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Cooperative Federalism for the Coastal Zone and the Outer Continental Shelf: A Legislative Proposal

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COMMENTS

Cooperative Federalism for the Coastal Zone and the Outer Continental Shelf: A Legislative Proposal

For more than thirty years Congress has worked to effect a balance between state and federal jurisdiction over the Outer Continental Shelf (OCS).[1] The Outer Continental Shelf Lands Act (OCSLA),[2] enacted in 1953, established federal authority over the OCS, and confirmed state authority over the coastal zone.[3] To encourage cooperation between federal and state governments, Congress passed the Coastal Zone Management Act (CZMA) in 1972,[4] with a provision requiring consistency between federal activities in the OCS which directly affect the coastal zone and state coastal management programs.[5]

Congress also sought to balance conservation and development of the coastal zone and of the OCS through federal-state partnership. But partnership has not emerged from statutes that subordinate in differing order the relative emphasis on conservation or development. The CZMA encourages coastal states first to accept responsibility for coastal management and secondarily to promote resource development.[6] The OCSLA encourages fed-

1. For purposes of the Outer Continental Shelf Lands Act, the term "outer Continental Shelf" includes all submerged lands lying seaward and outside of lands defined in 43 U.S.C. § 1301 as being within state jurisdiction. 43 U.S.C. § 1331(a) (1976). For a discussion of the history and scope of state and federal jurisdiction over the OCS, see *infra* text accompanying notes 15-16.

Many scientists predict that the OCS will be the largest domestic source of oil and gas through the 1990's. Some estimate that offshore lands may produce as much as one-fourth to one-third of the total United States domestic production by 1985. H.R. REP. No. 590, 95th Cong., 1st Sess. 74 (1977).

2. 43 U.S.C. §§ 1331-1356 (1976 & Supp. III 1979).

3. The Coastal Zone Management Act defines the "coastal zone" as the coastal waters (including the lands therein and thereunder) and adjacent shorelands seaward to the outer limit of the United States territorial sea. 16 U.S.C. § 1453(1) (1976).

4. 16 U.S.C. §§ 1451-1464 (1976 & Supp. II 1978).

5. 16 U.S.C. § 1456 (c)(1) (1976).

6. 16 U.S.C. §§ 1451(h), 1452 (1976).

eral agencies first to develop OCS resources and secondarily to preserve the coastal environment.[7] Ironically, the very provisions intended to balance these divergent interests—the CZMA consistency provision, for example[8]—fragment rather than integrate the statutes; and thus it is conflict, not cooperative federalism,[9] that characterizes the relationship between the OCSLA and the CZMA as they govern offshore oil and gas leasing.

Legislative schemes not judiciously formed must inevitably be judicially forced. California federal district court Judge Kelleher described the CZMA effort to integrate state and federal interests as producing a bureaucratic maze:

> The message is as clear as it is repugnant: under our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more *befuddled* than the Congress must reasonably have anticipated; if ultimate execution of the congressional mandate requires interaction between federal and state bureaucracy, the resultant *maze* is one of the prices required under the system.[10]

A wry assessment of legislation which has indeed gone awry.

The intended interplay between the CZMA and the OCSLA leads to infighting because Congress, in drafting the provisions for federal-state cooperation, settled for hopeful exhortations instead of designing effective strategies to induce compromise. Unwilling to assign final authority for each stage of the oil leasing process to either a federal or a state agency, Congress merely adjured both state and federal agencies to consider each other's needs.[11]

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7. 43 U.S.C. § 1332(3) (Supp. III 1979).

8. *See infra* note 29 and accompanying text.

9. The term "cooperative federalism" is used in this Comment to describe interdependence and compromise between state and federal parties, as contrasted with a more hierarchical notion of federalism.

10. American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 931 (C.D. Cal. 1978), *aff'd on other grounds*, 609 F.2d 1306 (9th Cir. 1979).

11. "[T]he rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity *should be* considered and recognized." 43 U.S.C. § 1332(5) (Supp. IV 1980) (emphasis added).

The key to more effective protection and use of the land and water resources of

That agencies do not lightly divest themselves of vested interests is underscored in *California v. Watt*,[12] in which state coastal zone conservation interests are pitted against federal OCS development forces. This first test case under the consistency provision of the CZMA reveals the labyrinth created by the Acts. The consistency provision requires that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."[13] As the parties demand definition of the phrase "directly affecting" it becomes evident that adjudicating the meaning of that one phrase will only draw conservation and development forces deeper into the tangle to clash over the meaning of other phrases in the consistency clause such as "consistent with" and "maximum extent practicable."[14] Case by case, court by court, phrase by phrase, each party will wrestle for control of OCS resources, and each skirmish will crystallize lines of resistance and diminish cooperation.[15]

Forcing the courts to award control through the consistency provision phrase by phrase will frustrate important goals. The delays attendant to litigation constitute delays in effecting the mandates of both the OCSLA and the CZMA. Resources will not be developed; conservation measures will not be established. Congress, not the courts, should resolve the issue of control, selecting one of two choices: forgo the notion of cooperative federalism and establish a clearly defined single authority for developing and protecting coastal and OCS resources, or establish procedural and substantive incentives that will persuade opposing interests to settle differences in compromise that effects the best possible balance.

This Comment asserts that the present regulatory scheme is inadequate to achieve the cooperative federalism necessary to balance coastal and OCS development and protection in the oil

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> the coastal zone is *to encourage* the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone . . . .

16 U.S.C. § 1451(h) (1976) (emphasis added).

12. 683 F.2d 1253 (9th Cir. 1982).

13. 16 U.S.C. § 1456(c)(1) (1976).

14. 683 F.2d at 1263-64.

15. *See infra* text accompanying note 32 for a diagram of potential clashes arising out of application of the consistency provision.

leasing process. Approving the congressional goal of balance through cooperation, this Comment suggests a legislative strategy forceful enough to overcome the resistance of parties committed to sharply opposed views. The legislative solution can best be assessed by first tracing the events that set in motion the opposing forces now impeding cooperative federalism and then by examining administrative and judicial challenges which illustrate how far from compromise are the state and federal parties under the present system.

