath the present waters of Lake Louisa. Contemporary and its predecessors in title have paid ad valorem property taxes on the entire parcel described above for at least the last ten years.

Contemporary brought a quiet title action alleging the Marketable Record Title Act (Section 712.01 et seq., Fla.Stat. (1977)) extinguished all claims of the State to the property described above.

* * *

The State does not challenge the judgment quieting Contemporary's title to the original uplands and Contemporary did not appeal the trial court's judgment in effect denying Contemporary's action to quiet title to the portions of lands described above which are still underwater. Therefore, in this case we are concerned only with the title to land formerly, but not now, covered by the waters of Lake Louisa.

* * *

Under common law doctrine the State of Florida in its sovereign capacity holds title to the beds of navigable waters, including the shore or the space between high and low water marks, in trust for the people of the state who have rights of navigation, commerce, fishing, boating and other public uses. Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Broward v. Mabry. Subject to these public rights the Legislature of the State of Florida has control over such sovereign trust lands but, it is said, may sell parts of such lands to private ownership when the public and private rights are not impaired. State ex rel Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908). Therefore the lands originally under the waters of Lake Louisa were sovereign lands.

The title to the uplands in question passed to the State of Florida as swamp and overflowed lands under the Act of September 28, 1850 (9 Stat. 519) and was conveyed into private ownership by the Trustees of the Internal Improvement Fund in 1883. Swamp and overflowed lands within the meaning of the act did not include any lands below navigable waters. Conveyances of uplands, including swamp and overflowed lands, for ordinary private ownership purposes do not extend below the ordinary high-water

mark of adjoining navigable waters and do not include sovereignty lands.

* * *

[I]t has been held in Florida that reliction does not apply where the land is reclaimed by the drainage operations of governmental agencies, in which case the State, not the upland owner, continues to own the former lake bottom, or sovereignty lands, that become uncovered and reclaimed between the original high water mark and the new lake water level resulting from the drainage operations. Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). While the purposes of the governmental action in this case was [sic] to control the water level of a chain of lakes and not as in Martin, for the express objective of reclaiming land, nevertheless we hold that the result is the same and that an artificial lowering of the waters of Lake Louisa occurred and that the sovereign lands formerly beneath the lake waters continued to be sovereignty lands after they were exposed.

The Marketable Record Title Act, section 712.02, Florida Statutes (1963), provides, in effect, that any person whose chain of title extends from any title transaction recorded over thirty years has a marketable record title free and clear of all claims except those set forth in section 712.03, Florida Statutes. When the Marketable Record Title Act was originally adopted in 1963, and at all times relevant to this case,¹ section 712.03 contained no exception in favor of sovereignty lands. On the contrary section 712.04 indicated that all governmental rights depending on any act or event prior to the date of a root of title were extinguished excepting only rights in favor of the state reserved in deeds by which Florida parted with title. Of course, that exception is not applicable in this case.

Contemporary claims all of its lands were included in the NW1/4 of the SW1/4 of Section 18 and therefore its "root of title" (Section 712.01(2), Fla.Stat. (1979)) is from the conveyance recorded December 23, 1938, and that effective December 23, 1968, the Marketable Record Title Act perfected its title to the property in question and barred the State's claims to that portion of the property in question lakeward of the original government meander line.

The question is therefore squarely presented: Can the Marketable Record Title Act as it existed prior to the 1978 amendment perfect title in a private owner to lands that would otherwise be owned by the State of Florida in its sovereign capacity and held in trust for all the people?

1. (4) Effective June 15, 1978, Ch. 78-288, Section 1, Laws of Florida, amended section 712.03, Florida Statutes (1977), adding an exception numbered 7 which provides that the Marketable Record Title Act does not extinguish "state title to lands beneath navigable waters acquired by virtue of sovereignty." It will be readily noted that this exception is patently ambiguous as relating to a case, such as this, involving lands no longer beneath navigable waters. If by this statute the Legislature intended to correct an oversight, not only did the horse in this case escape in the hiatus but the barn door is still ajar.

We read the Supreme Court's denial of certiorari in Modrall v. Sawyer, 297 So.2d 562 (Fla.1974), and its decision in Odom v. Deltona Corp., 341 So.2d 977 (Fla.1976), to answer the above question in the affirmative. Certainly, Justice Ervin, dissenting in Modrall, and Justices Sundberg, Overton and England, dissenting in Odom, understand those cases to have that meaning. Therefore, we feel compelled to answer the same question in the same way in this case.

NOTES

1. Consider the following analysis of Odom v. Deltona and the public trust doctrine:

Rosen, Public and Private Ownership Rights in Lands under Navigable Waters: The Governmental/Proprietary Distinction, 34 U. Fla. L. Rev. 561, 611-613 (1982).

Odom and Estuary Properties represent the culmination of Florida's trend toward "desanctifying" state ownership interests in sovereignty lands and merging the retained governmental interest with general police powers. The synthesis of MRTA [Marketable Record Title Act] with judicially created estoppel doctrines limited the implied reservation principle to the extent that state proprietary interests are treated the same as individual private property rights in the contemplation of the law. Once it was recognized that preservation of public rights in navigable waters did not require state ownership of the underlying lands, there was no reason to prohibit state alienation of such property; and once the power to alienate was acknowledged, there was no reason to treat the state differently than a private landowner dealing with ordinary real property.

The realization that the state's retained governmental power to control the use of navigable waters is not dependent upon ownership of the submerged property has facilitated the conceptual merger of the state's public trust authority with general police powers. It must be remembered that the notion of a distinct governmental interest in navigable waters was the product of an era in which virtually the only rights over the use of property that were accorded legal recognition were those connected with some identifiable interest in the property. Under common law theory, even the sovereign could not regulate the use of property in which he held no ownership rights, at least not without acquiring such rights through eminent domain.

With the expansion of the state's police power in the twentieth century, however, it came to be accepted that the use of private property could be controlled through reasonable regulations, such as zoning. Once it was recognized that both public servitudes in the navigable waters and private development of the underlying lands could be adequately regulated through the

police power, there was no longer any need for a distinct governmental trust interest in sovereignty lands. Thus, when the Odom court equated the retained governmental interest with the police power, it hastened the demise of an archaic concept which had outlived its usefulness and become a source of confusion for generations of judges, lawyers, and litigants.

By placing the state's proprietary interests in sovereignty lands on an equal ground with those of private citizens, and by replacing the governmental trust authority with the police power, Florida courts have effectively jettisoned the archaic and amorphous principles of the public trust doctrine in favor of a more familiar framework of analysis. The potential benefits of applying general property law to title disputes and police power principles to regulatory controversies are manifest. Where a legitimate public interest is threatened, there is no need for a determination of title to the land; thus, the costs and complications attendant to the determination of navigability are eliminated. When only proprietary rights are at stake, there is no basis for the state to assert the public trust principle as a pretext for attempting to appropriate without compensation property rights that had, by virtue of the state's own acts or omissions, become vested in a private party - a practice courts have repeatedly condemned. Instead of treating the resolution of disputes over public and private rights as a choice between absolutes, Florida may now achieve the balancing of public rights and proprietary interests originally intended by the trust doctrine.

Application of the governmental/proprietary distinction by Florida courts in resolving the conflict between public and private rights in lands under navigable waters confirms that the public trust doctrine is not concerned with ownership of the submerged lands so long as there is no interference with the public's right to use the navigable waters. The recognition of a severable proprietary interest in submerged lands is consistent with both common law precedent and common sense logic. There are many benefits that can be derived from submerged lands apart from but consistent with public rights in the waters. It makes no sense to say such interests must be preserved, if their preservation neither enhances nor diminishes the public rights for which the trust was created.

Moreover, the capacity to alienate proprietary interests in sovereignty lands is a natural concomitant of the state's function as trustee for the public's property. Since the state has the power to preserve the public servitudes in the waters, it is in the interest of the state and all of its citizens to permit private development of those resources that are not susceptible to common public use or enjoyment. If the distinction between governmental powers and proprietary rights is properly observed, public and private rights in navigable waters need not conflict, but may be exercised within their respective spheres to the mutual benefit of all.

* * *

2. The Marketable Title Act provides a statutory estoppel against competing claims, whether the claims are by individuals or the state, if a person has a recorded chain of title for thirty years. The sovereignty lands exception to this rule does not necessarily give the state a clear claim to the lands, because Florida courts have also allowed common law estoppel to operate to divest the state of title to sovereignty lands.

In Trustees of the Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956), the doctrine of equitable estoppel was applied against the state to quiet title to sovereignty lands. Part of the land had been validly conveyed by the Trustees. The remaining part of the land had been added by the deposit of spoil from an adjacent federal dredging operation. The court held that estoppel would be applied against the state if necessary to prevent "manifest injustice and wrongs to private individuals" so long as the application of estoppel did not interfere with the exercise of governmental powers by the state. Id. at 790.

In Trustees of the Internal Improvement Trust Fund v. Lobeau, 127 So.2d 98 (Fla. 1961), the Florida Supreme Court held that where there are "special and exceptional circumstances," the state could be estopped from denying the validity of a transaction between the state and a private citizen. In a specially concurring opinion, Justice Drew noted, however, that the doctrine of legal estoppel would not be available "when its application would affect the sovereign power of the State in the exercise of purely governmental function." Id. at 104. Justice Drew further noted that the doctrine of estoppel may only be invoked in the case of rights that could have been granted expressly by the state to private individuals. Id. at 104.

More recently, the Florida Supreme Court has qualified the Lobeau and Claughton rules. In Bryant v. Peppe, 238 So. 836 (Fla. 1970), the court ruled that estoppel could only be used to "bolster a paper title" from the state. Id. at 838. Neither equitable estoppel nor legal estoppel could be used to create title. Id.

Consider, however, Florida National Properties, supra, in which the court stated that although ownership is not usually transferred from the state to a riparian owner through an artificial change in the high water line of a navigable lake, "[a]cquiescence or failure by the state to restrain an artificial lowering of the water table for a long period might constitute laches or estoppel depending upon the facts and equities in each case." 338 So.2d at 18-19 (1976). It is difficult to reconcile this proposition with the rule set out in Bryant.

3. State ownership and, therefore, regulation of sovereignty lands can be limited by estoppel. Closely related are limitations on police power if rights of landowners have "vested." The following excerpt explains the relationship of the two doctrines.

Rhodes, Hauser & DeMeo, Vested Rights: Establishing Predictability in a Changing Regulatory System, 8 Stetson L.Rev. 1, 2-3 (1983).

Although the doctrines of equitable estoppel and vested rights arise from distinct theoretical bases, Florida courts have employed these concepts interchangeably. At least one commentator attempted to distinguish vested rights from equitable estoppel when he stated:

The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly, their elements are different. Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation.

The problem with this "derivative distinction" is that the judicial determination most often turns on equity and the relative positions of the parties. It is not surprising the quoted authority eventually concluded "[T]he courts seem to reach the same results when applying these defenses to identical factual circumstances." Thus, as a practical matter, rights will vest if the particular facts of a case justify application of the doctrine of equitable estoppel.

Although usually difficult to assert against a legitimate exercise of the police power, the doctrine of equitable estoppel may be invoked in Florida to prevent arbitrary governmental action. The Second District Court of Appeal succinctly captured the doctrine's policy underpinnings:

Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. . . .

Equitable estoppel, therefore, will be applied to a government exercising land use power when a property owner: (1) in good faith; (2) upon some act or omission of the government; (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the acquired right.

* * *

4. For cases interpreting the standards and applicability of the doctrine of vested rights, see Sakolsky v. City of Coral Gables, 151 So.2d 433 (Fla.1963); Dade County v. Rosell Construction, 297 So.2d 46 (Fla.1974); Texas Co. v. Town of Miami Springs, 44 So.2d

808 (Fla.1950); Pasco County v. Tampa Development Corp., 364 So.2d 850 (Fla. 2nd DCA 1978); Sharrow v. City of Dania, 83 So.2d 274 (Fla.1955); Dept. of Environmental Regulation v. Oyster Bay Estates, 384 So.2d 891 (Fla. 1st DCA 1980); City of Boynton Beach v. Carroll, 272 So.2d 171 (Fla. 4th DCA 1973).

5. Congress has also enacted legislation to quiet title to federally claimed lands. The federal Quiet Title Act of 1972 may also function to divest a state of public trust lands. See Block v. North Dakota below.

BLOCK v. NORTH DAKOTA
103 S.Ct. 1811 (1983)

* * *

Justice WHITE delivered the opinion of the Court.

Under the Quiet Title Act of 1972 (QTA), the United States, subject to certain exceptions, has waived its sovereign immunity and has permitted plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest. These cases present two separate issues concerning the QTA. The first is whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property. The second is whether the QTA's twelve-year statute of limitations, 28 U.S.C. Section 2409a(f), is applicable in instances where the plaintiff is a State, such as respondent North Dakota. We conclude that the QTA forecloses the other bases for relief urged by the State, and that the limitations provision is as fully applicable to North Dakota as it is to all others who sue under the QTA.

I

It is undisputed that under the equal footing doctrine first set forth in Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845), North Dakota, like other States, became the owner of the beds of navigable streams in the State upon its admission to the Union. It is also agreed that under the law of North Dakota, a riparian owner has title to the center of the bed of a non-navigable stream. Because of differing views of navigability, the United States and North Dakota assert competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota. The United States contends that the river is not now and never has been navigable, and it claims most of the disputed area based on its status as riparian landowner. North Dakota, on the other hand, asserts that the river was navigable on October 1, 1889, the date North Dakota attained statehood, and therefore that title to the disputed bed vested in it under the equal footing doctrine on that date. Since at least 1955, the United States has been issuing riverbed oil and gas leases to private entities.

* * *

The matter thereafter proceeded to trial. North Dakota introduced evidence in support of its claim that the river was navigable on the date of statehood. The federal defendants, while denying navigability, presented no evidence on this point; their evidence was limited to showing, for statute of limitations purposes, that the State had notice of the United States' claim more than twelve years prior to the commencement of the suit.

After trial, the District Court rendered judgment for North Dakota. The court first concluded that the Little Missouri River was navigable in 1889 and that North Dakota attained title to the bed at statehood under the equal footing doctrine and the Submerged Lands Act, 42 U.S.C. Section 1311(a). Then, applying what it deemed to be an accepted rule of construction that statutes of limitations do not apply to sovereigns unless a contrary legislative intention is clearly evident from the express language of the statute or otherwise, the court rejected the defendants' claim that North Dakota's suit was barred by the QTA's twelve-year statute of limitations, 28 U.S.C. Section 2409a(f).

* * *

II

The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress.

* * *

Only upon passage of the QTA did the United States waive its immunity with respect to suits involving title to land. Prior to 1972, States and all others asserting title to land claimed by the United States had only limited means of obtaining a resolution of the title dispute - they could attempt to induce the United States to file a quiet title action against them, or they could petition Congress or the Executive for discretionary relief. Also, since passage of the Tucker Act in 1887, those claimants willing to settle for monetary damages rather than title to the disputed land could sue in the Court of Claims and attempt to make out a constitutional claim for just compensation.

* * *

The predominant view, [prior to the QTA] was that citizens asserting title to or the right to possession of lands claimed by the United States were "without benefit of a recourse to the courts," because of the doctrine of sovereign immunity.

Congress sought to rectify this state of affairs. The original version of S. 216, the bill that became the QTA, was short and simple. Its substantive provision provided for no qualifications whatsoever. It stated in its entirety: "The United States may be named a party in any civil action brought by any person to quiet title to lands claimed by the United States." 117 Cong.Rec. 46380 (1971). The Executive Branch opposed the original version of S. 216 and proposed, in its stead, a more-elaborate bill, reprinted in S.Rep. No. 92-575, pp. 7-8 (1971), providing several "appropriate safeguards for the protection of the public interest."

This Executive proposal, made by the Justice Department, limited the waiver of sovereign immunity in several important respects. First, it excluded Indian lands from the scope of the waiver. The Executive branch felt that a waiver of immunity in this area would not be consistent with "specific commitments" it had made to the Indians through treaties and other agreements. Second, in order to insure that the waiver would not "serve to disrupt costly ongoing Federal programs that involve the disputed lands," the proposal allowed the United States the option of paying money damages instead of surrendering the property if it lost a case on the merits. Third, the Justice Department proposal provided that the legislation would have prospective effect only; that is, it would not apply to claims that accrued prior to the date of enactment. This was deemed necessary so that the workload of the Justice Department and the courts could develop at a rate which could be absorbed. Fourth, to ensure that stale claims would not be opened up to litigation, the proposed bill included a six-year statute of limitations.

The Senate accepted the Justice Department's proposal, with the notable exception of the provision that would have given the bill prospective effect only. The Senate-passed version of the bill contained a "grandfather clause" that would have allowed old claims to be asserted for two years after the bill became law.

Primarily because of the grandfather clause, the Executive Branch could still not accept the bill. The Department of Justice argued that this clause could cause "a flood of litigation on old claims, many of which had already been submitted to the Congress and rejected," thereby putting "an undue burden on the Department and the courts." As a compromise, the Department proposed to give up its insistence on "prospective only" language and to accept an increase in the statute of limitations to twelve years, in exchange for elimination of the grandfather clause. This proposal had the effect of making the bill retroactive for a twelve-year period. The House included this compromise in the version of the bill passed by it, and the Senate acquiesced and the bill became law with the compromise language intact.

* * *

III

We also cannot agree with North Dakota's submission, which was accepted by the District Court and the Court of Appeals, that the States are not subject to the operation of Section 2409a(f). This issue is purely one of statutory interpretation, and we find no support for North Dakota's position in either the plain statutory language or the legislative history.

The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign

immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.

* * *

Accordingly, before finding that Congress intended here to exempt the States from satisfying the time-bar condition on its waiver of immunity, we should insist on some clear indication of such an intention.

Proceeding in accordance with these well-established principles, we observe that Section 2409a(f) expressly states that any civil action is time-barred unless filed within twelve years after the date it accrued. The statutory language makes no exception for civil actions by States. Nor is there any evidence in the legislative history suggesting that Congress intended to exempt the States from the condition attached to the immunity waiver. These facts alone, in the light of our approach to sovereign immunity cases, would appear to compel the conclusion that States are not entitled to an exemption from the strictures of Section 2409a(f).

* * *

We do not discount the importance of the generally applicable rule of statutory construction relied upon by the Court of Appeals. The judicially-created rule that a sovereign is normally exempt from the operation of a generally-worded statute of limitations has retained its vigor because it serves the public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. Thus, in this case, the rule would further the interests of the citizens of North Dakota, by affording them some protection against the negligence of state officials in failing to comply with the otherwise applicable statute of limitations.

Even assuming, however, that this rule has relevance in construing the applicability to the States of a congressionally-imposed statute of limitations not expressly including the States, here the will of Congress is apparent and we must follow it.

* * *

IV

North Dakota finally argues that, even if Congress intended to apply Section 2409a(f) to it, and even if valid when applied in suits relating to other kinds of land, the section is unconstitutional under the equal footing doctrine and the Tenth Amendment insofar as it purports to bar claims to lands constitutionally vested in the State. We are unable to agree.

The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution.

Such a law would not run afoul of the equal footing doctrine or the Tenth Amendment, as asserted by North Dakota, but it would constitute a taking of the State's property without just compensation in violation of the Fifth Amendment. Section 2409a(f), however, does not purport to strip any State, or anyone else for that matter, of any property rights. The statute limits the time in which a quiet title suit against the United States can be filed; but, unlike an adverse possession provision, Section 2409a(f) does not purport to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under Section 2409a(f). A dismissal pursuant to Section 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.

Thus, we see no constitutional infirmity in Section 2409a(f). A constitutional claim can become time-barred just as any other claim can.

* * *

V

Admittedly, North Dakota comes before us with an appealing case. Both lower courts held that the Little Missouri is navigable and that the State obtained title to the disputed land at statehood. The federal defendants have not asked this Court to review the correctness of these substantive holdings other than to submit that these determinations are time-barred by the QTA. We agree with this submission. Whatever the merits of the title dispute may be, the federal defendants are correct: If North Dakota's suit is barred by Section 2409a(f), the courts below had no jurisdiction to inquire into the merits.

In view of the foregoing, the judgment of the Court of Appeals is reversed. North Dakota's action may proceed, if at all, only under the QTA. If the State's suit was filed more than twelve years after its action accrued, the suit is barred by Section 2409a(f). Since the lower courts made no findings as to the date on which North Dakota's suit accrued, the case must be remanded for further proceedings consistent with this opinion.

• So ordered.

6. The 1985 Florida legislature created a study committee to review how the Marketable Record Title Act has operated to divest title to state lands and to determine needed changes. Litigation under MRTA is suspended for one year.

C. PUBLIC RIGHTS IN NAVIGABLE WATERS

THE DANIEL BALL
77 U.S. 557 (1870)

Appeal from the Circuit Court for the Western District of Michigan, the case being thus:

The act of July 7th, 1838, provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon "the bays, lakes, rivers, or other navigable waters of the United States," after the 1st of October of that year, without having first obtained from the proper officer a license under existing laws; that for every violation of this enactment the owner or owners of the vessel shall forfeit and pay to the United States the sum of five hundred dollars; and that for this sum the vessel engaged shall be liable, and may be seized and proceeded against summarily by libel in the District Court of the United States.

The act of August 30th, 1852, which is amendatory of the act of July 7th, 1838, provides for the inspection of vessels propelled in whole or in part by steam and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register, or enrolment, under either of the acts, can be granted, and declares that if any vessel of this kind is navigated with passengers on board, without complying with the terms of the act, the owners and the vessel shall be subject to the penalties prescribed by the second section of the act of 1838.

In March, 1868, the Daniel Ball, a vessel propelled by steam, of one hundred and twenty-three tons burden, was engaged in navigating Grand River, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places, without having been inspected or licensed under the laws of the United States; and to recover the penalty, provided for want of such inspection and license, the United States filed a libel in the District Court for the Western District of Michigan.

The libel, as amended, described Grand River as a navigable water of the United States; and, in addition to the employment stated above, alleged that in such employment the steamer transported merchandise, shipped on board of her, destined for ports and places in States other than the State of Michigan, and was thus engaged in commerce between the States.

The answer of the owners, who appeared in the case, admitted substantially the employment of the steamer as alleged, but set up as a defense that Grand River was not a navigable water of the United States, and that the steamer was engaged solely in domestic trade and commerce, and was not engaged in trade or commerce between two or more States, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

It was admitted, by stipulation of the parties, that the steamer was employed in the navigation of Grand River between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places; that she was not enrolled and licensed for the coasting trade; that some of the goods that she shipped at Grand Rapids and carried to Grand Haven were destined and marked for places in other States than Michigan, and that some of the goods which she shipped at Grand Haven came from other States and were destined for places within that State.

It was also admitted that the steamer was so constructed as to draw only two feet of water, and was incapable of navigating the waters of Lake Michigan; that she was a common carrier between the cities named, but did not run in connection with or in continuation of any line of steamers or vessels on the lake, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both of the cities named.

* * *

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

Two questions are presented in this case for our determination.

First: Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

Second: Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstances tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to

determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in Gilman v. Philadelphia, "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States.

* * *

So far as [the Daniel Ball] was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she

was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress.

* * *

BROWARD v. MABRY
58 Fla. 398, 50 So.2d 826 (1909)

* * *

Under the common law of England, the crown in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution resulting in the independence of the American States, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution. The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing, and other easements allowed by law.

* * *

NOTES

1. The term "navigable waters" has been used repeatedly in this book to define the lands subject to ownership by the sovereign and to define waters which are subject to a public servitude -- the public rights of fishing, commerce, and navigation. The Daniel Ball sets out two possible tests of navigability for determining title to the beds of waterways:

- a) the ebb and flow of the tide test, and
- b) the navigability in fact test.

It has long been a matter of debate whether The Daniel Ball

rejects or simply expands the ebb and flow test. See Clement v. Watson, infra.

2. Common law or state legislation may provide guidelines for determining what waters are navigable in fact in order to determine title to the beds. In Odom v. Deltona, the Florida Supreme Court expressly adopted the federal definition of navigability in fact as the Florida title rule.

3. The general confusion over navigability is compounded by the fact that the term has been given different meanings in different contexts. Navigability may be defined differently in each of the following contexts:

- a) the English, federal, and state tests for title to beds;
- b) the admiralty test;
- c) the extent of the commerce power;
- d) various definitions in federal and state legislation and regulations.

This list is not comprehensive and does not set out all of the contexts in which "navigability" may be the basis for regulation or the allocation of property or rights.

CLEMENT v. WATSON
63 Fla. 109, 58 So. 25 (1912)

WHITFIELD, C. J. An action was brought by Waldo P. Clement to recover damages for an alleged assault upon him by Thomas E. Watson in excluding him from fishing privileges in waters on lands owned by Mrs. Watson tht are affected by the ebb and flow of the ocean tides, in Dade County, Fla. The court refused to give instructions requested by the plaintiff upon the theory that, in waters subject to the daily ebb and flow of the ocean tides, the defendant could have no private or exclusive ownership, and could have no control to regulate fishing thereon. A verdict for the defendant was directed by the court and judgment entered thereon, to which the plaintiff took writ of error. Under the statutes of this state the husband has the care and management of the wife's property.

It is agreed that the title to the property was derived indirectly from the United States government; that the title covers and includes a cove where the alleged assault was made; that the cove is surrounded by the Watson property, except the mouth of the cove, which meets the waters of New River Sound, that the mouth of the cove is about 300 feet wide; that a sand bar which runs across the mouth of the cove is almost bare at low

tide, but is covered at high tide; that the waters in the cove are subject to the ebb and flow of the tide. It also appears that originally the waters in the cove were very shallow and not useful for the public purpose of navigation; that the cove is small and narrows from its mouth to its terminus on the Watson lands; that Watson's predecessor in title dredged a channel 16 feet wide and a place for a yacht to lay in at low water in the cove so as to make the wharf accessible by small craft; that the Watson residence is near the cove, and the family wharf extends into the cove from the land.

While the navigable waters in the state and the lands under such waters, including the shore, or space between high and low water marks, are held by the state for the purpose of navigation and other public uses, subject to lawful governmental regulation, yet this rule is applicable only to such waters as by reason of their size, depth, and other conditions are in fact capable of navigation for useful public purposes. Waters are not under our law regarded as navigable merely because they are affected by the tides.

The shore of navigable waters which the sovereign holds for public uses is the land that borders on navigable waters and lies between ordinary high and ordinary low water mark. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation. Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.

While in its original state the cove in which the alleged assault was committed was, by reason of its size and the shallowness of the water therein, manifestly not capable of navigation for useful public purposes, and the cove is not a part of the shore of the navigable waters in the sound adjacent to the cove. This being so, the cove was a subject of private ownership which included fishing privileges therein. The fact that a part of the cove was made navigable by artificial means after it became private property did not take away the right of the owner to control the fishing privileges therein subject to law.

It appears to be conceded that if the defendant had a right to exclude the plaintiff from fishing privileges in the cove, the alleged assault was not unlawful. In this view no reversible error is made to appear, since the damages claimed are only for the consequences of the alleged unlawful assault.

The judgment is affirmed.

KAISER AETNA v. UNITED STATES
444 U.S. 164 (1979)

Mr. Justice REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a lagoon. It covered 523 acres on the island of Oahu, Hawaii, and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean. The pond was contiguous to the bay, which is a navigable waterway of the United States, but was separated from it by the barrier beach.

Early Hawaiians used the lagoon as a fishpond and reinforced the natural sandbar with stone walls. Prior to the annexation of Hawaii, there were two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. Water from the bay and ocean entered the pond through the gates during high tide, and during low tide the current flow reversed toward the ocean. The Hawaiians used the tidal action to raise and catch fish such as mullet.

Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. And in 1848 they were allotted as parts of large land units, known as "ahupuaas," by King Kamehameha III during the Great Mahele or royal land division. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of petitioner Bishop Estate, the present owner.

In 1961, Bishop Estate leased a 6,000-acre area, which included Kuapa Pond, to petitioner Kaiser Aetna for subdivision development. The development is now known as "Hawaii Kai." Kaiser Aetna dredged and filled parts of Kuapa Pond, erected retaining walls and built bridges within the development to create the Hawaii Kai Marina. Kaiser Aetna increased the average depth of the channel from two to six feet. It also created

accommodations for pleasure boats and eliminated the sluice gates.

When petitioners notified the Army Corps of Engineers of their plans in 1961, the Corps advised them they were not required to obtain permits for the development of and operations in Kuapa Pond. Kaiser Aetna subsequently informed the Corps that it planned to dredge an 8-foot-deep channel connecting Kuapa Pond to Maunalua Bay and the Pacific Ocean, and to increase the clearance of a bridge of the Kalaniana'ole Highway -- which had been constructed during the early 1900's along the barrier beach separating Kuapa Pond from the bay and ocean -- to a maximum of 13.5 feet over the mean sea level. These improvements were made in order to allow boats from the marina to enter into and return from the bay, as well as to provide better waters. The Corps acquiesced in the proposals, its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."

At the time of trial, a marina-style community of approximately 22,000 persons surrounded Kuapa Pond. It included approximately 1,500 marina waterfront lot lessees. The waterfront lot lessees, along with at least 86 nonmarina lot lessees from Hawaii Kai and 56 boat owners who are not residents of Hawaii Kai, pay fees for maintenance of the pond and for patrol boats that remove floating debris, enforce boating regulations, and maintain the privacy and security of the pond. Kaiser Aetna controls access to and use of the marina. It has generally not permitted commercial use, except for a small vessel, the Marina Queen, which could carry 25 passengers and was used for about five years to promote sales of marina lots and for a brief period by marina shopping center merchants to attract people to their shopping facilities.

In 1972, a dispute arose between petitioners and the Corps concerning whether (1) petitioners were required to obtain authorization from the Corps, in accordance with Sec. 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. Sec. 403, for future construction, excavation, or filling in the marina, and (2) petitioners were precluded from denying the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. The dispute foreseeably ripened into a lawsuit by the United States Government against petitioners in the United States District Court for the District of Hawaii. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States" and thus subject to regulation by the Corps under Section 10 of the Rivers and Harbors Appropriation Act. It further held, however, that the Government lacked the authority to open the now dredged pond to the public without payment of compensation to the owner. In reaching this holding, the District Court reasoned that although the pond was navigable for the purpose of delimiting Congress' regulatory power, it was not navigable for the purpose of defining the scope of the federal "navigational servitude" imposed by the Commerce Clause. Thus,

the District Court denied the Corps' request for an injunction to require petitioners to allow public access and to notify the public of the fact of the pond's accessibility.

The Court of Appeals agreed with the District Court's conclusion that the pond fell within the scope of Congress' regulatory authority, but reversed the District Court's holding that the navigational servitude did not require petitioners to grant the public access to the pond. The Court of Appeals reasoned that the "federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest." The question before us is whether the Court of Appeals erred in holding that petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna.

II

The Government contends that petitioners may not exclude members of the public from the Hawaii Kai Marina because "[t]he public enjoys a federally protected right of navigation over the navigable waters of the United States." When petitioners dredged and improved Kuapa Pond, the Government continues, the pond -- although it may once have qualified as fast land -- became navigable water of the United States. The public thereby acquired a right to use Kuapa Pond as a continuous highway for navigation, and the Corps of Engineers may consequently obtain an injunction to prevent petitioners from attempting to reserve the waterway to themselves.

The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied.

* * *

It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, and to establish the limits of the jurisdiction of federal courts conferred by Art. III, Section 2, of the United States Constitution over admiralty and maritime cases. Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce

Clause, this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access.

A

Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause. Early in our history this court held that the power to regulate commerce necessarily includes power over navigation. As stated in Gilman v. Philadelphia, 3 Wall. 713, 724-725, 18 L. Ed. 96 (1866):

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

The pervasive nature of Congress' regulatory authority over national waters was more fully described in United States v. Appalachian Power Co., supra, 311 U.S., at 426-427, 61 S. Ct., at 308:

"[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation.... In truth the authority of the United States is the regulation of commerce on its waters. Navigability ... is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.... [The] authority is as broad as the needs of commerce.... The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

Appalachian Power Co. indicates that congressional authority over the waters of this Nation does not depend on a stream's "navigability."

* * *

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question. As was recently pointed out in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), this court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Id. at 124, 98 S.Ct., at 2659. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action -- that have particular significance. When the "taking" question has involved the exercise of the public right of navigation over interstate waters that constitute highways for commerce, however, this Court has held in many cases that compensation may not be required as a result of the federal navigational servitude.

C

The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation. Thus, in United States v. Chandler-Dunbar Co., supra, 229 U.S., at 69, 33 S.Ct., at 674, this Court stated that "the running water in a great navigable stream is [incapable] of private ownership...." And, in holding that a riparian landowner was not entitled to compensation when the construction of a pier cut off his access to navigable water, this Court observed:

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of

navigation." Scranton v. Wheeler, 179 U. S. 141, 163, 21 S.Ct. 48, 57, 45 L.Ed. 126 (1900).

For over a century, a long line of cases decided by this court involving Government condemnation of "fast lands" delineated the elements of compensable damages that the Government was required to pay because the lands were riparian to navigable streams. The Court was often deeply divided, and the results frequently turned on what could fairly be described as quite narrow distinctions. But this is not a case in which the Government recognizes any obligation whatever to condemn "fast lands" and pay just compensation under the Eminent Domain Clause of the Fifth Amendment to the United States Constitution. It is instead a case in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements. The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property -- the right to exclude others.

Because the factual situation in this case is so different from typical ones involved in riparian condemnation cases, we see little point in tracing the historical development of that doctrine here. Indeed, since this Court's decision in United States v. Rands, 389 U.S. 121, 123, 88 S.Ct. 265, 266, 19 L.Ed. 2d 329 (1967), closely following its decisions in United States v. Virginia Electric & Power Co., 365 U.S. 624, 628, 81 S.Ct., 784, 788, 5 L.Ed. 2d 838 (1961), and United States v. Twin City Power Co., 350 U.S. 222, 226, 76 S.Ct. 259, 261, 100 L.Ed. 240 (1956), the elements of compensation for which the Government must pay when it condemns fast lands riparian to a navigable stream have remained largely settled. Distinctions between cases such as these, on the one hand, and United States v. Kansas Life Ins. Co., 339 U.S. 799, 808, 70 S.Ct. 885, 890, 94 L.Ed. 1277 (1950), may seem fine, indeed, in the light of hindsight, but perhaps for the very reason that it is hindsight which we now exercise, the shifting back and forth of the Court in this area until the most recent decisions bears the sound of "Old, unhappy, far-off things, and battles long ago."

There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience. The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Thus, when the Government acquires fast lands to improve navigation, it is not required under the Eminent Domain

Clause to compensate landowners for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site, Twin City Power Co., supra, or a port site, United States v. Rands, supra. But none of these cases ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest. The nature of the navigational servitude when invoked by the Government in condemnation cases is summarized as well as anywhere in United States v. Willow River Col., 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945):

"It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

We think, however, that when the Government makes the naked assertion it does here, that assertion collides with not merely an "economic advantage" but an "economic advantage" that has the law back of it to such an extent that courts may "compel others to forbear from interfering with [it] or to compensate for [its] invasion." United States v. Willow River Co., supra, at 502, 65 S.Ct., at 764.

Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). More than one factor contributes to this result. It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing. It consequently is not the sort of "great navigable stream" that this Court has previously recognized as being "[incapable] of private ownership." And, as previously noted, Kuapa Pond has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water.

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials

representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property" - expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

* * *

And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual \$72 regular fee.

Accordingly the judgment of the Court of Appeals is reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long-established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable waters of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

* * *

NOTES

1. Many areas of Florida are mazes of canals. The rights of the public in these canals depends on whether the canals are navigable waters. See Vaughn v. Vermilion Corp., 444 U.S. 206 (1979) in which the Supreme Court did not apply Kaiser-Aetna to deny public access rights to a manmade canal system, but remanded for a factual determination of whether the canals in question had replaced or destroyed any preexisting navigable waterways.

2. For articles discussing the Kaiser-Aetna decision, see Note, Determining the Parameters of the Navigation Servitude Doctrine, 34 Vand. L. Rev. 461 (1981); Note, Water and Watercourses - Public Use - The Effect of Property Law as a Limitation on Federal Navigational Servitude, 9 Fla. St. U. L. Rev. 209 (1981); Note, Public Right of Access to Privately Created Navigable Waterways, 94 Harv. L. Rev. (1980).

3. The navigation servitude is a dominant servitude and may impair the rights of riparian owners. See, RIGHTS OF RIPARIAN OWNERS, Section 5, infra.

Section 4. PUBLIC ACCESS TO BEACHES

GION v. CITY of SANTA CRUZ
DIETZ v. KING
84 Cal.Rptr. 162, 465 P.2d 50 (1970)

PER CURIAM.

We consider these two cases together because both raise the question of determining when an implied dedication of land has been made.

Gion v. City of Santa Cruz concerns three parcels of land on the southern or seaward side of West Cliff Drive, between Woodrow and Columbia Streets in Santa Cruz. The three lots contain a shoreline of approximately 480 feet and extend from the road into the sea a distance varying from approximately 70 feet to approximately 160 feet. Two of the three lots are contiguous; the third is separated from the first two by approximately 50 feet. Each lot has some area adjoining and level with the road (30 to 40 feet above the sea level) on which vehicles have parked for the last 60 years. This parking area extends as far as 60 feet from the road on one parcel, but on all three parcels there is a sharp cliff-like drop beyond the level area onto a shelf area and then another drop into the sea. The land is subject to continuous, severe erosion. Two roads previously built by the city have been slowly eroded by the sea. To prevent future erosion the city has filled in small amounts of the land and placed supporting riprap in weak areas. The city also put an emergency alarm system on the land and in the early 1960's paved

the parking area. No other permanent structures have ever been built on this land.

* * *

Since at least 1900 various members of the public have parked vehicles on the level area, and proceeded toward the sea to fish, swim, picnic, and view the ocean. Such activities have proceeded without any significant objection by the fee owners of the property. M.P. Bettencourt, who acquired most of the property in dispute in 1941 and sold it to Gion in 1958 and 1961, testified that during his 20 years of ownership he had occasionally posted signs that the property was privately owned. He conceded, however, that the signs quickly blew away or were torn down, that he never told anyone to leave the property, and that he always granted permission on the few occasions when visitors requested permission to go on it. In 1957 he asked a neighbor to refrain from dumping refuse on the land. The persons who owned the land prior to Bettencourt paid even less attention to it than did Bettencourt. Every witness who testified about the use of the land before 1941 stated that the public went upon the land freely without any thought as to whether it was public or privately owned. In fact, counsel for Gion offered to stipulate at trial that since 1900 the public has fished on the property and that no one ever asked or told anyone to leave it.

The City of Santa Cruz has taken a growing interest in this property over the years and has acted to facilitate the public's use of the land. In the early 1900's for instance, the Santa Cruz school system sent all the grammar and high school students to this area to plant ice plant, to beautify the area and keep it from eroding. In the 1920's, the city filled in holes and built an embankment on the top level area to prevent cars from driving into the sea. At that time, the city also installed an emergency alarm system that connected a switch near the cliff to an alarm in the firehouse and police station. The city replaced a washed out guardrail and oiled the parking area in the 1950's and in 1960-61 the city spent \$500,000 to prevent erosion in the general area. On the specific property now in dispute, the city filled in collapsing tunnels and placed boulders in weak areas to counter the eroding action of the waves. In 1963, the city paved all of the level area on the property, and in recent years the sanitation department has maintained trash receptacles [sic] thereon and cleaned it after weekends of heavy use.

The superior court for the county of Santa Cruz concluded that the Gions were the fee owners of the property in dispute but that their fee title was "subject to an easement in defendant, City of Santa Cruz, a Municipal corporation, for itself and on behalf of the public, in, on, over and across said property for public recreation purposes, and uses incidental thereto, including, but not limited to, parking, fishing, picnicking, general viewing, public protection and policing, and erosion control, but not including the right of the City or the public to build any permanent structures thereon."

* * *

In Dietz v. King, plaintiffs, as representatives of the public, asked the court to enjoin defendants from interfering with the public's use of Navarro Beach in Mendocino County and an

unimproved dirt road, called the Navarro Beach Road, leading to that beach. The beach is a small sandy peninsula jutting into the Pacific Ocean. It is surrounded by cliffs at the south and east, and is bounded by the Navarro River and the Navarro Beach Road (the only convenient access to the beach by land) on the north. The Navarro Beach Road branches from a county road that parallels State Highway One. The road runs in a southwesterly direction along the Navarro River for 1,500 feet and then turns for the final 1,500 feet due south to the beach. The road first crosses for a short distance land owned by the Carlyles, who maintain a residence adjacent to the road. It then crosses land owned by Mae Crider and Jack W. Sparkman, proprietors of an ancient structure called the Navarro-by-the-Sea Hotel, and, for the final 2,200 feet, land now owned by defendants.

The public has used the beach and the road for at least 100 years. Five cottages were built on the high ground of the ocean beach about 100 years ago. A small cemetery plot containing the remains of shipwrecked sailors and natives of the area existed there. Elderly witnesses testified that persons traveled over the road during the closing years of the last century. They came in substantial numbers to camp, picnic, collect and cut driftwood for fuel, and fish for abalone, crabs, and finned fish. Others came to the beach to decorate the graves, which had wooden crosses upon them. Indians, in groups of 50 to 75 came from as far away as Ukiah during the summer months. They camped on the beach for weeks at a time, drying kelp and catching and drying abalone and other fish. In decreasing numbers they continued to use the road and the beach until about 1950.

In more recent years the public use of Navarro Beach has expanded. The trial court found on substantial evidence that "For many years members of the public have used and enjoyed the said beach for various kinds of recreational activities, including picnicking, hiking, swimming, fishing, skin diving, camping, driftwood collecting, firewood collecting, and related activities." At times as many as 100 persons have been on the beach. They have come in automobiles, trucks, campers, and trailers. The beach has been used for commercial fishing, and during good weather a school for retarded children has brought its students to the beach once every week or two.

None of the previous owners of the King property ever objected to public use of Navarro Beach Road. The land was originally owned by a succession of lumber and railroad companies, which did not interfere with the public's free use of the road and beach. The Southern Pacific Land Company sold the land in 1942 to Mr and Mrs. Oscar J. Haub who in turn sold it [to] the Kings in 1959. Mrs. Haub testified by deposition that she and her husband encouraged the public to use the beach. "We intended," she said, "that the public would go through and enjoy the beach without any charge and just for the fun of being out there," and "[w]e intended that the beach be free for anybody to go down there and have a good time." Only during World War II, when the U.S. Coast Guard took over the beach as a base from which to patrol the coast, was the public barred from the beach.

In 1960, a year after the Kings acquired the land, they placed a large timber across the road at the entrance to their

land. Within two hours it was removed by persons wishing to use the beach. Mr. King occasionally put up No Trespassing signs, but they were always removed by the time he returned to the land, and the public continued to use the beach until August 1966. During that month, Mr. King had another large log placed across the road at the entrance to this property. That barrier was, however, also quickly removed. He then sent in a caterpillar crew to permanently block the road. That operation was stopped by the issuance of a temporary restraining order.

The various owners of the Navarro-by-the-Sea property have at times placed an unlocked chain across the Navarro Beach Road on that property. One witness said she saw a chain between 1911 and 1920. Another witness said the chain was put up to discourage cows from straying and eating poisonous weeds. The chain was occasionally hooked to an upright spike, but was never locked in place and could be easily removed. Its purpose apparently was to restrict cows, not people, from the beach. In fact, the chain was almost always unhooked and lying on the ground.

From about 1949 on, a proprietor of the Navarro-by-the-Sea Hotel maintained a sign at the posts saying, "Private Road - Admission 50 cents - please pay at hotel." With moderate success, the proprietor collected tolls for a relatively short period of time. Some years later another proprietor resumed the practice. Most persons ignored the sign, however, and went to the beach without paying. The hotel operators never applied any sanctions to those who declined to pay. In a recorded instrument the present owners of the Navarro-by-the-Sea property acknowledged that "for over one hundred years there has existed a public easement and right of way" in the road as it crosses their property. The Carlyles and the previous owners of the first stretch of the Navarro Beach Road never objected to its use over their property and do not now object.

The Mendocino county superior court ruled in favor of defendants, concluding that there had been no dedication of the beach or the road and in particular that widespread public use does not lead to an implied dedication.

In our most recent discussion of common-law dedication, *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240-241, 267 P.2d 10, we noted that a common-law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period. When dedication by acquiescence for a period of less than five years is claimed, the owner's actual consent to the dedication must be proved. The owner's intent is the crucial factor. When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public. The question then is whether the public has used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one." As other cases have stated, the question is whether the public has engaged in "long-continued

adverse use" of the land sufficient to raise the "conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

In both cases at issue here, the litigants representing the public contend that the second test has been met. Although there is evidence in both cases from which it might be inferred that owners preceding the present fee owners acquiesced in the public use of the land, that argument has not been pressed before this court. We therefore turn to the issue of dedication by adverse use.

Three problems of interpretation have concerned the lower courts with respect to proof of dedication by adverse use: (1) When is a public use deemed to be adverse? (2) Must a litigant representing the public prove that the owner did not grant a license to the public? (3) Is there any difference between dedication of shoreline property and other property?

In determining the adverse use necessary to raise a conclusive presumption of dedication, analogies from the law of adverse possession and easement by prescriptive rights can be misleading. An adverse possessor or a person gaining a personal easement by prescription is acting to gain a property right in himself and the test in those situations is whether the person acted as if he actually claimed a personal legal right in the property. Such a personal claim of right need not be shown to establish a dedication because it is a public right that is being claimed. What must be shown is that persons used the property believing the public had a right to such use. This public use may not be "adverse" to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication.

Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road. Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public.

Litigants seeking to establish dedication to the public must also show that various groups of persons have used the land. If only a limited and definable number of persons have used the land, those persons may be able to claim a personal easement but not dedication to the public. An owner may well tolerate use by some persons but object vigorously to use by others. If the fee owner proves that use of the land fluctuated seasonally, on the other hand, such a showing does not negate evidence of adverse user. "[T]he thing of significance is that whoever wanted to use [the land] did so * * * when they wished to do so without asking permission and without protest from the land owners." (Seaway Company v. Attorney General (Tex.Civ.App. 1964) 375 S.W.2d 923, 936.)

The second problem that has concerned lower courts is whether there is a presumption that use by the public is under a license by the fee owner, a presumption that must be overcome by the public with evidence to the contrary. Counsel for the fee owners have argued that the following language from F. A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 448, 150 P.62, 68 is controlling:

* * * where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property.

We rejected that view, however, in O'Banion v. Borba, *supra*, 32 Cal.2d 145, 195 P.2d 10. With regard to the question of presumptions in establishing easements by prescription we said: "There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. [Citations.] It has been intimated that the presumption does not arise when the easement is over unenclosed and unimproved land. Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions." (32 Cal.2d at pp. 148-149, 195 P.2d at pp. 12-13.)

No reason appears for distinguishing proof of implied dedication by invoking a presumption of permissive use. The question whether public use of privately owned lands is under a license of the owner is ordinarily one of fact. We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate

that he has made a bona fide attempt to prevent public use. Whether an owner's efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although "No Trespassing" signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

A final question that has concerned lower courts is whether the rules governing shoreline property differ from those governing other types of property, particularly roads. Most of the case law involving dedication in this state has concerned roads and land bordering roads. This emphasis on roadways arises from the ease with which one can define a road, the frequent need for roadways through private property, and perhaps also the relative frequency with which express dedications of roadways are made. The rules governing implied dedication apply with equal force, however, to land used by the public for purposes other than as a roadway. In this state, for instance, the public has gained rights, through dedication, in park land.

* * *

Even if we were reluctant to apply the rules of common-law dedication to open recreational areas, we must observe the strong policy expressed in the constitution and statutes of this state of encouraging public use of shoreline recreational areas.

* * *

There is also a clearly enunciated public policy in the California Constitution in favor of allowing the public access to shoreline areas:

"No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water." (Art. XV, section 2.)

Recreational purposes are among the "public purposes" mentioned by this constitutional provision.

* * *

This court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than it has when well-defined roadways are at issue. With the increased urbanization of this state, however, beach areas are now as well-defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and

expanding public access to and use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways.

We conclude that there was an implied dedication of property rights in both cases. In both cases the public used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one." In both cases the public used the land in public ways, as if the land was owned by a government, as if the land were a public park.

In *Gion v. City of Santa Cruz*, the public use of the land is accentuated by the active participation of the city in maintaining the land and helping the public to enjoy it. The variety and long duration of these activities indicate conclusively that the public looked to the city for maintenance and care of the land and that the city came to view the land as public land.

No governmental agency took an active part in maintaining the beach and road involved in *Dietz v. King*, but the public nonetheless treated the land as land they were free to use as they pleased. The evidence indicates that for over a hundred years persons used the beach without regard to who owned it. A few persons may have believed that the proprietors of the Navarro-by-the-Sea Hotel owned or supervised the beach, but no one paid any attention to any claim of the true owners. The activities of the Navarro-by-the-Sea proprietors in occasionally collecting tolls has no effect on the public's rights in the property because the question is whether the public's use was free from interference or objection by the fee owner or persons acting under his direction and authority.

The rare occasions when the fee owners came onto the property in question and casually granted permission to those already there have, likewise, no effect on the adverse user of the public. By giving permission to a few, an owner cannot deprive the many, whose rights are claimed totally independent of any permission asked or received of their interest in the land. If a constantly changing group of persons use land in a public way without knowing or caring whether the owner permits their presence, it makes no difference that the owner has informed a few persons that their use of the land is permissive only.

The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the widespread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away. In each case the trial court found the elements necessary to implied dedication were present - use by the public for the prescriptive period without asking or receiving permission from the fee owner. There is no evidence that the respective fee owners attempted to prevent or halt this use. It follows as a matter of law that a dedication to the public took place. The judgment in *Gion* is affirmed. The judgment in *Dietz* is reversed with directions that judgment be entered in favor of plaintiffs.

* * *

In addition to the sui generis nature of the land itself, a multitude of complex and sometimes overlapping precedents in the law confronted the trial court. Several early Oregon decisions generally support the trial court's decision, i.e., that the public can acquire easements in private land by long-continued use that is inconsistent with the owner's exclusive possession and enjoyment of his land. A citation of the cases could end the discussion at this point. But because the early cases do not agree on the legal theories by which the results are reached, and because this is an important case affecting valuable rights in land, it is appropriate to review some of the law applicable to this case.

One group of precedents relied upon in part by the state and by the trial court can be called the "implied-dedication" cases. The doctrine of implied dedication is well known to the law in this state and elsewhere.

* * *

Dedication however, whether express or implied, rests upon an intent to dedicate. In the case at bar, it is unlikely that the landowners thought they had anything to dedicate, until 1967, when the notoriety of legislative debates about the public's rights in the dry-sand area sent a number of ocean-front landowners to the offices of their legal advisers.

A second group of cases relied upon by the state, but rejected by the trial court, deals with the possibility of a landowner's losing the exclusive possession and enjoyment of his land through the developemnt of prescriptive easements in the public.

In Oregon, as in most common-law jurisdictions, an easement can be created in favor of one person in the land of another by uninterrupted use and enjoyment of the land in a particular manner for the statutory period, so long as the user is open, adverse, under claim of right, but without authority of law or consent of the owner. In Oregon, the prescriptive period is ten years. ORS 12.050. The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years. There is no suggestion in the record that anyone's permission was sought or given; rather, the public used the land under a claim of right. Therefore, if the public can acquire an easement by prescription, the requirements for such an acquisition have been met in connection with the specific tract of land involved in this case.

The owners argue, however, that the general public, not being subject to actions in trespass and ejection, cannot acquire rights by prescription, because the statute of limitations is irrelevant when an action does not lie.

While it may not be feasible for a landowner to sue the general public, it is nonetheless possible by means of signs and fences to prevent or minimize public invasions of private land for recreational purposes. In Oregon, moreover, the courts and the Legislative Assembly have both recognized that the public can

acquire prescriptive easements in private land, at least for roads and highways.

* * *

Another statute codifies a policy favoring the acquisition by prescription of public recreational easements in beach lands. See ORS 390.610. While such a statute cannot create public rights at the expense of a private landowner the statute can, and does, express legislative approval of the common-law doctrine of prescription where the facts justify its application. Consequently, we conclude that the law in Oregon, regardless of the generalizations that may apply elsewhere, does not preclude the creation of prescriptive easements in beach land for public recreational use.

Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.

A custom is defined in 1 Bouv. Law Dict., Rawle's Third Revision, p. 742 as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates."

In 1 Blackstone, Commentaries *75-*78, Sir William Blackstone set out the requisites of a particular custom.

Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long "that the memory of man runneth not to the contrary." Professor Cooley footnotes his edition of Blackstone with the comment that "long and general" usage is sufficient. In any event, the record in the case at bar satisfies the requirement of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion.

The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right. In the case at bar, there was evidence that the public's use and enjoyment of the dry-sand area had never been interrupted by private landowners.

the dry-sand area had never been interrupted by private landowners.

Blackstone's third requirement, that the customary use be peaceable and free from dispute, is satisfied by the evidence which related to the second requirement.

The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. There is evidence in the record that when inappropriate uses have been detected, municipal police officers have intervened to preserve order.

The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.

The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes. The record shows that the dry-sand area in question has been used, as of right, uniformly with similarly situated lands elsewhere, and that the public's use has never been questioned by an upland owner so long as the public remained on the dry sand and refrained from trespassing upon the lands above the vegetation line.

Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law. The custom under consideration violates no law, and is not repugnant.

Two arguments have been arrayed against the doctrine of custom as a basis for decision in Oregon. The first argument is that custom is unprecedented in this state, and has only scant adherence elsewhere in the United States. The second argument is that because of the relative brevity of our political history it is inappropriate to rely upon an English doctrine that requires greater antiquity than a newly-settled land can muster. Neither of these arguments is persuasive.

The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites. While it is not necessary to rely upon precedent from other states, we are not the first state to recognize custom as a source of law. See *Perley et ux' v. Langley*, 7 N.H. 233 (1834).

On the score of the brevity of our political history, it is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law. This truism does not, however, militate against the validity of a custom when the custom does in fact exist. If antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land.

Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. In the case at bar, the landowners conceded their actual knowledge of the public's long-standing use of the dry-sand area, and argued that the elements of consent present in the relationship between the landowners and the public precluded the application of the law of prescription. As noted, we are not resting this decision on prescription, and we leave open the effect upon prescription of the type of consent that may have been present in this case. Such elements of consent are, however, wholly consistent with the recognition of public rights derived from custom.

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

For the foregoing reasons, the decree of the trial court is affirmed.

CITY OF DAYTONA BEACH v. TONA-RAMA, INC.
271 So.2d 765 (Fla. 1st DCA 1972)

WIGGINTON, Judge.

* * *

The primary issue delineated by the pleadings calls for a judicial declaration as to the ownership of a parcel of land forming a part of the Atlantic Ocean beach and consisting of the soft sand area lying easterly of the established bulkhead line paralleling the beach on the west and the mean high water mark of the ocean which forms the border of the soft sand area on the east. The parcel in question is approximately 150 feet deep east and west and is adjacent to and southerly of an existing pier extending into the ocean. The soft sand area of the beach does not support vegetation and, although not normally covered by tidal action of the ocean, is occasionally covered by the sea during hurricanes, northeastern windstorms and extreme high tides.

As the purported record title owner of the parcel of land in question, appellants McMillan and Wright, Inc., applied to the City of Daytona Beach for a building permit authorizing it to construct an observation tower to be operated in connection with and as a part of its pier recreational facilities. The location of the tower is immediately south of and adjacent to the existing pier and within the soft sand area of the beach. After much

deliberation and an extensive investigation of the legal aspects of the application, a resolution was adopted by the City approving the application and authorizing the issuance of the requested permit.

Objection to the construction of the observation tower and a challenge to the City's right to grant a building permit for such construction were promptly registered by appellees as citizens and taxpayers of the community.

* * *

A fair and objective consideration of all the evidence before the trial court establishes the following undisputed facts. For more than twenty years prior to the institution of this action the general public visiting the ocean beach area had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of the beach involved in this proceeding as a thoroughfare, for sunbathing, picnicking, frolicking, running of dune buggies, parking, and generally as a recreation area and playground. The public's use of the area in question for the purposes hereinabove stated was open, notorious, visible, and adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land. The City of Daytona Beach has constantly policed the area for the purpose of keeping it clear of trash and rubbish and for preserving order among the users of the beach; has controlled automobile traffic using the hard sand area of the beach and enforced a prohibition against parking by vehicles on the area in question; and has otherwise exercised the police power of the City over the area for the convenience, comfort, and general welfare of all persons using and enjoying the beach area.

Appellants, purporting to be the record title owners of the parcel of land in dispute, testified that the public's use of the soft sand area owned by them was not inconsistent with nor did it adversely affect their use of the parcel in the operation of their pier so they had no reason to prohibit or interfere with the public's use of the area during the preceding years. They testified also that in washing down the pier or replacing piling from time to time they did exercise the authority of requiring people in the area to move back a safe distance so as not to interfere with this work.

* * *

It is our view that the sporadic exercise of authority and dominion by the owners over the parcel in question was not sufficient to preserve their rights as against the prescriptive rights which accrued to the benefit of the public by its use of the beach area.

Appellants further contend that the trial court applied to the facts found by it in this case incorrect principles of law when it concluded that there had accrued to the public a prescriptive right to the soft sand area of the beach involved in this case. With this contention we are unable to agree. In the cases of *City of Miami Beach v. Miami Beach Improvement Co.* and *City of Miami Beach v. Undercliff Realty & Investment Co.*, the Supreme Court of Florida recognized that under proper factual circumstances the public may acquire a prescriptive right in

beach or oceanfront land as against the rights of the record title holder.

In setting forth the elements necessary to be proved in order to establish a prescriptive right in land, the Supreme Court in *Downing v. Bird* said:

"In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejection.

"While there are slight differences in the essentials of the two actions, they are not great. In acquiring title by adverse possession, there must of course be "possession". In acquiring a prescriptive right this element is use of the privilege, without actual possession. Further, to acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public."

Based upon the foregoing authorities, we conclude that the trial court applied correct principles of law to the facts found by it in holding that the public has acquired a prescriptive right to the continued use and enjoyment of the soft sand area constituting the parcel of land involved in this case and that appellant City of Daytona Beach was without lawful authority to grant to appellant, McMillan and Wright, Inc., as owners of the land, a building permit to construct the observation tower which forms the basis of this dispute.

* * *

ON PETITION FOR REHEARING

SPECTOR, Chief Judge.

While the factual circumstances of this case require adherence to our initial decision, we deem it necessary to clarify our opinion lest it be construed as lending the approval of this court to all of the theories argued by appellees in their brief in support of the trial court's judgment.

In its brief, the appellee Board of Trustees of Internal Improvement Trust Fund advanced the following argument in support of the judgment reviewed herein:

"There has been a growing concern recently in coastline areas to secure public access to beaches and other coastal areas. The public's rights for the use and enjoyment of land are expanding, partly due to growing judicial recognition of the need to preserve beaches for public recreation. This is evidenced by recent decisions by the California and Oregon Supreme Courts.

"The public possesses property rights in nearly all the coastal tidelands through either state ownership or public rights to use privately owned coastal property. There exist three methods by which the public has been permitted to acquire and/or maintain legal right of access to beaches and other recreational areas, none of which require any 'adverse' use by members of the public in the strict sense of the term."

We now expressly reject the contention embodied in the foregoing excerpts from the appellees' brief. Were we to accept such notions, it would amount to expropriation of private property without compensation by sheer judicial fiat. Our initial decision herein was and is in no way influenced by the appellees' notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners.

One of the cases relied on by appellees, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), indicates that in 1967 the Oregon State Assembly, in response to "public debate and political activity," enacted legislation by which it was sought to establish as the public policy of that state the very concepts urged by the appellees in the quoted excerpt from their brief. The Oregon legislation reads as follows:

"ORS 390.610 (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof.

"(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are

confirmed and declared vested exclusively in the State of Oregon and shall be held and administered in the same manner as those lands described in ORS 390.720."

Even though the above statute had been enacted by the legislature, the Oregon Attorney General conceded, with court's approval, that "such legislation cannot divest a person of his rights in land, Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line." State ex rel. Thornton v. Hay, supra, 462 P.2d at p. 675.

We deem it important to emphasize that our decision is not the product of any new legal principle. The concept of prescriptive easements is one long recognized by the courts of this and other jurisdictions. In Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625, 626, the late Mr. Justice Terrell, speaking for the court, said:

"Where the common law obtains, 20 years' continuous and uninterrupted use has always created a prescriptive right as well in the public as private individuals. Such a right once obtained is valid and may be enjoyed to the same extent as if a grant existed, it being the legal intendment that its use was originally founded upon such a right. . . .

"Prescription is a mode of acquiring title to property by immemorial or long-continued enjoyment. It refers to personal usage restricted to the claimant and his ancestors or grantors. The original theory was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time in England went back to the time of Richard I. To avoid the necessity of proving such long duration a custom arose of allowing a presumption of a grant on proof of usage for a long term of years, which is now regulated by statute in most states."

Thus, it is by virtue of this ancient doctrine that the public's right to a prescriptive easement has arisen in the beach area involved. The nature and extent of use by the public cannot be denied. It has been used by a multitude of people for many, many years. It has been regularly patrolled by police in Daytona Beach. The city has installed garbage and trash barrels along the beach. The record even shows that the city has installed showers for use of the bathing public on the easterly side of the seawall. The extensive use of the beach by such huge numbers of bathers clearly supports the trial court's finding that a prescriptive easement exists here.

Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.

There are many beaches along our entire shoreline that are resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches. These elements and circumstances were found to exist in the case at bar by the trial court.

We share appellees' concern with the problem posed by the development of our privately owned shorelines. Nonetheless they are privately owned. Confiscation is not permitted under the state or federal constitutions, *Hughes v. Washington*, supra.

As clarified above, we adhere to our initial opinion.

Maloney, Fernandez, Parrish & Reinders, Public Beach Access: A Guaranteed Place to Spread Your Towel, 29 U. Fla. L. Rev. 853 (1977).

* * *

State Efforts

The leading state legislation on beach access has come from Texas and Oregon. The Oregon statute, under which Thornton was decided, declares that the entire Oregon coastline, except those portions disposed of by the state before July 5, 1947, belongs to the state to be administered as a state recreation area. Furthermore, where public use of beach areas "has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, . . . it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources. This does not mean that private individuals can be divested of their rights in land which, under the Borax decision, may extend to the mean high tide line. It does, however, in doubtful cases provide Oregon courts with a strong legislative statement supporting preference of public over private rights in beach areas.

The Texas legislature has enacted even stronger statutes. The public access provision, however, is limited to areas to which the public has already acquired a right of use or easement through one of the common law theories. A major improvement over Oregon's statute is that:

In any action brought or defended under this Act . . . a showing that the area in question is embraced within the area from mean low tide to the line of vegetation shall be prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea;

(2) there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea.

There are criminal penalties and fines for the display of any communication at any public beach which states that the public does not have the right of access to such public beach.

Except for Oregon and Texas, state legislation has largely been piecemeal. Florida's beach access legislation affords a good example. A statement of the public's interest in beach areas is noticeably absent from the Florida Beach and Shore Preservation Act. The legislation does provide for purchase by the state of public access easements. Also, under the Outdoor Recreation and Conservation Act of 1963, the Division of Recreation and Parks of Florida's Department of Natural Resources may exercise the power of eminent domain to acquire any and all rights which may be necessary for the use and enjoyment of public waterways. The Department is also authorized to assist local governments financially in the acquisition of local beach properties, and is urged by the legislature to give priority to applications relating to the acquisition of public beaches in urban areas.

