

STATE AND FEDERAL CLAIMS TO SUBMERGED LANDS IN THE MISSISSIPPI SOUND

Monograph 1 revised

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FOREWORD

This revision of the monograph first published by the Office of Energy and Environmental Law in January, 1980, appears at a time when the prospects for major oil and gas discoveries off the Alabama coast appear bright. At such a time it becomes more urgent that conflicting federal and state claims to the certain of the submerged lands in the Mississippi Sound be settled as quickly as possible. This monograph provides a review and analysis of the current state-federal conflict, and discusses the history and development of the law governing submerged land ownership.

Research and writing for the original text, which appears herein as Chapter I-VI, was done by George Simon. Revision of the original material and research and writing for Chapters VII, VIII and X was done by Elizabeth Garber. Chapter IX was researched and written by Sarah Kathryn Farnell.

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I. INTRODUCTION

The Outer Continental Shelf Lands Act¹ as implemented by 43 C.F.R. 3301.3 authorizes the Bureau of Land Management of the United States Department of the Interior to request nominations for possible oil and gas leases in the submerged lands claimed and managed by the United States. These requests for nominations are published in the Federal Register in the form of notices of tentative sales.

On September 13, 1978, notice of Tentative Sale No. 62 was published at 43 Federal Register 40933. Among the submerged lands subject to this proposed sale of leases are submerged lands located with reference to OCS Official Protraction Diagram NH 16-4 Mobile. This diagram shows the submerged lands in the Gulf of Mexico lying adjacent to the states of Alabama and Mississippi claimed by the federal government. This diagram also shows the submerged lands considered by the federal government to be the property of the states of Alabama and Mississippi under the Submerged Lands Act.² All lands identified as submerged lands appertaining to the United States by OCS Diagram NH 16-4 Mobile are subject to the tentative sale. Among the lands so identified are four tracts of submerged lands that lie totally within the confines of the Mississippi Sound. Three of the tracts, one rather large and two relatively small, lie between Mississippi's lateral boundaries with Louisiana and Alabama. The fourth tract is divided into two portions by the lateral boundary between Mississippi and Alabama. The portion lying on the Alabama side of the lateral boundary is the larger of the two. OCS Diagram NH 16-4 Mobile shows these four tracts of submerged land to be totally surrounded by state owned submerged lands. They are federally claimed enclaves of submerged lands lying in the midst of submerged lands that are without doubt the property of the states of Alabama and Mississippi. This

unique and somewhat strange situation is the result of the interaction of two elements, the first being the geographical configuration of the Mississippi Sound and the second being the federal law governing the ownership of submerged lands.

The Mississippi Sound is a narrow body of tidal water extending 70 miles from east to west along the southern shores of Alabama and Mississippi. Off the coast of Alabama, the Sound is, on the average, 10.1 feet deep.³ It is bounded on the north by the mainland, on the east by Mobile Bay, on the west by Lake Borgne and on the south by a chain of islands running east to west from Mobile Bay to the St. Bernard Peninsula in Louisiana.

The Sound can best be described as a portion of a larger body of water, a bay complex consisting of the Sound, Lake Borgne, and Mobile Bay. The water area of the bay complex is bounded by a line drawn from Mobile Point on the east along the low water mark on the shores of Mobile Bay, the Sound and Lake Borgne to the tip of the St. Bernard Peninsula on the west. Headlands at Mobile Point and Isle au Pitre on the St. Bernard Peninsula and the island chain that lies between those headlands mark the seaward limits of the indentation. There are six islands lying between the headlands creating seven entrances to the bay complex. The length of the individual islands limits the width of each entrance to a maximum of five nautical miles. The distance between the island chain and the mainland shore ranges between three and ten nautical miles, and on the whole the Sound by itself does not deeply penetrate the mainland.

The shallow penetration of the Sound gives rise to another possible geographical description. The Sound can be described as a body of

water lying between the mainland and an offshore fringe of islands. This description requires the indentation to be described as a mere curvature of the coast and ignores the presence of Mobile Bay, Lake Borgne, and the two headlands. This description also implies that the general line of the coast follows the mainland shore of the Sound. Actually it does not. The general line of the coast runs along the island chain from Mobile Point to Isle au Pitre. These islands are not set off from that general line as are the islands off the southern coast of California, rather they form a portion of that general line.

The first of the two descriptions appears to be correct. Viewing the Sound as part of a bay complex reflects the geographical realities of this coastal area and does not require that geographical features be ignored. The Mississippi Sound is one portion of a bay complex forming a multi-mouthed, well marked indentation of the sea into the mainland.

II. HISTORICAL BACKGROUND

Prior to 1803 the lands surrounding the Mississippi Sound were known as Spanish West Florida. Spanish West Florida was "that tract of country which is south of the Mississippi territory, east of the river Mississippi and island of New Orleans, and west of the Perdido river, and a line drawn with the general course thereof to the southern boundary of the said Mississippi territory".¹ In 1803 this land was claimed by the Republic of France under the Treaty of San Ildefonso signed October 1, 1800. Under this treaty, Spain ceded the Louisiana Territory to France. There was some ambiguity with respect to the precise boundaries of Louisiana, and although Spain retained possession of Spanish West Florida, France purported to own it as a part of Louisiana.

In 1803 the United States acquired ownership of the Louisiana Territory by treaty with the Republic of France, signed April 30, 1803, ratified October 21, 1803.² The United States considered Spanish West Florida to be a part of the Louisiana Territory and evidenced its claim thereto when Congress authorized the President to establish Mobile as a port of entry and delivery.³ Congress in 1812 enlarged the boundaries of the Louisiana Territory to include Spanish West Florida.⁴ In May of 1812 Congress enlarged the Mississippi Territory to include Spanish West Florida.⁵

The Mississippi Territory was established by Congress in 1798.⁶ The territory encompassed...

all that tract of country bounded on the west by the Mississippi; on the north by a line to be drawn due east from the mouth of the Yassou to the Chatahouchee river; on the east by the river Chatahouchee; and on the south by the thirty-first degree of north latitude.

Under Section 5 of the Act the United States held this territory subject to the claims of the State of Georgia to the territory. "[T]he establishment of this [territorial] government shall in no respect impair the right of the State of Georgia, or of any person or persons either to the jurisdiction or the soil of the said territory...⁷" This territory did not include Spanish West Florida, which lay to the south of the thirty-first degree of north latitude.

In 1802 the State of Georgia by deed of cession to the United States released all claim to the Mississippi Territory. The deed of cession 'expressly stipulated', "That the territory thus ceded shall form a State and be admitted as such into the Union...with the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the north-western territory of the United States."⁸ Congress no longer spoke of holding the Mississippi Territory subject to the claims of Georgia, but rather spoke of holding subject to the articles of agreement and cession with Georgia.⁹

In 1812, the agreement between the United States and Georgia was modified when Congress requested permission from Georgia to establish two states rather than just one state in the Mississippi Territory.¹⁰

In 1817, Congress passed the Mississippi Enabling Act of March 1, 1817,¹¹ and in December of that same year, Mississippi was admitted as a state.¹² The boundaries of the State of Mississippi were set out in the Enabling Act as follows:

the territory included within the following boundaries, to wit; Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of the county of Washington, thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne, thence up said river to the thirty-first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence up the same to the beginning.

Mississippi was admitted on condition:

That the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said territory do agree and declare that they forever disclaim all right or title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States.

In 1819 Congress passed the Alabama Enabling Act,¹³ and in December of the same year Alabama was admitted as a state.¹⁴ The Alabama Enabling Act described Alabama's boundaries as follows:

Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence, east, to the western boundary line of the state of Georgia; thence along said line, to the southern boundary line of the state of Tennessee; thence, west along said boundary line, to the Tennessee river, thence, up to same, to the mouth of Bear creek; thence, by a direct line, to the north-west corner of Washington county; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido river; and thence, up the same to the beginning.

The Act also contained the following provision:

And provided always, That the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said territory, do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States;

Alabama's constitutional convention passed the required ordinance.

The text of the ordinance may be found in J. Aikin, Digest of the Laws of the State of Alabama, XLVi, (2nd ed. 1836).

It is clear that title to the lands underlying the Mississippi Sound was in the United States prior to the admission of Alabama and Mississippi into the Union. The question is now whether that title passed to Alabama and Mississippi at any time after admission.

III. DEVELOPMENT OF THE COMMON LAW

In 1842, the United States Supreme Court in Martin et al. v. The Lessee of Waddell,¹ announced the rule that gave rise to the principle that upon the admission of a state into the Union, all lands underlying the navigable waters within that state's boundaries become the property of that state. At issue in Martin was the ownership of a tract of land underlying the Raritan River and Raritan Bay in New Jersey. Raritan Bay is an indentation of the sea that lies within the westernmost reaches of lower New York Bay. Raritan Bay is bounded on the north by Staten Island and on the south and west by the mainland of the state of New Jersey. Plaintiff claimed ownership under a land grant issued pursuant to the charters of government given by King Charles II of England to the Duke of York in 1664 and 1674. Defendant claimed title under a grant from the State of New Jersey. The court held that the ownership of lands underlying navigable waters was an incident of sovereignty; that under the English law of the seventeenth century, the sovereign was without power to vest title to those lands in a private individual; that when the Duke of York surrendered his sovereignty to the crown in 1704, title to the submerged lands re-vested in the crown; and that

"[w]hen 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."²

The State of New Jersey was declared to be the owner of the lands underlying its navigable waters and the grant to the defendant was upheld.