I. History of Conflict Surrounding the Outer Continental Shelf

A. Evolving Consciousness of the Importance of OCS Resources

1. 1880-1947: Oil discovered—seabeds appropriated

California's fiercely proprietary concern with offshore resources comes as no surprise in view of the state's offshore commitment extending back to 1897. In that year the first offshore oil was recovered from the Santa Barbara Channel. Based on Supreme Court rulings that title to submerged lands had passed from the English Crown to the individual states rather than to the United States Government,[16] California assumed control of the submerged lands adjacent to its coastline. The Department of Interior (DOI or Interior) sanctioned California's proprietary stance, rejecting applications for Pacific Ocean oil leases because it considered such decisions to be exclusively within California's jurisdiction.[17] In 1938, however, a movement began in Congress to extend federal jurisdiction to the Continental Shelf.[18] Finally, in 1945, President Truman declared federal ownership of the Continental Shelf,[19] effecting the first transfer of control and initiating a tug-of-war for dominion over the seabed which continues today.

In 1947 the Supreme Court confirmed federal jurisdiction over the Continental Shelf on the basis of national defense and international relations considerations. In *United States v. Cali-*

16. *See, e.g.*, Martin v. Waddell, 41 U.S. 367, 403-04 (1842).

17. H.R. Rep. No. 1778, 80th Cong., 2d Sess. 4 (1948) *reprinted in* 1953 U.S. Code Cong. & Ad. News 1385, 1417.

18. *Id.*

19. Exec. Order No. 9633, 3 C.F.R. § 437 (1943-48 Compilation), *reprinted in* 59 Stat. 884 (1945).

fornia the Court held that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[20] Predictably, the loss of potential revenue from offshore lease sales occasioned state political, legislative, and judicial activity that rose to a fever pitch in the 1980's; and, predictably, California was in the forefront of that activity.

2. *1950-1960: Respective state-federal domains defined*

Thus by 1950 the federal government claimed control over the three-mile territorial belt. The coastal states, of course, rejected this usurpation, and their political fervor prompted a legislative reversal in 1953 that essentially restored the pre-1947 status quo in offshore oil and gas development. The Submerged Lands Act[21] relinquished to the coastal states title to and ownership of submerged lands up to the three-mile limit. The Act provided, however, that the federal government would control the natural resources of the Continental Shelf soil and seabed seaward of the three-mile zone.[22] And even though the federal government forfeited potential revenue and immediate control over the three-mile belt, it reserved constitutional powers over commerce, navigation, national defense and international affairs.[23] Thus the tug-of-war continued, though in increasingly subtle fashion.

Concurrent with the 1953 passage of the Submerged Lands Act, Congress enacted the Outer Continental Shelf Lands Act extending "[t]he Constitution and laws and civil and political jurisdiction of the United States . . . to the subsoil and seabed of the outer Continental Shelf."[24] The OCSLA authorized the Secretary of the Interior to promulgate regulations for developing OCS mineral resources.[25] Thus, as early as 1953 the OCS was governed by two Acts; but at that point a single actor, the Secretary of the Interior, possessed *carte blanche* authority[26] to moni-

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20. 332 U.S. 19, 38-39 (1947).
21. 43 U.S.C. §§ 1301-1315 (1976).
22. 43 U.S.C. § 1302 (1976).
23. 43 U.S.C. § 1314(a) (1976).
24. 43 U.S.C. § 1333(a)(1) (1976).
25. 43 U.S.C. § 1334(a)(1) (1976).
26. Congress criticized the OCSLA for lack of specific directives and for the too general guidelines given the Secretary. H.R. REP. No. 590, 95th Cong., 1st Sess. 57

tor the OCS.

3. 1960-1970: Emerging environmental concerns—increasing awareness of American dependence on foreign oil

Because OCS development occurred primarily in waters off states bordering the Gulf of Mexico and in a small area off the Santa Barbara Channel, and because this development was slow, national awareness of OCS activity was limited. Then the 1969 blowout of an OCS drilling project in the Santa Barbara Channel caused the "largest oil spill in U.S. history."[27] More than oil spilled over those troubled California waters. Environmental concerns erupted, signalling the beginning of contemporary awareness and controversy over the OCS.

Three years after the oil spill, the need for OCS development crystallized as dramatically as had the earlier environmental concern. The 1973 Arab oil embargo revealed American dependence on foreign oil. President Nixon's subsequent intention to lease ten million acres of frontier OCS off the Atlantic and Pacific coasts and off Alaska meant that in one year the leasing of territory would almost equal the total amount leased since the establishment of the OCS program.[28] Interest groups, varying from environmental organizations to commercial fisheries, demanded a role in offshore leasing policy decisions previously made by the Secretary of the Interior.[29] Oil spill and embargo: one helped shape the CZMA in its various stages and the other prompted amendments to the OCSLA.

B. The Coastal Zone Management Act and Outer Continental Shelf Lands Act Amendments—Congressional Response to the Heightened Awareness of OCS Resources

1. The Coastal Zone Management Act

To encourage comprehensive and coordinated federal-state planning for the protection and beneficial use of coastal zone resources, Congress, through the 1972 Coastal Zone Management Act, gave the states some apparent control over federal action.[30]

(1977).

27. *Id.* at 74.

28. *Id.* at 100.

29. *Id.* at 89.

30. The principal provisions encouraging federal-state cooperation include authorization of grants to the states for the preparation of coastal zone management programs,

Although earlier the OCSLA may indeed have endowed the Secretary of the Interior with *carte blanche* authority over the OCS, and although *carte blanche* authority may well have been excessive, such plenary authority at least promoted clarity. The CZMA, on the other hand, in attempting to distribute OCS authority, effectively precluded definitive decisions. Now there were two acts, a number of actors, and a befuddled script. It was the number of principals and the lack of demarcation which guaranteed subsequent infighting.