* * *

NOTES

1. The California Supreme Court's decisions in Gion v. Santa Cruz and Dietz v. King left landowners in a precarious situation. If a landowner allowed public use of beach property, he or she could be deemed to have "acquiesced" to public dedication of the property; if the owner objected and the public used the property anyway, the public might gain the same rights through adverse use. The result was that many owners closed and imposed security precautions on beaches that formerly had been accessible to the public. To some extent, these decisions frustrated the announced state policy to encourage public use of beaches.

2. The public's right to use the wet sand area of the beach is meaningless if there is no access. In Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972), the New Jersey Supreme Court held that the public trust doctrine dictates that municipally owned beaches must be open to all members of the public on equal terms. More recently, the New Jersey Supreme Court in Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355 (N.J. 1984) addressed the question of whether the public trust doctrine required that "ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body." The Bay Head case involved public access to a beach owned by a nonprofit corporation which limited

access to members of its association. The membership was limited to residents of Bay Head. The court stated:

* * *

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

* * *

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.

* * *

We see no reason why rights under the public trust doctrine to use of dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

* * *

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all circumstances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

* * *

3. In sharp contrast to New Jersey, there is little doubt that in many jurisdictions assertions by a state agency that the public trust doctrine necessitates public access to and use of the dry sand area would be considered a taking of private property without compensation. In many states, the only way to assure public access to tidelands is by public acquisition of beaches or access ways. The following excerpt explains methods for public acquisition of beaches or public rights of way:

Swim, Beach Access: Getting More for Less, Fla. B. Env'tl. L. Sec. Rep. 2 (1982)

* * *

There are two general approaches for obtaining beach access: 1) legislation, and 2) acquisition.

* * *

Acquisition Strategies

Purchase

Purchase of property in fee simple is the most direct means of acquiring public access to beachfront areas. Unless a governmental agency has eminent domain authority, such acquisitions are essentially limited to property available on the market. Governmental competition is likely to inflate market prices. Thus purchase of fee simple may be an expensive way to acquire access. Still, given availability, purchase of narrow accessways and beachfront strips, combined with acquisition of nearby land for parking would probably be a feasible tool. Fee simple could also be acquired by purchase of tax delinquent property and expiration of the owner's right of redemption.

Purchase of an easement could provide public access without eliminating the taxable status of the property, or markedly decreasing local government tax revenues. An easement is a right to use another's property in a specific manner. Title to the property remains in the grantor. Easements are categorized as affirmative or negative. An affirmative easement grants its holder the right to use land. Affirmative easements are most appropriate as walkways across private property to the wetland area or to expand the public's right of use to areas landward of the wetland area. A negative easement precludes some use of land, as does a conservation or scenic easement. Negative easements do protect coastal areas from development, but may restrict rather than increase public access to beaches unless their terms specifically provide for public use.

Easement acquisition could supply access at a fairly insubstantial cost. For example, the state could acquire routes already in use as accessways such as routes reserved for use for subdivision residents. There is also the potential to acquire easements along highway rights-of-way and utility easements. However, in the absence of eminent domain authority,

there is no requirement for a landowner to sell an access easement. In such a case easements, if available, are likely to be expensive.

The acquisition of leaseholds is another "less-than-fee" technique. Under a leasehold agreement, the landowner grants the lessee a right to use the land in a specific manner for a limited time period. Generally the landowner is responsible for paying property taxes on leased land. However, since land leased to a government agency may be entitled to tax exemption, a leasehold interest may be acquired at minimal expense to state government. A lease of public access rights, combined with an option to purchase can be a cost effective means to buy time pending a decision to purchase or financial capacity to purchase a particular coastal property interest. Leases can also be used to demonstrate to a landowner that public travel across his land would not be harmful and thus encourage the sale of an easement.

* * *

Donations

Land can be worth more as a tax deduction than a potential site for future development. Aside from avoidance of property or estate taxes and broker's fees, land donations or bargain sales to tax-exempt public or private organizations, result in tax benefits for the landowner in the form of a charitable deduction and reduced capital gains.

* * *

Another means to use these tax benefits and acquire access at less cost is by bargain sale. A bargain sale is the sale of property for less than fair market value. A bargain sale to a qualified public or private agency is treated as a donation to the degree that market value exceeds cash received. The seller receives some cash, plus a donation deduction for the difference between fair market value and the actual sale price. The amount of gain is determined by allocating the basis of the property sold between the portion sold and the portion donated. This allocation is made in the same ratio as the bargain sale price is to the fair market value. The amount of taxable gain is the difference between the bargain sale price and the adjusted basis thus allocated to the portion of the property sold. A bargain sale is often an attractive alternative.

* * *

Favorable tax treatment also encourages donations by bequest. Land willed to a qualified organization or governmental agency is not subject to estate or inheritance taxes. The fair market value of such a bequest is deductible, without limitation, from the deceased's gross estate when determining the taxable estate. The value of the gift is, however, included in the gross estate where it will increase the amount of marital deduction available. Bequest donations effective at death allow the landowner continued lifetime use of the land. The bequest donation of an access easement or fee simple access corridor could reduce the estate taxes enabling heirs to both afford to pay the estate taxes and keep the property.

Role of Non-Profit Land Trusts

In order to purchase land, government agencies must follow a virtual web of procedures. These procedures are designed to protect the landowner and the public and to establish priorities among the multitude of potential acquisitions which compete for scarce public funding. Prospective sellers or donors may be discouraged by conservative appraisals, publicity, intergovernmental conflicts or the tax consequences of lump sum payments which often accompany government acquisitions. Agencies may even be reluctant to accept donation of land until the public budget can afford recreational development and management. Between the time land can be identified as a priority and acquired, it may be developed adversely or purchased by those with intent to develop it. Also any land's price (but especially coastal land's price) is likely to escalate due to inflation, land booms, or government interest.

Non-profit groups such as the Trust for Public Land or the Nature Conservancy have proved to be an effective, flexible instrument for securing needed lands that might otherwise be lost awaiting government action. Because of their non-profit status, these organizations are often able to acquire property by donation or bargain sale and then resell the land to government agencies for substantially less than fair market value. As private entities, land trusts can move far more quickly and confidentially than a public agency. This ability may make all the difference to a landowner seeking a donation deduction in a year of particularly high income. Such groups are also able to purchase property by installment sale thus enabling the seller to take advantage of lower bracket tax rates. Government agencies should make cooperation with these non-profit trusts an integral part of acquisition programs. In addition, such organizations could be deemed eligible for access acquisition grants.

Perfection of Title

In addition to purchase or donation, access to beaches may also be assured by perfecting title to public accessways which has been acquired by prescription, dedication, or custom. Courts of Florida and other coastal states have recognized the unique quality of beach property and have protected the public's access rights through the use of these common law doctrines.

* * *

Administrative Acceptance of Dedicated Property

Because of Florida's history of land speculation, many coastal areas have been platted under local subdivision regulations. Often a property owner seeking to subdivide must agree to provide and record offers to dedicate roads or other land. Recorded dedication offers, if not deemed abandoned, can

provide beach access at substantial cost savings. Government could perfect these dedication offers by developing the dedicated land into useable public recreation areas. In order to determine the extent of dedicated beach access, existing subdivision dedications must be inventoried by record and site inspection. This process could also document and thus provide factual evidence of public use patterns which may have given rise to public access rights through the doctrine of custom, prescription, or implied dedication.

Legislation

Coastal recreational opportunities may also be increased by amending existing statutes or enacting new legislation. In exercise of its police power to protect the health, safety and welfare of Florida's citizens, state or local government could pass laws which condition plat approval, development approval, or public expenditures upon provision of public access. These types of laws would be supported by the declaration in Florida's Constitution that conservation and protection of natural resources and scenic beauty are state policy.

Conditioning Subdivision or Development Approval

In exercise of its police power, government may restrict private land use in order to protect the health, safety, and welfare of its citizens. Land owners may not use their property in such a manner as to cause public harm. Florida courts have not determined whether this power justifies mandatory dedication of recreational land as a condition of development approval. However, such a requirement would likely be upheld as a condition for subdivision approval under Florida's "rational nexus" test.

Dedication for community needs such as streets, sidewalks, or water and sewer lines is a well established aspect of state and local subdivision control. Florida Courts find such requirements within the police power because there is a rational nexus between the dedication mandated and the public need created by the new subdivision. Conditioning plat approval upon the mandatory dedication of land for recreational purposes, is not so well established in Florida. However, given the rapid disappearance of open space, and increased demand for public recreational services along Florida's coast, such dedication would be necessary to meet the additional recreational needs of new coastal subdivision residents. Because such subdivisions both increase demand and decrease supply of needed public recreational areas, requiring dedication of beach access would meet Florida's rational nexus test. Additionally, mandatory dedication of recreational land as a condition for subdivision approval has been strongly endorsed in dicta by the Florida courts. Such a dedication requirement would be especially appropriate in coastal areas where development practices cause erosion and thus decrease the amount of beach area available for recreational use.

Mandatory dedication of beach access easements could also be required as a condition of development approval by amending statutes which review development in coastal areas. Such amendments could be supported by legislative findings that coastal development has: 1) cut off access to publicly owned wetland beaches in an era when coastal recreational opportunities are increasingly required but rapidly diminishing; 2) increased coastal land values beyond government's acquisitional capacities - creating a pattern of land use which makes future purchases more difficult and expensive; 3) jeopardized sales tax revenues otherwise assured by beach-visiting tourists upon which the public welfare depends; and 4) created the need for state action to assure that land uses permitted by local governments do not overburden coastal recreational facilities in adjacent jurisdictions. Because an access easement involves only slight diminution in property value, (even less if the public already has access rights by virtue of the doctrines of custom, implied dedication, or prescription), such mandatory dedication may not be deemed confiscatory.

In lieu of requiring mandatory provision of access easements, statutes could be amended to require "consideration" of beach access in the permit review process. Alternatively the law could define access providing projects as coastal dependent and grant development priority to coastal dependent uses. Such statutory provisions (perhaps combined with the threat of judicial action to perfect the public's prescriptive rights) may persuade a developer to provide a small percentage of property for public access.

The Purse Strings Power

Another legislative strategy would be to allocate state expenditures in coastal areas to encourage landowners and local governments to take actions to enhance beach access. Since this tactic involves denial of a benefit, as opposed to a regulation, it would not be deemed confiscatory. The only constitutional limitation would be the protection against arbitrary and capricious government action guaranteed by the due process and equal protection doctrines.

Some Florida statutes already have such a provision. Section 161.091(1)(e), Florida Statutes, requires provision of "permanent public access at approximately 1/2 mile intervals, including adequate vehicle parking areas" prior to expenditure of state funds for beach restoration projects. Under this statute, the beach restoration project's sponsor must also contract to maintain the required accessways. Section 403.0615, Florida Statutes directs the Department of Environmental Regulation (DER) to "enhance existing public access when deemed necessary for the enhancement of" projects to restore and preserve Florida's water resources. This chapter could be amended to require provision of new beach access where such would not be contrary to the public interest. Under section 403.0615(c), DER could adopt rules to give funding priority to coastal projects which provide beach access.

Other purse strings management strategies could condition state coastal zone expenditures (such as for roads, infrastructure, or disaster relief) upon access providing actions by local government. Such actions could include a study of historic use patterns in the area, putting up access signs and performing maintenance in order to perfect public access rights, or enactment of land use ordinances to assure access. Lastly, the state acquisition programs could grant priority to local government project proposals which enhance coastal recreational opportunities.

Section 5. RIGHTS OF RIPARIAN OWNERS

As members of the public, riparian owners have all rights of the public in navigable waters. In addition, riparian owners have rights attributable to the ownership of land adjacent to navigable waters. These rights are described in the cases in this section.

The rights of riparian owners are subject to certain limitations. For example, in Rhode Island the generally recognized right of the riparian owner to "wharf out" cannot be asserted if the construction of a wharf would obstruct the right of the public to use the wet sand area. Therefore, docks and piers must be built high enough for the public to pass under, or the owner must provide access for the public to cross the docks or piers.

The rights of riparian owners in navigable waters are also subject to the navigation servitude. The federal navigation servitude is an incident of the federal government's Commerce Clause Power. It is a dominant servitude and can impair the riparian owner's rights without giving rise to a compensable taking. Many states also recognize a state navigation servitude which is subordinate to the federal servitude, but may be exercised where the federal government has not exercised its power. See generally, Stoebuck, Condemnation of Riparian Rights: A Species of Taking Without Touching, 30 La. L. Rev. 394 (1970).

BOARD of TRUSTEES v. MEDEIRA BEACH NOM., INC.
272 So.2d 209 (Fla.2d DCA 1973)

* * *

It should be remembered that even beachfront property owners are members of the public. Their status as riparian owners, however, has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally. They have the exclusive right of access over their own property to the water. The public has no right to

cross private property to reach navigable waters. See, Annot., 53 A.L.R. 1191 (1928); F.S. section 821.03 (1971); F.S.A. The riparian owner suffers special injury when a nuisance obstructs his right to navigation. See, e.g., Webb v. Giddens, 82 So.2d 743 (Fla.1955). The riparian has the right to an unobstructed view over the waters (Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 58, 78 So. 491, 501 (1918)) subject to the rights of the public to pass along the shore (State ex rel. Taylor v. Simberg, 2 Fla.Supp. 178 (1952)). The impact of governmental regulation on the rights to swim and fish may be greater on the riparian than on the public. Thus, a police power regulation prohibiting swimming, fishing, or boating may be unchallengable by the public but constitute a taking with respect to a riparian. See, Richardson v. Beattie, 98 N.H. 71, 95 A.2d 122 (1953); People v. Hulbert, 131 Mich. 156, 91 N.W. 211 (1902). Riparians appear to have a qualified common law right to wharf out to navigable waters in the absence of a statute. Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841 (1927); Williams v. Guthrie, 102 Fla. 1047, 137 So. 682 (1931). The riparian has the right to make his water access available to the public in a commercial context. Webb v. Giddens, 82 So.2d 743 (Fla.1955); Florio v. State ex rel. Epperson, 119 So.2d 305 (2d D.C.A.Fla.1960). The riparian may make reasonable use of the water and may consume water in a reasonable manner. See, Cason v. Fla. Power Co., 74 Fla. 1, 76 So. 535 (1917); Koch v. Wick, 87 So.2d 47 (Fla.1956).

* * *

GAME & FRESH WATER FISH COM'N v. LAKE ISLAND
407 So.2d 189 (Fla. 1981).

OVERTON, Justice.

This is an appeal from a trial court judgment holding chapter 65-1841, Laws of Florida, and the implementing administrative rule, unconstitutional as applied to appellees. Chapter 65-1841 authorizes the Game and Fresh Water Fish Commission to regulate the use of motorboats on the public waters of Lake Iamonia in Leon County. By rule 16E-14.02, Florida Administrative Code, the commission invoked this authority to absolutely prohibit the use of motorboats, including airboats, on the lake during duck hunting season. The trial court found the law and the rule to be constitutional as applied to the general public, but to be unreasonable and arbitrary as applied to island owners seeking access to their property. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution, and we affirm.

Lake Iamonia is a navigable lake in northern Leon County. In it are a number of islands, some of which are owned by appellees. The navigability of the lake is described by the trial court as follows:

* * *

3. The shallowness as well as the vegetation upon the lake has made navigation upon the lake difficult. While boat paths have been cut by persons using the lake, they do not provide ready access to some of the islands. For access to some of the islands boats must be poled or an airboat used. As to a few of the islands, the water level is too low for even a poled boat and an airboat is the only method of reaching them.

4. Navigation upon the lake has been made more difficult by a drawdown begun by the [commission] in 1977. This drawdown was deemed necessary because the natural outlet, a sinkhole at the eastern end of the lake, had been dammed off several years earlier. The dam had been constructed to prevent the lake from going periodically dry. Natural fluctuations from completely dry to flood had previously occurred with some regularity for decades, perhaps centuries before. After the dam had had its desired effect of keeping the water in the lake basin, it was discovered that the natural fluctuations were required to maintain the ecology of the lake. The lack of periodic drying out resulted in an "undesirable" plant growth, the white water lily, becoming predominant. The purpose of the drawdown was to allow the lake to again go dry. The hope is that this will result in killing off the white water lily so that more desirable vegetation will return along with open water.

During the 1978 duck hunting season, Lake Islands, Ltd., a limited partnership that owns some of the lake islands, requested from the commission a permit to use airboats on the lake in order to take prospective purchasers out to see the property. When the commission refused, Lake Islands sought and obtained from the circuit court of Leon County a temporary injunction restraining the commission from enforcing its rule against Lake Islands during the hunting season. The court later entered a final judgment requiring the commission to issue permits to the island owners for reasonable use of motorboats and airboats on the lake during the hunting season. In its judgment the trial court found that the rule prohibiting motorboats and airboats on Lake Iamonia during hunting season was not unconstitutional per se as a taking of property without just compensation, but that substantive due process required a regulation not be arbitrary or unreasonable, specifically finding that: "Riparian rights over navigable waters amount in substance to the right of the owner of an island on Lake Iamonia to be guaranteed the right of ingress and egress to his property." The trial court further found that: "[E]ven though the regulation is a reasonable exercise of police power, and in general any restriction it creates constitutional, it is

unreasonable and arbitrary not to allow island owners at least some access to their property which is a well established common law right incident to ownership of property." The trial court then directed the commission to grant permits, upon application, to each island owner who applied, allowing them the use of motorboats or airboats for the limited purpose of transportation for egress and ingress to the owner's island.

We agree with this holding. Riparian rights under both common law and Florida statute include the right of ingress and egress. Thiesen v. Gulf, Florida and Alabama Railway, 75 Fla. 28, 78 So. 491 (1918); section 197.228, Fla.Stat. (1979). In Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association, 57 Fla. 399, 48 So. 643 (1909), this Court, speaking through Chief Justice Whitfield, set forth in detail the rights of riparian owners as follows:

Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. The common-law rights of riparian owners with reference to the navigable waters are incident to the ownership of the uplands that extend to high-water mark. The shore or space between high and low water mark is a part of the bed of navigable waters, the title to which is in the state in trust for the public. If the owner of land has title to high-water mark, his land borders on the water, since the shore to high-water mark is a part of the bed of the waters; and, if it is a navigable waterway, he has as incident to such title the riparian rights accorded by the common law to such an owner.

Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and dereliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, the right to have the water kept free from pollution, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest. Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bath houses, wharves,

or other structures to facilitate his business or pleasure; but these privileges are subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured. Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to so use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, or so as to unlawfully burden or monopolize navigation and commerce. The exclusive rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon; and these rights may not be so exercised as to injure others in their lawful rights....

The rights of the public in navigable streams for purposes of navigation are to use the waters and the shores to highwater mark in a proper manner for transporting persons and property thereon subject to controlling provisions and principles of law. The right of navigation should be so used and enjoyed as not to infringe upon the lawful rights of others. All inhabitants of the state have concurrent rights to navigate and to transport property in the public waters of the state. As to mere navigation in and commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the state. A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the state, and must be exercised subject to the rights of others. The right of access to the waters from the riparian lands may in general be exclusive in the owner of such lands, but as to the use of the navigable waters and the lands thereunder, including the shore, the rights of riparian owners and of others of the public are concurrent, and subject to applicable rules of law. A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands. In the absence of a valid statute providing otherwise, the injury must relate to riparian lands or business conducted thereon, and not to business conducted on the waters by virtue only of the right of navigation. It is not essential that the unlawful use of the waters or the land thereunder be in actual contact with the lands of the riparian owner, if the lawful use and enjoyment

of the riparian holdings are in fact appreciably injured as the proximate result of such unlawful use of the waters or the lands thereunder. In the absence of a valid grant from the state, no riparian owner or other person has an exclusive right to do business upon public waters of the state whether such waters are in front of the land of the riparian owner or not. As the shore or space between high and low water marks is a part of the bed of the navigable waters, one who holds to high-water mark is a riparian owner, and, as such, has common-law riparian rights as incidents to his title to the abutting lands.

Id., 57 Fla. at 402-03, 48 So. at 644-45 (citations omitted; emphasis supplied).

It is a recognized general rule of law that a riparian owner's interest in waterway navigation is the same as a member of the public except where there is some special injury to the riparian owner. See F. Maloney, S. Plager & F. Baldwin, Jr., Water Law and Administration, The Florida Experience (1968). We fully recognized this special injury exception in Webb v. Giddens, 82 So.2d 743 (Fla.1955). In that case Giddens was the owner of a parcel of land located on a small arm of Lake Jackson in Leon County. He was in the business of renting boats to people who came to fish. To reach the main part of Lake Jackson, his customers had to pass under a wooden state highway bridge that stretched across this arm of the lake. The state road department improved this road by removing the wooden bridge and replacing it with a fill completely spanning the arm and blocking Giddens and his customers from the main part of the lake. The trial court rejected the state road department's contention that one's riparian rights ended when he reached the water and held that the owner had a legal right of access to the main body of the lake for purposes of fishing, hunting, and boating. We approved that lower court decision, holding that one common law riparian right was ingress and egress to and from the water over the owner's land and that the issue was whether the denial of ingress and egress deprived the owner of "a practical incident of his riparian proprietorship." We concluded that Giddens' right of ingress and egress would be virtually meaningless unless he were allowed access to the main body of the lake. The Webb case is discussed as an appropriate illustration of a special injury to a riparian owner in F. Maloney, supra, at 100-04. We agree with the two conclusions reached therein that Webb stands for the following: (1) "for travel over a navigable body of water to be materially obstructed by the state there must be an overriding public interest that justifies depriving either the public or the riparian of the enjoyment of this right," and (2) "whether such an obstruction is called a public nuisance from which the riparian owner sustains special injury, or whether it is called a

private nuisance as to him, the riparian owner has the individual right to object and to have the courts hear his objection." Id. at 102.

For the riparian right of ingress and egress to mean anything, it must at the very least establish a protectable interest when there is a special injury. To hold otherwise means the state could absolutely deny reasonable access to an island property owner or block off both ends of a channel without being responsible to the riparian owner for any compensation. A waterway is often the street or public way; when one denies its use to a property owner, one denies him access to his property. This is particularly so in the case of island property. As stated rhetorically in F. Maloney, supra, "What good is access to a thirty-foot-deep channel a hundred yards or so long and blocked at both ends?" Id. at 104. Reasonable access must, of course, be balanced with the public good, but a substantial diminution or total denial of reasonable access to the property owner is a compensable deprivation of a property interest.

* * *

In the instant case the trial court concluded that as a matter of law island owners on Lake Iamonia have no reasonable method of transportation to their islands without the use of motorboats or airboats, and made an express finding that poling or paddling a boat to these islands was not reasonable under the circumstances of this case. Rule 16E-14.02 is an absolute prohibition during part of the year against the only reasonable means of transportation to and from the islands for property owners, and we agree with the trial court in its conclusion that the rule is unreasonable and arbitrary as applied to these property owners.

The rule is, however, constitutional in general application. When the question of ingress and egress of an island property owner is removed, we do not find that the mere restriction on the means of navigation on the lake violates any constitutional rights.

* * *

For the reasons expressed, the judgment is affirmed.

SUNDBERG, C.J., dissents with an opinion with which ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, Chief Justice, dissenting.

I must respectfully dissent to that portion of the majority opinion which holds that the act and implementing rule is unreasonable, arbitrary and unconstitutional as applied to island owner appellees. The majority finds the law and rule to be a reasonable exercise of the police power vis-a-vis the general public, but unreasonable as it affects the appellees because it unreasonably limits their common law riparian rights of ingress and egress.

Regrettably, the majority misconceives both the issue and the extent of the right of ingress and egress inuring to riparian

ownership. As is clear from both the trial court's judgment and this Court's opinion, the issue is one of navigation across the waters of Lake Iamonia. This case has nothing to do with ingress and egress to and from the uplands from the waters edge, i.e., "access to and from the navigable waters." Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 558, 57 So. 428, 431 (1912). The distinction is crucial, because while the right to ingress and egress is an exclusive right adhering in riparian ownership, the right to navigation is not.

As framed by the pleadings, adjudged by the trial court and held by the majority, the riparian owners enjoy a greater right of navigation across the waters of Lake Iamonia, than does the public in general. This simply is not the law. If the act and regulation is efficacious as to the public in general, then it is valid as applied to the island owners. This is so because the right of a riparian owner to navigation rises no higher than the right of the public in general. "The common-law riparian proprietor enjoys [the right of ingress and egress] and that of unobstructed view over the waters and in common with the public the right of navigating, bathing, and fishing, . . ." (Emphasis supplied.) Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 58, 78 So. 491, 501 (1917).

The vital distinction between the exclusive right to ingress and egress inuring to a riparian owner and the right in common with the public to navigation is pointed out with clarity by Justice Whitfield in one of the earliest decisions of this Court dealing with the subject of riparian rights, Ferry Pass I. & S. Association v. White's River I. & S. Association, 57 Fla. 399, 48 So. 643 (1909). The clarity and erudition of that discussion is such that it bears repeating in full.

* * *

[See majority, supra, for quote from Ferry Pass.]

* * *

Again in Merrell-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428 (1912), Justice Whitfield stated:

At common law, all navigable waters and the lands thereunder were held by the sovereign for the benefit of the whole people, and the owner of land abutting on navigable waters had no exclusive right in the waters, below ordinary highwater mark or in the lands under the waters, except the right of access to and from the navigable waters, and rights in the land growing out of accretion or reliction.

62 Fla. 549, 558, 57 So. 428, 431. No statutory rights are involved here. Section 197.228, Florida Statutes (1979), merely recognizes such riparian rights as exist at common law.^{1/}

The most recent decision to consider the distinction between rights of ingress and egress and rights of

navigation is Carmazi v. Board of County Commissioners of Dade County, 108 So.2d 318 (Fla. 3d DCA 1959). In that case riparian owners sought damages for encroachment upon their property rights as a result of a proposed dam to be located downstream from their waterfront property located on a navigable river. The dam would completely deny access by water from their property on Little River in Miami to Biscayne Bay. The court canvassed the earlier decisions of this Court, including those cited herein, and concluded that the riparian owners were entitled to no relief because the dam was in the public interest and the private rights of the owners were no different than those of the public in general to navigation. Hence, there was an appropriate exercise of the police power vis-a-vis the riparian owners. In particular, the court quoted the same excerpt from Thiesen v. Gulf, F. & A. Ry. Co., supra, which is quoted above and noted that:

The above quoted section recognizes the right of the riparian landowner to navigate, bathe and fish in the bay, and observes that this right is held in common with the public.

108 So.2d at 323 (emphasis in original).

The Carmazi court also correctly observed that the views expressed in Thiesen are supported by the majority of decisions as well as text writers in this country and still constitute the law in this state. In doing so the district court confronted the decision of this Court in Webb v. Giddens, 82 So.2d 743 (Fla.1955). In that case we held that a property owner situated on an arm of Lake Jackson in Leon County was entitled to compensation when the State Road Department replaced a bridge with a fill which cut off the landowner's access to the main body of the lake and interfered with his boat renting business. The

1. Section 197.228(1), Florida Statutes (1979), provides:

"Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high water mark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland."

district court distinguished the case on the basis that the Webb Court cited with approval the principle in the Thiesen case without overruling or receding from it and concluded that riparian rights were a field of law "which is unusually dependent upon the facts and circumstances of each case." 108 So.2d at 745.

I would not be so charitable. The Webb case to me represents an erroneous interpretation of Thiesen principles under the guise of applying equitable principles. By defining the landowner's navigational access to the main body of the lake as "a practical incident of his riparian proprietorship," the Court was less than faithful to the principles carefully articulated in Thiesen. There is much mischief in this. Although the Webb decision may have wrought an equitable result just as the result of the majority here may be equitable, nevertheless, such a result-oriented decision does a disservice to a body of law which has a pervasive effect on a state with such an abundance of riparian or littoral lands. I would recede from Webb v. Giddens.

There remains only to deal with Hayes v. Bowman, which was also relied upon by the trial judge. Although the Hayes decision speaks in terms of "common law riparian rights to an unobstructed view and access to the Channel over the foreshore across the waters toward the Channel" of a navigable bay, a careful analysis of the issue in the case makes it apparent that Justice Thornal was concerned only with the correlative rights between two upland riparian owners and an "equitable distribution" as between them of the submerged lands between the upland and the Channel. The resolution of the case turned on the manner in which one should measure the boundaries of riparian rights as they extend into submerged lands toward the channel of navigable waters. The Court concluded that those boundaries neither need be an extension of the upland property boundaries nor need they run at right angles with the shore line. Hence, the rule was prescribed that "riparian rights of an upland owner must be preserved over an area `as near as practicable` in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel." 91 So.2d at 802. It is obvious that such an equitable distribution can only exist between two upland riparian owners and affects the general public not one whit, because submerged lands while in the hands of the state are held for the benefit of the public in common, including riparian owners. Justice Thornal's citation of Thiesen and Merrill-Stevens with approval in his opinion makes this clear.

Consequently, once the majority finds the act and regulation in the instant case a reasonable exercise of the police power over navigation insofar as the general public is concerned, it must be found reasonable as to the island owners because they enjoy no greater rights to navigation on the lake than does the public in general. I would reverse the judgment of the trial court.

UNITED STATES v. CHANDLER-DUNBAR WATER POWER CO.
229 U.S. 53 (1913)

Mr. Justice Lurton ... delivered the opinion of the court.

From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been "taken," and for which compensation must be made under the Fifth Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?

That compensation must be made for the upland taken is not disputable. The measure of compensation may in a degree turn upon the relation of that species of property to the alleged water power rights claimed by the Chandler-Dunbar Company.

* * *

The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. Upon the admission of the State of Michigan into the Union the bed of the St. Marys River passed to the State, and under the law of that State the conveyance of a tract of land upon a navigable river carries the title to the middle thread.

The technical title of the Chandler-Dunbar Company therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Marys River. By reason of that fact, and the ownership of the shore, the company's claim is, that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgement of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made.

* * *

This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified

one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation.

* * *

In Gibson v. United States, 166 U. S. 269, it is said (p.271):

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

Thus in Scranton v. Wheeler, supra, the Government constructed a long dyke or pier upon such submerged lands in the river here involved, for the purpose of aiding its navigation. This cut the riparian owner off from direct access to deep water, and he claimed that his rights had been invaded and his property taken without compensation. This court held that the Government had not "taken" any property which was not primarily subject to the very use to which it had been put, and, therefore, denied his claim.

* * *

Unless, therefore, the water power rights asserted by the Chandler-Dunbar Company are determined to be private property the court below was not authorized to award compensation for such rights.

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

* * *

Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river at the rapids, Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation. The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has by the act of 1909 decided in effect to be an obstruction to navigation, and hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation or kept free from such obstructions in the interest of navigation. We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Company is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland taken to the international boundary is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Company of private property rights follows from the considerations before stated.

It is at best not clear how the Chandler-Dunbar Company can be heard to object to the selling of any excess of water power which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as it had no property right in the river which has been "taken." It has, therefore, no interest whether the Government permit the excess of power to go to waste or made the means of producing some return upon the great expenditure.

The conclusion therefore is that the court below erred in awarding \$550,000, or any other sum for the value of what is called "raw water," that is the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land.

Coming now to the award for the upland taken:

* * *

Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact. "The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." Boston Chamber of Commerce v. Boston, 217 U. S. 189, 194, 195.

* * *

COLBERG, INC. V. STATE
432 P.2d 3 (Cal. 1967)

SULLIVAN, Justice.

These consolidated actions for declaratory relief present the common issue whether plaintiff shipyard owners will have any causes of action for damages under the law of eminent domain arising out of the impairment of their access to the Stockton Deep Water Ship Channel as a result of the construction of two proposed fixed low level parallel bridges spanning a connecting navigable waterway to which their properties are riparian.

* * *

The state proposes to construct twin stationary freeway bridges across the Upper Stockton Channel between plaintiffs' properties and the turning basin. The vertical clearance of these bridges is to be, generally speaking, 45 feet above the water line.

Colberg alleges that 81 percent of its current business involves ships standing more than 45 feet above the water line. Plaintiff Stephens alleges that 35 percent of its current business involves such ships. The present minimum clearance between plaintiffs' yards and the Pacific Ocean is 135 feet, established by the Antioch Bridge. Plaintiffs allege in substance that after the construction of the proposed bridges, no vessel with fixed structure in excess of 45 feet above the water line will be able to enter their respective shipyards; that there is no other access by water to the yards from the San Joaquin River,

San Francisco Bay and the oceans of the world; and that plaintiffs, their properties and their business will suffer loss and damages because of the impairment of access resulting from the construction of the bridges.

* * *

The sole question in this case is whether the alleged impairment of plaintiffs' access to the Stockton Deep Water Ship Channel constitutes a taking or damaging of private property within the meaning of article I, section 14 of the California Constitution. In order to answer this question we are led to an examination of the interest of the state in its navigable waters; in the course of this examination we explain the relationship between the state's power to deal with its navigable waters and the extent of its constitutional duty to make compensation for damage caused by the exercise of that power.

In order to put the controversy into proper focus, we must first make some preliminary observations concerning plaintiffs' position and the nature and extent of their claim. First, it is clear that plaintiffs must assert the taking or damaging of a private right in order to bring themselves within the protective embrace of article I, section 14. Thus, they cannot ground their claim in the right of navigation, for this is a public right from the abridgment of which plaintiffs will suffer no damage different in character from that to be suffered by the general public.

* * *

The State of California holds all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."

* * *

The nature and extent of the trust under which the state holds its navigable waters has never been defined with precision, but it has been stated generally that acts of the state with regard to its navigable waters are within trust purposes when they are done "for purposes of commerce, navigation, and fisheries for the benefit of all the people of the state."

* * *

In *Boone v. Kingsbury* (1928) 206 Cal. 148, 273 P. 797, the state surveyor-general had refused to issue to plaintiffs permits to prospect for oil and gas upon tidal lands covered by navigable sea waters upon the ground, inter alia, that the granting of such permits would constitute an act without the scope of the trust because such prospecting would not be "in aid and furtherance of commerce and navigation." We rejected that contention, holding that the relationship of gasoline to commerce was manifest. "Gasoline is the power that largely moves the commerce of nations over lands and sea; *** Gasoline is so closely allied with state and national welfare as to make its production a matter of state and national concern. If it can be said of any industry that its output is 'in aid and furtherance of commerce and navigation,' and its production 'a public benefit,' the production of gasoline, by reason of the motive elements that inhere in it and its universal use and adaptability to varied uses and the convenient and portable form in which it may be confined, would

entitle it to a high classification in the scale of useful, natural products. It is a mover of commerce and fills the office of 'a public benefit.'

Finally, in the case of Gray v. Reclamation District No. 1500, supra, 174 Cal. 622, 163 P. 1024, plaintiffs sought to enjoin the operations of defendant district, which was engaged in efforts to reclaim land and prevent flooding, with incidental benefits to navigation, near the confluence of the Sacramento and Feather Rivers. We there rejected plaintiffs' contention that the state had no power to deal with its navigable waters unless its dominant purpose was to improve navigation. "The supreme control of the state over its navigable waters was early declared in Eldridge v. Cowell, 4 Cal. 80, approved in United States v. Mission Rock Co., 189 U.S. 391, 23 S.Ct. 606, 47 L.Ed. 865. This right of control embraces within it not alone the power to destroy the navigability of certain waters for the benefit of others, but extends in the case of streams to the power to regulate and control the navigable or nonnavigable tributaries, as in the debris cases, to the erection of structures along or across the stream, to deepening or changing the channel, to diverting or arresting tributaries; in short, to do anything subserving the great purpose, * * *." (Emphasis added.)

We deem it too clear to warrant the citation of further authority that the state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise. It is equally clear, however, that the question of governmental power is quite different from that of compensation for damage caused by the exercise of such power. It is to the latter question that we now turn.

We have referred above to the paramount supervisory power of the federal government over navigable waters. This power, though superior to that of the state, is not grounded in ownership of the navigable waterways upon which it operates, but rather derives from the commerce clause of the United States Constitution, and it has been stated that it may properly be exercised only in order to aid navigation.

* * *

The Fifth Amendment to the United States Constitution is of course applicable to the exercise of the federal navigational power within its proper scope, just as article I, section 15 of the state Constitution is applicable to the exercise of state power over navigable waters, but in many cases compensation for "damage" caused by exercise of the federal power is denied because the rights and values affected are deemed to be burdened with the so-called federal "navigation servitude." Among the rights so burdened is that of the access from riparian land to the affected navigable waterway. The limits of the servitude are reached, however, and just compensation must be paid in spite of the fact that the power has been exercised within its scope, when permanent physical encroachment upon or invasion of land riparian to the navigable waterway but above the ordinary high-water mark results.

* * *

As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse. We are of the further view that the law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that "when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience." (Gray v. Reclamation District No. 1500, supra, 174 Cal. 622, 636, 163 P. 1024, 1030.)

We have arrived at this conclusion after an examination of cases from other jurisdictions. It appears that in some states the servitude operates only when the state acts upon its navigable waters for the purpose of improving navigation, and that private rights "damaged" by acts not in aid of navigation are therefore compensable. Other jurisdictions hold as we do in the instant case, that the state's servitude operates upon certain private rights, including those of access, whenever the state deals with its navigable waters in a manner consistent with the public trust under which they are held. We are of the opinion that this view is supported not only by the present law of California, but also by considerations of sound public policy.

* * *

It is clear that the conclusions above expressed dispose of plaintiffs' contention that their right of access to the navigable waters fronting on their respective properties must, in order to be of utility, include the right to navigate freely to the sea. Whatever the scope and character of their right to have access to those navigable waters, we hold that such right is burdened with a servitude in favor of the state which comes into operation when the state properly exercises its power to control, regulate, and utilize such waters.

* * *

Finally, we emphasize that the state servitude upon lands riparian or littoral to navigable waters, like the federal servitude burdening such lands, does not extend to cases wherein the proper exercise of state power results in actual physical invasion of or encroachment upon fast lands.

We hold that plaintiffs' right of access from their respective riparian properties to the waters of the channel, whatever its scope as against private parties, is burdened with a servitude in favor of the state and that, since there is here no direct physical invasion of, or encroachment upon, said properties by the state, plaintiffs are not entitled to compensation for the abridgment or diminution, if any, of such right of access as a result of the lawful exercise of the state's power to regulate, control and deal with its navigable waters.

Section 6. THE TAKING ISSUE

The Fifth Amendment of the United States Constitution provides that private property "shall [not] be taken for public use without just compensation." When there has been a physical invasion of a person's property by a government, it is generally incontrovertible that there has been a taking of property requiring compensation. However, when the value or utility of land has been impaired or limited through a government's exercise of the police power, has the property been "taken"? This has been one of the most complicated and pervasive questions in land use and environmental law.

One of the leading cases on the taking issue is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Id. at 413. The court found in that case that the public interest was not sufficient to justify the extensive impairment of property rights:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits.... One fact for consideration in determining such limits is the extent of the diminution of value. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. Id. at 413. (Emphasis added).

The influence of the Holmes opinion is indisputable, but the dissent in the case written by Justice Brandeis is quoted nearly as frequently in taking litigation. Brandeis would have decided the question of legitimate police power versus compensable taking on whether the exercise of police power prevented a public harm or provided a public benefit. When the government exercises the police power to create benefits for a neighborhood, there must be a "reciprocity of advantage." "[W]here the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is ... no room for considering reciprocity of advantage."

Pennsylvania Coal did not, however, settle the confusion about regulatory taking or state an exclusive test for taking. In Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Supreme Court stated: "There is no set formula to determine where regulation ends and taking begins."

State courts have applied a variety of tests since no single rationale exists for determining a taking. In Maine v. Johnson, 265 A.2d 711 (Me. 1970), the Maine Supreme Court applied a diminution of value test to find that the denial of a permit denial under the Wetlands Act constituted a taking. In a zoning case, however, the same court affirmed the police power to set standards for development where "the use is actually and substantially an injury or impairment of the public interest," In Re Spring Valley Development, 300 A.2d 736, 748 (Me. 1973). In Turnpike Realty v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), the Massachusetts Supreme Judicial Court based the taking test on the distinction between creating public benefit and prevention of public harm. The denial of a permit to fill a New Hampshire saltmarsh was held to be a valid regulation because it would prevent future harm to the public, Sibson v. State, 336 A.2d 239 (N.H. 1975).

Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972), was the first to apply the "natural use" rule in calculating diminution of value for purposes of determining whether a taking had occurred. The court relied heavily on the fact that the regulation was intended to prevent a public harm rather than provide a benefit. The court also stated:

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

One commentator on the Just decision argued that "[i]n addition to modifying the concept of taking, the court redefines property." Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 Wis. L. Rev. 1039, 1078. The U.S. Supreme Court held in Goldblatt, supra, that an owner is not entitled to the "highest and best" use of his land if it causes a public harm. The Court did not, however, limit value to "natural use" and stated that reasonable investment-backed expectations have traditionally been a criterion in estimating the diminution of value of the owner's property.

The following cases set out the Florida Supreme Court's test for regulatory taking and the procedures for asserting a claim that property has been unconstitutionally taken.

GRAHAM v. ESTUARY PROPERTIES, INC.
399 So.2d 1374 (Fla. 1981)

McDONALD, Justice.

This case is before the Court for review of a district court decision reported at 381 So.2d 1126 (Fla. 1st DCA 1979). We affirm in part and reverse in part.

Estuary Properties, Inc., owns almost 6,500 acres of land in Lee County on the southwest coast of Florida near Fort Myers. The site includes substantial wetlands along Estero, San Carlos, Hurricane, and Hell-Peckish Bays and is a sensitive ecological environment. Tidal waters flush daily through about 2,800 acres of predominantly red mangroves on the edge of the bays. Some 220 days a year these tidal waters move through the red mangroves into the predominantly black mangrove forest which covers approximately 1,800 acres that Estuary wants to dredge or fill. The remaining 1,800 acres begin at the salina and range from two to five feet above mean sea level. Only 526 acres of the total area have been identified as dry enough to be classified as nonwetlands.

On June 18, 1975, Estuary applied to the board of county commissioners of Lee County for approval of a development of regional impact (DRI) pursuant to section 380.06, Florida Statutes (Supp.1974).^{1/} Estuary's plan provided for no construction on the 2,800 acres of red mangroves but contemplated destroying the 1,800 acres of predominantly black mangroves. In their place a 7.5 mile "interceptor waterway" would be constructed, and the fill from the waterway (and from twenty-seven lakes to be dredged) would be used to raise the elevation of the remaining land for construction. Estuary contended that the waterway and the lakes would replace the functions of the black mangroves in the ecosystem. Estuary's plan called for the eventual construction of 26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities.

The development proposal was submitted to the Southwest Florida Regional Planning Council (SWFRPC), which prepared a report pursuant to section 380.06(8). Based on this report SWFRPC recommended that the board of county commissioners deny the application.

After public hearings, the board adopted the SWFRPC findings and recommendations and concluded, inter alia, that the proposed

1. (1) The Florida Environmental Land and Water Management Act of 1972, ch. 380, Fla. Stat. (1973 & Supp. 1974), has been amended subsequent to Estuary's application for a permit, but the changes do not affect the issues here.

development would cause the degradation of the waters of Estero and San Carlos Bays. This degradation would adversely affect both the commercial fishing and shellfishing industries, as well as the sport fishing industry, resulting in an adverse economic impact on Lee County and the region. The board denied both the increase in zoning density and the application for development approval. The commissioners listed twelve conditions which would have to be met before they would approve a development order. The first condition was that Estuary submit an amended DRI application for development approval for a maximum density of two units per acre. Such density would allow Estuary to construct 12,968 residential units as well as commercial facilities. Other conditions included eliminating the destruction of such large acreages of mangroves^{2/} and giving consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a manner that would not violate applicable state water quality standards for the receiving bodies of water.^{3/}

Estuary appealed this order to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes (1973). After a five-day hearing de novo requested by the developer, the hearing officer found that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region. He concluded that the interceptor waterway would not adequately replace the functions of the mangroves and that removing them would greatly increase the risk of pollution to the surrounding bays, thus adversely affecting the area's economy. The hearing officer found that requiring the landowner to refrain from degrading state-owned waters was a reasonable restriction on this land required by chapter 380; consequently, he recommended denial of the appeal. The Land and Water Adjudicatory Commission adopted his recommendation and entered a final order denying the appeal.

Estuary sought judicial review in the First District Court of Appeal. That court granted relief and remanded the case to the adjudicatory commission with instructions to enter an order granting Estuary permission to develop its property, including the mangrove acreage, unless Lee County commenced condemnation

2. (2) Under the board's suggested rezoning, Estuary would be allowed 2 units per acre to be built on an upland site, leaving the submerged mangrove forests undeveloped.

3. (3) Additional conditions were aimed at alleviating the serious impact of a development of this size on local water supplies, schools, roads, sewage treatment facilities, and other government services.

proceedings on the mangrove acreage lying below the salina. The adjudicatory commission and Lee County have sought review by this court.

The decision of the district court is divided into two points. Simply stated they are:

- I. Denial of Estuary's application for development approval violates the provisions of chapter 380, Florida Statutes (1973 and Supp.1974).
- II. Denial of Estuary's application constitutes a taking of private property for public use without compensation in violation of the United States and Florida Constitutions.

I.

A.

The district court found that chapter 380 requires a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner. In this respect we agree with the district court. Although the act does not expressly mandate balancing, such legislative intent is clear from the stated purpose of the act and the factors enumerated in section 380.06(8),^{4/} which the regional planning agency must consider in making a DRI recommendation. The act specifically states that private property rights are to be preserved. Section 380.021, Fla. Stat. (1973). Therefore, the only way to logically and feasibly apply the act is by balancing the often conflicting interests according to the considerations listed in section 380.06(8).

-
4. (6) (a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region;
- (b) The development will have a favorable or unfavorable impact on the economy of the region;
- (c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;
- (d) The development will efficiently use or unduly burden public transportation facilities;
- (e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and
- (f) The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.

The district court found that the adjudicatory commission had not balanced the considerations in section 380.06(8) noting that the commission found favorably on four of the considerations and unfavorably on only two. According to the district court, the adjudicatory commission ruled against the development only because the commission found an adverse environmental impact would result and because the proposed development deviated from the policies of the planning agency.

There is no evidence, however, that the commission did not balance the factors. Balancing in an adjudicatory process does not always mean that four favorable considerations outweigh two unfavorable considerations. The legislature did not place specific values on each consideration listed in section 380.06(8). Thus, it would have been permissible for the hearing officer to determine that the adverse environmental impact and deviation from the policies of the planning council outweighed the other more favorable findings.

In Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), we stated that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." Id. at 924. Section 380.06(8) sets out guidelines for implementing the policies of the act. The guidelines may permit discretion on the part of the agency when balancing applicable considerations.

B.

The thrust of the district court's holding that denial of the DRI permit was improper is that the planning council and hearing officer applied an incorrect burden of proof. The court found that "the position of the Planning Council is that a private landowner has no private right to use his property unless he can prove that such will not impair a public benefit." 381 So.2d 1136. In determining that this position placed an unconstitutional burden of proof on the landowner, the court relied on Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965).

In Zabel this Court held that the statute in question would be unconstitutional as applied if it required the appellants to prove the proposed landfill would not materially and adversely affect any of the eight specified public interests. Zabel is of limited value in the instant case because the facts differ significantly. In Zabel the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased. The state's subsequent denial of the fill permit amounted to the state's reneging on its agreement. This court found that the rights to dredge, fill, and bulkhead the land were the appellants' only present rights attributable to

ownership of the submerged land itself." Id. at 381. Denying those rights would have deprived the owners of the only beneficial use of their property. To then place the burden of proof on the owners to show that the dredging and filling would have no adverse impact on public interest would have been unconstitutional. When Estuary bought the property in question in this case, however, it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted.

There is also a significant difference between the initial findings in Zabel and the initial findings of the planning council in this case. In Zabel the Court did not find that any material, adverse effect on the public interest had been demonstrated. 171 So.2d at 379. In the instant case there is no question but that the proposed development would have an adverse environmental impact. The issue in the present case, then, is not whether an adverse impact exists, but whether the curative measures are adequate. Zabel stands for the proposition that the burden is on the state to show that an adverse impact will result if a permit is granted. Here the state clearly met that burden. The burden of proof then shifted to Estuary to prove that the curative measures are adequate. Once there is sufficient evidence of an adverse impact, it is neither unconstitutional nor unreasonable to require the developer to prove that the proposed curative measures will be adequate.

In holding that the state has the initial burden of showing that a proposed DRI will have an adverse impact in light of section 380.06(8), we do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof. We simply reaffirm the rule that exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied. If the state denied a permit without showing the existence of an adverse or unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious.

* * *

II.

The second point upon which the district court based its decision was that denial of the permit constituted a taking of Estuary's property for a public purpose without compensation, in violation of the Florida and United States Constitutions.

Section 120.68(12)(c), Florida Statutes (1977), calls for the remand of a case to the agency if the reviewing court finds that the agency's exercise of discretion violated a constitutional or statutory provision. We disagree with the district court's conclusion that the facts as found by the agency constituted a taking and therefore violated the constitution or section 380.08, Florida Statutes.

There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case. Some of the factors which have been considered are:

1. Whether there is a physical invasion of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

If the regulation does not promote the health, safety, welfare, or morals of the public, it is not a valid exercise of the police power. Likewise, if the regulation is arbitrarily and capriciously applied it is an invalid exercise of the police power. If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power. It would seem, therefore, that if the regulation preventing the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of police power would be reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of

recreational fishing for the public, the regulation might be a taking.

Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. In the instant case, the adjudicatory commission found that the proposed development would cause pollution in the surrounding bays. Such pollution would affect the economy of Lee County. Therefore, the regulation at issue here promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied.

It may be, however, that a regulation complies with standards required for the police power but still results in a taking. This occurred in Pennsylvania Coal Co., upon which Estuary and the district court relied. In Pennsylvania Coal Co. the court considered a Pennsylvania statute, passed to protect the public safety, which prohibited subsurface mining of coal if such mining would cause subsidence of the surface. The Court held that enforcement of the statute amounted to a taking which required compensation. In holding that the mining prohibition was unconstitutional as applied, the Court emphasized that the statute rendered the coal company's rights to subsurface minerals virtually worthless. 260 U.S. at 414, 43 S.Ct. at 159.

The district court apparently determined that prohibiting the destruction of the mangroves rendered Estuary's property "virtually worthless." In support of this determination, the court relied on three cases: Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965); Alford v. Finch, 155 So.2d 790 (Fla. 1963); and Askew v. Gables-By-The-Sea, Inc., 333 So.2d 56 (Fla.1st DCA 1976), cert. denied, 345 So.2d 420 Fla. 1977). Zabel has already been distinguished from the case at bar and Gables-By-The-Sea, Inc., can be distinguished on similar grounds. In both cases the landowners had bought submerged bottom lands from the state. In both cases denying the right to fill the land deprived the landowners of all reasonable use of their property. In both cases all of the owners' lands were submerged and were totally useless without the right to fill them.

The property owned by Estuary, on the other hand, is not entirely submerged although part of it is covered part of the time by tidal flows. Furthermore, Estuary did not purchase its property from the state. Estuary purchased the property in question from a private individual with full knowledge that part of it was totally unsuitable for development.

Estuary argues that without the interceptor waterway it can make no beneficial use of its property. This argument is supported mainly by the self-serving testimony of the president of Estuary, who stated that he did not "believe that we can economically survive" by building approximately one-half the number of units originally proposed and giving up the interceptor waterway. Estuary offered no independent evidence to support this contention.

Simply because the interceptor waterway would increase the value of the property does not mean that disallowing it constitutes a taking. Nor is a taking established merely because Estuary may be allowed to build a development only half the size

of its original proposal. We agree with the Wisconsin Supreme Court's observations in Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), where that court pointed out the involvement of exceptional circumstances because of the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing. The court also noted the close proximity of the land in question to navigable waters which the state holds in trust for the public. Similar factors are present in the case at bar. We agree with the Wisconsin court that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." 56 Wis.2d at 17, 201 N.W.2d at 768.

We do not hold that any time the state requires a proposed development to be reduced by half it may do so without compensation to the owner. We do hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power. As we have already pointed out, there was ample evidence for the commission to find that destruction of the mangroves and creation of the waterway would result in an adverse impact on the surrounding area. The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm.

As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. Estuary is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power.

The district court also relied on Alford v. Finch, 155 So.2d 790 (Fla. 1963). In Alford the state attempted to incorporate the landowners' property into a game preserve without compensation to or consent of the owners. As in Zabel and Gables-By-The-Sea, Inc., the basis for finding that a taking occurred was that the state action rendered the property virtually valueless. For the reasons stated above, that determination is not present in this case.

Underlying all of the cases involving the police power to regulate private property is the reasonableness of the regulation. In Alford, for example, the plaintiff's land was required to be a game preserve while the lands of adjacent property owners were not. This requirement implicitly supports the unreasonableness of the regulation in that case. The landowners in Alford did not seek to alter their land so as to adversely affect their neighbors. They simply wanted to hunt on their land in the same manner as their neighbors. In those circumstances it was unreasonable to subject those landowners to

such a total restriction on the use of their property. In distinguishing Alford from the instant case, we again stress the magnitude of Estuary's proposed development and the sensitive nature of the surrounding lands and water to be affected by it. In this situation it is not unreasonable to place some restrictions on the owner's use of the property.

Another factor which may be considered in determining the reasonableness of an exercise of the police power involves the investment-backed expectation of the use of the property. In Zabel and Gables-By-The-Sea, Inc., the property owners' investment was backed by the expectation that they would be permitted to fill the lands in question. This expectation was further supported in Zabel by a statutory right to fill which existed when the property was purchased. Estuary, on the other hand, had only its own subjective expectation that the land could be developed in the manner it now proposes. Estuary diligently and at considerable expense prepared development plans in an attempt to assure that its development would not adversely affect the environment. It recognized that it should not materially alter the property in a way that would have serious adverse impact on the surrounding area. The fact finder concluded that Estuary's plans do not accomplish this goal, and that the development would in fact be detrimental to the surrounding area.

This case is remanded to the district court of appeal with instructions to remand it to the Florida Land and Water Adjudicatory Commission with instructions to that commission to comply with section 380.08(3), Florida Statutes (1973), as set forth in this opinion.

It is so ordered.

KEY HAVEN ASSOCIATED ENTERPRISES, INC.

v.

BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND
427 So.2d 153 (FLA. 1982)

OVERTON, Justice.

This is a petition to review the decision of the First District Court of Appeal in Key Haven Associated Enterprises v. Board of Trustees, 400 So.2d 66 (Fla. 1st DCA 1981). The district court held that an action for inverse condemnation, based on the denial of a dredge-and-fill permit by the Department of Environmental Regulation (DER), may not be taken in a circuit court until all remedies provided in chapter 120, Florida Statutes (1975), including an appeal to the appropriate district court of appeal, have been exhausted. The district court, in this holding, expressly construed article X, section 6, Florida Constitution. We have jurisdiction. Art. V, # 3(b)(3), Fla. Const. We approve in part and disapprove in part the decision of the district court and hold that, under the facts of this case, Key Haven was required to exhaust all executive branch

administrative remedies before instituting the circuit court action, but, under the specific circumstances in this case, would not have been required to seek direct review of the final executive branch action in the district court of appeal. Resolution of the issue in this case requires us to determine the appropriate forum in which to raise constitutional questions arising from administrative action or implementation of statutory provisions.

The present dispute evolves from the conflict between the implementation of legislation which has as its purpose the protection of our natural resources and the right to the beneficial use of private property. The facts as summarized are undisputed. Between 1964 and 1968, petitioner Key Haven, a land developer, purchased 185 acres of submerged shallow flatlands located in the Florida Keys from the governor and cabinet sitting as the Trustees of the Internal Improvement Fund (IIF), paying three hundred dollars per acre for the land. In 1972, four years after the last land purchase, Key Haven applied to the state, pursuant to the regulatory statutes, for a permit to dredge 679,000 cubic yards of limestone from a portion of its submerged lands and to use this material to fill the remaining land to create canal-front lots. In 1976, DER notified Key Haven of its intention to deny the application for the dredge-and-fill permit.

Key Haven sought and received a formal hearing under section 120.57(1), Florida Statutes (1975), in which it argued that the permit should be granted because the dredge-and-fill proposal conformed to the standards for preserving natural resources and water quality set out in chapters 253 and 403, Florida Statutes (1975). The Department of Administrative Hearings officer found, however, that Key Haven's proposed project would obliterate all aquatic life in the area so that the project did not meet the requirements of chapters 253 and 403. The hearing officer also found that, because the IIF trustees had not promised a permit to or misled Key Haven in any way, the state was not estopped from denying the permit even though the IIF trustees sold the submerged land to Key Haven with implied knowledge that the purchaser desired to improve the submerged land for beneficial use. DER issued a final order denying the dredge-and-fill permit.

At this state of the proceedings, Key Haven decided not seek review of DER's order by appealing to the IIF trustees pursuant to section 253.76, Florida Statutes (1975), and by thereafter appealing to the district court of appeal pursuant to section 120.68, Florida Statutes (1975). Instead, Key Haven filed suit in the circuit court, alleging that the denial of the dredge-and-fill permit, although proper under the requirements of chapters 253 and 403, constituted a taking of its property by inverse condemnation because the action totally denied it the use of its property for any beneficial purpose and because the IIF trustees sold the submerged lands to Key Haven's predecessor knowing of the intent to dredge and fill the land. Key Haven asserted that it was entitled to just compensation under article X, section 6, Florida Constitution.

DER filed a motion to dismiss, alleging that the circuit court lacked subject matter jurisdiction in the case. The trial

court granted the motion to dismiss based on Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCA 1979), and Kasser v. Dade County, 344 So.2d 928 (Fla. 3d DCA 1977). The trial court found that Key Haven was essentially alleging that the "agency action constituted an unconstitutional taking of land," and determined that Key Haven was in the same posture as the petitioners in Coulter in that "both actions were attempts to collaterally attack the particular agency's denial of a permit." The trial judge relied on the holding in Coulter that "those constitutional issues which could have been raised by the party in a petition to the district court of appeal for review of the agency action are foreclosed and may not be subsequently asserted in a suit for relief brought in circuit court," 373 So.2d at 525, in dismissing the suit for inverse condemnation, finding that "the plaintiff has not exhausted his administrative remedies." The trial judge also found that "Key Haven's assertions of satisfaction with the denial of the permit are inconsistent with its position that the same action constitutes and unconstitutional taking of property," citing Kasser v. Dade County.

Key Haven appealed to the First District Court of Appeal, which affirmed the trial court's order.

* * *

We agree in part and disagree in part. We agree that, before Key Haven could use the permit denial as a basis for an inverse condemnation claim, it was required to pursue a section 253.76 appeal to the IIF trustees. [This section was repealed in 1984.] We disagree with the district court's conclusion that, upon an adverse ruling by the trustees, Key Haven's only option would be to exhaust the administrative process delineated in chapter 120 by seeking judicial review of the agency action in a district court of appeal under the provisions of section 120.68.

We hold that, once an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation. We disagree, however, with Key Haven's contention that a party aggrieved by agency action is not in any way restricted in choosing a judicial forum in which to raise constitutional claims.

Constitutional Challenges to Administrative Action

* * *

Three types of constitutional challenges may be raised in the context of the administrative decision-making process of an executive agency. An affected party may seek to challenge: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule.

* * *

Constitutional Application of a Statute or Agency Rule

The final category of constitutional challenge is the claim that an agency has applied a facially constitutional statute or rule in such a way that the aggrieved party's constitutional rights have been violated. This type of challenge would involve the assertion that an agency's implementing action was improper because, for example, the agency denied the party the rights to due process or equal protection. A suit in the circuit court requesting that court to declare an agency's action improper because of such a constitutional deficiency in the administrative process should not be allowed. As well articulated by Judge Smith in the instant case, administrative remedies must be exhausted to assure that the responsible agency "has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue." Key Haven, 400 So.2d at 69. We also agree with the instant district court decision that, sitting in their review capacity, the district courts provide a proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final agency order constitutional. A party may, however, seek circuit court relief for injuries arising from an agency decision which the party accepts as intrinsically correct, as illustrated in this case.

Key Haven's Claim

In the instant case, Key Haven did not allege in the circuit court that any statute relied upon by DER in denying its dredge-and-fill permit was facially unconstitutional, nor did Key Haven assert that the agency action was improper because of a constitutional violation inherent in the agency's decision-making process. Rather, Key Haven asserted in its circuit court complaint that, although DER's action in denying the permit was proper and taken in accordance with the requirements of a constitutionally valid statute, the denial nevertheless resulted in an unconstitutional taking of Key Haven's private property without just compensation. We note that the statutes in this instance, chapters 253 and 403, allow such a taking to occur.

We hold that Key Haven could not pursue the inverse condemnation action in circuit court without first having taken an appeal of the permit denial to the IIF trustees, consisting of the governor and cabinet, as provided in section 253.76. The district court correctly observed that the trustees could have offered Key Haven several possible remedies as a result of the appeal. The trustees could have found the permit denial improper or found a basis for allowing less extensive development of the land. We do not agree, however, with the district court's holding that, had Key Haven appealed to the trustees without success, the claim that the agency action amounted to a taking of its property could be presented only to the district court on direct review of agency action.

A petition to the district court for review of agency action is necessarily taken when an aggrieved party wishes to assert that the agency action was improper. The district court considered Key Haven's assertion that its property had been taken without just compensation to be, in essence, a collateral attack on the propriety of the permit denial. The district court stated: "The constitutional question is not independent of the agency's action on the merits, but is inseparable from it, and the constitutional question is necessarily phrased, ingeniously or ingenuously, as a variation of the affected party's original position on the nonconstitutional question." Key Haven, 400 So.2d at 71. The district court observed that the claim that the property was taken was a "constitutionally rephrased question that Key Haven might have presented as a permit issue through Chapter 120 processes." *Id.* We must disagree. In the particular circumstances of this case, where the agency is implementing a statute which, by its terms, properly allows a total taking of private property, direct review in the district court of the agency action may be eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings. We disagree with the holdings in Albrecht v. State, 407 So.2d 210 (Fla. 2d DCA 1981), and in Coulter insofar as they conflict with our conclusions in this case.

We hold that Key Haven could have filed suit for inverse condemnation in the circuit court, after exhausting all executive branch appeals, because we find that Key Haven's claim in the circuit court is not a veiled attempt to collaterally attack the propriety of agency action. When an aggrieved party has no grounds for contesting the propriety of agency action, a remedy is available, but not mandatory, in the circuit court for inverse condemnation. We agree with the district court, and wish to emphasize, that if a party in Key Haven's position has appealed to the trustees and received an adverse ruling, the only way it can challenge the propriety of the permit denial, based on asserted error in the administrative decision-making process or on asserted constitutional infirmities in the administrative action, is on direct review of the agency action in the district court. The claim of the taking of property can be raised in this direct review proceeding, and, if an adequate record is available, the district court could require the state to institute condemnation proceedings.

