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A Comparison of American and British Offshore Oil Development during the Reagan and Thatcher Administrations--Part I

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A COMPARISON OF AMERICAN AND BRITISH OFFSHORE OIL DEVELOPMENT DURING THE REAGAN AND THATCHER ADMINISTRATIONS*

PART I**

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INTRODUCTION

Oil is one of the most precious commodities in the modern world. Immense hydrocarbon reserves lie in the seabed and subsoil off the shores of the United States of America and the United Kingdom. The federal government of the United States has natural resources jurisdiction over about one billion acres of ocean floor adjacent to the three-mile

territorial sea.[1] Coastal states of the Union have the right to exploit oil and gas deposits in the territorial sea washing their shorelines.[2] The area of federal jurisdiction, known as the Outer Continental Shelf (OCS), is estimated to contain forty-four billion barrels of oil and 231 trillion cubic feet of gas.[3] Worth two trillion dollars at current prices, these resources could run sixty-five million cars and heat twenty-three million homes for fifty years.[4] The much smaller United Kingdom Continental Shelf (UKCS) is also a valuable oil province. An official estimate puts recoverable reserves at between thirteen to thirty billion barrels of oil, and 1025 to 1700 billion cubic feet of gas.[5]

This essay is an analysis and comparison of the goals and policies of the law relating to offshore oil in the United States and the United Kingdom during the Reagan and Thatcher administrations. There are strong similarities and connections between both countries. Both countries share a common language and democratic institutions, and both countries are major economic and military partners. Most American whites have roots in the nations of the United Kingdom. The English common law is the basis of the laws of all but one of the states of the Union. Both countries are leading industrial powers, and, unlike most of their Western allies, they are oil producers as well as oil consumers. There is also a more immediate political likeness. The Republican administration of Mr. Ronald Reagan and the Conservative government of Mrs. Margaret Thatcher share a common belief in a free enterprise-based society with minimal governmental intervention in the economy.

Bearing in mind the above, one might expect to find strong parallels in energy policy and, therefore, in offshore oil law. Strong parallels there are, but there are also striking differences. The respective governments have inherited different political, economic, and legal situations. They govern in the context of differing institutions and pressures. It will be shown that United Kingdom objectives have tended to involve policy contradictions. American goals have been more harmonious, but have met with significant opposition. Because of a lack of opposition in the

1. AM. PET. INST., SHOULD OFFSHORE OIL BE PUT OFF LIMITS? 44 (1984).

2. *See infra* notes 45-52 and accompanying text.

3. *Consideration of Legislation to Restrict the Department of the Interior's Oil and Gas Leasing Program on the Outer Continental Shelf: Before the Subcomm. on Mining, Forest Management, and Bonneville Power Administration of the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. 900 (1984) (statement of J.J. Simmons III, Under Secretary, Dep't of the Interior) [hereinafter cited as *Consideration of Legislation*].

4. *Id.*

5. UNITED KINGDOM DEP'T OF ENERGY, DEVELOPMENT OF THE OIL AND GAS RESOURCES OF THE UNITED KINGDOM, 1983, at 1 (1984).

United Kingdom and a recent rearranging of priorities, it will be suggested that British oil policy has ultimately been more successful.

Part I of the essay will begin with a brief theoretical discussion of the goals that governments can pursue in relation to oil resources. The second section will chart America's economic and social history as an oil producer, and the development of its offshore oil laws up until 1980. The third section will examine the Reagan administration's OCS energy policies and how the implementation of these policies has affected and changed the law. Part II of the essay will begin with Section Four, which will outline the United Kingdom's recent oil-producing history and the laws which governed UKCS operations up until 1979. The fifth section will analyse Conservative oil strategy and its impact on law and administrative decision-making. The final section will conclude the analysis and comparison by summing up the goals and the differing levels of success of both systems. Recommendations which assume the continuation of present policies will also be submitted. It is believed that these recommendations will help to facilitate the further success of each government's announced goals.

Finally, it should be noted that this essay concentrates on oil. Despite the fact that natural gas is often found in the same reservoirs as oil, it has been accorded very different treatment in both the United States and the United Kingdom. Comparative natural gas law is a subject whose volume and complexity merits a separate study of its own.

I. THE DISTINCTIONS BETWEEN PRIVATE AND GOVERNMENTAL MINERAL OWNERS

At first glance it might be thought that the government of a country with ten billion barrels of proven oil reserves is in a similar position, and has similar interests, as an American owner of private oil and gas rights with a reservoir of, for example, fifty thousand barrels.[6] However, while the interests of private mineral owners are, on a much larger scale, also the interests of governments, it will be argued that a government's perspective on oil resources is much wider and more complex. To facilitate this inquiry, it will be necessary to begin by briefly describing the relationship between individual mineral owner and oil company in the United States.

6. The United States is one of the very few countries which has not transferred all ownership of oil and gas rights from private citizens to the state. *See* K. DAM, OIL RESOURCES: WHO GETS WHAT HOW? 3 (1976).

A. *The Private Mineral Owner*

There are three approaches that a private American mineral owner can employ in the exploration and development of his oil. In the vast majority of cases only one approach is practical.

First, the mineral owner could drill his own wells and sell his production directly on the market. In theory this is the preferable approach. The mineral owner would have every incentive to keep costs low and, moreover, would be able to keep all of the profits. But the problem here is that even the shallowest wells cannot be drilled without highly specialised skills and massive investment. Unless one is operating in proven territory, the prospects for success are at best speculative. As Ely remarks, "[i]f you own a farm, and think there is oil under it, it is possible you have enough savings to pay the cost of drilling a wildcat well. But, if you do, the statistical chances are something like forty to one that you will not find oil, and will soon be in neither the oil business nor the farming business."[7]

Second, the mineral owner could hire drilling companies to do the work for him for a fixed contractual fee and/or a share in the mineral rights. Often called a "farm-out," this type of transaction is typically used where an oil company holds a lease interest, but does not want to drill any wells itself. Again, a private owner could rarely afford the fees necessary for a hiring arrangement likely to be more costly, and just as risky, as the first alternative.

Accordingly, the only practical option left to mineral owners who are not themselves oil companies or millionaires is to lease their mineral interests out to oil companies.[8] Unlike many other lessor-lessee relationships (for example, landlord-tenant), the lessee in the oil and gas lease has the dominant bargaining position.[9] The lessor's only negotiating leverage arises from the fact that he owns the exclusive right to develop any hydrocarbons which may underlie his property. The lessee, who may be an Exxon or a Shell, has the finances, equipment, and expertise to extract the oil and gas and will, in most cases, already hold large areas of mineral lease acreage.

In his analysis of the Louisiana Mineral Code, McCollam describes

7. Ely, *Trends in National Petroleum and Mining Laws*, in THE ROLE OF NATIONAL GOVERNMENTS IN EXPLORATION FOR MINERAL RESOURCES 21 (Bonini, Hedberg, & Kalliakoski eds. 1963) (a collection of papers presented at the 55th meeting of the Princeton University Conference).

8. *Id.*

9. *See* Donohoe, *Implied Covenants in Oil and Gas Leases and Conservation Practice*, 33 INST. ON OIL & GAS L. & TAX'N 97, 98 (1982).

the structure of the typical oil and gas lease.[10] The lessee will usually obtain his lease by the payment of an up-front "bonus," which is regarded as being the cost of the lease. Conceptually, an oil and gas lease is divided into two periods: the "primary" and "secondary" terms. During the primary term (usually from three to five years), the lease can be kept alive either by production or good faith operations, or by the payment of periodic delay rentals. However, there must generally be production in paying quantities for the lease to continue into the secondary term. The lease will invariably confer the exclusive right to explore for and develop hydrocarbons in the acreage covered by the grant. If the lessee finds oil or gas, he will then pay the lessor a royalty, usually one-eighth of production.[11]

The effect of the normal oil and gas lease is to assign to the lessee the costs, the risks, and the lion's share of the rewards (if there are any) arising from exploration and development. The lessor contributes nothing to the oil operations on his land. The royalty he receives is his economic rent. The price he pays for this arrangement is the fact that the lease excludes him from the seventh-eighths of the hydrocarbons which could theoretically be his under the first two alternatives.