Section 307 of the CZMA, the consistency clause, potentially affects every stage of OCS oil and gas development. Section 307(c)(1) requires federal agencies conducting or supporting any activities "directly affecting" the coastal zone to do so in a manner consistent, to the maximum extent practicable, with approved state coastal zone management programs. Thus, depending on how expansively the statute is interpreted, Interior's selection of tracts to offer for leasing might be subject to a consistency determination. Section 307(c)(3) requires applicants for a federal license or permit to certify that any proposed activity affecting the coastal zone complies with and will be carried out in a manner consistent with the approved state program.[31] Accordingly, oil developers must pass state consistency review before Interior can grant a drilling permit.

Possibilities for federal-state disagreement arising from these statutes are amplified by regulations that render the labyrinth impenetrable. The regulations assign to the Department of Interior responsibility for conducting a 307(c)(1) consistency re-

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16 U.S.C. § 1454(a)(1) (1976); provision for the Secretary of Commerce to review the state program, 16 U.S.C. §§ 1455-56 (1976 & Supp. II 1978); and finally, the consistency provisions effected by program approval, 16 U.S.C. § 1456 (1976).

31. After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. . . . No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

16 U.S.C. § 1456(c)(3)(A) (1976).

view of its own direct federal activity, with provision for later review by the state coastal commission. But Interior also decides in the first place whether its own activities actually do "directly affect" the state coastal zone, just as Interior determines whether a consistency determination is even necessary. A matrix diagram of some of the statutory stages in consistency review shows the many possibilities for litigation and the points at which litigation may ensue.[32]

CZMA SECTION:	307(c)(1)	307(c)(3)(A)
FEDERAL ACTION:	Direct federal activities	Federally licensed and permitted activities
COASTAL ZONE IMPACT:	"Directly affecting the coastal zone"	"Affecting land or water uses in the coastal zone"
DETERMINATION OF IMPACT:	Made by federal agency	Made by state agency
CONSISTENCY REQUIREMENT:	Consistent to the maximum extent practicable with CZM program	Consistent with CZM program
CONSISTENCY DETERMINATION:	Made by federal agency (review by state agency)	Made by state agency
FEDERAL AGENCY RESPONSIBILITY FOLLOWING A DISAGREEMENT:	Federal agency not required to disapprove action following state agency disagreement (unless judicially compelled to do so)	Federal agency may not approve license or permit following state agency objection
ADMINISTRATIVE CONFLICT RESOLUTION:	Voluntary mediation by the Secretary of Commerce	Appeal to the Secretary of Commerce by applicant or independent secretarial review

A schematic view of the paths consistency participants can pursue at the pre-leasing stage is given in the following diagram of the "maze."

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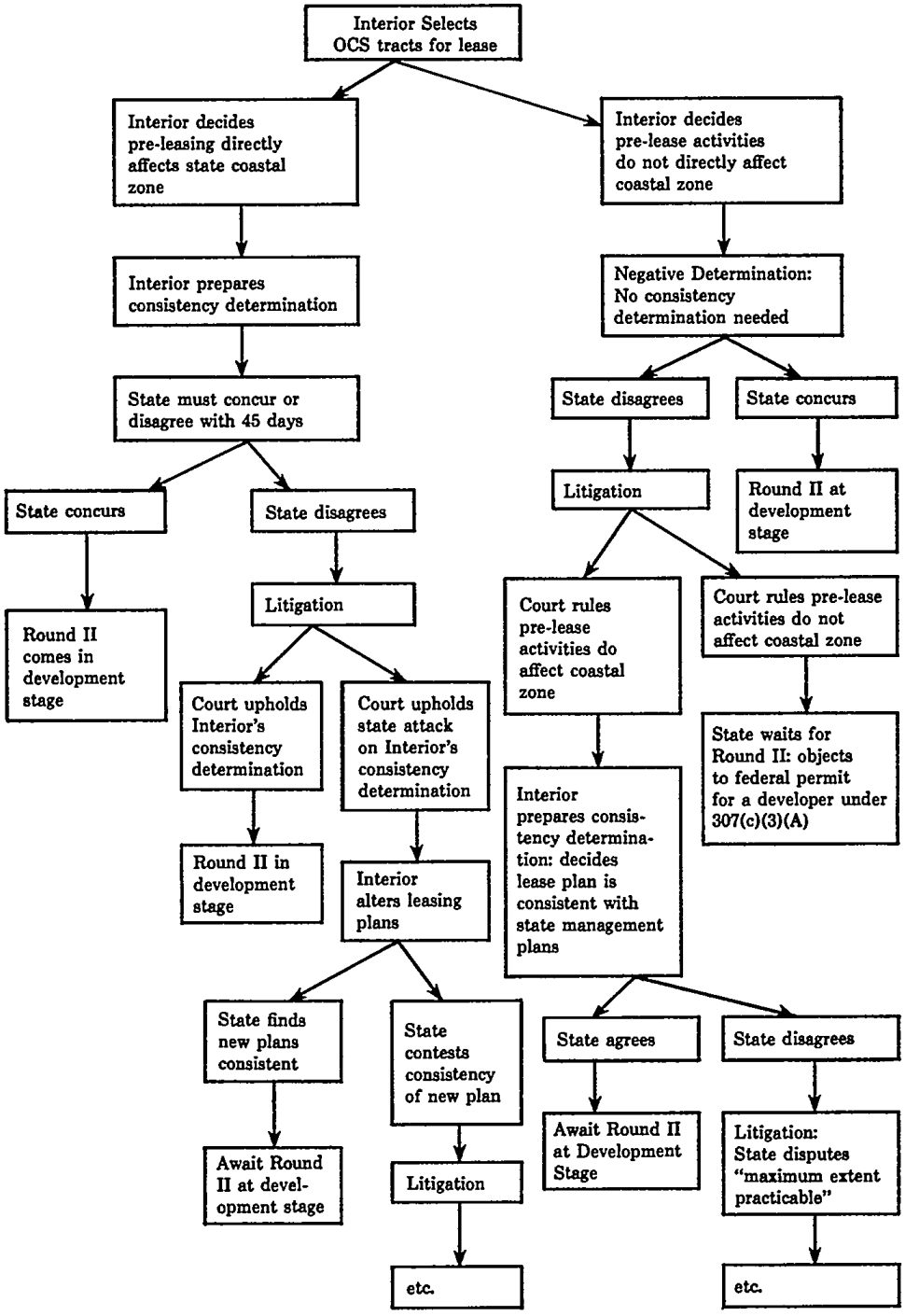
32. The matrix diagram was adapted from the NOAA Federal Consistency Matrix Diagram, 42 Fed. Reg. 43, 588-89 (1977) and shows the distinctive features of only two of the five consistency provisions. *See also* 16 U.S.C. § 1456(c)(1) and (c)(3)(A) (1976); 15 C.F.R. 930.1-930.86 and 930.120-930.134 (1982).