The Court in Martin did not characterize Raritan River and Bay as inland waters or as waters of the marginal sea. They did, however, consistently refer to those waters as being within that class of navigable waters consisting of "rivers, bays, and arms of the sea." This is the same class of navigable waters that today could be classified as inland waters. Therefore, under Martin it may be said that the thirteen original states as an incident of sovereignty hold title to the lands underlying their inland waters. A much broader inference can be drawn from Martin, however. The Court in no way implied that "rivers, bays, and arms of the sea" were in any respect different from the sea itself. The Court also spoke in general terms when it said "the people of each State...hold the absolute right to all their navigable waters and the soils under them."³ Further, in laying out the argument that the ownership of navigable waters and the lands thereunder is an incident of sovereignty the Court quoted Hale's Treatise de Jure Maris for the proposition that "the king is the owner of this great coast [England], and, as a consequence of his propriety, hath the primary right of fishing in the sea and creeks and arms thereof..."⁴ The king owns the sea along the coast and the creeks and arms of the sea as an incident of his sovereignty. The people of the original states after the Revolution assumed the sovereignty of the king. If ownership of the sea along the coast and the creeks and arms of the sea is an incident of sovereignty and if the people of the original states assumed that sovereignty, then the state arguably owns the seas along their coasts and the creeks and arms thereof. It must be remembered that this inference arises as dictum. The ownership of the marginal sea was not in issue in the case and the Court did not address that question.

The Court expanded the coverage of the rule announced in Martin et al. v. The Lessee of Waddell to include states admitted after the formation of the Union in Pollard's Lessee v. Hagan.⁵ In Pollard the plaintiff claimed title to a tract of land under a patent issued by the United States. The land in question was situated adjacent to the Mobile River in Mobile, Alabama. Prior to the admission of Alabama into the Union and to the issuance of the patent the land was subject to daily flooding by the high tide. The land was situated between the high and the low water marks. After 1822 the influence of the tide was removed by artificially filling the land. Although the land was subject to the tide, it lay approximately thirty miles inland from the Gulf of Mexico and at the head of Mobile Bay. The Court held:

"First. The shore of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively.
Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original states.
Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiff's the land in this case."⁶

Prior to the admission of Alabama the United States was the owner of the Mississippi Territory. It was argued that the United States retained ownership of the submerged lands under an ordinance passed by Alabama's Constitutional Convention that declared...

"that this convention, for and on behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States."

The Court, disregarding this argument, went on to find that the United States had obtained ownership of the Mississippi Territory

by deed of cession from Georgia in 1802 and by treaty with France in 1803. Further, the Court found that...

"it was the intention of the parties [Georgia and the United States] to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purpose of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. For a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public land. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects,⁸ that it was held by the States ceding the territories."

"When Alabama was admitted to the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of cession. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within limits of a State or elsewhere, except, in the cases where it is expressly granted."⁹

'Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States.* * * In the case of Martin et al. v. Waddell, the present Chief Justice* * * said: "When the Revolution took place, the people of each State became themselves sovereign; and in the character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject to the rights since surrendered by the Constitution". Then to Alabama belong the navigable waters, and soils under them, in controversy in this case...'¹⁰

It is to be noted that the Court placed no significance on the fact that the land in controversy was obtained from France and not from Georgia.

This coupled with the language in Pollard, that the United States had no "constitutional capacity to exercise municipal...sovereignty...within the limits of a State," suggests that the result of the case was not dependent upon the trust agreements embodied in the deed of cession from Georgia, and that the holding of the case would be equally applicable to other newly admitted states.

Narrowly stated, the Court held that, having been admitted to the Union on an equal footing with the thirteen original states, Alabama is the owner in fee simple of all the lands underlying the navigable waters situated within her territorial limits.

The Court again failed to characterize the waters in question as being inland waters or waters of the marginal sea. The Mobile River, however, could be classified as inland waters for it is located at the head of a large bay nearly thirty miles inland from the Gulf of Mexico. Upon the facts of both Martin and Pollard, the rule of state ownership of navigable waters and the lands underlying them does not apply to the marginal sea, but only to those waters that may be characterized as inland waters. Even so, the Court again made no distinctions between navigable waters and spoke of navigable waters in general terms. In Pollard there is a stronger basis than in Martin for an inference that the states own the marginal sea. The Court said, "although the territorial limits of Alabama have extended all her sovereign power [including the ownership of submerged lands] into the sea, it is there, as on the shore, but municipal power."¹¹ This statement is over broad in that the navigable waters in question were tidal river waters and not the sea. But even if the statement is dictum, it is a

statement of what the Court thought Alabama's ownership in submerged lands should be.

The holding of Pollard's Lessee v. Hagan,¹² the Pollard inland water rule, was applied to other states and was consistently re-affirmed and repeated throughout the remainder of the nineteenth and the first half of the twentieth centuries.¹³ Throughout its life the Pollard rule, while consistently applied, was applied only to rivers, lakes and bays-- those waters that are traditionally thought of as inland waters. The Pollard rule was never applied to any body of water considered to be a part of the open sea or a part of the three-mile marginal belt.¹⁴ It was assumed by all parties that the Pollard rule applied to all lands underlying navigable waters located within the territorial limits of a state, regardless whether those waters were inland waters or waters lying in the three-mile marginal belt.¹⁵

The scope of the Pollard rule was not challenged until 1947 when the question of the ownership of the lands underlying the waters of the marginal sea was presented for the first time to the United States Supreme Court in United States v. California.¹⁶ In California, the Court held: that the Pollard rule did not apply to lands underlying the marginal sea;¹⁷ that California had no property rights in those lands; and that

"The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, ... underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters."¹⁸

The Court made it clear that the new California rule applied to other coastal states in United States v. Louisiana,¹⁹ and United States v. Texas,²⁰ where it held that those two states as against the United

States had no property rights in the continental shelf adjacent to their coastlines. The California rule replaced the Pollard rule as the instrument used to determine the ownership of submerged lands lying below the low water mark of tidal waters. In establishing the rule the Court introduced a new criteria for determining ownership -- where tidal waters are involved only those submerged lands underlying inland waters belong to the states.²¹

The California, Louisiana, and Texas decisions did not affect the location of those state's seaward boundaries. Each state asserted a claim to a boundary lying seaward of its coastline. California claimed a boundary lying three English miles from its coast.²² Louisiana's seaward boundary was set by statute at a point 27 nautical miles from its shoreline.²³ In 1947, Texas extended its seaward boundary to the edge of the continental shelf.²⁴ In each decision the Court noted the location of the seaward boundaries, but in no instance did the Court hold that the boundaries were located elsewhere. In Louisiana the Court said

"We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits... The matter of state boundaries has no bearing on the present problem."²⁵

With respect to state ownership of submerged lands in the continental shelf, all that the Court held was that the Pollard inland water rule does not apply and that the states do not own the submerged lands lying between their coastlines and their seaward boundaries. The location of a state's seaward boundary prior to the passage of the Submerged Lands Act is of no aid in determining whether a particular tract of submerged lands is or not state property. The usefulness of the Pollard inland waters rule as a tool for making that determination is now a thing of the past.

IV. APPLICABLE FEDERAL LAW

The primary law governing the ownership of the submerged lands lying adjacent to the United States is found in the Submerged Lands Act,¹ and the Outer Continental Shelf Lands Act.² The Submerged Lands Act establishes the seaward boundary of each coastal state as a line lying three geographical miles seaward of the state's coastline.³ Each state has title to and the power to dispose of all of the lands underlying the navigable waters within its boundaries.⁴ The location of a state's seaward boundary is dependent upon the location of its coastline.⁵ The Submerged Lands Act defines the coastline as

"the line of ordinary low water along that portion of the coast that is in direct contact with the open sea, and the line marking the seaward limit of inland waters;"⁶

The Submerged Lands Act does not define "inland waters" and the United States Supreme Court has held that Congress by failing to define the term intended "to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act."⁷ For the purpose of defining "inland waters" for use with the Submerged Lands Act the Court in California adopted the definitions of "inland waters" contained in the Convention on the Territorial Sea and the Contiguous Zone.⁸

State ownership of a particular tract of submerged land is dependent upon whether the tract lies within the state's boundaries. The location of a state's boundaries is dependent upon the location of the state's coastline. Where the shore line is uniform the coastline is easily ascertained. It is the line of ordinary low water. Where the shore is not uniform, where there are islands and indentations, the location of

the coastline will depend upon whether the water within an indentation or between an island and the mainland are inland waters under the definitions of the Convention on the Territorial Sea and the Contiguous Zone.⁹

The Department of the Interior's rights and powers with respect to the natural resources of the continental shelf are governed by the Outer Continental Shelf Lands Act. In that Act Congress declared that it is

"the policy of the United States that the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition..."

The term "outer Continental Shelf" includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters" assigned to the states by the Submerged Lands Act.¹¹ The location of federally owned submerged lands is dependent upon the location of the states' seaward boundary and because of this the ownership of submerged lands in the continental shelf lying adjacent to the United States is determined by the location of the coastline.

In drawing Diagram NH 16-4 Mobile the Department of the Interior has used as the coastline the low water mark along the Alabama and Mississippi mainlands and the low water mark around each of the islands lying at the mouth of the indentation. As previously noted these islands lie off the mainland shores at a distance of 3 to 10 geographical miles. Consequently when the three mile state seaward boundary lines are drawn within the confines of the Mississippi Sound, there are areas in which these boundary lines overlap and areas in which they do not. The federal

enclaves are those areas in which the boundary lines do not overlap. These enclaves are outside of Alabama's and Mississippi's seaward boundaries and are thus considered to be subject to the jurisdiction and control of the United States within the provisions of the Outer Continental Shelf Lands Act.