The lessor's main interests in the mineral lease relationship are fourfold. First, the lessor will wish to maximise revenue. The lessor entered into the oil and gas lease to get a share in oil wealth which he could not otherwise obtain. Having waived his own right to produce his oil and gas, he will naturally want the largest possible share of the revenues that someone else is making from his reserves. Second, the lessor will want to maximise production. In almost all cases the maximisation of production is, for the lessor, equivalent to the maximisation of revenue. The lessor's royalty quantifiably increases with each extra barrel of oil produced. Third, the lessor will attempt to determine the extent of his reserves by maximising exploration. Finally, while the lessor will desire a comprehensive program of exploration and development of his resources, he will also be anxious to limit the damage done by oil operations to the surface of his land, where, for example, he may live, fish, or farm.

10. McCollam, *A Primer for the Practice of Mineral Law under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732, 782-83 (1976).

11. There are now a number of standard oil and gas leases which are used very widely. Almost all conform to the general description of terms given in the text. *See generally* PRINCIPLES OF THE OIL & GAS LEASE 51-153 (J. Lowe & K. Myles eds. 1985).

B. *The Governmental Mineral Owner*

The first step necessary in comparing a government's position with that of a private owner of oil and gas rights is to elucidate the differing economic identities of the two parties. The private mineral owner is an individual in a microeconomic context seeking to boost the net economic benefits flowing to him from his resources. The government, however, is a trustee in a macroeconomic context seeking to efficiently discharge the responsibilities it has to the many groups in society who are its beneficiaries. One cannot judge the performance of a private trustee till one ascertains the purpose of the trust, the beneficiaries, the resources involved, and the nature of the relevant economic situation. It is similarly impossible to analyse a government's oil and gas policy till one gains some understanding of the varied and often conflicting desiderata and pressures which influence energy decision-makers. In the free world, large sections of the business community profit directly from the production of oil, while still larger sections of the business community are fueled by its consumption. The responsibilities of the governments of oil-producing states are weighty and multifarious; a private lessor, on the other hand, has no responsibility other than to obtain the best terms for himself.

The oil and gas lease is the sole measure of the relationship between lessor and lessee. The lessor as landowner bargains in a purely proprietary capacity, since wider social and economic considerations play no part in the transaction. Where the government owns the oil and gas it also bargains in a proprietary capacity. Yet it does not act in a purely proprietary capacity, for government is a regulator as well as a landowner.[12] Thus in the absence of constitutional obstacles, the government, unlike the private lessor, can vary the contractual relationship to take into account changing social and economic conditions.[13] But in

12. In the context of the United States this double role of government is explained by Christopher in these terms:

> When the United States leases its lands for minerals, it occupies a troublesome dual capacity. In its proprietary capacity, the Government is like any other lessor, bargaining hard for the best lease terms, but recognizing their binding effect as a contract once they are agreed upon. However, in its governmental capacity, the United States as a sovereign has a continuing responsibility to exercise police powers, particularly those relating to conservation, over the land leased.

Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 43-44 (1953).

13. The Chairman of Shell Chemicals UK, W.C. Thomson, commented in 1976 that "[t]he rules today are what governments say they are, and they may be changed tomorrow." Petroleum Times, July 9, 1976, at 3, col. 2, *reprinted in* D. KETO, LAW AND OFFSHORE OIL DEVELOPMENT: THE NORTH SEA EXPERIENCE 14 (1978).

exercising its discretion to change operating conditions, the government takes the risk that private enterprise may quit the development of the resources.

It was previously noted that a private mineral owner usually lacks the capital and expertise to personally develop his oil reserves, and also lacks the capital to hire someone to do the job. His only practical option is to lease his mineral rights to private enterprise. Therefore, in the lease relationship the private mineral owner is typically in the weaker bargaining position. Governments are also faced with the three basic alternatives available to the private mineral owner. Normally, however, governments are not in such a weak position as the mineral owner, since part of a government's total revenue may be used to finance oil and gas exploration and development. While oil companies can easily afford to refuse to negotiate with a hard-bargaining lessor, they cannot so afford to be excluded from whole nations, especially if there are substantial oil deposits in any such given country.[14] On the other hand, few governments are either able or willing to commit the enormous quantities of capital required to support a purely state-run oil industry. Only in comparatively few countries, and then for mainly ideological reasons, do governments choose to develop hydrocarbon wealth without assistance from the private sector.[15]

In macroeconomic terms it is important to see the three methods of development as a type of spectrum. This spectrum charts the degree of government participation in oil exploration and development. State involvement is maximised in alternative one and minimised in alternative three. The alternatives are also economic models. A government need not necessarily chose one or either model. Most oil-producing states use facets of the various systems which they consider appropriate. A communist country like the People's Republic of China, for example, having neither the capital nor the expertise to properly develop its hydrocarbons in the South China Sea, has lately been giving licences to multinational oil companies to explore and develop that area. Western nations believe, to a lesser or greater degree, in the benefits of free market economics. Yet Norway relies on its state oil company, Staatoil, to play a leading

14. Daintith points out that "[b]oth the need for change, and the capacity to effect it, are likely to be less in states where small or insignificant discoveries have been made." Daintith, *Petroleum Licences: A Comparative Introduction*, in THE LEGAL CHARACTER OF PETROLEUM LICENCES: A COMPARATIVE STUDY 7 (T. Daintith ed. 1981).

15. For an interesting discussion of the problems of state financed oil and gas activity, see Ely, *supra* note 7, at 20.

role in the exploration of its reserves in the North Sea and North Atlantic. In this instance, Norway is using both state participation and private enterprise in its economic exploration and development model.

An investigation will now be undertaken of the main goals that a government may pursue with respect to oil reserves. This is not intended to be an exhaustive analysis of the goals; it is merely an introduction. Neither the United States nor the United Kingdom have developed their resources purely by means of a nationalised oil company. For the purposes of this analysis it is assumed that the hypothetical government has permitted substantial private enterprise participation.[16]

Since oil is a scarce and valuable resource, a government will often wish to maximise production to obtain self-sufficiency. This may have the effect of freeing it from reliance on potentially unstable foreign sources. Since it would have to buy foreign oil if it did not produce its own, the maximisation of production is also very useful in helping with balance of payments problems. Another reason for maximising production may be to lower the price of oil. This has the effect of lowering energy costs and making the whole economy more competitive.

To a government, the maximisation of production is only equivalent to the maximisation of revenue if production increases with no decrease in royalty or tax rates. A government will often attempt to increase oil revenues by raising the royalty or tax rate. Because overall costs will therefore be higher, a drop in the rate of oil production tends to result. Conversely, when a government wants to increase exploration, development, and production, it will often cut royalties and taxes. Obviously, the fact that a government is a regulator as well as a landowner means that the economics of production and revenue raising differ from the economics of the mineral owner who happens to be a private entity. A government may wish to maximise revenue for as many reasons as there are items on its public expenditure list.[17] Frequently, there is often a strong desire to create or rebuild other sectors of the economy with oil revenues.[18]

16. Keto, in his analysis of the various national goals relating to the North Sea development of the 1960's and 1970's, mentions six main objectives: (1) security of domestic oil supply, (2) public national revenues, (3) private national revenues, (4) safety, (5) social and economic stability, (6) environmental quality. D. KETO, *supra* note 13, at 47.

17. As Keto observes, "[i]t is a rare government that does not have difficulty balancing its budget." D. KETO, *supra* note 13, at 48.

18. For example, the idea of using UKCS revenues to bolster sections of the British economy has gained wide support among both businessmen and labor unions in the United Kingdom. *See* Williams, *Frittering Away the North Sea's Riches*, The Times (London), Dec. 14, 1981, at 15, col. 1.

Oil is traded on a world market, and merely because a state is producing oil does not necessarily mean that the oil is available to the markets of that state. The oil companies may be selling it abroad. Often a government will desire to have controls which can, at least in an emergency like an oil shortage or a war, ensure that the home-produced oil is available for home markets. In the words of the mineral economist Flawn, "[t]he question of national security is perhaps more closely tied to oil than to any other mineral commodity because of the essential nature of this mineral fuel."[19]

A government will seek to maximise direct economic benefit by ensuring that its home economy is as involved as possible in the oil developments.[20] Multinational oil companies, for example, can be encouraged to place orders for rigs or other equipment with home based industries.

Many governments believe that the best way to exploit natural resources is to rely heavily on the lease method, with free enterprise operating at its own risk and creating its own reward. Accordingly, the government will attempt to maximise competition by providing that such competition be as fair and free as possible.