For comprehensive discussions of the federal consistency provisions, see Schoenbaum & Parker, *Federalism in the Coastal Zone: Three Models of State Jurisdiction and Control,* 57 N.C.L. REV. 231, 238 (1979) and Behr, *Implementing Federal Consistency Under the Coastal Zone Management Act of 1972,* 3 N.Y. SEA GRANT L. & POL'Y J. 1 (1980).



Congress sought to motivate states to assume more responsibility for their coastal areas. Therefore the CZMA, designed to "encourage the states to exercise their full authority over the lands and waters in the coastal zone,"[33] offered as incentives both federal financing and the consistency provisions for all states that would establish an approved state management program.[34] Although Congress intended the consistency clause to be the enduring incentive in this effort toward cooperative federalism, the consistency clause has paradoxically become the first battleground, since Congress did not adequately motivate cooperation.

The CZMA attempt to ensure a balance between the development of OCS resources and the preservation of coastal systems has little chance of success because the consistency provisions obscure delineation of responsibility and control. Even the chairman of the House subcommittee responsible for the CZMA despaired of the consistency provisions:

> I reread the statute several times verbatim, which is something that no one ought to be condemned to do, and I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections.[35]

The legislative history of the CZMA, while revealing congressional intent that state and federal agents cooperate, also illuminates the intrinsic obstacles to cooperation, obstacles that Congress made no provision to overcome. When the consistency provision of the CZMA was first proposed, both the Senate and House bills required consistency only from "[f]ederal agencies conducting or supporting activities *in the coastal zone.*"[36] This phrasing passed both the Senate and the House, but the bill then went to conference for resolution of other difficulties. The

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33. 16 U.S.C. § 1451(h) (1976).

34. The term "management program" was defined as "a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(11) (1976).

35. *Hearings on H.R. 6956, H.R. 6979 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries,* 96th Cong., 1st and 2d Sess. 88 (1980).

36. S. REP. No. 753, 92d Cong., 2d Sess. 18 (1972) (Section 314(b)(1) of S. 3507) (emphasis added); H.R. REP. No. 1049, 92d Cong., 2d Sess. 5 (1972) (Section 307(c)(1) of H.R. 14146) (emphasis added).

Conference Committee at that point substituted the phrase "*directly affecting the coastal zone.*"[37] Even though this new phrasing opened the possibility that activities in the federally controlled OCS as well as activities within the state coastal zone could be subject to consistency review, no record was made of the reasons for the changed emphasis. This turn of a phrase fostered bureaucratic befuddlement; it is of course on the phrase "directly affecting" that the current litigation centers.

A savings provision in the CZMA only adds to the ambiguity: Nothing in this chapter shall be construed—(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, *submerged lands,* or navigable waters . . . .[38] If the consistency clause does not diminish federal control over submerged lands, then the states are in no better position than they were before they designed their management programs. Internally inconsistent provisions complicate implementation, promoting conflict, not cooperative federalism.

The CZMA guidelines for state coastal management plans present further evidence of the mistaken congressional assumption that friendly admonitions will ensure effective compromise. Theoretically, federal requirements govern state coastal plans. Individual state coastal zone management plans must be approved by the Secretary of Commerce, who grants approval only if the goals of federal agencies "principally affected" by the plans have been "adequately considered."[39] Such guidelines were meant to assure reciprocity between state and federal perspective, but only the political novice would expect such reciprocity. Furthermore, the states are required to include only those concerns which are "appropriate in the opinion of the state."[40] The guidelines are thus sufficiently ambiguous to encourage litigation rather than cooperation. And even after an appellate court decision attempting to clarify the degree to which state coastal programs must reflect federal interests, the controversy persists.[41]

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37. H. CONF. REP. No. 1544, 92d Cong., 2d Sess. 14, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822, 4824 (emphasis added).

38. 16 U.S.C. § 1456(e) (1976) (emphasis added).

39. National Oceanic and Atmospheric Administration, Interim Final Regulations on the Development and Approval of Coastal Zone Management Programs, 15 C.F.R. § 923.51(a) & (b) (1982).

40. *Id.*

41. In American Petroleum Inst. v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd on other grounds,* 609 F.2d 1306 (9th Cir. 1979), the court upheld the Department of

In 1976 Congress amended section 307(c)(3), adding a new subsection designed to expedite the process of obtaining licenses and permits for drilling wells and for the installation of OCS production facilities.[42] Pursuant to the new subsection, no exploration activities may be licensed or permitted unless the state concurs in the consistency certification. But the Secretary of Commerce can override a state's objection if he finds the activities consistent with objectives of the CZMA or otherwise necessary in the interests of national security.[43]

These 1976 Amendments reveal congressional awareness that because disputes will inevitably arise, someone should be empowered to settle them. But in fact the Amendments stop short of giving anyone that power. To facilitate state-federal coordination, the Amendments direct the Secretary of Commerce to mediate any disputes between state and federal agencies during the administration of the approved state management program.[44] State and federal agencies are instructed to cooperate, but not required to do so because the Secretary's mediation is not binding.

In 1980 Congress amended the CZMA again. The Senate discussed the consistency clause and affirmed its value. No changes were effected in section 307.[45] The House committee followed suit, stating that the consistency provisions "appeared to be working."[46] The committee agreed, in fact, that the "hearing

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Commerce approval of California's Coastal Zone Management Plan against an industry challenge based upon the alleged insufficiency of the plan to provide for the national interest in energy development. The court ruled that the CZMA is primarily directed to environmental concerns and that the nation's interest in energy is to be balanced with, rather than placed above, the national environmental interests addressed by the Act. Such a vague standard will not provide clear guidelines when the next challenge is brought.

