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Robert B. Krueger

Louis H. Singer

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# AN ANALYSIS OF THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978

ROBERT B. KRUEGER\* and LOUIS H. SINGER\*\*

The Outer Continental Shelf has been called "America's best hope for finding additional oil and gas resources and reducing our dependence on foreign oil."<sup>1</sup> Indeed, beneath the 1.3 million square miles of continental shelf and slope over which the United States has jurisdiction and control,<sup>2</sup> there exists an enormous quantity of energy resources. Demonstrated reserves of offshore oil and gas are approximately 3.5 billion barrels of oil and 36 trillion cubic feet of gas, with prospective reserves of an additional 8 to 50 billion barrels of oil and 28 to 199 trillion cubic feet of gas.<sup>3</sup> Although only 17 percent of domestic oil and gas production currently comes from the continental shelf, some studies estimate that offshore oil and gas may comprise as much as one-fourth to one-third of total U.S. production by 1985.<sup>4</sup> In addition, there are various hard minerals which are recoverable from the continental shelf by available mining techniques.<sup>5</sup>

The first federal act to authorize the leasing of the resources of the Outer Continental Shelf was the Outer Continental Shelf Lands Act of 1953 (hereinafter referred to as the "1953 act").<sup>6</sup> With the excep-

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\*Partner, law firm of Nossaman, Krueger & Marsh, Los Angeles, California.

\*\*Associate, law firm of LeBoeuf, Lamb, Leiby & MacRae, New York, New York.

1. 124 CONG. REC. S13,994 (daily ed. Aug. 22, 1978) (remarks of Sen. Jackson). For purposes of the Outer Continental Shelf Lands Act, the term "Outer Continental Shelf" includes "all submerged lands lying seaward and outside of the area of lands beneath navigable waters [title to which is confirmed unto the coastal states] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (1976). The term "continental shelf" as used in its geologic sense extends only to lands lying interior of the geologic slope. For a discussion of the scope of federal jurisdiction over offshore lands, see *infra* note 6.

2. R. KRUEGER, MANAGEMENT OF ENERGY RESOURCES ON FEDERAL LAND 1 (CALLAGHAN ENERGY LAW SERVICE, MONO. 11A, 1978) [hereinafter cited as KRUEGER, MANAGEMENT OF ENERGY RESOURCES]. This figure does not include the offshore lands owned by the states.

3. DEP'T OF THE INTERIOR, GEOLOGICAL SURVEY, *cited in* H.R. REP. NO. 590, 95th Cong., 1st Sess. 71 (1977).

4. *Id.* at 74.

5. M. BARAM & D. RICE, MARINE MINING OF THE CONTINENTAL SHELF 1 (1978). These minerals include sand and gravel, phosphorite, manganese oxide, calcium carbonate, barite, and various types of placer minerals.

6. 43 U.S.C. § §1331-1343 (1976). The basis for this exercise of sovereign powers over the resources of submarine areas beyond the territorial sea was President Truman's landmark proclamation, issued in 1945, in which he announced that "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf

tion of one limited amendment,<sup>7</sup> this "epochal statute"<sup>8</sup> remained unchanged for twenty-five years until the passage of the Outer Continental Shelf Lands Act Amendments of 1978 (hereinafter referred to as the "1978 act").<sup>9</sup> The 1978 act was itself the culmination of five years of congressional activity.<sup>10</sup> While the bulk of the 1978 act consists of amendments to the 1953 act, it also establishes an Offshore Oil Spill Pollution Fund<sup>11</sup> and a Fishermen's Contingency Fund<sup>12</sup> and amends the Coastal Zone Management Act of 1972.<sup>13</sup>

The 1978 act has many policy objectives, the most significant of which are the following:

1. To make oil and other natural resources available to meet domestic energy needs as rapidly as possible;
2. To balance development with protection of the environment;
3. To insure the public a fair return in exchange for development of the resources of the Outer Continental Shelf;
4. To preserve and maintain free enterprise competition with respect to such development; and
5. To provide coastal states with an opportunity to participate in

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beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States [and] subject to its jurisdiction and control." Presidential Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 Comp.). At the same time President Truman issued Executive Order 9633 which ordered that "the natural resources . . . of the continental shelf . . . contiguous to the coasts of the United States . . . [be] placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto." 3 C.F.R. 437 (1943-1948 Comp.)

Prior to 1947, it was thought that California and the other coastal states owned the land underlying the territorial sea. In 1947, however, the United States Supreme Court determined in *United States v. California*, 332 U.S. 19 (1948), that the federal government had "paramount rights in and . . . full dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. The same principle was confirmed as to other coastal states in succeeding decisions, which brought about the political pressure that resulted in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1343 (1976). That act in effect reversed *United States v. California* by vesting in the coastal states the ownership of lands "beneath navigable waters within [their respective] boundaries," 43 U.S.C. § 1311(a) (1976), which were defined as lands lying within three geographical miles of the "coast line," 43 U.S.C. § 1301(b) (1976). It also permitted historic boundaries in the Gulf of Mexico to the extent of three marine leagues (9 miles). *Id.* The Outer Continental Shelf Lands Act of 1953 was adopted as a companion measure to the Submerged Lands Act.

7. The Deepwater Port Act, 33 U.S.C. §§ 1501-1524, 43 U.S.C. § 1333 (1976), § 19(f) declared that the state laws applicable to OCS activities are those currently in force in the respective states, rather than those which were in force as of the effective date of the 1953 act. 43 U.S.C. § 1333 (1976).

8. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 23 (1953).

9. 16 U.S.C.A. §§ 1456-1456a, 1464; 30 U.S.C.A. § 237; 43 U.S.C.A. §§ 1331-1334, 1337, 1340, 1343-1356, 1801-1802, 1811-1824, 1841-1847, 1862-1866 (Supp. 1979).