Energy policy requires not only immediate, but also long-term planning. The desideratum of self-sufficiency must be measured against the objective of continuing supply and the conservation of resources. Depletion policy is sometimes used to conserve supply so that the oil may be available for a longer period of time.[21]

It is also very desirable on economic and strategic grounds that a government should have an accurate idea of the real extent of its reserves. This necessitates a thorough program of exploration to inventory resources.

Finally, neither the government nor the private mineral owner wishes to see other economic activities or scenic beauty and the environment interfered with or damaged by oil operations.[22] The government has an additional interest, however, in its desire to provide for the safety

19. P. FLAWN, MINERAL RESOURCES: GEOLOGY, ENGINEERING, ECONOMICS, POLITICS, LAW 202 (1966).

20. Keto remarks that all the nations bordering the North Sea have "shown a strong interest in ensuring that national business enterprises, as opposed to foreign enterprises, receive the maximum economic benefit from offshore development activities." D. KETO, *supra* note 13, at 49-50.

21. *See* P. FLAWN, *supra* note 19, at 183-95 (discussing the conservation concept).

22. In countries like Great Britain, the goal of environmental protection has been viewed as secondary to the goal of economic development. *See* D. KETO, *supra* note 13, at 54-55.

of its citizens who are employed in the oil industry.[23]

These are the main goals which governments pursue with regard to oil development. Many of them are contradictory in nature. If, for example, a government tries to maximise revenue, the rate of exploration and production may fall. Similarly, should the major goal focus on boosting production, then conceivably the environment may suffer. The ensuing sections will investigate where the governments of Mr. Reagan and Mrs. Thatcher have placed their priorities, the nature of the accompanying law, and the consequences.

II. THE DEVELOPMENT OF AMERICAN OFFSHORE OIL LAW

A. *Early Trends*

The United States oil industry began in 1859 when the Drake well was drilled in Titusville, Pennsylvania.[24] From this humble beginning the industry grew to become the largest in the world. Oil was a major factor in the huge American industrial expansion of the late nineteenth and early twentieth centuries. Dr. Paul H. Frankel refers to America in this period as the "fountainhead of oil supplies."[25] Not only was it a major producer of oil, it was also a major exporter. In 1938 it was estimated that the United States had 50.6% of the world's crude oil reserves, and produced 3.3 million barrels a day, nearly sixty percent of the world's production.[26] By the late 1940's, however, America's standing as an oil producer had, in comparative terms, declined due to the considerable expansion of exploration and development in the Middle East. The United States was still producing over half of the world's requirements, but by the late 1940's the Arab countries were accredited as having more reserves. By 1969 it was believed that the United States possessed only seven percent of world reserves as against a figure of 61.6% for the Arab countries.[27] At that time, the Middle East was outproducing the United States to the tune of about three million barrels a day.[28] As the 1970's dawned, America's economy was still the strongest on earth, but it was

23. *See* W. CARSON, THE OTHER PRICE OF BRITAIN'S OIL: SAFETY AND CONTROL IN THE NORTH SEA (1981).

24. AM. PET. INST., TWO ENERGY FUTURES: A NATIONAL CHOICE FOR THE 1980'S, at 43 (1980).

25. Frankel, *Structural Analysis of the International Oil Industry*, in 1 INT'L B.A., PETROLEUM LAW SEMINAR 1.5 (1978).

26. Lewis, *Some Aspects of the International Oil Industry Since the Second World War*, in 1 INT'L B.A., PETROLEUM LAW SEMINAR 2.5 (1978).

27. *Id.*

28. *Id.*

slowly slipping into a state of dependency on foreign oil. In 1970 the United States was twenty-three percent reliant on foreign oil imports,[29] and by 1976 the rate had risen to forty percent.[30]

Despite the huge volume of American oil production during much of this century, the United States offshore areas had been, up until the mid-1960's, but a marginal contributor to the overall energy picture. Before charting the development of the offshore industry any further, however, it is appropriate to deal with the ownership of oil and gas rights in the waters off America's shores. Every nation has traditionally been entitled under international law to a territorial sea skirting its coasts.[31] Although there is no generally accepted limit to the width of this territorial sea, in both the United States and the United Kingdom the limit is three miles.[32] Nations have complete jurisdiction over their territorial sea. Therefore, the United States and the United Kingdom own oil and gas rights in their respective three-mile limit areas. Yet operations are undertaken much farther offshore than three miles. The explanation for this situation lies with the international law doctrine of the continental shelf.

The continental shelf is both a geological concept and a legal doctrine. The geological continental shelf, along with the continental slope and the continental rise, is a part of the submerged segment of the great elevations which rise from the deep ocean floor to form the continents of the world. Typically, the shelf declines gently away from the land mass, the slope constitutes a sharp drop, and the rise runs gently down to the abyssal plain or deep ocean floor.[33]

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29. Shaffer, *OCS Development and the Consistency Provisions of the Coastal Zone Management Act—A Legal and Policy Analysis*, 4 OHIO N.U. L. REV. 595, 604 (1977).

30. *Id.* at 605.

31. In 1911 Fulton wrote:

> It is now settled as indisputable, both by the usage of nations and the principles of international law, that the open ocean cannot be appropriated by any one Power. But it is also as firmly established that all states possess sovereign rights in those parts of the sea which wash their shores, although there is not, and has never been, universal agreement as to the precise nature of these rights, or as to the extent of the sea that may be thus appropriated.

T. FULTON, THE SOVEREIGNTY OF THE SEA 537 (1911), *reprinted in* H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 3.3 (1980). *See generally* O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BRIT. Y.B. INT'L L. 303 (1971) (discussing the development of legal doctrine concerned with the territorial sea).

32. For the common position of both the United States and the United Kingdom on this issue, see Gormley, *The Unilateral Extension of Territorial Waters: The Failure of the United Nations to Protect Freedom of the Seas*, 43 U. DET. L.J. 695, 711-13 (1966).

33. For an excellent short geologic description of the continental shelf, slope, and rise, see Knight, *The Draft United Nations Conventions on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 459, 463-70 (1971).

The legal doctrine of the continental shelf was established by presidential proclamation[34] when, in 1945, President Harry Truman stated that it was the policy of the United States to regard "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control."[35] This unilateral claim purported to give the United States mineral jurisdiction over very wide areas of the seabed and subsoil of the ocean beyond the territorial sea.[36] The Truman Proclamation was quickly followed by the claims of many other countries to their continental shelf areas. In 1958 the international community met to codify the continental shelf regime. The result was the Geneva Convention on the Continental Shelf. Article I of the Convention provides that "the term 'continental shelf' " refers

> (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 200 metres or beyond that limit, to where the depth of the superadjacent waters admits of the exploration of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[37]

Both the United States and the United Kingdom were signatories. Thus it is this continental shelf doctrine which ultimately gives the United States the right to claim oil and gas rights in one billion acres of sea floor.

The first offshore wells in the history of the American oil industry were drilled in the Santa Barbara Channel off California in the 1890's. There were no developments in the Gulf of Mexico, America's main present-day offshore oil province, till the 1930's.[38] It was clear from 1945 that not only the territorial sea, but also the continental shelf, fell broadly under American natural resources jurisdiction. It was by no means obvious, however, whether it was the federal government, the state governments, or a combination of both, who were to have the right to develop the submarine hydrocarbons. *United States v. California*,[39]

34. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

35. *Id.*

36. For a discussion of the background to, and the effect of, the Truman Proclamation on the Continental Shelf, see Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976).

37. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311, 311.

38. Jones, *The Legal Framework for Energy Development on the Outer Continental Shelf*, 10 U.C.L.A.-ALASKA L. REV. 143, 147 (1981); Yudes, *Coastal Zone Impacts of Offshore Oil and Gas Development: An Accommodation Through the California Coastal Act of 1976*, 8 PAC. L.J. 783, 793 (1977).

39. 332 U.S. 19 (1947).

decided by the United States Supreme Court in 1947, held that the federal government had sole rights to oil and gas in the three-mile territorial sea.[40] *United States v. Louisiana*[41] was litigated shortly thereafter in 1950. In that case, Louisiana claimed oil and gas rights not only in the territorial sea, but also in a substantial part of the continental shelf.[42] Mr. Justice Douglas reiterated the holding of *United States v. California* and held in favor of the federal government both as to the territorial sea and the continental shelf.[43] A similar result was reached the same year in *United States v. Texas*.[44] Taken together, these three cases appeared to constitute a complete victory for the federal government.