The United States is asserting the power to lease the submerged lands lying within the federal enclaves in the Mississippi Sound by virtue of the Outer Continental Shelf Lands Act. These enclaves lie totally surrounded by state owned lands within a body of water that is virtually landlocked. Did Congress intend to retain federal government ownership of submerged lands lying within the "inner" continental shelf? Throughout the unamended sections of the Act,¹² the word "outer" is used to modify the term "Continental Shelf" a total of 28 times. The term "Continental Shelf" never appears without the modifier. Perhaps the most revealing statement of Congressional intent was made by Senator Holland of Florida:

"Mr. President, if Senators will give attention for a moment to the map which is placed in the rear of the Chamber, and which I believe reasonably and clearly outlines this situation, they will note that the map has a very narrow dark line surrounding the entire Nation on the Atlantic frontage and on the Gulf of Mexico frontage and on the Pacific Ocean frontage. That narrow line represents the areas which are covered by the joint resolution insofar as any grant of offshore lands to the States concerned." "Mr. President, I call attention to this map simply because, in my opinion, it shows clearly that what is involved here insofar as any grant of offshore submerged lands to the States is concerned, is nothing more than a narrow shoestring of land and water immediately adjoining our coast on all our outside salt-water frontages, and immediately affecting the local development of all the coastal communities, all the local coastal area of the States in the most vital way." As to the areas in white on the map, which lie just outside the narrow belt to which I have referred they represent the so-called outer Continental Shelf, or that portion of the Continental Shelf which lies beyond the State boundaries.¹³

This excerpt from the Congressional Record arguably shows that Congress in passing the Submerged Lands Act and the Outer Continental Shelf Lands Act intended to create a statutory scheme under which the ownership of the entire continental shelf is divided between the states and the federal government. In this scheme Congress divided the continental shelf into two mutually exclusive areas. The first area is assigned to the states and consists of "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each...State."¹⁴ This area includes tidelands, inland tidal waters, and the three mile marginal belt. This area might well be called the "inner continental shelf." It "is nothing more than a narrow shoestring of land and water immediately adjoining our coast on all our outside salt-water frontages."¹⁵ Directly adjacent to state property on "our outside salt-water frontages" lie the lands of the "outer continental shelf" which consist of "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301" of the Submerged Lands Act.¹⁶ It appears that Congress intended that there be but one line drawn around the entire "outside salt-water frontages" of the United States and that this one line divide state from federal property. Lands seaward of the line are assigned to the federal government, and landward of the line, lands are assigned to the states.

It is possible that a state will own submerged lands lying seaward of that one line in the area identified as the "outer continental shelf". The islands lying off the southern coast of California illustrate this point. Some of those islands are 20 to 30 miles from the mainland. By using the low water mark on each island as its coastline, each island

would have its own belt of state owned submerged lands.¹⁷ This would be an enclave of state property in the midst of property owned by the federal government. With respect to the submerged lands within the Mississippi Sound the opposite situation occurs. The federal government is asserting that there are enclaves of federal property landward of the line dividing the "inner" and the "outer" continental shelf.

If the water area of the Mississippi Sound is hypothetically treated as if it were a part of the continental land mass, an unbroken and fairly uniform three mile marginal belt lies immediately off the eastern portion of the coastline of Alabama and extends westward along the southern shores of the island chain until it reaches the area of submerged lands assigned to the state of Louisiana. The belt is solid and uniform. It conforms with the outlines of the Gulf Coast. All of the submerged lands lying between the high water mark on the mainland shores and the three mile boundary lying south of the island chain are without doubt the property of Alabama and Mississippi with the exception of the four enclaves claimed by the federal government. It can be argued that the three mile marginal belt running along the southern shores of the island chain constitutes a portion of "our outside salt-water frontages" and that all lands lying landward of its seaward most edge are part of the "inner" continental shelf.

The Mississippi Sound can be described as an indentation of the sea into the mainland. The federal government is asserting a claim to submerged lands lying within that indentation. Such an assertion is not in itself unusual when based on facts other than those presented by the geographical configuration of the Mississippi Sound. Cook Inlet in Alaska presents a prime example. Cook Inlet, located on the southern shores of Alaska, extends

a great distance into the Alaskan mainland. At its entrance the distance between the opposite shorelines of the indentation is approximately 47 geographical miles. The United States Supreme Court has held that because of the width of the Inlet's entrance and the requirements of the Convention on the Territorial Sea and the Contiguous Zone the federal government is entitled to claim submerged lands lying within Cook Inlet.¹⁸ Under this ruling, rather than extending across the entrance of the Inlet and thus forming the "seaward limits of inland waters" under Section 1301 (c) of the Submerged Lands Act, the coastline follows the low water mark along each side of the Inlet to a point within the indentation where the opposite low water marks are separated by a distance of 24 geographical miles.¹⁹

Federal submerged lands within Cook Inlet are nothing more than a continuous extension of the "outer" continental shelf into the confines of the indentation. There is only one coastline and only one continuous state seaward boundary in Cook Inlet. This is not the case in the Mississippi Sound. The federally claimed submerged lands are not mere extensions of the "outer" continental shelf into the confines of the indentation. They are separated from the great mass of lands in the "outer" continental shelf by intervening state owned submerged lands. There is not just one coastline and one seaward boundary, there are at least six coastlines fronting on the Mississippi Sound and four seaward boundaries lying within it. If one accepts the proposition that Congress intended to create only one continuous state seaward boundary along the "outside salt-water frontages" of the United States, the federal claims in Cook Inlet are consistent with such an intention, but the claims in the Mississippi Sound are not.

If Congress did intend to create two separate areas in the continental shelf in passing the Submerged Lands Act and the Outer Continental Shelf

Lands Act, and if the southern shores of the island chain is the "outer salt-water frontage" of the United States, two questions arise. First, if the federal enclaves are within the "inner" continental shelf and if they cannot be assigned to the states of Alabama and Mississippi under the Submerged Lands Act, does the Department of the Interior's Bureau of Land Management have authority to issue oil and gas leases in those submerged lands under the Outer Continental Shelf Lands Act? Second, did Congress in creating an "inner" and an "outer" continental shelf and by granting and confirming title to submerged lands within the "inner" continental shelf to the states intend to retain in the federal government any of the submerged lands lying within the "inner" continental shelf?

As will be seen, the primary issue in any controversy between a state and the federal government concerning the ownership of lands underlying tidal waters is the location of the coastline; that is, whether the waters are either inland waters or waters within the three-mile belt adjacent to the coastline. This fundamental uncertainty may very well serve as an effective road block to the development of the oil and gas resources that may be present in the seabed within the federal enclaves.

V. BOUNDARIES AND THE CONVENTION OF THE TERRITORIAL SEA
AND THE CONTIGUOUS ZONE

Under the Pollard inland water rule the location of Alabama's and Mississippi's seaward boundaries would determine whether or not the federal enclaves belong to the states. If those boundaries are located along the southern shores of the island chain or at a point further seaward, the question would be resolved in favor of the states. Under Pollard the submerged lands within the federal enclaves would have passed from the United States to Alabama and Mississippi when those states entered the Union.

In discussing the Pollard rule reference has been made to state boundaries. In that context the boundaries referred to are the state boundaries established by the Congressional legislation admitting each state into the Union without any consideration given to changes that the Submerged Lands Act might have made. This gives rise to a question of continuity. Are the state boundaries shown on Diagram NH 16-4 Mobile the same as those established by Congress in admitting Alabama and Mississippi into the Union? As previously noted the Court's decisions in California, Louisiana, and Texas did not affect the location of any state's seaward boundary. If Mississippi and Alabama had been parties to a similar suit, the location of their seaward boundaries presumably would have emerged unchanged. The Supreme Court in formulating the California rule effected no change in state boundaries. Did Congress in passing the Submerged Lands Act change any state's boundaries? The only provision for the re-location of state boundaries in the Submerged Land Act is found in section 1312. That section reads, in part, "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 coastline."¹ This is the only change the Congress intended. Section 1312 is framed in permissive language, "Any State...may extend."² The requisite element of state consent is present. The act of extension, itself, manifests state consent to the change. The seaward boundaries of a state under the Submerged Lands Act must conform with the boundaries established by Congress in admitting the state to the Union, unless section 1312 is applicable or another Congressionally approved change has been made.³ If Diagram NH 16-4 Mobile does not reflect the boundaries established by Congress in admitting Alabama and Mississippi and if the boundary extension provisions of section 1312 do not apply, the federal government in claiming the enclaves has changed the location of Alabama's and Mississippi's seaward boundaries by creating boundaries that heretofore did not exist. The question now concerns the scope of federal power and not just whether the Sound is or is not inland waters. Did the Submerged Lands Act and the Outer Continental Shelf Lands Act give the executive branch of the federal government the power to change state boundaries and remove lands from the territorial jurisdiction of the states?