42. H.R. REP. No. 1298, 94th Cong., 2d Sess. 30-31 (1976); 16 U.S.C. § 1456(c)(3)(B) (1976).

43. 16 U.S.C. § 1456(c)(3)(A) (1976).

44. 16 U.S.C. § 1456(h) (1976). The 1972 Act provided for mediation of disputes only during the development of a program, and thus the new provision presumably strengthens the Secretary's ability to resolve conflicts arising from the consistency provisions.

45. The Senate Committee on Commerce, Science and Transportation stated that "significant benefits have been produced through the federal consistency clause," that without the federal consistency requirement "wasteful expenditures may occur that do not serve the public interest," and that the § 307 provisions provide "a significant opportunity for States to influence, within the confines of the Act, federal activities in the coastal zone, and serve as an inducement for voluntary state participation in this most important national program." S. REP. No. 783, 96th Cong., 2d Sess. 10-11 (1980).

46. H.R. REP. No. 1012, 96th Cong., 2d Sess. 31, 34-35 (1980).

record does not support any . . . change."[47]

Because there had been few challenges to the CZMA in the eight years of its implementation,[48] Congress envisioned no subsequent difficulties with the CZMA consistency provisions. But the coastal states have only recently completed state plans and sought federal approval of these plans. It is only now that the challenges demonstrate the inadequacy of section 307.

2. *Outer Continental Shelf Lands Act Amendments*

After the Santa Barbara oil spill and the 1973 Arab oil embargo, Congress concluded that neither the OCSLA nor the 1972 CZMA could adequately monitor such concerns as federal liaison with state and local governments, federal receipt of fair market value for OCS resources, and environmental effects of OCS oil and gas development.[49] Legislative proposals were sponsored in the 94th Congress to amend both the CZMA and the OCSLA, but only the 1976 CZMA Amendments discussed above were enacted.

Not until 1978 did Congress enact the Outer Continental Shelf Lands Act Amendments,[50] designed to establish the "expe-

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47. *Id.*

48. At that point there had been three challenges. (1) American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 903 (C.D. Cal. 1978), *aff'd on other grounds*, 609 F.2d 1306 (9th Cir. 1979). The plaintiffs contended that in exercising § 307 powers, California would frustrate energy development. Because the plaintiffs presented no anticipated objections to specific activities, the court found the issue not ripe for review, concluding that "[w]hether the state will utilize its consistency powers improperly to retard or halt energy development [is] wholly speculative." (2) The National Oceanic and Atmospheric Administration within the Department of Commerce disagreed with DOI about whether section 307(c)(1) applied to DOI's pre-lease sale activities. *See infra* text accompanying note 60. (3) California challenged Interior's determination that pre-lease activities associated with OCS Lease Sale No. 48 did not "directly affect" the California coastal zone. *See infra* text accompanying notes 64-65.

Not until August 25, 1980, did a state exercise consistency powers under section 307(c)(3)(B). California objected to Chevron's plan to drill an exploratory well 5.7 nautical miles north of Anacapa Island. This environmentally sensitive area is the only stable breeding place in California for the brown pelican, an endangered species. Key foraging areas extend at least six miles from the island, and the California Coastal Management Program stipulates that no OCS activities be conducted within six miles of such areas. Because Chevron elected not to appeal California's veto, the first state veto under 307(c)(3)(B) prevailed. *See* Greenberg, *Federal Consistency Under the Coastal Zone Management Act: An Emerging Focus of Environmental Controversy in the 1980's*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 50,001, 50,006-07 (1980).

49. *See Joint Hearings Before the Comm. on Interior and Insular Affairs and Commerce, United States Senate*, 94th Cong., 1st Sess. (1975); H.R. REP. No. 284, 94th Cong., 1st Sess. 1-6 (1975).

50. Pub. L. No. 95-327, 92 Stat. 629 (1978) (codified at 43 U.S.C. §§ 1331-1343

ditious and orderly development [of the OCS] subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[51] The 1978 Amendments were intended to expedite recovery of OCS oil and other natural resources for domestic energy needs, to balance OCS development with protection of the environment, to preserve free enterprise in OCS development, and to allow coastal states the opportunity to participate in policy and planning decisions relating to OCS resources.[52]

The 1953 OCSLA first gave the Secretary of Interior authority to develop OCS mineral resources.[53] The 1978 Amendments provide guidelines for selection of lease sale areas and extend state and local government participation in the planning of OCS development. To initiate the OCS leasing process, the Secretary of Interior prepares a comprehensive five-year leasing program. This proposed program is submitted to the governors of affected coastal states for review and comment.[54] The OCSLA defines "affected states" as those to whom OCS activity may cause significant changes in the social, governmental, or economic structure or significant damage to the marine and coastal environments.[55] It is the Secretary of Interior, however, who decides which states are affected. Thus, the OCSLA, like the CZMA, invites controversy at every stage by failing to account for the markedly different interests of state and federal agencies.

After soliciting comments from affected states, the Secretary of Interior must then submit the comprehensive oil and gas leasing program to Congress. As part of the comprehensive plan, the Secretary determines the timing and location of exploration, development, and production by balancing developmental benefits against environmental risks.[56] State and local government officials may submit their own recommendations concerning OCS development, but the Secretary's determination controls unless found to be arbitrary or capricious.[57]

(Supp. III 1979)).

51. 43 U.S.C. § 1332(3) (Supp. III 1979).

52. 43 U.S.C. § 1802 (Supp. III 1979).

53. *See supra* note 21.

54. 43 U.S.C. § 1344(c)(2) (Supp. III 1979); 43 C.F.R. § 3310.2(a)(1) (1981).

55. 43 U.S.C. § 1331(f)(4)-(5) (Supp. III 1979).

56. 43 U.S.C. § 1344(a)(3) (Supp. III 1979).