1. The Submerged Lands Act of 1953

Predictably, the coastal states felt that the Supreme Court had unjustifiably held against them in the preceding litigation. Therefore, they took their case to Congress.[45] In 1953 Congress responded by passing the Submerged Lands Act[46] (SLA). The SLA vests the states with ownership and the right to develop land under navigable waters in the state and

> all lands permanently or periodically covered by tidal waters . . . to a line three geographical miles distant from the coastline of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union or as heretofore approved by Congress extends seaward (or into the Gulf of Mexico) beyond three geographical miles.[47]

But in no case could such a limit extend further than three miles into the Atlantic or Pacific, or for more than three marine leagues into the Gulf

40. *See id.* at 29-41.

41. 339 U.S. 699 (1950).

42. *Id.* at 702.

43. *Id.* at 704-06.

44. 339 U.S. 707 (1950).

45. The legislative history of the Submerged Lands Act sums up the position of the coastal states:

> The Federal Government has never, prior to 1937, asserted any right in the submerged tidelands, has never enjoyed any rights, either in its sovereign or proprietary capacity over such lands, but at all times, from the inception of the Government and prior to 1937, acting through its executive agencies, recognized that unqualified ownership was in the coastal States and that such States had full and complete sovereignty and dominion over these lands, subject to the constitutional right of the Federal Government to regulate commerce.

H.R. REP. No. 1778, 80th Cong., 2d Sess. 17, *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 1415, 1430.

46. 43 U.S.C. §§ 1301-1315 (1982).

47. *Id.* § 1301(a)(2).

of Mexico.[48] This raised questions as to where the boundaries of the Gulf states had been at the time they entered the Union, and whether Congress had subsequently altered any of the boundaries. Subsequent litigation established that the boundaries of Louisiana, Mississippi, and Alabama had always been three miles.[49] The Texas territorial sea was found to have been three marine leagues wide when Texas entered the Union,[50] while Florida's territorial sea on the Gulf of Mexico side had been reenacted as three marine leagues by Congress.[51] A further controversy, relating to Louisiana, has occurred over the exact position of that state's shifting coastline.[52] This issue is not capable of a definitive solution because Louisiana's coast erodes and accumulates very rapidly.

2. The Outer Continental Shelf Lands Act of 1953

The SLA resulted in the coastal states being given mineral jurisdiction in marine areas three to ten miles from the shore. In these waters the states can exploit oil and gas and other resources according to their own goals and policies. But this essay is concerned with the development of the rest of America's mineral offshore. This huge area, already referred to as the OCS, was made the responsibility of the federal government by the SLA.[53] In addition, the Outer Continental Shelf Lands Act of 1953[54] (OCSLA) delegated to the Secretary of the Interior the power to conduct lease sales and administer oil and gas operations on the OCS.[55] The Secretary was directed to use either a cash bonus bid with fixed royalty or a royalty bid with a fixed bonus bidding system when leasing.[56] But in general terms, the Department of the Interior (DOI) was given very wide discretion in going about its duties. Potentially interested parties like states and fishermen were given no statutory right to be heard or to participate in decision-making.[57] The OCSLA also appor-

48. *Id.* § 1301(b).
49. *See* United States v. Louisiana, 363 U.S. 1 (1960).
50. *Id.* at 36-64.
51. *See* United States v. Florida, 363 U.S. 121 (1960).
52. Considerable litigation, beginning with United States v. Louisiana, 394 U.S. 11 (1969), has resulted from the federal-state dispute as to the positioning of Louisiana's coast. On June 16, 1975, the Supreme Court, in a supplemental decree, established the boundaries of Louisiana's coastline. *See* United States v. Louisiana, 422 U.S. 13 (1975).
53. 43 U.S.C. § 1302 (1982).
54. *Id.* §§ 1331-1343 (1982) (amended 1978).
55. *Id.* § 1341(a)(1) (1976).
56. *Id.* § 1337(a).
57. For an analysis of the lack of participation involved in the provisions of the OCSLA, see Miron, *The Outer Continental Shelf—Managing (or Mismanaging) its Resources*, 2 J. MAR. L. & COM. 267, 270-74 (1971).

tioned the OCS between the coastal states for the purposes of determining the applicable law.[58] An individual state's laws were to apply to that part apportioned to it so long as the state law was not inconsistent with federal law.[59] State taxation was never to apply to the OCS.[60]

The object of the OCSLA was to provide a legal basis for the development of OCS resources.[61] The adopted leasing system relied entirely on private enterprise to undertake the envisaged offshore exploration and development. Because there was an abundance of cheap onshore oil during the 1950's, there was relatively little mineral activity on the OCS during that early period.[62] The federal offshore program was limited exclusively to the Gulf of Mexico till the late 1960's, and almost all operations in that sector occurred in the OCS adjacent to Louisiana. By 1968, federal waters off of Louisiana's coast boasted 518 producing oil and gas leases, as compared with ten off Texas and three off California.[63] These leases were the only producing leases in the OCS. Total federal offshore oil and condensate production for that year was 268,996,000 barrels or eight percent of the total United States oil and condensate production of 3,329,042,000 barrels.[64]

B. *Environmental Statutes*

Despite the concentration of operations off the Louisiana coast, it was events in California which would leave long-lasting marks on the American offshore oil industry. In March 1968 the Union Oil Company discovered oil in the Santa Barbara Channel. On January 29, 1969, as Platform A's fourth well was being completed, a blowout occurred.[65] The spill was fairly large, involving the diffusion of about 3.25 million

58. 43 U.S.C. § 1333(a)(2) (1976).

59. *Id.*

60. *Id.*

61. Several helpful discussions of the various facets of the OCSLA can be found in Christopher, *supra* note 12, at 23; Krueger, *An Evaluation of the Provisions and Policies of the Outer Continental Shelf Land Act*, 10 NAT. RESOURCES J. 763 (1970); Miron, *supra* note 57, at 267; Montgomery, *The Multiple Use Concept As the Basis of a New Outer Continental Shelf Legislative Policy*, 62 KY. L.J. 327 (1974).

62. *See* Murphy & Belsky, *OCS Development: A New Law and a New Beginning*, 7 COASTAL ZONE MGMT. J. 297, 300 (1980).

63. MINERALS MGMT. SERVICE, U.S. DEP'T OF THE INTERIOR, FEDERAL OFFSHORE STATISTICS 20 (1984).

64. *Id.* at 91.

65. For further discussion of the Santa Barbara blowout, see Levine, *The Santa Barbara Saga—Pre and Post N.E.P.A.*, 7 LINCOLN L. REV. 73 (1971); Nanda & Stiles, *Offshore Oil Spills: An Evaluation of Recent United States Responses*, 7 SAN DIEGO L. REV. 519 (1970); Walmsley, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514 (1972); Note, *The Oil Men and the Sea: The Future of Ocean Resource*

gallons.[66] Extensive short-term damage was caused to the surrounding environment. But after about a year, no discernible environmental impact attributable to the spill could be found by scientific analysis.[67] The main effect of the blowout was political in nature rather than biological. Across the nation television screens were filled with reports of black, glutinous oil flooding golden beaches and leaving a mass of dead or dying birds in its wake. The incident at Santa Barbara was in large part responsible for the creation of the American environmentalist movement.[68] The environmentalists became, and remain, one of the most powerful political lobbies in the United States. Their supporters in Congress passed a number of highly significant measures designed to protect America's people, countryside, and coasts from the adverse effects of industrial activity. Three of these measures are especially relevant for the purposes of this study and are therefore briefly summarised below.

1. The National Environmental Policy Act of 1969[69] (NEPA)

This piece of legislation has often been referred to as "the Sherman Act" of American environmental law. NEPA's most important provision, section 102(2)(c),[70] requires that an environmental analysis be undertaken before a decision on any federal action "significantly affecting the quality of the human environment" can be made.[71] Such an analysis is known as an environmental impact statement (EIS). In addition to giving an estimate of the likely environmental impact, the EIS must consider such issues as whether unavoidable adverse environmental effects will be caused by the proposed course of action, whether there are alternative courses of action, and whether irretrievable and irreversible commitments of resources will be involved in adopting the course of action.[72]

NEPA is an essentially procedural statute. If the EIS does not meet the requirements set out in section 102, the decision in question can be

Development in Light of Santa Barbara—Some Proposals to Rectify Continuing Inadequate Federal Regulation of Offshore Leasing, 11 ARIZ. L. REV. 677 (1969).