The question of the location of Alabama's and Mississippi's seaward boundary arose in United States v. Louisiana, Texas, Mississippi, Alabama, and Florida.⁴ The Submerged Lands Act

"makes two entirely separate types of grants of submerged lands to the States. The first is an unconditional grant allowing each coastal State to claim a seaward boundary out to a line three geographical miles distant from its 'coastline'. The second is a grant conditioned upon a State's prior history. It allows those States bordering on the Gulf of Mexico, which at the time of their entry into the Union had a seaward boundary beyond three miles, to claim this historical boundary 'as it existed at the time such State became a member of the Union', but with the maximum limitation that no State may claim more than 'three marine leagues'."⁵

In United States v. Louisiana, et al.,⁶ the Court was asked to determine whether the historical boundaries of Alabama and Mississippi entitled those states to take under the conditioned grant. The seaward portion of Mississippi's historical boundaries is described as follows:

"thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of the Pearl River with Lake Borgne."⁷

The description for Alabama is similar and reads:

"thence due south, to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore, to the Perdido River."⁸

The Court held that Alabama and Mississippi are not entitled to take under the conditioned grant and that their seaward boundaries are located three geographical miles from their coastlines. The Court did not rule on the location of those coastlines.⁹ As to the boundary descriptions, the Court said,

"[A]n Act of Admission which refers to all islands within a certain distance of the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands."¹⁰

The Court did not specifically state, but did strongly imply that the seaward boundaries of Mississippi and Alabama were located at the low water mark on the mainland and at the low water mark on each island. If this is so, then Alabama's and Mississippi's seaward boundaries did not embrace any submerged lands below the low water mark in the Gulf of Mexico, the Mississippi Sound, and, possibly, Mobile Bay. Further, whatever submerged lands Alabama and Mississippi hold in those areas are held by virtue of the Submerged Lands Act. Section 1312 authorizes the extension of Alabama's and Mississippi's seaward boundaries to a point three geographical miles distant from their coastlines. Section

1311 of the Act recognizes, confirms, establishes, and vests in the states of Alabama and Mississippi, "title to and ownership of the lands beneath navigable waters within" their boundaries.¹¹ As noted earlier in this discussion, the location of Alabama's and Mississippi's seaward boundaries is dependent upon the location of the coastline. In turn, the location of the coastline in this instance is dependent upon whether the Mississippi Sound qualifies as inland waters under the definitions of the Convention on the Territorial Sea and the Contiguous Zone. If the Mississippi Sound qualifies as inland waters, all the submerged lands lying within its confines will be the property of the states of Alabama and Mississippi.

The Convention on the Territorial Sea and the Contiguous Zone is a multilateral treaty embodying the principal that "the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."¹² The United States became a signatory to the Convention in March, 1961.

In United States v. California,¹³ the Court noted that since "inland waters" would be used in determining the international boundaries of the United States, the definition of that term should be taken from international law. The Convention was adopted because it provides a "settled international rule defining inland waters" and because it "establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations."¹⁴ The Court also held that the definitions of "inland waters" are to be "frozen" according to then-existing definitions, and that future changes in international law would have no effect. The ownership of submerged lands will not depend upon the future position of the United States with respect to foreign nations.¹⁵ The Convention definitions are to be uniformly applied to all portions of the

United States coast for purposes of administering the Submerged Lands Act. The predominant policy consideration is uniformity in application, and the Court does not feel that the Act itself has left the Court free to give precedence to policies calling for non-uniform application.¹⁶

Article 3 of the Convention provides that the breadth of the territorial sea is to be measured from a baseline consisting of "the low water line along the coast as marked on large scale charts officially recognized by the coastal state."¹⁷ The Convention definitions of inland waters are essentially the rules governing the location of the baseline where islands, rivers, bays and other geographic irregularities preclude a uniform, well-marked coastline. By applying the Convention to the administration of the Submerged Lands Act, the "Convention baseline" for measuring the territorial sea serves as the coastline under the Act for the purpose of measuring the seaward boundaries of the states. The terms coastline and baseline are synonymous. The coastline under the Act consists of "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 limits of inland waters."¹⁸ The baseline consists of "the low water line along the coast as marked on large scale charts",¹⁹ and that portion of the baseline the closing line, determined by reference to the Convention definitions of inland waters.²⁰

VI. APPLICATION OF THE SUBMERGED LAND ACT:
INLAND WATERS

Under the provisions of the Submerged Lands Act as they are defined by the Convention, waters lying landward of the baseline are inland waters and the lands underlying them belong to the states.¹ In general there are four circumstances under the Convention in which a baseline encloses inland waters: (1) where waters meet the geographical requirements of a bay under Article 7; (2) where waters qualify as a historic bay under Article 7 (6); (3) where straight baselines may be drawn as governed by Article 4; and (4) where a river flows directly into the sea as provided by Article 13. Of these four only the first three are relevant to this discussion. As noted above, the Mississippi Sound can be described as a portion of a bay complex; therefore, Article 7 applies. The Sound could be described as a body of water lying between the mainland and an offshore fringe of islands. In such a case, the requirements of a historic bay indicate that a body of water which does not meet the Article 7 tests may, nevertheless, qualify as inland waters under the Convention. The Mississippi Sound could also be described as an indentation of the sea into the mainland. In such a case Article 4 on straight baselines is applicable.

The Article 7 geographic tests for bays:

"For the purposes of these articles, a bay is a well marked indentation whose penetration is in such proportions to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation."²

Article 7 (2) sets out two geographic tests that a body of water must meet before it will be considered a bay. It must be a "well-marked

indentation" and it must be "landlocked". A body of water must meet both tests.³

The first test requires that the indentation be "well-marked" so as to "constitute more than a mere curvature of the coast". Basically, there must be identifiable points or headlands that mark the mouth or the entrance of the indentation.⁴ These headlands mark the natural entrance points of the indentation and if the indentation qualifies as a bay, "a closing line may be drawn between" those two points.⁵

In United States v. Louisiana, it was held that an island or a group of islands could be the headland of an indentation or a bay if they "are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention".⁶ Bays are usually understood to be indentations in the mainland and, generally, a headland will be a part of the mainland itself, but "there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay".⁷ Whether an island is "integrally related to the mainland" depends upon "its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast".⁸

The second test for a bay requires that the indentation be landlocked. The water area within the indentation must be "as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of the indentation". This is the semi-circle test. It is a measurement of water area. For the purpose of the test, "the area of an indentation is that lying between the low water marks of its natural entrance points".⁹ The semi-circle test ignores the presence of islands lying within "the area of

an indentation". The land area of such an island does not operate to decrease the water area. Such islands are treated as if they were water areas.¹⁰

Generally, the diameter of the semi-circle is equal to the length of the closing line drawn directly across the mouth of the indentation between the mainland headlands. This direct closing line, however, will not be used for measuring the diameter of the semi-circle where islands create more than one entrance into the indentation. Where this occurs lines are drawn across each entrance and the sum of the lengths of those lines is used as the diameter of the semi-circle.¹¹ This rule also applies where a low-tide elevation creates multiple entrances to the indentation. Article 11 (1) defines a low-tide elevation as "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide". In this instance a low-tide elevation is treated as if it were an island.¹² Where these islands are intersected by the "direct closing line between the mainland headlands...the bay should be closed by lines between the natural entrance points on the islands even if those points are landward of the direct line between the mainland entrance points."¹³ These closing lines "are to be baselines for all purposes".¹⁴ Where an island is treated as a mainland headland the area of the indentation is determined by the low-water mark from the island headland around the perimeter of the indentation to the opposite headland on the mainland. "There is no 'mouth' between the island and the mainland", and the width of the opening between the island and the mainland is not added to the width of the mouth of the bay.¹⁵

Applicability of this multiple entrance rule reduces the size of the semi-circle and thereby reduces the area that an indentation must have to qualify under the semi-circle test. An indentation with a wide entrance between its mainland headlands and a penetration shallow in comparison to the width of its headland to headland entrance may satisfy the semi-circle test due to the presence of islands creating multiple entrances. This reduction in the size of the semi-circle is justified by the rationale "that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland".¹⁶

When a body of water qualifies as a true bay under Article 7 (2), all of the waters within the bay that are landward of the closing line drawn across the natural entrance of the bay are inland waters, unless Article 7 (5) applies.

"Where the distance between the low water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."¹⁷

Article 7 (5) places a limitation upon the area within a qualified bay that may be regarded as inland waters. The closing line across the entrance to a bay cannot exceed 24 miles and where it does so, the closing line is moved landward into the bay to a point where the width of the bay does not exceed 24 miles.¹⁸ This 24 mile test is applied at the entrance of the bay and the measure that must be within the rule is the measure of the distance from headland to headland or, where applicable, the aggregate lengths of the closing lines drawn between islands that create multiple entrances to a bay.¹⁹ Failure to satisfy the 24 mile closing rule does not mean that a body of water cannot

qualify as a geographic bay. It means only that some of the waters within the geographic confines of the bay do not qualify as inland waters.²⁰

A bay complex occurs where there is a large primary indentation with tributary indentations emptying into it. In such instances if the body of water, including both primary and tributary indentations, "can reasonably be deemed a single indentation" the entire water area of the bay complex will be used for purposes of the semi-circle test. The failure of the bay complex to meet the semi-circle test will not, however, preclude the tributary indentations from qualifying as bays if they are well-marked and meet the semi-circle test on an individual basis.²¹

Though the United States contends that the Mississippi Sound is not a well-marked indentation into the mainland and that the islands do not qualify as arms of a bay, the Sound can easily be classified as a portion of a bay complex. It is part of a body of water that "can reasonably be deemed a single indentation" that lies landward of two readily identifiable headlands--Mobile Point on the east and Isle au Pitre on the west. The map shows that the combined water areas of Lake Borgne, the Mississippi Sound, and Mobile Bay far exceed the area of a semi-circle whose diameter is equal to the sum of the distances between each island in the chain. Assuming that the bay complex is a well-marked indentation whose water "area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of the indentation," the bay must also pass the 24 mile closing line test. If the aggregate width of the bay complex's entrances exceeds 24 miles, closing lines may not be drawn across each entrance. In other words, a line consisting of

the low water mark on the southern shores of each island and a closing line drawn between each island cannot be used as the coastline. A rough measurement of each entrance shows that the aggregate closing line exceeds 24 miles by approximately five miles. This does not mean that the bay complex is not an Article 7 bay. It means only that the entire bay complex does not qualify as inland waters. Under Article 7 (5) closing lines that do not exceed 24 miles in length must be drawn somewhere within the bay complex. The United States has chosen to draw them across the entrance of Lake Borgne and the entrances of Mobile Bay, thus excluding the Mississippi Sound from inland waters.²² The Convention provides an escape clause that allows a nation to claim a bay as inland waters when the bay does not meet the Article 7 tests. Use of that provision might be appropriate in this instance.