We reject the assertion that this permit denial cannot be both proper and confiscatory. This case presents a much different situation than that presented in Kasser v. Dade County, 344 So.2d 928 (Fla.3d DCA 1977), where the court refused to allow the contradictory claim that a denial of rezoning was both reasonable and confiscatory. A zoning ordinance is, by definition, invalid if it is confiscatory. We agree with the court in Kasser, which correctly held that an assertion that a denial of rezoning is confiscatory constitutes a direct attack on the validity of a zoning ordinance. This is not the case when a statute authorizes a permit denial which is confiscatory. As

we stated in Graham v. Estuary Properties, "it may be . . . that a regulation complies with standards required for the police power but still results in a taking." 399 So.2d at 1381.

We note that one of the factors that must be considered by the circuit court in determining if a taking of property has actually occurred is whether "the regulation precludes all economically reasonable use of the property." Id. at 1380. We point this out because the district court found that "Key Haven seeks in consequence of DER's lawful action . . . full compensation for the lost 'Manhattan' Key Haven might have raised from the ocean floor by dredge and fill." Key Haven, 400 So.2d at 69 (footnote omitted). We emphasize that taking will not be established simply because DER denies a permit for the particular type of use that a property owner considers to be the most desirable or profitable use of the property.

We conclude by holding that an aggrieved party must complete the administrative process through the executive branch, which in this instance requires an appeal to the IIF trustees. Having completed review in the executive branch, if an aggrieved party does not wish to further contest the validity of the permit denial by seeking district court review, the party may accept the agency action under the statute being implemented in this case and file suit in circuit court on the basis that denial was proper but resulted in an unconstitutional taking of the party's property. We find that this procedure exists independent of the specific statutory authority now found in section 253.763(2), Florida Statutes (1979), which became effective on May 29, 1978, after Key Haven filed suit in the circuit court in this case.*

We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or as failing to comply with the intent and purposes of the statute. Further, if an aggrieved party intends to assert that the agency should have, or could have, allowed at least a modified use of the property, this issue may not be presented to the circuit court in an inverse condemnation

*Section 253.763(2) provides:

Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

proceeding; this assertion presents an issue that must be addressed in the administrative proceeding and before the district court.

We approve the district court's holding in the instant case that the trial court properly dismissed Key Haven's suit in inverse condemnation because Key Haven had failed to exhaust its administrative remedies by appealing DER's order denying the dredge-and-fill permit to the IIF trustees, pursuant to section 253.76. We disapprove that part of the district court's holding that would require Key Haven to seek direct review of the trustees' action in the district court, as the only available avenue to obtain judicial consideration of its claim that its property was taken. Our holding does not mean that Key Haven cannot submit another proposed plan for the use of the subject property and proceed according to the procedures delineated in this opinion; the proceedings on this present application are, however, concluded.

For the reasons expressed, the opinion of the district court in the instant case is approved in part and disapproved in part.

It is so ordered.

NOTES

1. Further readings: Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Sax, Takings, Private Property, and Public Rights, 81 Yale L.J. 149 (1971); F. Bosselman, D. Callies, and J. Banta, The Taking Issue (1973); Haigler, McInery & Rhodes, The Legislature's Role in the Taking Issue, 4 Fla. St. U. L. Rev. 1 (1976); Binder, Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands, 25 Fla. L. Rev. 1 (1972).

2. A major issue that remains to be resolved is whether compensation is the appropriate remedy for a regulatory taking. Arguably the courts, rather than the appropriate decision-making bodies, are carrying out eminent domain proceedings if compensation is the remedy. Others argue that the police power is broad enough to allow complete taking of property which must be compensated. Still others argue that a regulatory taking is by definition a taking without due process, and the regulation must be invalidated, rather than compensating the landowner. For further discussion of these issues, see: Paster, Money Damages for Regulatory "Takings", 23 Nat. Resources J. 711 (1983); Gordon, Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road, 12 Real Est. L.J. 211 (1984); Kelso, Substantive Due Process as a Limit on Police Power Regulatory Takings, 20 Willamette L.J. 1 (1984); Siemon, Of Regulatory Takings and Other Myths, 1 F.S.U. J. Land Use & Envtl. L. 105 (1985).

PART THREE.

FLORIDA'S COASTAL ZONE PLANNING: A STUDY IN GOVERNMENTAL RELATIONS

Section 1. INTRODUCTION

Many of the legal issues in modern coastal zone management and planning involve questions of governmental authority and governmental relations. Although the federal government's commerce power has been very expansively interpreted, Congress is generally reluctant to interfere in the states' traditional regulation of land use and natural resources. Coastal zone management issues have produced paradoxical problems of the federal government claiming preemption in one area while praising the "new federalism" and urging state control in other areas. At the state level, most state planning and zoning power has been delegated to local governments, making comprehensive planning for coastal areas virtually impossible without a significant restructuring of priorities, major changes in the decision-making process and, in many cases, a redistribution of authority.

A first step in understanding the governmental relationships in the coastal zone is to look at the "proprietary" interests of the state and federal governments in the coastal zone. As in the case of the dividing line between state and private ownership, the boundary is not the ultimate arbiter of rights or authority. It is only a starting point in the analysis.

Section 2. FEDERAL AND STATE BOUNDARIES

THE TIDELANDS CONTROVERSY

The popular name given to the dispute between the federal and state governments over the control of the land, water and resources of the territorial sea, the Tidelands Controversy, is technically a misnomer. As the cases in Chapter 2 indicate, there has been no question concerning state ownership of the wet sand area, the area between the low and high tide lines. The major dispute that arose in the late 1930's and 1940's involved the lands seaward of the low tide mark.

Prior to the 1930's there had seemed to be little doubt that the submerged lands and resources of the territorial sea were "owned" by the adjacent states. Actions of the federal and state governments, as well as a century of court decisions, reinforced this commonly held perception. In the late 1930's, however, several factors led the federal government to assert an exclusive claim to the territorial sea. Overfishing by Japan off the country's west coast and national defense from enemy submarines were offered as reasons for the federal government's assertion of jurisdiction, but the primary basis for the change of position was the growing importance of oil and gas linked with the development of technology to exploit offshore petroleum resources. California had been leasing off-shore areas for oil development under the authority of a 1921 California leasing act. In May 1945 the Justice Department filed suit against California successfully challenging the state's ownership of resources in the territorial sea.

The United States claimed a 3-mile territorial sea, and it was known at that time that the oil resources of the continental shelf were not limited to that restricted area. There was no basis in international law for the United States to regulate or exclusively control oil exploitation beyond its territorial sea. The issue of the U. S. claim to the resources of the continental shelf vis-a-vis other countries was as important as the issue of federal control of the territorial sea. Following a national marine resources policy study by the Departments of Interior and State, the United States formalized its position concerning jurisdiction of the continental shelf and marine fisheries. The 1945 Truman Proclamation on the Continental Shelf stated:

"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 waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

* * *

A White House press release issued the same day, September 28, 1945, contained the following commentary:

* * *

"The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint. It will, however, make possible the orderly development of an underwater area 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf."

* * *

Although the U. S. claim to the continental shelf had no basis in international law, there was little international objection to the claim, and the Proclamation became the starting point of the international law of the continental shelf. The United States v. California litigation, however, was only the starting point of more than three decades of litigation and legislation attempting to define the relative rights of the federal and state governments in the adjacent seas and submerged lands.

UNITED STATES v. CALIFORNIA
332 U.S. 19 (1947)

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States by its Attorney General and Solicitor General brought this suit against the State of California invoking our original jurisdiction under Article III, sec. 2, of the Constitution which provides that "In all Cases . . . in which a State shall be party, the Supreme Court shall have original Jurisdiction." The complaint alleges that the United States "is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California." It is further alleged that California, acting pursuant to state statutes, but

without authority from the United States, has negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the lessees have done so, paying to California large sums of money in rents and royalties for the petroleum products taken. The prayer is for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

California has filed an answer to the complaint. It admits that persons holding leases from California, or those claiming under it, have been extracting petroleum products from the land under the three-mile ocean belt immediately adjacent to California. The basis of California's asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state, Cal.Const.Art.XII (1849); that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal footing" with the original states, California at that time became vested with title to all such lands. The answer further sets up several "affirmative" defenses. Among these are that California should be adjudged to have title under a doctrine of prescription; because of an alleged long-existing Congressional policy of acquiescence in California's asserted ownership; because of estoppel or laches; and, finally, by application of the rule of res judicata.

* * *

The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it. See McCulloch v. Maryland, 4 Wheat, 316, 403-408; United States v. Minnesota, 270 U.S. 181, 194. In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.

* * *

At the time this country won its independence from England there was no settled international custom or understanding among

nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality.^{1/} Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See The Queen v. Keyn, 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See Jones v. United States, 137 U.S. 202, 212-214; In re Cooper, 143 U.S. 472, 502-503.

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. See Jones v. United States, 137 U.S. 202; In re Cooper, 143 U.S. 472, 502. The belief that local interests are so predominant as constitutionally to require state dominion over

1. (16) Secretary of State Jefferson in a note to the British minister in 1793 pointed to the nebulous character of a nation's assertions of territorial rights in the marginal belt, and put forward the first official American claim for a three-mile zone which has since won general international acceptance. Reprinted in H. Ex. Doc. No. 324, 42d Cong., 2d Sess. (1872) 553-554. See also Secretary Jefferson's note to the French Minister, Genet, reprinted in American State Papers, I Foreign Relations (1833), 183, 184; Act of June 5, 1794, 1 Stat. 381; 1 Kent, Commentaries, 14th Ed., 33-40.

lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations. The country's adoption of the three-mile belt is by no means incompatible with its traditional insistence upon freedom of the sea, at least so long as the national Government's power to exercise control consistently with whatever international undertakings or commitments it may see fit to assume in the national interest is unencumbered. See Hines v. Davidowitz, 312 U.S. 52, 62-64; McCulloch v. Maryland, *supra*. The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. See United States v. Belmont, 301 U.S. 324, 331-332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.

The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See Chy Lung v. Freeman, 92 U.S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with resources which might be of national and international importance.

* * *

The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there. As a consequence of this discovery, California passed an Act in 1921 authorizing the granting of permits to California residents to prospect for oil and gas on blocks of land off its coast under the ocean. Cal. Stats. 1921, c. 303. This state statute, and others which followed it, together with the leasing practices under them, have precipitated this extremely important controversy, and pointedly raised this state-federal conflict for the first time. Now that the question

is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.

We hold that the United States is entitled to the relief prayed for.

THE SUBMERGED LANDS ACT of 1953

43 U.S.C.S. 1311-1314

Section 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they hereby, subject to the provisions hereof, recognized, confirmed established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases. (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this

Act [enacted May 22, 1953], except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

* * *

Section 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical 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, or if it has been heretofore approved by Congress. (Emphasis added.)

* * *

Section 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands.

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act [43 USCS # 1311].

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

* * *

UNITED STATES v. FLORIDA
363 U.S. 121 (1960)

MR. JUSTICE BLACK delivered the opinion of the Court.

This controversy involves the interests of all five Gulf States -- Florida, Texas, Louisiana, Mississippi and Alabama -- in the submerged lands off their shores. The Court heard the claims together, but treats them in two opinions. This opinion deals solely with Florida's claims. The result as to the other States is discussed in [a separate] opinion, ante, p. 1. All the claims arise and are decided under the Submerged Lands Act of 1953.

The Act granted to all coastal States the lands and resources under navigable waters extending three geographical miles seaward from their coastlines. In addition to the three miles, the five Gulf States were granted the submerged lands as far out as each State's boundary line either "as it existed at the time such State became a member of the Union," or as previously "approved by Congress," even though that boundary extended further than three geographical miles seaward. But in no event was any State to have "more than three marine leagues into the Gulf of Mexico." This suit was first brought against Louisiana by the United States, United States v. Louisiana, 350 U.S. 990, invoking our original jurisdiction under Art. III, 2, cl. 2, of the Constitution, to determine whether Louisiana's boundary when it became a member of the Union extended three leagues or more into the Gulf, as Louisiana claimed, so as to entitle it to the maximum three-leagues grant of the Submerged Lands Act. After argument on the Government's motion for judgment against Louisiana, we suggested that the interests of all the Gulf States under the Act were so related, "that the just, orderly, and effective determination" of the issues required that all those States be before the Court. United States v. Louisiana, 354 U.S. 515, 516. All are now defendants, each has claimed a three-league boundary and grant, which the United States denies, and the issues have been extensively briefed and argued by the parties. As stated, this opinion deals only with the United States-Florida controversy.

Florida contends that the record shows it to be entitled under the Act to a declaration of ownership of three marine leagues of submerged lands, because (1) its boundary extended three leagues or more seaward into the Gulf when it became a State, and (2) Congress approved such a three-league boundary for Florida after its admission into the Union and before passage of the Submerged Lands Act. Since we agree with Florida's latter contention, as to congressional approval, we find it unnecessary to decide the boundaries of Florida at the time it became a State.

Florida claims that Congress approved its three-league boundary in 1868, by approving a constitution submitted to Congress as required by a Reconstruction Act passed March 2,

1867. 14 Stat. 428. That constitution carefully described Florida's boundary on the Gulf of Mexico side as running from a point in the Gulf "three leagues from the mainland" and "thence northwestwardly three leagues from the land" to the next point. The United States concedes that from 1868 to the present day Florida has claimed by its constitutions a three-league boundary into the Gulf. The United States also admits that Florida submitted this constitution to Congress in 1868, but denies that the Gulf boundary it defined was "approved" by Congress within the meaning of the Submerged Lands Act. This is the decisive question as between Florida and the United States.

The 1868 Florida Constitution was written and adopted by Florida pursuant to the congressional Act of March 2, 1867 as supplemented by a second Act of March 23, 1867.

* * *

Congress not only approved Florida's Constitution which included three-league boundaries, but Congress in 1868 approved it within the meaning of the 1867 Acts.

* * *

The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were examined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress," had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress. When Florida's claims were mentioned in the hearings it was generally assumed that Congress had previously "approved" its three-league boundaries. The Senate Report on a prior bill, set forth as a part of the report on the 1953 Act, pointed out that "In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico." S. Rep. No. 133, 83d Cong., 1st Sess. 64-65. The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard -- "boundaries ... heretofore approved by the Congress" -- the Act was intended to "confirm" and "restore" the three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in United States v. Texas, 339 U.S. 707; United States v. Louisiana, 339 U.S. 699; and United States v. California, 332 U.S. 19. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its

shores. And, as we have held, the 1953 Act was within the power of Congress to enact. Alabama v. Texas, 347 U.S. 272. See also United States v. California, 332 U.S. 19, 27.

We therefore deny the United States' motion for judgment. We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution. The cause is retained for such further proceedings as may be necessary more specifically to determine the coastline, fix the boundary and dispose of all other relevant matters. The parties may submit an appropriate form of decree giving effect to the conclusions reached in this opinion.

It is so ordered.

NOTES

1. The Submerged Lands Act of 1953 was the Congressional response to United States v. California and its progeny. Although the Act declared state ownership of the submerged lands and resources within 3 miles of the coast, it by no means ended the federal-state conflict in the marginal seas. Note that the federal grant to the states took the form of a "quitclaim" and was without prejudice to state claims beyond 3 miles. Rather than finally settling the issue of the state-federal boundary, the Submerged Lands Act signaled the beginning of another series of disputes concerning state claims beyond 3 miles.
2. The first series of cases involved the states bordering the Gulf of Mexico. Only Florida and Texas established the right to a 3 league boundary. The Supreme Court rejected the claims of Mississippi, Alabama and Louisiana to territorial seas beyond 3 miles.
3. The 1960 Florida boundary case, supra, settled only the Florida boundary in the Gulf of Mexico. In the 1970's, Florida and the other Atlantic states asserted claims beyond 3-miles in the Atlantic Ocean. In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court rejected the claims of the states that made up the original thirteen colonies. Florida's claim was also rejected, United States v. Florida, 420 U.S. 531 (1975), resulting in Florida having a 3-mile territorial sea in the Atlantic Ocean and a 3-league territorial sea in the Gulf of Mexico. The final issue to be resolved, of course, was to determine where the Atlantic ends and the Gulf begins.

DECREE

The joint motion for entry of a decree is granted.

For the purpose of giving effect to the decision and opinion of this Court announced in this case on March 17, 1975, 420 U.S. 531, and to the Supplemental Report of the Special Master filed January 26, 1976, it is ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As against the State of Florida, the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than 3 geographic miles seaward from the coastline of that State and extending seaward to the edge of the Continental Shelf, and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, as determined under the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606.

2. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of 3 geographic miles, and the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313.

3. As against the State of Florida, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the coastline of that State; the State of Florida is not entitled to any interest in such lands, minerals, and resources. Where the historic coastline of the State of Florida is landward of its coastline, the United States is additionally entitled, as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the State's historic coastline (but not less than 3 geographic miles from its coastline), and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "historic coastline" refers to the coastline as it existed in 1868, as to be determined by the parties.

4. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313.

5. For the purpose of this decree, the Gulf of Mexico lies to the north and west, and the Atlantic Ocean to the south and east, of a line that begins at a point on the northern coast of the island of Cuba in 83 degrees west longitude, and extends thence to the northward along that meridian of longitude to 24 degrees 34' north latitude, thence eastward along that parallel of latitude through Rebecca Shoal and the Quicksands Shoal to the Marquesas Keys, and thence through the Florida Keys to the mainland at the eastern end of Florida Bay, the line so running that the narrow waters within the Dry Tortugas Islands, the Marquesas Keys, and Florida Keys, and between the Florida Keys and the mainland, are within the Gulf of Mexico.

6. There is no historic bay on the coast of the State of Florida. There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), the closing lines of which affect the right of either the United States or the State of Florida under this decree.

7. Jurisdiction is reserved by this Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree.

NOTES

1. Although it is now well settled that the federal government, not the states, "owns" the submerged lands beyond the 3-mile territorial sea, the actual boundary lines are still in dispute. Cases like United States v. Maine, United States v. California, and United States v. Louisiana continued for years in an attempt to determine the location of the 3-mile boundary. For states with large oil reserves offshore or with a major interest in inshore fisheries, the determination of the exact extent of state jurisdiction is considered extremely important. Irregular coastlines, bays, rivers and islands created delimitation problems not addressed by the Submerged Lands Act. In order to deal with these issues, the Supreme Court in United States v. California, 381 U.S. 139 (1965), adopted the definitions an international treaty, the Convention on the Territorial Sea and Contiguous Zone, done at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, to deal with the boundary delimitation issues left unresolved by the Submerged Lands Act.

2. Waters within bays, the mouths of rivers, and between fringe islands and the coast are internal or inland waters, not part of the territorial sea. The limit of the territorial sea must be measured from closing lines, not from the low water line. The figures below from Shalowitz, Boundary Problems Raised by the Submerged Lands Act, 54 Colum. L. Rev. 1021 (1954), illustrate some of the terminology and definitions involved in territorial sea delimitation.

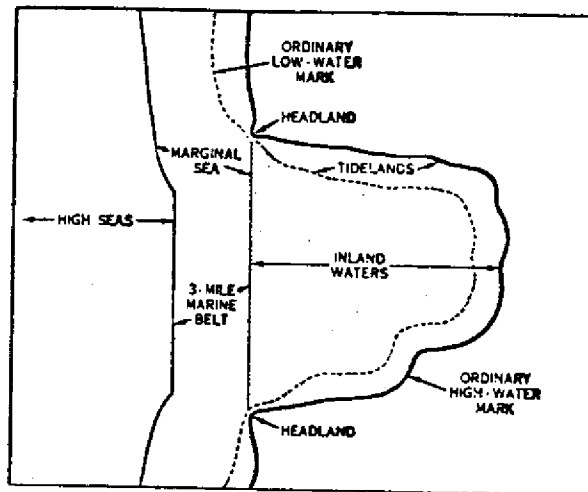
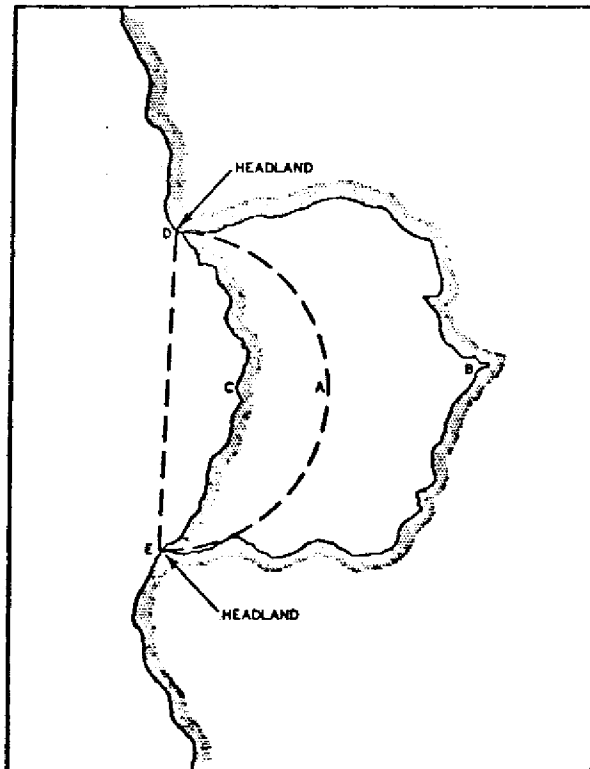


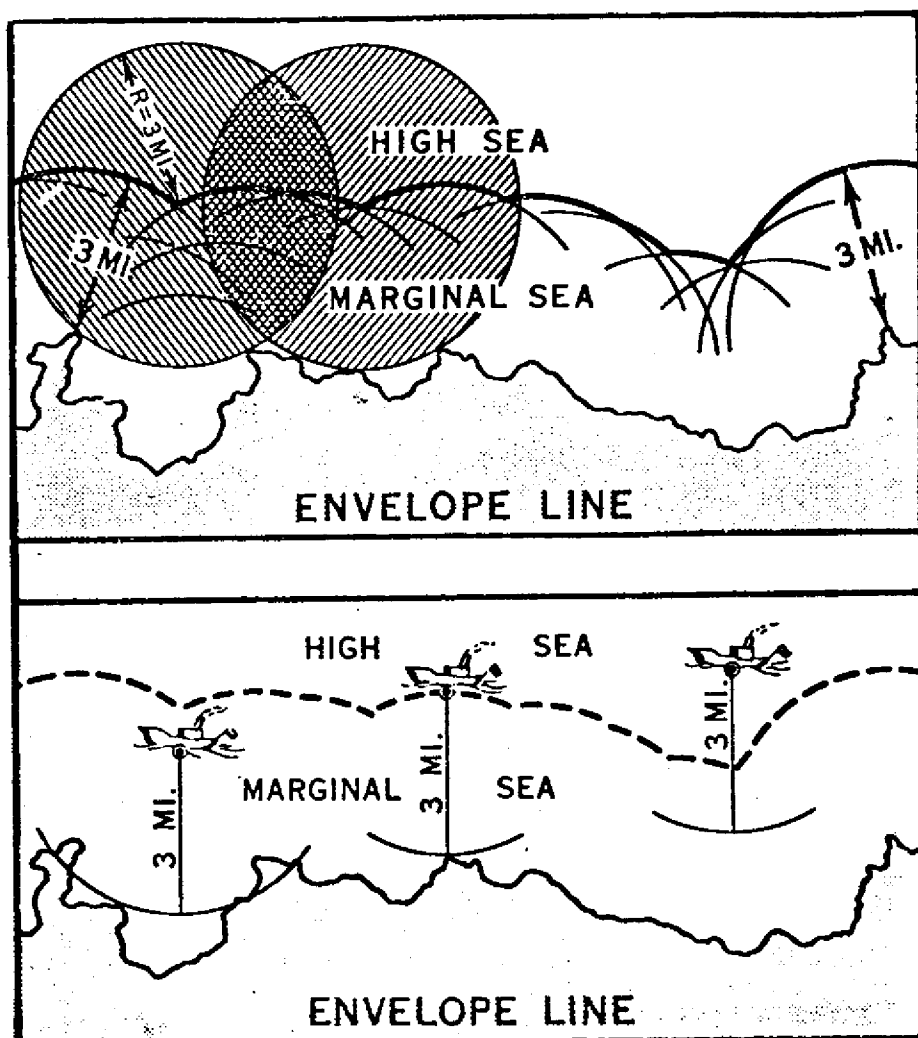
FIGURE 1.—Terminology.

The Supreme Court adopted the Convention on the Territorial Sea and Contiguous Zone's semi-circle, twenty-four mile closing line rule for bays. [Art. 7(4)] In order to qualify as a bay, a body of water must have an area larger than a semicircle, the closing line of the bay representing the diameter. In no event, however, can the closing line be more than twenty-four miles. In the diagram below, coastline B represents a true bay. Coastline C only has an indentation that does not constitute a bay.



—An open and a closed bay by the semicircular method.

Note that the territorial sea is not measured by a line running parallel to the coast, but is enclosed by an "envelope of arcs." This envelope of arcs method assures that the territorial sea boundary is always three miles from the nearest point on the coastline.



—Principle of the envelope line and its use by the navigator.

3. The United States v. Florida decree, supra page 196, stated that the Bay of Florida was not a historic bay. Historic bays are an exception to the 24-mile closing line/semicircle rule. In United States v. Louisiana, 394 U.S. 11 (1969), the Supreme Court set out the test for a historic bay:

-continuous exercise of authority and dominion over the area claimed..

-acquiescence by foreign nations.

See also United States v. Alaska 422 U.S. 184 (1975).

4. A majority of coastal nations claim a territorial sea of 12 miles or more, as compared to the U.S. claim of 3 miles. The Third United Nations Conference on the Law of the Sea (UNCLOS III) recently concluded a comprehensive Law of the Sea Treaty (which the U.S. did not sign) which recognizes the legality of a 12 mile territorial sea. From time to time legislation has been introduced in Congress to expand the territorial sea to 12 miles. If the U.S. territorial sea were expanded to 12 miles, what would be the effect on federal and state jurisdiction under the Submerged Lands Act? Note that the Submerged Lands Act grants states title to a limit of three miles, not to the territorial sea.

5. The United States offshore jurisdiction is not limited to a 3 mile territorial sea and the continental shelf. The U.S. also claims a 12 mile contiguous zone, a 200 mile fishery conservation zone (1976) and a 200 mile exclusive economic zone (1983). For an overview of U.S. claims and boundaries, see Feldman and Colson, The Maritime Boundaries of the United States, 75 Am. J. Int'l Law 729 (1981).

6. While the federal-state boundary dispute raged, there was actually very little conflict over lateral boundaries, the boundaries between states in the territorial sea. The Texas-Louisiana boundary became important because of the oil involved, but most states saw little reason to even negotiate a territorial sea boundary line with their neighbors. Federal legislation, however, has ended the days of amiably shared territorial waters. First, the Coastal Energy Impact Program and now the proposed Revenue Sharing Act base allocation of funds to the states on a formula related to oil leasing and production on the "adjacent" continental shelf. "Adjacent" shelf is determined by extending state territorial sea boundaries. Now the interstate war is on. See, Christie, Coastal Energy Impact Program Boundaries on the Atlantic Coast: A Case Study of the Law Applicable to Lateral Seaward Boundaries, 19 Va. J. Int'l L. 841 (1980).

Section 3. FISHERIES MANAGEMENT

A. STATE FISHERIES MANAGEMENT

Prior to 1977, states were the primary managers of the country's fisheries. By virtue of the police power, the states regulated fisheries in inland waters and the territorial seas. The landmark case of Skiriotes v. Florida, 313 U.S. 69 (1941), recognized the right of a state to regulate its citizens outside territorial waters. In holding that state regulations on the taking of sponges would apply to a Florida resident even if he were not in territorial waters, the Supreme Court stated:

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress....

A primary means of enforcement of state fisheries laws has been the use of landing laws or the prohibition of the possession of certain gear. In addition to regulating state citizens and other fishermen within the territorial sea, these kinds of laws can have significant impacts on noncitizen fishermen fishing outside the territorial sea. In spite of the extraterritorial impacts, the Supreme Court has, prior to 1977, upheld landing laws when they are necessary for enforcement of fishery management legislation.

The following excerpt provides an overview of state fisheries regulation prior to 1977:

Schoenbaum & McDonald, State Management of Marine Fisheries After the Fishery Conservation and Management Act of 1976 and Douglas v. Seacoast Products, Inc., 19 Wm. & Mary L. Rev. 17 (1977)

A. State Jurisdiction Over Fisheries Within Territorial Waters

In analyzing the law of fisheries management one initially must determine the sources and extent of state jurisdiction and control over marine fisheries. States historically have asserted claims of control over fisheries located both within and without territorial waters. Prior to 1900, the United States Supreme Court recognized that the states, as sovereign representatives of the people, possessed an ownership interest in fish and wildlife located within their territories.^{1/} Subsequently, in Missouri v. Holland the Court limited the state ownership doctrine to include only wildlife reduced to actual possession by skillful capture,

noting that the claim to title in migratory creatures rested upon a "slender reed."

In 1948 the Supreme Court discarded the concept of "ownership" and described the doctrine as a "fiction," which was utilized to express the states' power to preserve and regulate the exploitation of their natural resources. This power to regulate fishes in territorial waters, the Court stated, was always subject to paramount powers retained by the federal government. The theory of state ownership resurfaced in 1953, however, with the passage of the Submerged Lands Act, which vested in the states "title to and ownership of ... natural resources" within their navigable waters and the lands beneath them. Included in this statutory grant was the "right and power to manage, administer, lease, develop and use" the natural resources, which were defined to include fish, shrimp, oysters, and other marine animal and plant life. Subject to the paramount powers of the federal government, the Submerged Lands Act confirmed the ownership interest of the states in the marine resources found within their territorial waters.

* * *

B. Extraterritorial State Jurisdiction

In addition to the ownership theory empowering states to manage fisheries within their territorial waters, two legal doctrines establishing the authority of coastal states to regulate and manage marine fisheries located beyond their territorial waters have been recognized. The first doctrine arose from state regulations collectively known as "landing laws."^{2/} Under such regulations, states may exercise control

1. (10) See, e.g., *Geer v. Connecticut*, 161 U.S. 519, 528-29 (1896) (the state, as the sovereign representative of its people, has the right to control and regulate, to the maximum extent possible, the common ownership of wildlife); *Manchester v. Massachusetts*, 139 U.S. 240, 259-60 (1891) (states have an ownership interest in territorial waters and the fish within those waters); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842) (the common ownership interest of New Jersey in marine fisheries within navigable waters was paramount to right of private ownership traceable to a grant by royal charter to the Duke of York).

2. (24) Generally, landing laws prohibit the possession, sale, or transportation of fish, or game within a state if such possession, sale, or transportation violates state law. The prohibition extends to all fish because it is impossible to distinguish between fish caught within or without state territorial waters, and any limitation on the prohibition would render its enforcement ineffective.

over fish caught beyond the three mile limit that subsequently are brought within their territorial waters. In the principal case of Bayside Fish Co. v. Gentry the Supreme Court upheld as a valid exercise of the state's police power a California landing law, regulating the processing of sardines, that applied equally to all of those fish regardless of where they were caught. The purpose of the regulation was to prevent a depletion of the local fish supply, and jurisdiction to control the sardines brought into the state was necessary to prevent evasion of this local policy. Because any impact on commerce was incidental and beyond the purposes of the legislation, the Court rejected the argument that the landing law placed an improper burden on interstate commerce. Consequently, justified by conservation enforcement considerations, the states could prohibit possession of fish taken outside their territorial waters and require a permit for any fishing vessel operating within state waters even though its catch may have come from operations conducted wholly outside the state.

The second basis for extraterritorial regulation of marine fisheries is derived from the right of a state to control the conduct of its citizens on the high seas. The Supreme Court relied on this rationale in Skiriotes v. Florida to affirm the conviction of a Florida resident who had used gear prohibited under Florida law to harvest sponges outside the territorial limit of the state's police power over one of its citizens, which was permissible in the absence of any conflict with federal law.

Recently, a series of cases arising in Alaska explored a new basis for state extraterritorial jurisdiction over marine fisheries. The controversies involved regulations to control crab fishing in the Bering Sea Shellfish Area, which extends hundreds of miles west of Alaska's shoreline. The regulations provided for the closing of the crab fishing area each year after 23,000,000 pounds of crab had been taken and made it unlawful to possess, transport, buy, or sell additional crabs "taken in any waters seaward of the officially designated as the territorial waters of Alaska." In Hjelle v. Brooks crab fishermen from the state of Washington obtained a preliminary injunction in the United States District Court for the District of Alaska against the enforcement of these regulations on the ground that they unconstitutionally burdened interstate commerce. Because the state purported to exercise direct control over crabs in the entire Bering Sea Shellfish Area, the court rejected Alaska's contention that the regulations were necessary to conserve crab fishing within the state. Although the landing law cases permit a state to regulate extraterritorial conduct to facilitate conservation of a resource clearly within the state, the court distinguished Hjelle from those cases on its facts. Because of the direct extraterritorial effect of the regulations and the absence of a showing that their purpose was to facilitate conservation enforcement within state waters, the court concluded that the plaintiffs were likely to prevail on the merits and issued the preliminary injunction.

Following the Hjelle decision the Alaska Board of Fish and Game repealed the objectionable regulations and issued emergency measures. These provisions established a series of crab fishing

closures for designated "statistical areas," each of which consisted of a "registration" area of waters within state jurisdiction and an adjacent seaward "biological influence zone." In State v. Bundrant the Alaska Supreme Court reviewed the convictions of several crab fishermen charged with violating these new regulations. The defendants were of two categories: those charged with illegal possession within the three mile limit of crabs taken on the high seas and those charged with prohibited extraterritorial activities within closed areas located sixteen to sixty miles off the Alaskan coast. Only one of the defendants was an Alaskan resident.

In holding that both categories of defendants were properly charged and subject to state regulation, the Alaska Supreme Court repudiated the analysis of Hjelle and departed from the well-established limits on state power to exercise extraterritorial jurisdiction. The court refused to adopt a restrictive interpretation of the landing law cases, which would have required the demonstration of an enforcement problem within state territorial waters as a prerequisite for expanded state jurisdiction; instead, the court stated that the test was whether the regulations bore a "reasonable relationship to the purpose sought to be achieved." Thus the issue was whether extraterritorial control was necessary on ecological grounds for the conservation of fishery resources that existed partially within state waters. Applying this doctrine, the court concluded that because crabs are migratory creatures, moving beyond the state's territorial boundaries at various times during the year, Alaska's regulation of activity on the high seas was necessary to conserve the crabs existing within its waters and thus clearly within the state's police power.

The court in Bundrant also extended the Skiriotes concept of the power of a state to regulate the conduct of its citizens on the high seas. Citing precedents from domestic and international law, the court broadened this principle into a general concept of "objective territorial" jurisdiction whereby a state may control the activities of noncitizens outside its jurisdiction when those activities have detrimental effects on a fishery within state waters. The impact of this concept is to allow direct state enforcement against noncitizens on the high seas.

* * *

C. Limits on State Jurisdiction

Even within the three mile limit, the Constitution and applicable federal law restrict state control over marine fisheries. In Toomer v. Witsell the Supreme Court held that a South Carolina statute requiring nonresidents to pay a \$2,500 license fee and residents only \$25 was a violation of the privileges and immunities clause of the Constitution. Interpreting the clause as a guarantee of the right of nonresidents to engage in commercial fishing within a state on an equal basis with citizens of that state, the Court stated that a disparity in the treatment of nonresidents is justifiable only when a substantial reason exists for the discrimination beyond the mere fact that the nonresidents are citizens of another

state; furthermore, if such reason exists, the degree of discrimination must bear a close relation to the state's purpose.^{3/} The court rejected as unsubstantiated by the record arguments that the discriminatory fees were necessary to maintain conservation and to recover costs of enforcement.

Toomer also overturned a South Carolina statute that required all owners of shrimp boats fishing within the state's territorial waters to unload their catch at a South Carolina port. Because the statute's purpose was to divert business to South Carolina that otherwise would have gone to other states, it created a burden on interstate commerce, which contravened the commerce clause of the United States Constitution.

The equal protection clause of the fourteenth amendment also has been used as the basis for declaring state fisheries regulation unconstitutional. In Takahashi v. Fish and Game Commission the Supreme Court held that a California statute barring the issuance of commercial fishing licenses to "persons ineligible for citizenship" was directed towards resident Japanese aliens and therefore created an impermissible classification. The concept of equal protection guarantees resident aliens the same right to earn a livelihood as is enjoyed by all citizens.

In the recent Douglas decision, the Supreme Court announced another limitation on state regulation of marine fisheries.

* * *

3. (68) The Court also rejected the state ownership theory as a justification for discrimination against nonresidents, and distinguished McCready v. Virginia, 94 U.S. 391 (1876), which upheld a Virginia statute prohibiting nonresidents from planting oysters in the tidal waters of the Ware River. The Court restricted McCready to inland waters and non-free swimming fish. 334 U.S. at 401.

DOUGLAS, COMMISSIONER, VIRGINIA MARINE
RESOURCES COMMISSION v. SEACOAST PRODUCTS, INC.
431 U.S. 265 (1977)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is the validity of two Virginia statutes that limit the right of nonresidents and aliens to catch fish in the territorial waters of the Commonwealth.

I.

Persons or corporations wishing to fish commercially in Virginia must obtain licenses. Section 28.1-81.1 of the Virginia Code (Sec. 81.1) (Supp. 1976), enacted in 1976, limits the issuance of commercial fishing licenses to United States citizens. Under this law, participants in any licensed partnership, firm, or association must be citizens. A fishing business organized in corporate form may be licensed only if it is chartered in this country; American citizens own and control at least 75% of its stock; and its president, board chairman, and controlling board majority are citizens.

Section 28.1-60 of the Virginia Code (Sec. 60) (Supp. 1976) governs licensing of nonresidents of Virginia to fish for menhaden an inedible but commercially valuable species of fin fish. Section 60 allows nonresidents who meet the citizenship requirements of Section 81.1 to obtain licenses to fish for menhaden in the three-mile-wide belt of Virginia's territorial sea off the Commonwealth's eastern coastline. At the same time, however, Section 60 prohibits nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay.

Appellee Seacoast Products, Inc., is one of three companies that dominate the menhaden industry. The other two firms, unlike Seacoast, have fish-processing plants in Virginia and are owned by American citizens. Hence, they are not affected by either of the restrictions challenged in this case. Seacoast was founded in New Jersey in 1911 and maintains its principal offices in that State; it is incorporated in Delaware and qualified to do business in Virginia. The other appellees are subsidiaries of Seacoast; they are incorporated and maintain plants and offices in States other than Virginia. In 1973, the family of Seacoast's founder sold the business to Hanson Trust, Ltd., a United Kingdom company almost entirely owned by alien stockholders. Seacoast continued its operations unchanged after the sale. All of its officers, directors, boat captains, and crews are American citizens, as are over 95% of its plant employees.

At the time of its sale, Seacoast's fishing vessels were enrolled and licensed American-flag ships. See *infra*, at 272-274. Under 46 U.S.C. Section 808, 835, the transfer of these vessels to a foreign-controlled corporation required the approval of the Department of Commerce. This was granted unconditionally over the opposition of Seacoast's competitors after a full public hearing that considered the effect of the transfer on fish conservation and management, on American workers and consumers, and on competition and other social and economic concerns. Following this approval, appellees' fishing vessels were re-enrolled and relicensed pursuant to 46 U.S.C. Section 251-252, 263. They remain subject to all United States laws governing maritime commerce.

In past decades, although not recently, Seacoast had operated processing plants in Virginia and was thereby entitled to fish in Chesapeake Bay as a resident. More recently, Seacoast obtained nonresident menhaden licenses as restricted by Section 60 to waters outside Chesapeake Bay. In 1976, however, Section 81.1 was passed by the Virginia Legislature, c. 338, 1976 Va. Acts, and appellant James E. Douglas, Jr., the Commissioner of Marine Resources for Virginia, denied appellees' license applications on the basis of the new law. Seacoast and its subsidiaries were thereby completely excluded from the Virginia menhaden fishery.

Appellees accordingly filed a complaint in the District Court for the Eastern District of Virginia, seeking to have sections 60 and 81.1 declared unconstitutional and their enforcement enjoined. A three-judge court was convened and it struck down both statutes. It held that the citizenship requirement of section 81.1 was pre-empted by the Bartlett Act, 16 U.S.C. 1081 *et seq.*, and that the residency restriction of section 60 violated the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction of the Commissioner's appeal, 425 U.S. 949 (1976), and we affirm.

II

Seacoast advances a number of theories to support affirmance of the judgment below. See Fusari v. Steinberg, 419 U.S. 379, 387 n. 13 (1975); Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970). Among these is the claim that the Virginia statutes are pre-empted by federal enrollment and licensing laws for fishing vessels. The United States has filed a brief as amicus curiae supporting this contention. Although the claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Art. VI, cl. 2, it is treated as "statutory" for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications. See Hagans v. Lavine, 415 U.S. 528, 549 (1974). Since we decide the case on this ground, we do not reach the constitutional issues raised by the parties.

The well-known principles of pre-emption have been rehearsed only recently in our decisions. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977); De Canas v. Bica, 424 U.S. 351 (1976). No purpose would be served by repeating them here. It is enough to note that we deal in this case with federal legislation arguably superseding state law in a "field which . . . has been traditionally occupied by the States." Jones v. Rath Packing Co., *supra*, at 525. Pre-emption accordingly will be found only if "that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)." Ibid. We turn our focus, then, to the congressional intent embodied in the enrollment and licensing laws.

The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since. Ships engaged in trade with foreign lands are "registered," a documentation procedure set up by the Second Congress in the Act of Dec. 31, 1792, 1 Stat. 287, and now codified in 46 U.S.C., c.2. "The purpose of a register is to declare the nationality of a vessel . . . and to enable her to assert that nationality wherever found." The Mohawk, 3 Wall. 566, 571 (1866); Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912). Vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" under procedures established by the Enrollment and Licensing Act of Feb. 18, 1793, 1 Stat. 305, codified in 46 U.S.C., c. 12. "The purpose of an enrollment is to evidence the national character of a vessel . . . and to enable such vessel to procure a . . . license." The Mohawk, *supra*; Anderson v. Pacific Coast S.S. Co., *supra*.

A "license," in turn, regulates the use to which a vessel may be put and is intended to prevent fraud on the revenue of the United States. See 46 U.S.C. 262, 263, 319, 325; 46 CFR 67.01-13 (1976). The form of a license is statutorily mandated: "license is hereby granted for the . . . [vessel] to be employed in carrying on the (. . . `coasting trade,` `whale fishery,` `mackerel fishery,` or `cod fishery,` as the case may be), for one year from the date hereof, and no longer." 46 U.S.C. 263. The law also provides that properly enrolled and licensed vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." Section 251. Appellees' vessels were granted licenses for the "mackerel fishery" after their transfer was approved by the Department of Commerce.

The requirements for enrollment and registration are the same. 46 U.S.C. 252; The Mohawk, *supra*, at 571-572. Insofar as pertinent here, enrolled and registered vessels must meet identification, measurement, and safety standards, generally must be built in the United States, and must be owned by citizens. An exception to the latter rule permits a corporation having alien stockholders to register or enroll ships if it is organized and chartered under the laws of the United States or of any State, if its president or chief executive officer and the chairman of its board of directors are American citizens, and if no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens. 46 U.S.C. 11; 46 CFR 67.03-5 (a) (1976). The Shipping Act, 1916, further limits foreign ownership of American vessels by requiring the Secretary of Commerce to approve any transfer of an American-owned vessel to noncitizens. 46 U.S.C. 808.

Deciphering the intent of Congress is often a difficult task, and to do so with a law the vintage of the Enrollment and Licensing Act verges on the impossible. There is virtually no surviving legislative history for the Act. What we do have, however, is the historic decision of Mr. Chief Justice John Marshall in Gibbons v. Ogden, 9 Wheat. 1 (1824), rendered only three decades after passage of the Act. Gibbons invalidated a discriminatory state regulation of shipping as applied to vessels federally licensed to engage in the coasting trade. Although its historic importance lies in its general discussion of the commerce power, Gibbons also provides substantial illumination on the narrower question of the intended meaning of the Licensing Act.

* * *

Although Gibbons is written in broad language which might suggest that the sweep of the Enrollment and Licensing Act ousts all state regulatory power over federally licensed vessels, neither the facts before the Court nor later interpretations extended that far. Gibbons did not involve an absolute ban on steamboats in New York waters. Rather, the monopoly law allowed some steam vessels to ply their trade while excluding others that were federally licensed. The case struck down this discriminatory treatment. Subsequent decisions spelled out the negative implication of Gibbons: that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.

For example, in Smith v. Maryland, 18 How. 71 (1855), the Court upheld a conservation law which limited the fishing implements that could be used by a federally licensed vessel to take oysters from state waters. The Court held that an "enrolment and license confer no immunity from the operation of valid laws of a State," *id.*, at 74, and that the law was valid because the State "may forbid all such acts as would render the public right [of fishery] less valuable, or destroy it altogether," *id.*, at 75. At the same time the Court explicitly reserved the question of the validity of a statute discriminating against nonresidents. *Ibid.* To the same effect is the holding in Manchester v. Massachusetts, 139 U.S. 240 (1891). There, state law prohibited the use by any person of certain types of fishing tackle in specified areas. Though Manchester was a Rhode Island resident basing a claim on his federal fisheries license, the Court held that the statute

"was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. . . . [T]he statute may well be considered as an impartial and reasonable regulation . . . and the subject is one which a State may well be

permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish . . . is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States." Id., at 265.

More recently, the same principle was applied in Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), where we held that the city's Smoke Abatement Code was properly applicable to licensed vessels. Relying on earlier cases, we noted that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power." Id., at 447. As an "[e]venhanded local regulation to effectuate a legitimate local public interest," id., at 443, the ordinance was valid.

Although it is true that the Court's view in Gibbons of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as Gibbons. We have no doubt that Congress has ratified the statutory interpretation of Gibbons and its progeny. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975); Snyder v. Harris, 394 U.S. 332, 339 (1969); Francis v. Southern Pacific Co., 333 U.S. 445, 449-450 (1948). We consider, then, its impact on the Virginia statutes challenged in this case.

C

The federal licenses granted to Seacoast are, as noted above, identical in pertinent part to Gibbons's licenses except that they cover the "mackerel fishery" rather than the "coasting trade." Appellant contends that because of the difference this case is distinguishable from Gibbons. He argues that Gibbons upheld only the right of the federal licensee, as an American-flag vessel, to navigate freely in state territorial waters. He urges that Congress could not have intended to grant an additional right to take fish from the waters of an unconsenting State. Appellant points out that the challenged statutes in no way interfere with the navigation of Seacoast's fishing boats. They are free to cross the State's waters in search of fish in jurisdictions where they may lawfully catch them, and they may transport fish through the State's waters with equal impunity.

Appellant's reading of Gibbons is too narrow. Gibbons emphatically rejects the argument that the license merely establishes the nationality of the vessel. That function is performed by the enrollment. 9 Wheat., at 214. Rather, the license "implies, unequivocally, an authority to licensed vessels to carry on" the activity for which they are licensed. Id., at 212. In Gibbons, the "authority . . . to carry on" the licensed activity included not only the right to navigate in, or to travel across, state waters, but also the right to land passengers in

New York and thereby provide an economically valuable service. The right to perform that additional act of landing cargo in the State -- which gave the license its real value -- was part of the grant of the right to engage in the "coasting trade." See Harman v. Chicago, 147 U.S. 396, 405 (1893).

The same analysis applies to a license to engage in the mackerel fishery. Concededly, it implies a grant of the right to navigate in state waters. But, like the trading license, it must give something more. It must grant "authority . . . to carry on" the "mackerel fishery." And just as Gibbons and its progeny found a grant of the right to trade in a State without discrimination, we conclude that appellees have been granted the right to fish in Virginia waters on the same terms as Virginia residents.

Moreover, 46 U.S.C. 251 states that properly documented vessels "and no others" are "entitled to the privileges of vessels employed in the coasting trade or fisheries." Referring to this section, Gibbons held: "[T]hese privileges . . . cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege . . . convey[s] the right [to carry on the licensed activity] to which the privilege is attached." 9 Wheat., at 213. Thus, under section 251 federal licensees are "entitled" to the same "privileges" of fishery access as a State affords to its residents or citizens.

Finally, our interpretation of the license is reaffirmed by the specific discussion in Gibbons of the section granting the license, now 46 U.S.C. 263. The Court pointed out that "a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." 9 Wheat., at 213-214. Gibbons recognized that the "grantor" was Congress. Id., at 213. Thus Gibbons expressly holds that the words used by Congress in the vessel license transfer to the licensee "all the right" which Congress has the power to convey. While appellant may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce. Cf. Toomer v. Witsell, 334 U.S. 385, 403-406 (1948). Accordingly, we hold that, at the least, when Congress re-enacted the license form in 1936, using language which, according to Gibbons, gave licensees "all the right which the grantor can transfer," it necessarily extended the license to cover the taking of fish in state waters, subject to valid state conservation regulations.

Application of the foregoing principles to the present case is straightforward. Section 60 prohibits federally licensed vessels owned by nonresidents of Virginia from fishing in the Chesapeake Bay. Licensed ships owned by noncitizens are prevented by section 81.1 from catching fish anywhere in the Commonwealth. On the other hand, Virginia residents are permitted to fish commercially for menhaden subject only to seasonal and other conservation restrictions not at issue here. The challenged statutes thus deny appellees their federally granted right to engage in fishing activities on the same terms as Virginia residents. They violate the "indisputable" precept that "no State may completely exclude federally licensed commerce." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). They must fall under the Supremacy Clause.

Appellant seeks to escape this conclusion by arguing that the Submerged Lands Act, 67 Stat. 29, U.S.C. 1301-1315, and a number of this Court's decisions recognize that the States have a title or ownership interest in the fish swimming in their territorial waters. It is argued that because the States "own" the fish, they can exclude federal licensees. The contention is of no avail.

The Submerged Lands Act does give the States "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction. 43 U.S.C. 1311(a). But when Congress made this grant pursuant to the Property Clause of the Constitution, see Alabama v. Texas, 347 U.S. 272 (1954), it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." United States v. Louisiana, 363 U.S. 1, 10 (1960); see 43 U.S.C. 1314(a). Since the grant of the fisheries license is made pursuant to the commerce power, see supra, at 281-282; Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365, 377 (1883), the Submerged Lands Act did not alter its preemptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.

In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. Ibid.; Geer v. Connecticut, 161 U.S. 519, 539-540 (1896) (Field, J. dissenting). The "ownership" language of

cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S., at 402; see also Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-421 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.

III

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a Southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachusetts in succeeding years. A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent. We cannot find that Congress intended to allow any such result given the well-known construction of federal vessel licenses in Gibbons.

For these reasons, we conclude that sections 60 and 81.1 are pre-empted by the federal Enrollment and Licensing Act. Insofar as these state laws subject federally licensed vessels owned by nonresidents or aliens to restrictions different from those applicable to Virginia residents and American citizens, they must fall under the Supremacy Clause. As we have noted above, however, reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision.

The judgment of the District Court is

Affirmed.

B. FEDERAL FISHERIES MANAGEMENT

In 1976, Congress enacted the Fishery Conservation and Management Act of 1976 (later entitled the Magnuson Fishery Conservation and Management Act) [hereinafter MFCMA or Magnuson Act], 16 U.S.C. 1801-1882, which extended exclusive United States management authority over fisheries to 200 miles. The following excerpt describes the basic provisions of the MFCMA:

Greenberg and Shapiro, Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform, 55 S. Cal. L. Rev. 641 (1982).

* * *

A. GENERAL STRUCTURE OF THE ACT

The Magnuson Act corrected three deficiencies in federal laws for the conservation and management of fisheries. First, it had long been apparent that the contiguous zone created by the Bartlett Act did not establish an appropriate area for managing coastal fisheries. Second, United States international agreements were ineffective to ensure conservation and management of fishery stocks on the high seas, and valuable fisheries were being depleted. Third, conflicts arose among state governments in managing high seas fisheries since migrating fish disregarded boundaries separating the territorial and high seas.

The Magnuson Act expanded the federal fisheries management authority from a twelve mile zone to a two hundred mile zone, thereby increasing its legal jurisdiction from an area of approximately 545,000 square nautical mile (nm) to over 2.2 million square nm. Approximately twenty percent of the world's fisheries were thus brought under United States control. To promote management and conservation, the Act vested broad authority in the newly created [regional] Councils and the Secretary of Commerce to regulate both foreign and domestic fishing. The heart of the Magnuson Act is the creation of federal authority to prepare and implement, in accordance with national standards, plans that will achieve and maintain the "optimum yield"^{1/} from fisheries subject to management. The Act establishes eight regional Councils^{2/} responsible for the

1. (97) The Act defines "optimum yield" as:
the amount of fish---

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor. 16 U.S.C. 1802(18)(1976).

2. (98) The Councils represent the following regions: (1) New England, (2) Mid-Atlantic, (3) South Atlantic, (4) Caribbean, (5) Gulf of Mexico, (6) Pacific, (7) North Pacific, and (8) Western Pacific. 16 U.S.C. 1852(a)(1)-(8)(1976).

preparation of Fishery Management Plans (FMP's) for fisheries within their geographical regions of responsibility. These FMP's must be submitted to the Secretary of Commerce for his approval. Furthermore, the Councils may prepare, and submit to the Secretary, proposed regulations they deem necessary for FMP implementation.

The voting members of the Councils include the state government officials principally responsible for marine fishery management, the regional directors of the National Marine Fisheries Service (NMFS), and other individuals appointed by the Secretary from lists of "qualified" persons submitted by the governors of states represented on the Councils. The Councils' authority is constrained by the Secretary's power to approve or disapprove proposed FMP's and by the Secretary's rulemaking and enforcement authority. Although this relationship has at times resulted in jurisdictional conflict between Council and Secretary, the allocation of authority generally appears to work.

All FMP's and their implementing regulations must be consistent with the seven National Standards for fishery conservation and management set forth by Congress in title III of the Act.^{3/} In addition, the Secretary must establish guidelines based on these national standards to assist Councils in the

3. (106) Magnuson Act section 301(a)(1)-(7), 16 U.S.C. 1851(a)(1)-(7)(1976). These standards are:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield of each fishery.

(2) Conservation and management measures shall be based upon the best scientific evidence available.

(3) 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.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variation among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

development of FMP's. The National Oceanic and Atmospheric Administration (NOAA) published such guidelines in 1977 and is now in the midst of a substantial review which will lead to revisions in the guidelines.

Any FMP prepared by a Council must contain conservation and management measures applicable to foreign and domestic vessels that are consistent with both national standards and other applicable law. Each FMP must describe the fishery and include information concerning vessels, gear, management costs, actual and potential revenues, the extent of foreign and American Indian fishing, and other relevant matters. The FMP must also assess and specify the fishery's condition and the fishery's maximum sustainable yield^{4/} and optimum yield; supporting material for such specifications must also be included. The FMP must further specify the capacity of domestic fishermen to harvest the optimum yield, whether any portion is available for foreign fishing, and the extent of American fish processing capacity. Finally, the Councils must specify the data to be submitted to the Secretary concerning the fishery.^{5/}

After a Council prepares an FMP, the plan is submitted to the Secretary of Commerce, who then has sixty days to approve, fully disapprove, or partially disapprove the proposal. The Secretary coordinates his review with the Secretary of State with regard to foreign fishing, and with the Coast Guard with regard to enforcement at sea. If the Secretary approves the FMP, he is then required to publish proposed implementing regulations. Following public review and comment, the Secretary issues final regulations and is then responsible for their implementation.

* * *

4. (112) Maximum sustainable yield, a traditional fisheries biology concept, is simply a tool by which the level of harvest of a given stock of fish can be determined. It is in essence, the surplus production of the fishery; the safe upper limit of the harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable.

5. (116) In addition, there are a number of provisions the Councils may consider in a discretionary manner. These include the subjecting of domestic vessels to permit and fee requirements; the designating of zones where vessel and gear restrictions apply; the limiting of catches based on number, size, or other criteria; and the limiting of the number of vessels in the fishery. Of particular relevance for purposes of this article is the provision that permits an FMP to "incorporate (consistent with the national standards, the other provisions of the Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery." Section 303(b)(5), 16 U.S.C. 1853(b)(5).

NOTES

1. Florida belongs to two regional fishery management councils---the Gulf of Mexico and the South Atlantic. Is federal jurisdiction under the MFCMA the same in the Gulf of Mexico and the Atlantic Ocean? See 16 U.S.C. 1811.

2. Further readings: H. Knight, Managing the Sea's Living Resources (1977); Symposium of the Fishery Conservation and Management Act of 1976, 52 Wash. L. Rev. 427 (1977).

C. STATE FISHERIES MANAGEMENT AFTER THE MFCMA

The fisheries jurisdiction retained by the states after enactment of the MFCMA is addressed in section 306. Note that a limited Skiriotes-type jurisdiction over state-registered boats is retained by the states. The harder question is determining to what extent Congress intended to displace the previous body of fishery management law. Read section 306 and evaluate the Florida cases on the issue of federal preemption of state fisheries law.

Section 306. State Jurisdiction.

(a) In General. Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. For purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend (1) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party and (2) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich. No State may directly or indirectly regulate any fishing which is engaged in by any vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception. (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that--

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

* * *

SOUTHEASTERN FISHERIES ASSOCIATION

v.

DEPT. of NATURAL RESOURCES
(453 So.2d 1351) (Fla. 1984).

OVERTON, J.

This is a petition to review a decision of the First District Court of Appeal reported as State, Department of Natural Resources v. Southeastern Fisheries Ass'n, 415 So. 2d 1326 (Fla. 1st DCA 1982). The district court found Florida's fish trap law, section 370.1105, Florida Statutes (Supp. 1980), to be constitutional and concluded that the law is enforceable by the state in its territorial waters as well as in the extra-territorial waters beyond Florida. The district court certified the following question to be one of great public importance:

Does Section 370.1105, Florida Statutes (1980 Supp.), apply to waters outside the territorial boundaries of the State of Florida, notwithstanding the absence of a provision expressing the intention that its provisions are to be given extraterritorial effect?

* * *

The petitioner, Southeastern Fisheries, has asserted (1) that the statute is void for vagueness and overbreadth and (2) that the statute cannot now be enforced in the extra-territorial waters beyond Florida, particularly in view of the asserted federal preemption.

The statute in question, section 370.1105, Florida Statutes (Supp. 1980), makes it unlawful to fish for saltwater finfish with any traps, or to possess any fish trap other than those traps specifically exempted by the act. The act, however, does not expressly state that its provisions apply in the extra-territorial waters beyond Florida.

* * *

On the first point, we agree with the district court that the statute is neither overbroad nor vague.

* * *

The certified question concerns the application of section 370.1105 beyond state waters when evidence of that intent is not expressed in the statute. If we find there was an intent that this statute was to apply in extra-territorial waters beyond Florida, we must then determine whether the federal government has preempted the regulation of the use of fish traps in these extra-territorial waters.

At the outset we recognize that the state can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided, however, that the federal government has not preempted state regulation. See Skiriotes v. Florida, 313 U.S. 69 (1941). The Florida Legislature has expressly done so in other instances. For example, section 370.15(2)(a), Florida Statutes (1979), makes it "unlawful for any person, firm or corporation to catch, kill, or destroy shrimp or prawn within or without the waters of this state." (Emphasis added.) See State v. Millington, 377 So. 2d 685 (Fla. 1979). In section 370.15(2)(a) the legislature clearly stated its intent that the statute apply within or without the waters of Florida. No such terminology is contained in section 370.1105, the statute in issue here.

In Bethell v. Florida, the United States District Court for the Southern District of Florida expressly held that "Section 370.1105, Florida Statutes (1981) is declared unconstitutional to the extent that it attempts to exercise the authority of the State of Florida over the area which is beyond the territorial seas of the State of Florida" Slip op. at 1 (Summary Final Judgment). In so holding, the United States District Court recognized Skiorotes v. Florida, but determined that the Fishery Conservation and Management Act, 16 U.S.C. 1801(b) (1976), applied. The court found that under that act the State of Florida participated as a member of the South Atlantic Fishery Management Council and in June 1982 accepted a fishery management plan which allowed the limited use of fish traps to catch saltwater finfish. The court expressly found that "whether there exists a conflict with federal law in this area of regulation is no longer open to question" and concluded that "section 370.1105 Florida Statutes has been preempted by 16 U.S.C. 1801 et seq." Bethell v. Florida, slip op. at 3 (Order Granting Plaintiff's Motion for Summary Judgment). The court cited the Florida Third District Court of Appeal's decisions in Tingley v. Allen, 397 So. 2d 1166 (Fla. 3d DCA 1981), and Livings v. Davis, 422 So. 2d 364 (Fla. 3d DCA 1982), as being consistent with its decision.

Finally, the court held that enforcement of section 370.1105 would violate the commerce and equal protection clauses of the United States Constitution.

The attorney general of Florida takes issue with the United States District Court's decision, noting that he is challenging that decision, and he requests that we hold this case in abeyance pending federal court resolution of his appeal. We decline to do so. The issue is whether or not Florida should be allowed to regulate the use of fish traps in extra-territorial waters pursuant to section 370.1105. The state's authority to regulate in those waters is only by the consent and acquiescence of the federal government. We find that if there is to be a confrontation between the state and the federal government, then the legislature should expressly declare that it is its intent that the statute apply in extra-territorial waters, as it did in section 370.15(2)(a) concerning shrimp. Since there is no clear expression by the legislature that it is unlawful "to set, lay, place or otherwise attempt to fish for saltwater finfish with any trap" outside the territorial waters of Florida, we find it would be improper to apply this statute to extra-territorial waters by implication and confront the federal government with its asserted validity.

Having so found, we must accept the petitioners' argument that the unlawful possession of these fish traps in the territory of the state or in its territorial waters has the effect of unconstitutionally restricting the lawful use of these traps in extra-territorial waters. We hold that the statute is valid to prohibit the use and possession of fish traps within the state and its territorial water, but that the state, in order to prosecute for unlawful possession of fish traps, must prove, as an element of possession, the intent to unlawfully use the fish traps in the territorial waters of Florida.

PEOPLE v. WEEREN
607 P.2d 1279 (Cal. 1980)

RICHARDSON, Justice.

Defendants Hans H.H. Weeren and Steven C. Jennings appeal from the judgments of conviction of the misdemeanor violation of Fish and Game Code section 2000, which generally and in relevant part provides: "It is unlawful to take any . . . fish . . . except as provided in this code or regulations made pursuant thereto." The convictions are based on trial court findings that defendants with the use of a spotter aircraft took broadbill swordfish contrary to the regulations of the Fish and Game

Department (Cal.Admin.Code, tit. 14, sec. 107, subd. (g)(2). This regulation specifically mandates that "Broadbill swordfish may not be taken for commercial purposes except by the holder of a revocable permit issued by the department, and as herein provided . . . (g) Methods of Take. . . . (2) Aircraft may not be used to directly assist a permittee or any person in the taking of any species of fish while operating under the swordfish permit."

Both of the defendants are citizens and residents of California holding commercial fishing licenses by the State of California. Their 19-ton vessel, the Comanche, and the accompanying spotter aircraft, were both based in Oxnard, Ventura County, on California's southern coastline. The Comanche was licensed for commercial fishing for swordfish under Fish and Game Code sections 7880-7890. It carried an appropriate "certificate of boat registration" and boat registration number required by those statutes. However, because it also was enrolled with a "United States document number," it did not bear the California identification number contemplated by Vehicle Code sections 9840-9860.

On September 28, 1977, California Fish and Game officials boarded the Comanche at a point 10 miles south-southeast of Anacapa Island in waters of the Santa Barbara Channel, situated more than 3 nautical miles from the shore of either the mainland or of any California coastal islands. The officials determined that two swordfish seized on the Comanche had been caught at that location by defendants, with the help of radio communication and directions from a spotter aircraft. The officials remained aboard while the Comanche sailed under their direction to Channel Island Harbor in Ventura County.