66. *See* Kaplan, *California: Threatening the Golden Shore*, in THE POLITICS OF OFFSHORE OIL 4 (J. Goldstein ed. 1982).

67. *Id.*

68. *See* Comment, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 LA. L. REV. 177, 181 (1979).

69. 42 U.S.C. §§ 4321-4370 (1982).

70. *Id.* § 4332.

71. *Id.* § 4332(c).

72. *Id.*

struck down as unlawful.[73] But if the federal agency properly prepares the EIS, it may then act as it desires subject to the broader concept of judicial review of administrative action.

NEPA also created a Council on Environmental Quality[74] (CEQ). This body assists the President in the compilation of an Environmental Quality Report which is annually submitted to Congress.[75] It also helps in the formulation of national environmental policy and has promulgated regulations dealing with the EIS process which are binding on federal agencies.[76] CEQ regulations are to be accorded substantial deference by the courts in the interpretation of NEPA.[77]

2. The Coastal Zone Management Act of 1972[78] (CZMA)

This statute was passed to encourage and provide the framework for federally approved state Coastal Zone Management Programs (CZMP).[79] Such programs were necessary, Congress reasoned, because of increasing societal pressure on the coasts of America.[80] The CZMA was an attempt to facilitate state planning of future social, economic, and environmental impacts on the shoreline.

The CZMA provides two major incentives for coastal states to prepare coastal zone management plans and thereafter submit them to the Secretary of Commerce for approval. First, any approved plan is eligible for federal grants.[81] Second, the states are given a participating role in federal decisions relating to the coastal zone by the so-called "consistency provisions." Section 307 of the CZMA provides that any federal agency conducting or supporting activities which directly affect the coastal zone in a state which has a federally approved coastal plan must do so in a manner which is, to the maximum extent practicable, consis-

73. *See generally* W. RODGERS, ENVIRONMENTAL LAW 730-37 (1977) (exploring the various EIS inadequacies that courts have found to be in violation of section 102).

74. 42 U.S.C. §§ 4341-4347 (1982).

75. *Id.* § 4344(1).

76. The CEQ's power to promulgate binding regulations relative to NEPA is not expressly provided for in NEPA. But in 1977, President Carter decided to provide for a set of procedural environmental regulations which would apply to all federal agencies and ordered the heads of federal authorities to comply with CEQ regulations. Exec. Order No. 11,991, 3 C.F.R. 123 (1978), *reprinted in* 42 U.S.C. § 4321 app. at 509 (1982) (amending Exec. Order No. 11,514, 3 C.F.R. 902 (1970)).

77. *See* Andrus v. Sierra Club, 442 U.S. 347, 358 (1978).

78. 16 U.S.C. §§ 1451-1464 (1982).

79. S. REP. No. 753, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776, 4776.

80. *See id.* at 2-6, 1972 U.S. CODE CONG. & AD. NEWS at 4776-81.

81. *See* 16 U.S.C. § 1455 (1982).

tent with that plan.[82] The same section further provides that any person who submits an exploration or development plan with respect to an OCS mineral lease to the Secretary of Interior for approval must, if such plan would affect any land or water use in the coastal zone of a state having an approved plan, attach to the plan a certification that the activities are consistent with the state's plan, and that the activities will be carried out in a manner consistent therewith.[83] The state or state agency must receive a copy of the exploration or development plan.[84] The Secretary of the Interior cannot approve such a plan till the state agrees that it fulfills the consistency requirement, or the Secretary of Commerce approves the plan as being consistent with the objectives of CZMA or is otherwise necessary in the interest of national security.[85]

3. The Endangered Species Act of 1973[86] (ESA)

The ESA has as its objective the protection of endangered species of wildlife.[87] For the purposes of the ESA, an endangered species is designated as such by the Secretary of the Interior,[88] or, in certain circumstances, by the Secretary of Commerce.[89] Substantive, as well as procedural, guidelines are laid down by the ESA for all federal agencies. Every federal agency must ensure that none of its actions are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[90] An intricate procedure to facilitate compliance is included in the ESA[91] and is expanded upon by further regulations. If the federal agency fears that there may be a possibility of jeopardizing an endangered species, the Fish and Wildlife Service (FWS)

82. *Id.* § 1456(c)(1).
83. *Id.* § 1456(c)(3)(B).
84. *Id.*
85. *Id.* § 1456(c)(3)(B)(i), (iii).
86. 16 U.S.C. §§ 1531-1543 (1982).
87. *See* S. REP. No. 307, 93d Cong., 1st Sess. 1-2, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989, 2989-90. *See generally* Goplerud, *The Endangered Species Act: Does it Jeopardize the Continued Existence of Species?*, 1979 ARIZ. ST. L.J. 487; Rosenberg, *Federal Protection of Unique Environmental Interests: Endangered and Threatened Species*, 58 N.C.L. REV. 491 (1980); Simmons, *The Endangered Species Act of 1973*, 23 S.D.L. REV. 302 (1978); Comment, *Promise and Peril: A New Look at the Endangered Species Act of 1973*, 27 ST. LOUIS U.L.J. 959 (1983).
88. 16 U.S.C. § 1532(6), (15) (1982).
89. The listing of certain migratory marine species of game fish is undertaken by the Secretary of Commerce. *See id.* § 1533(a)(2); Reorg. Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970), *reprinted in* 5 U.S.C. app. at 1138 (1982), *and in* 84 Stat. 2090 (1970); *see also* Comment, *supra* note 87, at 971-75 (describing listing procedures).
90. 16 U.S.C. § 1536(a)(2) (1982).
91. *Id.* § 1536(b), (c).

or the National Marine Fisheries Service (NMFS) may become involved in a biological analysis of the likely effects of the proposed decision.[92] The particular species involved determines which service undertakes the biological analysis.[93] If a threshold consultation by the service determines that the proposed action will jeopardize an endangered species, the federal agency instituting the action will be advised of this finding.[94] Should it be found that there is insufficient information to determine whether a relevant species will be jeopardized, section 7(d) of the ESA stipulates that the federal agency must not make, nor allow to be made, any irreversible or irretrievable commitment of resources which might prevent the formulation of alternative measures to avoid endangering a species later.[95] Because the ESA imposes substantive as well as procedural duties on federal agencies, it is, within its own narrower scope, a more powerful statute than NEPA.

4. Miscellaneous Environmental Statutes

There are several other important environmental statutes which merit attention. The Clean Air Act[96] gives authority to the Administrator of the Environmental Protection Agency (EPA) to prescribe national ambient air quality standards.[97] While the Clean Air Act makes no specific mention of its applicability beyond the territorial limits of the states, the Administrator of the EPA has determined that the Act is applicable "to the extent that the emission [from an OCS facility] may affect air quality in a coastal state."[98] The Marine Protection Research and Sanctuaries Act[99] gives the Secretary of Commerce the power, subject to a requirement of consultation with the heads of other federal departments and the approval of the President, to designate sections of the OCS or

92. *See* 50 C.F.R. § 402.01 (1984).

93. *See id.*

94. *Id.* § 402.04(e)(3).

95. 16 U.S.C. § 1536(d) (1982); *see* 50 C.F.R. § 402.04(f) (1984).

96. 42 U.S.C. §§ 7401-7642 (1982). *See generally* Hays, *Clean Air: From the 1970 Act to the 1977 Amendments*, 17 DUQ. L. REV. 33 (1978-79) (discussing the evolution of the amendments of 1977).

97. *See* 42 U.S.C. § 7408 (1982).

98. Comment, *supra* note 68, at 185.

99. 16 U.S.C. §§ 1431-1434 (1982). *See generally* Epting, *National Marine Sanctuary Program: Balancing Resource Protection with Multiple Use*, 18 HOUS. L. REV. 1037 (1981); Hoagland, *Federal Ocean Resource Management: Interagency Conflict and the Need for a Balanced Approach to Resource Management*, 3 VA. J. NAT. RESOURCES L. 1 (1983); Kifer, *NOAA's Marine Sanctuary Program*, 2 COASTAL ZONE MGMT. J. 177 (1975); Schenke, *The Marine Protection, Research, and Sanctuaries Act: The Conflict Between Marine Protection and Oil and Gas Development*, 18 HOUS. L. REV. 987 (1981).

territorial sea as marine sanctuaries.[100] After a marine sanctuary is created, its future administration becomes the responsibility of the Secretary of Commerce.[101] Lastly, the Federal Water Pollution Control Act[102] provides that there shall be no discharges of oil or other hazardous substances into or on the navigable waters of the United States' territorial sea, or in connection with oil and gas activities authorised by the OCSLA.[103]

C. *The Outer Continental Shelf Lands Act Amendments of 1978*

In the autumn of 1973 the State of Israel was attacked by its Arab neighbors. Generous assistance from the United States was instrumental in enabling Israel to successfully resist the invasion. In retaliation, the Organisation of Petroleum Exporting Countries (OPEC) curtailed supplies of oil to the United States.[104] As a reaction to the rocketing price of petroleum, the Nixon administration declared self-sufficiency in energy to be a national goal.[105] Project Independence, as it was called, involved the leasing of ten million OCS acres for oil and gas in 1975 alone.[106] Much of this acreage was located in the unexplored or frontier areas of the American offshore. An ambitious plan, this drive to dramatically increase oil and gas production was geared to complete United States self-sufficiency by 1980. It proved impossible to carry out.