10. For a summary of that activity, see H.R. REP. NO. 590, 95th Cong., 1st Sess. 95-100 (1977).

11. 43 U.S.C.A. §§ 1811-1824 (Supp. 1979).

12. 43 U.S.C.A. §§ 1841-1847 (Supp. 1979).

13. 16 U.S.C.A. § 1456-1456a, 1464 (Supp. 1979).

policy and planning decisions relating to the resources of the Outer Continental Shelf.<sup>14</sup>

In Part I of this article, the administrative system of the Outer Continental Shelf Lands Act, as amended, will be analyzed by examining each of its functional aspects in light of its objectives. The discussion will concentrate on the changes made by the 1978 act and the problems these amendments were designed to alleviate. The other elements of the 1978 act will be discussed in Part II. In the concluding part, the discussion will focus on the general nature of U.S. offshore resources policy as reflected in the 1978 act.

## I. PROVISIONS AND POLICIES OF THE OUTER CONTINENTAL SHELF LANDS ACT, AS AMENDED

### A. *Selection of Lands for Lease*

The 1953 act vested in the Secretary of the Interior the authority to grant mineral leases covering areas of the Outer Continental Shelf not already under lease or withdrawn from leasing under the act's provisions.<sup>15</sup> The 1953 act did not, however, set forth standards or guidelines by which the Secretary was to select areas for lease sale. Further, the act failed to establish a system whereby the Secretary could obtain the technical data needed to assess the potentiality of offshore mineral prospects.

The absence of guidelines for selecting tracts in the 1953 act gave rise to congressional charges that the Department of the Interior had too much discretion<sup>16</sup> and that affected coastal states and local governments did not participate sufficiently in the decision-making process.<sup>17</sup> The problems caused by the government's lack of information were somewhat relieved by amendments to the regulations of the Department of the Interior which required companies conducting offshore exploratory work to disclose their geological and geophysical data to the U.S. Geological Survey (USGS),<sup>18</sup> which could in turn assist the Bureau of Land Management (BLM) in making tract selections.<sup>19</sup> Congress, however, perceived that BLM needed the means of acquiring better information about offshore resources.<sup>20</sup>

The 1978 act attempts to limit the Secretary of the Interior's discretion in selecting lands for lease by requiring him to submit a

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14. 43 U.S.C.A. §1802 (Supp. 1979).

15. 43 U.S.C. §1337 (1976).

16. See H.R. REP. NO. 590, *supra* note 3, at 103.

17. See, e.g., 124 CONG. REC. S13,994 (daily ed. Aug. 22, 1978) (remarks of Sen. Jackson).

18. 30 C.F.R. §§ 251.12, 252.3 (1978).

19. 43 C.F.R. §3301.2 (1978).

20. See, e.g., H.R. REP. NO. 590, *supra* note 3, at 199.

comprehensive oil and gas leasing program to the Congress and by setting forth the considerations upon which such a program is to be based.<sup>21</sup> Thus, the 1978 act provides that in determining the timing and location of exploration, development, and production, the Secretary must take into account not only available information about the various oil and gas bearing offshore regions, but also such considerations as whether developmental benefits and environmental risks are being equitably shared among such regions, the "laws, goals, and policies of affected States," the needs of regional energy markets, and the interests of potential oil and gas producers.<sup>22</sup> The Secretary is also directed to obtain a proper balance between the potential for environmental damage, the potential for discovery of oil and gas, and the potential for an adverse impact upon the coastal zone.<sup>23</sup>

To provide a greater role for state and local governments in the planning process, the 1978 act requires the Secretary to solicit comments from the governors of states affected by a proposed leasing program,<sup>24</sup> who may in turn request comments from local governments.<sup>25</sup> Affected states and local governments also have the right under the 1978 act to submit recommendations regarding the size, timing, or location of specific lease sales or development and production plans.<sup>26</sup> A state's recommendation in this regard must be accepted, and that of a local government may be accepted, if the Secretary determines that it provides for "a reasonable balance between the national interest and the well-being of the citizens of the affected State."<sup>27</sup> The Secretary's determination of the merits of a recommendation controls unless found to be arbitrary or capricious.<sup>28</sup>

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21. 43 U.S.C.A. §1344 (Supp. 1979).

22. 43 U.S.C.A. §1344(a)(2) (Supp. 1979).

23. 43 U.S.C.A. §1344(a)(3) (Supp. 1979).

24. 43 U.S.C.A. §1344(c)(2) (Supp. 1979). The term "affected state" as defined in the act includes any state which is designated by the Secretary as a state in which there will be significant changes in the social, governmental or economic infrastructure resulting from OCS activities or in which there will be a significant risk of serious damage to the marine and coastal environment in the event of any oil spill or blowout. 43 U.S.C.A. §1331(f) (Supp. 1979).

25. 43 U.S.C.A. §1344(c)(2) (Supp. 1979). Thus, on March 9, 1979, the Secretary of the Interior sent his proposed leasing schedule to the affected coastal states. The proposal included the holding of 26 lease sales between 1980 and 1985. 10 COASTAL ZONE MANAGEMENT NEWSLETTER (March 14, 1979).

26. 43 U.S.C.A. §1345(a) (Supp. 1979).

27. 43 U.S.C.A. §1345(c) (Supp. 1979).

28. 43 U.S.C.A. §1345(d) (Supp. 1979). Additional state input is provided through the interplay between the 1978 act and the Coastal Zone Management Act, 16 U.S.C. §1451-1464 (1976). In general, an OCS development plan will not be approved unless it is consistent with any approved coastal zone management program of an affected state. See 16 U.S.C. §1456 (1976).