We will affirm defendants' convictions on the ground that California, in the protection of its legitimate interests may exercise penal control over its citizens extraterritorially.

* * *

1. California's Territorial Waters

Defendants assert that because the precise location of the Comanche when she was boarded was beyond California's boundaries their convictions must fall.

* * *

Here, consistent with the high court's conclusion in California II, we determine only that Santa Barbara Channel is outside California's boundaries for purposes of federal law, and that California's boundaries are those which are established under the Act as interpreted in California II. The channel is thereby excluded from California's boundaries. It follows that when defendants committed the acts for which they were convicted, they were not within California's inland waters.

2. Extraterritorial Regulation Under Federal Law

We agree with the People's assertion that federal law does not prohibit California's assertion of penal jurisdiction over defendants even though at the time of their commission of the charged offenses they acted outside of California's territorial limits as defined for federal purposes.

The United States Supreme Court has held that in matters affecting its legitimate interests a state may regulate the conduct of its citizens upon the high seas where no conflict with federal law is presented. (Skiriotes v. Florida (1941) 313 U.S. 69, 77, 61 S.Ct. 924, 929, 85 L.Ed. 1193.) More specifically, the court recognized that a state's interests in preserving nearby fisheries is sufficiently strong to permit such extraterritorial enforcement of its laws enacted for that purpose. (Skiriotes, supra, at p. 75, 61 S.Ct. at p. 928; Felton v. Hodges (5th Cir. 1967) 374 F.2d 337, 339; State v. Bundrant (Alaska 1976) 546 P.2d 530, 550-554; see United States v. Alaska (1975) 422 U.S. 184, 198-199, 95 S.Ct. 2240, 2251, 45 L.Ed.2d 109.)

It seems obvious that by adoption and enforcement of its control regulations California seeks to prevent the depletion of a very valuable natural resource. Fish swim. By their very nature they move freely across those arbitrary boundaries which are enacted by governmental entities for official purposes. The commercial and recreational value of California's fisheries are self-evident and are developed, both quantitatively and in their financial aspects, in the record before us. We have no difficulty in discerning in the preservation of its valuable fish population the requisite state interest for extraterritorial enforcement. Furthermore, the state laws here at issue present no conflict with federal swordfish policies because no federal rules in that field have as yet been promulgated under the FCMA.

The record in this case is favorable to the penal reach of California law. Consistent with the Skiriotes rationale we observe that defendants are California citizens and residents. Both the Comanche and the spotter aircraft were based in California. California facilities were intended for use in both the landing and selling of their catch. California's interest in defendants' activities was both real and continuing.

Defendants assert, however, that their convictions are invalid because the FCMA expressly forbids extraterritorial fishing regulation by a state, except in cases where the fishing vessel is "registered under the laws of such State." (16 U.S.C.A. # 1856(a).) Was the Comanche so "registered"?

Both federal and state governments provide various means of identifying and classifying those craft which move in the nation's navigable waters. Under federal law all domestic vessels over five net tons are subject to federal classification. "Registration" is an ancient term of art under the federal scheme, reserved solely for ships which are engaged in foreign trade. (46 U.S.C.A. 11 et seq.) Those vessels which are engaged

in commercial fishing from United States ports, on the other hand, must be "licensed" if over five net tons, and both "licensed" and "enrolled" if over twenty net tons. (Id., 251-263; 46 C.F.R. 67.01-5, 67.01-11, 67.01-13, 67-07-13.) All boats so "documented" are assigned an official number. (Id., 67.11-1.)

The term "enrollment" evidences the national character of the vessel enabling it to procure a license. The "license," in turn, limits the commercial use to which the craft may be put in order to prevent evasion of federal revenue laws. Possession of a federal fishing license, however, does not preclude the nondiscriminatory state regulation of the licensed vessel's fishing activities.

California provides two means of vessel classification and numbering; an identification number (CF number), and a "certificate of boat registration" with "registration plates." (sections 7880, 7887.) Such "registration," renewable annually upon payment of a fee (section 7890), constitutes a state license to use the boat for commercial fishing of a specified kind.

Defendants urge that because the Comanche carried United States documentation, and therefore bore no CF number, it cannot be deemed "registered" in California for purposes of the FCMA. We disagree. In our view, the Comanche's California "registration" for commercial swordfishing purposes permitted California to regulate such activities on the high seas. In our view, a contrary interpretation would render FCMA's express recognition of state extraterritorial jurisdiction (16 U.S.C.A. 1856(a)) virtually meaningless, limiting such jurisdiction to pleasure boats and those few commercial fishing vessels lighter than five net tons.

We also find significance in the fact that, because the federal government has developed no swordfish regulations, the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibilities of substantial or, indeed, total depletion of an important natural resource. Had Congress intended by its successive enactments such a drastic curtailment of the states' Skiriotes jurisdiction, it would have said so. On the contrary, though undoubtedly aware of various state fishing "registration" schemes such as California's, Congress avoided all reference to the long established terms of art in the federal documentation laws, and premised continued state jurisdiction on the undefined and generic concept of local "registration."

As previously noted, the Comanche was licensed for commercial swordfishing. We think our broader interpretation of the term "registration" in [the] FCMA prevents the anomalous result which would follow if the state's extraterritorial jurisdiction over commercial fishing was preserved as to those boats in which the state had asserted only a limited identification and recordkeeping interest, but was precluded as to vessels like the Comanche which it has specifically licensed to engage in the activity of swordfishing.

From the foregoing we conclude that section 1856(a), fairly read, is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are regulated by it and operated from ports under its authority. (See Fidell, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot (1977) 52 Wash.L.Rev. 513, 593-597, and fn. 467; cf., Northwest Trollers Ass'n v. Moos (1977) 89 Wash.2d 1, 568 P.2d 793, 795.)

We conclude that federal law does not preclude application of California's fishing laws to defendant's activities.

ANDERSON SEAFOODS, INC. v. GRAHAM
529 F. Supp. 512 (N.D. Fla. 1982)

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

HIGBY, District Judge.

The State of Florida prohibits taking food fish "without the waters of" the state with a purse seine and possessing food fish taken with a purse seine. Sec. 370.-08(3), Fla.Stat. (1979). Violating the prohibition is a first degree misdemeanor. Id. Fish gathered by purse seines and equipment used, including the seines and vessels used, may be seized upon a violator's arrest and forfeited to the state upon conviction. Sec. 370.061, Fla.Stat. (1979). Anderson Seafoods, Inc., seeks a preliminary injunction forbidding Florida from enforcing section 370.08(3) in [the] United States Fishery Conservation zone. It argues regulation of all fishing in the zone has been preempted by federal legislation and Florida consequently does not have authority to prohibit the use of purse seines in the zone.

Preliminary injunctions are not granted unless necessary to protect a party from irreparable injury and to preserve the court's power to make a meaningful decision on the merits. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). As always the hoary four prerequisites must be considered. They are:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 at 572 (5th Cir. 1974).

The likelihood the plaintiff will prevail on the merits of its preemption claim is not substantial. Federal law on a subject is superior to all state law on the subject of Congress expressed its intent to establish such superiority. See, McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819). Congressional authority to legislate in an area is the first question to address in a preemption analysis. Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Congress's authority to regulate offshore fishing is unquestioned here. Preemption may be express or implied from a pervasive congressional scheme of regulation, a dominant federal interest in the subject matter, or a purpose of the congressional regulation which requires unitary regulation.

Congress expressed its intent to preempt regulation of fishing in the country's coastal waters. By statute it created a fishery conservation zone.

The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. 1811. Florida's seaward boundary is defined by the line three miles seaward from its coastline. United States v. Florida, 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976). Congress established this zone in a series of statutes enacted to conserve and manage the harvesting of a valuable national resource, saltwater fish. 16 U.S.C. 1801, et seq.

The statute indicates congressional intent to preempt regulation of a subject. "The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over . . . (1) All fish within the fishery conservation zone. [and other specified fish species and fishery resources beyond the zone]." 16 U.S.C. 1812.

Section 1801 also states a strong federal interest in fish management and that fish management requires unitary regulation. Congress, however, while prohibiting states from regulating fishing outside their boundaries, also provided for state regulation of fishing in the fishery conservation zone. "No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." 16 U.S.C. 1856(a) (emphasis supplied). Anderson's vessels are registered under the laws of Florida.

Congress's reservation of state authority to regulate fishing indicates it did not intend complete preemption. See, People v. Weeren, 26 Cal.3d 654, 163 Cal.Rptr. 255, 607 P.2d 1279 (Cal.1980), cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980). This conclusion is buttressed by the fact that Florida's laws regulating fishing outside its boundaries have been on the books since 1953. Congress must be presumed to have been aware of existing state regulation. Yet its law

contemplates continued state regulation rather than completely forbidding it.

Tingley v. Allen, 397 So.2d 1166 (Fla. 3d D.C.A. 1981), holds federal law has preempted state regulation of fishing in the fishery conservation zone. Its decision is based upon an interpretation of Title 16, United States Code, Section 185(a), not upon Florida law. I simply do not agree with that court's decision, and since the question is one of federal law not state, I am not bound by it.

There is not a substantial likelihood Anderson's will prevail upon the merits. It has, however, proven the remaining three prerequisites to obtaining a preliminary injunction.

The second prerequisite, substantial threat of irreparable injury to the plaintiff if an injunction is not granted, exists. Anderson's is a seafood business. Anderson's has been using purse seines to catch mullet since June, 1981, and wants to continue. Its conversion of three boats to purse seines was a substantial investment. Purse seines are the most efficient way to catch mullet offshore. Letting its purse seine boats and its processing equipment sit idle substantially reduces Anderson's income while they continue to cause it to incur costs of doing business. Idleness the remaining weeks of January will cause a \$180,000.00 loss.

Fishing off the Hillsborough County coast, in the fishery conservation zone, Anderson's employees were told by a Marine Patrol Officer the Patrol would enforce section 370.08(3) and seize fish taken in violation of it as well as the equipment used to take them. Anderson's problem is immediate because it is trying to harvest a peculiar delicacy, mullet roe. Roe is available only during a certain time during the mullet spawning season. It will not be available after approximately the third week of this month. Thus Anderson's faces the irreparable harm of being prohibited from gathering a fish product available for only a short limited time and quite important to its seafood sales business.

A preliminary injunction's third prerequisite has been established. The threatened injury to Anderson's outweighs the possible harm to Florida. Florida has a legitimate interest in protecting mullet, which spend their lives in Florida's territorial waters. But Anderson's three boats are not going to decimate the mullet population. A significant part of Anderson's business will be injured. Florida will also suffer the always significant impairment of its right to enforce its law. This is certainly a serious harm to a sovereign but equaled by the immediate injury to Anderson.

The observations made about the third prerequisite apply equally to the fourth. In this case the public's interest in denying the preliminary injunction and the defendant injunction and the defendants' are the same.

For the reasons set forth in this order Anderson's motion for preliminary injunction is denied.

Consider the conclusions drawn on the preemption issue by Greenberg and Shapiro, Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform, supra.

* * *

Thus, the Magnuson Act allows the exercise of state police power over FCZ fishing where:

1. The state regulation is not in conflict with any applicable federal fishery regulation, i.e.,
 - a. There are no federal fishery regulations for the subject fishery and there is no affirmative decision by the federal government that any regulation in such fishery would be inappropriate; or
 - b. Compliance with both federal and state regulation is possible; or
 - c. Enforcement of the state regulation would not interfere with the fulfillment of the objectives of the applicable federal regulations; and
2. The vessel from which the fishing took place is "registered" under state law; and
3. The state's legitimate interest in the fishery justifies the direct or indirect effect of its regulation of fishing in the FCZ; and
4. The regulation neither discriminates against vessels from other states nor constitutes an undue burden on interstate commerce nor violates any other federal right or authority.

* * *

NOTES

1. The Third District Court of Appeal case of Living v. Davis, 422 So.2d 364 (Fla. 3d DCA 1982), is currently on appeal to the Florida Supreme Court. In the case, the court found that extraterritorial application of a Florida law prohibiting the taking of small shrimp or prawn was unconstitutional based on the Supremacy Clause.

2. If a state can regulate its fishermen beyond the territorial sea, how can regulations be enforced? Are landing laws still viable after the MFCMA prohibition on indirect regulation of noncitizens? Are there any problems of "equal protection"?

3. What is the relationship between the MFCMA and the Coastal Zone Management Act, infra? The territorial sea is part of a state's coastal zone, and fisheries regulation is part of a state's coastal zone planning. The Coastal Zone Management Act requires federal activities that affect the coastal zone to be consistent with the state's coastal zone management plan. What is the effect if the state prohibits a certain kind of gear for conservation reasons, but the federal fishery management plan for the fishery allows the gear? See, Florida v. Baldrige discussed infra in the section on Federal Consistency. For a complete discussion of the issue, see Taylor & Reiser, Federal Fisheries and State Coastal Zone Management Consistency, 3 Territorial Sea No. 1 (May 1983).

4. Prior to 1983, Florida had few general laws, but more than two hundred special local laws relating to marine fisheries. Local acts were often conflicting and rarely had resource conservation or management as a primary goal. Conflicts between recreational and commercial fishermen, and among commercial fishermen, and the overfishing of many species required comprehensive fishery management for Florida's territorial waters.

1983 legislation created the Marine Fisheries Commission within the Department of Natural Resources. The Commission is composed of 11 persons representing recreational and commercial fishing interests, environmental organizations and the public. The Commission has rulemaking authority for saltwater fisheries pursuant to a state policy and standards. Former special local acts are transformed into rules of the Commission over a three year period, and subject to Commission review, revision or appeal.

In order to aid in comprehensive management, the legislation also provides for a marine fisheries information system. Licenses are also required for all commercial fishermen.

All persons who sell saltwater products, which include marine plants, sand dollars and sponges, as well as finfish, shellfish, shrimp, crab and lobsters, must have a Saltwater Products License. The fee schedule for the license is \$25 per year for Florida residents, \$100 per year for nonresidents, and \$150 per year for aliens. Can these fees be justified? Are they constitutional?

Section 4. THE COASTAL ZONE MANAGEMENT ACT OF 1972

The federal Coastal Zone Management Act of 1972 was enacted during the same period as other major federal environmental legislation, but differed substantially from legislation like the Clean Air Act or the Clean Water Act. First, state participation in coastal zone management planning was completely voluntary, and federal standards or management would not be imposed if the state did not develop a plan. Second, although there was a recognized national interest in effective coastal management, Congress also recognized that the type of land use planning and management required was primarily within the traditional domain of state and local governments. The "Congressional Declaration of Policy" (as amended in 1980) sets out the purposes of the Act:

CONGRESSIONAL DECLARATION OF POLICY

SEC. 303. The Congress finds and declares that it is the national policy-

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, which programs should at least provide for--

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.

(C) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) public access to the coasts for recreation purposes,

(E) assistance in the redevelopment of deteriorating urban waterfronts and ports, and restoration of historic, cultural, and esthetic coastal features,

(F) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(G) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) the giving of timely and effective notification of, and opportunities for public and local government participation in coastal management decisionmaking, and

(I) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decisionmaking; and

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this titles.

* * *

The CZMA set out requirements for state management programs to be eligible for federal approval. Federal funding for development and administration of approved programs provided the primary motivation for states to participate initially. All eligible states participated at some time during the development stage of the program. The development stage turned out to be a long, arduous process in most states. In general, the states lacked statutory bases to implement coastal zone plans, and local governments often balked at what was perceived as state usurpation of local planning and zoning functions.

The section 305 and 306, 16 U.S.C. 1454-1455, program requirements are set out below. A.P.I. v. Knecht provides an overview of state program development and the federal approval process.

Section 305. Management program development grants

* * *

(b) Program requirements. The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to the management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

(7) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

* * *

Section 306. Administrative grants

* * *

(c) Program requirements. Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

(1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title [16 USCS 1452].

(2) The state has:

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, an areawide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 [42 USCS 3334], a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing

consultation and coordination between the management agency designated pursuant to paragraph (5) of this subsection and with local governments, interstate agencies, regional, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this title; except that the Secretary shall not find any mechanism to be "effective" for purposes of this subparagraph unless it includes each of the following requirements:

(i) Such management agency if required, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, to send a notice of such management program decision to any local government whose zoning authority is affected thereby.

(ii) Any such notice shall provide that such local government may, within the 30-day period commencing on the date of receipt of such notice, submit to the management agency written comments on such management program decision, and any recommendation for alternatives thereto, if no action is taken during such period which would conflict or interfere with such management program decision, unless such local government waives its right to comment.

(iii) Such management agency, if any such comments are submitted to it, with [within] such 30-day period, by any local government--

(I) is required to consider any such comments,

(II) is authorized, in its discretion, to hold a public hearing on such comments, and

(III) may not take any action within such 30 day period to implement the management program decision, whether or not modified on the basis of such comments.

(3) The state has held public hearings in the development of the management program.

(4) The management program and any changes thereto have been reviewed and approved by the Governor.

(5) The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this subsection.

(6) The state is organized to implement the management program required under paragraph (1) of this subsection.

(7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program.

(9) The management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values.

(d) **Required authority for management of coastal zone.** Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 [42 USCS 3334], regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power

(1) to administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(2) to acquire fee simple and less than fee simple interest in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(e) **Required findings.** Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses with the coastal zone;

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

* * *

Section 307. Coordination and cooperation

* * *

(b) Adequate consideration of views of Federal agencies. The Secretary shall not approve the management program submitted by a state pursuant to section 306 [16 USCS 1455] unless the views of Federal agencies principally affected by such program have been adequately considered.

* * *

NOTES

1. The legislative history of the CZMA, court decisions, and the fact that the act was part of the "environmental decade" indicate that the CZMA was "primarily an environmental statute." But the act clearly did not have a single objective. Is it possible to "preserve, protect, and develop" coastal resources? Which purpose has priority? How does one gauge the success of the program?

2. In the early 1970s, President Nixon's Administration supported general land use regulation rather than special legislation for the coastal zone. Congress rejected such legislation. Coastal zone regulation, however, had the support of both developers and environmentalists. Many states were independently beginning to develop independently programs and legislation to protect the coast. Developers hoped that programs following national guidelines would provide consistency and certainty for coastal development, environmentalists sought to protect areas they viewed as the most sensitive in the country.

AMERICAN PETROLEUM INSTITUTE v. KNECHT
456 F.Supp.889 (C.D. Cal. 1978)

MEMORANDUM OF DECISION AND ORDER

KELLEHER, District Judge.

Plaintiffs American Petroleum Institute, Western Oil and Gas Association, and certain oil company members of the aforesaid Institute and Association brought this action against three federal officials ("the federal defendants") in their official capacities as Secretary of Commerce, Administrator of the National Oceanic and Atmospheric Administration ("NOAA"), and Acting Associate Administrator of the Office of Coastal Zone Management ("OCZM"), seeking declaratory and injunctive relief against defendants' imminent grant of "final approval" of the California Coastal Zone Management Program ("CZMP") pursuant to section 306 of the Coastal Zone Management Act of 1972, as amended ("CZMA") and seeking further relief in the nature of mandamus directing the federal defendants to grant "preliminary approval" to the CZMP pursuant to Section 305(d) of the Act.

In brief, plaintiffs contend that the California Program cannot lawfully be approved by the federal defendants under Section 306 of the CZMA, principally for two reasons. First, the CZMP is not a "management program" within the meaning of Section 304(11) of the Act in that (a) it fails to satisfy the requirements of Sections 305(b) and 306(c), (d), and (e), and regulations promulgated thereunder, as regards content specificity; and (b) it has not been "adopted by the state" within the meaning of Section 306(c)(1). Second, the procedures by which the CZMP has reached the present state of development violate the CZMA, the National Environmental Policy Act ("NEPA")(42 U.S.C. Section 4321 *et seq.*), and California statutes in that the final environmental impact statement, which differs substantially from both the draft and revised draft environmental impact statements, was not subject to formal notice and hearings, yet purports to contain one of five "elements" of the CZMP.

* * *

For reasons set forth below, the Court affirms the federal defendants' Section 306 approval of the CZMP and grants judgment for defendants and against plaintiffs.

FACTS

The following facts appear to be before the Court without dispute:

1. Plaintiff American Petroleum Institute ("API"), a corporation organized under the District of Columbia nonprofit corporation laws, is a national trade association of approximately 350 companies and 7,000 individuals engaged in the

petroleum industry. Its members include companies and individuals actively engaged in exploration, production, refining and marketing of petroleum products in the United States, including the State of California and the Outer Continental Shelf off the coast of California.

2. Plaintiff Western Oil and Gas Association ("WOGA"), a corporation organized under the California nonprofit corporation laws, is a regional trade association of over 75 member companies and individuals engaged in the petroleum industry. Its members include companies and individuals responsible for in excess of 65 percent of the production of petroleum, in excess of 90 percent of the refining of petroleum, and in excess of 90 percent of the marketing of petroleum in the southern western states of the United States, including California and the Outer Continental Shelf off the coast of California.

3. Plaintiffs Champlin Petroleum Company; Chevron U.S.A., Inc.; Continental Oil Company; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; Mobil Oil Corporation; Reserve Oil & Gas Company; Shell Oil Company; Texaco, Inc.; and Union Oil Company of California ("the oil company plaintiffs") are each corporations organized under the laws of the various states and are members of API or WOGA. The oil company plaintiffs, among other activities, are engaged in the business of exploration for and production of oil and natural gas both within the state of California and on the Outer Continental Shelf ("OCS") off the California coast. Some of the oil company plaintiffs own interests in OCS leases purchased in federal lease sales under the provisions of the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.). The remaining plaintiffs have interests in the coastal zone of California and/or are oil and gas consumers engaged in business in California.

4. Defendant Juanita Kreps, sued herein in her official capacity, is Secretary of the United States Department of Commerce ("Secretary") and is charged with administering the CZMA, which includes approval or disapproval of coastal zone management programs submitted by the coastal states, of which California is one. NOAA exists within the Department of Commerce. By administrative directive dated October 13, 1976, the Secretary delegated, inter alia, the CZMA approval function to the Administrator of NOAA and expressly reserved other powers under the Act. Defendant Richard Frank is the Administrator of NOAA and is sued herein in his official capacity. Within NOAA there exists the Office of Coastal Zone Management ("OCZM"). Defendant Robert W. Knecht is the Acting Associate Administrator ("Acting Administrator") for coastal zone management and is sued herein in his official capacity. By Administrative directive dated October 20, 1976, the Administrator of NOAA delegated to the Associate Administrator for Coastal Zone Management the authority to exercise all functions under the CZMA not expressly reserved to either the Secretary or the Administrator of NOAA.

5. The defendant-in-intervention, California Coastal Commission, is an agency of the State of California created pursuant to the California Coastal Act of 1976 (Cal.Pub.Res.Code sec. 30000, et seq.). The Coastal Commission is the successor in interest to the California Coastal Zone Conservation Commission

created pursuant to Proposition 20 (Cal.Pub.Res.Code sec. 27000, et seq.), which expired on December 31, 1976. The California Coastal Act became effective on January 1, 1977.

6. Defendants-in-intervention, Natural Resources Defense Council, Inc., and the Sierra Club ("NRDC") are associations whose members claim an interest in coastal zone management.

7. On March 31, 1976, the California Coastal Zone Conservation Commission submitted to the federal defendants a coastal zone management program for approval under the provisions of CZMA section 306.

8. In September of 1976 the federal defendants issued a Draft Environmental Impact Statement ("DEIS") wherein they announced their tentative decision to approve the California Coastal Zone Management Program submitted in March. Thereafter, the State of California enacted the Coastal Act of 1976, which declared itself to be "California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 . . ." (Cal.Pub.Res.Code sec. 30008.)

9. On October 20, 1976, the DEIS was withdrawn and the public hearings to be held thereon were cancelled. On April 12, 1977, the federal defendants issued a Revised Draft Environmental Impact Statement ("RDEIS") and announced their tentative decision to approve the revised coastal zone management program submitted by the Coastal Commission. At this time the CZMP was described as consisting of the California Coastal Act of 1976, the Coastal Conservancy Act (Cal.Pub.Res.Code sec. 31000 et seq.), and the Urban and Coastal Park Bond Act (Cal.Pub.Res.Code sec. 5096.111 et seq.). Public hearings were held on the RDEIS and the CZMP as therein described on May 19, 1977, in Los Angeles, California. Plaintiffs appeared and (by oral testimony and written comments submitted before the hearing and additional comments submitted thereafter) recommended that the CZMP not be approved and that a new environmental impact statement be prepared.

10. On August 16, 1977, the federal defendants issued their Final Environmental Impact Statement ("FEIS"), together with Attachment K, containing written statements from parties commenting on the CZMP. In the FEIS, the CZMP was described as consisting of five elements: the Coastal Act of 1976, the Coastal Conservancy Act, the Urban and Coastal Park Bond Act, the Coastal Commission's final regulations (Cal.Admin.Code, Title 14, sec. 13000 to 14000), and Part II (Introduction and Chapters 1-14) ("the Program Description") of the FEIS. On September 1, 1977, plaintiffs submitted to the federal defendants written comments objecting to approval of the CZMP as defendants proposed in the FEIS. Defendants replied by letter dated September 8, 1977, from Acting Administrator Knecht to plaintiffs' counsel, by which letter defendants indicated that they intended to proceed with approval of the CZMP. As noted previously, final approval, accompanied by a recital of findings, occurred on November 7.

The Court has before it for determination both preliminarily and for ultimate disposition questions of the highest importance, greatest complexity, and highest urgency. They arise as the result of high legislative purpose, low bureaucratic bungling, and present inherent difficulty in judicial determination. In

other words, for the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it almost wholly unmanageable. In the course of the legislative process, there obviously came into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto. Because the action taken gives rise to claims public and private which must be adjudicated, this matter is now involved in the judicial process.

In whatever technical form the questions and issues are here presented, they resolve themselves into the familiar situation in which a court must sit in some form of judicial review of administrative action--and it isn't easy.

We deal here with a hybrid kind of record and consequent hybrid form of review. As will appear from the extensive discussion below, the several approaches to and differing views of the proper scope and kind of judicial review are here brought under consideration.

We have questions of whether review is proper or timely and, if so, of what proper scope and result. We treat each seriatim.

STANDING

This issue need not detain us long. While defendants originally urged that plaintiffs in this case lack standing to litigate speculative harms, during oral argument counsel for the NRDC, to whom the task of pressing defendants' standing and ripeness contentions was apparently assigned, conceded that what had previously been designated an issue of standing was more properly characterized as a ripeness problem. The Court nevertheless briefly examines the standing of plaintiffs to maintain the present action before addressing the ripeness issue.

The Supreme Court has liberalized the law of standing so that, while injury in fact is always required, Sierra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), "an identifiable trifle is enough." U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) [quoting Davis, Administrative Law Treatise, sec. 22.09-5 at 748 (1970 Supp.)]; National Automatic Laundry & Cleaning Council v. Schultz, 143 U.S.App.D.C. 274, 278, 443 F.2d 689, 693 (1971). The distinction that the Court has drawn is one between actual and abstract injury.

Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as a result of the challenged statute or official conduct.

O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

In the present case plaintiffs, whose activities will be regulated by the CZMP to the extent that their activities in exploring for and developing oil and gas resources on the OCS must be consistent therewith, have alleged and shown injury in fact. For upon approval by the federal defendants of the CZMP under section 306 of the CZMA, the consistency provisions of section 307 are triggered. Thereafter, before federal agencies may approve certain activities of plaintiffs relating to exploration and development of OCS resources, plaintiffs must certify that the proposed activity is consistent with the CZMP. Although the state is afforded six months to certify to the federal agency whether or not a proposed activity is consistent, the initial burden of determining consistency falls to the applicant. The gravamen of the complaint is that the submitted CZMP as approved by the federal defendants lacks the requisite specificity under CZMA and consequently may not be approved under section 306. If approved, plaintiffs claim immediate and substantial harm by compulsion to expend large sums of money to determine if their proposed activities are consistent. Moreover, plaintiffs allege that this lack of specificity increases their burden and makes it impossible to discharge, since they cannot with any reasonable assuredness certify that any activity subject to section 307 is in fact consistent with the CZMP. The undeniable interest of plaintiffs in the area subject to the CZMP, the fact that once section 306 approval is given, their activities are subject to regulation under it, and the fact that an immediate consequence is to compel plaintiffs to expend financial resources in an effort to satisfy the requirements of section 307, combined with their claim that this burden is substantially increased by virtue of the very defects which they assert make approval improper, provide the necessary injury in fact to give plaintiffs standing to challenge the federal defendants' action in approving the CZMP under section 306.

Accordingly, the Court finds that the plaintiffs have standing to litigate the issues presented.

* * *

LEGISLATIVE HISTORY OF THE CZMA

A seemingly unbridgeable gulf between the parties concerning the proper construction of the CZMA establishes the cutting edge of this action. First, noted at the outset of this memorandum of decision, plaintiffs complain that the California Program fails to qualify for final approval under section 306 because it lacks the requisite specificity Congress intended management programs to embody, especially with respect to the substantive requirements of sections 305(b) and 306(c), (d), and (e), so as to enable private users in the coastal zone subject to an approval program to be able to predict with reasonable certainty whether or not their proposed activities will be found to be "consistent" with the program under section 307(c). Second, plaintiffs contend that a proper understanding of section 306(c)(8), particularly in light of the 1976 Amendments, compels the conclusion that in requiring "adequate consideration"

Congress intended that an approvable program affirmatively accommodate the national interest in planning for an siting energy facilities and that the CZMP fails so to do. The Court here addresses each of these contentions.

A. The Definition of "Management Program."

Any attempt to resolve this underlying dispute, out of which most of the issues in this lawsuit arise, must begin with Congress' definition of a "management program" in section 304(11) of the Act:

The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, and other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies and standards to guide public and private uses of lands and waters in the coastal zone.

(Emphasis supplied.) This definition is exactly as originally contained in the Senate version of the CZMA (S.3507). In its report on S.3507, the Committee on Commerce stated:

"Management program" is the term to refer to the process by which a coastal State . . . proposes . . . to manage land and water uses in the coastal zone so as to reduce or minimize a direct, significant, and adverse effect upon those waters, including the development of criteria and of the governmental structure capable of implementing such a program. In adopting the term "Management program" the Committee seeks to convey the importance of a dynamic quality to the planning undertaken in this Act that permits adjustments as more knowledge is gained, as new technology develops, and as social aspirations are more clearly defined. The Committee does not intend to provide for management programs that are static but rather to create a mechanism for continuing review of coastal zone programs on a regular basis and to provide a framework for the allocation of resources that are available to carry out these programs.

S.Rep.No.92-753, 92d Cong., 2d Sess. (1972), U.S.Code Cong. & Admin.News 1972, pp. 4776, 4784, reprinted in Senate Committee on Commerce, Legislative History of the CZMA 201-02 (Comm. Print 1976) ("Legislative History") (emphasis supplied). The House version (H.R. 14146) did not contain a definition of "management program" and the Conference Report (H.Rep.No.92-1544, 92d Cong., 2d Sess. (1972) (Legislative History at 443f)) failed to add anything further to the above explanation.

The Court agrees with defendants that Congress never intended that to be approvable under section 306 a management program must provide a "zoning map" which would inflexibly commit the state in advance of receiving specific proposals to permitting particular activities in specific areas. Nor did

Congress intend by using the language of "objectives, policies, and standards" to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user. To satisfy the definition in the Act, a program need only contain standards of sufficient specificity "to guide public and private uses."

The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational process by which to regulate uses therein. Although sensitive to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns. "The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the various alternatives. The aim of this legislation is to assist in this very critical goal." S.Rep.No.92-753, U.S. Code Cong. & Admin.News 1972, p. 4781 (Legislative History at 198). See H.Rep.No.92-1049, 92d Cong., 2d Sess. (1972) (Legislative History at 313 and 315).

The Amendments of 1976 made clear the national interest in the planning for, and siting of, energy facilities (to be discussed *infra*). Apparently neither the Act nor the Amendments thereto altered the primary focus of the legislation: the need for a rational planning process to enable the state, not private users of the coastal zone, to be able to make "hard choices." "If those choices are to be rational and devised in such a way as to preserve future options, the program must be established to provide guidelines which will enable the selection of those choices." H.Rep. No. 92-1049 (Legislative History at 315). The 1976 Amendments do not require increased specificity with regard to the standards and objectives contained in a management program. (Specificity as it relates to section 306(c)(8) will be discussed *infra*.)

In conclusion, to the extent plaintiffs' more specific challenges to the Acting Administrator's section 306 approval are premised on an interpretation of congressional intent to require that such programs include detailed criteria establishing a sufficiently high degree of predictability to enable a private user of the coastal zone to say with certainty that a given project must be deemed "consistent" therewith, the Court rejects plaintiffs' contention.

Section 306(a)(1) requires the Secretary, prior to approval of a management program under section 306, find that it contains that which section 305(b) specifies. Plaintiffs have focused their attack in large measure on what they charge is the CZMP's failure to include those items which section 305(b) mandates, especially those required by paragraphs (2), (3), and (5) thereof. The attack is premised not on any alleged invalidity of or ambiguity in NOAA's regulations (15 C.F.R. Parts 920 and 923) -- although plaintiffs insist the proposed (now interim final) program approval regulations (Part 923), rather than the then-existing regulations, should have been utilized in evaluating the

California Program -- but rather on the alleged failure of the Acting Administrator properly to apply the regulations to the CZMP.

The Court has reviewed the Acting Administrator's findings, the CZMA, and the regulations (both then-existing, proposed, and now interim final), and concludes that the Acting Administrator's finding that the Program satisfies the requirements of section 305(b) (as required by section 306(a)(1)) was not arbitrary or capricious, and further, that his application of the then-existing regulations (published January 9, 1975) was not an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. 706(2)(A).

The Court has reviewed in great detail Attachment J to the FEIS, wherein the OCZM summarizes and responds to comments received both from other governmental agencies (state and federal) and from private interests addressed to the draft management program and EIS. Attachment J includes OCZM's responses to similar concerns voiced by a number of reviewers (FEIS at J-1 through J-12) and its responses to comments received from individual reviewers (FEIS at J-13 through J-48), including plaintiffs (FEIS at J-29 through J-41) and various federal agencies (such as the Federal Energy Administration, and the Department of the Interior) whom plaintiffs have characterized as opposing section 306 approval (FEIS at J-17 through J-22).

In their comments the various parties have raised most of the issues which plaintiffs have raised in this action. The Court finds additional support for the Acting Administrator's decision in the thoughtfulness and reasonableness with which OCZM has addressed the views of the various reviewers. The Acting Administrator had these comments and responses before him at the time of his approval of the CZMP and they lend further support to the nonarbitrary character of his decision.

The Court notes that while the interaction between the state (Coastal Commission) and various interested and affected federal agencies during the review process was substantially less than ideal in this instance, a situation of which the Acting Administrator was painfully aware, nevertheless the requirement of section 307(b) that "the views of Federal agencies principally affected by such program have been adequately considered" before section 306 approval may be granted has been satisfied.

Without belaboring the point or embarking on a needless point-by-point analysis and refutation of plaintiffs' assertions regarding the Acting Administrator's findings under section 305(b), the Court, consistent with the previously-expressed view of the specificity which the Act requires, finds the "performance standards" approach embodied in the California Program to be permissible. The CZMA, as noted earlier, does not speak to this issue beyond defining "management program" in section 304(11).

The requirements of sections 305(b) and 306(c), (d), and (e) do not constrain the state in the manner in which it meets them; nor does it constrain the Secretary or NOAA in establishing through regulations that which it will require of a management program in this regard. Congress has granted the Secretary and Acting Administrator considerable discretion. They have exercised it in promulgating approval regulations. The Court's

review of these indicates that rulemaking itself has been an open process and has involved ongoing interaction between NOAA and interested parties.

As noted previously, the Court, cognizant of Congress' expression of approval for the manner in which NOAA and OCZM (and particularly Mr. Knecht) have carried out its mandate (see S.Rep.No.94-277, 94th Cong., 1st Sess. 30 (1975) U.S.Code Cong. & Admin.News 1976, p. 1768 (Legislative History at 756)), and further cognizant of Congress' resolving its original uncertainty over whether the CZMA should be administered by the Department of the Interior or the Department of Commerce in favor of the latter largely because of the "requisite oceanic, coastal ecosystem, and coastal land use expertise" found in NOAA (see S.Rep.No.94-277 at 7 n.5 (Legislative History at 733)), concludes that considerable deference is due NOAA's interpretation of its own regulations. In short, the Acting Administrator's findings and Attachment J of the FEIS, when viewed in the context of the legislative history of the Act and of the statutory language itself, satisfy the Court that approval of the California Program has not been arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Adequate Consideration of the National Interest.

Plaintiffs' fundamental grievance with the California Program stems from its assertion that the Program fails to satisfy the mandate of section 306(c)(8) -- that before the Secretary grant approval to management program under section 306 she find that it

provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.

Plaintiffs urge that the CZMA, particularly in light of the 1976 Amendments, requires an "affirmative commitment" on the part of the state before section 306 approval is proper. The California Program allegedly fails adequately to make that commitment in that its general lack of specificity, coupled with what plaintiffs characterize as California's overall antipathy to energy development (as embodied in the policies and practices of its Coastal Commission), combine to give the Coastal Commission a "blank check" effectively to veto any or all exploration and development activities subject to section 307(c)(3) simply by finding such activity not to be "consistent" with the CZMP.

Defendants, beyond taking issue with plaintiffs' characterization of California's energy posture, assert first, that plaintiffs' premise that the Act requires an affirmative commitment is incorrect as a matter of law and second, that the Program contains adequate consideration of national energy interests. Defendants contend that the CZMP contains "performance standards and criteria" more than adequate to satisfy the requirements of the CZMA and serve as a guide to plaintiffs in planning their activities in the coastal zone.

Implicit in the various provisions of the Coastal Act (and in particular those in sections 30001.2 and 30260-64) and in Chapter 11 of the Program Description is a wholly adequate consideration of the national energy interest.

Plaintiffs apparently focus on language in H.Rep.No.92-1049 (which accompanied H.R. 14146) to the effect that, "if the program as developed is to be approved and thereby enable the State to receive funding assistance under the title, the State must take into account and must accommodate its program to the specific requirements of various Federal laws which are applicable to its coastal zone." Legislative History at 321. The report continues:

To the extent that a State program does not recognize these overall national interests, as well as the specific national interest in the generation and distribution of electric energy . . . or is construed as conflicting with any applicable statute, the Secretary may not approve the State program until it is amended to recognize those Federal rights, powers, and interests.

Id. at 322.

It is to be noted that the reference in the House Report to the state's need to "accommodate" its program is to "the specific requirements of various [applicable] Federal laws." It is not a requirement that the state program expressly "accommodate" energy interests. In the program approval regulations published on January 9, 1975 (40 Fed.Reg. 1683), NOAA stated that:

A management program which integrates . . . the siting of facilities meeting requirements which are of greater than local concern into the determination of uses and areas of Statewide concern will meet the requirements of Section 306(c)(8).

15 C.F.R. 923.15(a). In subsection (b) NOAA amplified on the above requirement.

. . . The requirement should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early stage in the State's planning activities and that such facilities not be arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons. . . . No separate national interest "test" need be applied and submitted other than evidence that the listed national interest facilities have been considered in a manner similar to all other uses, and that appropriate consultation with the Federal agencies listed has been conducted.

The Coastal Zone Management Act Amendments of 1976, Pub.L. 94-370 ("1976 Amendments"), while largely prompted by the 1973 Arab oil embargo and while expressly recognizing the national interest in the planning for and siting of energy facilities,

nevertheless did not alter the requirement of "adequate consideration" in section 306(c)(8) or make any changes in the degree of specificity required under the Act. Rather, recognizing that coastal states like California were currently burdened by the onshore impacts of Federal offshore (OCS) activities and likely to be burdened further by the plans for increased leases on the OCS, Congress sought to encourage or induce the affected states to step up their plans vis-a-vis such facilities.

The primary means chosen to accomplish this result was the Coastal Energy Impact Program ("CEIP") contained in new section 308. As the Conferees explained, the purpose of the 1976 Amendments was

to coordinate and further the objectives of national energy policy by directing the Secretary of Commerce to administer and coordinate, as part of the [CZMA], a coastal energy impact program.

. . . The conference substitute follows both the Senate bill and the House amendment in amending the 1972 Act to encourage new or expanded oil and natural gas production in an orderly manner from the Nation's outer Continental Shelf (OCS) by providing for financial assistance to meet state and local needs resulting from specified new or expanded energy activity in or affecting the coastal zone.

H.Rep.No.94-1298, 94th Cong., 2d Sess. 23 (1976), U.S.Code & Admin.News 1976, pp. 1820, 1921 (Legislative History at 1073). The formula Congress provided for calculating a state's share of the Coastal Energy Impact Fund ("the Fund") established to carry out the CEIP's purposes is itself further evidence of the congressional intention to provide "built-in incentives for coastal states to assist in achieving the underlying national objective of increased domestic oil and gas production." H.Rep.No.94-1298 at 25, U.S.Code Cong. & Admin.News, p. 1822. (Legislative History at 1075).

The formula, as so constructed, provides incentives to coastal states (if they are interested in increasing their share of the funds appropriated for this purpose) to encourage and facilitate achievement of the basic national objective of increasing domestic energy production. This provision would be in harmony with sound coastal zone management principles because Federal aid would be available only for states acting in accord with such principles. For example, since the grant is based on new leaseings, production, first landings, and new employment, it is to the state's interest to apply the "consistency" provisions and related process to the issuance of oil exploration, development and production plans, licenses, and permits as quickly as possible rather than to postpone decision-making for the statutory 6-month period.

Id. The Congress was particularly careful to circumscribe the role of the federal government in particular siting decisions.

Thus, section 308(1) provides:

The Secretary shall not intercede in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of, financial assistance under this section.

This provision is consistent with the approach of the CZMA as a whole to leave the development of, and decisions under, a management program to the state, subject to the Act's more specific concern that the development and decision-making process occur in a context of cooperative interaction, coordination, and sharing of information among affected agencies, both local, state, regional, and federal. This last, especially as regards energy facility planning, is the policy behind the Energy Facility Planning Process ("EFPP") of section 305(b)(8) and the Interstate Grants provision of new section 309 (which encourages the coastal states to give high priority to coordinating coastal zone planning utilizing "interstate agreements or compacts"). It should be noted that the only amendment to the national interest requirement of section 306(c)(8) effectuated by the 1976 Amendments is the additional requirement that in fulfilling its obligation to provide "adequate consideration of the national interest" in the case of energy facilities, the state also give such consideration "to any applicable interstate energy plan or program" established under section 309.

The Court rejects plaintiff's argument that affirmative accommodation of energy facilities was made a quid pro quo for approval under section 306 by the 1976 Amendments. In addition to the above, the Court notes that Congress itself did not assume that such siting was automatically to be deemed necessary in all instances. For instance, in its report on H.R. 3981, the Committee on Merchant Marine and Fisheries stated that the addition of the EFPP in section 305(b)(8)

reflects the Committee's finding that increasing involvement of coastal areas in providing energy for the nation is likely, as can be seen in the need to expand the Outer Continental Shelf petroleum development. State coastal zone programs should, therefore, specifically address how major energy facilities are to be located in the coastal zone if such siting is necessary. Second, the program shall include methods of handling the anticipated impacts of such facilities. The Committee in no way wishes to accelerate the location of energy facilities in the coasts; on the contrary, it feels a disproportionate share are there now. . . . There is no intent here whatever to involve the Secretary of Commerce in specific siting decisions.

H.Rep.No.94-878 at 45-46 (Legislative History at 931-32) (emphasis supplied). The siting in the coastal zone of energy facilities which could be located elsewhere is embodied in section 308. See H.Rep.No.94-878 at 15 and 26 (Legislative History at 900 and 912).

The Senate Committee on Commerce, in reporting S. 586 to the full Senate, stated:

The Secretary of Commerce (through NOAA) should provide guidance and assistance to States under this section 305(b)(8), and under section 306, to enable them to know what constitutes "adequate consideration of the national interest" in the siting of facilities necessary to meet requirements other than local in nature. The Committee wishes to emphasize, consistent with the overall intent of the Act, that this new paragraph (8) requires a State to develop, and maintain a planning process, but does imply intercession in specific siting decision. The Secretary of Commerce (through NOAA), in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of that process.

S.Rep.No-277 at 34, U.S.Code Cong. & Admin.News 1976, p. 1801 (Legislative History at 760) (emphasis supplied).

Consistent with this mandate, NOAA has promulgated revised program approval regulations (43 Fed.Reg. 8378, March 1, 1978). These interim final rules follow the submission of comments on the proposed rules published on August 29, 1977 (42 Fed.Reg. 43552). The Court looks to the revised regulations because they reflect NOAA's interpretation of any changes wrought by the 1976 Amendments, the former regulations against which the California Program was tested having been promulgated after the Arab oil embargo but before the 1976 Amendments.

In its response to several reviewers' suggestion that section 306)(c)(8) be interpreted to require that facilities be accommodated in a State's coastal zone, the agency reiterated the position it has maintained since the inception of the CZMA that

the purpose of "adequate consideration" is to achieve the act's "spirit of equitable balance between State and national interests." As such, consideration of facilities in which there may be a national interest must be undertaken within the context of the act's broader finding of a "national interest in the . . . beneficial use, protection, and development of the coastal zone" (Section 302(a)). Subsection 302(g) of the Act gives "high priority" to the protection of natural systems. Accordingly, while the primary focus of subsection 306(c)(8) is on the planning for and siting of facilities, adequate consideration of the national interest in these facilities must be based on a balancing of these interests relative to the wise use, protection and other development of the coastal zone. As the Department of Energy noted in its comments on the proposed regulations:

The Act presumes a balancing of the national interest in energy self-sufficiency with State and local concerns involving adverse economic, social, or environmental impacts.

43 Fed.Reg.8379.

Section 306(c)(8) is treated at length in 15 C.F.R. 923.52. After generally noting that one "need not conclude . . . that any and all such facilities proposed for the coastal zone need be sited therein," the regulation proceeds to set forth requirements which must be met by the management program in order to satisfy section 306(c)(8). While these are considerably more detailed than those contained in its predecessor (15 C.F.R. 923.15, January 9, 1975), they do not change the basic tenor of the rule as interpreted by NOAA. Having previously determined that the Acting Administrator's utilization of the then-existing regulations was proper--indeed, to have applied proposed regulations arguably would have been improper--and having determined that it was not abuse of discretion to proceed with approval of the California Program rather than await promulgation of final revised approval regulations, given the fact that the proposed regulations effected no fundamental change of philosophy but merely a "shift in emphasis" (42 Fed.Reg.43552), the Court concludes that the Acting Administrator's finding that the CZMP satisfied section 306(c)(8) is neither arbitrary nor capricious.

The Court notes further in this regard that the standards established by the Coastal Act (and in particular sections 30260-64 and 30413) for making energy facilities siting decisions, in the words of the Coastal Commission staff, "establish the general findings that must be made to authorize coastal dependent industrial facilities, liquefied natural gas terminals, oil and gas developments, refineries, petrochemical facilities and electric power plants." FEIS, Part II (Chapter 9) at 66. The key to the California approach, and one which the Acting Administrator and this Court find acceptable under the CZMA, is that the standards require that "findings" be made upon which specific siting decisions ensue. For instance, in dealing with the siting of oil tanker facilities, section 30261(a) requires that

. . . [t]anker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement of other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oil spills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

As can readily be seen from these provisions, whether a particular tanker facility siting proposal will be deemed "consistent" with these requirements of the California Program will turn on specific findings of a factual nature. The California Program sensibly does not attempt to map out in advance precisely what type or size tanker facilities will be found to meet these requirements in particular areas of its almost 1,000-mile coastline. Rather, by its very nature, the Coastal Act encourages plaintiffs with a particular facility in mind to address themselves to the standards set forth in the Coastal Act and to plan such a facility in cooperation and communication with the Coastal Commission from the inception. This approach seems consonant with the overall approach of the

CZMA itself. In this regard it is noteworthy that the Senate Committee on Commerce, in summarizing the "key findings" of a number of reports made under the aegis of the committee-created National Ocean Policy Study, stated that "coastal States often have been criticized unfairly for delaying the siting of energy facilities when such action often is the result of lack of information and planning." S.Rep.No.94-277 at 3, U.S.Code Cong. & Admin.News 1976, p. 1770 (Legislative History at 729). The CZMP takes an approach which has received the congressional blessing. To the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a "zoning map" which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their position. While wholly sympathetic to the legitimate concerns of corporate officers and planners who must conform their activities to the standards of the CZMP, the Court nevertheless concludes that the Acting Administrator's finding that the Program satisfies section 306(c)(8) is supportable and hence not arbitrary or capricious. It proceeds from a correct interpretation of the CZMA.

Finally, the Court notes that both the California Program and the CZMA contain safeguards to protect plaintiffs from arbitrary exercise by the Coastal Commission of its section 307 consistency powers. First, plaintiffs under the Coastal Act may seek judicial review of a decision of the Coastal Commission finding a specific proposed activity of plaintiffs to be inconsistent with the CZMP. Such review certainly may encompass a challenge to the Commission's interpretation of the California Program as well as a challenge to specific findings upon which the determination presumably would be based. Second, with respect to an adverse consistency determination regarding any proposed activity for which a federal license or permit is required or which involves an OCS plan, the party against whose activity such a determination has been made may seek review by the Secretary of Commerce (who could also undertake review on her own initiative) on the grounds that "the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security." Sections 307(c)(3)(A) and (B). Third, under section 312(a) the Secretary is obliged to conduct "a continuing review of (1) the management programs of the coastal states and the performance of such states with respect to coastal zone management; and (2) the coastal energy impact program provided for under section 308." Subsection (b) provides:

The Secretary shall have the authority to terminate any financial assistance extended under section 306 . . . if (1) [s]he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary

In short, both as regards specific determinations of inconsistency and as regards general trends in and manner of issuance of such determinations, plaintiffs are amply protected

by and have various forms of recourse under the California Program itself and sections 307 and 312 of the CZMA.

APPROVAL BY THE FEDERAL DEFENDANTS

Plaintiffs have charged that the procedures followed by the state in developing and adopting, and by the federal defendants in approving, the California Program violated both the CZMA and NEPA.

Section 306(c)(1) requires the Secretary to find that [t]he state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title.

(Emphasis supplied.) The Acting Administrator has so found. Findings at 13-14 (and references to the FEIS contained therein). Section 306(c)(3) amplifies the requirement of section 306(c)(1) by demanding a finding be made that "[t]he state has held public hearings in the development of the management program." This too has been found. Findings at 16 (and references to the FEIS contained therein).

Plaintiffs' claims of invalid adoption by the state having been discussed previously, the Court merely adds that the process of developing a coastal zone management program for the state of California has been ongoing since the enactment of Proposition 20 (the California Coastal Zone Conservation Act of 1972) and that the Acting Administrator's finding that that process has been open within the meaning of section 306(c)(1) and (3) is supported by the record. Under the arbitrary and capricious standard applicable to such findings, they must be sustained.

Plaintiffs mount an assault on the review process undertaken by the federal defendants in approving the CZMP under section 306, focusing on the purported inadequacies of the environmental review process culminating in the FEIS. As noted earlier, a challenge under NEPA invites broader-ranging evidentiary review (not limited to the administrative record) and requires application of the observance of procedure standard of review. Having done so, the Court concludes that the environmental review process here followed and the FEIS produced thereby are adequate under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)).

Section 102(2)(C) mandates that an EIS address:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposal action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Plaintiffs contend first, that the federal defendants utilized the environmental review process not to conduct a bona fide environmental review but to advocate a prior decision to grant final approval to the CZMP; second, that the FEIS is deficient because the Program discussed therein differs substantially from that disclosed in the RDEIS; third, that it fails to adequately discuss possible alternatives to section 306 approval; fourth, that it fails to consider all available relevant information; and fifth, that it fails to discuss potential and unavoidable adverse impacts of approving and implementing the CZMP.

The Court discusses these claims in order.

First, the Court finds nothing improper in the federal defendants' informing the public and other organs of government of its tentative conclusion that the California Program meets the requirements of section 306 so as to qualify for final approval. The nature of the cooperative interaction between the state and federal governments envisioned by the CZMA in the development of a management program makes it wholly unrealistic to assume that the federal agency charged with reviewing that program will entertain no preliminary conclusions as to its adequacy under the Act.

With respect to plaintiffs' second claim--that the RDEIS and FEIS differ substantially in their description of the elements of the California Program--the Court concludes that such claim lacks merit. First, the two statutory elements of the Program other than the Coastal Act both were noted in the RDEIS (at 8, 12, and 77). Neither establishes standards in the sense that the Coastal Act does; rather, these companion statutes provide a portion of the implementation authority required by section 306(c)(6), (7), and (d) of the CZMA. Second, the RDEIS contains the original version of the Program Description found in the FEIS. As discussed at length in another section of this memorandum, Chapter 11 of the Program Description has been formally adopted by the Coastal Commission; and the remaining chapters, being of an essentially descriptive nature, were not required to be. The procedures followed may have been sloppy, but the Court cannot say that the failure expressly to designate Part II of the RDEIS an "element" of the CZMP was fatal--particularly in light of the Court's conclusions regarding the legal status of the Program Description. Finally, the Court notes that the revisions made in the Program Description were largely prompted by comments received on the original Program Description, including those received from plaintiffs.

Plaintiffs' third argument--that the FEIS fails adequately to discuss alternatives to section 306 approval--is premised on plaintiffs' insistence that the federal defendants should have denied final approval and instead granted the CZMP preliminary approval under section 305(d), particularly in light of the fact that the local coastal programs required by the Coastal Act (not due until 1980) will add the requisite degree of specificity to enable the Program to qualify for section 306 approval. While there is support for plaintiff's position in the legislative history surrounding the addition of "preliminary approval" to section 305 effected by the 1976 Amendments (H.Rep.No.94-878, 94th Cong., 2d Sess. 48 (1976) (Legislative History at 934)), nevertheless the FEIS discusses this alternative to section 306 approval and rejects it on the basis of a reasonable construction of sections 306(e)(1) (dealing with permissible implementation techniques for control of land and water uses) and 305(d), the NOAA regulations relevant thereto (15 C.F.R. 923.26), the pertinent legislative history, and the application of the above to the provisions of the CZMP. FEIS at 184-85. The federal defendants' conclusion -- that "if a state has the necessary authorities in place and will employ acceptable implementation techniques, the 'preliminary approval' option is inappropriate" (FEIS at 184) -- is reasonable in order to give harmonious and full effect to sections 305(d) and 306(e)(1). Again, while the Court, if faced with the choice, might have opted for preliminary approval, we may not substitute our judgment for that of the Acting Administrator. It is sufficient for present purposes to note that, contrary to plaintiffs' contention, the FEIS does adequately discuss this alternative.

Plaintiffs' final two claims are premised on the alleged failure of the FEIS to discuss the adverse impact nationwide should California utilize its section 307 consistency powers to retard or preclude OCS and related energy development. Plaintiffs also assert that the FEIS fails adequately to discuss the impact of the CZMP on the "socio-economic" environment (e.g., impact on "urban sprawl"). The Court rejects this argument.

As this Circuit has stated:

. . . [A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers, with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed projects' environmental impact and encourage public participation in the development of that information.

Trout Unlimited v. Morton, *supra*, 509 F.2d at 1283. "An EIS need not discuss remote or highly speculative consequences. . . [The] adequacy of the content of the EIS should be determined through use of a rule of reason." *Id.* In elaborating on this "rule of reason" the Second Circuit has observed that

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. [Citations omitted].

County of Suffolk v. Secretary of the Interior, supra, 562 F.2d at 1375.

In this instance, the inadequacies raised by plaintiffs rest on the highly speculative assumption that in implementing its management program California will abuse its section 307 consistency powers, the California courts will acquiesce therein, and, further, the Secretary of Commerce will fail to discharge her duties under sections 307(c)(3) and 312. As stated during our discussion of the ripeness issue, the Court declines to make such an assumption -- nor must the federal defendants in preparing the FEIS engage in such speculation.

The Court views the situation with which it is here presented as not unlike that presented in Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973). In that case an action was brought by environmental groups to enjoin construction of a new seaward runway at Honolulu International Airport. The defendants in preparing the EIS determined that it was unnecessary to undertake air pollution studies because of the very nature and location of the proposed project. In rejecting plaintiff-appellants' claim that such omission was fatal to the adequacy of the EIS, this Circuit remarked:

The Reef Runway will relocate aircraft takeoffs, the major source of aircraft air pollution, 6,700 feet seaward, and away from the populated areas of Honolulu. The essence of this project, therefore, involves moving the sources of the air pollution away from people. The federal and state officials concluded that detailed air pollution studies were unnecessary, on the premise that at the very least, the project was extremely unlikely to worsen the air quality in any relevant sense.

Id. at 470.

Similarly, the "essence" of the CZMP, in accordance with sections 302 and 303 of the CZMA, is sensitivity to environmental concerns in establishing standards for utilization of the coastal zone; consequently, fewer and less detailed environmental studies would be expected because the Program emphasizes environmental preservation.

Finally, the Court notes that the act of approving the California Program in itself does not result in the undertaking of any specific project by the state or federal governments or any private user(s) of the coastal zone. The concerns raised by plaintiffs -- in particular, the alleged omission in the FEIS of an adequate discussion of the significance of permitting OCS

development to go forward and the impact of precluding such development -- will be addressed in connection with the preparation and dissemination of environmental impact statements for specific proposed activities. The environmental review here undertaken resembles that frequently utilized where a "multistage" project is involved; consequently, the failure of the FEIS to discuss such possibilities is justified on this alternative ground. The Second Circuit addressed this issue in County of Suffolk, supra. That case involved preparation of an EIS in connection with the proposed lease-sale by the Department of the Interior of federal lands on the OCS to petroleum companies. There, in reversing the district court's finding that that [the] EIS was inadequate in its failure to explore the possibility that state and local governments affected by such lease-sale might bar the landing of pipelines on their shores and thereby in necessitating the use of tankers increase the hazards of oil pollution, the Court reasoned:

. . . [T]he extent to which treatment of a subject in an EIS for a multistage project may be deferred, depends on two factors: (1) whether obtaining more detailed useful information on the topic of transportation is "meaningfully possible" at the time when the EIS for an earlier stage is prepared, see Natural Resources Defense Council v. Morton, [148 U.S.App.D.C. 5, at 15,] 458 F.2d [827] at 837, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project, see Natural Resources Defense Council v. Callaway, 524 F.2d at 88.

If the additional information would at best amount to speculation as to future event or events, it obviously would not be of much use as input in deciding whether to proceed. As we said in Callaway, supra, referring to Morton, supra:

"NEPA does not require a 'crystal ball' inquiry . . . An EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible, Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). A government agency cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS." 524 F.2d at 88.

Where the major federal action under consideration, once authorized, cannot be modified or changed, it may be essential to obtain such information as is available, speculative or not, for whatever it may be worth in deciding whether to make the crystallized commitment (e.g., the construction of a bridge of a specified type between two precise points). But where a multistage project can be modified or changed in the future to minimize or eliminate

environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the "rule of reason." Indeed, in considering a project of such flexibility, it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand.

562 F.2d at 1378 (emphasis supplied). The court concluded that "projection of specific pipeline routes was neither 'meaningfully possible,' nor 'reasonably necessary under the circumstances.'" *Id.* at 1382. This factor of multistage projects whose various stages are "substantially independent" of one another similarly has been considered by this Circuit in assessing the adequacy of an EIS.

The Court concludes that this action presents an analogous situation to which this reasoning applies. Approval and implementation of the CZMP no more indicates which of potentially dozens of projects will be certified as consistent (and undertaken subject to what conditions) than the decision of the Department of the Interior to proceed with the lease-sale of a large tract of federal OCS lands indicated which of potentially dozens of exploration and development projects would be permitted (and under what conditions).

The Court concludes, as did the court in *Cady v. Morton supra*, that "although the EIS could be 'improved by hindsight,' it has satisfied the intent of the statute. *National Forest Preservation Group v. Butz*, 485 F.2d 403, 412 (9th Cir. 1973)." 527 F.2d at 797.

The length, complexity and convolutions of this memorandum and of the findings and conclusions set forth herein speak louder and much more eloquently than the words themselves. The message is as clear as it is repugnant: under our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated; if ultimate execution of the congressional mandate requires interaction between federal and state bureaucracy, the resultant maze is one of the prices required under the system.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

The administrative action is affirmed; the petition is denied, each side to bear its costs.

NOTES

1. The importance of energy development and improvement of the states' abilities to cope with the coastal impacts of energy development were themes of the 1976 amendments to the CZMA. See generally Hildreth, The Coast-Where Energy Meets the Environment, 13 San Diego L. Rev. 253 (1976). In order to facilitate coastal planning and mitigation of energy-related impacts, the Coastal Energy Impact Program was established.

Section 308. Coastal energy impact program

(a) Administration and coordination by Secretary; financial assistance; audit; rules and regulations. (1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this title, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting from specified activities involving energy development.

* * *

(4) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(2); except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

(B) The study of, planning for, development of, and the carrying out of projects and programs in such state which are--

(i) necessary, because of the unavailability of adequate financing under any other subsection, to provide new or improved public facilities and public services which are required as a direct result of new or expanded outer Continental Shelf energy activity; and

(ii) of a type approved by the Secretary as eligible for grants under this paragraph, except that the Secretary may not disapprove any project or program for highways and secondary roads, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care.

(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

* * *

(g) Eligibility requirements; apportionment of assistance.

(1) No coastal state is eligible to receive any financial assistance under this section unless such state--

(A) has a management program which has been approved under section 306 [16 USCS 1455];

(B) is receiving a grant under section 305(c) or (d) [16 USCS 1454(c) or (d)]; or

(C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 303 [16 USCS 1452].

(2) Each coastal state shall, to the maximum extent practicable, provide that financial assistance provided under this section be apportioned, allocated, and granted to units of local government within such state on a basis which is proportional to the extent to which such units need such assistance.

Can a state that does not have an approved coastal zone plan receive CEIP funds? The federal Office of Coastal Zone Management (now the Office of Ocean and Coastal Resource Management) took the position that a state without a federally-approved plan, or working toward one, could not be considered "making satisfactory progress toward ... a program ... consistent with the policies [of the CZMA]...." Note that the eligibility requirements for CEIP funds also apply to interstate grants.

2. The funds available through CEIP have been minimal in recent years, and although the allocation formula is related to continental shelf oil leasing and production, allocations are merely budgeted yearly and do not represent a vested "share" of the revenue from offshore leasing or oil production. Recently, legislation has been introduced to allow direct sharing of revenues from offshore leases by the coastal states. Why should coastal states receive a share of the revenues? When minerals are extracted from federal lands within a state, the state receives a share of the federal revenues. Is the coastal state/continental shelf situation a valid analogy to the situation of federal lands within a state?

The 1980 amendments to the CZMA introduced a number of new programs, but more significantly, provided an opportunity for members of Congress to express their view of the federal government's continuing role in coastal zone management; that is, that once the federal government has facilitated the development and initial administration of a state's coastal zone program, it

is the responsibility of the state to institutionalize and fund the program. The Reagan Administration has substantially cut funding and personnel. The continuation of the program at both the state and federal levels is in question. Most states claim that their programs cannot survive without federal funding. Can federal consistency be justified for state programs without adequate federal evaluation and oversight? Would Revenue Sharing solve the perceived problems?