There were a number of reasons for the failure of this and other plans to boost American offshore production in the 1970's. First, the new environmental statutes, particularly NEPA, made the process of

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100. 16 U.S.C. § 1432(a) (1982).

101. *Id.* § 1432(f).

102. 33 U.S.C. §§ 1251-1376 (1982). *See generally* Baum, *Legislating Cost-Benefit Analysis: The Federal Water Pollution Control Act Experience*, 9 COLUM. J. ENVTL. L. 75 (1983); Bermingham, *The Federal Government and Air and Water Pollution*, 23 BUS. LAW. 467 (1968); Keener, *Federal Water Pollution Legislation and Regulations with Particular Reference to the Oil Industry*, 4 NAT. RESOURCES LAW. 484 (1971).

103. 33 U.S.C. § 1321(b)(1) (1982).

104. For an economic and international law analysis of the Arab oil boycott, see C. DORAN, MYTH, OIL AND POLITICS 31-46 (1977); Boorman, *Economic Coercion in International Law: The Arab Oil Weapon and the Ensuing Juridical Issues*, 9 J. INT'L LAW & ECON. 205 (1974); Muir, *The Boycott in International Law*, 9 J. INT'L LAW & ECON. 187 (1974).

105. *See generally* Gendler, *Offshore Oil Power Plays: Maximizing State Input into Federal Resource Decision Making*, 12 NAT. RESOURCES LAW. 347 (1979); Jaidah, *The United States' Energy Situation: An OPEC View*, 11 NAT. RESOURCES LAW. 617 (1978); Kesterman & Hay, *Domestic Offshore Drilling and U.S. Energy Options*, 5 J. MAR. L. & COM. 701 (1974); Williams, *Oil and Gas and the Federal Lands*, 1976 UTAH L. REV. 507, 507-08.

106. *See* H.R. REP. NO. 590, 95th Cong., 2d Sess. 76, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 1450, 1483.

OCS oil and gas leasing more complex and drawn out[107] since an EIS was required for every lease sale.[108] The first post-NEPA OCS lease sale was held in the Gulf of Mexico in November 1971. The total pre-lease planning stage took ten months; five of those months were required for the compilation of an EIS.[109] By January 1977, it was taking an average of eleven months at the pre-lease stage to prepare the EIS.[110]

Second, state authorities, environmentalists, and fishermen were deeply suspicious of the sudden burst of activity. The OCSLA, they complained, did not give them, the very groups who might well be adversely affected, any say in the matters at hand.[111] Other sectors of the public did not believe that the OCSLA was doing enough to foster competition in the offshore oil industry, as it was feared that only the largest oil companies could afford the up front cash bonuses. After the bonuses had been paid, it was believed, the fixed royalty was but a small imposition on corporate profits.

The result of this considerable public dissent was a legal and political campaign against the expansion programs.[112] The environmental statutes were used to mount a litigious assault on the Department of Interior's OCS decisions. The consequence was extensive delay, with lease sales often deferred or dropped altogether.[113] Widespread political dissatisfaction with this state of affairs led to an exhaustive series of Congressional hearings and decisions designed to change the OCS oil and gas regime. The product which resulted was the Outer Continental Shelf Lands Act Amendments of 1978[114] (OCSLAA). As this legislation pro-

107. For several discussions concerned with the effect of NEPA on OCS oil and gas leasing in the 1970's, see GENERAL ACCOUNTING OFFICE, ISSUES IN LEASING OFFSHORE LANDS FOR OIL AND GAS DEVELOPMENT 33-35, 73-77 (1981); Craft, *Recent Congressional Action on Outer Continental Shelf Oil and Gas Development*, 13 TULSA L.J. 742, 747-50 (1978); McDermott, *Expanded Offshore Leasing and the Mandates of NEPA*, 10 NAT. RESOURCES LAW. 531 (1977).

108. Every such lease sale is regarded as an action "significantly affecting the quality of the human environment" within the meaning of § 102 of NEPA (42 U.S.C. § 4332(c) (1982)). *See* Kreuger, *The Management of Federal Petroleum Resources in the United States*, 27 INT'L & COMP. L.Q. 61, 81 (1978).

109. GENERAL ACCOUNTING OFFICE, *supra* note 107, at 33.

110. *Id.*

111. *See* H.R. REP. NO. 590, 95th Cong., 2d Sess. 89-90, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1496-97.

112. *See* Jones, Mead, & Sorensen, *The Outer Continental Shelf Lands Act Amendments of 1978*, 19 NAT. RESOURCES J. 885, 885-86 (1979).

113. *See* GENERAL ACCOUNTING OFFICE, *supra* note 107, at 38-45; *see also* Note, *Environmental Law: Governmental Suspension of Outer Continental Shelf Oil Drilling Operations*, 30 OKLA. L. REV. 930 (1977) (discussing the environmentally based cancellation of leases in the Santa Barbara Channel in the early 1970's).

114. 43 U.S.C. §§ 1331-1356, 1801-1866 (1982). For further discussion of the 1978 Amendments and the issues surrounding their enactment, see Best, *Outer Continental Shelf Development*

vides the statutory basis for present-day OCS oil and gas leasing and operations, an outline of the new leasing system and other relevant facets of the OCSLAA will therefore be presented. It is stressed that the following analysis is not intended to cover all of the various provisions of the OCSLAA. Rather, it is intended to delineate the most significant features of the new regime and illuminate the major governmental policies.

1. National Policy

Sections 2 and 102 of the OCSLAA give legislative expression to national goals relating to the exploitation of the OCS.[115] The main policy objectives of the OCSLAA are as follows: (1) to expedite exploration, development, and production on the OCS and hence to achieve national energy goals;[116] (2) to provide proper environmental safeguards;[117] (3) to involve the coastal states in decision-making and make sufficient information available to them to allow for long-term planning;[118] (4) to protect other users of the OCS, and coastal areas, from the impacts of offshore oil development;[119] (5) to insure that the public receives a fair and equitable return from OCS oil and gas leasing;[120] and (6) "to preserve and maintain free enterprise competition" in the offshore oil industry.[121] As the substantive provisions of the OCSLAA are examined, it will be possible to perceive how Congress attempted to facilitate the achievement of these goals.

2. Authority

The OCSLA of 1953 gave the Secretary of the Interior authority to administer OCS leasing and mineral operations. This primary authority was retained by the Secretary in the OCSLAA.[122] The authorising provision, section 5, is very broadly worded. It gives the Secretary the power

After a Year Under the OCS Lands Act Amendments, 27 INST. ON MIN. L. 152 (1980); Craft, *supra* note 107, at 744-74; Jones, Mead, & Sorensen, *supra* note 112, at 888-908; Kreuger & Singer, *An Analysis of the Outer Continental Shelf Lands Act Amendments of 1978*, 19 NAT. RESOURCES J. 909 (1979); Moore, *The OCS Lands Act Amendments of 1978-1980 and Beyond*, 31 INST. ON OIL & GAS L. & TAX'N 293 (1980); Comment, *supra* note 68, at 187-203.