Implementation of the goal of coastal state involvement in the management of federal energy resources may hinder the rapid development of offshore resources, another goal of the 1978 act. Like the Deepwater Port Act,<sup>29</sup> the 1978 act extends the influence of the coastal states far beyond the coastal lands owned by them pursuant to the Submerged Lands Act.<sup>30</sup> The oil and gas industry has already expressed the fear that implementation of the 1978 act will reduce the total amount of petroleum that is produced.<sup>31</sup>

Predictably, the tiers of study, planning, and mandatory determinations required by the 1978 act, which are in addition to those imposed by the National Environmental Policy Act,<sup>32</sup> will delay offshore development. Such delay can only be justified if it is the sole means of protecting the coastal and marine environment, a proposition which can and should be empirically tested. Clearly, the burden of proving the value of greater coastal state participation lies with those supporting that goal.

The 1978 act's objective of increasing the federal government's knowledge of offshore resources is furthered by the enactment of the oil and gas information program,<sup>33</sup> which is in large part a codification of regulations recently adopted by USGS.<sup>34</sup> This program requires that the Secretary be given access to all data and information obtained by lessees and permittees in the course of exploration, development, or production under the condition that its confidentiality will be maintained unless the lessee or permittee agrees to its disclosure.<sup>35</sup> Based upon a finding that the government's existing collection of data "relies too heavily on unverified information from industry sources,"<sup>36</sup> the 1978 act also directs the Secretary to conduct a continuing investigation of the availability of oil and natural gas resources on the Outer Continental Shelf and to report to Congress on his findings.<sup>37</sup> The version of the 1978 act which passed the Senate in July 1977 would have authorized the federal government to conduct both geological and geophysical operations for this purpose. This authorization was deleted from the final version of the act, however, thereby leaving the manner in which information is to be gathered to the Secretary's discretion.

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29. 33 U.S.C. §§ 1501-1524 (1976).

30. 43 U.S.C. §§ 1301-1315 (1976).

31. [1978] 9 ENVIR. REP. (BNA) 1454.

32. 42 U.S.C. § 4321-4347 (1976).

33. 43 U.S.C.A. § 1352 (Supp. 1979).

34. 30 C.F.R. §§ 252.1-252.6 (1978).

35. 43 U.S.C.A. § 1352 (Supp. 1979).

36. 43 U.S.C.A. § 1865(a)(3) (Supp. 1979).

37. 43 U.S.C.A. § 1865 (Supp. 1979).

The 1953 act required that an oil and gas lease not contain more than 5,760 acres (9 square miles).<sup>38</sup> The clear preference on the part of the major oil companies has been for large offerings of blocks of the maximum size, and this has been the usual practice of the Department of the Interior under the 1953 act. Through 1975, the typical sale has resulted in the leasing of 71 tracts, with each tract covering an average of 4,645 acres.<sup>39</sup> The 1978 act retains these same acreage restrictions unless the Secretary finds that "a larger area is necessary to comprise a reasonable economic production unit."<sup>40</sup>

## B. Allocation of Lands; Lease Sales

### 1. Alternative Bidding Systems.

The 1953 act required that oil and gas leases be issued by competitive bidding<sup>41</sup> and authorized the Secretary of the Interior to call for bidding on the basis of cash bonus with a fixed royalty of not less than 12½ percent or on the basis of a royalty bid with a 12½ percent minimum and a fixed cash bonus.<sup>42</sup> Except in certain instances in which a higher flat royalty was stated or there was experimental royalty bidding, the practice of the Secretary under the 1953 act was to issue leases with a 16-2/3 percent royalty and on the basis of the highest cash bonus bid.<sup>43</sup>

The 1978 act continues the requirement that leases be allocated on a competitive basis and authorizes the two methods of bidding specifically called for by the 1953 act.<sup>44</sup> In addition, it authorizes the adoption of any of the following bidding systems: (1) a variable royalty bid with a fixed work commitment based on a dollar amount for exploration, (2) a cash bonus bid, or work commitment bid with a fixed cash bonus, and a diminishing or sliding royalty, (3) a cash bonus bid with a fixed share of the net profits at a rate of not less than 30 percent, (4) a net profits bid with a fixed cash bonus, (5) a cash bonus bid with a fixed royalty and a net profits interest, and (6)

38. 43 U.S.C. §1337(b) (1976).

39. UNITED STATES SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 94th CONG. 2d SESS., JOINT BIDDING FOR FEDERAL ONSHORE OIL AND GAS LANDS, AND COAL AND OIL SHALE LANDS 19 (Comm. Print 1976).

40. 43 U.S.C.A. §1337(b) (Supp. 1979).

41. 43 U.S.C. §1337(a) (1976). Despite its considerable advantages, the concept of competitive bidding has not been accepted in most countries. A study of world petroleum policies which the authors of this article prepared revealed that the petroleum systems of most countries show no evidence that rights to explore for or exploit petroleum are allocated on a competitive basis.

42. *Id.*

43. H.R. REP. NO. 590, *supra* note 3, at 138; KRUEGER, MANAGEMENT OF ENERGY RESOURCES, *supra* note 2, at 43.

44. 43 U.S.C.A. §1337(a)(1) (Supp. 1979).

a work commitment bid with a fixed cash bonus and a fixed royalty.<sup>45</sup> Moreover, the Secretary of the Interior is authorized to adopt any other system of bid variables, terms and conditions which is determined to be useful to accomplish the act's purposes, unless the Senate or House passes a resolution disapproving such system.<sup>46</sup> The 1978 act also requires that bidding systems other than bonus bidding be applied to not less than 20 percent and not more than 60 percent of the total area offered for leasing during each of the five years following the act's passage, unless the Secretary of the Interior determines such a requirement is "inconsistent with the purposes and policies" of the act.<sup>47</sup>

This emphasis on alternative bidding systems is based upon a desire to encourage experimentation under the largely unsupported belief that the use of these alternative systems will facilitate the entry of independent oil companies into U.S. offshore petroleum development.<sup>48</sup> In fact, even when not taking into account bonus bidding or other preleasing expenses, the costs of operating on the OCS are typically so high as to exclude the small company.<sup>49</sup> Also, the considerable advantages of the cash bonus bidding system should not be overlooked. This system is simple to administer, provides an incentive for early development, and affords the government an early return of revenue. Lastly, it is the most popular form of allocation in industry, a fact which seems to have weighed against it in the Congress.