3. In certain areas, for example, the Chesapeake Bay, planning by individual states is an insufficient basis for effective management. The CZMA provided for interstate coordination, but the major effort and funding during the early years was toward state program development. The 1980 amendments gave interstate planning and management a higher priority:

INTERSTATE COASTAL ZONE MANAGEMENT COORDINATION.

Section 309 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456b) is amended to read as follows:

INTERSTATE GRANTS

Sec. 309. (a) The coastal States are encouraged to give high priority--

(1) to coordinating State coastal zone planning, policies, and programs with respect to contiguous areas of such States;

(2) to studying planning, and implementing unified coastal zone policies with respect to such areas; and

(3) to establishing an effective mechanism, and adopting a Federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

The coastal zone activities described in paragraphs (1), (2), and (3) of this subsection may be conducted pursuant to interstate agreements or compacts. The Secretary may make grants annually, in amounts not to exceed 90 percent of the cost activities, if the Secretary finds that the proceeds of such grants will be used for purposes consistent with sections 305 and 306.

(b) The consent of the Congress is hereby given to two or more coastal States to negotiate, and to enter into, agreements or compacts, which do not conflict with any law or treaty of the United States, for--

(1) developing and administering coordinated coastal zone planning, policies, and programs pursuant to sections 305 and 306; and

(2) establishing executive instrumentalities or agencies which such States deem desirable for the effective implementation of such agreements or compacts. Such agreements or compacts shall be binding and obligatory upon any State or party thereto without further approval by the Congress.

(c) Each executive instrumentality or agency which is established by an interstate agreement or compact pursuant to this section is encouraged to give high priority to the coastal zone activities described in subsection (a). The Secretary of the Interior, the Chairman of the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Secretary of the department in which the Coast Guard is operating, and the Secretary of Energy, or their designated representatives, shall participate ex officio on behalf of the Federal Government whenever any such Federal-State consultation is requested by such an instrumentality or agency.

(d) If no applicable interstate agreement or compact exists, the Secretary may coordinate coastal zone activities described in subsection (a) and may make grants to assist any group of two or more coastal States to create and maintain a temporary planning and coordinating entity to carry out such activities. The amount of such grants shall not exceed 90 percent of the cost of creating and maintaining such an entity. The Federal officials specified in subsection (c), or their designated representatives, shall participate on behalf of the Federal Government, upon the request of any such temporary planning and coordinating entity for a Federal-State consultation.

(e) A coastal State is eligible to receive financial assistance under the section if such State meets the criteria established under section 308(g)(1).

4. The CZMA also established the Estuarine Sanctuaries Program. The federal government will provide matching funds for the purpose of:

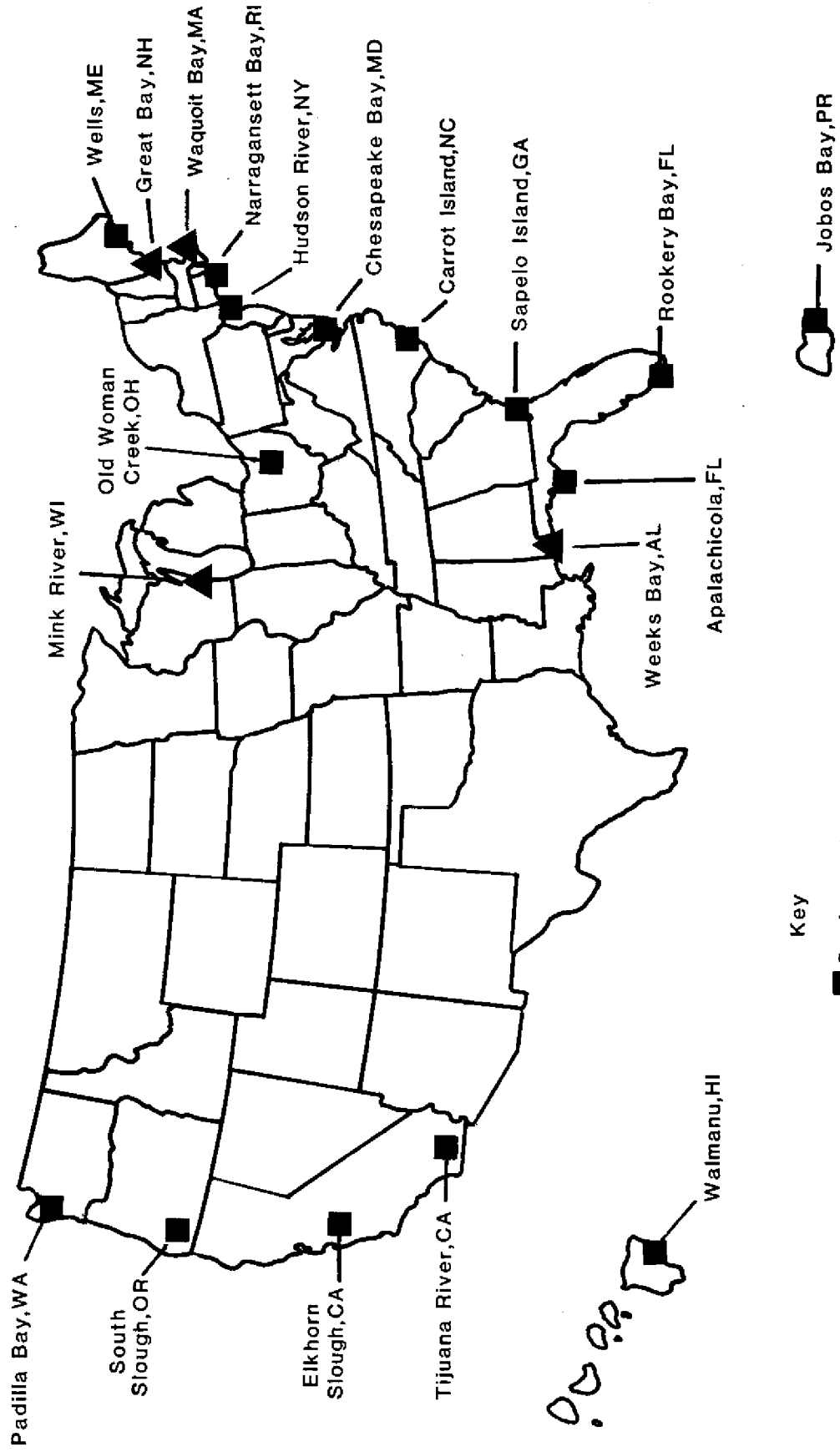
- acquiring, developing, or operating estuarine sanctuaries, to serve as natural field laboratories in which to study and gather data on the natural and human processes occurring within the estuaries of the coastal zone; and

- acquiring lands for the preservation of islands.

The goal is to preserve relatively pristine estuaries that are characteristic of regions of the country to be used as "living laboratories" and to be a source of baseline information for evaluating estuarine systems.

Fifteen estuarine sanctuaries have been established nationally. Apalachicola Bay and River Estuarine Sanctuary is located in northwest Florida. Some of the materials in Part One describe the initial stages of the project. Rookery Bay Estuarine Sanctuary is located in southwest Florida.

ESTUARINE SANCTUARY SYSTEM



Section 5. THE FEDERAL CONSISTENCY REQUIREMENT

Although federal funding provided an initial impetus for states to participate in coastal zone planning, the provisions of section 307(c) of the CZMA may assure state participation when federal funding dwindles. The so-called federal consistency requirement provides the states with the potential to participate effectively in federal decision-making that affects their coastal areas. Section 307(c), 16 U.S.C. 1456, is set out below:

Section 307(c) Consistency of Federal activities with state management programs; certification.

(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3) (A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the

Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 306 [16 USCS 1455], any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until--

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan in which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification,

or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) Applications of local governments for Federal assistance; relationship of activities with approval management programs. State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Inter-governmental Coordination Act of 1968 (82 Stat. 1098). Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

FEDERAL CONSISTENCY MATRIX

The diagram on the following pages illustrates how "consistency" works. Note who makes the decision as to whether the action is consistent with the state's approved management plan.

FEDERAL CONSISTENCY MATRIX

CZMA Section	307(c)(1)&(2)	307(c)(3)(A)	307(c)(3)(B)	307(d)
Federal action	Direct federal activities including development projects.	Federally licensed and permitted activities	Federally licensed and permitted activities described in OCS plans	Federal assistance to state and local gov'ts
Coastal Zone Impact	Directly affecting the coastal zone	Affecting the coastal zone	Affecting the coastal zone	Affecting the coastal zone
Responsibility to notify state agency	Federal agency proposing the action	Applicant for federal license or permit	Person submitting OCS plan	Intergov'tal review procedure
Notification procedure	Chosen by federal gov't.	Consistency certification	Consistency certification	Intergov'tal review procedure
Consistency requirement	Consistent to the maximum extent practicable with CZM program	Consistent with CZM program	Consistent with CZM program	Consistent with CZM program

FEDERAL CONSISTENCY MATRIX (CONT'D)

Consistency determination	Made by federal agency (review by state)	Made by state agency	Made by state agency	Made by state agency
Federal agency responsibility following a disagreement	Federal agency not required to disapprove action following state agency disagreement (unless judicially impelled to do so)	Federal agency may not approve license or permit following state agency objection	Federal agency may not approve federal licenses or permits for activities described in OCS plan following state agency objection	Federal agency may not grant assistance following state objection
Administrative conflict resolution	Mediation by the Secretary	Appeal to the Secretary by applicant or independent secretarial review	Appeal to the Secretary by person or independent secretarial review	Appeal to the Secretary by applicant agency or independent secretarial review

States do not always agree with federal determinations that an activity does not "affect" or "directly affect" the coastal zone, or that an activity is consistent with the states' programs. Section 307 also provides for mediation of serious disputes by the Secretary of Commerce. Of course, federal mediation of an agency decision by the secretary of a federal agency is not considered a satisfactory resolution by some states. Several cases are currently in the courts.

Section 307(h) Mediation of disagreements. In case of serious disagreement between any Federal agency and a coastal state--

- (1) in the development or the initial implementation of a management program under section 305 [16 USCS 1454]; or
 - (2) in the administration of a management program approved under section 306 [16 USCS 1455];
- the Secretary [or Commerce], with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

SECRETARY of INTERIOR v. CALIFORNIA
104 S.Ct. 656 (1984)

Justice O'CONNOR delivered the opinion of the Court.

This case arises out of the Department of Interior's sale of oil and gas leases on the outer continental shelf off the coast of California. We must determine whether the sale is an activity "directly affecting" the coastal zone under section 307(c)(1) of the Coastal Zone Management Act (CZMA). That section provides in its entirety:

"Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. 1456(c)(1).

We conclude that the Secretary of the Interior's sale of outer continental shelf oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of the statute.

I

CZMA defines the "coastal zone" to include state but not federal land near the shorelines of the several coastal states, as well as coastal waters extending "seaward to the outer limit of the United States territorial sea." 16 U.S.C. 1453(1).

* * *

CZMA was enacted in 1972 to encourage the prudent management and conservation of natural resources in the coastal zone.

* * *

Through a system of grants and other incentives, CZMA encourages each coastal state to develop a coastal management plan. Further grants and other benefits are made available to a coastal state after its management plan receives federal approval from the Secretary of Commerce. To obtain such approval a state plan must adequately consider the "national interest" and "the views of the Federal agencies principally affected by such program." 16 U.S. 1455(c)(8), 1456(b).

Once a state plan has been approved, CZMA section 307(c)(1) requires federal activities "conducting or supporting activities directly affecting the coastal zone" to be "consistent" with the state plan "to the maximum extent practicable." 16 U.S.C. 1456(c)(1). The Commerce Department has promulgated regulations implementing that provision. Those regulations require federal agencies to prepare a "consistency determination" document in support of any activity that will "directly affect" the coastal zone of a state with an approved management plan. The document must identify the "direct effects" of the activity and inform state agencies how the activity has been tailored to achieve consistency with the state program. 15 CFR 930.34, .39 (1983).

II

OCS lease sales are conducted by the Department of the Interior (Interior). Oil and gas companies submit bids and the high bidders receive priority in the eventual exploration and development of oil and gas resources situated in the submerged lands on the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

In 1977, the Department of Commerce approved the California Coastal Management Plan. The same year, Interior began preparing Lease Sale No. 53 -- a sale of OCS leases off the California coast near Santa Barbara. * * * Interior issued a Draft Environmental Impact Statement in April, 1980.

On July 8, 1980 the California Coastal Commission informed Interior that it had determined Lease Sale No. 53 to be an activity "directly affecting" the California coastal zone. The state commission therefore demanded a consistency determination

-- a showing by Interior that the lease sale would be "consistent" to the "maximum extent practicable" with the state coastal zone management program. Interior responded that the Lease Sale would not "directly affect" the California coastal zone. Nevertheless, Interior decided to remove 128 tracts, located in four northern basins, from the proposed lease sale, leaving only the 115 tracts in the Santa Maria Basin. In September 1980, Interior issued a final Environmental Impact Statement.

* * *

On December 16, 1980, the state commission reiterated its view that the sale of the remaining tracts in the Santa Maria Basin "directly affected" the California coastal zone. The commission expressed its concern that oil spills on the OCS could threaten the southern sea otter, whose range was within 12 miles of the 31 challenged tracts. The commission explained that it "has been consistent in objecting to proposed offshore oil development within specific buffer zones around special sensitive marine mammal and seabird breeding areas. . . ." The commission concluded that 31 more tracts should be removed from the sale because "leasing within 12 miles of the Sea Otter Range in Santa Maria Basin would not be consistent" with the California Coastal Management Program. California Governor Brown later took a similar position, urging that 34 more tracts be removed.

Interior rejected the State's demands. In the Secretary's view, no consistency review was required because the lease sale did not engage CZMA section 307(c)(1), and the Governor's request was not binding because it failed to strike a reasonable balance between the national and local interests. On April 10, 1981, Interior announced that the lease sale of the 115 tracts would go forward, and on April 27 issued a final notice of sale. 46 Fed.Reg. 23674 (1981).

Respondents filed two substantially similar suits in federal district court to enjoin the sale of 29 tracts situated within 12 miles of the Sea Otter range. Both complaints alleged, inter alia, Interior's violation of section 307(c)(1) of CZMA. They argued that leasing sets in motion a chain of events that culminates in oil and gas development, and that leasing therefore "directly affects" the coastal zone within the meaning of section 307(c)(1).

The district court entered a summary judgment for respondents on the CZMA claim. The Court of Appeals for the Ninth Circuit affirmed that portion of the district court judgment that required a consistency determination before the sale. We granted certiorari, and we now reverse.

III

Whether the sale of leases on the OCS is an activity "directly affecting" the coastal zone is not self-evident.

* * *

We are urged to focus first on the plain language of section 307(c)(1). Interior contends that "directly affecting" means "[h]av[ing] a [d]irect, [i]dentifiable [i]mpact on [t]he [c]oastal [z]one." Respondents insist that the phrase means "[i]nitiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." But CZMA nowhere defines or explains which federal activities should be viewed as "directly affecting" the coastal zone, and the alternative verbal formulations proposed by the parties, both of which are superficially plausible, find no support in the Act itself.

We turn therefore to the legislative history. A fairly detailed review is necessary, but that review persuades us that Congress did not intend OCS lease sales to fall within the ambit of CZMA section 307(c)(1).

In the CZMA bills first passed by the House and Senate, section 307(c)(1)'s consistency requirements extended only to federal activities "in" the coastal zone. The "directly affecting" standard appeared nowhere in section 307(c)(1)'s immediate antecedents. It was the House-Senate Conference Committee that replaced "in the coastal zone with "directly affecting the coastal zone." Both chambers then passed the conference bill without discussing or even mentioning the change.

At first sight, the Conference's adoption of "directly affecting" appears to be a surprising, unexplained, and subsequently unnoticed expansion in the scope of section 307(c)(1), going beyond what was required by either of the versions of section 307(c)(1) sent to conference. But a much more plausible explanation for the change is available.

The explanation lies in the two different definitions of the "coastal zone." The bill the Senate sent to the Conference defined the coastal zone to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." * * * By contrast, the House bill's definition of "coastal zone" included lands under federal jurisdiction; thus federal activities on those lands were to be fully subject to section 307(c)(1)'s consistency requirement. Under both bills, however, submerged lands on the OCS were entirely excluded from the coastal zone, and federal agency activities in those areas thus exempt from section 307(c)(1)'s consistency requirement.

Against this background, the Conference Committee's change in section 307(c)(1) has all the markings of a simple compromise. The Conference accepted the Senate's narrower definition of the "coastal zone," but then expanded section 307(c)(1) to cover activities on federal lands not "in" but nevertheless "directly affecting" the zone. By all appearances, the intent was to reach at least some activities conducted in those federal enclaves excluded from the Senate's definition of the "coastal zone."

* * *

Nonetheless, the literal language of section 307(c)(1), read without reference to its history, is sufficiently imprecise to leave open the possibility that some types of federal activities conducted on the OCS could fall within section 307(c)(1)'s ambit. We need not, however, decide whether any OCS activities other than oil and gas leasing might be covered by section 307(c)(1), because further investigation reveals that in any event Congress expressly intended to remove the control of OCS resources from CZMA's scope.

B

If section 307(c)(1) and its history standing alone are less than crystalline, the history of other sections of the original CZMA bills impel a narrow reading of that clause.

* * *

C

To recapitulate, the "directly affecting" language in section 307(c)(1) was, by all appearances, only a modest compromise, designed to offset in part the narrower definition of the coastal zone favored by the Senate and adopted by the Conference Committee. Section 307(c)(1)'s "directly affecting" language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act. Consistent with this view, the same Conference Committee that wrote the "directly affecting" language rejected two provisions in the House bill that would have required precisely what respondents seek here -- coordination of federally sponsored OCS activities with state coastal management and conservation programs. In light of the Conference Committee's further, systematic rejection of every other attempt to extend the reach of CZMA to the OCS, we are impelled to conclude that the 1972 Congress did not intend section 307(c)(1) to reach OCS lease sales.

IV

A

A broader reading of section 307(c)(1) is not compelled by the thrust of other CZMA provisions. First, it is clear beyond peradventure that Congress believed that CZMA's purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone.

* * *

Moreover, a careful examination of the structure of CZMA section 307 suggests that lease sales are a type of federal agency activity not intended to be covered by section 307(c)(1) at all.

Section 307(c) contains three coordinated parts. Paragraph (1) refers to activities "conduct[ed] or support[ed]" by a federal agency. Paragraph (2) covers "development projects" "undertake[n]" by a federal agency. Paragraph (3) deals with activities by private parties authorized by a federal agency's issuance of licenses and permits. The first two paragraphs thus reach activities in which the federal agency is itself the principal actor; the third reaches the federally approved activities of third parties. Plainly, Interior's OCS lease sales fall in the third category. Section 307(c)(1) should therefore be irrelevant to OCS lease sales, if only because drilling for oil or gas on the OCS is neither "conduct[ed]" nor "support[ed]" by a federal agency. Section 307(c)(3), not section 307(c)(1), is the more pertinent provision. Respondents' suggestion that the consistency review requirement of section 307(c)(3) is focused only on the private applicants for permits or licenses, not federal agencies, is squarely contradicted by abundant legislative history and the language of section 307(c)(3) itself.

CZMA section 307(c)(3) definitely does not require consistency review of OCS lease sales. As enacted in 1972, that section addressed the requirements to be imposed on federal licensees whose activities might affect the coastal zone. A federal agency may not issue a "license or permit" for any activity "affecting land or water uses in the coastal zone" without ascertaining that the activity is consistent with the state program or otherwise in the national interest. Each affected state with an approved management program must concur in the issuance of the license or permit; a state's refusal to do so may be overridden only if the Secretary of Commerce finds that the proposed activity is consistent with CZMA's objectives or otherwise in the interest of national security. Significantly, section 307(c)(3) contained no mention of consistency requirements in connection with the sale of a lease.

In 1976, Congress expressly addressed -- and preserved -- that omission. Specific House and Senate Committee proposals to add the word "lease" to section 307(c)(3) were rejected by the House and ultimately by the Congress as a whole. It is surely not for us to add to the statute what Congress twice decided to omit.

Instead of inserting the word "lease" in section 307(c)(3), the House-Senate Conference Committee renumbered the existing section 307(c)(3) as section 307(c)(3)(A), and added a second paragraph, section 307(c)(3)(B). Respondents apparently concede that of these two subparagraphs, only the latter is now relevant to oil and gas activities on the OCS. The new paragraph section 307(c)(3)(B), however, provides only that applicants for federal licenses or permits to explore, produce, or develop oil or gas on the OCS must first certify consistency with affected state plans. Again, there is no suggestion that a lease sale by Interior requires any review of consistency with state management plans.

B

If the distinction between a sale of a "lease" and the issuance of a permit to "explore," "produce," or "develop" oil or

gas seems excessively fine, it is a distinction that Congress has codified with great care. CZMA section 307(c)(3)(B) expressly refers to the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331 et seq., (OCSLA), so it is appropriate to turn to that Act for a clarification of the differences between a lease sale and the approval of a plan for "exploration," "development," or "production."

OCSLA was enacted in 1953 to authorize federal leasing of the OCS for oil and gas development. The Act was amended in 1978 to provide for the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. 1332(3) (1976 ed., Supp. III). As amended, OCSLA confirms that at least since 1978 the sale of a lease has been a distinct stage of the OCS administrative process, carefully separated from the issuance of a federal license or permit to explore, develop, or produce gas or oil on the OCS.

Before 1978, OCSLA did not define the terms "exploration," "development," or "production." But it did define a "mineral lease" to be "any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals. . . ." 43 U.S.C. 1331(c). The pre-1978 OCSLA did not specify what, if any, rights to explore, develop, or produce were transferred to the purchaser of a lease; the Act simply stated that a lease should "contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease." 43 U.S.C. 1337(b)(4). Thus before 1978 the sale by Interior of an OCS lease might well have engaged CZMA section 307(c)(3)(B) by including express or implied federal approval of a "plan for the exploration or development of, or production from" the leased tract.

The leases in dispute here, however, were sold in 1981. By then it was quite clear that a lease sale by Interior did not involve the submission or approval of "any plan for the exploration or development of, or production from" the leased tract. Under the amended OCSLA, the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development. Actual submission and approval or disapproval of such plans occurs separately and later.

Since 1978 there have been four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production. Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States. Formal review of consistency with state coastal management plans is expressly reserved for the last two stages.

(1) Preparation of a leasing program. The first stage of OCS planning is the creation of leasing program. Interior is required to prepare a 5-year schedule of proposed OCS lease sales. 43 U.S.C. 1344 (1976 ed., Supp. III). During the

preparation of that program Interior must solicit comments from interested federal agencies and the governors of affected states, and must respond in writing to all comments or requests received from the state governors. 43 U.S.C. 1344 (1976 ed., Supp. III). The proposed leasing program is then submitted to the President and Congress, together with comments received by the Secretary from the governor of the affected state. 43 U.S.C. 1344(d)(2) (1976 ed., Supp. III).

Plainly, prospective lease purchasers acquire no rights to explore, produce, or develop at this first stage of OCSLA planning, and consistency review provisions of CZMA section 307(c)(3)(B) are therefore not engaged. There is also no suggestion that CZMA section 307(c)(1) consistency requirements operate here, though we note that preparation and submission to Congress of the leasing program could readily be characterized as "initiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence."

(2) Lease sales. The second stage of OCS planning -- the stage in dispute here -- involves the solicitation of bids and the issuance of offshore leases. 43 U.S.C. 1337(a) (1976 ed., Supp. III). Requirements of the National Environmental Protection Act and the Endangered Species Act must be met first. The governor of any affected state is given a formal opportunity to submit recommendations regarding the "size, timing, or location" of a proposed lease sale. 43 U.S.C. 1345(a) (1976 ed., Supp. III). Interior is required to accept these recommendations if it determines they strike a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. 1345(c) (1976 ed., Supp. III). Local governments are also permitted to submit recommendations, and the Secretary "may" accept these. 43 U.S.C. 1345(a), (c) (1976 ed., Supp. III). The Secretary may then proceed with the actual lease sale. Lease purchasers acquire the right to conduct only limited "preliminary" activities on the OCS -- geophysical and other surveys that do not involve seabed penetrations greater than 300 feet and that do not result in any significant environmental impacts. 30 CFR 250.34-1 (1982).

Again, there is no suggestion that these activities in themselves "directly affect" the coastal zone. But by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production that might trigger CZMA section 307(c)(3)(B); the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

3) Exploration. The third stage of OCS planning involves review of more extensive exploration plans submitted to Interior by lessees. 43 U.S.C. 1340 (1976 ed., Supp. III). Exploration may not proceed until an exploration plan has been approved. A lessee's plan must include a certification that the proposed activities comply with any applicable state management program developed under CZMA. OCSLA expressly provides for federal disapproval of a plan that is not consistent with an applicable state management plan unless the Secretary of Commerce finds that

the plan is consistent with CZMA goals or in the interest of national security. 43 U.S.C. 1304(c)(2) (1976 ed., Supp. III). The plan must also be disapproved if it would "probably cause serious harm or damage ... to the marine, coastal, or human environment...." 43 U.S.C. 1334(a)(2)(A)(i), 1340(c)(1) (1976 ed., Supp. III). If a plan is disapproved for the latter reason, the Secretary may "cancel such lease and the lessee shall be entitled to compensation...." 43 U.S.C. 1340(c)(1) (1976 ed., Supp. III).

There is, of course, no question that CZMA consistency review requirements operate here. CZMA section 307(c)(3)(B) expressly applies, and as noted, OCSLA itself refers to the applicable CZMA provision.

(4) Development and production. The fourth and final stage is development and production. 43 U.S.C. 1351 (1976 ed., Supp. III). The lessee must submit another plan to Interior. The Secretary must forward the plan to the governor of any affected state and, on request, to the local governments of affected states, for comment and review. 43 U.S.C. 1345(a), 1351(a)(3) (1976 ed., Supp. III). Again, the governor's recommendations must be accepted, and the local governments' may be accepted, if they strike a reasonable balance between local and national interests. Reasons for accepting or rejecting a governor's recommendations must be communicated in writing to the governor. 43 U.S.C. 1345(c) (1976 ed., Supp. III). In addition, the development and production plan must be consistent with the applicable state coastal management program. The State can veto the plan as "inconsistent," and the veto can be overridden only by the Secretary of Commerce. 43 U.S.C. 1351(d) (1976 ed., Supp. III). A plan may also be disapproved if it would "probably cause serious harm or damage . . . to the marine, coastal or human environments." 43 U.S.C. 1351(h)(1)(D)(i) (1976 ed., Supp. III). If a plan is disapproved for the latter reason, the lease may again be cancelled and the lessee is entitled to compensation. 43 U.S.C. 1351(h)(2)(C) (1976 ed., Supp. III).

Once again, the applicability of CZMA to this fourth stage of OCS planning is not in doubt. CZMA section 307(c)(3)(B) applies by its own terms, and is also expressly invoked by OCSLA.

Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OSC lease, standing alone, entails no right to explore, develop, or produce oil and gas resources on the OCS. The first two stages are not subject to consistency review; instead, input from State governors and local governments is solicited by the Secretary of Interior. The last two stages invite further input for governors or local governments, but also require formal consistency review. States with approved CZMA plans retain considerable authority to veto inconsistent exploration or development and production plans put forward in those latter stages. The stated reason for this four part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.

Having examined the coordinated provisions of CZMA section 307(c)(3) and OCSLA we return to CZMA section 307(c)(1).

As we have noted, the logical paragraph to examine in connection with a lease sale is not 307(c)(1), but 307(c)(3). Nevertheless, even if OCS activity "conduct[ed]" or "support[ed]" by a federal agency, lease sales can no longer aptly be characterized as "directly affecting" the coastal zone. Since 1978 the sale of a lease grants the lessee the right to conduct only very limited, "preliminary activities" on the OCS. It does not authorize full scale exploration, development, or production. Those activities may not begin until separate federal approval has been obtained, and approval may be denied on several grounds. If approval is denied, the lease may then be cancelled, with or without the payment of compensation to the lessee. In these circumstances, the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed "direct."

It is argued, nonetheless, that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable. On the other side, it is argued that consistency review at the lease sale stage is at best inefficient, and at worst impossible: Leases are sold before it is certain if, where, or how exploration will actually occur.

The choice between these two policy arguments is not ours to make; it has already been made by Congress. In the 1978 OCSLA amendments Congress decided that the better course is to postpone consistency review until the two later stages of OCS planning, and to rely on less formal input from State governors and local governments in the two earlier ones. It is not for us to negate the lengthy, detailed, and coordinated provisions of CZMA section 307(c)(3)(B), and OCSLA sections 1344-1346 and 1351, by a superficially plausible but ultimately unsupportable construction of two words in CZMA section 307(c)(1).

Collaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts. In view of the substantial consistency requirements imposed at the exploration, development, and production stages of OCS planning, the Department of the Interior, as well as private bidders on OCS leases, might be well advised to ensure in advance that anticipated OCS operations can be conducted harmoniously with state coastal management programs. But our review of the history of CZMA section 307(c)(1), and the coordinated structures of the amended CZMA and OCSLA, persuades us that Congress did not intend section 307(c)(1) to mandate consistency review at the lease sale stage.

Accordingly, the decision of the Court of Appeals for the Ninth Circuit is reversed insofar as it requires petitioners to conduct consistency review pursuant to CZMA section 307(c)(1) before proceeding with Lease Sale No. 53.

It is so ordered.

NOTES

1. Secretary of Interior v. California was a 5-4 decision, with a strong dissent refuting each point of the majority's argument. States are having a difficult time applying the decision to determine which federal activities are still subject to review. What is the holding? What is dicta? Proposed revisions to NOAA's regulations limit changes simply to excluding OCS oil and gas lease sales from the federal consistency requirements of section 307(c)(1) of the CZMA.

2. Legislation that would effectively overrule Secretary of Interior v. California was introduced in both houses of Congress, but has not yet passed. Congressional reauthorization of the CZMA is scheduled for 1985, and the consistency issue is likely to be revisited at that time.

KEAN v. WATT
13 E.L.R. 20618

Civ. No. 82-2420 (D.N.J. 1982)

* * *

Two substantive issues remain to be resolved:

First, when the Secretary of the Interior determines under section 307(c)(1) of the Coastal Zone Management Act whether a proposed lease sale on the Outer Continental Shelf directly affects a state's coastal zone should he consider only the effects of the preleasing activities, or is he required also to consider the likely effects upon the coastal zone of exploration, development and production activities which may flow from any leases which are granted?

Second, if the Secretary is required to consider the likely effects of exploration, development and production activities flowing from any leases, does the potential destruction of the tilefish and other fish habitats on the Outer Continental Shelf, the potential interference with fishing nets and lines on the Outer Continental Shelf, and the consequent financial injury inflicted on commercial activities conducted within the coastal zone directly affect New Jersey's coastal zone within the meaning of Section 307(c)(1)?

* * *

The only likely environmental effects of preleasing activities is the destruction of the forces required to produce the vast quantities of paper generated by such activities. It is no answer to say that the state will be protected by the lessors' consistency certification at various stages of the program. The states are entitled under the statute to both forms of protection -- the Secretary's review and determination of the consistency of the entire program under Section 307(c)(1) and the lessors' certification of consistency under Section 307(c)(3)(B) at the various stages of the program as it progresses.

* * *

E. Economic Effects of Outer Continental Shelf Leases:

There are two kind of effects upon which New Jersey relies to support its contention that the lease of the 23 tracts at issue would be inconsistent with its Coastal Zone Management Program. The principal effects upon which it relies are economic in nature and do not have a physical impact upon the natural order within the coastal zone. The tilefish habitat is in the two canyons, far beyond New Jersey's coastal zone. Similarly the areas in which fishing might be interfered with are outside the coastal zone. The fishing industry which would be affected by loss of the tilefish and interference with nets is headquartered within the coastal zone. New Jersey argues that actions affecting that industry are subject to the consistency requirements of Section 307(c)(1).

The other kind of effects of the leasing upon which New Jersey relies to establish inconsistency to take place in the coastal waters. Relying on the affidavit of Bruce L. Freeman, the State noted that summer flounder, black sea bass and scup migrate in summer periods from the Outer Continental Shelf area to waters within the coastal zone. According to the State, these fish are not denizens just of the seven tracts which the State sought to remove from the leasing program or the 16 tracts where special lease stipulations were sought. Rather, they inhabit the entire inshore edge of the warm bank of water at the upper edge of the Continental Shelf. The Freeman affidavit conceded "It is not presently known what direct biological impact the drilling operation will have upon these species." Thus the data developed to date would hardly support a finding of inconsistency based on the effect of the leasing on summer flounder, black sea bass and scup.

Thus the only significant effect upon which the State relies to establish inconsistency and which would be felt within the New Jersey coastal zone is the financial impact which a destruction of Outer Continental Shelf fish and impediments to fishing in the Outer Continental Shelf would have upon New Jersey's fishing industry. I conclude that this is not the kind of injury to which the Coastal Zone Management Act is directed.

Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. 1456(c)(1), the provision of the Act upon which New Jersey here relies, states that:

"Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved State management programs."

Section 304(a) and (b) of the Coastal Zone Management Act, 16 U.S.C. 1453(a) and (b) limit the "coastal zone" to the "coastal waters within the territorial jurisdiction of the United States," i.e., for New Jersey those waters within three miles of the New Jersey coast. See 15 CFR 920.2(b), part of the interpretative regulations published by the United States Department of Commerce to implement the Coastal Zone Management Act: "The [coastal] zone extends . . . seawards to the three-mile limit of the U.S. territorial sea." See also N.J.A.C. 7:7E-4.3(a) defining the "ocean" segment of the New Jersey coastal zone as extending to "three nautical miles from the shoreline." In expressing concern as to a fishery more than 60 miles offshore, New Jersey does not allege any physical impact on its coastal zone other than the possible effect (as yet not established) upon the summer flounder, black sea bass and scup.

It would be in clear conflict with the Federal Government's exercise of its jurisdiction over the Outer Continental Shelf to extend the reach of the State's Coastal Management Program to actions and effects felt exclusively in the Outer Continental Shelf area. I need not go into the question whether, as the Government contends, the subject of the protection of the tilefish and other fish which the State seeks to protect is preempted by the Fisheries Conservation and Management Act of 1976. 16 U.S.C. 1801, et seq.

A reading of the Act suggests most strongly that the protection which it is designed to afford is protection of the coastal zone's natural resources such as wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs and fish and wildlife and their habitat within the coastal zone, e.g., 16 U.S.C. 1453(a). There are, of course, numerous references to the fishing industry and other commercial ventures in the Act. It is clear that these references are made in two contexts. First, these ventures are often dependent upon the success of preserving the natural resources of the coastal zone. Second, these ventures, if not properly conducted, may themselves pose a threat to the natural resources of the coastal zone. There is nothing in the Act that suggests to me that it is concerned with the economic health of a particular industry located within the coastal zone except as its economic health may be affected by management of the physical resources of the coastal zone itself.

New Jersey and the amici supporting New Jersey's position refer to certain isolated statements constituting part of the legislative history of the Coastal Zone Management Act to support their contention that the economic impact within the coastal zone should be considered in a Section 307(c)(1) determination, even

though no natural conditions in the coastal zone are affected at all. The legislative history of the 1980 reauthorization of the Coastal Zone Management Improvement Act of 1980, Public Law 96-464, 94 Stat. 2060 (1980) includes a House Report, HR Rep. No. 96-1012, 96 Congress, Second Session 34-35 (1980). There the Committee spoke in terms of a requirement of a consistency determination where a program had an "economic, geographical or social" relationship to a state coastal program. If this was intended to refer to such a relationship which did not arise out of an impact on the coastal environment, it is inconsistent with the sense of the Act itself and with the sense of other legislative history. I do not think it is controlling.

The consequence of adopting New Jersey's construction of the Act would be an extraordinary extension of the Act's reach. If each Federal action affecting an industry conducted within the coastal zone were to be subjected to a consistency determination and had to be accomplished in a way which is, to the maximum extent practicable, consistent with the state management programs, all manner of Federal actions, not just those on the Outer Continental Shelf, would be subjected to the Act's rather severe inhibitions on Federal activities. That cannot have been the intent of Congress, and I conclude that a state cannot cite an adverse effect upon a coastal industry as an inconsistency with its coastal management program unless the effect arises from some interference with the natural order within the coastal zone.

To the extent that a threatened injury to the natural environment is totally outside the coastal zone, New Jersey's objections must be made not through the mechanism of the Coastal Zone Management Act but through the procedures established by Section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1345(a).

As described earlier in this opinion, under Section 19(a) of the Outer Continental Shelf Lands Act, the Governor of a state may submit recommendations to the Secretary regarding the size, timing or location of a proposed lease sale.

Section 19(c) provides that: "[t]he Secretary shall accept recommendations of the Governor . . . if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state." This is a much broader inquiry than is provided in the Coastal Zone Management Act. It is not enough for the Secretary to consider effects upon the natural order and to the economic well-being of persons within and without the coastal zone. However, the weight to be given to the state and national interest is very different under the two acts. Under the Coastal Zone Management Act, the state interests are given great weight, and Federal officials must conduct their activities directly affecting the coastal zone to the maximum extent practicable consistently with state management programs. Under the Outer Continental Shelf Lands Act, on the other hand, the Federal authorities are given great weight. The Secretary is given the authority to balance the Federal and state interest, and under Section 19(d) of the Act, his determination in this regard shall be final and shall not be the basis for invalidation of a

proposed lease sale in any suit, unless found to be arbitrary and capricious.

Section 19 will be available to the Governor of New Jersey prior to the lease sales scheduled for April 1983. I cannot anticipate whether additional data will be available to him before he makes his recommendations. Nor can I anticipate whether the response of the Department of the Interior will be the same as it was with respect to recommendations addressed to Lease Sale No 59 and Resale No. 2. That will have to abide the event.

F. Relief to be Granted

Summary judgment will be entered as follows:

* * *

Judgment will be entered declaring that activities of the Federal agencies outside of New Jersey's coastal zone which affect commercial activities within the State's coastal zone but which do not affect the natural environment within such coastal zone do not directly affect the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act.

* * *

No costs will be allowed any party.

CAPE MAY GREENE, INC. v. WARREN
698 F.2d 179 (3d 1983)

WEIS, Circuit Judge.

Finding that circumstances warranted an exception to its general prohibition against floodplain development, New Jersey granted permission for construction of dwelling units in a seaside community. The federal Environmental Protection Agency later agreed to grant funds for the construction of an indispensable sewage treatment plant in the area, but only on the condition that no hookups be permitted to the proposed residences. In view of the record in this case and because Congress has encouraged state and local regulation of coastal areas, we conclude that EPA acted arbitrarily in imposing the hookup restriction in defiance of the state and local action. Accordingly, we vacate the judgment entered in favor of EPA and remand for further proceedings.

Plaintiff Cape May Greene, Inc. sought injunctive and declaratory relief against the restrictive condition, but the district court denied relief and entered summary judgment against plaintiff. Other claims against non-federal defendants and cross-claims were ultimately terminated, and plaintiff appeals.

* * *

In 1979, the plaintiff developer applied to the New Jersey Department of Environmental Protection for a permit to construct 244 residential units in tract A. The state agency reviewed the developer's proposal in accordance with the Coastal Area Facility Review Act, N.J. STAT. ANN. sections 13.19-1 TO -21 (West 1979 & Supp. 1982). That Act, which is the New Jersey management plan for regulation of the coastal area, had been approved by the federal government pursuant to the Coastal Zone Management Act of 1972, 16 U.S.C. 1451-1464 (1976) & Supp. IV 1980). The New Jersey agency reviewed such factors as flood hazard possibilities, air and water quality, traffic volume, road access, and the effect on environmentally sensitive areas. In 1980, a permit was approved, conditioned on the availability of sewage hookups to the housing units.

As the New Jersey agency was aware, the developer expected that a proposed regional sewage disposal plant would service the new housing. The treatment plant had been under consideration for some years, but the federal EPA had indicated it might restrict sewer connections to the plant.

The existing waste water treatment plant is owned and operated by the City of Cape May. Constructed in 1958, it has a capacity of 3.0 m.g.d. The plant is unsatisfactory because of the high level of pollutants it discharges into Delaware Bay. The need to improve the plant's efficiency became apparent in the summer of 1975 when the beaches in this resort area had to be closed because of pollution. In the following year, the New Jersey Department of Environmental Protection imposed a ban on any further hookups to the plant. The ban was lifted in November 1978 after plans to rehabilitate the facility were undertaken.

The Cape May County Municipal Utilities Authority proposed to construct a new, more efficient and slightly larger (3.2 m.g.d.) system on the site of the existing plant and applied to EPA for a matching funds grant. EPA is authorized to grant funds for the construction of sewage facilities under the Water Pollution Control (Clean Water) Act, 33 U.S.C. 1251-1376 (1976 & Supp. IV 1980).

In October 1978, EPA informed the Authority that it would fund a disposal plant whose capacity could service the existing population and projected growth in the area, but not any development within the floodplain or environmentally sensitive areas of the Cape May region.

* * *

After extensive consultations with the affected municipalities, the Authority submitted an amendment to the disposal plant plan in January 1980 and supplemented it in April of that year. In brief, the Authority's proposal excluded sewer hookups in environmentally sensitive areas, such as beaches, dune complexes, intermittent stream corridors, bogs, and fresh water wetlands. These areas had already been designated by the state coastal management plan as prohibited for development. Although, with the exception of wetlands, the state plan applied only to housing projects consisting of 25 or more units, the Authority's

proposal would extend the ban on hookups to individual lots as well.

In addition, the prohibition against hookups would be extended to critical wetland and upland habitat areas, consistent with local plans and the state coastal management program. The net result would be that any new construction in the region would be forced to take place within or adjacent to areas that were previously developed and already had available the infrastructure for transmission of waste water to the disposal plant. With respect to tracts A and B, the Authority pointed out that the value of the storm, sanitary and water service infrastructure in place was approximately \$1,423,000. Moreover, both of these tracts had been identified as development areas in the Cape May County comprehensive plan and the state's Coastal Zone Management Plan.

* * *

In a published report of its Cape May environmental review, EPA stated it would take steps to designate the critical and floodplain areas as unsuitable for septic tanks. It also stated, "EPA will deny permits for any package treatment plant that is proposed to serve development that is delineated as 'nonsewerable' in the approved 201 facilities plan." Thus, the agency announced its intention to ban, not only sewer hookups, but any other means of waste water disposal as well.

The developer then asked the district court to declare the restrictive condition void as beyond EPA's authority, and to prohibit the Authority from agreeing to the grant condition. The district court, however, granted summary judgment in favor of EPA, finding the grant condition to be reasonable and in accordance with the agency's authority. The court read Executive Order 11,988, 42 Fed. Reg. 26951, reprinted in 42 U.S.C. 4321 app. at 320 (Supp. IV 1980), as exhorting EPA to minimize floodplain development as far as possible and to supply the necessary authorization for the grant condition.

* * *

II

We turn to the merits of the appeal. The developer contends that EPA's actions are inconsistent with the Coastal Zone Management Act of 1972, 16 U.S.C. 1451-1464 (1976 & Supp. IV 1980), and the National Flood Insurance Act of 1968, 42 U.S.C. 4001-4128 (1976 & Supp. IV 1980). Moreover, EPA is said to have exceeded its authority under both the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370 (1976 & Supp. III 1980), and Executive Order 11,988. The developer concludes by arguing that EPA did not correctly appraise the topography of the land in determining that tracts A and B would serve as water storage and wave dissipation areas in the event of flooding.

EPA asserts that the grant condition was reasonable and that its authority extends to deterrence of development in floodplains. It argues that its action is within the scope of

Executive Order 11,988, and a federal environmental standard more demanding than one adopted by a state in its management plan may be enforced.

The parties' arguments are wide ranging, and it is helpful to narrow the issues to those presented in the case. There is no dispute about environmentally sensitive sites such as sand dunes, bogs, marshes, wetlands, or wildlife habitats. All areas of the discription in the Cape May region are already protected by the local and state land use plans, and no objection is raised to incorporating sewer restrictions for these places into the grant conditions. The controversy is limited to the restriction as applied to floodplain locations whose sole function is said to be storage of flood waters and wave energy dissipation. No plant, animal or marine life, or other ecological considerations, are advanced as additional values which must be considered with respect to tracts A and B.

In addition, the need to improve the efficiency of the existing sewage disposal plant has existed for years and that circumstance is unrelated to the floodplain. The current pollution problem must be alleviated, even apart from whether development takes place in the parcels at issue.

Narrowing the matter even more are the facts that state and local plans have previously found that disputed area suitable for development, and that sewers and water lines are adjacent to the tracts and available for service. Further, local building restrictions mandate compliance with federal flood protection insurance standards. In short, the local and state governments would allow some regulated development in tracts A and B. EPA would allow none because its prohibition against sewer hookups is as effective a ban against residential building as can be devised, particularly when considered in conjunction with its announced policy that no septic tanks or package treatment systems will be allowed in the area.

EPA does not contend that the resulting land use control is simply an unavoidable by-product of the grant condition. Rather, it has openly stated that its aim is to prohibit housing the floodplain. Nor does EPA argue that the restriction is needed to insure the efficiency of the sewage plant. Thus, the agency has reversed its earlier view that land use controls must come from the state and local governments, and has asserted authority that it previously disclaimed.

It is also clear that EPA is using its power to regulate grants under the Clean Water Act to accomplish matters not included in that statute. Although it also cites the National Environmental Policy Act, the agency relies primarily on the Executive Order to support its action. Essentially, the conflict here centers on federal agency action not explicitly required by statute and contrary to state and local legislation in a field where congressional intervention has been hesitant and tentative.

Land use planning has traditionally been considered a matter of local concern and Congress has not been hospitable to demands that it preempt the field. See Biderman v. Morton, 497 F.2d 1141, 1144 [6 ERC 1639] (2d Cir. 1974). (In enacting the Fire Island National Seashore Act, 16 U.S.C. 459(e) (1976 & Supp. V 1981), "Congress carefully avoided interfering with the power of

the municipalities on the Seashore to enact zoning ordinances or grant zoning variances.") In 1972, Congress did tentatively touch a toe in the water when the Coastal Zone Management Act was passed. Although the statute is designed to incorporate national environmental policies into land use decisions, the approach is one of encouragement, rather than mandate.

The legislative history of the Coastal Zone Management Act is emphatic in stating this guideline:

"[The Act] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. *** There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones."

Sen. Rep. No. 753, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4776.

State participation in the program is voluntary. Funding is offered for the preparation and implementation of state plans which meet federal approval. These plans must incorporate designated policy interests, but are administered by the states and it is they who make the development and local use decisions.

New Jersey's plan was submitted to and approved by the federal government. See 45 Fed. Reg. 71640 (Oct. 29, 1980); 43 Fed. Reg. 51829 (Nov. 7, 1978). The state, therefore, has accepted the congressional invitation to regulate coastal areas with due regard for national policies. The management plan, as defined by the statute, is to set forth "objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. 1453(g).^{1/} The Act provides that it shall not supersede, modify or repeal existing laws, id. 1456(e)(2), but also states that "[e]ach federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." Id. 1456(c)(1).

1. (10) The 1980 amendments to the Coastal Zone Management Act state that the management plan should include provisions for the protection of floodplains and minimizing the loss of life or property caused by "improper development in flood-prone areas." 16 U.S.C. 1452(2)(A), (B). The House Committee Report emphasized that this clarification of national policy did not represent a new program requirement. *** The approved New Jersey plan has incorporated the protection of floodplain areas as one of its policies for coastal management.

The role assigned to EPA by the Clean Water Act, 33 U.S.C. 1251-1376, is to reduce the discharge of pollutants into the nation's waterways and coastal areas. In carrying out that task, EPA is authorized to grant funds for the construction of sewage treatment plants. In addition to this direct and primary obligation, EPA asserts a secondary or indirect role, along with other federal agencies, in the protection of the environment under the National Environmental Policy Act, 42 U.S.C. 4321-4370, and Executive Order 11,988.

The purpose of the National Environmental Policy Act is to "provid[e] a statement of national environmental goals, policies, and procedures," and to impose on federal agencies a responsibility to consider the consequences of their actions on the environment. Sen. Rep. No. 296, 91st Cong., 1st Sess. 14. All agencies of the federal government are required to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." 42 U.S.C. 4332(2)(B) (emphasis added).

The Act is not a mandate to pursue environmental policies to the exclusion of all others, but is rather a congressional "recording of priorities so that environmental costs and benefits will assume their proper place along with other considerations." Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1112, [2 ERC 1779] (D.C. Cir. 1971). An agency need not, "in selecting a course of action, . . . elevate environmental concerns over other appropriate considerations." Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, [13 ERC 2157] (1980). In short, the National Environmental Policy Act requires a balancing between environmental costs and economic and technical benefits. Calvert Cliffs' Coordinating Committee, Inc., v. U.S. Atomic Energy Commission, 449 F.2d at 1113. See also Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 298, [4 ERC 1721] (8th Cir. 1972), cert. denied, 412 U.S. 931 [5 ERC 1416] (1973).

The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute, see Gage v. Atomic Energy Commission, 1973); Kitchen v. Federal Communications Commission, 464 F.2d 801 [4 ERC 1252] (D.C. Cir. 1972), and the Supreme Court has characterized "its mandate to the agencies [as] essentially procedural." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 [11 ERC 1439] (1978). "Even the most enthusiastic commentators of the Act agree that NEPA does not confer unlimited power on the agencies, does not delegate vast areas of congressional authority, and does not initiate a free-for-all among agencies for new programs and domains." F.R. Anderson, Jr., "The National Environmental Policy Act" in Federal Environmental Law 291 (Environmental Institute, E. Dolgire & T. Gilbert eds., West Publishing Co. 1974).

Thus, the National Environmental Policy Act provides little, if any, support for an agency taking substantive action beyond that set forth in its enabling act. EPA's reliance on the National Environmental Policy Act is general. Because it has authority under the Clean Water Act to condition grants and NEPA mandates a consideration of environmental effects, EPA argues that it can condition funding for sewage plants on terms designed to avert environmental consequences that pose risks to human health and safety. The agency does not contend, indeed it could not in light of the statute's "essentially procedural" nature, that the Act dictates any particular substantive policy authorizing EPA to impose land use controls or ban floodplain development.

The other ground on which EPA relies is Executive Order 11,988, issued on May 25, 1977, in part "to avoid the direct or indirect support of floodplain development whenever there is a practicable alternative." 42 Fed. Reg. 26951. The order was based on the National Environmental Policy Act, the National Flood Insurance Act of 1968, 42 U.S.C. 4001-4128, and the Flood Disaster Act of 1973, Pub. L. 95-128, 91 Stat. 1144, 1145, codified at 42 U.S.C. 4003, 4106 (Supp. IV 1980). The order was prompted to some extent by the unsatisfactory federal experience with losses under the Flood Insurance Programs. In addition, federal agencies had not properly observed flood protection precautions for their own installations despite the fact that these measures had been required for state and nongovernmental structures.

Executive Order 11,988 was designed to apply to federal facilities, as well as those constructed for other entities through the use of federal funds. Essentially, the Order requires federal agencies to avoid taking action in a floodplain wherever there is a practicable alternative and to minimize the harm to floodplains that might be caused by any agency action.

Two aspects of this case touch on floodplain policy. The sewage plant itself is to be located in the floodplain for reasons of economy. The existing plant is there and some of its structures are to be integrated into the new facility. Largely for that reason, EPA concluded that other sites would not be practical alternatives and decided that an exception to its ban on action within the floodplain was appropriate.

The second aspect is only peripheral to the plant itself and that is the prohibition on hookups to the proposed residences within the floodplain. EPA's ban was not directed at the operator of the sewage plant or its appurtenances, but rather to customers who would be serviced by the plant -- people who are not directly subject to EPA authority. The agency persisted in its position, even though the state plan required developers to comply with federal flood insurance protection standards, thus reducing the government's loss exposure, one of the principal objects of the Executive Order. Not satisfied with the state's limitations, however, EPA went further and adopted a zero growth approach, the ultimate in minimization. Congress has never taken such a drastic step in regulating overall floodplain development.

When Congress did act with respect to specific regions, the coastal barrier areas, it made its position absolutely clear.^{2/}

We do not meet the issue in this case of whether EPA lacked all authority to take the action it did, but decide the case on a narrower ground.^{3/} Our brief review of the National Environmental Policy Act and the Executive Order authority relied on by EPA is but a backdrop to our consideration of whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A)(1976).

The Supreme Court has stated that "[t]o make this finding the court must consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 [2 ERC 1250] (1971). Yet, "the concept of 'arbitrary and capricious' review defies generalized application and demands instead, close attention to the nature of the particular problem faced by the agency." Natural Resources Defense Council, Inc. v. Securities Exchange Commission, 606 F.2d 1031, 1050 [13 ERC 1321] (D.C. Cir. 1979). Thus, the scope of judicial review necessarily admits of some flexibility and the stringency of our inquiry will depend on, and often vary according to, the variety of factors presented by a particular case.

2. (14) The Coastal Barriers Resource Act, Pub. L. No. 97-348, 96 Stat. 1653 (approved Oct. 18, 1982) establishes the coastal barrier resources system, consisting of bay barriers, tombolos, barrier spits, and barrier islands within specified areas of the Atlantic and Gulf coasts. Further federal assistance, with certain limited exceptions, for development within or access to those areas is banned. The Act also prohibits flood insurance for any new construction or substantial improvements of structures within the system after October 1, 1983. The stated purpose of the legislation is "to minimize the loss of human life, wasteful expenditure of federal revenues, and the damage to fish, wildlife, and other natural resources ... by restricting future federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers." Id. section 2(b). This statute demonstrates that when Congress intends to adopt a zero growth approach for an area by withdrawing all financial incentive to development, it does so expressly. Congress has never taken such an approach to floodplain development generally.

3. (15) In City of New Brunswick v. Borough of Milltown, 686 F.2d 120 (3d Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3321 (1982)(No. 82-662), we held that EPA has authority to withhold federal grant funds for a sewage plant because one of the municipalities to be serviced by the plant had not adopted a system of user's charges as required by the Clean Water Act. *** The EPA action there was based upon an express provision of the Clean Water Act. . . . Hence, unlike here, EPA's action was directly related to its primary obligation under the statute.

If an agency's action is clearly within its statutory authority, then the arbitrary and capricious standard focuses on the factual issues. When, however, there is some doubt about the agency's compliance with statutory constraints, that factor may throw a somewhat different light on the factual evaluation. As agency action moves toward the gray area at the outer limits of statutory authority, the arbitrary and capricious nature of the action may be more evident. For that reason, we have discussed the agency's asserted sources of power. Another shadow is cast when agency action, not clearly mandated by the agency's statute, begins to encroach on congressional policies expressed elsewhere.

We conclude that there are a number of factors which demonstrate that the EPA action was arbitrary. The most obvious is the agency's failure to give sufficient weight to the congressional admonition in the Coastal Zone Management Act that, to the "maximum extent practicable," federal actions are to be consistent with the state's management plan.

EPA contends that "the consistency requirement of the statute only contemplates that federal agencies will not support activities in the coastal zone which are prohibited by the state's plan." (Appellee's Brief at 31). In essence, EPA is arguing, not that its action is consistent, but that the consistency requirement does not apply to its action since rather than allowing prohibited development, it seeks to prohibit allowed development. EPA also points out that a request by the New Jersey Department of Environmental Protection for mediation of the dispute resulting from EPA's action was denied by the Secretary of Commerce. See 16 U.S.C. 1456(h).

The Secretary's decision to deny mediation and EPA's argument here both rest on a regulation promulgated by the National Oceanic and Atmospheric Administration, the federal agency charged with administering the Coastal Zone Management Act. That regulation reads:

"When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies)"

15 C.F.R. 930.39(d) (1982).

The regulation is contained in Subpart C of NOAA's regulations on "Federal Consistency with Approved Coastal Management Programs." Subpart C deals with "Consistency for Federal Activities." The regulations expressly provide that "[t]he term 'federal activity' does not include . . . the granting of Federal assistance to an applicant agency (see Subpart F of this part)." *Id.* 930.31(c).

It is Subpart F, which deals with "Consistency for Federal Assistance to State and Local Governments," that is pertinent to EPA's action here and that section contains no counterpart to the regulation cited by EPA. Subpart F states that "[n]otwithstanding State agency consistency for the proposed project, the Federal agency may deny assistance to the applicant agency." *Id.* 930.96(a). The regulations thus make a distinction

between "federal activity" and "federal assistance to a non-federal activity."

When federal assistance is provided for what is essentially a state or local activity, the congressional preference for having policies initiated at the state level must be respected. Consistency to the maximum extent practicable with the state's determination is at the heart of the statutory scheme of encouraging, but not directing, state management of the coastal areas. The congressionally mandated consistency requirement becomes even more compelling where, as here, the federal agency seeks to reach beyond the local activity it is funding and impose a federal standard on private activity traditionally subject only to state and local regulation. In short, the inconsistency of EPA's action with the state's plan is a factor to be considered in determining whether that action was arbitrary.

EPA should not have defied the state's decision to allow development in the limited areas of the floodplain at issue here. The same national interest in floodplains that EPA purports to uphold has been incorporated into the New Jersey coastal management plan. In compliance with the directive of the Coastal Zone Management Act that "[t]he management program provide [] for adequate consideration of the national interest involved in the siting of facilities," 42 U.S.C. 1455(c)(8), New Jersey adopted a policy that "[i]n general, coastal development is discouraged in flood-hazard areas." State of New Jersey Coastal Management Program -- Bay and Ocean Segment (FEIS), Part II, Chap. 4, Sec. 5.232(a) at 161 (effective September, 1978). That policy was based on a review of the Flood Disaster Protection Act, the National Flood Insurance Act and Executive Order 11,988 and a recognition that "the national interest in these areas is to avoid the long and short term adverse impacts associated with the occupancy and modification of floodplains." *Id.*, Chap. 6 at 190.

The developer's proposal for development of Tract A was approved as an exception to the general policy because all structures would be elevated one foot above the base flood level and would not increase flood damage potential by obstructing flood waters. Thus, the state had not acted irresponsibly.

In addition, the state decision to allow development in tract A was based to some extent on a local need to encourage building close to other developed areas, rather than at scattered sites away from the population center or near environmentally sensitive areas. In essence, this was simply "fill in" on a somewhat larger scale than EPA proposed. The difference between the EPA position and the state plan in this respect was one of degree. EPA wished to limit "fill in" to lots of 3.4 acres; the state plan looked to a larger area.

A related economic concern of the local municipality was its investment of over a million dollars in roads, sewers and water mains to the area. The plan to use the existing infrastructure is tied in with the local governments' aversion to scattered site development in areas where no such facilities had been constructed.

Under the EPA restrictions, houses may be built on lots that are at an elevation of more than 10 feet above mean sea level. These lots comprise 7.7 acres in tract A and 22 acres in tract B. The record reveals no efforts by EPA to have serious discussions about the concept of cluster zoning in the area, which would allow development but at the same time reduce the number of structures on land lower than 10 feet above sea level.

We note also that EPA's assertion that the tracts under scrutiny would provide flood water storage and wave energy dissipation have been sharply attacked and have little record support.

It is significant also that the compromise plan which the Authority submitted to the EPA provided for a tightening of local control. Although the provisions of the coastal management plan apply to development of 25 or more lots, the Authority proposed to extend the restrictions to individual lots. Thus, the building limitations which had previously been applicable only to large developments would be applied to all.

When passing the Coastal Zone Management Act, Congress was cognizant of the valuable contribution local governments can make to responsible management of the coastal areas.

"Local government does have continuing authority and responsibility in the coastal zone. *** Whenever local government has taken the initiative to prepare commercial plans and programs which fulfill the requirements of the Federal and coastal state zone management legislation, such local plans and programs should be allowed to continue to function under the state management program."

Sen. Rep. No. 753, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4776, 4779. The Authority's plan seems especially appropriate here in that it not only meets the requirements, but extends the reach, of the coastal management legislation.

After weighing all the factors, we are persuaded that EPA acted arbitrarily and contrary to law in refusing to accept the Authority's compromise. That proposal was fully in accord with the state's management plan and the Coastal Zone Management Act. Even if it be conceded that EPA had the power to enforce the land use restriction, a question we do not decide, the agency's action was in excess of that required under the circumstances.

We recognize the legitimate interest in limiting development of floodplains and that, under other circumstances, EPA's actions might be sustainable. But the circumstances here lead us to hold that the district court erred in entering judgment for the defendants.

NOTES

1. Florida is in the process of determining just how powerful a management tool the consistency requirement can be. Florida is challenging a federal fishery management plan that allows use of purse seines; Florida regulation is stricter than the federal plan and prohibits purse seining. See Florida v. Baldrige, Civ. No. TCA 83-7071-WS (filed March 4, 1983, N.D. Fl.). Florida has challenged offshore lease sales in both the Atlantic and Gulf as inconsistent with Florida's coastal plan. EPA ocean dumping site designations that threaten water quality and endanger coral reefs, as well as federal highway projects that will destroy wetlands and interfere with growth management planning have been the subjects of negotiations concerning federal consistency with the state coastal plan. Projects for the ocean incineration of hazardous wastes may also be attacked as inconsistent with the state's plan.

2. The term "directly affects" is not the only term limiting application of the consistency requirement to federal activities. What does "to the maximum extent practicable" mean? NOAA regulations currently define the phrase as follows:

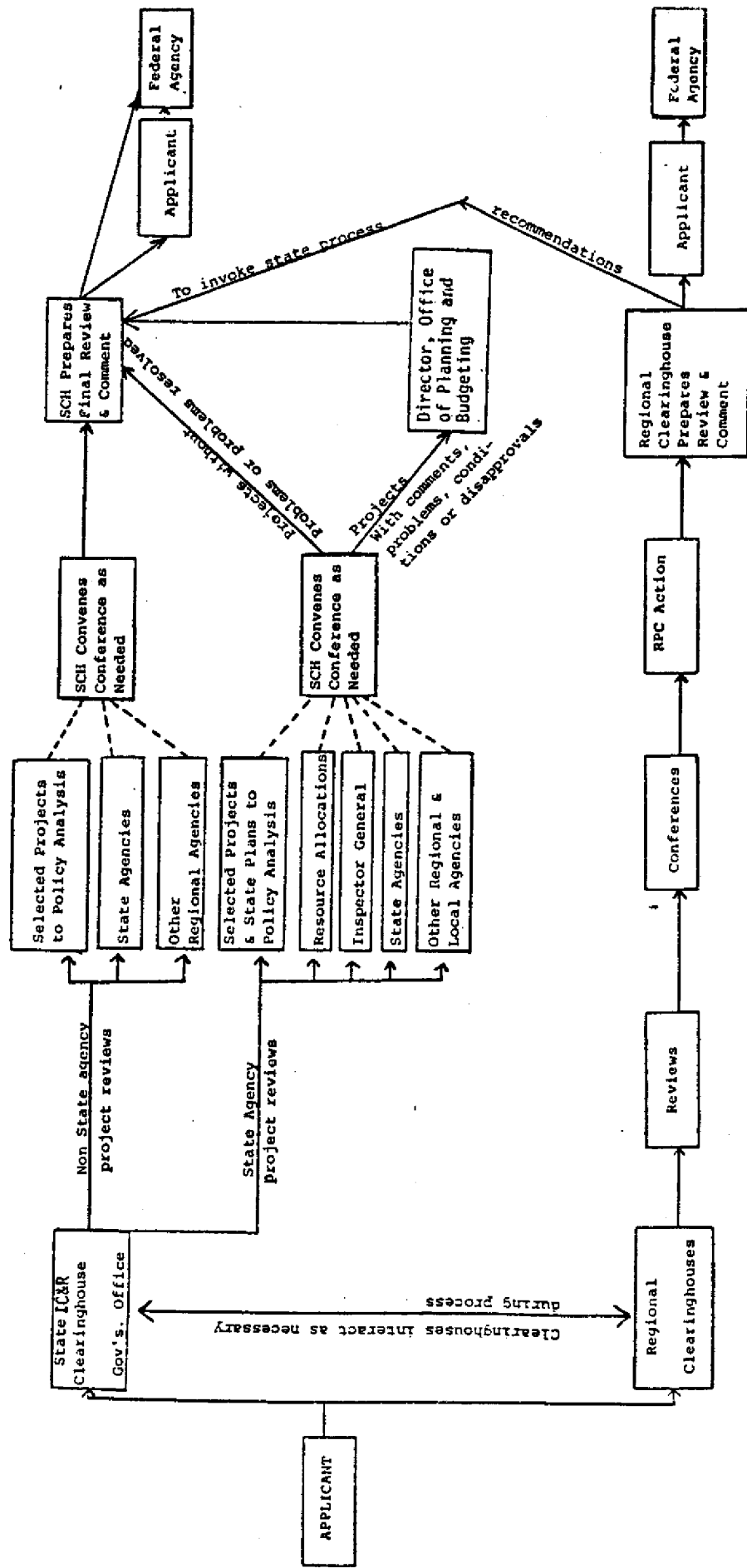
Section 930.32 Consistent to the maximum extent practicable.