Historic Bays. A coastal nation may claim a historic bay as inland waters.²³ The Convention while recognizing historic bays does not define them and does not specifically state that they may be claimed as inland waters. Article 7 (6) excludes them from the Article 7 technical tests, thereby leaving the Convention silent concerning their identification. To fill this void the Court has adopted pre-Convention rules of international law and has set forth three requirements that must be met in order for a nation to claim a body of water as a historic bay. First, the coastal nation must assert the power to exclude foreign vessels from the waters in question.²⁴ Second, the nation must have asserted this power continuously.²⁵ Finally, foreign governments must have acquiesced in the assertion of that power, and the assertion of the power must be of a nature sufficient to give foreign governments notice of the assertion. Acquiescence without notice is insufficient.²⁶

The Court has not held that an actual, physical exclusion of foreign vessels is required but there must be an unambiguous assertion of the right to do so.²⁷ Unambiguous assertions of the power to exclude foreign vessels do not include: a state "legislative declaration of jurisdiction without evidence of further active and continuous dominion over the waters" claimed;²⁸ the reasonable regulation of navigation;²⁹ and the enforcement of fish and wildlife regulations.³⁰

Regardless of whether the claim of historic inland waters is being asserted against the United States by a state or against a foreign nation by the United States, the sufficiency of the claim is measured on an international rather than a domestic level.³¹ If a claim asserted by a state against the United States could be successfully asserted by the United States on an international level, the state should prevail. A state claim of historic inland waters against the United States is also a claim by the United States to those waters against foreign nations. While a state may not normally extend the boundaries of the United States into international territory without the consent of the United States,³² the United States cannot prevent the extension of its boundaries by historic state action when that action forms the basis of a claim to historic inland waters. State activities in the claimed waters may be asserted against the United States to the extent that the United States would rely upon them in an action against a foreign nation.³³

The United States cannot block a substantiated state claim to historic inland waters by asserting that it does not wish to recognize or assert the claim on an international level.³⁴ If the state claim satisfies the above-mentioned requirements, the waters in question are as a matter of international law historic inland waters and are thus within the boundaries of the United States.

"The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable."³⁵

"It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California."³⁶

As just noted a historic bay is not required to meet the Article 7 tests. If for some reason the Mississippi Sound does not qualify as inland waters under Article 7, it may still be classified as inland waters if historic title to those waters can be established. Establishing historic title is essentially an evidentiary problem in which the sufficiency of any evidence presented will be the determinative factor.

From the time of admission to the Union, Alabama and Mississippi have consistently exercised their police jurisdiction in the Sound, enforcing seafood laws and regulating wildlife resources. Since 1956, the Alabama Commissioner of the Department of Conservation and Natural Resources has been authorized to lease lands in the Mississippi Sound;³⁷ Mississippi granted leases as early as 1959. The United States acquiesced to Alabama's and Mississippi's authority until the September 1978 publication of OCS, Official Protraction Diagram NH 6-4 Mobile. The Sound could be considered an historic bay under the Court's criteria.

Straight Baseline:

"In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines

joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."³⁸

Article 4 of the Convention places in treaty form a principle of international law recognized by the International Court of Justice in United Kingdom v. Norway (The Fisheries Case).³⁹ Article 4 allows a coastal nation to claim as inland waters those waters lying between the mainland and offshore island fringes. Those waters are enclosed by drawing straight baselines from the mainland to the fringe of islands and along the outer parameter of the islands and then back to the mainland. The circumstances in which a coastal nation may draw straight baselines are limited. The straight "baseline must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked" to the mainland so as to appear to be inland waters.⁴⁰ These limitations presumably prevent the use of straight baselines to enclose waters between the mainland and islands that are too remote from the mainland. Also low-tide elevations may not be used in drawing straight baselines unless some structure is built upon them that remains permanently above sea level.⁴¹

No nation is required to use straight baselines. Their use is entirely optional.⁴² The use of straight baselines is an extension of national boundaries and sovereignty and the decision to use them on the United States coast is one that must be made by the United States. That decision cannot be made by the individual states on behalf of the United States.⁴³ The United States by disclaiming any intent or desire to use straight baselines may conclusively preclude their use by a state or by the Court in adjudicating the rights of a state vis a vis the United States. This is true even where their use is particularly well suited

to the coastal configuration in question. The use of straight baselines is a political question and the Court has stated that it is unwilling to review or overturn the United States' decision not to use them.⁴⁴ This rule also applies to the use of a "fictitious bay" which is "merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast".⁴⁵

Although the United States cannot be required to use straight baselines, the conclusive effect of disclaiming an intent to use them may be avoided if the United States has in the past "actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4."⁴⁶ This is closely linked to the concept of historic bays. If the United States has drawn straight baselines consistently in the past and has thus claimed the enclosed waters as inland waters, it may be precluded from denying that claim in the future or from disclaiming any intent to use straight baselines.⁴⁷ As indicated earlier, the Court has seriously questioned the idea that the federal government could contract a state's territory in the name of foreign policy.⁴⁸

With respect to island fringes, the Court in United States v. Louisiana concluded "that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland" and "that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines".⁴⁹ If the coastal nation does not wish to use straight baselines to enclose waters lying landward of an island fringe, Article 10 of the Convention controls.⁵⁰ Article 10 (2) states "[t]he territorial sea of an island is measured in accordance with the provisions of these articles". In

other words the low water line on each island is used as a baseline for measuring a territorial sea for each island.

If the Mississippi Sound is classified as a body of water lying between the mainland and an offshore fringe of islands, Article 4 is applicable. In such a case, those waters will qualify as inland waters only if the United States chooses to draw straight baselines along the outer perimeter of the island chain, or if the United States has in the past drawn the international boundary in that area in a manner consistent with the provisions of Article 4. If drawn along the island chain, a straight baseline would meet the Article 4 (2) requirement that any such line "not depart to any appreciable extent from the general direction of the coast". If a straight line were drawn along that portion of Alabama's coastline lying between the Perdido River and Mobile Point and extended westward, it would be seen that the island chain lies closer to that imaginary line than does the low water mark on the mainland immediately adjacent to the Mississippi Sound. Further, the enclosed nature of the Sound makes them "sufficiently closely linked to the land domain to be subject to the regime of internal waters".⁵¹

VII. COMMON LAW AND LEGISLATIVE INTENT

In United States v. Louisiana, the government conceded that the waters in the Sound off Louisiana and Mississippi were "sufficiently enclosed to constitute inland waters".¹ Justice William O. Douglas concluded, "The United States concedes that, so far as Louisiana, Mississippi, and Alabama are concerned, all the submerged lands between the mainland and the islands are sufficiently enclosed to constitute inland waters that passed to the State on its entry into the Union, Pollard v. Hagan, How. 212".² Though Pollard was unaffected by the Submerged Lands Act, the purpose of the Act was to restore submerged lands to the state. A senate report on the Act stated:

The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities: that the States and their grantees have invested large sums of money in such lands;...and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.³

Congress desired to insure that the States were not denied what in equity was their land. The nature of the Sound requires environmental protections which could more effectively be controlled by the States. The Mississippi Sound is an estuary, a body of coastal sea water which is diluted with fresh water.⁴ The estuary and Sound off Mississippi's and Alabama's coast is rich in a variety of animal and plant life. For example, seven mobile marine life species which bred in estuaries are found in the Mississippi Sound; nineteen species use the Sound's estuaries for nursery areas.⁵ Not only are sounds and estuaries of the "greatest biological and ecological importance of the entire coastal region, [they are also] the most sensitive to disturbance."⁶ With increases in offshore drilling, ecological disturbances are inevitable:

Chronic pollution is the result of a wide range of activities including handling errors during shipment of petroleum products, illegal tanker bilge washings, offshore drilling and watercraft operation. While accidental oil spills may be catastrophic, ...it must be recognized that continuing low-level chronic oil pollution in a complex estuarine system such as coastal Alabama may be of more critical concern.

The Sound's ecological sensitivity to disturbance necessitates intensive management of marine life and leasing laws. In view of the state's past assertion of this authority in the Sound, and immediate interest in preserving the beauty and safety of their coastal area, Alabama⁸ and Mississippi are in the best position to continue managing offshore leasing. The legislative desire behind the Submerged Lands Act, which allowed States rather than the Federal Government to exploit offshore resources, was based in part on the belief that states could operate in the interests of the public more effectively.⁹ However, for the States to retain control over this estuary, the Sound must be declared inland waters.

VIII. STATE CONTROL OVER FEDERALLY OWNED LANDS

So far, this discussion has: (1) questioned the United States' right to own lands on the inner continental shelf; (2) presented three circumstances in which the Mississippi Sound might be classified as inland waters under provisions of the Submerged Lands Act and Articles of the Convention of the Territorial Sea and the Contiguous Zone; (3) discussed recognition of the Sound as inland waters in common law decisions on boundaries; and, (4) shown a legislative intent that States own offshore land, thereby preventing deprivation of property rights, and promoting efficient control of resources.

The Court must now determine the relative positions of Alabama, Mississippi and the United States under the law, and settle the ownership of the enclaves in question. If the Court decides in favor of the United States, how effectively can Mississippi or Alabama protect their interests in these areas? Recent state attempts to block leasing of federally owned land on environmental grounds indicate the ineffectiveness of a state's authority in this area.