On the other hand, there are disadvantages to using many of the alternatives to cash bonus bidding. Net profits bidding avoids the premature abandonment problem created by a high, flat royalty but has one basic defect: the larger the reserved net profits interest, the less incentive the operator has to be efficient. There may in fact be an incentive to be inefficient where the operator has a very small share of net profits but receives an administrative allowance of a specified percentage of operating expenses.

Under a work commitment or development contract bidding system, resource rights are allocated to the firm which commits itself to

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45. *Id.*

46. 43 U.S.C.A. § 1337(a)(1)(H) (Supp. 1979); 43 U.S.C.A. § 1337(a)(4) (Supp. 1979).

47. 43 U.S.C.A. § 1337(a)(5)(B) (Supp. 1979).

48. H.R. REP. NO. 590, *supra* note 3, at 139.

49. According to Lloyd Unsell, executive vice-president of the Independent Petroleum Association of America, less than 1% of roughly 10,000 independent operators have the economic resources "to go offshore." According to Mr. Unsell, the average independent does not expect or want to compete on the OCS. Mr. Unsell suggests that the high operating costs of offshore operations and not federal legislation are the major reason for this attitude. Sumpter, *Why U.S. independents aren't rushing offshore*, 77 OIL AND GAS J. 67, 68 (March 5, 1979).



spending the greatest sum in developing the resource. While this alternative would ensure the rapid development of offshore resources, the effect of the system is to divert monies that might otherwise be paid as a bonus or for a higher royalty to exploratory operations. Thus, the work commitment bidding system can be viewed as a government subsidy of the exploratory programs offered by the lessee.<sup>50</sup> For this reason, the criteria for evaluating this subsidy should be comparable to those applied to a direct appropriation of public funds. Further, it should be noted that the adoption of this bidding system suggests a judgment that the resources would not otherwise be optimally developed. A basic drawback in many of the development contracts that have been seen to date has been that they have encouraged companies to offer to perform work unnecessary for the efficient development of the resource. Further, such contracts are difficult to administer and require many subjective judgment factors.<sup>51</sup>

Royalty bidding, whether on a flat royalty basis (lease awarded to the highest gross royalty offered) or a sliding scale basis (lease awarded to the highest multiple of a stated royalty scale), is frequently suggested as a means of attracting bidders who do not have the funds to compete on the basis of cash bonus or of interesting bidders in exploring unattractive properties which are presently undeveloped. There are, however, some basic drawbacks to both forms of royalty bidding. Royalty in any form creates an inherent problem of resource economics. It becomes part of the fixed costs of operation and thereby contributes to diminishing the operator's incentive to produce as such costs approach the value of production. Flat royalty bidding compounds the problem: the greater the royalty, the greater the incentive to abandon a well prematurely.

A sliding scale royalty presents less of a problem in this respect because the royalty adjusts downward with a decrease in production, but this factor also provides the operator with incentive to produce at the lowest permissible rate in order to reduce the royalty. The extraction of the resource may, therefore, be unreasonably delayed, with a correlative delay in the payment of royalty to the government. It is also true of any type of royalty bidding that the ultimate return to the lessor will depend upon the success of the lessee's operation.

The premature abandonment problem could be substantially eliminated by providing for a successively decreasing royalty, possibly

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50. ERICKSON, WORK COMMITMENT BIDDING, in *MINERAL LEASING AS AN INSTRUMENT OF PUBLIC POLICY* 61 (M. Crommelin & A. Thompson eds. 1977).

51. Krueger, *An Evaluation of the Provisions and Policies of the Outer Continental Shelf Lands Act*, 10 NAT. RES. J. 763, 790 (1970).

even providing for its termination, when production or reserves reach stated minimal levels. Such a system would, however, encourage the operator to establish the stated lower levels prematurely in order to reduce royalty in the same fashion as does the sliding scale. It would also create a much greater administrative burden on the leasing agency.

## 2. Joint Bidding.

The use of joint bidding in Outer Continental Shelf lease sales has been gradually increasing in recent years; whereas prior to 1972 it was unusual for more than one-half of the bids submitted in any lease sale to be jointly formed, the presence of a majority of joint bids has been commonplace since that time.<sup>5 2</sup> Joint bidding allows companies to spread their investment over a larger number of leases, thereby significantly reducing their risk of not making a commercial discovery of oil or gas. This would suggest that joint bidding results in increased participation in lease sales and higher lease sales,<sup>5 3</sup> both of which are goals of the 1978 act.

The use of joint bidding by the majors, however, has come under attack on the ground that it has lessened competition and deterred the entry of the independents into OCS development. While there is considerable question about whether this conclusion is valid,<sup>5 4</sup> joint bidding on OCS leases among companies that produce more than 1.6 million barrels per day of crude oil, natural gas, and liquified petroleum was banned by the Department of Interior on September 19, 1975,<sup>5 5</sup> and by Congress three months later.<sup>5 6</sup> The 1978 act continues this prohibition but allows for an exemption if both of the following conditions are present: the leases offered for sale cover lands which have "extremely high cost exploration or development problems" and exploration would not occur on those lands unless the exemption were granted.<sup>5 7</sup> The Secretary of the Interior recently denied a request to allow joint bidding by the majors on Beaufort Sea tracts on the basis that exploration and development would still occur even if joint bidding for these tracts were not allowed.<sup>5 8</sup>

In addition to mandating the use of alternative bidding systems and restricting joint bidding, the 1978 act contains other provisions

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52. KRUEGER, MANAGEMENT OF ENERGY RESOURCES, *supra* note 2, at 45.

53. SENATE REPORT, *supra* note 39, at 19-35.

54. See KRUEGER, MANAGEMENT OF ENERGY RESOURCES, *supra* note 2, at 45.

55. 43 C.F.R. § 3302.3-2(a) (1978).