57. 43 U.S.C. § 1345(a)-(d) (Supp. III 1979). The framers of the 1978 Amendments stated that the "intent of the committee is to insure that the Secretary give thorough consideration to the voices of responsible regional and local State officials in planning

The balancing task required by the OCSLA is so complex that the intended reach of the Act is inherently beyond its grasp. The OCSLA, like the CZMA, manifests congressional committment to cooperative federalism, but like the CZMA, the OCSLA embodies too many conflicting mandates. The 1978 Act, after all, encourages both OCS development and environmental protection. It seeks to generate as much revenue as possible for the federal government and at the same time to encourage private industry. Finally it attempts to strike a balance between federal interests and states' rights.

Further complicating the internal complexities of the OCSLA and the CZMA is the overlap between the two Acts. Congress intended a complementarity between the two. In spite of their conflicting priorities, one is not to cancel the other: "Except as otherwise expressly provided in this chapter, nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972 . . . ."[58] The House committee report specifically endorses the CZMA consistency provisions.

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976, certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments *nothing in this Act is intended to amend, modify, or repeal any provision of the Coastal Zone Management Act.* Specifically, nothing is intended *to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan.*[59]

Disconcertingly, the emphasis on cooperative federalism as a means of effecting federal-state balance has produced one stat-

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OCS leasing and development. The committee did not believe that any State should have a veto power over OCS oil and gas activities." S. REP. No. 284, 95th Cong., 1st Sess. 78 (1977). Representative Murphy explained that the

> conference report through OCSLA § 19 would open Interior's decision-making process so that relevant outsiders—and in particular, State governments, and through States, local government—may present their views and must be heard. They would not have a veto—only an opportunity to present their views and assurances that those views will be considered.

124 CONG. REC. H8847 (daily ed. Aug. 17, 1978) (remarks of Rep. Murphy).

58. 43 U.S.C. § 1866(a) (Supp. III 1979).

59. H.R. REP. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added).

ute weighted toward resource development and one weighted toward resource conservation, while each statute is denied precedence over the other. These statutes variously put the Secretary of Interior or the Secretary of Commerce in charge, then offer control to governors of affected states or to state coastal commissions. Neither statute expressly gives anyone a final uncontroverted authority nor effectively induces anyone to cooperate with anyone else.

II. Administrative and Judicial Challenges to the CZMA Consistency Provision

A. Justice Department Opinion

In 1978 the California Coastal Commission (CCC) began the first stage of its drive toward asserting that section 307(c)(1) of the CZMA requires federal decisions pertaining to OCS tract selection and lease stipulations to be consistent with a state's coastal zone management program to the maximum extent practicable. At that time, the Department of Commerce agreed with California that pre-leasing decisions were subject to CZMA consistency requirements, while the Department of Interior insisted that consistency applied only after there were actual leases which could "directly affect" a coastal zone.[60]

When subsequently asked to resolve the dispute, the Justice Department concluded that Congress intended consistency determination to apply to pre-leasing activities that fall within the scope of the statute and characterized the question of which pre-leasing activities are subject to the Act as a factual one. The Justice Opinion emphasized that the key factual question is whether a particular pre-leasing activity *directly affects* the coastal zone, but declined to express any view regarding specific activities.[61] Since the National Oceanic and Atmospheric Administration (NOAA)[62] had previously specified that the proper test for consistency applicability was whether an activity would "*significantly* affect" the coastal zone,[63] the Justice Department

60. *See* 44 Fed. Reg. 44,588 (1979).

61. *See* 44 Fed. Reg. 37,142 (1979).

62. NOAA within the Department of Commerce has responsibility for implementing the CZMA. *See* 15 U.S.C. § 1511(e)(1), (3) (Supp. III 1979); 15 C.F.R. § 930.1 (1982).

63. 43 Fed. Reg. 10,510-11, 10,518-19 (1978) (superseded, to have been codified at C.F.R. § 930.21(a)). In the revised rules issued to conform to the Justice Department Opinion, NOAA declined to define the term, declaring that the "Justice Department Opinion has led us back to our original view that the precise definitions for 'directly

ruling constituted a partial defeat and partial victory for each side, but no definitive pronouncement. The request for an opinion from the Justice Department appears to have been a gearing up for the consistency issue challenge in OCS Lease Sale No. 48.

B. Lease Sale No. 48

In June 1979 the State of California challenged the Department of Interior's determination that pre-lease activities associated with OCS Lease Sale No. 48 did not "directly affect" the California coastal zone. Interior's position was the one it has maintained to the present: that because intervening lessee action was necessary to develop mineral resources following the lease sale, pre-lease sale activities could not themselves "directly affect" the coastal zone.[64] California requested that the Secretary of Commerce mediate the disagreement, as provided for by section 307(h) of the CZMA.[65] When mediation failed, no further steps were taken.

The state and federal parties, having consulted the Justice Department and having tested the inadequate mediation provision in the statute, were ready for the unavoidable battle: a suit by the State of California against the Secretary of Interior, forcing judicial consideration of the meaning of "directly affect." This suit, inevitable after enactment of two statutes with overlapping responsibilities and imperfectly defined authority, arose from the following events.

C. California v. Watt

The Ninth Circuit decided *California v. Watt*[66] on August 12, 1982, but the circumstances giving rise to the suit began several years earlier. In October 1978 Secretary of Interior Andrus announced a tentative tract selection for Lease Sale No. 53, five different basins off the coast of California—one of which was the Santa Maria Basin, which contains 115 of the 253 tracts involved in the sale. Later, Andrus proposed to delete the other four basins from Sale No. 53 and to offer only the Santa Maria

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affecting' and 'affecting' the coastal zone are impossible to create." 44 Fed. Reg. 37,142-43 (1979).

64. 683 F.2d at 1260.

65. H.R. REP. No. 1012, 96th Cong., 2d Sess., app. I (1980).

66. 683 F.2d 1253 (9th Cir. 1982).