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

3. Is there a "positive" obligation on federal agencies to support activities authorized under a state's coastal plan as well as a "negative" duty not to participate in activities that are inconsistent with the state plan? Although federal regulations attempt to preclude such an application of the consistency regulations, Cape May Greene could certainly be read as requiring "positive" federal consistency in relation to local land use decisions. See Blumm, Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency, 5 Colum. J. Envtl. L. 69 (1978).

4. Consistency determinations are difficult in Florida where the effect of an activity on 25 different statutes must be analyzed. The Governor's Office serves as a clearinghouse for consistency review. See the diagram below.

FLORIDA'S INTERGOVERNMENTAL COORDINATION & REVIEW PROCESS



5. Consider the effect the following section of the Florida Coastal Management Act has on state consistency determinations.

Fla. Stat. 380.23 Federal consistency.-

(1) When an activity requires a permit or license subject to federal consistency review, the issuance or renewal of a state license shall automatically constitute the state's concurrence that the licensed activity or use, as licensed, is consistent with the federally approved program. When an activity requires a permit or license subject to federal consistency review, the denial of a state license shall automatically constitute the state's finding that the proposed activity or use is not consistent with the state's federally approved program, unless the United States Secretary of Commerce determines that such activity or use is in the national interest as provided in the Federal Coastal Zone Management Act of 1972.

(2) Where federal licenses, permits, activities, and projects listed in subsection (3) are subject to federal consistency review and are seaward of the jurisdiction of the state, or there is no state agency with sole jurisdiction, the Department of Environmental Regulation shall be responsible for the consistency review and determination; however, the department shall not make a determination that the license, permit, activity, or project is consistent if any other state agency with significant analogous responsibility makes a determination of inconsistency. All decisions and determinations under this subsection shall be appealable to the Governor and Cabinet.

(3) Consistency review shall be limited to review of the following activities, uses, and projects to ensure that such activities and uses are conducted in accordance with the state's coastal management program:

(a) Federal development projects and activities of federal agencies which significantly affect coastal waters and the adjacent shorelands of the state.

(b) Federal assistance projects which significantly affect coastal waters and the adjacent shorelands of the state and which are reviewed as part of the review process developed pursuant to OMB Circular A-95.

(c) Federally licensed or permitted activities affecting land or water uses when such activities are in or seaward of the jurisdiction of local governments required to develop a coastal zone protection element as provided in s. 380.24 and when such activities involve:

1. Permits required under ss. 10 and 11 of the Rivers and Harbors Act of 1899, as amended.
2. Permits required under s. 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.
3. Permits required under ss. 201, 402, 403, 404, and 405 of the Federal Water Pollution Control Act of 1972, as amended, unless such permitting activities pursuant to such sections have been delegated to the state pursuant to said act.
4. Permits required under the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 33 U.S.C. ss. 1401,

1402, 1411-1421, and 1441-1444.

5. Permits for the construction of bridges and causeways in navigable waters required pursuant to 33 U.S.C. s. 401, as amended.

6. Permits relating to the transportation of hazardous substance materials or transportation and dumping which are issued pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. ss. 1801-1812, as amended, or 33 U.S.C. s. 419, as amended.

7. Permits and licenses required under 43 U.S.C. s. 717 for construction and operation of interstate gas pipelines and storage facilities.

8. Permits required under 15 U.S.C. s. 717, as amended, for construction and operation of facilities needed to import and export natural gas.

9. Permits and licenses required for the siting and construction of any new electrical power plants as defined in s. 403.503(7), as amended.

10. Permits and licenses required for drilling and mining on public lands.

11. Permits for areas leased under the OCS Lands Act, as amended, including leases and approvals under 43 U.S.C. s. 1331, as amended, of exploration, development, and production plans.

12. Permits for pipeline rights of way for oil and gas transmissions.

13. Permits and licenses required for deepwater ports under 33 U.S.C. s. 1503, as amended.

(4) The department shall by rule adopt procedures for the expeditious handling of emergency repairs to existing facilities for which consistency review is required pursuant to subsections (1), (2), and (3).

(5) In any coastal management program submitted to the appropriate federal agency for its approval pursuant to this act, the department shall specifically waive its right to determine the consistency with the coastal management program of all federally licensed or permitted activities not specifically listed in subsection (3).

(6) Agencies shall not review for federal consistency purposes an application for a federally licensed or permitted activity if the activity is vested, exempted, or excepted under its own regulatory authority.

(7) The department shall review the items listed in subsection (3) to determine if in certain circumstances such items would constitute minor permit activities. If the department determines that the list contains minor permit activities, it may by rule establish a program of general concurrence pursuant to federal regulation which shall allow similar minor activities, in the same geographic area, to proceed without prior department review for federal consistency.

(8) This section shall not apply to the review of federally licensed or permitted activities for which permit applications are filed with the appropriate federal agency prior to approval of the state coastal management program by the appropriate federal agency pursuant to 16 U.S.C. ss. 1451 et seq.

Section 6. FLORIDA'S COASTAL ZONE MANAGEMENT PLAN

The beginnings of Florida's interest in coastal management planning predate the federal CZMA by two years. In 1970 the legislature created the Coastal Coordinating Council which from 1970 to 1975 worked toward development of a coordinated coastal resource management program. The Council was abolished in 1975, and its duties were transferred first to the Department of Natural Resources and, in 1977, to the Department of Environmental Regulation.

The legislative basis for developing a coastal zone management plan (CZMP) was also in place at an early stage. The 1970 coastal construction setback line program and the 1972 Environmental Land and Water Management Act, FLA. STAT. 380.12, the State Comprehensive Planning Act, FLA. STAT. 23.0111, the Land Conservation Act, FLA. STAT. 259.01, and the Florida Water Resources Act, FLA. STAT. 373.012, went far towards establishing the necessary authority for developing an approvable CZMP. The shift of emphasis from the "environmental crisis" after 1972, lack of political support, and other problems plagued development of Florida's CZMP. The development of the current plan was authorized, however, by the Legislature in 1978 in what has been referred to as the "No New Nothing Act." In other words, although the Act did reflect a continuing commitment to coastal planning, the legislative concensus was that existing legislation provided an adequate basis for coastal planning and that the emphasis should be on coordination of state efforts.

FLORIDA STATUTES - COASTAL PLANNING AND MANAGEMENT

- 380.19 Department of Environmental Regulation.
- 380.20 Short title.
- 380.21 Legislative intent.
- 380.22 Lead agency authority and duties.
- 380.23 Federal consistency.
- 380.24 Local government participation.
- 380.25 Previous coastal zone atlases rejected.

380.19 Department of Environmental Regulations.-

(1) It is the intent of the Legislature that the environmental aspects of the coastal areas of this state have attracted a high percentage of permanent population and visitors and that this concentration of people and their requirements has had a serious impact on the natural surroundings and has become a threat to the health, safety, and general welfare of the citizens of this state. It is further determined that a coordinated effort of interested federal, state, and local agencies of

government is imperative to plan for and effect a solution to this threat, and that the creation of an advisory council will aid in accomplishing this purpose and in the implementation of s. 7, Art. II of the State Constitution, and s. 20.03(9).

* * *

(4) The duties of the [department] shall be:

(a) To employ a staff director and such other personnel as may be necessary to aid in carrying out the work of the [department];

(b) To conduct, direct, encourage, coordinate, and organize a continuous program of research into problems relating to the coastal zone;

(c) To review, upon request, all plans and activities pertinent to the coastal zone and to provide coordination in these activities among the various levels of government and areas of the state;

(d) To develop a comprehensive state plan for the protection, development, and zoning of the coastal zone, making maximum use of any federal funding for this purpose;

(e) To provide a clearing service for coastal zone matters by collecting, processing, and disseminating pertinent information relating thereto;

(f) To make use of pertinent data as may be secured from departments, boards, commissions, officials, agencies, and institutions, except such records or information as may be required by law to be confidential; and

(g) To provide such other services as any interested agency may request.

* * *

380.20 Short title.- Sections 380.21-380.25 may be cited as the "Florida Coastal Management Act of 1978."

380.21 Legislative intent.-

(1) The Legislature finds that:

(a) The coast is rich in a variety of natural, commercial, recreational, ecological, industrial, and aesthetic resources, including, but not limited to, energy facilities, as that term is defined in s. 304(5) of the Federal Coastal Zone Management Act of 1972, of immediate potential value to the present and future well-being of the residents of this state.

(b) It is in the state and national interest to protect, maintain, and develop these resources through coordinated management.

(c) State land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development.

(2) The Legislature therefore grants authorization for the Department of Environmental Regulation to compile a program based on existing statutes and existing rules and submit an application to the appropriate federal agency as a basis for receiving administrative funds under the Federal Coastal Zone Management Act of 1972. It is the further intent of the Legislature that

enactment of this legislation shall not amend existing statutes or provide additional regulatory authority to any governmental body except as otherwise provided by s. 380.23. The enactment of this legislation shall not in any other way affect any existing statutory or regulatory authority.

380.22 Lead agency authority and duties.-

(1) The Department of Environmental Regulation shall be the lead agency pursuant to 16 U.S.C. ss. 1451 et seq., and shall compile and submit to the appropriate federal agency an application to receive funds pursuant to s. 306 of the Federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. ss. 1451-1464). The application for federal approval of the state's program shall include program policies that only reference existing statutes and existing implementing administrative rules. In the event the application or the program submitted pursuant to this subsection is rejected by the appropriate federal agency because of failure of this act, the existing statutes, or the existing implementing administrative rules to comply with the requirements of the Federal Coastal Zone Management Act of 1972, as amended, no state coastal management program shall become effective without prior legislative approval. The coastal management application or program may be amended from time to time to include changes in statutes and rules adopted pursuant to statutory authority other than this act.

(2) The Department of Environmental Regulation shall also have authority to:

(a) Establish advisory councils with sufficient geographic balance to insure statewide representation.

(b) Coordinate central files and clearinghouse procedures for coastal resource data information and encourage the use of compatible information and standards.

(c) Provide to the extent practicable financial, technical, research, and legal assistance to effectuate the purposes of this act.

(d) Review rules of other affected agencies to determine consistency with the program and to report any inconsistencies to the Legislature.

(3) The Secretary of Environmental Regulation shall adopt by rule a specific formula for allocation of federal funds for the administration of the program.

380.25 Previous coastal zone atlases rejected.- The legislative draft of the coastal management program submitted to the Legislature by the department dated March 1, 1978, and the prepared coastal zone atlases are expressly rejected as the state's coastal management program. The department shall not divide areas of the state into vital, conservation, and development areas.

Although many states enacted special legislation to create a CZMP, Florida legislative authorization required a plan based on existing statutes. The process for developing such a plan is called "networking." The approach has advantages and disadvantages. Networking lacks the advantage of having specialized legislation dealing with the unique problems of the coastal zone. Since all of the state could reasonably be classified a coastal zone, this may not be as much of a problem in Florida as in other states using networking. A major advantage of networking may prove to be that networked plans have a better chance of survival after federal funding dwindles. Special coastal zone management agencies or departments may be institutionalized by law in a state, but may be extremely ineffective when loss of federal funding causes staff and budget cuts.

The following chart sets out the statutory authorities that have been networked to form Florida's CZMP and the agencies involved:

STATUTE	LEGAL AUTHORITY DESCRIPTION	ADMINISTERING AGENCY
1. Chapter 23, F.S.	State Comprehensive Planning, Power Plant Site Plans	OPB, DCA
2. Chapter 119, F.S.	Public Records	DOS
3. Chapter 120, F.S.	Administrative Procedures	APC, DOAH
4. Chapter 160, F.S.	Regional Planning Councils	RPC
5. Chapter 161, F.S.	Coastal Construction	DBR
6. Chapter 252, F.S.	Disaster Preparedness	DCA
7. Chapter 253, F.S.	Sale, Lease, or Other Conveyance and Dredging and Filling in Submerged Lands and Wetlands	TIITF, DNR, DER
8. Chapter 258, F.S.	Outdoor Recreation and Conservation	DNR
9. Chapter 259, F.S.	Outdoor Recreation and Conservation	DNR
10. Chapter 260, F.S.	Outdoor Recreation and Conservation	DNR
11. Chapter 267, F.S.	Historic Preservation	DOS
12. Chapter 288, F.S.	Economic Development/Industrial Siting	DOC, DER
13. Chapter 315, F.S.	Port Facilities Financing	Port Authorities
14. Chapter 334, F.S.	Public Transportation	DOT
15. Chapter 366, F.S.	Public Utilities	PSC
16. Chapter 370, F.S.	Living Resources (marine)	DNR
17. Chapter 372, F.S.	Living Resources (freshwater)	GFWFC
18. Chapter 373, F.S.	Withdrawal, Diversion, Storage, and Consumption of Water; Save Our Rivers	DER, WMD

19.	Chapter 375, F.S.	Outdoor Recreation and Conservation	DNR
20.	Chapter 376, F.S.	Pollutant Spill Prevention and Control; Ports and Waterways	DNR
21.	Chapter 377, F.S.	Oil and Gas Production	DNR
22.	Chapter 380, F.S.	Developments of Regional Impact and Areas of Critical State Concern, Coastal Management	DCA, DER
23.	Chapter 388, F.S.	Arthropod Control	DHRS
24.	Chapter 403, F.S.	Sources of Water Pollution; Sources of Air Pollution; Power Plants; Dredging and Filling; Control of Hazardous Wastes; Resource Recovery; Ports and Waterways	DER
25.	Chapter 582, F.S.	Soil and Water Conservation	DACS

SOURCE: The Florida Coastal Management Program's Final Environmental Statement, August 1981.

*KEY:

APC - Adminis. Procedures Comm.	DOT - Dept of Transportation
DACS - Dept of Agriculture and Consumer Services	GFWFC - Game & Fresh Water Fish Commission
DCA - Dept of Community Affairs	OPB - Office of Planning & Budget
DER - Dept of Env'tl Regulation	PSC - Public Service Commission
DHRS - Dept of Health and Rehabilitative Services	RPC - Regional Planning Council
DNR - Dept of Natural Resources	TIITF - Trustees of the Internal Improvement Trust Fund
DOAH - Div. of Adminis. Hearings	WMD - Water Management District
DOC - Dept of Commerce	
DOS - Dept of State	

The CZMP is implemented primarily by three agencies - the Department of Environmental Regulation, the Department of Natural Resources and the Department of Community Affairs. The Department of Environmental Regulation (DER) is the lead agency for the CZMP and administers environmental permitting programs for air and water pollution sources, dredge and fill, drinking water, solid and hazardous wastes, and siting of power plants, transmission lines and industry. The Department of Natural Resources manages submerged lands and other state-owned lands, recreation and conservation lands, marine resources, mineral resources, and shoreline use and protection. The Department of Community Affairs has primary responsibility for the Coastal Energy Impact Program and a state disaster preparedness program and coordinates the state response to the Development of Regional Impact and Areas of Critical State Concern Programs.

The Interagency Management Committee (IMC), created by Joint Resolution of the Governor and Cabinet in 1980, is the mechanism for coordinating state legislation and agency regulation. The IMC is responsible for integration and coordination of coastal activities, identification and resolution of jurisdictional overlap or conflict, and preparation of recommendations for new legislation, memoranda of understanding, and rulemaking to the Governor and Cabinet. The IMC is composed of representatives of ten agencies.

The Secretaries of the Departments of:

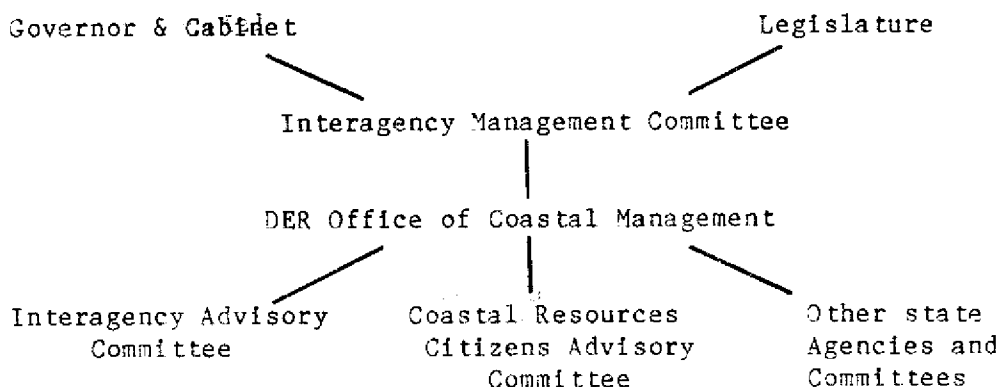
- Commerce
- Environmental Regulation
- Community Affairs
- Transportation
- Health & Rehabilitative Services
- Governor's Office of Planning and Budgeting

The Directors or Executive Directors of:

- Department of Natural Resources
- Game and Fresh Water Fish Commission
- Division of Archives & History Department of State
- Division of Forestry, Dept. of Agricultural & Consumer Ser.

The IMC receives staff support from DER's Office of Coastal Management and additional input from the State Interagency Advisory Committee (IAC) on Coastal Zone Management and the Governor's Coastal Resources Citizens Advisory Committee, the mechanism for public participation in the coastal management process. The IAC serves as the interagency liaison for implementation of the CZMP and prepares background and issue papers for the IMC.

Framework for Agency Coordination



Florida's CZMP received federal approval in 1981. The federal CZMA, however, calls for periodic review of the state program in order to maintain its status as an approved program.

Section 8. COMPREHENSIVE PLANNING

Finnell, Coastal Land Management in Florida, 1980 Am. B. Found. Research J. 303, 314-323.

I. Florida's Planning Framework

A. State Comprehensive Planning

Since most of the state of Florida is, arguably, in the "coastal zone," it is imperative that Florida integrate its coastal management process with its state comprehensive planning process. The numerous competing environmental, economic, and social values necessitate a comprehensive approach. The State Comprehensive approach. The State Comprehensive Planning Act of 1972, until it was extensively amended in 1978, gave Florida a better statutory foundation for state comprehensive planning than California had. The 1978 amendments weakened Florida's excellent process for formulating and adopting coastal management policies of the California type, notwithstanding the legislature's stated intention that the "state coastal zone management plan shall be a part of the state comprehensive plan." In this section, I trace the evolution of the state comprehensive planning process during Governor Askew's administration and conclude with a summary of current changes that are being implemented by the Executive Office of the Governor.

The weakening of the act was the result of a conflict between the governor and the legislature. Key legislators believed that the original wording of the act enabled the executive to legislate. The act, in both its original and its amended form, authorizes the state land-planning agency to "[p]repare and revise from time to time as necessary, the state comprehensive plan" and designates the governor as the "chief planning officer of the state." The original act also provided that after any plan was approved by the governor and the state legislature, the provisions of the plan became "effective as state policy," and thereafter "[s]tate department or agency budgets shall be prepared and executed based upon and consistent with law and the state comprehensive plan." The 1978 legislature, in response to then governor Askew's attempts to implement the act, amended the act to make the state comprehensive plan "advisory only," not to "have the force or effect of law or authorize the implementation of any programs not otherwise authorized pursuant to law."

By mid-1977, although the state land-planning agency's effectiveness was limited by the same conflict between the governor and the legislature that eventually led to the weakening of the act, it had produced nine comprehensive-plan elements--for agriculture, education, growth management, health, housing and

community development, land development, recreation and leisure, social services, and transportation. All were accepted by Governor Askew and submitted to the legislature in May 1977. The legislature directed that portions submitted in 1977 "not become effective as state policy until after the close of the 1978 regular session of the Legislature." It also required that any coastal plan be part of the state comprehensive plan and directed that such a plan be submitted to the 1978 legislature.

The 1978 legislature was a completely different kind of legislature than the 1972 legislature that had mandated the plan. Anticipating the growing legislative hostility, the governor described the submitted plan as an "executive action document," which was "not before the Legislature for passage, approval or revision." He also recommended that the state planning act be amended "to eliminate the artificial distinction between state and executive policy." The legislature's response was more drastic, however, than the governor had wanted.

On August 28, 1978, Governor Askew, as chief planning officer of the state, adopted by executive order a state comprehensive plan to guide the preparation of more detailed planning documents and related planning activities undertaken by executive agencies. The 1978 amendments make the plan "advisory only," without the "force or effect of law," except as specifically authorized by law. The distinction between cases in which the plan will be "advisory only" and those in which it will have the "force or effect of law" is elusive. By the term "advisory only," the legislature probably meant that, unless otherwise specifically provided by statute, the state comprehensive plan was not entitled to legal observance and acceptance by anyone (although, practically, it most likely will be followed by anyone answerable to the governor, assuming that the extant plan indeed reflects the current governor's goals and objectives for the state). To illustrate the probable effect of a coastal management plan under the amended law, consider the following scenario.

Florida's state comprehensive plan is to be a statement of "goals, objectives, and policies," and the "policies" and "goals" of any state coastal zone management plan are required to be a part of the state comprehensive plan. If the governor, as chief planning officer, issued an executive order adopting coastal resources planning and management policies and goals similar to the public access, recreation, marine environment, land resources, development, and industrial development policies included in the California Coastal Act of 1976, would these policies and goals have the "force and effect of law" or be "advisory only"? It would depend on the circumstances. For example, the ELA requires a local government, when hearing an application for a permit to undertake a development of regional impact, to consider, among other things, whether the "development unreasonably interferes with the achievement of the objectives of an adopted state land development plan applicable to the area.¹/ In these circumstances, the coastal policies would seem to have the force and effect of law.

There are several statutory provisions that apparently would give any comprehensive plan accepted by the governor the effect of law. Most notable for coastal land management purposes are the requirement in the Local Government Comprehensive Planning Act of 1975 that the state comprehensive plan be used as a basis for reviewing and commenting on local comprehensive plans; the Electrical Power Plant Siting Act's requirement that ten-year site plans for electrical generating facilities and site certification requests for specific power plants be reviewed for consistency with the state plan; the ELA's requirement that the state comprehensive plan be considered by local governments when they decide whether permission should be granted to undertake development of regional impact; and the Florida Water Resources Act's requirement of interagency coordination and cooperation in the preparation of a Florida water use plan, which, when completed, is to be included in the state comprehensive plan. The post-1978 state planning act also continues to require the state land-planning agency to coordinate certain other planning functions, including planning that occurs pursuant to several important federal planning programs. Except where, as here, some other Florida statute thus expressly requires observance and acceptance of the state comprehensive plan, however, the coastal policies would be "advisory only" and not legally enforceable.

In California, by way of analogy, the reports of the Office of Planning and Research are only advisory, but that agency has recently shown that with gubernatorial support its planning reports can affect decisions of other state agencies. Florida's state comprehensive plan may affect decisions of agencies headed by the governor, such as the Department of Environmental Regulation, and of those regional agencies whose officials are appointed by the governor, such as the water management districts. Less certain is what the plan's effect will be on agencies headed by the governor and cabinet, such as the Department of Natural Resources, or on local governments, private developers, or the Army Corps of Engineers.

The Florida Supreme Court's 1978 decision in Askew v. Cross Key Waterways also seems relevant to the question whether the post-1978 state planning act provides a suitable process for formulating and adopting state coastal policies and goals that govern decisions. In Cross Key the court has rejected the liberal federal view of delegation of legislative power also

1. (64) ELA, section 380.06(11)(a). Notwithstanding the apparent legislative intention to provide a close connection between the state comprehensive plan and decision making under other acts such as the DRI process under ELA, section 380.06(11)(a), some knowledgeable Florida attorneys and agency officials are reluctant, for various reasons, to assume that these duties will be enforced by Florida courts.

* * *

followed in many states. It held that legislative standards in the ELA (having the imprimatur of the American Law Institute) were unconstitutional under the separation-of-powers section of the Florida constitution. In so doing, the court called into question the constitutionality of any coastal management process in which any significant administrative decisions are not governed by detailed legislative standards or at least subject to a high degree of legislative oversight. In light of Cross Key, proponents of coastal zone management for Florida should probably rely on the state comprehensive plan as the principal vehicle for preparing and adopting state coastal policies and goals only if the State Comprehensive Planning Act is restored to its pre-1978 form, including a requirement of legislative review.

The state planning process is presently undergoing extensive revisions partly because of Governor Graham's views on the relationship of policy planning and the budget process and partly because of organizational changes pursuant to the Reorganization Act of 1979. Shortly after his election, Governor Graham introduced a decision-making process that relates more closely the state planning and budgeting functions. The Office of Planning and Budgeting in the Executive Office of the Governor is implementing an eight-step public management system that proceeds as follows: (1) analyze public "needs" such as for transportation, housing and community improvement, natural resource protection, and economic opportunities; (2) determine the governor's priorities and goals on the basis of the "needs analysis"; (3) develop alternative approaches that will realistically respond to the governor's goals and objectives; (4) develop the governor's recommended budget (a financial document that relates, among other things, to the state comprehensive plan); (5) allocate financial resources (including the governor's action on the legislature's appropriation bill); (6) send each state agency an approved budget and secure final performance agreements from each agency; (7) monitor the agency performance agreements; and (8) evaluate agency performance as measured by the performance agreements and other relevant objectives and policies as set forth in such documents as the state comprehensive plan. Steps (7) and (8) are carried out by the Executive Office of the Governor.

B. Local Comprehensive Planning

Florida's Local Government Comprehensive Planning Act of 1975 (LGCPA) could make Florida the nation's leader in reform of the anachronistic local land regulatory process that exists throughout most of the country. The act resembles California's local general planning law but is potentially stronger because of the Florida act's closer connection between the planning and regulatory functions. Both states require every local government to prepare and adopt a comprehensive plan. Florida's act, however, has a stronger "consistency" clause: after the plan is adopted, all development--private and public--must be consistent with the plan. Only in California's relatively narrow "coastal zone" and other particular areas does California tie regulation so closely to preadopted plans.

Florida's 1975 local planning act is a product of the second phase of a land and water regulatory reform effort that began in 1972. When Governor Askew's Task Force on Resource Management made its 1972 recommendations, the governor and major legislative leaders decided that the 1972 legislature should make only minimal changes in the existing local role in land use control. An Environmental Land Management Study (ELMS) Committee was created to study whether more substantial reform of the local planning and regulatory role was needed.

The legislature directed the ELMS committee to consider, among other things, the progress of the American Law Institute's Model Land Development Code (ALI Code). The two most difficult issues considered by the ALI were (1) how to distribute land planning and regulatory authority between state and local governments and (2) whether to require a formal plan as a prerequisite to regulation. On the first issue, the code reflects compromise between localism and centralism by leaving most land use decision making at the local level but providing for state intervention when particular clearly defined regional and state interests outweigh the local values. Florida, in its Environmental Land and Water Management Act of 1972, essentially adopted this position of article 7 of the ALI code.

On the second issue--whether to mandate planning--the ALI code reflects an assumption that some kinds of land development decisions do not involve administrative discretion: development "as of right," or "general development" permission, is distinguished from development involving administrative discretion, or "special development" permission. Planning is a precondition to regulation only for specified discretionary decisions, such as planned unit developments. Florida's ELMS committee rejected the ALI distinction. The committee determined that, in Florida at least, most local land development decisions would probably involve discretion and that the best way to promote principled administrative decisions would be to require local governments to adopt standards and thereafter measure all their decisions regarding land development by those standards. Florida's LGCPA closely followed the committee recommendations.

The LGCPA required all local governments--incorporated municipalities, counties, and certain other units--to prepare and adopt local comprehensive plans by July 1, 1979, with extensions to be allowed on a showing of cause and good faith efforts. With some notable exceptions, such as the city of Sanibel Island, discussed below, Florida's cities and counties, as of late 1979, are not responding expeditiously and effectively to that requirement. Only 88 cities out of 390 and 13 counties out of 67 met the 1979 deadline. If a municipality refuses to adopt a plan, the act requires the county in which it is located to prepare one; if the county refuses, the state shall prepare and adopt one. An optimistic prediction is that local comprehensive plans are not likely to be fully completed until two or three years after the 1979 deadline.

There are several reasons why many of Florida's local governments are not effectively implementing the local planning act. One is that the Florida legislature has not funded the program adequately. The 1975 legislature declined to follow the

ELMS committee's recommendation that a \$50 million, three-year appropriation for local planning be included in the LGCPA and that the law not become effective unless properly funded. The Florida League of Cities, whose attitude toward Florida's land regulatory reform has, from 1972 to 1979, oscillated between strong opposition and indifference, has complained about the legislature's failure to fund local planning; but the Graham task force received some conflicting testimony concerning whether local governments have adequate funds for complying with the the LGCPA. True, the act does not require local governments to do anything more than a well-functioning local government should do anyway. Nevertheless, the ELMS committee's initial recommendation still seems sound: the LGCPA substantially changes Florida's local land-planning and regulatory system, and better implementation and better relationships between state and local government could be promoted by improved funding of the process.

The major shock of an inadequately funded and administered LGCPA will be felt, of course, only after all deadlines for adopting plans have expired. Then, in some areas, courts will probably be asked to enjoin all further development until the requirements of the act have been complied with. A cynical observer of Florida's legislative process might conclude that the 1975 legislature, that passed the LGCPA without adequate funding, did so knowing that the repercussions would not be felt for seven or eight years and at that time the legislature could weaken the act to avoid the costs--political and economic--of compliance. That supposition may be contributing to the local sluggishness in preparation and adoption of comprehensive plans.

An equally plausible prediction, though, is that Florida's state and local governments--especially many in the southern end of the peninsula--will, during the 1980s, continue to strengthen and improve the land and water regulatory processes that were put into effect during the 1970s. Although there is widespread concern among environmentalists that "their golden era is over," it is possible that such concern, at least as it relates to Florida's land and water regulatory systems, may be too pessimistic; in fact it is reasonably predictable that Florida's land and water regulatory arrangements will become increasingly strict during the coming years. Three factors support this view: (1) the legislature has continued to improve and strengthen Florida's state-local cooperative environmental laws notwithstanding recurring efforts to dismantle or seriously weaken them; (2) a growing number of Florida local governments are controlled by those who favor local growth controls; and (3) chances of local environmental and growth control ordinances meeting constitutional requirements are improved if they are supported by good comprehensive planning.

If the second prediction is borne out, national attention to the effects of exclusionary land policies may shift, during the 1980s, from such overcrowded areas as New Jersey to the increasingly affluent and overcrowded areas of Florida. To note that "Florida and development have always been synonymous" is not to overstate Florida's development history. But the composition

of Florida's population is changing, and Florida communities such as Boca Raton and Sarasota County have political majorities increasingly desirous of strict environmental protection and growth control laws.

* * *

[Although few local governments met the original July 1, 1979, deadline for adoption of local comprehensive plans, virtually all have now complied "in some manner."]

The 1984 State and Regional Planning Act

The 1984 State and Regional Planning Act requires the governor to prepare a state comprehensive plan which "provides long-range guidance for the orderly social, economic, and physical growth of the state." The proposed plan, which was to be developed by December 1, 1984, was recommended to the Administration Commission (Governor and Cabinet) and transmitted to the legislature. The legislature gave statewide effect to the state comprehensive plan by enacting it, with some modifications, into law during the 1985 legislative session.

The following excerpt explains the state and regional planning framework and how the plan will function. Does the 1984 legislation solve all the problems noted in the Finnell article?

Rhodes & Apgar, Charting Florida's Course: The State and Regional Planning Act of 1984, 12 Fla. St. U.L. Rev. 583, 593-602 (1985).

* * *

III. Overview of The Planning Framework

As finally passed, the Act features a decentralized planning process that spreads responsibility for implementing state policies to state and regional agencies, and an innovative adoption process that highlights legislative involvement. The Act stresses that planning is an ongoing process and establishes mechanisms for continuing mediation and conflict resolution among planning units.

* * *

A. The State Comprehensive Plan

Under the Act, the state comprehensive plan "shall be composed of goals and policies briefly stated in plain, easily

understood words that give specific policy direction to state and regional agencies."^{1/} This one sentence description marks an important shift in emphasis in Florida's planning process. The Act makes it clear that the state plan is not to become a lengthy, detailed document to which every unit of government will look for specific direction in every situation. Rather, the goals and policies of the state plan must be developed further in functional plans by each unit of government.

B. State Agency Functional Plans

The distinction between the state plan and agency functional plans is clearly drawn through the Act's definitions of three plan components:

"Goal" means the long-term end toward which programs and activities are ultimately directed.

"Policy" means the ways in which programs and activities are conducted to achieve identified goals.

"Objective" means specific, measurable, intermediate ends that are achievable and mark progress toward a goal.

The Act combines these elements as follows: The state plan is composed of "goals" and "policies," while an agency functional plan contains "agency program policies and objectives and

1. (47) Fla. Stat. 23.0114(1)(Supp. 1984). Although the ELMS Committee opted to support an intergovernmentally integrated "rational" planning system, this approach was not without significant debate. A rational planning system keys on goals that are effectuated by policies that are further implemented by objectives. The potential effectiveness of this approach was questioned particularly by legislative and business community members on the committee. These members preferred an incremental approach to problem solving that would focus attention to current problems and remedies which offer immediate resolution. This approach would mitigate problems as they arrive rather than create a system to achieve specified goals through reasonably articulated means. The alternative approach, referred to in the committee as "disjointed incrementalism," is supported and discussed in Lindblom, The Science of "Muddling Through," 19 Pub. Ad. Rev. 79 (1959). Lindblom's approach generally reflects legislative problem solving, which is usually characterized by amendments to existing policies that differ only incrementally from such policy, consideration of a relatively small number of means, simultaneous choice of ends and means, and successive and repeated attacks on problems as opposed to a final, comprehensive resolution. See M. Mandelker & R. Cunningham, Planning and Control of Land Development 41-50 (1979); Hirschman & Lindblom, Economic Development, Research and Development, Policy Making: Some Converging Views, 7 Behavioral Sci. 211, 215-16 (1962).

administrative directions." State "goals," the long-term end of all state programs, are found only in the state plan; "policies," expressing the manner in which programs are to be conducted to achieve these goals, are a shared responsibility of the state plan and agency plans; and "objectives," specific measurable ends, are reserved for the agencies' functional plans.

The Act requires each state agency to develop a functional agency plan that is consistent with the state plan within one year of the adoption of the state comprehensive plan. Each agency's plan is required to contain a statement of the policies that guide the agency's programs, in addition to the objectives "against which the agency's achievement of its policies and the state comprehensive plan's goals and policies shall be evaluated."

C. Comprehensive Regional Policy Plans

Comprehensive regional policy plans comprise a second category of implementing functional plans. As with the functional agency plans, the regional plan must be consistent with the state comprehensive plan. Unlike an agency plan, however, the regional plan is an intermediate-level plan; it addresses "regional goals and policies" but not objectives. The Act further directs: "Regional plans shall address significant regional resources, infrastructure needs, or other issues of importance within the region."

Regional plans should form a vital link between state and local governments. Presently, this link is incomplete because there is no requirement in the Act for local government comprehensive plans to be consistent with the state's goals and policies. The Act lays the groundwork, however, for the region to become the coordinating body between state and local units of government. It emphasizes a strong local role in developing the regional plan and requires the regional planning council to "seek the full cooperation and assistance of local governments" in the planning process. Further, "[t]he draft regional plan shall be circulated to all local governments in the region. Local governments shall be afforded a reasonable opportunity to comment on the regional plan."

D. The Scope of Regional Agency Plans

One of the significant issues that emerged from the 1984 legislative debate concerned the proper scope of the regional plan. The question was whether the regional policy plan should go beyond the policies reflected in the state plan or statutes, or whether the state plan and statutes should constitute an absolute outer limit for the policies and programs that a region might adopt. The ELMS Committee struck a balance on this issue and recommended:

Regional plans shall minimize overlap or duplication between the regional plan and state regulatory and permitting programs.

Any proposed regional standard that is substantially different from a state agency regulatory or permitting standard covering the same subject shall be accompanied by an explanation and justification setting out the importance of the standard to the region, the impact on the affected state regulatory program, and the benefits and costs of the standard.

The ELMS Committee also recommended that "substantially different" regional standards be specifically reviewed and approved by the Administration Commission before taking effect.

By the time the Senate Natural Resources Committee considered Senate Bill 550 some concern had arisen about the scope of regional authority. The ELMS Committee's recommendation was dropped from the bill and the following language was substituted and included in the bill passed by the legislature:

Regional plans shall specify regional issues that may be used in reviewing a development of regional impact. Such issues shall be consistent with any state statutes, rules, or policies that specifically relate to or govern a regional issue or criteria adopted for DRI reviews. All regional issues and criteria shall be included in the comprehensive regional policy plan adopted by rule pursuant to s. 160.072.2/

Debate on the role of regional planning councils is a major unresolved issue that could seriously hamper the development of a statewide planning framework. The debate erupted early in 1984 in hearings before a subcommittee of the House Select Committee on Growth Management, chaired by Representative Sam Bell. After this early flurry, opposing interests seemed to reach an uneasy

2. (61) Fla. Stat. 160.07(1)(Supp. 1984). This statutory language may have interesting consequences for development of regional impact reviews. It could significantly limit the scope of DRI reviews through the requirements that regional plans specify regional issues that may be used in such reviews and that "all regional issues and criteria" shall be included in the plan. Note also that the term "criteria" inserted in the Act is the same term used in the Warren S. Henderson Wetlands Protection Act, ch. 84-79, 1984 Fla. Laws 202, to describe the standards to be used by the Department of Environmental Regulation (DER) in reviewing permit applications. This correlation raises the question of whether regional criteria for DRI reviews regarding wetlands must henceforth be consistent with DER criteria.

truce. Only late in the 1984 session did regional planning councils reemerge to secure a strong position for themselves in the planning process.

IV. The Roles of The Executive Office of the Governor and of The Cabinet

The Act establishes a strong central role for the Governor but provides a check against the Governor's authority through review by the Cabinet at various points in the process. The Governor has a vital role--to prevent the plan from becoming simply a collection of numerous agency desires. As the state's highest elected official, it is appropriate that this task fall to the Governor. The Governor's role begins with preparing the draft plan. During that process, the Governor is authorized to "[p]repare or direct appropriate state or regional agencies to prepare such studies, reports, data collections, or analyses as are necessary or useful in the preparation or revision of the state comprehensive plan, state agency functional plans, or regional comprehensive plans." The Governor's Office is given wide latitude in drafting the plan." The Act directs the Governor's office to prepare "statewide goals and policies" dealing with "growth and development in Florida," with initial emphasis on "the management of land use, water resources, and transportation system development."

Before the plan is submitted to the legislature, the Administration Commission will review the proposed state plan. The Act provides that the plan will be transmitted to the Administration Commission "on or before December 1, 1984," and at that time "copies shall also be provided to each state agency, to each regional planning agency, to any other unit of government that requests a copy, and to any member of the public who requests a copy." As an intermediate step, the Commission serves two important functions. First, it provides a public forum. Submission to the Administration Commission is the first date for formal publication of the proposed plan document. After receiving public comment, the Commission submits the plan to the legislature "together with any amendments approved by the Commission, and any dissenting reports." The Act thus provides an opportunity for formal public comment, for an expression of differences at the executive level, and for those comments to accompany the draft plan to the legislature. The Commission's second important function is to identify the parts of the draft plan that go beyond existing law and therefore could not survive if the legislature fails to adopt the plan.

Review by the Administration Commission is an important threshold step in the innovative adoption process. It sets the stage both for legislative consideration and for adoption by rule if the legislature fails to act. However, it would be unfortunate if the Cabinet attempted to resolve all conflicts and concerns of various interests in this phase. This fine-tuning should take place in the legislative process. In recognition of this fact, the Act provides for both the draft plan "and any dissenting reports" to be forwarded to the legislature.

The Governor's plan implementation responsibilities are also significant. The Act states that the Governor "as chief planning officer of the state, shall oversee the implementation process." For that task, the Governor is empowered to prepare and adopt by rule "criteria, formats, and standards for the preparation and the content of state agency functional plans and comprehensive regional policy plans." The Governor designates and prepares specific data, forecasts, and projections, and, perhaps most significantly, "assumptions" to be used "by each state and regional agency in the preparation of plans." Finally, the Governor has general authority to "[d]irect state and regional agencies to prepare and implement, consistent with their authority and responsibilities under law, such plans as are necessary to further the purposes and intent of the state comprehensive plan."

The Executive Office of the Governor has a strong central role in coordinating the functional plans of agencies and regional policy plans. The Act provides that state agency functional plans shall be submitted to the Executive Office of the Governor "within 1 year of the adoption of the state comprehensive plan." The Governor's office is allowed [sixty] days to review a proposed agency functional plan for consistency with the state plan and then is to return the plan to the agency "together with any [proposed revisions.]" The state agency must incorporate the Governor's recommended changes or petition the [Administration] Commission to resolve any disputes. Here the [Administration] Commission is a check on the power of the Governor's office.

* * *

The Governor [also] has ... review authority for comprehensive regional policy plans. [Regional policy plans must be submitted to the Governor within 18 months of the adoption of the state comprehensive plan for review and recommended revisions. Regional planning councils will adopt the comprehensive regional policy plans by rules which will be subject to legislative review. The legislature may reject, modify, or take no action on rules. If the legislature takes no action, the rules become effective; otherwise, the regional councils must conform the rules to the legislative changes.]

V. Mediation of Conflicts

An innovative ELMS Committee contribution to the State and Regional Planning Act is the recognition and requirement of informal dispute resolution when agency plans conflict. The ELMS Committee concluded that intergovernmental and interagency coordination are vital to an effective statewide system. Successful planning only occurs when all levels of government regularly communicate and coordinate their comprehensive and functional plans. To effect this aim and to encourage a cooperative conflict resolution approach, the committee recommended mediation rather than an adversary proceeding, such

as a judicial or administrative hearing. If conflicts cannot be settled by mediation, the ELMS Committee recommended that a formal appeal should be available to allow the Florida Land and Water Adjudicatory Commission to resolve the controversy.

The ELMS Committee's mediation recommendations are incorporated in several of the Act's provisions. Once the state comprehensive plan is adopted, each state agency must adopt a functional plan that is consistent with the adopted state comprehensive plan. Consistency is initially determined by the Executive Office of the Governor. The Governor is also required to mediate all consistency disputes between agencies. If mediation is unsuccessful, the Adjudicatory Commission will take final action. The language in the statute that mandates the Governor to mediate all disputes provides an opportunity for informal dispute resolution in all cases prior to formal adjudication by the Adjudicatory Commission.

A similar process to resolve consistency disputes is provided when conflicts arise between the Governor's office and regional planning councils, whose comprehensive regional policy plans also must be consistent with the adopted state comprehensive plan.

Although the Act places the responsibility for mediation on the Governor, the spirit of the legislation would seem to enable the Governor to designate an experienced and recognized mediator to carry out the Governor's duty. This may be desirable for several reasons. Mediation is a voluntary process in which those involved in a dispute jointly explore and hopefully reconcile their differences with the assistance of a qualified and impartial third party. To maintain necessary credibility, a mediator must be impartial, and just as important, must not be perceived as entertaining any possibility of bias. Since the Governor's own office must initially determine if a state agency functional plan or regional comprehensive plan is inconsistent with the state plan, it is possible the Governor might be perceived as biased in favor of his office's findings. To avoid this perception, and thereby maximize the potential for effective resolution through mediation, the Governor could appoint recognized and experienced mediators as his designees in this process.

Another option is to request the Division of Administrative Hearings to assign a hearing officer to mediate, provided the hearing officer is adequately trained in mediation techniques. If this approach is followed, and mediation is unsuccessful, a different hearing officer would have to be assigned to hear an appeal if the Land and Water Adjudicatory Commission were to assign the appeal to the Division of Administrative Hearings.

The ELMS Committee also recommended that regional planning agencies establish a mediation process to resolve conflicts among local government comprehensive plans. However, the resolution of any issue through the mediation process should not alter any person's right to a judicial determination of any issue if otherwise authorized by law. These recommendations were incorporated in the Act.

The ELMS Committee's several mediation recommendations were accepted by the legislature as promising alternatives to time-consuming, costly, and perhaps improvident formal litigation between government agencies. If implemented by agencies with the proper orientation towards problem resolution, mediation will fulfill this promise.

VI. The Consistency Mandate

The key word used throughout the Act to describe the relationship between the state plan and lower tiers of implementing plans is "consistency." State agency functional plans and comprehensive regional policy plans are required to be consistent with the state plan and are subject to mandatory change if they are found to be inconsistent. In the ELMS Committee's discussion of the planning bill, and in the legislative debate, the question repeatedly arose: Can we define "consistency" so that we can better understand the nature and extent of the obligation it imposes? No satisfactory definition emerged, because in large part the definition depends on the specific language of the applicable state goal or policy.

Fundamentally, the consistency mandate requires that state agency and regional plans remain within the limits that the state plan places on lower tiers of implementing plans or regulations. Those limits will always be either express or implied within the different elements of the state plan. For example, suppose the state plan includes the following policy: "channelization or other alteration of natural rivers or streams shall be prohibited." Obviously, the range of options on this issue for state agency functional plans or regional plans would be very limited. On the other hand, if the state comprehensive plan states that "the state shall have a management system adequate to protect the state's water quality and quantity resources," a great many different state and regional agency policies and programs could be fashioned that would contribute significantly toward achieving this goal.

The state plan should include a general definition of "consistency" and additional specific definitions for particular program areas where they would prove useful. The general definition should be along the following lines: "A policy, objective, program, or regulation that contributes significantly to the attainment of a goal or goals stated in the state comprehensive plan, and which does not substantially detract from the attainment of any other state goal shall be found to be consistent with the state comprehensive plan."

VII. Conclusions and Recommendations

The State and Regional Planning Act of 1984 is law. Now comes the crucial challenge--implementation. Since Florida has not experienced a successful state planning process, there is no

helpful positive precedent. Nonetheless, lessons can be learned from the unsuccessful 1978 experience, the Act's legislative adoption history, and similar efforts in other states.

* * *

NOTES

1. The State Comprehensive Plan, as enacted, did not contain a definition of consistency; however, the following sections were included in the plan description:

* * *

(2) The State Comprehensive Plan is intended to be a direction-setting document. Its policies may be implemented only to the extent that financial resources are provided pursuant to legislative appropriation.... The plan does not create regulatory authority or authorize the adoption of agency rules, criteria, or standards not authorized by law.

[Note: The plan specifically states that agency functional plans "are not rules and therefore are not subject to the provisions of chapter 120."]

(3) The goals and policies contained in the State Comprehensive Plan shall be reasonably applied where they are economically and environmentally feasible, not contrary to the public interest, and consistent with the protection of private property rights. The plan shall be construed and applied as a whole, and no specific goal or policy in the plan shall be construed or applied in isolation from the other goals and policies in the plan.

* * *

3. The COASTAL AND MARINE RESOURCES goal and policies in the State Comprehensive Plan are set out below:

(9)(a) Goal -- Florida shall ensure that development and marine resource use and beach access improvements in the coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches and marine environment, consistent with sound environmental planning.

(b) Policies --

1. Accelerate public acquisition of coastal and beachfront land where necessary to protect coastal and marine resources or to meet projected public demand.

2. Ensure the public's right to reasonable access to beaches.
3. Avoid the expenditure of state funds that subsidize development in high-hazard coastal areas.
4. Protect coastal resources, marine resources and dune systems from the adverse effects of development.
5. Develop and implement a comprehensive system of coordinated planning, management, and land acquisition to ensure the integrity and continued attractive image of coastal areas.
6. Encourage land and water uses which are compatible with the protection of sensitive coastal resources.
7. Protect and restore long-term productivity of marine fisheries habitat and other aquatic resources.
8. Avoid exploration and development of mineral resources which threaten marine, aquatic, and estuarine resources.
9. Prohibit development and other activities which disturb coastal dunes, and ensure and promote the restoration of coastal dune systems that are damaged.
10. Give priority in marine development to water-dependent uses over other uses.

Local Government Comprehensive Planning

The state comprehensive plan's PLAN IMPLEMENTATION goal provides that "[s]ystematic planning capabilities shall be integrated into all levels of government in Florida with particular emphasis on improving intergovernmental coordination and maximizing citizen involvement." The seventh policy statement under that goal directs the state to "[e]nsure the development of comprehensive ... local plans that implement and accurately reflect state goals and policies and that address problems, issues, and conditions that are of particular concern in a region." Although the state comprehensive plan does not apply directly to local governments, 1985 amendments to the Local Government Comprehensive Planning Act of 1975 (now the Local Government Comprehensive Planning and Land Development Regulation Act) require the state land planning agency, the Department of Community Affairs [DCA], to review local plans for consistency with the state plan and the regional policy plans. If the DCA

finds that the local plan is inconsistent, the DCA can recommend, but not require, changes in the plan. If after the opportunity for revision, the local government does not bring the plan into compliance, the DCA will issue a notice of intent to determine the plan not in compliance and will request an administrative hearing. The hearing officer's recommended order submitted to the Administration Commission must sustain the local plan "unless it is shown by a preponderance of the evidence" that the plan is not in compliance. If the Administration Commission finds the local plan not in compliance, the commission must specify the remedial action required by the local government. The commission can also limit state funding, grants, and revenue sharing to local governments that are not in compliance.

If the DCA review of a local government plan finds the plan in compliance, the DCA will issue a notice of such intent, and the local government will adopt the the plan. Within 21 days of adoption of the plan, an "affected person" who objects to the DCA finding and who has participated in local government proceedings can file a petition with the DCA for an administrative hearing. An affected person includes "the affected local government, persons owning property or residing or owning or operating a business within the boundaries of the local government ..., and adjoining local governments" that would have substantial fiscal or environmental impact from the plan.

The hearing officer's standard of review is whether the "local government's determination of compliance is fairly debatable." After the hearing officer submits a recommended order to the DCA, the DCA will issue a final order if it finds the plan in compliance, or will submit the recommended order to the Administration Commission for final action if the plan is found not in compliance.

In addition to reviewing local plans for consistency with the state and regional comprehensive plans, the 1985 legislation requires the DCA to review the local plans for:

- compliance of plan elements with the legislative requirements of chapter 163.
- consistency of elements within the plan.
- coordination and consistency in management of bays, estuaries, and harbors falling in more than one jurisdiction.
- policies to guide future development.
- programs, procedures, mechanisms, and processes for implementing and evaluating effectiveness of the local plan.

The same review procedures apply as discussed above.

Yet another consistency requirement of chapter 163 mandates that local government actions be consistent with local government comprehensive plans. The following article explains the requirement and some of the legal issues that arise.

Arline, The Consistency Mandate of the Local Government Comprehensive Planning Act, Fla. B.J. 661 (Oct. 1981).

The concern that comprehensive planning guide and control the development of land is a fairly recent phenomenon. The Florida Legislature first addressed planning in 1969 by allowing it as an unfunded option of local governments. In 1973, two thirds of the state had no land use controls whatsoever and ad hoc decisionmaking regarding development was rampant. As a consequence of this conspicuous absence of land use control, the quality of life in Florida steadily deteriorated.

Realizing that a statewide approach to growth management was needed, the legislature created the Environmental Land Management Study (ELMS) Committee to study land development regulation and resource management, and to recommend new legislation. One proposal was the Local Government Comprehensive Planning Act (LGCPA).

Enacted in 1975, the LGCPA requires every local government in Florida to adopt and implement a comprehensive plan to guide and control future development. The substance of these plans is specified in broad terms. Eight elements must be included in all plans; three additional elements are required for larger units of local government and for those in the coastal zone; and 11 elements are encouraged as options. Procedures for review and a deadline for enactment of the plans are established. The deadlines have now passed and most local governments in Florida have comprehensive plans in effect. Many difficult legal issues are likely to arise in the implementation of these plans, but one of the most challenging will involve definition of the plans' legal effect.

The LGCPA gives the comprehensive plan a new legal status. It states:

After a comprehensive plan or element or portion thereof has been adopted in conformity with this act, and all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan or element or portion thereof.

Consistency with the comprehensive plan, then, is required for development projects of government, for development orders issued by government, and for regulations controlling land development. In addition, the LGCPA requires consistency between the various elements of a comprehensive plan.

Various synonyms have been used to define consistency: "in accordance with," "compatible with," "conformance to" and "does not conflict." As a term of art, like the word "reasonable," "consistency" will be a challenge for the courts to define and apply. This article will briefly address the major issues raised by the consistency mandate. Because a few states, most notably

Oregon, California, and Hawaii, enacted planning laws requiring consistency a few years before Florida, a small body of case law has developed. These cases, and a few which have discussed consistency in Florida, will be analyzed. The scope of judicial review will also be mentioned.

The comprehensive plan

Understanding the nature of the comprehensive plan is an important prerequisite to an examination of the consistency mandate. On one level, the comprehensive plan is an educational document for local officials and citizens. It contains analyses of the various social, economic, and environmental factors affecting the community. Most plans are replete with maps, tables and charts which, among other things, delineate population growth, inventory natural resources, and plot housing starts. More importantly for attorneys, the plan embodies goals and objectives designed to guide local decisionmakers.

These policies, developed with public participation, are supposed to reflect the citizens' desires for the future of their community. Because the comprehensive plan, in effect, defines the public interest, it is much like a constitution, which limits as well as directs the actions of local officials.

Plans vary in their degree of specificity. Some are very general, using vague and imprecise language which can support contrary actions and does little to bind local decision makers. Land use maps may be absent or broadly drawn and colored without detail. Plans such as these are designed to maintain a high degree of flexibility and avoid reducing the discretion of elected officials. In extreme cases they may be "nonplans," which circumvent the spirit and intent of the LGCPA.

Other plans, however, are very specific, containing definite, clearly defined goals and objectives, and requiring the implementation of programs to solve recognized problems. Such plans often have very detailed maps which can replace the zoning map as a blueprint for future development in the community.

It must be recognized that where a particular plan lies along this continuum of specificity establishes its degree of control over the local decision maker. It affects the integrity of the planning process itself and is inextricably tied to the determination of consistency. A plan that is vague and general is not an effective guide to growth and is not susceptible to enforcement through the consistency mandate. Review by the Department of Veterans and Community Affairs and by the courts as to whether plans are sufficient to meet the requirements of the Act will be an important determinant of the LGCPA's effectiveness.

For a comprehensive plan to be effective, it must have the force of law. No matter how well drawn or specific, if a comprehensive plan is relegated to collect dust on the shelves it is utterly useless as a document of land use control. It is the consistency mandate which gives teeth to the plan. It forms the vital link between the plan and actual development.

Defining consistency

The LGCPA requires several types of consistency. The first and most important involves consistency between the issuance of development orders and the comprehensive plan. Conforming the administration of development regulations to the goals and objectives, maps and policies of the plan has been the subject of several lawsuits.

The most notable consistency case is Fasano v. Board of County Commissioners of Washington County [507 P.2d 23 (Or. Sup.Ct. 1973)]. In Fasano, the comprehensive plan specifically designated the subject property as single family residential. It was rezoned by the commission to a higher density in order to accommodate the development of a 32-acre mobile home park. Fasano, who lived near the proposed mobile home park, complained that the decision to rezone and grant the permit was inconsistent with the plan. The Supreme Court of Oregon agreed, proceeding to define consistency by examining the interrelationship of planning and zoning. It said that zoning and planning "are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide a detailed means of giving effect to those principles."

To judge whether the rezoning action was consistent with the plan, the court said that the governmental action must be "in accord" with the various planning goals and objectives in the plan. In addition, the court said proving consistency with the plan involves showing: (1) there is a public need for the kind of change in question and (2) the need will best be served by changing the classification of the particular piece of property in question as compared with other available property.

A few cases in Florida address consistency in the administration of development regulations. In Dade County Association of Unincorporated Areas, Inc. v. Board of County Commissioners of Metropolitan Dade County [45 Fla. Supp. 193 (1975)], the plan made specific reference to the subject property, recommending low density, single family use. The landowner petitioned for a rezoning to increase the density in order to accommodate development of a low income housing project for the elderly. The rezoning was granted by the county commission, citing the need for such low income housing, but reversed by the circuit court because it was inconsistent with the plan.

Judge Jack Turner echoed Fasano and declared the comprehensive development master plan was "the basic instrument for land use planning and development in Dade County." With regard to the legal significance of the plan, the court said:

The recommendations and conclusions contained within the comprehensive development master plan . . . may not be indiscriminately ignored in the exercise of the zoning power. The enactment of the master plan . . . represents an affirmative commitment by the board of county commissioners

to the public to implement the community goals and policies whenever applicable. Therefore, the official recommendations and conclusions of the master plan and the area restudy carry a presumption of correctness and they should be followed unless there are compelling reasons to depart therefrom. [emphasis added]

Because the plan was of such a specific nature as applied to the subject property, the court took a strict approach in requiring consistency. A recent case from the Fifth District Court of Appeal, however, has interpreted the consistency mandate as a minimal restriction.

In Hoffman v. Brevard County Board of County Commissioners [390 So.2d 445 (Fla. 5th D.C.A. 1980)], the petitioner owned 60 acres near the Sebastian Inlet which was zoned general use and designated on the plan as recreational and open space. The plan expressly stated that the property "should be retained for public recreational uses in conjunction with limited transient camping facilities." Hoffman asked the county to rezone the property for a travel trailer park. The commission refused, stating that such a commercial venture would be inconsistent with the public recreational designation in the plan.

The court upheld the county. It then proceeded to argue, in dicta, that the travel trailer park would have been consistent with the public recreational designation. The court reasoned that the plan should be read broadly to protect the rights of the landowner, and since the plan did not expressly distinguish between commercial and noncommercial recreational uses, in its opinion, a commercial travel trailer park was consistent with the plan.

The Fifth District Court of Appeal applied a very broad definition of consistency in this case, saying the comprehensive plan was only a "set of guidelines" that does not "rigidly bind" the commission in the administration of the zoning ordinance. This comes very close to denying the efficacy of the plan altogether.

A very recent circuit court case from Palm Beach County used the consistency mandate to hold invalid a rezoning by the county commission. The petitioners in Holiday City Civil Association and Boca Grande Property Owners Association v. Palm Beach County Commissioners owned home adjacent to property which had been rezoned from agricultural to general commercial use to accommodate the development of a large-scale shopping center. The plan designated the land as agricultural. The circuit court found that the proposed development would be disruptive to the character of the surrounding neighborhood and was inconsistent with the land use plan for Palm Beach County.

It might appear from these cases that a simple solution to the problem faced by local government officials of acting consistently with the plan when administering a zoning ordinance would be merely to amend the plan to make it consistent with the proposed rezoning. This raises an issue, which has been discussed in a few cases from other states, of whether the amendments are consistent with the plan.

In Dalton v. City and County of Honolulu [462 P.2d 199 (Haw. Sup.Ct. 1969)], the Supreme Court of Hawaii held that Honolulu could not use the amendment procedure to circumvent the consistency mandate. At issue was a proposed development of multi-family housing in an area designated agricultural by the plan. To avoid acting inconsistently when accommodating this development, the city amended the plan to increase the density allowed on the property and rezoned it accordingly.

Although the court recognized the statutory authority to amend the plan, it held the amendment invalid in this case based on an analysis of the statutory purpose of the land use plan. The plan is intended to be "long-range and comprehensive," the court reasoned, because:

To allow the city to amend the General Plan and then adopt a zoning ordinance contrary to the unamended plan is to allow the city to accomplish by two ordinances exactly what the charter sought to prohibit.

Dalton is the first case to recognize and close a major loophole in the consistency requirement. If the local government can avoid acting inconsistently by simply amending the plan to accommodate a specific development proposal, then the comprehensive planning process is a worthless endeavor and consistency an impotent requirement. In that case, zoning would precede planning rather than vice versa as the LGCPA intends.

A case from Oregon which deals with this issue is South of Sunnyside Neighborhood League v. Board of County Commissioners of Clackamas County [569 P.2d 1063 (Or. Sup.Ct. 1977)], in which the plan was amended to raise the density on the subject property to allow the development of a hotel and shopping center complex. The Supreme Court of Oregon invalidated the amendment, arguing that because the legislature intended the plan to be "coordinated and interrelated," the amendment must be consistent with the unamended portions of the plan.

The comprehensive plan should never stand as a rigid barrier to change. As a live document, it ought to be periodically reviewed and amended. However, in applying the consistency mandate to the amendment process, Dalton and Sunnyside argue that an amendment should be coordinated with the rest of the plan to maintain its comprehensive, long-range nature. The LGCPA establishes procedures for the plan's amendment involving public hearings which tend to provide some degree of protection from ad hoc amendment. Unfortunately, the LGCPA is not otherwise helpful, stating merely that, "if any amendment to the land use element would be inconsistent with any other element of the plan previously adopted, the governing body shall also amend such other element...." This clause does not go as far as the cases to protect the long-range comprehensive nature of the plan. It is arguable, however, that the intent of the LGCPA, to establish the plan as a guide to future development, can only be fulfilled by protecting the plan's integrity from unwarranted amendment.

As the section quoted above indicates, internal consistency among the various elements of the plan is of importance. The

LGCPA also states: "Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent...." This third type of consistency has been at best only indirectly addressed by the courts.

In Green v. Hayward [552 P.2d 815 (Or.Sup.Ct. 1976)] the local government had rezoned two parcels of land adjacent to an existing veneer plant to allow the plant to construct facilities for the recovery of waste wood products. Opponents of the rezoning argued it was not in conformance with a land use map in the plan, which designated the parcels for agricultural use.

In this case the map defined its own degree of specificity, stating, "In interpreting proposals shown on this plan diagram, it is necessary to refer to the findings, goals, objectives, recommendations, and descriptive analyses contained in the text...." The map was explicitly intended only to be illustrative and did not require the location of specific land uses. Therefore, the court reasoned it could not rely entirely on the map, and that to decide whether the rezoning was consistent required an examination of the rest of the plan.