56. 42 U.S.C. § 6213(c) (1976).

57. 42 U.S.C.A. § 6213(c) (Supp. 1979).

58. See 10 COASTAL ZONE MANAGEMENT NEWSLETTER 4 (March 7, 1979).

designed to encourage competition. Thus, the 1978 act provides that following each notice of a proposed lease sale but before the acceptance of bids, the Attorney General, in consultation with the Federal Trade Commission, has 30 days to review the competitive effects of the sale.<sup>59</sup> The Secretary of the Interior is free to reject a recommendation of the Attorney General that the lease sale may create a situation inconsistent with the antitrust laws, as long as he notifies the Attorney General and the lessee of the reason for his decision.<sup>60</sup> The 1978 act also requires the Secretary of the Interior to give due consideration throughout the leasing process to the views of the Attorney General with respect to matters which may affect competition.<sup>61</sup>

### *C. Persons Who May Hold Leases; Term*

Like the 1953 act, the 1978 act authorizes the grant of leases to "qualified" persons but contains no restrictions as to citizenship.<sup>62</sup> Both the current<sup>63</sup> and the proposed<sup>64</sup> regulations of BLM, however, restrict the holding of leases to citizens, resident aliens, or corporations of the United States or its states or territories. Even though foreign nationals and corporations are not permitted to hold leases, they are free to use domestic subsidiaries and have done so extensively.<sup>65</sup> Further, any person authorized by the Secretary may conduct geological and geophysical operations on the Outer Continental Shelf,<sup>66</sup> and the regulations do not contain any restrictions in this regard. Thus, the class of entrants to OCS development is determined not by regulation but by economic interest in the resource offered.

The purpose of efficient resource management appears to be served by the existing system, which permits open competition but guarantees the federal government legal jurisdiction over its Outer

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59. 43 U.S.C.A. § 1337(c) (Supp. 1979).

60. *Id.*

61. 43 U.S.C.A. § 1334(a) (Supp. 1979).

62. 43 U.S.C.A. § 1337(a) (Supp. 1979).

63. 43 C.F.R. § 3300.1 (1978).

64. 44 Fed. Reg. 6,474 (1979) (proposed § 3316.1).

65. 1 NOSSAMAN, WATERS, SCOTT, KRUEGER & RIORDAN, STUDY OF THE OUTER CONTINENTAL SHELF LANDS OF THE UNITED STATES, Tables 8-3, 8-6, 8-20 (1968) [hereinafter cited as NOSSAMAN OCS STUDY]. See R. KRUEGER, THE UNITED STATES AND INTERNATIONAL OIL: A REPORT FOR THE FEDERAL ENERGY ADMINISTRATION ON U.S. FIRMS AND GOVERNMENT POLICY at A-26 (1975). For example, British Petroleum through a subsidiary owns a major part of the North Slope Alaska reserves.

66. 43 U.S.C.A. § 1340(a)(i) (Supp. 1979).

Continental Shelf lessees. This purpose is also served by the absence of any restrictions on the number of acres that any operator can hold under lease. In this regard, the Outer Continental Shelf Lands Act is clearly superior to the Mineral Lands Leasing Act of 1920 with its individual acreage restrictions.<sup>6 7</sup>

The 1978 act continues the requirement of the 1953 act that oil and gas leases endure for an initial period of five years "and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon."<sup>6 8</sup> Unlike the 1953 act, however, the 1978 act allows the Secretary of the Interior to issue leases for an initial period of up to ten years where the longer period is necessary "to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions."<sup>6 9</sup> This amendment should satisfy those who have suggested that a five-year primary term for oil and gas leases may be too short with respect to drilling on the continental slope and in areas such as Alaska where operations must be conducted on a short season basis.<sup>7 0</sup>

#### *D. Operations*

Many aspects of lease administration relating to operations on the Outer Continental Shelf are affected by the 1978 act. Like the 1953 act and regulations thereunder, the 1978 act is concerned with maximizing production, with safety, and with environmental protection. The 1978 act amends the 1953 act to limit administrative discretion and to provide for additional planning and studies, new sanctions, and closer governmental supervision in these areas.

With respect to exploratory operations, the 1978 act establishes procedures for the submission of exploration plans by lessees and for the evaluation and approval of such plans by the Secretary of the Interior.<sup>7 1</sup> While the new statutory provisions relating to exploration plans are similar to regulations currently in force,<sup>7 2</sup> significant changes have been made. Unlike existing regulations, the 1978 act establishes specific criteria according to which the Secretary must

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67. 30 U.S.C. § 184 (1976).

68. 43 U.S.C.A. § 1337(b)(2) (Supp. 1979).

69. 43 U.S.C.A. § 1337(b)(2)(B) (Supp. 1979).

70. 1 NOSSAMAN OCS STUDY, *supra* note 65, § 11.45.

71. 43 U.S.C.A. § 1340(c) (Supp. 1979).

72. 30 C.F.R. § 250.34-1 (1978).

approve or reject an exploration plan and requires that the Secretary act on a proposed plan within 30 days of its submission.<sup>73</sup>

In most areas of the OCS, lessees must also submit development and production plans to USGS prior to undertaking such activities.<sup>74</sup> The 1978 act requires lessees to produce any oil or gas obtained pursuant to an approved plan at rates consistent with any rule or order issued by the President.<sup>75</sup> If no such rule or order is issued, lessees must comply with rates established by the Secretary of Energy which are designed to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas.<sup>76</sup>