115. 43 U.S.C. §§ 1332(3)-(6), 1802 (1982).
116. *Id.* §§ 1332(3), 1802(1).
117. *Id.* §§ 1332(3), 1802(2).
118. *Id.* §§ 1332(4), (5), 1802(4)-(6).
119. *Id.* §§ 1332(6), 1802(7), (8).
120. *Id.* § 1802(2)(c).
121. *Id.* § 1802(2)(d).
122. *Id.* § 1334.

to "administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and . . . prescribe such rules and regulations as may be necessary to carry out such provisions."[123] For many years the responsibility of the Secretary for OCS operations had been delegated to two federal agencies. The Bureau of Land Management (BLM) arranged the actual leasing process, while the United States Geological Survey (USGS) administered post-lease operations.[124] This setup ceased in 1982 with the formation of the Minerals Management Service (MMS).[125] The MMS has both an onshore,[126] and an offshore role.[127] The Associate Director for Offshore Minerals Management has responsibility for the latter. One of the two Deputy Associate Directors administers leasing, while the other is responsible for operations and enforcement. Also responsible to the Associate Director are four regional MMS managers whose duties relate to the four OCS regions: the Alaskan OCS, the Pacific OCS, the Atlantic OCS, and the Gulf of Mexico. Inspection of OCS standards for environmental and personal safety, and their enforcement, is undertaken through district MMS offices. There are a varying number of standards attached to each regional OCS office.

3. The Five-Year Leasing Program

This is one of the most significant of the innovations introduced by the 1978 legislation. Section 18 of the OCSLAA envisages that all future federal OCS leasing will proceed with reference to a five-year plan.[128] The Secretary of the Interior is responsible for the compilation of a program[129] consisting "of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he [the Secretary] determines will best meet national energy needs . . . ."[130] Section 18 provides an exhaustive set of policy guidelines for the five-year plans.[131] Some of the most important issues which

123. *Id.* § 1334(a).
124. For a good description of the pre-1982 OCS role of the BLM and the USGS, see Jones, *supra* note 38, at 156-58.
125. Dep't of the Interior Secretarial Order No. 3071, 47 Fed. Reg. 4751 (1982).
126. The onshore role relates mainly to federal mineral royalty management. *See* 30 C.F.R. §§ 201-220 (1983).
127. *See id.* § 250.10-.20; Martin, *Outer Continental Shelf Leases and Operating Regulations*, in 2 LAW OF FEDERAL OIL AND GAS LEASES § 25.03[2], at 25-13 to -14 (1984).
128. 43 U.S.C. § 1344(a) (1982).
129. *Id.*
130. *Id.*
131. *Id.* § 1344(a)(1)-(4).

the Secretary must consider in drawing up an OCS program are: (1) overall social, economic, and environmental effects of OCS development on marine, coastal, and human environments;[132] (2) the existing information relating to pertinent geological, environmental, and economic facets of selected OCS regions,[133] with "an equitable sharing of developmental benefits and environmental risks among the various regions";[134] (3) the objectives of coastal states as identified by state governors;[135] (4) relative environmental sensitivity and relative hydrocarbon-bearing potential of the OCS regions;[136] and (5) the necessity to "assure receipt of fair market value for the lands leased."[137]

Responding to the fears of the coastal states, Congress provided for a substantial degree of participation in this first stage of the offshore process. Specifically, during preparation of the five-year program, the Secretary must invite suggestions from the governor of any state which may be affected.[138] He must also invite the suggestions of interested federal agencies and the Attorney General.[139] It was hoped that the latter's involvement would enhance the goal of fostering competition.[140]

After the proposed program has been finalised it must be published in the *Federal Register*.[141] However, at least sixty days must elapse between the completion of the proposed program and its publication.[142] This period is required so that the governor of each affected state may review and comment on the plan. If any suggestion is received by the Secretary within fifteen days of the proposed program's publication, the Secretary must reply, "granting or denying such request in whole or in part . . . ."[143] This response is to contain an adequate statement of reasons for the given decision.[144]

When the proposed program is published copies are also to be sent to Congress, the Attorney General, and the governors.[145] Within ninety

132. *Id.* § 1344(a)(1).
133. *Id.* § 1344(a)(2)(A).
134. *Id.* § 1344(a)(2)(B).
135. *Id.* § 1344(a)(2)(F).
136. *Id.* §§ 1344(a)(2)(G), (H), 1344(a)(3).
137. *Id.* § 1344(a)(4).
138. *Id.* § 1344(c)(1).
139. *Id.*
140. *See* H.R. REP. No. 590, 95th Cong., 2d Sess. 47-48, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1454.
141. 43 U.S.C. § 1344(c)(3) (1982).
142. *Id.* § 1344(c)(2).
143. *Id.*
144. *Id.*
145. *Id.* § 1344(c)(3).

days of publication in the *Federal Register*, the Attorney General, in consultation with the Federal Trade Commission, may make comments on the effect of the plan on competition.[146] Any other person may submit his own comments.[147] Before the Secretary ultimately approves his leasing program he must submit it again to Congress and to the President, together with any comments or suggestions received.[148] If he does not accept recommendations from the Attorney General, the governors, or the local governments of affected states, he must provide an explanation for his decision.[149]

4. The Leasing System

In keeping with the original OCS legislation,[150] only a leasing system (as opposed, for instance, to a hiring system) of exploitation was authorised.[151] Section 8 provides that an OCS oil and gas lease is to be of an area not exceeding 5,760 acres unless the Secretary finds that a larger acreage is required to be economical.[152] The initial or primary term is to be five years, but this can be increased to ten years if the Secretary finds that a longer period is necessary because of deep water or unusually adverse conditions.[153] While maintenance in the initial term may or may not require delay rentals,[154] the lease may definitely not be maintained beyond the initial term without production in paying quantities or other approved drilling operations.[155] The lease gives the right to explore for, develop, and produce the oil and gas in the lease acreage.[156] This right is subject to the lessee obtaining the Secretary's approval for exploration and development plans.[157] The lease must also require that the lessee offer twenty percent of his hydrocarbon production to small and independent refineries[158] within the meaning of the Emergency Petroleum Allocation Act of 1973.[159] The latter provision represents yet another attempt to promote competition within the oil industry.

146. *Id.* § 1344(d)(1).
147. *Id.*
148. *Id.* § 1344(d)(2).
149. *Id.*
150. *See supra* notes 54-60 and accompanying text.
151. 43 U.S.C. § 1344(a) (1982).
152. *Id.* § 1337(b)(1).
153. *Id.* § 1337(b)(2)(A), (B).
154. *Id.* § 1337(b)(6).
155. *Id.* § 1337(b)(2).
156. *Id.* § 1337(b)(4).
157. *Id.*
158. *Id.* § 1337(b)(7).
159. 15 U.S.C. §§ 751-760 (1982).

In Section One it was shown that in relation to mineral resources a government is a regulator as well as a landowner.[160] But in the United States, the Secretary of the Interior's power to alter the terms of a federal oil and gas lease after it has been executed is subject to, and limited by, the provisions of the American Constitution. The case of *Union Oil Co. v. Morton*[161] is a good example of how the Constitution may affect the regulatory decisions of the Secretary of the Interior. In early 1969, the infamous Santa Barbara blowout occurred on one of Union Oil's lease tracts in the Santa Barbara Channel.[162] Prior to the blowout, Union Oil had been granted permission to install a further production platform on the tract. But in the wake of the blowout, permission was withdrawn. Union Oil and three other oil companies who held equity interests in the lease filed suit. One of their major arguments was that the suspension was in reality a denial of their right to operate the lease and was hence a "taking" without compensation under the fifth amendment.[163] The United States Court of Appeals for the Ninth Circuit held that if the suspension did actually amount to a cancellation of the lease, the Secretary's action constituted a violation of the fifth amendment.[164] As Congress had not, reasoned the court, explicitly authorised compensation for such a "taking," the decision to do so would have to be considered ultra vires.[165] To avoid such constitutional difficulties, OCS oil and gas leases are now concluded subject to future laws and regulations. In addition, section 5 of the OCSLAA now provides, in certain circumstances, for the cancellation or suspension of OCS leases.[166] In the event of a lawful cancellation the same section allows for the granting of compensation.[167]

The leasing process itself will not be considered in this section of the essay. A number of regulations and other procedures govern the highly complex pre-lease stage, and deal with such issues as the means of selecting OCS tracts to be offered for auction, methods of environmental analysis, and tract evaluation for fair market value. Changes in these regulations and procedures have been the key to the present administration's expanded program for leasing. Accordingly, an extensive analysis

160. *See supra* notes 12-23 and accompanying text.
161. 512 F.2d 743 (9th Cir. 1975). *See generally* Note, *supra* note 113, at 930-37 (discussing the implications of the case for offshore oil development).
162. *See supra* note 65.
163. 512 F.2d at 750-51.
164. *Id.* at 752.
165. *Id.* at 750.
166. *See* 43 U.S.C. § 1334(a)(1), (2) (1982).
167. *Id.* § 1334(a)(2)(C).