Basin tracts for leasing.[67]

On July 6, 1980, the CCC requested that Interior submit a consistency determination pursuant to 307(c)(1) of the CZMA at the issuance of the proposed notice of sale. On October 16 Secretary Andrus issued the proposed notice of sale for Lease Sale No. 53. The notice proposed leasing only within the Santa Maria Basin. A few days later Interior notified the CCC of its "negative determination," which concluded that the pre-leasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone, thereby rendering a consistency determination unnecessary.[68]

The CCC, proceeding on the assumption that a consistency determination was necessary, asked for deletion of approximately thirty tracts in the northern portion of the Santa Maria Basin in order for Lease Sale No. 53 to be consistent with the California Coastal Management Plan. Then on December 24, 1980, Governor Brown asked Interior to delete the disputed northern tracts from the sale.[69]

New Secretary of Interior Watt's first communication to Governor Brown was a revised proposed notice of sale, including all the Santa Maria tracts and tentatively reinserting the four earlier-proposed basins into the sale. Governor Brown reiterated California's objections to leasing those four basins and insisted that pursuant to the balancing test of section 19 of the OCSLA,[70] the controversial tracts in the Santa Maria Basin should be deleted from the sale. Secretary Watt responded by announcing in a news release that Lease Sale No. 53 would be divided into two sales. Because of the Secretary's finding of overriding national interest, the tracts in the Santa Maria Basin would be sold in May 1981. The tracts in the other four basins would be sold at a later date.[71] On April 29, 1981, the State of California and others filed suit against Secretary Watt, seeking to enjoin Lease Sale No. 53.

Secretary Watt explained to Governor Brown after suit had been filed that Interior had delayed leasing the four basins in

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67. *Id.* at 1258-59.

68. *Id.*

69. *Id.* at 1259.

70. 43 U.S.C. § 1345(c) (Supp. III 1979). "The Secretary shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and well-being of the citizens of the affected state."

71. 683 F.2d at 1259.

order to consider the Governor's recommendations. He stated, moreover, that his analysis of the development of the Santa Maria Basin tract showed that the national benefits far outweighed the potential for harm to the well-being of the citizens of California.

On May 27, 1981, the federal district court granted the State of California a preliminary injunction blocking the lease sale of the disputed tracts, and on August 18 the court's decision on the merits provided injunctive and declaratory relief on California's claims under the CZMA. The court ruled that the final notice of lease sale for the twenty-nine northern tracts directly affected California's coastal zone,[72] thus requiring Interior to conduct its pre-lease activities in a manner consistent to the maximum extent practicable with the California Coastal Management Program. On appeal, the Ninth Circuit affirmed the requirement of a consistency determination for Lease Sale No. 53, but stayed the district court's order requiring federal lease sale activities to be conducted consistently with California's Coastal Zone Management Plan.[73] The court of appeals refused to endorse the district court's presumption that California's view of consistency would ultimately control.[74]

The district court's and court of appeals' analyses demonstrate that neither plain meaning, legislative intent, nor administrative regulations definitively resolve conflicts over the language in the consistency provision.[75] Since the governing acts fail to vest final authority in administrative channels, the effect is to place OCS development decisions in the hands of the courts.

Despite the Ninth Circuit's effort to provide guidelines by which Interior may demonstate consistency with California's plan, there is still no appellate decision *defining* the standard of consistency DOI must meet vis-à-vis a state program.[76] Endless

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72. California v. Watt, 520 F. Supp. 1359, 1382 (C.D. Cal. 1981).

73. 683 F.2d at 1267.

74. *Id.* at 1266.

75. *See id.* at 1259-67.

76. We, therefore, interpret section 307(c)(1) to require that Lease Sale 53 be made consistent with California's plan to the maximum extent practicable. Accommodation to California's plan to a lesser extent does not afford consistency to the maximum extent practicable. Accommodation to a greater extent exceeds the command of the statute.

Id. at 1265.

If Congress has perfected the art of creating ambiguous standards, this court has

wrangling (whether "consistent" means "compatible" or "uniform with," what "maximum extent practicable" means and so forth) will clutter the courts, interfere with the implementation of both the CZMA and the OCSLA, and impede cooperative federalism.

Ideally the CZMA should allow the states sufficient participation in both resource development and resource conservation to balance the earlier OCSLA thrust chartering federal agencies with such goals. Congress optimistically set up a state-federal cooperative system that relies on federal supremacy at the predevelopment stages and state supremacy at the development stage. But *California v. Watt* makes it clear that states will not acquiesce at the predevelopment stage and raises the possibility that federal agencies will not submit at the development stage. Moreover, both the states and federal agencies can read the ambiguous language of the OCSLA and the CZMA to justify their respective arguments and to support their ongoing battles.

Thus, the principal benefit of *California v. Watt* is its lesson regarding the gloomy prospects for cooperation on a battleground. Without a legislative scheme that recognizes and compensates for the predictable power struggle over scarce and valuable resources, no court or agency can ensure cooperative federalism.

III. A Legislative Proposal to Achieve Cooperative Federalism

A. The Need for Legislative Action

The control of submerged lands has, as noted earlier, alternated between the two principals. Because of the Submerged Lands Act, OCSLA, and CZMA, the states at the moment are principally in control of the Continental Shelf adjacent to their coastal borders, subject to federal supremacy over navigation, commerce, defense, and international affairs and subject to any impacts from OCS development that fall outside the scope of the consistency provision. The federal government principally controls the Outer Continental Shelf, subject to consistency requirements for activities that affect the coastal zones of states with approved coastal management programs. But within the

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mastered tautology in interpreting the standard. A fair paraphrase of the court's "guidelines" would be: "Maximum extent practicable means maximum extent practicable. Less is less and more is more."

memory of both state and federal agents is a time when neither had to defer to the other while exercising jurisdiction over potentially profitable resources. That memory cuts against cooperative federalism.

Further hindering cooperative federalism is the entrenched will to fight sustained by an alliance of self-serving and self-righteous motivations. Each level of government colors its own agenda with a zeal both selfish and altruistic. Self-serving California seeks to protect fishing and tourism while self-righteously claiming congressional mandate to protect the whale, sea otter, wet lands, and other fragile coastal resources. Self-serving Interior reaches for the enormous royalties from offshore leasing while self-righteously claiming congressional mandate to free the United States from energy dependence on foreign oil.