In addition to making a range of traditional enforcement actions available to the Secretary, including lease cancellation<sup>77</sup> and criminal and civil penalties,<sup>78</sup> the 1978 act prohibits the submission of a bid for a lease "if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases."<sup>79</sup> This provision reflects a concern raised in numerous forums at various times since the 1973 oil embargo that the oil companies might be withholding oil and gas from production to create an artificial scarcity. The Secretary of the Interior in 1977 investigated the issue by creating a departmental committee to review certain oil and gas leases that were not then in production. In June 1977, the Interior Department announced the cancellation of two federal oil and gas leases in the Gulf of Mexico, citing a lack of drilling activity. Since that time, a study done by the National Research Council of the National Academy of Sciences and the National Academy of

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73. 43 U.S.C.A. § 1340(c)(1) (Supp. 1979). The latter amendment contained in the 1978 act should hasten exploration. Existing regulations (currently in the process of being modified) require the USGS Supervisor to withhold a decision on an exploration plan until written comments have been received from each affected state or until 30 days after each state receives a copy of the plan, whichever comes first. 30 C.F.R. § 250.34-1(d)(1)(ii) (1978). As one environmental scientist has commented, "if the exploration plan were vigorously opposed by the state or local governments, the five year lease period may well expire before even the exploration plan can be approved, much less the development and production plan." Letter from Dr. David Smith to USGS (November 8, 1977) (commenting on 1977 proposed revision of OCS oil and gas operating regulations).

74. 43 U.S.C.A. § 1351(a)(1) (Supp. 1979). The 1978 act provides an exemption for tracts in the Gulf of Mexico and for tracts for which a lease was issued before September 18, 1978, and with respect to which no oil or gas has been discovered in paying quantities. Plans may be required, however, for tracts which, although located in the Gulf of Mexico, are adjacent to the State of Florida. 43 U.S.C.A. § 1351(l) (Supp. 1979).

75. 43 U.S.C.A. § 1334(g)(1) (Supp. 1979).

76. 43 U.S.C.A. § 1334(g)(2) (Supp. 1979).

77. 43 U.S.C.A. § 1334(a) (Supp. 1979).

78. 43 U.S.C.A. § 1350 (Supp. 1979).

79. 43 U.S.C.A. § 1337(d) (Supp. 1979).

Engineering showed that, in at least one of the six fields reviewed, accelerated production of natural gas was warranted.<sup>80</sup>

It has recently been suggested that a large number of prospective bidders will be disqualified from bidding because they are not meeting due diligence requirements elsewhere, and that as a result this sanction is contrary to the objective of increasing competition for OCS leases.<sup>81</sup> On the contrary, the fact that this prohibition might apply to many bidders strongly supports those who believe a sanction of this nature is necessary. Also, it seems that in exercising control over public resources, the federal government must be given at least some of the powers of a private landowner to increase revenues and manage effectively. Those powers should include the right to ignore prospective lessees not meeting their leasehold obligations elsewhere.

Building on regulations promulgated in the aftermath of the Santa Barbara oil spill, the 1978 act attempts to reduce dangers to the environment from OCS operations by providing for the suspension and cancellation of leases to prevent serious environmental harm<sup>82</sup> and for the protection of the clean air standards of coastal zones.<sup>83</sup> The 1978 act also directs the Secretary to conduct studies of areas included in lease sales and areas already developed in order to assess environmental impacts of oil and gas development on the human, marine, and coastal environment.<sup>84</sup>

In the period from 1953 through 1975, 13,087 wells were drilled in the OCS.<sup>85</sup> Sixty-eight people died in accidents involving such wells and about 107 were injured.<sup>86</sup> To provide for safe OCS operations, the 1978 act requires the use of the best available and safest technologies that are economically feasible<sup>87</sup> and provides for increased civil and criminal penalties for violations.<sup>88</sup> In addition, the

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80. H.R. REP. NO. 95-1835, 95th Cong., 2nd Sess. 24-25 (1979).

81. See 77 OIL AND GAS J. 73 (March 19, 1979).

82. 43 U.S.C.A. § 1334(a) (Supp. 1979).

83. 43 U.S.C.A. § 1351(d) (Supp. 1979).

84. 43 U.S.C.A. § 1346 (Supp. 1979).

85. COUNCIL ON ENVIRONMENTAL QUALITY, OIL AND GAS IN COASTAL LANDS AND WATERS 26 (1977).

86. *Id.*

87. 43 U.S.C.A. § 1347(b) (Supp. 1979). An exception is made for cases where the Secretary determines that the incremental benefits "are clearly insufficient to justify the incremental costs of using such technologies." *Id.* Concerning best available and safest technologies, see NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, BEST AVAILABLE & SAFEST TECHNOLOGIES—GUIDELINES FOR IMPLEMENTATION (July 19, 1979) (report prepared by the Panel on Best Available & Safest Technologies, Assembly of Engineering).

88. 43 U.S.C.A. § 1350 (Supp. 1979).

1978 act requires the Secretary of the Interior and the Secretary of the Department in which the Coast Guard is operating, in consultation with other appropriate federal agencies, to commence promptly a joint study of existing safety and health regulations and of the technology, equipment, and techniques available for the exploration, development, and production of OCS minerals.<sup>89</sup> On the basis of that study, the President must submit to Congress his proposals for the promotion of safety and health in OCS activities.<sup>90</sup>

### *E. Other Uses of the Outer Continental Shelf*

In enacting the 1978 act, Congress determined that the federal government must assume the responsibility of minimizing conflict between the exploitation of oil and gas and other uses of the marine environment, including recreational activity and the recovery of other resources such as fish and shellfish.<sup>91</sup> Accordingly, the 1978 act provides that in adopting and revising a leasing program, the Secretary of the Interior must consider other uses of the sea and seabed, including fisheries, navigation, sealanes, and potential sites of deepwater ports.<sup>92</sup> Further, the 1978 act requires the Secretary of Commerce, in cooperation with the Secretary of the Interior, to conduct a survey of obstructions on the OCS and to develop charts identifying the same for use by commercial fishermen.<sup>93</sup>

The 1978 act fills a gap in the law by extending the scope of the Outer Continental Shelf Lands Act to cover geothermal resources.<sup>94</sup> The act still fails to provide, however, for the licensing or development of fresh water resources, living resources, salvage and treasure trove, the construction of islands and artificial structures, and dredging and filling.<sup>95</sup>

## II. OTHER ELEMENTS OF THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978

### *A. Offshore Oil Spill Pollution Fund*

The risk of oil pollution can be expected to increase as oil and gas activity accelerates on the Outer Continental Shelf. As a result, Con-

89. 43 U.S.C.A. § 1347(a) (Supp. 1979).