States have several means of preventing leases of federally owned submerged land: the Endangered Species Act, the Outer Continental Shelf Act, and until recently, the Coastal Zone Management Act. The Endangered Species Act requires that a wildlife agency investigate and state the impact of any federal agency's proposed action, on the existence of any threatened species or the species' critical habitat.¹ Though initially the act was an uncompromising protection of endangered species,² a 1978 amendment allows exceptions to enforcement in the interest of interest of important national objectives.

A similar trend is noted in the development of the Outer Continental Shelf Lands Act (OCS). The Act as amended in 1978 encourages the protection of the environment and the development of petroleum resources. The Secretary of the Interior can suspend or cancel an OCS lease for environmental reasons,³ whereas the courts can countermand the Secretary's decision to lease lands only if that decision is arbitrary or illegal.⁴ The States' authority is set forth in Section 19 of the OCS Act, which requires that "serious consideration be given to state recommendations on lease sales, [and until recently] the consistency section in the Coastal Zone Management Act, which required federal activities to be consistent with approved state coastal zone management programs".⁵

In recent litigation between states and the federal government, a strong national policy to develop the resources of the outer continental shelf has predominated over states' environmental interests. For example, the Department of the Interior proceeded with lease sales in the Beaufort Sea, though the National Marine Fisheries Service stated that not enough information existed to determine whether the bowhead and gray whales were jeopardized by the sale. When a group of Alaskan citizens and environmentalists challenged the sale in North Slope Borough v. Andrus⁶, the court ultimately decided that the Environmental Impact Statement included sufficient information to determine that the lease sale itself was not environmentally harmful:

"the purpose of the EIS is simply to provide the decision maker with adequate environmental information guided by a rule of reason governing what the agency must discuss and to what extent".

Massachusetts' Georges Bank is another area in which the economic interest in energy sources prevailed over the local and national environmental interests. Georges Bank is not only a high production fishing ground, it

is also an area frequented by the endangered humpback and right whales.⁸ A lawsuit seeking to prevent the sale had the result of an agreement by the Department of Interior to particular safeguards protecting the fish; however, the lease sales were completed.⁹

In both the North Slope Borough and the Georges Bank case, potentially unacceptable projects were allowed to proceed before research on the environmental impact of the project was completed. The court's decisions seem to reflect a policy of rapid development of offshore energy resources. Projects considered important to the national interest in obtaining energy sources have priority over environmental concerns.

Section 19 of the OCS Act, which requires that consideration be given to state recommendations on lease sales, and the consistency section of the Coastal Zone Management Act, were tested in the pending California v. Watt litigation.¹⁰ The controversy arose when Secretary of the Interior, James Watt, offered 32 tracts for lease in the Santa Maria Geological basin without consulting the state of California. In July, 1981, a federal court held that the Reagan administration had violated the Coastal Zone Management Act provisions requiring consultation with the states on certain offshore projects. The Court concluded that "pre-lease activities...were intended to be subjected to the consistency requirements of the Coastal Zone Management Act". The Court issued an injunction against the sale of oil leases. The federal government has announced its intention to appeal. If affirmed, the Watt decision appears to grant coastal states veto power on whether the Interior Department may even designate for exploration an offshore area which directly affects a state's coastal management plan.

The National Oceanic and Atmospheric Administration issued a rule July 8, 1981,¹² exempting the Interior Department's offshore planning and leasing activities from the consistency clause of the Coastal Zone Management Act. President Reagan had previously proposed a phase-down of grants for the Coastal Zone Management Act which also would eliminate consistency requirements:

"A survey of coastal states show more than half shutting down their coastal management programs if federal funding is withdrawn in fiscal year 1982...Alabama...indicated they would lose their total staff."¹³

The July 8th NOAA rule places a coastal state's total authority in OCS Act provision that the Secretary must consider a state's recommendations before leasing submerged land. Therefore, the court can only countermand the Secretary's decision to lease if that decision is illegal or arbitrary. The House Appropriations Committee came to coastal states' defense in California v. Watt by issuing a report stating that in that case environmental costs outweighed the economic benefit of drilling.¹⁴ Perhaps in the future, the House Appropriations Committee will provide the protection previously found in the Coastal Zone Management Act.

Presently, not only the federal government, but also states such as Alabama and Mississippi have increased lease sales. With the national interest in fuel sources, the subsequent increase in outer continental shelf development and decrease in statutory environmental safeguards, states will have to play a larger role in controlling leasing of federally owned submerged lands in order to protect their own interests. State challenges to the sale of leases have not been totally unsuccessful; in the Georges Bank case, the challenge did result in stricter pollution regulations. The belief that advancements in techniques will minimize

environmental hazards may be well founded; however, an inevitable increase in water pollution from increased drilling activities must be acknowledged. Preserving the ecological resources at stake is of equal national importance with developing energy resources.

IX. STATE OIL AND GAS REGULATION

Oil and gas exploration and production in offshore state waters is regulated by the State Oil and Gas Board, the State Department of Conservation and the Coastal Area Board. The Alabama Water Improvement Commission regulates discharge of pollutants from drilling operations into state waters.

The State Oil and Gas Board, by the provisions of the Code of Alabama (1975),¹ is charged with the responsibility of requiring that oil and gas well drilling operations be conducted in such a manner as to prevent escape of oil or gas out of one stratum to another; to prevent the intrusion of water from one stratum into a separate oil or gas stratum; to prevent the pollution of fresh water supplies by oil, gas or saltwater; to prevent wells from being drilled, operated or produced in a manner which would cause injury to neighboring property; to prevent the drowning by water of any stratum capable of producing oil or gas; and to prevent "blowout," "caving" and "seepage."

The jurisdiction of the Board extends throughout the coastal area, including activities on coastal waters to the extent of state-ownership thereof. The Board, through its rule-making authority, has developed comprehensive onshore and offshore regulations preventing pollution and governing disposal of waste generated incident to oil and gas exploration and development.

The Board issues drilling permits and other orders upon the finding that proposed activities comply with both stated conservation measures and the stringent pollution control requirements provided by statute and regulation.

In 1974, after a series of public hearings, the State Oil and Gas Board promulgated a set of comprehensive rules and regulations governing drilling, producing and pipeline operations in Alabama's submerged offshore lands. These regulations are designed to prohibit waste, pollution and the other potential hazards to the offshore area outlined in Code of Alabama Section 9-17-1 through 9-17-32.

By authority of Code of Alabama (1975), the Lands Division of the Department of Conservation and Natural Resources is authorized to lease any interests in state lands under the jurisdiction of the Department for the exploration, development and production of oil, gas or any other mineral associated with such lands. The Department is also the authorized leasing authority for interests in lands underlying navigable streams, navigable waters, bays, estuaries, lagoons, bayous, or lakes and the shores along any navigable waters to high-tide mark as well as submerged lands in the Gulf of Mexico within the seaward boundary of the state of exploration, development and production of oil, gas or any other mineral.

The agency regulates, through the issuance of permits, the following activities on state-owned lands and submerged lands: seismic exploration; aerial power lines over navigable streams; pipelines across navigable streams, buried or submerged cable; and dredging of water bottoms under navigable streams. Additional responsibilities include the administration of the Gulf States Marine Fisheries Compact and review of coastal area development projects covered under U.S. Army Corps of Engineers permit system.

Under the terms of leases recently negotiated with oil companies, the Department of Conservation has reserved the right to approve all

well locations, as well as the location of all artificial islands and pipelines. The sale preceding these leases prohibited any surface drilling locations within one mile of the beaches fronting the Gulf of Mexico and within one-half mile of all other beaches.

The state Coastal Area Board operates under authority set forth in Code of Alabama (1975), Section 9-7-10 through 9-7-22. Created in response to the provisions of the federal Coastal Zone Management Act of 1972, the Coastal Area Board coordinates all state and federal activities having a significant impact on the coastal waters. Energy siting is one activity regulated by the CAB. Subject to the requirements of 15 CFR Part 930, any person who submits to the Department of the Interior any plan for exploration of any outer continental shelf area must certify that the activities described in the plan which affect the coastal area will comply with, and be conducted consistently with, Coastal Area Board regulations. The Coastal Area Board's permit review program applies to any activity which requires a permit from another state agency. Rather than issue a separate permit, the CAB maintains the right to review permits already issued.

The Coastal Area Board voted in July, 1981, to require any oil companies drilling in territorial waters of the state to meet the following conditions: the companies will undertake a biological monitoring program during the exploration and production stages of the drilling process; the companies will "use a rational and logical approach" to transport any hydrocarbons discovered and will minimize the number of pipelines to on-shore facilities.

Under the provisions of Code of Alabama (1975), Section 22-22-2 et seq., the Alabama Water Improvement Commission is given authority to control and abate pollution in state waters. The Commission is designated the state water pollution control agency for purposes of the Federal Water Pollution Control Act. Specific powers of the commission include requiring maintenance of records, monitoring and reports of any person discharging or applying to discharge pollution into state waters; administering all state laws relating to water pollution, determining when a violation of these laws has occurred and issuing cease and desist orders; and issuing permits for discharge of wastes and for installation modification or operation of disposal systems. The Commission is also empowered to commence legal actions in conjunction with the attorney general or any district attorney to recover civil penalties for violations, damages for pollution of state waters (including clean-up costs), and costs to replenish wildlife. In July, 1981, the Water Improvement Commission as a part of a joint agency statement with the Department of Conservation, CAB, and the Oil and Gas Board issued requirements applicable to offshore oil and gas drilling operations to take preventive action against discharge of pollutants from drilling sites in the state's territorial waters.