The plan contained other policies such as preserving agricultural land, discouraging urban sprawl, and making the most efficient use of public services by encouraging the development of vacant land where services were available. Other objectives called for preserving the integrity of neighborhoods, protecting open space, and encouraging efficient transportation systems. In determining how consistency can be reached in a case of conflicting policies, the court said: "We are reluctant to hold that one or a few of those general standards may be severed from the plan as a whole and used in isolation as justification for a rezoning decision." Since some of the policies contained in the plan supported the rezoning, and since the map was clearly of limited effect, the court held the rezoning to be consistent.

Although the court recognized the apparent inconsistencies among some of the policies of the plan, it did not say the plan was invalid. This is an important precedent, for the issue of internal consistency is bound to arise in Florida. It may be argued that a perfectly consistent plan is probably unattainable unless it is very specific. A general plan containing vague goals encouraging environmental protection as well as economic growth, for example, is capable of supporting contrary results. To purge one of these goals in keeping with a strict interpretation of internal consistency would deny reality and stifle the planning process.

The fourth and final type of consistency involves the plan's implementation. The LGCPA requires all land development regulations enacted or amended to be consistent with the plan. Hence, zoning, subdivision regulations, building and other codes must be consistent with the goals and objectives of the plan.

The Oregon Supreme Court was confronted with an inconsistent zoning ordinance in Baker v. City of Milwaukee [533 P.2d 772 (Or. Sup.Ct.)]. The city had adopted a zoning ordinance which established a density of 39 units per acre on the land in

question. The following year they adopted a comprehensive plan lowering this density to 17 units per acre. Several years later the city received an application to develop an apartment complex at 26 units per acre, within the limits of the zoning ordinance, yet higher than the requirements of the plan. The petitioner asked the city to conform the ordinance to the plan and to deny the application. Baker argued that the city had a duty to make the conflicting zoning ordinance consistent with the plan. The Supreme Court of Oregon agreed.

The court said that since the comprehensive plan was the controlling land use planning instrument for the City of Milwaukee, it must be given preference over conflicting zoning ordinances. Further, the court argued that because "zoning ordinances are subservient to the plan, the city has a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it." The court concluded, saying "... the zoning decisions of a city must be in accord with the plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail."

The problem of inconsistent zoning was not altogether solved by the court in Baker, for there remained the issue of zoning ordinances less intensive than the plan. This issue appeared two years later in Marracci v. City of Scappoose [552 P.2d 552 (Or. App. 1976)]. The city had denied Marracci a permit to construct an apartment complex because it exceeded the density authorized by the zoning ordinance. The plan, however, authorized a higher density and would have easily accommodated the development. Marracci sued to force the city to conform the zoning ordinance to the plan and grant a development permit.

The court interpreted Baker as holding that only "more intensive" zoning ordinances can be inconsistent. The court reasoned, "... a comprehensive plan only establishes a maximum limit on the possible intensity of land use...." Thus, the court concluded that there was no conflict between the plan and the zoning ordinance and upheld denial of the development permit.

This same issue was addressed by a Florida court in Dade City v. Inversiones Rafamar, S.A. [360 So.2d 1130 (Fla. 3rd D.C.A. 1978)], where the plan called for zoning the developer's land at five dwelling units per acre, but the existing zoning sets the density at one dwelling unit per acre. The developer petitioned the city to rezone the property to two and one-half dwelling unit per acre, arguing it was compelled by the plan. The Third District Court of Appeal disagreed, saying:

... it must be recognized that the plan, by calling for a use from one to five homes per acre, leaves discretion to the County Commission as to whether development in the area substantiates one unit per acre or a greater density....

The zoning ordinance, which set a lower density than that shown in the plan, was upheld as consistent.

Judicial review

Whether the consistency mandate can be used successfully to encourage planned growth depends, in part, on the willingness of Florida courts to review local land use decisions. The courts of Florida have traditionally avoided these local disputes, however, by applying a very limited degree of review. The Oregon and California courts, on the other hand, expanded the scope of judicial review to address the consistency issue. This is an important precedent as Florida courts begin to hear cases involving the consistency mandate and deserves at least brief attention.

The Fasano court found it needed a factual record to determine consistency adequately. Consequently, it was necessary to alter the standard of review applied in the past to local zoning matters. The court reasoned that because the rezoning at issue focused on specific piece of property and was not of general application, it was quasi-judicial, not a legislative action. This enabled the court to apply principles of administrative law and proceed past a determination of whether the action was merely arbitrary and capricious to examine the substance of the local government's action. Refusing to apply the traditional presumption of validity, the court shifted the initial burden to the board, as proponent of the rezoning, to prove its action was consistent. Moreover, it applied the competent substantial evidence rule, rather than the fairly debatable rule, to a review of the evidence. Because the board had failed to make findings of fact showing consistency with the plan, the court invalidated the rezoning.

The California courts take a somewhat similar approach in distinguishing legislative from quasi-judicial actions when reviewing local decisions for consistency with the plan. Findings of fact are necessary for quasi-judicial actions and the competent substantial evidence rule applies on review. Variances, subdivision plat approval and the granting of rezoning requests have been held to be quasi-judicial. Comprehensive plan and zoning amendments, however, are legislative, notwithstanding their specific application.

The law in Florida regarding the scope of judicial review of local land use matters is plagued with inconsistency and hopelessly confused. Principles of the separation of powers, administrative law, rules of evidence and appellate procedure cloud the development of a precise definition of the limits of judicial involvement. Although a thorough analysis of this law is beyond the scope of this article, a few general concepts regarding the scope of review of local land use matters do emerge from the case law.

Initially, a presumption of validity is applied by the courts to the actions of the local government. The attacker of a local land use decision has a burden of proving the action is not

even fairly debatable. This is a very heavy burden which the legislative/quasi-judicial distinction made in Fasano is not likely to ease.

The courts in Florida have traditionally applied the presumption of validity and the fairly debatable rule to both legislative and quasi-judicial actions. Two courts have applied the competent substantial evidence rule when reviewing variances and special exceptions. One court has applied both concepts at the same time and another has said that, whichever applies, they both mean the same thing.

With this confusion in the case law, it is unfortunate that the LGCPA merely directs the courts to consider "the reasonableness of the comprehensive plan ... or the appropriateness and completeness of the comprehensive plan ... in relation to the governmental action...."

The potential use of the consistency mandate to adequately police the implementation of the local comprehensive plan is severely reduced by the Florida courts' traditional abstention from local land use matters. This tradition may change as radically as the tradition of land use control was changed by the adoption of the LGCPA. Never before have local governments in Florida been required to plan for their future development. Never before has the discretion of local decision-makers been limited by requiring consistency with the comprehensive plan.

Conclusion

Ralph Waldo Emerson said, "Consistency is the hobgoblin of little minds...." The Florida Legislature has declared it law. As such, the consistency mandate is intended to form the link between the comprehensive plan and the regulation of development. The term ensures that planning precede regulation, by controlling the plan's implementation as well as amendment.

The law regarding the consistency mandate is just beginning to develop. Currently unrecognized by lawmakers and jurists alike, this clause is perhaps the most important development in the area of land use control since the advent of Euclidean zoning. Whether it succeeds in improving the quality of planning and, therefore, the quality of life in Florida remains to be seen. At any rate, the consistency mandate will most surely generate an enormous amount of litigation in the years to come and may well change forever the degree of judicial involvement in local growth management issues.

NOTES

1. Section 163.3187 Fla. Stat. provides that the local comprehensive plans may be amended only twice per calendar year except in the case of an emergency.

2. The 1985 Local Government Comprehensive Planning and Land Development Regulation Act [LGCP&LDRA] provides that local land development orders and regulations be consistent with the local government plans. In order to implement the plans, the act requires that local governments adopt, at a minimum, land development regulations:

- for subdivisions.
- to implement the land use element of the plan, ensure compatible adjacent uses, and provide for open space.
- to protect potable water supplies.
- to regulate areas subject to flooding, and provide for drainage and stormwater management.
- to protect environmentally sensitive areas.
- to regulate signage.
- to provide for public services and facilities.
- to regulate traffic flow.

Although the local regulations are not generally reviewable, the DCA may require a local government to submit regulations, if "it has reasonable grounds to believe that a local government has totally failed to adopt any one or more of the ... regulations required by [the act]." If DCA finds that the local government has not adopted the necessary regulations, "it may institute an action in circuit court to require adoption of these regulations." The court cannot review compliance of regulations with the act or consistency with the local plan.

3. The LGCP&LDRA also defines consistency for determining whether developments or local government actions are consistent with the local comprehensive plan.

Florida Statutes 163.3194

(3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the

land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

4. A 1984 Florida Supreme Court case, Citizen's Growth Management Coalition of West Palm Beach v. City of West Palm Beach, 450 So.2d 204 (Fla. 1984), involved the challenge of a citizen's group to a rezoning decision which was alleged to be inconsistent with the local government plan. The court found that the citizen's group lacked standing to question the validity of the ordinances: The following excerpt illustrates the court's reasoning.

* * *

The question of standing to challenge zoning decisions was comprehensively explained in Renard v. Dade County. In that case a district court of appeal certified as a question of great public interest:

The standing necessary for a plaintiff to (1) enforce a valid zoning ordinance; (2) attack a validly enacted zoning ordinance as not being fairly debatable and therefore an arbitrary and unreasonable exercise of legislative power; and (3) attack a void ordinance, i.e., one enacted without proper notice required under the enabling statute or authority creating the zoning power.

261 So.2d at 834. This Court held that under the first category a plaintiff had to prove special damages different in kind from that suffered by the community as a whole, that under the second category a plaintiff needed to have a legally recognizable interest that was adversely affected, and that under the third category an affected resident, citizen, or property owner had standing.

It therefore became important to determine into which category a particular case fell,

for different rules of standing applied depending on whether the action sought to enforce a valid zoning ordinance, whether it attempted to attack a validly enacted zoning ordinance as being an unreasonable exercise of legislative power, or whether it involved an attack upon a zoning ordinance which was void because not properly enacted.

Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082, 1087 (Fla. 1978).

Appellant argues that none of these three categories are applicable to actions seeking to enforce compliance with the Local Government Comprehensive Planning Act. Appellant claims that although the legislature did not enact a separate statutory section on standing, it intended to grant standing to the fullest extent possible by using the phrase "justiciably raised" in section 163.3194(3)(a), which provides in part:

--A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan or element or elements thereof relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan or element or elements thereof in relation to the governmental action or development regulation under consideration.

We do not find that the legislature, by adopting this section, intended to broaden the requirements for standing. Because the legislature did not specifically address the question of who has standing to enforce compliance with the Act, we find that it must not have intended to alter the standing requirements established in Renard v. Dade County.

In the alternative, appellant argues the Act creates for citizens and residents legally recognizable interests which are adversely affected if a rezoning ordinance fails to comply with the Act's requirements. We disagree with this contention. The legislature specifically delineated the intent and purpose of this act in section 163.3161, which provides:

163.3161 Short title; intent and purpose.--

(1) This act shall be known and may be cited as the "Local Government Comprehensive Planning Act of 1975."

(2) In conformity with, and in furtherance of, the purpose of the Florida Environmental Land and Water Management Act of 1972, chapter 380, it is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.

(3) It is the intent of this act that its adoption is necessary so that local governments can preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.

(4) It is the intent of this act to encourage and assure cooperation between and among municipalities and counties and to encourage and assure coordination of planning and development activities of units of local government with the planning activities of regional agencies and state government in accord with applicable provisions of law.

(5) It is the intent of this act that adopted comprehensive plans shall have the

legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.

(6) It is the intent of this act that the activities of units of local government in the preparation and adoption of comprehensive plans, or elements or portions thereof, shall be conducted in conformity with the provisions of this act.

(7) The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.

Thus the legislature has not indicated in this section that it intended to create additional legal rights in citizens who are only affected in common with the community as a whole. The expressed intent contained in subsection (5) that development shall not be permitted unless it is in conformity with the comprehensive plan imposes a legal duty upon the governing body but does not create a right of judicial redress in the citizens and residents of the community. The legal duty imposed on local governmental bodies is akin to their general obligation to pass ordinances that are reasonable. See 1 Rathkopf, The Law of Zoning and Planning sec. 3.05 (4th ed. 1979). We therefore hold that only those persons who already have a legally recognizable right which is adversely affected have standing to challenge a land use decision on the ground that it fails to conform with the comprehensive plan. Since the trial court found that the Coalition had failed to prove that it or any of its members had a legally recognizable interest which would be affected by the city's ordinances, we affirm its holding that appellant lacked standing to question the validity of the ordinances.

It is so ordered.

5. Largely in response to Citizen's Growth Management Coalition, the legislature created an administrative review process for development regulations to assure consistency with the local comprehensive plan. Within twelve months of the adoption of a regulation, substantially affected persons may challenge it as inconsistent with the local plan. (A regulation that is not challenged within twelve months is deemed consistent.) "Substantially affected" is defined in the same terms as in Chapter 120, the Administrative Procedures Act. As a condition precedent to the proceeding, the affected person must file a petition with the local government outlining the facts and the basis for considering the regulation inconsistent. Within thirty days of the local government's response, the person may petition the DCA for an informal hearing.

The DCA will issue a written opinion on whether the regulation is consistent with the local plan. If the DCA finds the regulation consistent, the person who filed the original petition may request an administrative hearing. The act provides that the "adoption of a land development regulation is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan." The order of the hearing officer will constitute a final order, appealable pursuant to section 120.68.

If DCA finds the regulation inconsistent, the agency will request an administrative hearing. The standard of review is the same, and the hearing officer's order will be a final order.

In either proceeding, if the hearing officer finds the regulation inconsistent, the order will be submitted to the Administration Commission. The Administration Commission shall hold a hearing to consider sanctions against the local government, including restriction of funding, grants, and revenue sharing.

6. Even though coastal jurisdictions were originally required to include a "coastal element" in their local comprehensive plans, the LGCPA was not listed as part of Florida's networked coastal management plan. The federal government requires that elements of a state's coastal management plan have a state enforcement mechanism, and the state had only had the authority to review and comment upon local plans.

The 1985 amendments greatly expanded the requirements for the "coastal management" element of local comprehensive plans. The legislation included new policies, including limiting public expenditures that subsidize growth in high-hazard coastal areas, required extensive studies and inventories as a basis for the

coastal management elements, and listed components that the elements must contain. Among the components are:

-a component outlining principles of hazard mitigation and protection of human life, including population evacuation in the event of impending natural disaster.

-a beach and dune protection component.

-a redevelopment component outlining principles for eliminating inappropriate and unsafe developments when opportunities arise; e.g., post-hurricane redevelopment.

-a shoreline use component identifying public beach access areas and assessing the need for water-dependent and water-related facilities.

-designation of high hazard coastal areas.

-a deep-water port component.

With the expanded coastal management element and the DCA review procedures in place, can local comprehensive plans and the LGCP& LDRA be included in Florida's networked coastal plan?

Regional Planning Councils

The role of Regional Planning Councils [RPCs] has been discussed briefly in the context of developing comprehensive regional policy plans, but the RPCs have other important duties including review of Developments of Regional Impact. The nature and function of RPCs is set out below:

SOUTH FLORIDA REGIONAL PLANNING COUNCIL

v.

BOARD of COUNTY COMMISSIONERS of PALM BEACH COUNTY
372 So.2d 1142 (Fla. 4th DCA 1979):

* * *

The cause of action sued upon had its genesis in an Interlocal Agreement entered into on July 1, 1974, between Dade, Monroe, Broward and Palm Beach Counties. Said counties joined together to form the SFRPC pursuant to Section 163.01, Florida Statutes (1969) the purpose of which was:

a. To provide local governments with a means of exercising the rights, duties and powers of a Regional

Planning Agency as defined in Chapters 23, 163, and 380 of the Florida Statutes, including those functions enumerated hereinabove by preambles, and other applicable Florida, Federal and Local law.

b. To provide a means for conducting the comprehensive regional planning process.

c. To provide regional coordination for the members of the Council.

d. To exchange, interchange, and review the various programs of the individual members which are of the regional concern.

e. To promote communication among members and the identification and resolution of common regional-scale problems.

f. To cooperate with Federal, State, Local and non-governmental agencies and citizens to insure the orderly and harmonious coordination of State, Federal, and Local planning and development programs in order to assure the orderly, economic, and balanced growth and development of the Region, consistent with the protection of the natural resources and environment of the Region and to protect the health, safety, welfare and quality of life of the residents of the Region.

Although the district contemplated to be affected by the Council's planning activities also included Martin and St. Lucie counties, these counties never saw fit to join in the Interlocal Agreement.

Among the planning activities which the Council engaged in were the following: review of developments of regional impact, nominations for Areas of Critical State Concern, review of proposed federally funded projects, review of applications for Army Corp. of Engineer Dredge and Fill Permits and Subdivision Feasibility Studies. In addition, the SFRPC published a Coastal Zone Management Study and numerous other reports.

The operating budget of the SFRPC is derived from membership assessments, legislative appropriations, grants and matching funds from the state and federal governments, and charges for various services. The annual membership assessment, however, is the basic source of operating revenue, as legislative appropriations vary yearly, grants and matching funds span fiscal periods and fluctuate, and the various service charges are insubstantial.

* * *

REGIONAL PLANNING COUNCILS

The state is divided into eleven regional planning councils. Each council is headed by a governing body which is made up of representatives appointed by local governments and the Governor. Each council has the authority to fix and collect membership dues to support its work. In addition, operating funds may be provided by the Legislature.

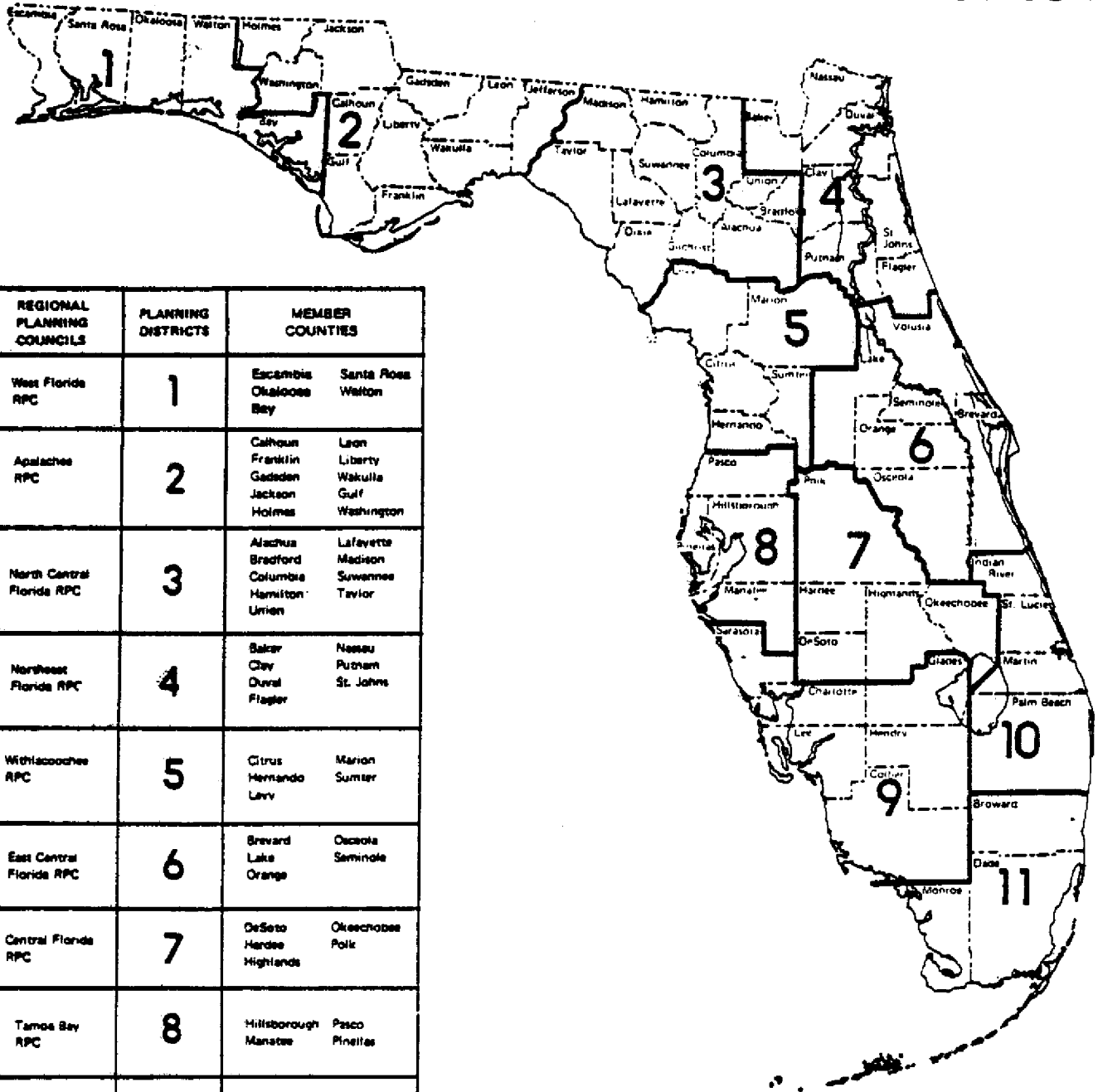
Based upon legislation passed in 1980, each council must develop and adopt comprehensive regional policy plans. These plans must be consistent with Chapters 373 and 403, F.S., and they shall be used to review developments of regional impact, local government comprehensive plans and federally assisted projects. Regional planning councils will be involved in the implementation of the coastal management program based upon Chapters 160 and 380, F.S.

Councils have had a formal role in reviewing developments of regional impact (DRI's) for a number of years. This role was augmented and strengthened with the passage of the Regional Planning Council Act of 1980. Thus, one role of the councils will be to develop and implement rules for reviewing DRI's. In addition to this formal role, the support and assistance of councils will be needed to address certain issues of special focus. In some cases, a council may have an informal role while in other cases, they may utilize coastal management funds to address a specific coastal issue. For example, the support and active participation of councils will be crucial to the development of effective hurricane evacuation plans....

All of the RPC's have specific program activities which have been recognized and incorporated into Florida's Coastal Management Program. Some of the activities that bear directly on coastal management include: DRI review and comment; local government planning assistance and review; and regional A-95 Clearinghouse coordination and review.

* * *

Regional Planning Councils of Florida



REGIONAL PLANNING COUNCILS	PLANNING DISTRICTS	MEMBER COUNTIES
West Florida RPC	1	Escambia Okaloosa Walton Bay
Apalachee RPC	2	Calhoun Franklin Gadsden Jackson Holmes Washington
North Central Florida RPC	3	Alachua Bradford Columbia Hamilton Union Lafayette Madison Suwannee Taylor
Northeast Florida RPC	4	Baker Clay Duval Flagler Nassau Putnam St. Johns
Withlacoochee RPC	5	Citrus Hernando Levy Marion Sumner
East Central Florida RPC	6	Brevard Lake Orange Ocala Seminole
Central Florida RPC	7	DeSoto Hardee Highlands Okeechobee Polk
Tampa Bay RPC	8	Hillsborough Manatee Pasco Pinellas
Southwest Florida RPC	9	Charlotte Collier Glades Hendry Lee Sarasota
Treasure Coast RPC	10	Indian River Martin Palm Beach St. Lucie
South Florida RPC	11	Broward Dade Monroe

Effective January, 1981

Distributed by:
 Substate Program Development Office
 Department of Veteran and Community Affairs
 (904) 488-0410

Section 9. DEVELOPMENTS OF REGIONAL IMPACT

GRAHAM v. ESTUARY PROPERTIES, INC.
399 So.2d 1374 (Fla. 1981)

McDONALD, Justice.

This case is before the Court for review of a district court decision reported at 381 So.2d 1126 (Fla. 1st DCA 1979). We affirm in part and reverse in part.

Estuary Properties, Inc., owns almost 6,500 acres of land in Lee County on the southwest coast of Florida near Fort Meyers. The site includes substantial wetlands along Estero, San Carlos, Hurricane, and Hell-Peckish Bays and is a sensitive ecological environment. Tidal waters flush daily through about 2,800 acres of predominantly red mangroves on the edge of the bays. Some 220 days a year these tidal waters move through the red mangroves into the predominantly black mangrove forest which covers approximately 1,800 acres that Estuary wants to dredge or fill. The remaining 1,800 acres begin at the salina and range from two to five feet above mean sea level. Only 526 acres of the total area have been identified as dry enough to be classified as nonwetlands.

On June 18, 1975, Estuary applied to the board of county commissioners of Lee County for approval of a development of regional impact (DRI) pursuant to section 380.06, Florida Statutes (Supp., 1974). Estuary's plan provided for no construction on the 2,800 acres of red mangroves but contemplated destroying the 1,800 acres of predominantly black mangroves. In their place a 7.5 mile "interceptor waterway" would be constructed, and the fill from the waterway (and from twenty-seven lakes to be dredged) would be used to raise the elevation of the remaining land for construction. Estuary contended that the waterway and the lakes would replace the functions of the black mangroves in the ecosystem. Estuary's plan called for the eventual construction of 26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities.

The development proposal was submitted to the Southwest Florida Regional Planning Council (SWFRPC), which prepared a report pursuant to section 380.06(8). Based on this report SWFRPC recommended that the board of county commissioners deny the application.

After public hearings, the board adopted the SWFRPC findings and recommendations and concluded, inter alia, that the proposed development would cause the degradation of the waters of Estero and San Carlos Bays. This degradation would adversely affect both the commercial fishing and shellfishing industries, as well as the sport fishing industry, resulting in an adverse economic impact on Lee County and the region. The board denied both the increase in zoning density and the application for development approval. The commissioners listed twelve conditions which would have to be met before they would approve a development order.

The first condition was that Estuary submit an amended DRI application for development approval for a maximum density of two units per acre. Such density would allow Estuary to construct 12,968 residential units as well as commercial facilities. Other conditions included eliminating the destruction of such large acreages of mangroves and giving consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a manner that would not violate applicable state water quality standards for the receiving bodies of water.

Estuary appealed this order to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes (1973). After a five-day hearing de novo requested by the developer, the hearing officer found that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region. He concluded that the interceptor waterway would not adequately replace the functions of the mangroves and that removing them would greatly increase the risk of pollution to the surrounding bays, thus adversely affecting the area's economy. The hearing officer found that requiring the landowner to refrain from degrading state-owned waters was a reasonable restriction on this land required by chapter 380; consequently, he recommended denial of the appeal. The Land and Water Adjudicatory Commission adopted his recommendation and entered a final order denying the appeal.

Estuary sought judicial review in the First District Court of Appeal. That court granted relief and remanded the case to the adjudicatory commission with instructions to enter an order granting Estuary permission to develop its property, including the mangrove acreage, unless Lee County commenced condemnation proceedings on the mangrove acreage lying below the salina. The adjudicatory commission and Lee County have sought review by this Court.

The decision of the district court is divided into two points. Simply stated they are:

- I. Denial of Estuary's application for development approval violates the provisions of chapter 380, Florida Statutes (1973 and Supp. 1974).
- II. Denial of Estuary's application constitutes a taking of private property for public use without compensation in violation of the United States and Florida Constitutions.

A.

The district court found that chapter 380 requires a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner. In this respect we agree with the district court. Although the act does not expressly mandate balancing, such legislative intent is clear from the stated purpose of the act and the factors enumerated in

section 380.06(8),^{1/} which the regional planning agency must consider in making a DRI recommendation. The act specifically states that private property rights are to be preserved. Section 380.021, Fla. Stat. (1973). Therefore, the only way to logically and feasibly apply the act is by balancing the often conflicting interests according to the considerations listed in section 380.06(8).

The district court found that the adjudicatory commission had not balanced the considerations in section 380.06(8) noting that the commission found favorably on four of the considerations and unfavorably on only two. According to the district court, the adjudicatory commission ruled against the development only because the commission found an adverse environmental impact would result and because the proposed development deviated from the policies of the planning agency.

There is no evidence, however, that the commission did not balance the factors. Balancing in an adjudicatory process does not always mean that four favorable considerations outweigh two unfavorable considerations. The legislature did not place specific values on each consideration listed in section 380.06(8). Thus, it would have been permissible for the hearing officer to determine that the adverse environmental impact and deviation from the policies of the planning council outweighed the other more favorable findings.

1. (6) Section 380.06(8) states:

- Within 50 days after receipt of the notice required in paragraph 7(d), the regional planning agency, if one has been designated for the area including the local government, shall prepare and submit to the local government a report and recommendations on the regional impact of the proposed development. In preparing its report and recommendations the regional planning agency shall consider whether, and the extent to which:
- (a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region;
 - (b) The development will have a favorable or unfavorable impact on the economy of the region;
 - (c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;
 - (d) The development will efficiently use or unduly burden public transportation facilities;
 - (e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and
 - (f) The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.

In Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), we stated that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." Id. at 924. Section 380.06(8) sets out guidelines for implementing the policies of the act. The guidelines may permit discretion on the part of the agency when balancing applicable considerations. See Florida State Board of Architecture v. Wasserman, 377 So.2d 656 (Fla. 1979).

8.

The thrust of the district court's holding that denial of the DRI permit was improper is that the planning council and hearing officer applied an incorrect burden of proof. The court found that "the position of the Planning Council is that a private landowner has no private right to use his property unless he can prove that such will not impair a public benefit." 381 So.2d at 1136. In determining that this position placed an unconstitutional burden of proof on the landowner, the court relied on Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965).

In Zabel this Court held that the statute in question would be unconstitutional as applied if it required the appellants to prove the proposed landfill would not materially and adversely affect any of the eight specified public interests. Zabel is of limited value in the instant case because the facts differ significantly. In Zabel the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased. The state's subsequent denial of the fill permit amounted to the state's reneging on its agreement. This Court found that the rights to dredge, fill, and bulkhead the land were the appellants' "only present rights attributable to ownership of the submerged land itself." Id. at 381. Denying those rights would have deprived the owners of the only beneficial use of their property. To then place the burden of proof on the owners to show that the dredging and filling would have no adverse impact on public interest would have been unconstitutional. When Estuary bought the property in question in this case, however, it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted.

There is also a significant difference between the initial findings in Zabel and the initial findings of the planning council in this case. In Zabel the court did not find that any material, adverse effect on the public interest had been demonstrated. 171 So.2d at 379. In the instant case there is no question but that the proposed development would have an adverse environmental impact. The issue in the present case then, is not whether an adverse impact exists, but whether the curative measures are adequate. Zabel stands for the proposition that the burden is on the state to show that an adverse impact will result if a permit is granted. Here the state clearly met that burden. The burden of proof then shifted to Estuary to prove that the

curative measures are adequate. Once there is sufficient evidence of an adverse impact, it is neither unconstitutional nor unreasonable to require the developer to prove that the proposed curative measures will be adequate.

In holding that the state has the initial burden of showing that a proposed DRI will have an adverse impact in light of section 380.06(8), we do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof. We simply reaffirm the rule that exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied. If the state denied a permit without showing the existence of an adverse or unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious.

This brings us to the issue of whether or not Estuary met its burden of proving that the interceptor waterway would adequately cure the effect of the planned dredging and filling and of the destruction of the black mangroves. Because of the sensitive nature of the land, it was not unreasonable for the commission to place a great deal of weight on the environmental impact of the proposed development. There is sufficient competent substantial evidence in the record to support the finding of the commission that the interceptor waterway would not only fail to prevent an adverse environmental impact but would in fact pollute the surrounding bays. It may be that there was sufficient evidence to support the opposite conclusion, as Estuary suggests, but we will not substitute our judgment for a decision of the adjudicatory commission made within the ambit of its responsibilities and with due regard to law and due process. Section 120.68(10), Fla. Stat. (1977). For the reasons stated above we hold that the district court incorrectly reversed the adjudicatory commission's finding that the proposed DRI would have an adverse impact on the region.

* * *

Florida Statutes, Section 380.06 Developments of regional impact. ---

(1) DEFINITION.-- The term "development of regional impact," as used in this section, means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.

(2) STATEWIDE GUIDELINES AND STANDARDS.--

(a) The state land planning agency shall recommend to the Administration Commission specific statewide guidelines and standards for adoption pursuant to this subsection. The Administration Commission shall by rule adopt statewide guidelines and standards to be used in determining whether

particular developments shall undergo development-of-regional-impact review. The statewide guidelines and standards previously adopted by the Administration Commission and approved by the Legislature shall remain in effect unless revised pursuant to this section, or superseded by other provisions of law. Revisions to the present statewide guidelines and standards, after adoption by the Administration Commission, shall be transmitted on or before March 1 to the President of the Senate and the Speaker of the House of Representatives for presentation at the next regular session of the Legislature. Unless approved by law, the revisions to the present statewide guidelines and standards shall not become effective.

(b) In adopting its guidelines and standards, the Administration Commission shall consider and be guided by:

1. The extent to which the development would create or alleviate environmental problems such as air or water pollution or noise.
2. The amount of pedestrian or vehicular traffic likely to be generated.
3. The number of persons likely to be residents, employees, or otherwise present.
4. The size of the site to be occupied.
5. The likelihood that additional or subsidiary development will be generated.
6. The extent to which the development would create an additional demand for, or additional use of, energy, including the energy requirements of subsidiary developments.
7. The unique qualities of particular areas of the state.

* * *

(12) REGIONAL REPORTS.--

(a) Within 50 days after receipt of the notice of public hearing required in paragraph (11)(c), the regional planning agency, if one has been designated for the area including the local government, shall prepare and submit to the local government a report and recommendations on the regional impact of the proposed development. In preparing its report and recommendations, the regional planning agency shall identify regional issues based upon the following review criteria and make recommendations to the local government on these regional issues, specifically considering whether, and the extent to which:

1. The development will have a favorable or unfavorable impact on the environment and natural and historical resources of the region.
2. The development will have a favorable or unfavorable impact on the economy of the region.
3. The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities.
4. The development will efficiently use or unduly burden public transportation facilities.
5. The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment.

6. The development complies with such other criteria for determining regional impact as the regional planning agency shall deem appropriate, including, but not limited to, the extent to which the development would create an additional demand for, or additional use of, energy, provided such criteria and related policies have been adopted by the regional planning agency pursuant to s. 120.54. Regional planning agencies may also review and comment upon issues which affect only the local governmental entity with jurisdiction pursuant to this section; however, such issues shall not be grounds for or be included as issues in a regional planning agency appeal of a development order under s. 380.07.

(13) CRITERIA IN AREAS OF CRITICAL STATE CONCERN.-- If the development is in an area of critical state concern, the local government shall approve it only if it complies with the land development regulations therefor under s. 380.05 and the provisions of this section.

(14) CRITERIA OUTSIDE AREAS OF CRITICAL STATE CONCERN.-- If the development is not located in an area of critical state concern, in considering whether the development shall be approved, denied, or approved subject to conditions, restrictions, or limitations, the local government shall consider whether, and the extent to which:

(a) The development unreasonably interferes with the achievement of the objectives of an adopted state land development plan applicable to the area;

(b) The development is consistent with the local comprehensive plan and local land development regulations; and

(c) The development is consistent with the report and recommendations of the regional planning agency submitted pursuant to subsection (12).

(15) LOCAL GOVERNMENT DEVELOPMENT ORDER.--

(a) The appropriate local government shall render a decision on the application within 30 days after the hearing unless an extension is requested by the developer.

(b) When possible, local governments shall issue development orders concurrently with any other local permits or development approvals that may be applicable to the proposed development.

(c) The development order shall include findings of fact and conclusions of law consistent with subsections (13) and (14).
The development order:

1. Shall specify the monitoring procedures and the local official responsible for assuring compliance by the developer with the development order.

2. Shall establish compliance dates for the development order, including a deadline for commencing physical development and for compliance with conditions of approval or phasing requirements, and shall include a termination date that reasonably reflects the time required to complete the development.

3. Shall establish a date until which the local government agrees that the approved development of regional impact shall not

be subject to down-zoning, unit density reduction, or intensity reduction, unless the local government can demonstrate that substantial changes in the conditions underlying the approval of the development order have occurred, or that the development order was based on substantially inaccurate information provided by the developer, or that the change is clearly established by local government to be essential to the public health, safety, or welfare.

4. Shall specify the requirements for the annual report designated under subsection (18), including the date of submission, parties to whom the report is submitted, and contents of the report, based upon the rules adopted by the state land planning agency. Such rules shall specify the scope of any additional local requirements that may be necessary for the report.

5. May specify the types of changes to the development which shall require submission for a substantial deviation determination under subsection 19.

6. Shall include a legal description of the property.

* * *

NOTES

1. The DRI program was substantially amended in 1985. For a complete discussion of the DRI process prior to the 1985 amendments, see Frith, Florida's Development of Regional Impact Process, Practice, and Procedure, 1 F.S.U. J. Land Use & Env'tl. L. 71 (1985).

2. Chapter 380 formerly required the Administration Commission to determine the kinds and sizes of development that would be presumed to be of regional impact. These thresholds, however, created only a presumption that the development was or was not a DRI. General Development Corp. v. Division of State Planning, 353 So.2d 1199 (Fla. 1st DCA 1977). This situation gave the state planning agency a great deal of flexibility. A fixed threshold would allow developers to plan projects just below the limit or divide one large project into two smaller projects, and thus avoid DRI review for projects with substantial impact. Developers, on the other hand, found the presumptive thresholds created uncertainty that affected both project design and expense.

The 1985 amendments to chapter 380 represent a compromise. First, the Administration Commission is to adopt by March 1, 1986, criteria for determining when "two or more developments shall be aggregated and treated as a single development" for purposes of undergoing DRI review. Next, fixed thresholds are established at eighty per cent (not a DRI) and 120 per cent (definitely a DRI) of the numerical thresholds of guidelines and standards. A development between eighty and 100 per cent of the threshold is presumed not to be required to undergo DRI review; a development at 100 per cent, or between 100 and 120 per cent is presumed to require review.

3. The following section includes standards and guidelines adopted by the Administration Commission and those superseding standards and guidelines enacted by the Florida legislature in the 1985 session.

FLORIDA ADMINISTRATIVE CODE
DEVELOPMENTS PRESUMED TO BE OF REGIONAL IMPACT

[380.0651 (3)(a) Airports.--

1. Any of the following airport construction projects shall be presumed to be a development of regional impact:

- a. A new airport with paved runways.
- b. A new paved runway.
- c. A new passenger terminal facility.

2. a. Expansion of an existing runway or terminal facility by 25 percent or more on a commercial service airport or a general aviation airport with regularly scheduled flights shall be presumed to be a development of regional impact.

b. For the purposes of this section, runway expansion shall include strengthening the runway when the strengthening will result in an increase in aircraft size, or the addition of jet aircraft utilizing the airport.

3. Any airport development project which is proposed for safety, repair, or maintenance reasons alone and would not have the potential to increase or change existing types of aircraft activity shall not be presumed to be a development of regional impact.]

[380.0651 (3)(b) Attractions and Recreation Facilities.--

Any sports, entertainment, amusement, or recreation facility, including but not limited to sports arenas, stadiums, race tracks, tourist attractions, amusement parks, and pari-mutuel facilities, the construction or expansion of which:

1. For single performance facilities:

- a. provides parking spaces for more than 2,500 cars; or
- b. provides more than 10,000 permanent seats for

spectators; or

2. for serial performance facilities:

- a. provides parking spaces for more than 1,000 cars; or
- b. provides more than 4,000 permanent seats for spectators.

For purposes of this subsection "serial performance facilities" means those using their parking areas or permanent seating more than one time per day on a regular or continuous basis.]

27F-2.93 Electrical Generating Facilities and Transmission Lines. The following developments shall be presumed to be developments [of] regional impact and subject to the requirements of Chapter 380, Florida Statutes:

(1) Any proposed steam electrical generating facility with a total generating capacity greater than one hundred (100) megawatts, or a proposed steam addition to an existing electrical generating facility, which addition has a generating capacity of greater than one hundred (100) megawatts; except that this paragraph shall not apply to a facility which produces electricity not for sale to others. Generating capacity shall be measured by the manufacturer's rated "name plate" capacity.

(2) Any proposed electrical transmission line which has a capacity of two hundred thirty (230) kilovolts or more and crosses a county line.

Provided, however, that no electrical transmission line shall be considered as falling within this standard if its construction is to be limited to an established right-of-way, as specified in Subsection 380.04(3)(b), Florida Statutes.

27F-2.04 Hospitals. The following development shall be presumed to be a development of regional impact and subject to the requirements of Chapter 380, Florida Statutes:

Any proposed hospital which has a design capacity of more than six hundred (600) beds, or whose application for a certificate of need under section 381.494, Florida Statutes, shows in the statement of purpose and need that such hospital is designed to serve the citizens of more than one county.

[380.0651 (3)(c) Industrial Plants and Industrial Parks.-- Any proposed industrial, manufacturing, or processing plant under common ownership, or any proposed industrial park under common ownership which provides sites for industrial, manufacturing, or processing activity which:

1. provides parking for more than 2,500 motor vehicles; or
2. occupies a site greater than 320 acres.]

27F-2.06 Mining Operations.

(1) The following development shall be presumed to be a development of regional impact and subject to the requirements of Chapter 380, Florida Statutes:

Any proposed solid mineral mining operation which annually requires the removal or disturbance of solid minerals or overburden over an area, whether or not contiguous, greater than one hundred (100) acres or whose proposed consumption of water would exceed three million (3,000,000) gallons per day. In computing the acreage for this purpose, a removal or disturbance of solid minerals or overburden shall be considered part of the same operation if it is all located within a circle, the radius of which is one mile and the center of which is located in an area of removal or disturbed solid minerals or overburden.

(2) As used in this section:

(a) the term "overburden" means the natural covering of any solid mineral sought to be mined, including, but not limited to soils, sands, rocks, gravel, limestone, water or peat.

(b) The term "solid mineral" includes, but is not limited to, clay, sand, gravel, phosphate rock, lime, shells (excluding live shellfish), stone and any rare earths contained in the soils or waters of this state, which have theretofore been discovered or may be hereafter discovered.

[380.0651 (3)(d) Office development.-- Any proposed office park operated under one common ownership, development plan, or management, that:

1. Encompasses 300,000 or more square feet of gross floor area;
2. Has a total site size of 30 or more acres ; or
3. Encompasses more than 600,000 square feet of gross floor area in counties with a population greater than 500,000 and only in geographic areas specifically designated as suitable for increased threshold intensity in the approved local comprehensive plan and in the comprehensive regional policy plan.]

27F-2.08 Petroleum Storage Facilities.

(1) The following developments shall be presumed to be developments of regional impact and subject to the requirements of Chapter 380, Florida Statutes:

(a) Any proposed facility or combination of facilities located within one thousand (1,000) feet of any navigable water for the storage of any petroleum product with a storage capacity of over fifty thousand (50,000) barrels.

(b) Any other proposed facility or combination of facilities for the storage of any petroleum product with a storage capacity of over two hundred thousand (200,000) barrels.

(2) For the purpose of this section, "barrel" shall mean forty-two (42) U.S. Gallons.

[380.0651 (3)(e) Port Facilities.-- The proposed construction of any waterport or marina [is] required to undergo development-of-regional-impact review, except those designed for:

1. The wet storage or mooring of less than 100 watercraft used exclusively for sport, pleasure, or commercial fishing.
2. The dry storage of less than 150 watercraft used exclusively for sport, pleasure, or commercial fishing.
3. The wet or dry storage or mooring of less than 300 watercraft used exclusively for sport, pleasure, or commercial fishing in an area designated by the Governor and Cabinet in the state marina siting plan as suitable for marina construction.
4. The dry storage of less than 300 watercraft used exclusively for sport, pleasure, or commercial fishing at a marina constructed and in operation prior to July 1, 1985.]

27F-2.10 Residential Developments.

(1) The following developments shall be presumed to be developments of regional impact and subject to the requirements of Chapter 380, Florida Statutes:

Any proposed residential development that is planned to create or accomodate more than the following number of dwelling units:

* * *

[See the chart at note 4 on Dwelling Unit Thresholds.]

* * *

Provided, however, that any residential development located within two (2) miles of a county line shall be treated as if it were located in the less populous county.

[380.0651 (3)(j).-- No rule may be adopted concerning residential developments which treats a residential development in one county as being located in a less populated adjacent county unless more than 25 percent of the development is located within 2 or less miles of the less populated county.]

(2) As used in this section the term "residential development" shall include but not be limited to:

(a) the subdivision of any land attributable to common ownership into lots, parcels, units or interests, or

(b) land or dwelling units which are part of a common plan of rental, advertising, or sale, or

(c) the construction of residential structures, or

(d) the establishment of mobile home parks.

(3) As used in this section the term "dwelling unit" shall mean a single room or unified combination of rooms, regardless of form of ownership, that is designed for residential use by a single family. This definition shall include, but not be limited to, condominium units, individual apartments and individual houses.

(4) For the purpose of this section the population of the county shall be the most recent estimate for that county, at the time of the application for a development permit. The most recent estimate shall be that determined by the Executive Office of the Governor pursuant to Section 23.019, Florida Statutes.

27F-2.11 Schools.

(1) The following development shall be presumed to be a development of regional impact and subject to the requirements of Chapter 380, Florida Statutes:

The proposed construction of any public, private or proprietary post-secondary educational campus which provides for a design population of more than three thousand (3,000) full-time equivalent students, or the proposed physical expansion of any public, private or proprietary post-secondary educational campus having such a design population, by at least twenty percent (20%) of the design population.

(2) As used in this section, the term "full-time equivalent student" shall mean enrollment for fifteen (15) quarter hours during a single academic semester. In area vocational schools or

other institutions which do not employ semester hours or quarter hours in accounting for student participation, enrollment for eighteen (18) contact hours shall be considered equivalent to one quarter hour and enrollment for twenty-seven (27) contact hours shall be considered equivalent to one semester hour.

[380.0651 (3)(f) **Retail, service, and wholesale development.**-- Any proposed retail, service, or wholesale business establishment or group of establishments operated under one common property ownership, development plan, or management that:

1. Encompasses more than 400,000 square feet of gross area; or
2. Occupies more than 40 acres of land; or
3. Provides parking spaces for more than 2,500 cars.]

[380.0651 (3)(g) **Hotel or motel development.**--

1. Any proposed hotel or motel development that is planned to create or accommodate 350 or more units; or
2. Any proposed hotel or motel development that is planned to create or accommodate 750 or more units, in counties with a population greater than 500,000, and only in geographic areas specifically designated as highly suitable for increased threshold intensity in the approved local comprehensive plan and the comprehensive regional policy plan.]

[380.0651 (3)(h) **Recreational vehicle development.**-- Any proposed recreational vehicle development planned to create or accommodate 500 or more spaces.]

[380.0651 (3)(i) **Multi-use development.**-- Any proposed development with two or more land uses under common ownership, development plan, advertising, or management where the sum of the percentages of the appropriate thresholds identified in chapter 27F-2, Florida Administrative Code, or this section, for each land use in the development is equal to or greater than 130 percent. This threshold is in addition to, and not preclude, a development from being required to undergo development-of-regional-impact review under any other threshold.]

* * *

4. The following chart contains the dwelling unit thresholds for residential developments that must undergo DRI review. Areas with larger populations are assumed to be able to absorb larger developments without having a regional impact. Does this tend to concentrate new development in more populated areas? If so, is this a desirable effect? Do the thresholds discriminate against or protect less populated counties?

DRI DWELLING UNIT THRESHOLDS
 (Source: Chapter 27F-2.10, Florida Administrative Code)

<u>COUNTY</u>	<u>DRI DWELLING UNIT THRESHOLD</u>	<u>COUNTY</u>	<u>DRI DWELLING UNIT THRESHOLD</u>
Alachua	1,000	Lake	1,000
Baker	250	Lee	2,000
Bay	1,000	Leon	1,000
Bradford	250	Levy	250
Brevard	2,000	Liberty	250
Broward	3,000	Madison	250
Calhoun	250	Manatee	1,000
Charlotte	750	Marion	1,000
Citrus	750	Martin	750
Clay	750	Monroe	750
Collier	1,000	Naussau	500
Columbia	500	Okaloosa	1,000
Dade	3,000	Okeechobee	250
DeSoto	250	Orange	3,000
Dixie	250	Osceola	750
Duval	3,000	Palm Beach	3,000
Escambia	2,000	Pasco	1,000
Flagler	250	Pinellas	3,000
Franklin	250	Polk	2,000
Gadsden	500	Putnam	750
Gilchrist	250	St. Johns	750
Glades	250	St. Lucie	1,000
Gulf	250	Santa Rosa	750
Hamilton	250	Sarasota	1,000
Hardee	250	Seminole	1,000
Hendry	250	Sumter	500
Hernando	750	Suwannee	250
Highlands	750	Taylor	250
Hillsborough	3,000	Union	250
Holmes	250	Volusia	2,000
Indian River	750	Wakulla	250
Jackson	500	Walton	250
Jefferson	250	Washington	250
Lafayette	250		

NOTE: DRI dwelling unit thresholds are based on population estimates for April 1, 1984.

5. If development is within eighty and 120 percent of a threshold, a developer still must deal with presumptions as to whether a project is a DRI. If a developer is in doubt as to whether his project must undergo DRI review, the developer may request a determination, known as a binding letter, from the Department of Community of Affairs. A binding letter of interpretation from the DCA binds not only the state, but also regional and local agencies, as well as the developer.

If the development is within twenty percent above or below the designated thresholds, the DCA or the local government with jurisdiction over the area of the proposed project may require the developer to obtain a binding letter. Also, any adjacent local government may petition the DCA to require a developer to obtain a binding letter.

6. As a condition to obtain a development order, developers have often been required to contribute land, funds, or public facilities to the local government. Local governments support these types of conditions or exactions as a means of alleviating the impact of the development on the community and as requiring development to "pay its own way." Developers often complained that they were paying a disproportionate amount for the scope of the development or that the conditions bore no relationship to alleviating the impact of development. The 1985 amendments to chapter 380 provide:

380.06(15)(d) Conditions of a development order that require a developer to contribute land for a public facility, or construct, expand, or pay for land acquisition or construction or expansion of public facility, or portion thereof, shall meet the following criteria:

1. The need to construct new facilities or add to the present system of public facilities must be reasonably attributable to the proposed development.

2. Any contribution of funds, land, or public facilities required from the developer shall be comparable to the amount of funds, land, or public facilities that the state or local government would reasonably expect to expend or provide, based on projected costs of comparable projects, to mitigate the impacts reasonably attributable to the proposed development.

3. Any funds or lands contributed must be expressly designated and used to mitigate impacts reasonably attributable to the proposed development.

(e) Development order exactions.--

1. Effective July 1, 1986, local governments shall not include as a development order condition for a development of regional impact, any requirement that a developer contribute or pay for land acquisition or

construction or expansion of public facilities or portions thereof, unless the local government has enacted a local ordinance which requires other development not subject to this section, to contribute its proportionate share of the funds, land, or public facilities necessary to accommodate any impacts having a rationale nexus to the proposed development, and the need to construct new facilities or add to the present system of public facilities must be reasonably attributable to the proposed development.

* * *

7. The 1985 amendments added several mechanisms to expedite the DRI process and alleviate some of the costs due to time delays. Section 380.06(8) allows a developer to proceed with a limited amount of a proposed project pending DRI review. The limited development must be pursuant to a written preliminary development agreement with the DCA, subject to all other government approvals, and solely at the risk of the developer.

Conceptual agency review, section 380.06(9), facilitates planning and permit application preparation. If a proposed development receives conceptual agency review approval, "there shall be a rebuttable presumption that the developer is entitled to receive a construction or operation permit for an activity for which the agency granted conceptual review approval"

A development which is designated one of Florida's Quality Developments is exempt from DRI review. The amendments set out strict criteria for designation, and the designation must be approved by the state, regional, and local planning agencies. A developer may appeal an adverse decision on designation to the Quality Developments Review Board, consisting of the Secretaries of the Department of Community Affairs and the Department of Environmental Regulation, the Executive Directors of the Department of Natural Resources, the appropriate water management district, and the regional planning council, and the chief executive officer of the local government. An affirmative vote of five members of the board is required for designation.

Section 10. THE AREA OF CRITICAL STATE CONCERN PROGRAM

ASKEW v. CROSS KEY WATERWAYS
372 So.2d 913 (Fla. 1978)

SUNDBERG, Justice.

We deal today with the constitutionality of the provisions of Section 380.05(1), Florida Statutes (1975), for designation of areas of critical state concern by use of the criteria stated in Section 380.05(2)(a) and (b), Florida Statutes (1975). The issue reaches us by appeal from two separate decisions of the District Court of Appeal, First District, which have been consolidated for review by this Court.

* * *

Responding to the policy and mandate contained in Article II, Section 7, Florida Constitution,¹ in 1972 the legislature enacted the "Florida Environmental Land and Water Management Act," Chapter 72-317, Laws of Florida, Chapter 380, Florida Statutes. Section 380.05(1)(a) of the enactment empowers the division of State Planning to recommend areas of critical state concern to the Governor and cabinet acting as the Administration Commission. In its recommendation the Division of State Planning must designate the boundaries of the proposed area of critical state concern, explain the reasons for its conclusion that the area is of critical concern to the state or region, the dangers which would result from uncontrolled or inadequate development of the area, and the advantages to be gained from the development of the area in a coordinated manner. In addition, the Division of State Planning recommends specific principles for guiding the development of the proposed area.

Section 380.05(2), Florida Statutes (1975), enunciates the criteria which the division of State Planning shall utilize in determining whether to recommend designation of a particular area as one of critical state concern:

(2) An area of critical state concern may be designated only for:

(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.

1. (2) Art. II, section 7, Fla.Const., reads:

"Natural resources and scenic beauty.-- It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

(b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

(c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

Prior to submitting a recommendation with respect to an area of critical state concern to the Administration Commission, the Division of State Planning must give notice to all local governments and regional planning agencies included within the proposed boundaries, including any notice required by Chapter 120, Florida Statutes (1975), the Administrative Procedure Act, the provisions of which govern the actions taken by the Division of State Planning and the Administration Commission under Chapter 380. Section 380.05(4) and (8), Florida Statutes (1975); Section 120.72, Florida Statutes (1975).

Within 45 days after receiving the recommendations of the Division of State Planning, the Administration Commission must either reject the recommendations or adopt them with or without modification. Thereafter, by rule, the Administration Commission designates the area of critical state concern and approves the principles for guiding development of the designated area. Section 380.05(1)(b), Florida Statutes (1975). The Administration Commission is statutorily prohibited from designating more than five percent, in the aggregate, of the land within the state (approximately 1.8 million acres) as an area of critical state concern. Section 380.05(17), Florida Statutes (1975).

Section 380.05(5) provides that:

After the adoption of a rule designating an area of critical state concern the local government having jurisdiction may submit to the state land planning agency its existing land development regulations for the area, if any, or shall prepare, adopt and submit new or modified regulations, taking into consideration the principles [for guiding development] set forth in the rule designating the area as well as the factors that it would normally consider.

Subsection (7) of Section 380.05 directs the Division of State Planning to provide technical assistance to the local government in the preparation of the proposed land development regulations. If the Division of State Planning determines that the land development regulations submitted by the local government comport with the principles for guiding development, it shall by rule approve the locally-promulgated land development regulations. Section 380.05(6). The regulations are not effective until the Division of State Planning's rule approving them becomes effective which, under Section 120.54(11), Florida Statutes (1975), is 20 days after it is filed with the Secretary of State.

If the relevant local government fails to propose land development regulations within six months of adoption of the rule designating the area of critical state concern or, if such regulations have been proposed but the Division of State Planning concludes that they do not comply with the principles for guiding development for the area, within 120 days thereafter the Division of State Planning must recommend land development regulations to the Administration Commission. Section 380.05(8). The Administration Commission is allowed forty-five days after the receipt of recommended regulations, if any, from the Division of State Planning within which to reject the same or adopt them with or without modification. The Administration Commission must establish the land development regulations, by rule, within the forty-five day period as well. This rule must specify to what extent the regulations will supersede or supplement local land development regulations. Section 380.05(8). Although the regulations are administered by the local government, the Division of State Planning may initiate judicial proceedings to compel their enforcement if it concludes that local administration is inadequate. Section 380.05(8) and (9). Chapter 380 possesses the flexibility to conform to changed needs and conditions of a designated area of critical state concern by permitting the local government to propose new land development regulations after the initial regulations have been approved by the Division of State Planning or the Administration Commission. Section 380.05(10). It is essential under the statutory scheme that land development regulations become effective within twelve months after the adoption of the rule designating the area of critical state concern. If this condition is not fulfilled, the designation terminates and the area may not be redesignated for a period of one year after the termination. Section 380.05(12).

The Act affects regulation of virtually all development in an area of critical state concern: all building, mining, and changes in the use or appearance of land, water and air and appurtenant structures; material increases in the density of its use; alteration of shores and banks; drilling; structural demolition; clearing adjunct to construction; and deposit of waste or fill. Excepted are work by road agencies and other utilities; structural maintenance affecting only the interior or the color or exterior decoration of a structure; the use of structures for customary dwelling purposes; changes of usage within the same regulated class of use; changes in ownership; and changes in rights of access, riparian rights, easements and covenants affecting rights and land. Section 380.04.

The controversy before us results from actions taken by the Administration Commission of the Department of Administration in designating the Green Swamp area of critical state concern and the Florida Keys area of critical state concern and, in the case of the former, adopting land development regulations.

The criteria for designation of an area of critical state concern set forth in Section 380.05(2)(a) and (b) are constitutionally defective because they reposit in the

Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection.

* * *

The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest.

* * *

Under the provisions of Section 380.05, the Administration Commission "fleshes out" what it has in the first instance conceived. In the words of Justice Whitfield in State v. Atlantic Coast Line Ry., supra, the function of the Administration Commission under Section 380.05(1) and (2)(a) and (b) involves the exercise of primary and independent discretion rather than the determination "within defined limits, and subject to review, [of] some fact upon which the law by its own terms operates" 47 So. at 972. In contrast, by The Big Cypress Conservation Act of 1973, Section 380.055, Florida Statutes (1975), the legislature conceived the areas of critical state concern and left to the Division of State Planning and the Administration Commission the task of "fleshing out" through adoption of land development regulations.

Our research in other jurisdictions fails to disclose one instance in which the legislative branch has unconditionally delegated to an agency of the executive branch the policy function of designating the geographic area of concern which will be subject to land development regulation by the agency. For example, in CEEED v. California Coastal Zone Conservation Commission, 43 Cal.App.3d 306, 118 Cal.Rptr. 315 (Dist.Ct.App. 1974), the California court sustained against an unlawful delegation attack broad powers of regional commissions to issue development permits within the California coastal zone designated by the Coastal Conservation Act of 1972. Any development in the designated coastal area was subject to permitting by an appropriate regional commission pending formulation and submission for adoption by the legislature of a comprehensive California Coastal Zone Conservation Plan. The court approved the standard in the Act, which required a finding before permitting, that ". . . the development will not have any substantial adverse environmental or ecological effect" and that ". . . the development is consistent with, the findings and declarations set forth in Section 27001 and with the objectives set forth in Section 27302." It dealt with the delegation issue in the following language:

The constitutional doctrine prohibiting delegation of legislative power rests on the premise that the Legislature may not abdicate its responsibility to resolve the "truly fundamental issues" by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies. (Citations omitted) Consequently, where the Legislature makes the fundamental policy decision and delegates to some other body

the task of implementing that policy under adequate safeguards, there is no violation of the doctrine. (Citations omitted.)

* * * * *

The "substantial adverse environmental or ecological effect" standard is more specific than the broad "health, safety, or general welfare" guideline upheld in Candlestick and the cases cited above. [Candlestick Properties, Inc. v. San Francisco Bay CND Commission, 11 Cal.App.3d 557, 89 Cal.Rptr. 897 (Dist.Ct.App. 1970)]. Although application of the standard calls for the exercise of judgment and discretion, by the very nature of the legislative goals, considerable discretion must of necessity be vested in the Commission. As the court in Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 271, 104 Cal.Rptr. 761, 777, 502 P.2d 1049, 1065, said of the "significant effect on the environment" phrase in the California Environmental Quality Act: To some extent this is inevitable in a statute which deals, as the EQA must, with questions of degree." The statutory criteria to be observed by the Commission and the regional commissions in carrying out the tasks delegated to them clearly satisfy constitutional requirements. The fact that the Commission is required to weigh complex factors in determining whether a development will have a substantial adverse environmental or ecological effect does not, as plaintiffs charge, mean that unbridled discretion has been conferred on it. A statute empowering an administrative agency to exercise a judgment of a high order in implementing legislative policy does not confer unrestricted powers. (Citations omitted)

The language of the California court is not dissimilar to that used by Justice Whitfield in State v. Atlantic Coast Line Ry., supra. However, the striking difference between the California Act and the statutory scheme here under consideration lies in the fact that the California Act geographically circumscribed by its own terms both the coastal zone and the area within the coastal zone within which the regional commissions were authorized to require development permitting. Furthermore, the permitting function was an interim measure pending adoption by the legislature of a comprehensive Coastal Zone Conservation Plan.

In J.M. Mills, Inc. v. Murphy, 116 R.I. 54, 352 A.2d 661 (1976), the Rhode Island Supreme Court dealt with the validity of the Fresh Water Wetlands Act. The Act provides for regulation of all fresh water wetlands. The Act defines its geographical jurisdiction, declares the state policy with regard to wetlands, and requires the approval of both the Director of the Department of Natural Resources and the municipality in which the land is located before wetlands may be altered. Plaintiff landowner sought a declaratory judgment challenging the functions vested in the Director and the municipalities as being an unlawful delegation of legislative power. On appeal by the plaintiff from an adverse decision in the trial court, the supreme court affirmed. After noting that the nondelegation doctrine has been relaxed of late, the court reasoned that the adequacy of

legislative standards could best be measured against the intended purpose of the legislation. Having enunciated these general principles the court stated:

With these general principles in mind, we proceed to consider the validity of a delegation of authority to the director of the Department of Natural Resources to disapprove applications to alter fresh water wetlands. Section 2-1-21 requires anyone who would alter the character of a wetland to obtain the approval of the director and fixes the governing standard as the "best public interest." The plaintiffs argue that this is not a meaningful standard. In response to this contention, we first note that the director is given jurisdiction over only a very limited area, wetlands. The term "wetlands" is precisely defined in 2-1-20. In a previous case where this court found a valid delegation of authority to the Blackstone Valley Sewer District Commission, City of Central Falls v. Halloran, 94 R.I. 189, 179 A.2d 570 (1962), we placed great weight on the fact that the administrative agency was given discretion to act only in a well-defined geographical area. Here, also, the scope of administrative authority is clearly confined.

352 A.2d at 666 (emphasis supplied).

It is apparent that the Rhode Island court was materially influenced by the fact that the administrative agency was granted discretion to act only in a geographical area well-defined by the legislature.

To the same effect is the case of Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J.Super. 135, 355 A.2d 679 (1976), upholding against constitutional attack the New Jersey Coastal Area Facility Review Act. The Act establishes boundaries for the "coastal area" of the state and declares that this area constitutes "an exceptional, unique, irreplaceable and delicately balanced physical, chemical and biologically acting and interacting natural environmental resource" The State Department of Environmental Protection is designated as the agency to administer the Act and is granted authority to adopt rules and regulations to effectuate its purposes. After declaring the purposes of the legislation, the Act proceeds to list the facilities subject to its provisions. In denying the challenge that the Act does not provide adequate standards for its administration, the New Jersey court approved some rather nonspecific standards when coupled with procedural safeguards designed to insure against unreasonable and unwarranted administrative action. Nonetheless, the geographic area to be regulated by the administrative agency was discreetly defined by the Act.