90. *Id.*

91. 43 U.S.C.A. § 1344 (Supp. 1979).

92. 43 U.S.C.A. § 1344(a)(2)(D) (Supp. 1979). The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524, 43 U.S.C. § 1333 (1976), establishes a mechanism for licensing and regulating the ownership and construction of "deepwater ports," defined as any facility beyond the territorial sea and used as a port or terminal for the loading, unloading or storage of oil. 33 U.S.C. § 1502 (10) (1976).

93. 43 U.S.C.A. § 1847 (Supp. 1979).

94. 43 U.S.C.A. § 1331(q) (Supp. 1979).

95. See KRUEGER, MANAGEMENT OF ENERGY RESOURCES, *supra* note 2, at § 11A.33.

gress provided in the 1978 act for an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of OCS activities and for any damages to public or private interests caused by such spills or discharges.<sup>96</sup>

Specifically, Title III of the 1978 act establishes an Offshore Oil Pollution Compensation Fund in an amount not to exceed \$200 million to be administered by the Secretary of Transportation and the Secretary of the Treasury.<sup>97</sup> The fund is financed by the imposition of a fee of three cents per barrel on all oil produced on the OCS, and by money obtained through fines, penalties, and reimbursements.<sup>98</sup> The three cents per barrel fee is "imposed on the owner of the oil when such oil is produced."<sup>99</sup> Prior to adoption of final regulations under the 1978 act by the Coast Guard, many commentators in industry suggested that the government's royalty share of production should be excluded from the amount of oil used as a basis for calculating the fee.<sup>100</sup> The substance of their argument was that because the government is entitled to take its royalty share of production in kind, the federal government and not the producer is the owner of "royalty oil" at the time such oil is produced. The Coast Guard, however, rejected this argument in adopting its final regulations.<sup>101</sup>

Title III contemplates recovery for two types of economic losses arising out of or directly resulting from oil pollution: removal costs and damages.<sup>102</sup> Any person residing in the U.S., the federal government, a state government, or a local governmental entity may assert a claim for removal costs.<sup>103</sup> Each of the foregoing persons or entities may also assert a claim for injury to, or destruction of, real or personal property and for loss of use of real or personal property or natural resources.<sup>104</sup> Further, any of the foregoing persons or entities which derived at least 25 percent of their earnings from activities which utilized damaged property or natural resources may assert a claim for loss of profits or impairment of earning capacity from injury to or destruction of that property or those natural resources.<sup>105</sup> The President, acting as a trustee for OCS resources, and state governments can assert a claim for injury to or destruction of

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96. 43 U.S.C.A. §§1811-1824 (Supp. 1979).

97. 43 U.S.C.A. §1812(a) (Supp. 1979).

98. 43 U.S.C.A. §1812(b) (Supp. 1979).

99. 43 U.S.C.A. §1812(d)(1) (Supp. 1979).

100. See 44 Fed. Reg. 16,860 (1979).

101. *Id.*

102. 43 U.S.C.A. §1813 (Supp. 1979).

103. 43 U.S.C.A. §1813(b)(1) (Supp. 1979).

104. 43 U.S.C.A. §1813(b)(2) (Supp. 1979).

105. 43 U.S.C.A. §1813(b)(4) (Supp. 1979).



natural resources.<sup>106</sup> The federal government and any state or political subdivision thereof may assert a claim for loss of tax revenues for a period of one year due to injury to real or personal property.<sup>107</sup> Finally, the Attorney General can bring an action for removal costs or damages on behalf of a group of U.S. residents if he determines that the claimants would be more adequately represented as a class.<sup>108</sup>

Owners and operators of vessels (other than public vessels) or offshore facilities are strictly liable for all of the foregoing types of losses.<sup>109</sup> Title III limits the amount of their liability, however, except when the incident causing the pollution is the result of willful misconduct, gross negligence, or the violation of safety standards of the federal government.<sup>110</sup> Where these exceptions do not apply, the liability of the owner or operator of a vessel is limited to \$250,000 or \$300 per gross ton, whichever is greater.<sup>111</sup> The owner or operator of an offshore facility is liable for the total of removal and cleanup costs plus an amount limited to \$35 million for all damages.<sup>112</sup> Notwithstanding these limitations, however, an owner or operator of an offshore facility or vessel from which an oil discharge occurs must bear all costs of removal incurred by the federal or any state government or any local official or agency.<sup>113</sup> The fund is liable without limitation for all uncompensated losses except as to particular claimants who have caused such losses through their own willful misconduct or negligence.<sup>114</sup>

The most controversial aspect of Title III is the requirement that each offshore facility used for drilling for, producing, or processing oil, or which has the capacity to transport, store, transfer, or otherwise handle more than 1,000 barrels of oil at any one time, must establish and maintain "evidence of financial responsibility" in the amount of \$35 million.<sup>115</sup> Evidence of financial responsibility may be established by any one or any combination of the following methods: insurance, guaranty, indemnity, surety bond, qualification as self-insurer, or any alternative method accepted by the Fund Administrator.<sup>116</sup> Each of these methods of "evidencing financial

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106. 43 U.S.C.A. §1813(b)(3) (Supp. 1979).

107. 43 U.S.C.A. §1813(b)(5) (Supp. 1979).

108. 43 U.S.C.A. §1813(b)(7) (Supp. 1979).

109. 43 U.S.C.A. §1814(a) (Supp. 1979).