The Water Improvement Commission has approved the following four requirements for offshore drilling:

1. No discharge of pollutants into state waters allowed.
2. Drillers must submit a plan for monitoring and spill prevention.
3. Drillers must post a bond or letter of guaranty sufficient

to cover any water quality damage.

4. Drillers must agree to arbitration in the event of a dispute with the state. The arbitration agreement will not affect a party's rights to go to court; it is envisioned as a device to avoid lawsuits.

Under this joint agency statement, a driller must obtain a permit from the Corps of Engineers. The permit must then be certified by AWIC and the Coastal Area Board. The State Oil and Gas Board and the Department of Conservation will retain their respective requirements which must still be complied with under the new regulations.

The Coastal Area Board, Alabama Water Improvement Commission, Department of Conservation and Natural Resources, and State Oil and Gas Board are attempting to coordinate regulatory and permitting activities in Mobile Bay with each other and with the federal agencies involved in oil and gas regulation. As part of the joint agency statement issued in July, 1981, a "state position" was adopted to reflect the agencies' regulatory policy. Important parts of this statement are:

1. That the prohibition against the discharge of any pollutants into the water, which is applicable to Mobil's exploration drilling program in Mobile Bay, should remain in effect for all exploratory drilling activities permitted in the coastal waters of Alabama;
2. That only the minimum number of drilling rigs that are absolutely necessary and can be justified by an applicant should be permitted;
3. That a continual monitoring program to measure and analyze the impact, if any, on the eco-system in Mobile Bay.

Mississippi Sound and offshore waters of Alabama due to these increased exploration activities should be required;

4. Only the minimum number of production platforms and wells that are absolutely necessary and can be justified by an applicant should be permitted; and
5. A minimum number of transportation corridors, or pipeline routes, deemed absolutely necessary should be developed and utilized to bring production onshore.

This policy is reflected in the regulatory activities of the agencies outlined above.

X. CONCLUSION

Conflicting federal and state claims to submerged lands is a problem that has plagued this nation for over a century. In the first half of the nineteenth century the Court set forth a rule that seemed to settle the problem for all time.¹ That rule provided that all lands underlying the navigable waters within the boundaries of a state are the property of that state.

After the discovery of vast natural resources under the sea in the 1930's and 1940's, however, the Federal Government began to challenge the State's claims of title to submerged lands.² When put to the test, the Pollard rule was found inadequate. Stronger federal control of the nation's coastal areas was deemed necessary. The Court restricted the scope of the Pollard rule to tidelands and inland waters, and declared that those submerged lands lying seaward of the low water mark on our coasts and outside the limits of inland waters, were subject to the paramount right of the United States.³ Under the California rule, no state had property rights in submerged lands lying seaward of the coastline. Congress accepted this new rule,⁴ and then motivated by a desire to settle the controversy for all time and a desire to restore to the states those lands that were thought to be theirs under the Pollard rule, Congress passed the Submerged Lands Act.⁵ In that Act Congress attempted to set forth a firm rule under which all the lands underlying the navigable waters of the continent and continental shelf of the United States would be assigned to either the states or the federal government. Congress knew that there was a major problem, the identification of inland waters, and they knew that they could not solve the problem through

legislation.⁶ Congress deliberately left inland waters to be defined and identified by the courts.⁷ The Court accepted that duty and held that the Convention on the Territorial Sea and the Contiguous Zone would provide the necessary definitions.⁸ The Court has also accepted the task of locating the coastline.⁹ The Court must now determine the relative legal positions of Alabama, Mississippi, and the United States, and settle the ownership of the enclaves in question.

FOOTNOTES

I. INTRODUCTION

1. 43 U.S.C. 1331-1343 (1953).
2. 43 U.S.C. 1301-1315 (1953).
3. Crance, Description of Alabama Estuarine Areas-Cooperative Gulf of Mexico Estuarine Inventory, 6 Alabama Marine Resources Bulletin 1, 21 (197).

II. HISTORICAL BACKGROUND

1. 2 Stat. 713, 714.
2. 57 Perry, The Consolidated Treaty Series, 27 (1969).
3. Act of Feb. 24, 1804, 2 STAT. 251, 254.
4. Act of April 25, 1812, 2 STAT. 713
5. Act of May 14, 1812, 2 STAT. 734.
6. Act of April 7, 1798, 1 STAT. 549.
7. 1 STAT. 549, 550.
8. Pollard v. Hagan, 3 How. 212, 222, 44 U.S. 1846.
9. See Act of March 3, 1803, 2 STAT. 229.
10. Resolution, June 17, 1812, 2 STAT. 786.
11. 3 STAT. 348
12. Resolution of Dec. 10, 1817, 3 STAT. 472
13. March 2, 1819, ch. 47, 3 STAT. 489.
14. Resolution, December 14, 1819, 3 STAT. 608

III. DEVELOPMENT OF THE COMMON LAW

1. 16 Pet. 367, 10 L. Ed. 997 (1842).
2. Martin et. al v. The Lessee of Waddell, 16 Pet., 367, 410, 10 L. Ed. 997, 1013 (1842).
3. 16 Pet. at 410, 10 L. Ed. at 1013.
4. 16 Pet. at 412, 10 L. Ed. at 1013.
5. 3 How. 212, 11 L. Ed. 565 (1846).
6. 3 How. at 230, 11 L. Ed. at 574.
7. 3 How. at 234, 11 L. Ed. at 576.
8. 3 How. at 222-223, 11 L. Ed. at 570.
9. 3 How. at 223, 11 L. Ed. at 571.
10. 3 How. at 228-229, 11 L. Ed. at 573.
11. 3 How. at 32, 11 L. Ed. at 574.
12. 3 How. 212, 11 L. Ed. 565 (1846).
13. E.g., Silas Mason Co. Inc. v. Washington Tax Commissioner, 302 U.S. 186, 58 S. Ct. 233 (1937) (Columbia River at the Grand Coulee Dam, Washington), United States v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197(1925) (Mud Lake Minnesota), Appleby v. City of New York, 271 U.S. 364, 46 S. Ct. 569(1926) (Hudson River at New York City), Scott v. Lattig, 227 U.S. 229, 33 S. Ct. 242(1912) (Snake River, Idaho), Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548 (1894) (Columbia River, Washington), Weber v. State Harbor Commissioners, 18 Wall. 57, 23 L. Ed. 59 (85 U.S. 1873) (San Francisco Bay), Smith v. Maryland, 18 How. 71, 15 L. Ed. 269 (59 U.S., 1855) (Chesapeake Bay).
14. United States v. California, 332 U.S. 19, 36, 67 S. Ct. 1658, 1667 (1947).
15. Id.
16. 332 U.S. 19, 67 S. Ct. 1658 (1947)
17. 332 U.S. at 36, 67 S. Ct. at 1667.
18. United States v. California, 332 U.S. 804, 805, 68, S. Ct. 20, 21 (1947), Order and Decree.
19. 339 U.S. 699, 70 S. Ct. 914 (1950)

20. 339 U.S. 707, 70 S. Ct. 918 (1950)
21. United States v. California, 332 U.S. 804, 68 S. Ct. 20 (1947).
22. United States v. California, 332 U.S. at 23, 67 S. Ct. at 1660, Cal. Const. of 1849, Art. XII.
23. United States v. Louisiana, 339 U.S. at 703, 70 S. Ct. at 916, 6 DART, LA. GEN. STATS. (1939) Section 9311.1-9311.4.
24. United States v. Texas, 339 U.S. at 720, 70 S. Ct. at 924, Act of May 23, 1947, L. Texas, 50th Leg., p. 451.
25. 339 U.S. at 705, 70 S. Ct. at 917.

IV. APPLICABLE FEDERAL LAW

1. 43 U.S.C. Section 1301-1315 (1953).
2. 43 U.S.C. Section 1331-1343 (1953).
3. 43 U.S.C. Section 1312.
4. 43 U.S.C. Section 1311(a).
5. United States v. California, 381 U.S. 139, 148, 85 S. Ct. 1401, 1407(1965).
6. 43 U.S.C. Section 1301 (c).
7. United States v. California, 381 U.S. 139, 150-51, 85 S. Ct. 1401, 1408 (1965).
8. 381 U.S. at 165, 85 S. Ct. at 1415.
9. See United States v. California, 381 U.S. 139, 85 S. Ct. 1401 (1965), United States v. Louisiana, 394 U.S. 11, 89 S. Ct. 773 (1969).
10. 42 U.S.C. Section 1332 (a).
11. 43 U.S.C. Section 1331 (a).
12. 43 U.S.C. Section 1332-1343 (1953).
13. 99 Cong. Rec. 2745 (1953).
14. 43 U.S.C. Section 1301 (a) (2).
15. 99 Cong. Rec. 2745 (1953) (remarks of Sen. Holland).
16. 43 U.S.C. Section 1331 (a).
17. United States v. California, 382 U.S. 448, 86 S. Ct. 607 (1965).