In 1974, Massachusetts enacted St.1974, c. 637, "An act protecting land and water on Martha's Vineyard" which is patterned after The American Law Institute, Model Land Development Code. ALI, A Model Land Development Code, Art. 7 (1976). Section 380.05, Florida Statutes (1975), was likewise modeled after an earlier draft of Article 7 of the American Law Institute Model Code. The Martha's Vineyard Act was the subject

of litigation in Island Properties, Inc. v. Martha's Vineyard Commission, 361 N.E.2d 385 (Mass.1977). The test in this case did not touch upon the subject of unlawful delegation and, therefore, the decision is not persuasive in the instant cases. It is instructive to note, however, that in implementing the ALI model code the Massachusetts legislature expressly delineated the geographical area of Martha's Vineyard within which the Martha's Vineyard Commission is authorized to designate districts of critical planning concern. Under the terms of the Massachusetts act the commission was charged with developing standards and criteria for identification of areas of critical planning concern within the boundaries of the island, which standards and criteria were subject to and received the approval of the Secretary of Communities and Development. The Massachusetts scheme, then, is similar to that adopted by the Florida Legislature for the "Big Cypress Area" (Section 380.055) insofar as establishment of the geographic perimeters in which the agency may exercise its discretion is concerned.

* * *

Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us. Appellants argue that Section 380.05 requires that all land development regulations be consistent with the principles for guiding development which are adopted contemporaneously with the designation of an area of critical state concern and, therefore, there can be no abuse in the process. We concur that the provisions of Section 380.05 coupled with Chapter 120, Florida Statutes, are calculated to assure procedural due process. Nonetheless, the standard by which land development regulations are to be measured is not a standard articulated by the legislature but one determined by the Administration Commission through formulation of principles for guiding development. In short the primary policy decision of the area of critical state concern to be designated as well as the principles for guiding development in that area are the sole province of an administrative body.

* * *

Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.

* * *

Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. The criteria contained in Section

380.05(2)(a) and (b), Florida Statutes (1975), do not comply with this constitutional imperative.

Our decision today need not impair the ability of our state government to protect the resources and facilities described in Section 380.05(2)(a) and (b), however. In complying with the policy and mandate of Article II, Section 7, Florida Constitution, the legislature need only exercise its constitutional prerogative and duty to identify and designate those resources and facilities. It may be done in advance as with the Big Cypress area of critical state concern, Section 380.055, Florida Statutes (1975), or through ratification of administratively developed recommendations as in the case of the California Coastal Zone Conservation Plan, CEED v. California Coastal Zone Conservation Commission, supra. In either case the ultimate selection of priorities for areas of critical state or regional concern will rest with representatives of our government charged with such responsibilities under our Constitution.

THE CRITICAL AREA PROGRAM SUMMARIZED
(Source: Department of Community Affairs)

The Areas of Critical State Concern program is authorized by Section 380.05, Florida Statutes, part of the Florida Environmental Land and Water Management Act of 1972. The Act provides that the State land planning agency (The Florida Department of Community Affairs) may recommend to the Administration Commission specific areas of "critical state concern." The statute allows designation of areas with significant environmental resources, historical resources or sites, or areas impacted by an existing or proposed major public facility.

The Administration Commission may adopt the recommendation by a rule setting boundaries of the area and principles to guide development. Once an area is designated by rule, affected local governments have 180 days to submit land development regulations consistent with the principles set forth in the rule. If the local government fails to submit regulations, or its proposals are insufficient, the State agency may propose regulations. If the agency's proposals are adopted by the Administration Commission, the local government must apply the regulations.

Three critical areas have been designated: The Big Cypress Swamp, the Green Swamp, and the Florida Keys. The Florida Legislature, through the Big Cypress Conservation Act of 1973, designated the Big Cypress Swamp as Florida's first Area of Critical State Concern. The Big Cypress Swamp encompasses 358,000 acres of estuaries, marshland, and cypress swamp, and it is part of the watershed for the Everglades National Park. The Green Swamp, a major recharge area for the Floridan Aquifer was designated by the Governor and Cabinet in July 1974. The Florida Keys, a unique chain of 97 islands with environmental and historic resources important to tourists and residents were

designated by the Governor and Cabinet as the third Area of Critical State Concern in April 1975.

In August 1977, the First District Court of Appeal in Cross Keys Waterways, Inc. v. Askew, et. al., ruled that Section 380.05, F.S., was unconstitutional In November 1978, the Florida Supreme Court upheld the decision of the District Court. In December 1978, a special session of the Legislature redesignated and extended the critical area regulations and established a joint legislative committee to propose amendments. That committee developed several recommendations which were incorporated into Section 380.05 in 1979.

A major amendment provides stronger legislative oversight of the program through legislative review of each designation by the Governor and Cabinet. The Legislature "may reject, modify or take no action relative to the adopted rule." Legislative confirmation of each designation is not required. No state land development regulations can be established until after the legislative review.

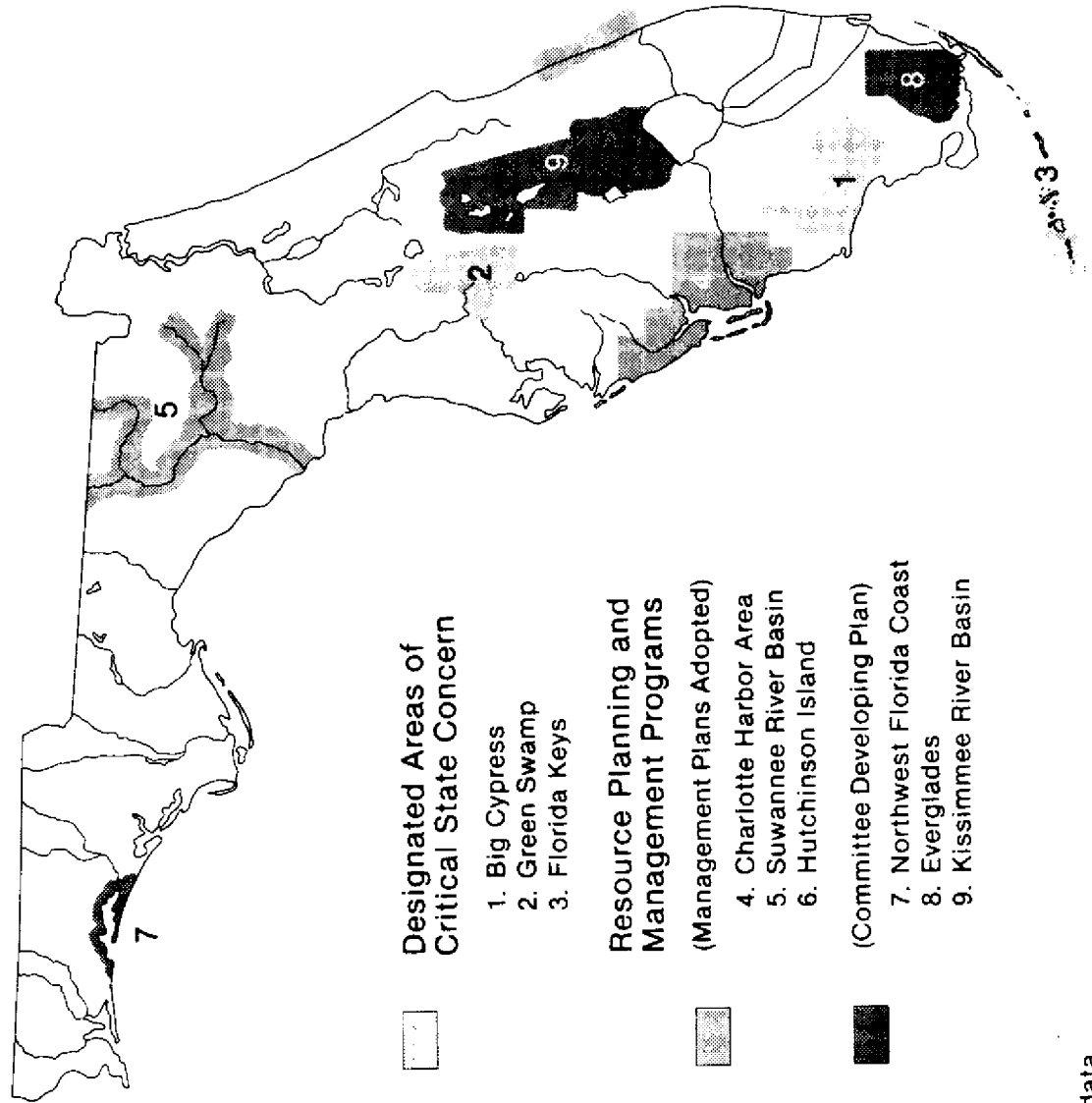
Another provision added to Chapter 380, F.S., in 1979 requires the appointment by the Governor of a Resource Planning and Management Committee before a formal designation can occur. The Committee brings together State, regional and local agencies, and interest groups, and emphasizes voluntary intergovernmental cooperation to solve growth and resource management problems. If the Committee's efforts prove unsuccessful, the Governor can then seek a formal critical area designation through the Administration Commission.

Since 1979, four Resource Planning and Management Committees have been appointed. The Charlotte Harbor and the Suwannee River Resource Planning and Management Committees were appointed as a prerequisite to their possible designation as Areas of Critical State Concern. The green Swamp and the Florida Keys Resource Planning and Management Committee were established to review land development regulations and determine if such regulations meet the requirements for repeal of the critical area designation. [Recent committee appointments include the Northwest Florida Coast, the East Everglades and Kissimmee River Basin Resource Planning and Management Committees.] On the whole, these committees seem to have worked effectively on a wide range of issues.

[Florida Statutes section 380.045 Resource planning and management committees; objectives; procedures.-

(1) Prior to recommending an area as an area of critical state concern pursuant to s. 380.05, the Governor, acting as the chief planning officer of the state, shall appoint a resource planning and management committee for the area under study by the state land planning agency. The objective of the committee shall be to organize a voluntary, cooperative resource planning and management program to resolve existing, and prevent future, problems which may endanger those resources, facilities, and areas described in s. 380.05(2) within the area under study by the state land planning agency.]

Areas of Critical State Concern



Designated Areas of Critical State Concern

1. Big Cypress
2. Green Swamp
3. Florida Keys

Resource Planning and Management Programs

(Management Plans Adopted)

4. Charlotte Harbor Area
5. Suwannee River Basin
6. Hutchinson Island

(Committee Developing Plan)

7. Northwest Florida Coast
8. Everglades
9. Kissimmee River Basin

Designated Areas

Big Cypress Swamp - The Florida Legislature, through the Big Cypress Conservation Act of 1973, designated Big Cypress Swamp as Florida's first Area of Critical State Concern. Development activity within the Big Cypress Swamp ACSC continues to be monitored by DCA. This consists of meetings with local government planning officials and the South Florida Water Management District. In addition, the Department has increased its coordination with State agencies in Tallahassee (i.e., Big Cypress Task Force, DNR Land Acquisition programs) in an effort to participate more effectively in their decisions.

Green Swamp - The Green Swamp, a major recharge area for the Floridan Aquifer was designated an ACSC by the Governor and Cabinet in 1974. The entire Green Swamp critical area is contained within Polk and Lake Counties. Polk County is near adopting ordinances that would satisfy the State's Principles for Guiding Development. DCA staff is continuing to work with Lake County to remove the designation. Until that time, DCA will continue to review development permits for their conformance with ACSC standards and maintain the Green Swamp Resource Planning and Management Committee to review proposed local government ordinances and plan revisions.

Florida Keys - The Department's program in the Florida Keys involves three major functions: (1) the Governor's Resource Planning and Management Committee; (2) the monitoring and enforcement of the ACSC program; and (3) a cooperative planning effort between Monroe County and DCA. This cooperative effort is funded by \$320,000 allocated by the Florida Legislature. Of this sum, \$200,000 will be passed through to the County for development of a revised comprehensive plan. The Department is using the remaining money to hire a planning coordinator and appropriate staff, located in Key West, to oversee this effort. In addition, the Department has hired staff, also located in Monroe County, to conduct an extensive monitoring and enforcement program.

[Franklin County - Franklin County was designated an ACSC by the 1985 legislature.]

Resource Planning and Management Programs

Charlotte Harbor (completed) - DCA is monitoring local government compliance with the Charlotte Harbor Management Plan. This is accomplished by staff visits to the area, along with information provided by numerous members of the public. Lines of communication are maintained with local officials, water management districts, and the Southwest Florida Regional Planning Council. The DCA has also initiated discussions with the State

agencies which participated in the preparation of the Charlotte Harbor Management Plan to clarify their respective authorities in implementing the Plan's policies and objectives.

Suwannee River (completed) - The DCA has recently hired two part-time building inspectors to monitor development along the Suwannee River Basin for compliance with the Suwannee River Floodplain Management Ordinance. This ordinance was adopted by 11 counties and 4 municipalities on the recommendation of the Suwannee River Resource Planning and Management Committee. The monitoring program is in cooperation with the Suwannee River Water Management District where the DCA staff are located. In addition, these staff members are available to assist local governments in coordination with State agencies.

Hutchinson Island (on-going) - The Hutchinson Island Resource Planning and Management Committee is in the final stages of adopting a Management Plan (a final recommendation is due in October). At that time DCA will review the plan to determine if it adequately addresses State and regional issues. If it does, DCA will initiate a monitoring program to assure that the principles outlined in the Management Plan are complied with by State, regional, and local governments.

Proposed Areas [Now appointed.]

Everglades - A major Resource Planning and Management Program is a component of Governor Graham's "Save Our Everglades" initiative. This effort will examine resource issues in South Florida from the Kissimmee River to Florida Bay and from the Fakahatchee Strand to the East Everglades. Two Resource Planning and Management Committees will be established (an East Everglades Committee and a Kissimmee Committee) to analyze resource management problems and propose solutions.

Northwest Florida Coast - This Committee, soon to be appointed, is in response to the tremendous development pressure now occurring on the coast of Northwest Florida. This Committee, which will be implemented in two phases, will examine the complex issues of coordinating large scale development in an area with limited public facilities and experience dealing with growth management issues. The Okaloosa-Walton County area will be the focus during the first phase. Escambia, Santa Rosa and Bay Counties will be addressed in the second phase.

Section 11. SPECIAL MANAGEMENT AREAS AND STATE LAND
ACQUISITION PROGRAMS

In addition to the Area of Critical State Concern Program, the state of Florida has a variety of other programs and laws to protect special areas or provide public recreation. These programs include:

- Aquatic Preserves System
- State Wilderness System
- Conservation and Recreation Lands
- Environmentally Endangered Lands

Florida Coastal Management Program, Final Environmental Impact Statement (1981).

FLORIDA'S AQUATIC PRESERVES SYSTEM

State Concern

Through Florida's Aquatic Preserve Act of 1975 (Chapter 258, F.S.) the state manages 30 estuarine and marine aquatic preserves within the coastal zone. The Act was passed to set aside certain state-owned submerged lands and associated coastal waters in areas which have exceptional biological, aesthetic, and scientific value as state aquatic preserves or sanctuaries for the benefit of future generations. A designated Aquatic Preserve may include open water areas, coastal marshes mangrove islands, grass flats, sandy beaches, and other features of estuarine, lagoon and nearshore marine tidal water bodies.

* * *

The majority of aquatic preserves are either in or near regions of increasing urbanization. Competition for the use of these areas is great. Many wetland areas within or adjacent to the preserves were filled in the past to create useable "dry" land. Conversely, significant portions have been dredged to provide fill materials or to create navigation channels. In some cases, coastal marshes and mangrove swamps have been drained for mosquito control and to improve upland properties. Exploratory wells have been drilled, shell and sand has been mined, and structures of all shapes and sizes have been erected. In addition, some of the areas have experienced increasing amounts of pollution of various forms. Concern over these problems resulted in passage of the Aquatic Preserve Act.

Selection Criteria

All of the aquatic preserves were selected on the basis of being areas of submerged lands (and associated waters) which were of exceptional value. The purpose essentially is to maintain them in their natural or existing condition, or to restore them.

Additional general criteria which further describe the nature of the designated preserves are: 1) each area includes only state-owned lands or water bottoms specified by law; 2) privately-owned lands or water bottoms are excluded except where negotiated with a private owner; and 3) all established aquatic preserves exclude: a) any publicly-owned and maintained navigation channel or other authorized (by the U.S. Congress) public works project designed to improve or maintain commerce and navigation, and b) all lands which may be lost through avulsion or artificially induced erosion.

In addition to these requirements, the Act also specifies that each of the preserves be characterized as being of one or more of three principal types: (1) biological, where certain forms of animal or plant life, or their supporting habitat, is to be protected; (2) aesthetic, where certain scenic qualities or amenities are to be maintained; and (3) scientific, where other particular qualities or features are to be maintained. Six aquatic preserves, Estero Bay, Rookery Bay, Coupon Bight, Lignumvitae Key, North Fork St. Lucie River, and Cockroach Bay remain to be formally designated as belonging in one or more of these three types.

* * *

The[se] ... guidelines serve to direct the management of the aquatic preserves. Specific prohibitions in the Act include:

1. The sale, lease or transfer of state submerged lands except when it is in the public interest;
2. Any further dredging or filling of submerged lands except in certain instances such as authorized public navigation projects and other authorized projects for the creation and maintenance of marinas, piers, etc.;
3. The drilling of gas or oil wells;
4. The erection of certain structures; and
5. The discharging of wastes or effluents when such action substantially departs from the intent of the Act.

* * *

In addition, the Trustees can permit ... uses and activities which may not have been specifically provided for but which are found to be compatible with the intent of the Act. Hence, although these areas are called preserves, several uses and activities are permitted which may have some effect on the existing conditions in the areas.

* * *

FLORIDA'S STATE WILDERNESS SYSTEM

State Concern And Program Fulfillment Of That Concern

The State Wilderness System Act (also in Chapter 258, F.S.) provides for the selection and management of state lands set aside as State Wilderness Areas in order to protect and enhance their natural qualities.

These areas are predominantly in a natural undisturbed condition, and are in need of additional protection by the state. Some of these areas are very fragile and are vulnerable to many of man's activities. In addition, some areas are near developing urbanized regions and thus are subject to secondary effects of neighboring development, such as pollution, disruption of habitat, and over-intensive recreation. These wild or natural areas possess certain features which are valuable resources and thus desirable to preserve. Their ecological value as important bird and fish habitats, breeding grounds, and natural botanical areas, as well as their aesthetic and educational values were recognized by the state by enacting the State Wilderness System Act.

* * *

Selection Criteria

As with aquatic preserves, each wilderness area is one or more of three principal types: 1) biological, 2) aesthetic and 3) scientific. Each may contain desirable aspects of all three types. A "biological" type of wilderness area is one which is set aside to promote certain forms of animal life in its supporting habitats; "aesthetic" wilderness areas protect certain scenic qualities; and "scientific" areas, preserve certain features (which may or may not include biological or aesthetic qualities) for scientific or educational purposes.

All wilderness areas must be large enough to at least include those principal features which would justify their establishment. There is no limit on the number of wilderness areas the state may establish but each area must be justified by its intrinsic merit, according to the provisions of the Act and rules established by the Board of Trustees.

Certain priority guidelines must be met to ensure that the most appropriate wilderness areas are selected first. In general, the order of the selection and establishment of areas is governed by the relative vulnerability of their features. Specifically, the Board of Trustees is required to give high priority to areas which: 1) are in close proximity to urban or rapidly developing areas; 2) are in imminent danger from the effects of some other activity; 3) are intended to protect rare or endangered species or unique features; or 4) constitute the last vestiges of an area's natural conditions.

* * *

Management Guidelines/Authorities

The Board of Trustees is required to adopt rules and regulations to ensure that all wilderness areas are regulated under a uniform set of general management criteria. These prohibit alteration of physical conditions within any wilderness area except:

1. Minimum development which is consistent with the public's convenience and necessity and is in accordance with the Act itself; and
2. Approved activities which are designed to enhance the area's quality or utility.

Other general management criteria are:

1. That all human activity within the area may be subject to additional rules and regulations that have been applied (in accordance with the Act) to that specific area; and
2. That other uses or human activities which were not originally contemplated under the guidelines, may be permitted if found to be compatible by the Board of Trustees.

Within these guidelines, various public uses are permitted, as long as they are compatible with those purposes for which the area was established. Permitted uses include:

- | | |
|------------|-----------------|
| 1. Hiking | 6. Picnicking |
| 2. Bathing | 7. Sightseeing |
| 3. Fishing | 8. Camping |
| 4. Boating | 9. Nature Study |
| 5. Hunting | 10. Research |

In addition, wilderness areas may be designated and used for water storage areas or ground water recharge areas.

* * *

CONSERVATION AND RECREATION LANDS:
ENVIRONMENTALLY ENDANGERED LANDS

State Concern and Program Fulfillment of That Concern

As the direct result of the state's concern for preserving valuable and irreplaceable natural resources, the Land Conservation Act of 1972 (Chapter 259, F.S.) was enacted. It authorized the state to issue, upon approval of the voters, \$200 million of state bonds for purchase of environmentally endangered lands.

The concern which led to the passage of this act stemmed largely from the recent realization that Florida's extraordinary natural systems were being rapidly degraded or destroyed. Man's insufficient regard for the value of the state's natural systems was a basic cause for this problem. The state's rapid population growth, coupled with inadequate governmental controls, further contributed to Florida's environmental degradation.

In response to these problems, the Environmentally Endangered Lands (EEL) Program was instituted. The Program is designed to complement existing regulatory programs and contribute to the overall effectiveness of the state's environmental protection efforts. Hence, the acquisition of valuable lands was viewed as an effective method for meeting the state's concern for protecting Florida's environmental resources.

Additional sources of funding, as well as further emphasis on areas of special management, were provided in 1979 when the state legislature established the Conservation and Recreation Lands Trust Fund (Section 253.023, F.S.) administered within the Department of Natural Resources.

* * *

[C]riteria are listed in order from Step 1 through Step 7. Evaluation of each proposed acquisition project is to begin with the first step by the selection committee, proceed in an orderly manner through each step, until all steps are satisfied. Evaluation of a proposed acquisition project is to cease when any of the steps, 1 through 6, are not satisfied. These steps are summarized as follows:

Step 1 - Public purpose and conformance to management plans in accordance with Section 259.04(1) and 253.03(7), F.S., i.e., acquisition projects are to be acquired to meet one or more stated public purpose for:

1. Environmentally Endangered Lands, such as:
 - a. Those areas of ecological significance, the development of which by private or public units, would cause the deterioration of submerged lands, inland or coastal waters, marshes, or wilderness areas essential to the environmental integrity of the area of adjacent areas;

b. Those areas which, in the judgment of the Game and Fresh Water Fish Commission, Department of Natural Resources, or Department of Environmental Regulation, would require a remedial public works project to limit or correct environmental damage if developed; or

c. Any beaches or beach within the state which have been eroded or destroyed by natural forces or which are threatened or potentially threatened, by erosion or destruction by natural forces.

2. Use as outdoor recreation lands.

3. Lands acquired in the public interest, such as:

a. For use and protection as natural floodplain, marsh, or estuary, if the protection and conservation of such lands is necessary to enhance or protect water quality or quantity or to protect fish or wildlife habitat which cannot otherwise be accomplished through local and state regulatory programs;

b. For use as state parks, recreation areas, public beaches, state forests, wilderness areas, or wildlife management areas;

c. For restoration of altered ecosystems to correct environmental damage that has already occurred; or

d. For preservation of significant archaeological or historical sites.

Projects that are proposed for purchase as EEL acquisitions must be in conformance with the comprehensive plan to conserve and protect environmentally endangered lands in the state. All proposed projects must conform to the state land management plan for acquisition, management and disposition of all state-owned lands to ensure maximum benefit and use, when the plan is developed.

Step 2 - Ecological, recreational, archaeological, or historic value:

1. Projects are to be evaluated for their ecological value as natural resources, including consideration of species of fish and wildlife, habitat, geological features, water quality and quantity, contribution to quality of adjacent areas, and other considerations.

2. Projects are to be evaluated for their recreational value, including consideration as parks, sites for both primitive camping and recreational vehicular camping, sites for hiking, canoeing, fishing, hunting, and other recreational activities.

3. Projects are to be evaluated for their archaeological and historical value including value to the educational and scientific community of the State and to the public as a whole and potential for restoration or maintenance to insure availability for the public use and enjoyment.

4. Projects are to be evaluated to ensure that there is no available existing suitable state-owned lands.

Step 3 - Ownership Pattern:

1. Projects are to be evaluated for functional useability by the public, including appropriate access, proximity to potential users, sufficient areal extent for stated public purpose, and other appropriate considerations.

2. Projects are to be evaluated for manageability in accordance with stated public purpose, including the degree of protection afforded natural or cultural resources, proximity to other parcels of state-owned land, potential for development of public facilities, capability for restoration and maintenance, and other appropriate considerations.

3. Projects are to be evaluated to ascertain if any portion of the project may already be in public ownership, including local, state or federal ownership.

4. Projects are to be evaluated in relationship to the type of land, the stated public purpose and the quantity of that type already available to the public.

Step 4 - Vulnerability and Endangerment:

1. Projects are to be evaluated for vulnerability, that is, susceptibility to degradation caused by man's activities, directly or indirectly, including encroaching residential or commercial activity, land alteration activities, land-use changes and other considerations that may create an adverse impact on the proposed project.

2. Projects are to be evaluated for endangerment, that is, the potential for actual destruction or degradation by man's activities of the resources which form the basis of the stated public purpose, including development plans for the parcel, loss of the resource unless adequately protected or maintained, and other considerations that may result in an irreplaceable loss to the state.

Step 5 - Location:

1. Projects are to be evaluated for their location within the State to achieve a balance of available resources for the public including consideration of historical or archaeological significance, environmental significance, or recreational significance, and consideration of unique qualities of different areas of the State.

2. Projects are to be evaluated for their local, regional or state-wide significance to the public, including consideration of recreational needs, water quality or quantity needs, environmental needs, and other appropriate considerations.

3. Projects are to be evaluated for their proximity to urban areas to provide a reasonable balance of available resources for the benefit and welfare of the public.

Step 6 - Cost:

Projects are to be evaluated for their availability for purchase in accordance with the stated public purpose and evaluated in view of the availability of other local, state or federal funding to accomplish the stated public purpose.

In addition, projects are to be evaluated in terms of unit cost in relationship to the regional cost of land and the need of the region for the resources, as well as in terms of their cost for development, restoration, maintenance or management.

Step 7 - Additional Criteria:

The Committee can use additional criteria as appropriate to achieve the legislative intent to insure the availability of public lands for recreation for the people residing in urban and metropolitan areas of the State, more particularly those areas exhibiting the greatest concentration of population, as well as those people residing in less populated, rural areas and to achieve the conservation and protection of valuable archaeological and historical sites and environmentally unique and irreplaceable lands as valued ecological resources.

Criteria in this step are optional and additional to the essential criteria in Steps 1 through 6. Identification of this additional criteria is not to be used as a reason to cease further consideration of a proposed acquisition project.

Section 12. PROTECTION OF BEACHES, DUNES, AND BARRIER ISLANDS

Beaches, dunes, and barrier islands are the most sensitive areas of the coastline. They are also the most attractive areas for recreation and development. Development on beaches and dunes has caused serious erosion of these areas, resulting in loss of recreation areas, habitat, public facilities, and storm protection the beaches and dunes had provided. Federal, state, and local governments have, perhaps inadvertently, encouraged growth in these sensitive areas by providing infrastructure, flood insurance, and disaster relief.

There are two approaches that can be taken to regulating development on beaches, dunes and barrier islands. First, growth can be regulated directly by restricting or prohibiting structures that will contribute to erosion of the shore or that will be located in unsafe or unstable areas. Because government subsidies have stimulated growth, withholding of government support for development on barriers and beaches may provide a second, indirect means of regulation. This section will discuss the application of these approaches at the state and federal levels.

Maloney and O'Donnell, Drawing the Line at the Oceanfront: The Role of Coastal Construction Setback Lines in Regulating Development of the Coastal Zone, 30 U. Fla. L. Rev. 383-403 (1978).

Introduction

Recent years have witnessed a surge of public concern over the adverse environmental impact of rapid and unrestrained real estate development. Nowhere has this public awareness been more evident than in Florida. Within a span of five years the state's legislature has enacted measures to regulate developments of regional impact, protect ecologically critical areas, and promote comprehensive and environmentally sound land use planning throughout the state. From the outset, Florida's coastal zone has received special attention as an area of crucial economic importance to the state that poses unique problems of land use regulation and planning. In 1970, the legislature created the Coastal Coordination Council to direct research and coordinate planning for sound management of the coastal zone. Moreover, the congressionally enacted Coastal Zone Management Act of 1972 has provided federal resources and encouragement that have served to intensify the state's efforts in developing a comprehensive program for managing the resources of the coastal zone.

Florida has not, however, relied solely on long-range programs to ensure preservation of oceanfront and coastal property. Recognizing the pressing problems of coastal flooding

and beach erosion, the legislature enacted measures in both 1970 and 1971 that imposed coastal construction setback lines for all of the state's high-energy beaches. The 1970 Act, an interim measure, required all construction begun after July 27, 1970, to be landward of a line fifty feet upland of mean high water. The following year the legislature authorized establishment of an engineered setback line for the high-energy beaches of each coastal county. Although the Florida legislature has not enacted comparable measures for restricting land use on the state's vast vegetated, estuarine, and wetlands shores, the Department of Environmental Regulation has become involved in regulating construction, excavation, and filling on tidal wetlands as part of its overall efforts to control water pollution.

In addition to these state-level operations, several local communities in Florida have developed various regulatory measures for their coastal areas. A number of local governments have enacted coastal construction and excavation setback ordinances to protect the dunes, bluffs, and vegetation of their high-energy beaches. One county has adopted measures to protect shoreline mangroves and other coastal wetlands vegetation. Other communities have developed special land use programs and site-specific building codes to ensure reasonable use of coastal property within their respective jurisdictions.

* * *

The Coastal Environment Natural Dynamics of a High-Energy Beach

Sand beaches and dunes comprise a very small and unstable part of Florida's coastal zone. Forming a narrow band along the shores of the Atlantic Ocean and the Gulf of Mexico, they offer some of the state's most attractive and most hazardous locations for real estate development. Without adequate controls on construction and excavation, oceanfront development could destroy not only man-made structures but also beaches and dunes.

Flood and erosion are natural occurrences in the life of a sand beach. A single great storm can eradicate an entire beach and dunal system leaving upland property directly exposed to the forces of ocean winds and waves. Normally, the high-energy beach provides its own natural defenses. The upward slope of the shore as it emerges from the water edge serves to dissipate wave energy; coastal vegetation stabilizes the sand beach and absorbs the direct forces of wind and water; and wind-borne sand accumulates in dunes that not only buffer the impact of high winds and waves but also provide important sand supplies for restoring flood-eroded beaches.

Because of the inevitable loss of sand due to the action of waves and longshore currents, the survival of a sand beach depends primarily upon its ability to regenerate. Under natural conditions, the mechanism of littoral drift will ensure a balance between erosion and accretion. The same forces of waves and currents that remove sand will also transport it along the shore

and deposit it at some other point on the beach. In addition, the littoral drift will transport sand from the ocean bottom to the beach, thereby restoring or enlarging it.

The intrusion of stable, artificial structures into the natural setting of a high-energy beach can easily destroy its defenses and disrupt its natural regeneration. For example, a bulkhead or other vertical, impermeable structure interrupts the shore's natural slope and directly blocks the full force of waves. The result is a turbulent, scouring action at the base of the structure that accelerates the removal of sand and undermines not only the beach but the structure itself. Further upland, excavation and construction can destroy vegetation and dunes which are vital to the stability and safety of the beachfront. Equally important, the development of shorefront property can interfere with the process of littoral drift, upsetting the balance of erosion and accretion necessary for the survival of a high-energy beach.

Thus, the major purpose of a coastal setback is to keep developmental activities from encroaching upon the shore and interfering with the natural defenses and regeneration of a beach. Natural beach contours should dictate the location of a setback line. For example, excavation or construction should be kept upland of dune formations in order to preserve the dunes' protective and restorative functions. Another physical feature that requires protection is the beachfront bluff or storm berm. The presence of beachfront bluffs normally indicates that the seaward beach area is subject to periodic flooding and erosion. Indeed, the vertical seaward face of the bluff itself is a product of erosion. The storm berm, on the other hand, is an elevated sand formation created by severe wave action depositing sand in a clearly marked ridge; and even where such berms support diverse vegetation, they would likely be overtopped by severe storm flooding. Thus, construction and excavation should be set back well landward of the seaward edge of bluffs or berms and whatever stabilizing vegetation is present should be preserved as much as possible.

Because beach front vegetation exerts such an important stabilizing influence on a high-energy beach, the proper siting of construction and excavation should be determined according to the presence of certain species. Pioneer vegetation, comprising the seaward fringe of vegetation, is the species in need of the most protection because its major function is to stabilize fragile dune formation. Developmental activities normally should not be allowed in areas where pioneer vegetation is the dominant species. Immediately landward of pioneer vegetation, scrub vegetation predominates and protects areas behind it from storm tides, winds, and erosion. Although not as crucial as pioneer vegetation, these species should also be protected either by prohibiting construction and excavation or by ensuring that development will not result in their destruction.

* * *

Legal Problems in Implementing the Model Ordinance: Special Features of a Coastal Setback

A coastal setback line should be contrasted with traditional setback provisions that regulate land use in a stable, manmade environment of streets, buildings, and platted lots. The coastal setback operates in the dynamic natural environment of high-energy beaches and coastal wetland. Consequently, its location, purposes, and permanency may differ markedly from its traditional counterpart. While the coastal setback raises many of the legal problems associated with urban setbacks, the instability of the coastal area adds an element of uncertainty to the resolution of these problems.

The features of the coastal area can vary from one location to another and change within one location over a period of time. The natural contours and dynamics of the shore can vary drastically within a small area; what might be necessary to protect beach and upland property in one location might not be necessary a short distance away. For example, a decision that a setback line has been properly established on one section of a beach would not preclude a nearby property owner from challenging its application to his parcel. Similarly, even though a line has been properly determined for a property at a particular point in time does not mean it cannot be challenged or altered at some future date if changing shore conditions render it too stringent or permissive. Whether the location of the line is arbitrary and therefore susceptible to attack on equal protection grounds is a complicated issue of fact which can be resolved only by a precise determination of the environmental conditions existing at a specific time on a specific property. Thus, the variable and changing features of the beachfront and the wetlands tend to make any setback line a provisional regulatory measure as susceptible to change as the environment it seeks to protect.

State and Federal Regulations

The setback and permitting provisions of the model ordinance should be distinguished from other regulatory measures affecting the development of coastal property. For example, the ordinance provisions are independent of the mean high water line, whereas, in Florida the mean high water line is the baseline for setting the interim setback line on high-energy beaches. Any proposed development should be in compliance with this interim line or with the state's engineered setback requirements administered by the Department of Natural Resources.

Another important regulatory line is the hundred year flood line which designates the boundary of high-hazard areas for coastal construction and sets the required elevation for new structures under the National Flood Insurance Program. Although the model ordinance itself does not specify any elevation standards, its permit provisions require that a proposed structure meet the standards of the national program.

* * *

Adoption of a local ordinance to regulate coastal development would not necessarily duplicate state and federal programs. For example, with the approval of the Department of Natural Resources, two counties in Florida have chosen to administer their own local controls over beachfront development rather than to rely upon the department's coastal setback regulations. As long as local regulation meets or exceeds minimal standards established by state and federal authorities, local governments can play a major role in regulating coastal development within their jurisdiction.

Problems of Nonconforming Use, Equitable Estoppel, Exceptions and Nuisance

An owner of coastal property initially must determine which provisions of the [model] local ordinance, if any, are controlling. This is essentially a question of timing. Under the ordinance, if a nonconforming structure is "existing or under construction at the effective date," the setback regulations normally do not apply to the modification, maintenance, or repair of the structure. Such construction, however, must meet three requirements. First, alterations that increase the size and/or lower the elevation of the structure are prohibited. Thus construction may occur only within the existing foundations and above the first dwelling floor or lowest deck of the existing structure. Second, the construction must meet those requirements for a permit under the ordinance that are designed to minimize its adverse impact on the coastal environment. Third, the restoration of a nonconforming structure that was damaged or destroyed by coastal flooding or erosion is prohibited. The last provision stems from the fact that the entire purpose of the model ordinance would be defeated if structures in violation of the setback and proven to have an adverse impact on the beach or to be vulnerable to flood damage are allowed to be maintained and reconstructed.

If a project does not meet the ordinance's deadline, the common law doctrine of equitable estoppel might still prevent imposition of setback and permit requirements on a particular property. In contrast to the ordinance's grandfather provision which requires an owner to show the existence or actual construction of a structure, equitable estoppel requires an owner to show only that he has relied on prior official approval to make substantial investments in his project. If such detrimental reliance can be shown, the doctrine protects the owner from changes in land use regulation.

Both the ordinance's grandfather provision and common law equitable estoppel, however, may be unavailable if an owner has knowledge of a pending change in land use restrictions that will affect his property. Florida courts have often applied the "red flag doctrine" if an owner has adequate warning that his planned use of land will be prohibited by pending changes in local ordinances. In Sharrow v. City of Ania [83 So.2d 274 (Fla. 1955)], the doctrine was applied to impose a setback line that

was enacted after an owner had received a building permit for his property. The court argued that the owner had full knowledge of the pending setback restrictions when he received his permit and therefore must develop his property in compliance with them. The red flag doctrine could be invoked if the owner of coastal property undertakes development that would violate the pending model ordinance. The central issue in such cases is whether the owner had sufficient knowledge of the pending change to realize his project would be subject to its restrictions. The proposal of and subsequent public hearings on an ordinance in a particular locality arguably are sufficient red flag warnings. Once these events have transpired an owner could not avoid the new setback requirements simply by beginning construction or by making substantial investments in his project.

A mistake in issuing an official permit for construction that actually violates the local ordinance would not allow an owner to invoke equitable estoppel. In Godson v. Town of Surfside [150 Fla. 614, 8 So.2d 497 (1942)], the Supreme Court of Florida held that an owner could be forced to remove a completed addition to his beachfront dwelling despite the fact that earlier the city had approved his permit application. The permit had failed to show that the proposed addition would violate local setback restrictions on the beach, but the mistake did not allow the owner to invoke the protections of equitable estoppel.

Certain structures are excepted from the setback regulations of the ordinance. Generally, these exceptions include improvements that enhance the coastal property owner's access to and use of adjacent coastal waters. Catwalks, footbridges, docks, and boat shelters are allowed seaward of the setback as noncommercial appurtenances to the littoral property. In order to minimize adverse environmental effects, however, such structures would be subject to the permit requirements of the ordinance which restrict their location, size, and design.

A structure in full compliance with the model ordinance might still constitute a public or private nuisance. Although the ordinance is designed to prevent environmental degradation, an approved development might cause destruction of dunes and coastal vegetation as well as create or aggravate flooding, erosion, and pollution problems. The adverse impact of such development on public areas below the mean high water line should be sufficient grounds for a public nuisance claim. Yet one major roadblock to public nuisance actions has been the claim that the state, either by legislative action or by constitutional amendment, has legalized a type of pollution, thereby lifting it out of the category of a public nuisance. The same reasoning might be applied successfully against a local government. During the laissez faire period, courts tended to overprotect the right to own and use private property and failed to recognize the ecological consequences of pollution. Consequently, injunctions were denied in most cases on the alternate grounds that the nuisance did not exist or that the economic importance of the polluter's operations caused the equities to be balanced in favor of the polluter.

In a recent Florida decision, the First District Court of Appeal rejected a public nuisance suit in which a beachfront project not only had complied with the state's setback line but also had been approved by the Department of Natural Resources. [Shevin v. Indico Corp., 319 So.2d 173 (Fla. 1st DCA 1975)] The court simply upheld the findings of the trial court, however, and did not rule out such claims as a matter of law. In light of today's environmental consciousness, whether compliance with the model ordinance or express approval by local authorities would automatically preclude the bringing of a public nuisance action is questionable. Of course, only after this issue has been tested in light of current public policy will the answer become clearer. In any event, a private nuisance claim might be available to riparian owners adversely affected by improper siting or design of coastal development regardless of compliance with the ordinance.

Legal Challenges to the Model Ordinance

An individual owner may directly challenge the proposed ordinance in a number of ways. First, the local government's location of the setback line may be challenged on procedural grounds. The ordinance expressly requires three steps: prior scientific surveys, public notice, and public hearings. Failure to adhere to these formal guidelines could jeopardize the validity of any setback regulation. Indeed, Florida's courts undoubtedly would insist not only that formal procedures be followed but also that such procedures adequately insured consideration of all issues and views relevant to establishing a setback line under the ordinance. In Heeb v. Trustees of the Internal Improvement Fund [37 Fla. Supp. 1 (Dade County Cir. Ct. 1971)], the Circuit Court of Dade County overturned a local bulkhead line on procedural grounds despite the fact that formal public notice and hearings had been provided. Scrutinizing the record of the proceedings, the court determined that local officials had dominated the proceedings in such a way as to prevent presentation of adverse views and consideration of all relevant issues. Thus mere formal adherence to the ordinance's procedural provisions is not sufficient to meet the threshold procedural requirements.

The substantive validity of a setback could also be subject to attack. Initially, an owner could apply to the local governing body for review and revision of the established line. As previously noted, changing natural conditions at the shore could undermine the substantive validity of a setback by altering the physical features or vegetation upon which the line was established. Such changes could warrant not only local government review but also judicial review: there is clear precedent in Florida for the proposition that a change of conditions enables an owner to challenge an existing land use restriction in the courts.

Florida's courts, however, presume the validity of any official determination of what land use regulations are needed

for the public welfare. Local government need only show that its regulation can be supported on grounds that are "fairly debatable." The existence of evidence against a disputed setback line, even evidence which might well have sustained establishing a different line, is not determinative. Local government need only demonstrate that substantial evidence supports its decision. Consideration of comprehensive surveys and the provision of adequate public hearings, moreover, undoubtedly would lend further support to the local government's position. Nonetheless, this presumption of validity could be overcome by sufficient technical evidence and expert testimony marshalled against a proposed setback line.

Variance Procedures and Problems

An owner wishing to undertake construction at variance with established setback restrictions must apply directly to the local governing body. The ordinance authorizes discretionary variances and attempts to provide sufficient guidelines for such governmental action. A threshold requirement for obtaining a variance is a showing of hardship on the part of an affected landowner. An owner, however, would not be able to meet this requirement if the hardship proves to be self-induced. For example, a developer might plat his subdivision so that a series of small-sized lots straddle the setback line. Without a variance, no construction would be feasible on these seaward lots. Nevertheless, the hardship imposed by the setback could be avoided by alternative platting that would enlarge the seaward lots at the expense of upland parcels. By choosing to locate his small lots on the seaward boundary of the subdivision the developer has created the complained-of hardship. Such hardship should not be considered legitimate grounds for granting a discretionary variance.

In addition to a showing of hardship, an applicant for a variance must also meet the requirements for a permit under the ordinance. The list of permit conditions ought to be sufficiently clear to obviate any challenge on the grounds of inadequate criteria for granting or denying a variance. Unless both public officials and private individuals have such guidelines, the entire variance procedure is subject to attack.

The validity of variance procedures under the ordinance may be undermined if a local governing body grants an excessive number of variances. In Florida, setback restrictions can become unenforceable against an individual who is denied a variance when several other property owners in the area have been successful in obtaining one. Essentially, the courts argue that a refusal to grant a variance after several have been allowed in similar circumstances is arbitrary and capricious on the part of the administrative authority and will not be sustained. Furthermore, the presumption of validity accorded to the initial establishment of a setback line probably would not be applied to variances. Whereas most courts defer to local government's decisions on the location of a setback as being quasi-legislative, these courts

generally consider decisions on individual variances to be quasi-judicial or administrative in nature and thus subject to closer judicial scrutiny.

The Taking Issue

Since the United States Supreme Court's decision in Gorieb v. Fox [274 U.S. 603 (1927)], courts have generally sustained setback lines as legitimate regulatory measures not requiring public compensation. This policy is justified for several reasons. A setback usually has a minimal adverse impact on the use of a particular property. Although it prohibits construction and excavation on one segment, the setback allows other uses of that segment and permits all uses of the remainder; thus, the value of property as a whole often remains unimpaired. In addition, an individual owner derives certain benefits from setback restrictions: the value of property is directly enhanced by proper siting of structures and indirectly enhanced by the imposition of the same restrictions on neighboring property. Finally, when the effects of setback restrictions are assessed in the aggregate, they clearly serve a legitimate public purpose by promoting the safety, health, and aesthetic appeal of a community.

* * *

[A] number of flood plain zoning cases have allowed complete prohibition of development without requiring the state to compensate the affected landowner. Emphasizing the magnitude of public harm prevented by these restrictions, courts have regarded beneficial uses such as agriculture or recreation sufficient to avoid a compensable taking.

* * *

The New Jersey courts have addressed this issue directly in the companion cases of Spiegle v. Borough of Beach Haven [218 A.2d 129 (1966), cert denied, 385 U.S. 831(1966); and 281 A.2d 377 (1971)]. The initial decision by the state's supreme court upheld an ordinance establishing a setback line for coastal areas subject to severe storm damage. Considering both the potential public harm and the probable private losses that would result from any construction seaward of the building line, the court concluded that the "regulation prescribed only such conduct as good husbandry would indicate that plaintiffs should themselves impose on the use of their own lands." The mere fact that the setback line might prohibit all construction on a given property was insufficient to sustain a claim of taking. An owner must also show "the existence of some present or potential beneficial use of which he has been deprived." From the court's perspective, the erection of a building in a hazardous area where it is almost certain to be severely damaged or destroyed could not be regarded as a project bringing any real economic benefit to the landowner. Thus, by prohibiting such construction the regulation merely affirmed what natural conditions alone would dictate to a reasonable person.

That the ordinance was valid on its face, however, did not prevent the plaintiff from asserting his claim of taking. Indeed, in subsequent litigation Spiegler convinced the state's appellate division that at least one of his proposed projects could meet the threshold requirement laid down by the supreme court. He first demonstrated that technically his planned dwelling could be constructed seaward of the setback line in such a way as to withstand predicted storm forces. He further showed that it would be economically feasible for him to undertake such a project. He thereby established to the satisfaction of the court that the proposed use of his land would be to his benefit. Having recognized Spiegler's real beneficial interest in developing the property, the court then found little difficulty in holding the imposition of the setback, which effectively precluded all construction on Spiegler's property, "to constitute a taking."

* * *

Recognition of the hazards to the landowner and the potential harm to the public posed by homes and other structures in flood-prone areas has prompted some courts to uphold prohibition of all construction without compensating the affected landowner. Moreover, if natural conditions themselves prove sufficiently hazardous or inhospitable to obviate any profitable use of a property, the reasoning advanced by both Spiegler and Just affords another basis for severely regulating land use without compensation. Indeed, these latter cases might provide the most persuasive arguments for sustaining coastal restrictions. Construction and excavation in areas subject to flooding, erosion, and ecological degradation do not represent reasonable beneficial uses of land, and thus the denial of such uses should not be regarded as a compensable taking.

Conclusion

Rapid and largely unrestrained real estate development along the coastal zone poses unique problems of land use regulation and planning. Two dichotomies permeate this theme: the first is the ubiquitous conflict between the right of a landowner to the free use of his land and the power of the state to regulate unreasonable use of property; second is the desire for growth and development, which historically and almost by definition disregarded ecological and environmental consequences. Fortunately, our coastal environment increasingly is being considered a valuable treasure rather than an exploitable one. Obviously, resolution of the competing interests will involve a delicate balancing process. Comprehensive local regulation of coastal construction and excavation can serve a vital and necessary function in resolving coastal zone problems. The model ordinance which follows is designed to assist coastal communities in implementing their planning programs.

NOTES

1. In order to preserve dunes and natural shoreline processes, and control construction in hazardous or unstable areas, the Beach and Shore Preservation Act and the Coastal Zone Protection Act of 1985 establish three zones of regulation in coastal areas - coastal construction control lines, thirty-year erosion lines, and coastal building zones.

Coastal construction control lines (CCCLs) are established by the Department of Natural Resources (DNR) for each county with open, sandy beaches to define the beach-dune system subject to "severe fluctuations based on the 100-year storm surge...." DNR may establish segments of a CCCL landward of the 100-year storm surge zone, "provided such ... segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge." The 1985 amendments to chapter 161 require the Governor and Cabinet to adopt the CCCL after a public hearing.

Chapter 161 provides that once a CCCL is established, "no person ... shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations ...; or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward thereof except as hereinafter provided." The language is not a complete prohibition on construction seaward of the CCCL. DNR can grant or approve permits for construction seaward of the CCCL if there already exists a "reasonably continuous and uniform construction line closer to the line of mean high water" than the CCCL or the property owner supplies adequate data on shore and dune stability and storm tides to demonstrate that the siting and design of the project will not endanger the dune system, existing structures, or adjacent properties.

The thirty-year erosion line is intended to limit construction in areas where the shoreline is unstable by prohibiting permits for major structures seaward of the line. The line is to be based on DNR projections of what area will be seaward of the seasonal high-water line within thirty years of the date of application for a permit. The CCCL creates the landward limit of the thirty-year erosion line. The legislation provides, however, that where the prohibition precludes construction, a permit for a single-family dwelling may be issued if:

1. The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before the effective date of this section [Oct. 1, 1985];
2. The owner of the parcel ... does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;

3. The proposed single-family dwelling is located landward of the frontal dune; and

4. The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.

The CCCL requirements and the prohibitions relative to the thirty-year erosion line do not apply to "any modification, maintenance, or repair to any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation of the structure." "Specifically excluded from this exemption are seawalls or other rigid coastal or shore protection structures...." In the case of rebuilding a major structure, e.g., after a major hurricane, the act provides that:

[t]he department may, however, at its discretion, issue a permit for the repair or rebuilding within the confines of the original foundation of a major structure.... Under no circumstances shall the department permit such repair or rebuilding that expand the capacity of the original structure seaward of the 30-year erosion projection.... However, in reviewing applications for rebuilding, the department shall specifically consider changes in shoreline conditions, the availability of other rebuilding options, and the design adequacy of the project sought to be rebuilt.

The coastal building zone is defined as an area 1500 feet landward of the CCCL in areas where it is established and 3000 feet landward of the mean high-water line in other coastal areas. The zone extends to as much as 5000 feet from the CCCL on barrier islands. Within the coastal building zone, major structures must meet state minimum structural requirements, including conforming to the Standard Building Code and being designed to withstand a 100-year storm event.

2. A major problem in the management of barrier islands, beaches, and dunes has been the fact that both federal and state programs, including flood insurance, transportation programs, sewage treatment facility funding, and disaster relief, have tended to subsidize growth in the sensitive barrier areas. The federal government has enacted legislation to limit continued subsidization of growth on undeveloped barriers.

Section 341(d) (1) of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35 established a new section 1321 of the National Flood Insurance Act of 1968. Section 1321(a) states that no new federal flood insurance coverage shall be provided on or after October 1, 1983, for any new construction or substantial

improvements of structures located on undeveloped coastal barriers (now the Coastal Barriers Resources System). Many of Florida's islands do not qualify under the definition of coastal barrier in the Act because they are coquina or limestone based, rather than sandy sediment. In spite of the many areas not included as barriers, over half the total area ineligible for flood insurance is located in Florida, Texas and Louisiana.

The Coastal Barrier Resources Act, P.L. 97-378, bans direct and indirect federal subsidies for development on barrier islands designated part of the Coastal Barrier Resources System. New federal assistance is prohibited for roads, bridges, sewer systems, and VA and FHA housing loans. There are exceptions for energy development, national defense and Coast Guard activities, maintenance of navigation channels and facilities, and enhancement of fish and wildlife habitat.

Bostic v. United States, 581 F. Supp. 254 (1984), discusses the Coastal Barrier Resources System:

* * *

II. Legislative Background

Bills to enact a Coastal Barrier Resources Act were originally introduced in April, 1981. Prior to passage of initially proposed legislation, the Omnibus Budget Reconciliation Act of 1981 (hereinafter OBRA) was signed into law on August 13, 1981. Section 341(d)(1) of OBRA established a new section of the National Flood Insurance Act of 1968, 42 U.S.C. 4028, which provided that no new federal flood insurance would be provided on after October 1, 1983, for new construction or substantial improvements of structures located on undeveloped coastal barriers to be designated by the Secretary of Interior.

* * *

In accordance with the directive of Section 341 OBRA, the Secretary established a Coastal Barriers Task Force to conduct the requisite study. This study by the Task Force resulted in the creation of ... maps which designated undeveloped coastal barriers. The Secretary reported his findings to Congress on April 13, 1982.

* * *

During the time that the Department of Interior Task Force had been fulfilling its responsibilities under OBRA, in fact, during the final stages of agency action, Congress passed CBRA [16 U.S.C. 3501 et seq.], which was signed into law by the President on October 18, 1982.

* * *

[T]he final maps referred to in Section 4 of CBRA superseded and replaced the proposed [OBRA] maps

III. The Coastal Barrier Resources Act

The enactment of CBRA established the Coastal Barrier Resources System (hereinafter CBRS or the System) ... which

consists of undeveloped coastal barriers located on the Atlantic and Gulf coasts of the United States.

Section 5(a)(1) of CBRA prohibits new federal expenditures or financial assistance within the CBRS. Effective October 1, 1983, the financial assistance prohibited explicitly includes flood insurance

Section 3 of CBRA defines an "undeveloped coastal barrier" to mean:

(A) A depositional geologic feature (such as a bay barrier, tombolo barrier spit or barrier island that --

(i) consists of unconsolidated sedimentary materials,

(ii) is subject to wave, tidal and wind energies, and

(iii) protects landward aquatic habitats from direct wave attack; and

(B) all associated aquatic habitats, including the adjacent wetlands, marshes, estuaries, inlets, and nearshore waters; but only if such features (i) contain few manmade structures and these structures, and man's activities on such feature and within such habitats, do not significantly impede geomorphic and ecological processes, and (ii) are not included within the boundaries of an area established under Federal, State, or local law, or held by a qualified organization ... primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes.

* * *

The purpose of CBRA is manifold:

The Congress declares it is the purpose of this Act to minimize the loss of human life, wasteful expenditure of Federal revenues and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts

* * *

Congress' goal is to be accomplished by:

... restricting future federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers ... and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved.

In achieving its goal, Congress has expressly confined its curtailment of federal assistance to undeveloped coastal barriers.

The requirement that only those coastal barriers containing few man-made structures be included in the system serves two purposes. First, the denial of federal assistance to existing developed communities, many of which have been established for many years, would be inequitable. Second, in areas where development has already taken place, the structures and man's activities in these areas tend to interfere with the natural processes and change the essential nature of coastal barriers. [House Report]

The original criterion used by Congress to make a threshold determination of developed and undeveloped barriers was whether there existed approximately one structure per five (5) acres of fastlands. With this beginning point the Committee examined the maps proposed by the Secretary and made its determinations regarding the barriers. [Section 4 of CBRA references and adopts maps for the CBRS.]

3. Florida has also taken measures to limit subsidization of growth in sensitive coastal areas. Governor Graham issued the following Executive Order in 1981:

EXECUTIVE ORDER NUMBER 81-105

WHEREAS, it is the policy of the State of Florida to protect and manage Florida's extensive, fragile coastal resources, in order to enhance the recreational, scientific and natural resource values, for both present and future Floridians; and

WHEREAS, coastal barriers, which include barrier islands, beaches, and related lands, are essential to the maintenance of these coastal resources; and

WHEREAS, these coastal barriers serve to reduce Florida's vulnerability to natural hazards, particularly hurricanes, thereby reducing the ever-present threat to human life, private and public property, and other resources in the coastal areas; and

WHEREAS, these coastal barriers are vulnerable to hurricanes, other storm damage and geologic composition, and are continuously altered by wave, tidal, and wind actions; and

WHEREAS, these coastal barriers are a source of beauty and enjoyment, in addition to contributing billions of dollars to the State's economy annually; and

WHEREAS, past utilization of coastal barriers often has not taken place in a manner consistent with public safety and economic welfare; and

WHEREAS, certain State actions, programs, and funding policies have historically subsidized and encouraged development on coastal barriers resulting in loss of barrier resources, increased vulnerability of human life, health, and property and the recurring obligation of tax dollars; and

WHEREAS, the Florida Legislature, the Governor, the Cabinet, and various state agencies have recognized the importance of protecting these critical coastal areas and sought to manage

these resources in a manner consistent with the principles of public safety, economic development, and resources;

NOW, THEREFORE, I, BOB GRAHAM, as Governor and Chief Executive of the State of Florida, by virtue of the authority vested in me by the Constitution and the Laws of the State, do hereby issue the following order effective immediately:

The Secretaries of the Departments of Commerce, Environmental Regulation, Health and Rehabilitative Services, Transportation, Veteran and Community Affairs and Director of the Governor's Office of Planning and Budgeting are directed to take the following actions as applicable to their agencies:

1. Give coastal barriers, which include barrier islands, beaches and related lands, high consideration in existing state land acquisition programs and priority in the development of future acquisition programs.

2. Direct state funds and federal grants for coastal barrier projects only in those coastal areas which can accommodate growth, where there is need and desire for economic development, or where potential danger to human life and property from natural hazards is minimal. Such funds shall not be used to subsidize growth or post disaster redevelopment in hazardous coastal barrier areas. Specific consideration shall be given to the impacts of proposed development or redevelopment with respect to hazard mitigation.

3. Encourage, in cooperation with local governments, appropriate growth management so that population and property in coastal barrier areas are consistent with evacuation capabilities and hazard mitigation standards.

Signed 4 September 1981

4. An Attorney General's opinion suggested that the executive order was an ineffective and unenforceable tool for protecting coastal barriers. The coastal infrastructure policy of the Coastal Zone Protection Act of 1985, however, reinforces the governor's expenditure limitation approach. The act provides that "[n]o state funds shall be used for the purposes of constructing bridges or causeways to coastal barrier islands ... which are not accessible by bridges or causeways..." and the state will not expend funds to expand infrastructure unless it is consistent with the approved coastal management element of local comprehensive plans. In addition, section 163.3178 provides that "it is the intent of the Legislature that local government comprehensive plans ... limit public expenditures in areas that are subject to destruction in natural disaster.

CONCLUSION: THE FUTURE OF COASTAL MANAGEMENT IN FLORIDA

In the early 1970s, Florida seemed to be at the forefront of the environmental and coastal management movement. Florida's legislation and programs were innovative, but in large part reactionary. Former Governor Reuben Askew was quoted as saying that if governments were "judged solely on their response to the environmental crisis, I'm confident that Florida would walk away with the honors." Once environmental crises of the early 1970s -- hurricanes, floods, droughts, water shortages -- had passed, public interest waned, and programs suffered from insufficient funding and conservative implementation and interpretation.

The environmental conservatism that dominated the late 1970s perhaps peaked in 1978 when the state legislature "downgraded" the state comprehensive plan to advisory, rejected as draft state coastal plan, and passed the Coastal Management Act. The "No New Nothing Act," as the coastal act was dubbed, mandated the Department of Environmental Regulation to create a coastal management program from existing legislation and authorities. In spite of this limitation and the apparent "lack of an environmental base, an economic development base, or a local government base,"¹ Florida developed a program that received federal approval in 1981.

In a 1983 Coastal Discussion Paper prepared for the Governor's Coastal Resources Citizen's Advisory Committee and the Office of Coastal Management, Tina Bernd-Cohen summarized the strengths and weaknesses of the Florida program:

* * *

The program:

- . provides a clear program focus on coastal and coastal-related issues
- . provides a central location for coordinating, tracking, and reviewing coastal activities, research, and programs
- . provides a federal-state-local partnership in coastal management
- . provides an institutional framework within which complex coastal issues, policies, and problems which cross jurisdictional boundaries can be resolved through coordinated state management and joint problem-solving
- . provides a state voice in federal activities through federal consistency reviews and monitors federal level policies and regulatory changes which may affect Florida

1. O'Connell, Florida's Struggle for Approval Under the Coastal Zone Management Act, 25 Nat. Res. J. 61, 69 (1985).

- . fosters a greater awareness of complex coastal issues and the impact of development on natural resources, while providing staff expertise to address the problems and policy issues and solve problems.
- . directs coastal funding to address issues and solve problems
- . maintains Florida's eligibility to receive federal funds for coastal management, interagency coordination, and state policy planning

Weaknesses of the program, which impede its effective implementation and limit its applicability as a comprehensive resource management program, are related to limitations placed on the program by the Florida Coastal Management Act. The program:

- . is based on existing state statutes which are fragmented and single purpose oriented
- . cannot require state agencies to coordinate management activities or bind agencies to joint policy decisions and negotiated conflict settlements
- . has a weak state-local partnership in coastal management because local participation is voluntary
- . is supported by insufficient state resources to carry out the program without federal assistance
- . is underutilized by state agencies, the Governor, and the legislature

* * *

Florida's program has been crippled from its inception by insufficient state funding and staffing, and now funding from federal sources has also dwindled. Although Congress has persisted in its support for the coastal zone management program, President Reagan has "zero budgeted" coastal programs for the past two years. Like other environmental programs, the federal coastal zone program has received less emphasis under the current administration. Under the "new federalism," the states have suddenly found themselves in a leadership role for environmental protection and coastal management after almost two decades of federal government initiative.

In Florida, the pendulum also has swung in regard to public concern for and awareness of environmental issues. Predictions of Florida's growth by the end of the century have focused attention on the inadequacies of state programs. A recent survey of Florida citizen's identified growth management as Florida's most important problem. Although the rubric has changed from coastal management to growth management, the issues are still the same -- comprehensive planning and management of land use and natural resources, protection of unique and sensitive areas, and maintenance of Florida's "high quality of life."

Florida's legislature has accepted its new role and mandate, and in 1983 and 1984 enacted landmark water resources and wetlands protection legislation. In 1985, the adoption of the State Comprehensive Plan and the enactment of the Growth Management Act and the Coastal Zone Protection Act greatly enhanced the state's capability to manage coastal uses and resources. Among the major achievements of the 1985 legislation are:

- strengthening of the coastal management elements of local government comprehensive plans;
- requiring state review of local plans for consistency with the State Comprehensive Plan and providing a mechanism for encouraging consistency;
- limitations on infrastructure funding that subsidizes growth on barrier islands and growth that is inconsistent with the coastal management element of local government comprehensive plans;
- prohibitions on major structures in areas subject to erosion.
- limitations on post-hazard rebuilding of coastal structures;
- special coastal construction standards designed to protect the dunes, shorelines, structures, and lives.

The next step must be strong, effective, well-funded implementation with continued public support. Public awareness, education, and support are not only the impetus for legislative action, but the key to effective implementation.

Without a public consensus, the program will only limp along with forced and begrudging compliance. Florida cannot afford to operate the program without the help of the citizens, who must be educated as to the need for the program and be shown, by agency example, that the relationship between state regulation and local implementation need not be adversarial. County Commissioners will not enforce the program if their constituency regards it as a handicap instead of a personal need and goal. The public and local government form the foundation of the arch, without which the keystone program will fall. The state does not have the power, personnel, or funds to simply impose the program. It must persuade local government to incorporate coastal environmental considerations in all appropriate decisions and it must provide the technical expertise at state, regional, and local levels to advise local government. Continuous, flexible, progressive, informed, and imaginative planning must be the watchword. Guy, Florida's Coastal Management Program: A Critical Analysis, 11 Coastal Zone Mgmt. J. 219, 241-2 (1983).