110. 43 U.S.C.A. §1814(b) (Supp. 1979).

111. 43 U.S.C.A. §1814(b)(1) (Supp. 1979).

112. 43 U.S.C.A. §1814(b)(2) (Supp. 1979).

113. 43 U.S.C.A. §1814(d) (Supp. 1979).

114. 43 U.S.C.A. §1814(f) (Supp. 1979).

115. 43 U.S.C.A. §1815(b) (Supp. 1979).

116. 44 Fed. Reg. 16,869 (1979).

responsibility” has come under attack. Some commentators have suggested that insurance to cover oil spill risks would probably not be available at any cost.<sup>117</sup> The guaranty and indemnity methods are considered limited because it is felt that large companies would only indemnify or guarantee the performance of their subsidiaries.<sup>118</sup> Commentators have called the surety method “totally useless.”<sup>119</sup> The cost of a surety bond can be expected to be two percent per year. In addition to the yearly cost, however, a bonded company must pay back any amount paid out by the bonding company.<sup>120</sup> Perhaps in recognition of the possible difficulties many entities will have in meeting these financial responsibility requirements, the 1978 act requires the President to conduct a study to determine whether adequate private oil pollution insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and offshore facilities and whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions.<sup>121</sup>

### *B. Other Elements*

There are numerous other elements of the 1978 act, only a few of which will be noted here.

Title IV of the act establishes a Fishermen’s Contingency Fund in an amount which may not exceed \$1 million to pay for damages to commercial fishing vessels and gear due to OCS activities.<sup>122</sup> To this end, the holders of OCS leases, permits, easements, and pipeline rights-of-way may be assessed amounts not exceeding \$5,000 per lease, permit, easement, or right-of-way by the Secretary of Commerce.<sup>123</sup> Commercial fishermen suffering damage may file claims for compensation which are referred to hearing examiners.<sup>124</sup> In the absence of a request for judicial review, a successful claimant is disbursed the amount of his award from the fund and the Secretary of Commerce acquires by subrogation all rights of the claimant against any person found to be responsible for his damages.<sup>125</sup>

Title V of the 1978 act amends that portion of the Coastal Zone Management Act of 1972 which grants funds to coastal states im-

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117. *Id.* at 16,867.

118. *See id.*

119. *Id.*

120. *Id.*

121. 43 U.S.C.A. § 1815(d) (Supp. 1979).

122. 43 U.S.C.A. § 1842 (Supp. 1979).

123. 43 U.S.C.A. § 1842(c) (Supp. 1979).

124. 43 U.S.C.A. § 1845 (Supp. 1979).

125. 43 U.S.C.A. § 1845(h) (Supp. 1979).

pacted by OCS energy activities.<sup>126</sup> These funds are intended to assist coastal states in financing public facilities, public services, and environmental costs associated with OCS activities. The 1978 act modifies the formula by which funds are allocated,<sup>127</sup> changes the eligibility requirements for receiving funds,<sup>128</sup> and increases the level of funding.<sup>129</sup> Title V also adds a new provision to the Coastal Zone Management Act authorizing the Secretary of Commerce to make grants to coastal states in the amount of 80 percent of the costs they incur in carrying out their responsibilities under the Outer Continental Shelf Lands Act.<sup>130</sup>

Finally, it might be noted that the 1978 act requires the Secretary of the Interior to list all shut-in<sup>131</sup> oil wells and all gas wells flaring natural gas on OCS leases.<sup>132</sup> The Secretary must also indicate the reason each listed well is shut-in or flaring natural gas and whether he intends to require production or order the cessation of flaring.<sup>133</sup>

### III. CONCLUSION

The 1978 act effects many important changes in the manner in which the United States manages its outer continental shelf lands. Also, the same congressional concern and activities which brought about passage of that act also sparked reform through administrative regulations shortly before the act's passage.

Although enacted just a short time ago, the 1978 act has already engendered much criticism. Perhaps that was a predictable result, given the inherent conflicts among the act's objectives. The most obvious conflict among the act's goals is that between the encouragement of petroleum development and the protection of the environment. Perhaps an equally important conflict exists between the objectives of maximizing revenue to the federal government and the objective of encouraging private participation in resource development. The solution, of course, is not to do away with conflicts but to strike a good balance between conflicting goals. It is questionable whether the 1978 act accomplishes this goal.

For the most part, critics have not commented on the fact that despite the many real changes made by the 1978 act, the basic phi-

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126. 16 U.S.C.A. §1456a(b) (Supp. 1979).

127. *Id.*

128. *Id.*

129. 16 U.S.C.A. §1464 (Supp. 1979).

130. 16 U.S.C.A. §1456a(c)(2) (Supp. 1979).

131. A "shut-in" well is a producing well that has been closed down temporarily due to the lack of a market or for repairs, building up reservoir pressure, or similar reasons.

132. 43 U.S.C.A. §1861(a) (Supp. 1979).

133. *Id.*

losophy of our OCS resource policy remains the same. That philosophy is that the goals of the Outer Continental Shelf Lands Act can best be achieved by private industry working under the scrutiny of the federal and state governments. Thus, the 1978 act continues to follow the leasehold or concession approach to the development of natural resources on the OCS, an approach that has been common in the development of privately owned lands in the United States, but which is followed in increasingly fewer countries.

The trend in other parts of the world is to adopt the concept of direct state participation in the development of petroleum resources. This trend has not for the most part been associated with any particular political ideology. Rather, it has been based upon the self-perceived need of each nation to maximize its economic and strategic position with respect to this critical resource.

Even though it did not radically change U.S. policies, the 1978 act does give the federal government the means of further asserting its presence in the management of its offshore resources. It also marks what one hopes will be a continued effort on the part of the federal government to deal concertedly with energy and resource issues. Viewed in a worldwide energy context, it seems clear that the United States today is reassessing and broadening its knowledge of and management over its energy resources.