18. United States v. Alaska, 422 U.S. 184, 95 S. Ct. 2240 (1975).
19. 422 U.S. at 186.
- V. BOUNDARIES AND THE CONVENTION OF THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE
 1. 43 U.S.C. Section 1312
 2. 43 U.S.C. Section 1312
 3. See United States v. Louisiana, Texas, Mississippi, Alabama, and Florida, 363 U.S. 1, 76, 80 S. Ct. 961, 1003 (1960).
 4. 363 U.S. 1, 80 S. Ct. 961, (1960).
 5. United States v. Louisiana, 389 U.S. 155, 156, 88 S. Ct. 367, 368 (1967).
 6. 373 U.S. 1, 80 S. Ct. 961 (1960).
 7. 363 U.S. at 81, 80 S. Ct. 1006, Resolution of December 10, 1817, 3 STAT. 472.
 8. 363 U.S. at 82, 80 S. Ct. at 1006, Resolution of December 14, 1819, 3 STAT. 608.
 9. 363 U.S. at 82 nn. 135, 139, 80 S. Ct. at 1006.
 10. 363 U.S. at 81, 80 S. Ct. 1006.
 11. 43 U.S.C. Section 1311(a).
 12. Article 1 (1).
 13. 381 U.S. 139, 85 S. Ct. 1401 (1965).
 14. 381 U.S. at 164, 165, 85 S. Ct.
 15. 381 U.S. at 167, 85 S. Ct. at 1416.
 16. United States v. Louisiana, (The Louisiana Boundary Case), 394 U.S. 11, 34, 89 S. Ct. 773, 787, (1969).
 17. Article 3 (1).
 18. 43 U.S.C. Section 1301 (c).
 19. Article 3 (1).
 20. United States v. Louisiana (The Texas Boundary Case), 349 U.S. 1, 4-5, 89 S. Ct. 768, 770-771 (1969), United States v. Louisiana (The Louisiana Boundary Case), 394 U.S. 11, 35, 89 S. Ct. 773, 787 (1969).

VI. APPLICATION OF THE SUBMERGED LANDS ACT: INLAND WATERS

1. 43 U.S.C. Section 1301 (a) (2), 1301 (c), 1311 (a); Convention of the Territorial Sea and the Contiguous Zone, Article 5 (1).
2. Article 7 (2).
3. United States v. Louisiana, 394 U.S. 11, 54, 89 S. Ct. 773, 797 (1969).
4. *Id.*
5. Article 7 (4).
6. 394 U.S. 11, 66, 89 S. Ct. 773, 803 (1969).
7. 394 U.S. at 61-62, 89 S. Ct. at 801.
8. 394 U.S. at 66, 89 S. Ct. at 803.
9. Article 7 (3).
10. *Id.*
11. *Id.*
12. 394 U.S. 11, 60 n. 80, 89 S. Ct. 773, 800.
13. 394 U.S. at 60, 89 S. Ct. at 800.
14. 394 U.S. at 55, 89 S. Ct. at 797-798.
15. 394 U.S. at 62 n. 83, 89 S. Ct. at 801.
16. 394 U.S. at 58, 89 S. Ct. at 799.
17. Article 7(5).
18. United States v. Alaska, 422 U.S. 184, 95 S. Ct. 2240 (1975).
19. United States v. Louisiana, 394, U.S. 11, 55 n. 7, 89 S. Ct. 773, 798 (1969).
20. 394 U.S. at 54, 98 S. Ct. at 797.
21. 394 U.S. at 52-53, 89 S. Ct. at 796-797.
22. NOAA Chart No. 11376 (1978), NOAA Chart No. 11371 (1978).
23. United States v. Alaska, 422 U.S. 184, 95 S. Ct. 2240 (1975),
United States v. Louisiana, 394 U.S. 11, 89 S. Ct. 773, (1969),
United States v. California, 381 U.S. 139, 85 S. Ct. 1401 (1965).

24. United States v. Alaska, 422 U.S. 184, 197, 95 S. Ct. 2240, 2250 (1975).
25. 422 U.S. at 189, 95 S. Ct. at 2246.
26. 422 U.S. at 200, 95 S. Ct. at 2251.
27. 422 U.S. at 203, 95 S. Ct. at 2253.
28. United States v. California, 381 U.S. at 174, 85 S. Ct. at 1420.
29. United States v. Louisiana, 394 U.S. at 24, 89 S. Ct. at 781.
30. United States v. Alaska, 422, U.S. at 197 95 S. Ct. at 2250.
31. United States v. Alaska, 422, U.S. at 203, 95 S. Ct. at 2253.
32. United States v. California, 381 U.S. at 168, 85 S. Ct. at 1417.
33. United States v. Louisiana, 394 U.S. at 78, 89 S. Ct. at 809.
34. 394 U.S. at 77, 89 S. Ct. at 809.
35. United States v. California, 381 U.S. at 168, 85 S. Ct. at 1417.
36. United States v. Louisiana, 394 U.S. at 77 n. 107, 89 S. Ct. at 809.
37. Ala. Code Section 9-17-62 (1975).
38. Article 4 (1).
39. [1951] I.C.J. 116.
40. Article 4 (2).
41. Article 4 (3).
42. United States v. Louisiana, 394 U.S. 11, 70-71, 89 S. Ct. 773, 805-806 (1969).
43. United States v. California, 381 U.S. 139, 168, 85 S. Ct. 1401, 1417 (1965).
44. United States v. Louisiana, 394 U.S. at 72-73, 89 S. Ct. at 807.
45. 394 U.S. at 72 n. 96, 89 S. Ct. at 806.
46. 394 U.S. at 73 n. 97, 89 S. Ct. at 807-808.
47. *Id.*
48. See United States v. Louisiana, 394 U.S. at 77 n. 104, 89 S. Ct. at 809, United States v. California, 381 U.S. at 168, 85 S. Ct. at 1417.

49. 394 U.S. at 67-68, 89 S. Ct. at 804.

50. 394 U.S. at 71, 89 S. Ct. at 806.

51. Article 4(2).

VII. COMMON LAW AND LEGISLATIVE INTENT

1. 394 U.S. 11, 89 S. Ct. 773 (1969).

2. *Id.* at 118 (Douglas J., dissenting in part).

3. Senate Report No. 133, 83rd Cong. 1 Sess., reprinted in [1951] U.S. Code Cong. & Ad. News 1429.

4. Crance, Description of Alabama Estuarine Areas-Cooperative Gulf of Mexico Estuarine Inventory, 6 Alabama Marine Resources Bulletin 1,2 (1971).

5. *Id.* p. 32-33.

6. TerEco Corp., Literature Review of the Mississippi Sound and Adjacent Area, A Report to the Department of the Army, Prepared under Contract No. DACW1-78-C-0244, 114 (Feb. 1979).

7. Lipp, 'Water Pollution,' The Environment of Offshore and Estuarine Alabama, 68, (1974).

8. The State Oil and Gas Board of Alabama has published regulations governing submerged drilling in Oil and Gas Report 1, March 1980 Supplement. These regulations include the pollution provisions of rule OS-3 and Section 9-17-11, and harsh penalties for violations of any provision, 9-17-32.

9. S. Rep. No. 133, 83d Cong., 1st Sess. 70, 70.

VIII. STATE CONTROL OVER FEDERALLY OWNED LANDS

1. H. R. Rep. No. 96-697, 96th Cong., 1st Sess. 12, reprinted in [1979] U.S. Code Cong. and Ad. News 2576, 2576.

2. See, e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, [1978] 8 ENVIR. L. REP. 20513, in which the snail darter's habitat was protected at the price of halting completion of the Tellico Dam.

3. 43 U.S.C. Section 1334(a)(1), Section 1334(a)(2), ENVIR. L. REP. STAT. & REG. 42457.

4. Massachusetts v. Andrus, 594 f. 2d at 892, [1979] 9 ENVIR. L. REP. 20767.

5. [1981] 11:50 ENVIR. REP. (BNA) 2197.
 6. 486 f. Supp. 332, [1980] 10 ENVIR. L. REP. 20832 (D.C. Cir. Oct. 9, 1980).
 7. [1980] 10 ENVIR. L. REP. 10210, 10213.
 8. [1980] 10 ENVIR. L. REP. 10210, 10210.
 9. Conservation Law Foundation of New England, Inc. v. Andrus, 623 f. 2d. 712. (1st Cir. 1979).
 10. Civil No. 81-2080-MPR. (C.D. Cal. 1981).
 11. [1981] 12:6 ENVIR. REP. (BNA) 196.
 12. [1981] 12 ENVIR. REP. (BNA) 366.
 13. [1981] 7:22 TEX COASTAL AND MARINE Council³.
 14. [1981] 12:10 ENVIR. REP. (BNA) 312
- IX. STATE OIL AND GAS REGULATION
1. Code of Alabama, 1975, Section 9-17-1 through 9-17-32.
 2. Section 9-17-60 through 9-17-69.
 3. 16 U.S.C. Section 1451 et seq.
- X. CONCLUSION
1. Pollard's Lease v. Hagan, 3 How. 212, 11 L. Ed. 565 (1846).
 2. 42 Op. A.G. 241 at 243 (1963).
 3. United States v. California, 332 U.S. 19, 67, S. Ct. 1658 (1947).
 4. See Alabama v. Texas et al., 347 U.S. 272, 74 S. Ct. 481 (1954).
 5. See, Senate Rep. No. 133, 83rd Cong. 1st Sess., reprinted in [1953] U.S. Code Cong. & Ad. News 1474.
 6. See 99 Cong. Rec. 2621 (remarks of Senator Holland), 99 Cong. Rec. 2629 (remarks of Senator Corden).
 7. United States v. California, 381 U.S. 139, 85 S. Ct. 1401 (1965).
 8. United States v. California, 381 U.S. 139, 85, S. Ct. 1401 (1965); United States v. Louisiana, 394 U.S. 11, 89 S. Ct. 773 (1969).
 9. E.g., United States v. Florida, 425 U.S. 791, 96 S. Ct. 1840

(1976); United States v. California, 436 U.S. 32, 98 S. Ct.
1662 (1978); United States v. California, 432 U.S. 40, 97 S. Ct.
2915 (1975); United States v. California, 382 U.S. 448, 86 S. Ct.
607 (1966).