Rather than provide a scheme that overcomes resistance, the CZMA and OCSLA offer increased opportunities for resistance. Congress has in fact set in place too many acts, too many actors, and too many balancing acts, leaving the courts to impose order, one case at a time. As indicated earlier, the CZMA directs the Secretary of Commerce to mediate grievances between states and the Secretary of Interior, but the mediation is not binding. Only the motivation of the participants determines whether the mediation will work. If the parties achieve more for themselves by resisting mediation (as with Lease Sales No. 48 and No. 53), they will do so.

In addition to mediating between the states and DOI, the Secretary of Commerce is required to mediate disagreements between a state and an OCS lessee seeking a permit or license from the Secretary of Interior for OCS exploration, development, or production activities. In this instance, the mediation is binding, and can only be overturned by a reviewing court. But there is still no incentive to make major concessions. Rather than compromise, the parties will litigate, each hoping the court will interpret "consistency" entirely in its favor.

The Secretary of Commerce and Secretary of Interior are not only set against one another, they are sometimes set against themselves. Although procedurally directed to act as mediator and final decision maker, the Secretary of Commerce defends the state's consistency determination because he gave prior approval to the state's management program. The Secretary of Interior defends his Department's development program by statutory direction and because of national energy priorities; but

Interior's involvement in the NEPA review[77] of the leasing process means the Secretary must consider both state and national environmental concerns. The CZMA makes him sometimes an advocate for the oil and gas lessee and at other times the lessor-regulator because he is required to see that the lessee completes all lease obligations.

The CZMA directs the states to balance environmental protection of the coastal zone against national energy needs. The OCSLA directs the Secretary of Interior to perform still another balancing act by developing oil and gas resources in the OCS through private enterprise while yet considering environmental impacts. Such tricky balancing cannot be successfully performed without compelling incentives.

A final balancing act is that occasioned by shifting priorities at both levels of government. If Jerry Brown were at Interior, for example, and James Watt in the Governor's Mansion in California, the competing interests would align differently. And it must be remembered that priorities in the White House and in administrative agencies may dramatically reverse in January following any election year. Such reversals seldom occur within a state government, but the goals of Louisiana's Coastal Commission differ markedly from those of California. So just as an effective statutory scheme should provide meaningful mediation and a delineation of roles and responsibilities that does not force agencies into internal and external conflict, so should the scheme provide a formula that survives potential diversity between administrations as well as political diversity from state to state in a geographical spectrum.

B. A Proposal for Legislative Action

If Congress remains determined to give states greater authority in coastal zone management while at the same time providing for efficient recovery of OCS oil and gas, it must consider major changes in the federal-state provisions of the CZMA. *California v. Watt* shows that the consistency clause generates rather than resolves conflict; so, clearly a conflict resolution

77. The National Environmental Policy Act of 1969 (NEPA) requires all federal agencies to consider environmental preservation as they prepare an environmental impact statement. The environmental impact statement is necessary for any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1976).

mechanism is essential to cooperative federalism. If the sharply polarized concerns of labor and management can sometimes be reconciled at a bargaining table, perhaps the differing objectives of states, federal agencies, and private developers could similarly be sorted out through appropriate bargaining procedures for specific lease and development proposals.[78]

An effective conflict resolution mechanism could require that proposed notices of sale, and later, development plans be filed with an ad hoc five-person OCS bargaining panel consisting of one representative each from the state coastal agency, the governor's executive office, the Department of Interior, the Department of Commerce, and a developer involved. Basic rules of decision (for example, a vote of three to approve a lease sale and a vote of four to approve development plans) would be specified, with a final decision shuttled directly to the President should the panel deadlock.

Most important, the decisions of the bargaining panel would be subject to limited judicial review. Only a panel with limited access to judicial resolution would be likely to arrive at cooperative decisions and at the congressional aim of meaningful coordination. If by deadlocking, the panel could shift the decision to the courts, there would be no more incentive to compromise than there is under the present legislative scheme. A panel decision would be overturned only for fraud, violation of the panel's procedural rules, or violation of protected statutes, and no court could rewrite the substantive terms of a panel's agreement.

Such a bargaining panel offers a choice beyond the traditional alternatives of allowing Congress, the agencies, or the courts to resolve disputes. When such vital concerns as energy development and environmental values conflict, an ad hoc panel would provide flexibility within the broad purposes of comprehensive state coastal management programs and federal OCS leasing directives. Although the bargaining process would not allow direct public participation, and although the limited judicial review might trouble participants or other interested parties, recollection of the unyielding stance of both state and federal

78. Congress has already created one bargaining panel in an analogous situation. The Endangered Species Act provides for a bargaining panel to balance economic considerations against environmental concerns and thereby exempt certain projects from strict complaince with the Act. H.R. REP. No. 1625, 95th Cong., 2d Sess., 14-15 (1978) *reprinted in* U.S. CODE CONG. & AD. NEWS 9453, 9464-65, codified at 16 U.S.C. § 1536(g),(h) (Supp. II 1980).

parties in *California v. Watt* should serve to soften the shortcomings perceived in such a bargaining panel.

An additional proposal for promoting cooperative federalism draws from the history of federal-state relations off California shores. When California was long-ago the lessor and all revenues from offshore development went into the state treasury, development matched technology. True, the Santa Barbara oil spill and increased public commitment to environmental concerns have since modified public willingness to develop offshore resources. But if a percentage of the bonuses and of production royalties went directly into the state treasury or into a special state resource conservation fund, reluctant states would have new incentives to compromise. The percentage allowed from each development project could in fact be one of the bargaining factors for panel consideration.

A bargaining panel and revenue sharing would relieve some of the confusion engendered by the CZMA consistency provisions. Analysis of the consistency provisions under the present regime would make the most ingenious cartographer despair of charting passage through the current maze of indeterminate language, conflicting goals, and ambiguous authority. Sophisticated bureaucrats can only blanch at the present prospect: enter the labyrinth and spend years cutting through obstacles, only to find that all paths lead to litigation. The obstacles can be removed through legislative change permitting optimum balance between resource development and conservation in the coastal zone and the Outer Continental Shelf.

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