of the old and new pre-lease procedures will appear in Section Three.[168] It should be briefly noted, however, that the OCSLAA gives the coastal states an opportunity to participate in the OCS process at the lease stage. At least thirty days before any lease sale, the Secretary of the Interior must publish in the *Federal Register*, and submit to Congress, a notice identifying the tracts which he proposes to lease and the bidding system he intends to use.[169] The governor of any affected state can submit suggestions with respect to such lease sale within sixty days after the notice has been given.[170] The Secretary must accept these recommendations if he thinks they adequately balance the national interest with the benefit of the citizens of the state.[171] The national interest is to be construed in a way that gives high priority to the environmentally balanced production of oil and gas.[172] The Secretary's determination of this issue can only be challenged on the grounds that it is arbitrary and capricious.[173]

5. The New Bidding System

The previous offshore regime had theoretically given the Secretary of the Interior the right to use two bidding systems. But an overwhelming majority of pre-1978 lease sales had utilised the cash bonus bid with fixed royalty method. Apprehension over the supposed anti-competitive effects of this bidding mechanism was addressed by the 1978 Amendments. As was the case previously, section 8(a) of the 1978 Amendments authorises the Secretary to award leases to the highest responsible qualified bidder.[174] All bidding must be conducted by sealed bid.[175] Section 8(a) substantially expands the Secretary's range of bidding options by authorising four basic bid variables: the cash bonus bid,[176] the royalty bid,[177] the work commitment bid,[178] and the net profits share bid.[179] Although the Secretary has further discretion to use any other variable which is consistent with the purposes of the Act,[180] section 8(a) prohibits

168. *See infra* notes 275-302 and accompanying text.
169. 43 U.S.C. § 1337(a)(8) (1982).
170. *Id.* § 1345(a), (b).
171. *Id.* § 1345(c).
172. *Id.*
173. *Id.* § 1345(d).
174. *Id.* § 1337(a)(1).
175. *Id.* § 1337(a).
176. *Id.* § 1337(a)(1)(A).
177. *Id.* § 1337(a)(1)(B).
178. *Id.* § 1337(a)(1)(G).
179. *Id.* § 1337(a)(1)(D).
180. *Id.* § 1337(a)(1)(H).

the use of more than one bid variable for a given modification.[181]

A major reason for the authorisation of such a wide variety of bid alternatives was to encourage the DOI to experiment and innovate.[182] It was hoped that experimentation with differing methods might illuminate the most satisfactory option. To ensure that the Secretary did not continue to utilise only one system, Congress stipulated that at least twenty percent, but not more than sixty percent, of all acreage leased in a given year had to be leased by a bidding system other than a cash bonus bid with fixed royalty.[183] This stipulation was qualified by a proviso allowing the Secretary to ignore the twenty percent requirement if he determined that it was "inconsistent with the purposes and policies of this subchapter."[184] The Attorney General, in consultation with the Federal Trade Commission, must be given at least thirty days to review the results of a lease sale before the Secretary announces lease awards.[185]

6. Exploration and Development Plans

Any person may obtain a permit to conduct preliminary geological or geophysical exploration on the OCS as authorised by the Secretary of the Interior.[186] But a lessee cannot conduct any drilling on his own lease acreage unless such exploration is undertaken pursuant to an exploration plan.[187] The plan, which must be submitted to the Secretary of the Interior for approval, may relate to two or more tracts, and may be the joint effort of two or more lessees.[188] The exploration plan can only be approved by the Secretary if he finds that it is consistent with the OCSLAA, the regulations passed under the OCSLAA, and the terms of the lease.[189] The Secretary can require modifications to be made which would ensure consistency.[190] Before an exploration plan can be approved, it must also conform to the "consistency" requirement of the CZMA.[191] After the exploration plan has been approved, the lessee may

181. *Id.*
182. *See* H.R. REP. No. 590, 95th Cong., 2d Sess. 138-41, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1544-47.
183. 43 U.S.C. § 1337(a)(5)(B) (1982).
184. *Id.*
185. *Id.* § 1337(c)(1).
186. *Id.* § 1340(a)(1).
187. *Id.* § 1340(b).
188. *Id.* § 1340(c)(1).
189. *Id.*
190. *Id.*
191. *See id.* § 1340(c)(2); *see also* 16 U.S.C. § 1456(c)(3)(B)(i) (1982) (setting forth consistency requirements).

be required to obtain a drilling permit before he can begin actual work.[192]

Should hydrocarbons in paying quantities be found on the lease acreage, commercial production cannot begin till the lessee has obtained the Secretary's approval for a development and production plan.[193] Section 25 makes an exception in this respect for leases in the Gulf of Mexico,[194] and further provides that a plan may cover more than one lease.[195] Section 19 of the OCSLAA provides that the governor of any affected state has a right to submit comments on any development plan before it is approved by the Secretary.[196] As with lease sales, the governor is given sixty days to forward such suggestions.[197] The Secretary must accept them if he thinks "that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[198] The Secretary's decisions on these issues can only be challenged on the ground that they are arbitrary and capricious.[199] The development plan, like the exploration plan, must conform to the "consistency" requirement of the CZMA.[200]

Within sixty days after the comment period, the Secretary must approve, reject, or require modifications in the plan.[201] Section 25 indicates that he must reject the plan if the lessee fails to show that he can comply with the relevant provisions of law, if the operations could threaten national security or defense, or if the plan would threaten serious damage to wildlife or the environment with no prospect of the threat decreasing.[202]

7. The Information Programs

Section 20 of the OCSLAA sets up an Environmental Studies Program.[203] This program is intended to facilitate the gathering of environmental information on any area where lease sales are proposed to be held. The information can then be used in the "assessment and manage-

192. *See* 43 U.S.C. § 1340(d) (1982); *see also* 30 C.F.R. § 250.36 (1983) (describing permit application procedures).
193. 43 U.S.C. § 1351(a)(1) (1982).
194. *Id.*
195. *Id.* § 1351(c).
196. *Id.* § 1345(a).
197. *Id.* § 1345(b).
198. *Id.* § 1345(c).
199. *Id.* § 1345(d).
200. *See id.* § 1351(d); *see also* 16 U.S.C. § 1456(c)(3)(B)(i) (setting forth consistency requirements).
201. 43 U.S.C. § 1351(h)(1) (1982).
202. *Id.* § 1351(h)(1)(A)-(D).
203. *Id.* § 1346.

ment of environmental impacts" on the OCS and coastal areas.[204] The Secretary is also given authority to conduct ongoing environmental studies during the post-lease stage.[205] Section 20 requires that there be full cooperation with the states.[206]

The OCS Oil and Gas Information Program is created by section 26.[207] This section provides that any lessee who is engaged in OCS exploration, development, or production, must allow the Secretary access to all data and information accruing from such activities.[208] In addition, there are precautions designed to ensure that a lessee's anonymity and competitive position are not prejudiced.[209] Every federal department is likewise required to make available to the Secretary all information that is likely to be useful to him in his OCS responsibilities.[210] This pool of information is designed to help the Secretary carry out his duties in a more informed fashion, and assist coastal states and local governments in planning for OCS developments.

8. The Compensation Funds

The Offshore Oil Pollution Compensation Fund[211] is available to meet the claims of any party who suffers economic loss in the removal of spilled oil, or from damage to property resulting from oil pollution.[212] The Fund, which is administered by the Secretary of Transportation and the Secretary of the Treasury,[213] does not normally exceed the amount of $200,000,000,[214] and is financed by a levy on OCS producers.[215] Section 304 also imposes a type of limited strict liability on owners and operators of offending vessels or offshore installations.[216] These statutory provisions are designed as an alternative to fault liability.

The Fisherman's Contingency Fund is administered by the Secretary of Commerce.[217] Its purpose is to provide a means of compensation

204. *Id.* § 1346(a)(1).
205. *Id.* § 1346(b).
206. *Id.* § 1346(c).
207. *Id.* § 1352(a)(1)(A).
208. *Id.* § 1352(a)(1).
209. *Id.* § 1352(c)(1), (2).
210. *Id.* § 1352(a)(2).
211. *Id.* §§ 1811-1824.
212. *Id.* § 1813(a)(1), (2).
213. *Id.* § 1812(a).
214. *Id.*
215. *Id.* § 1812(d)(1).
216. *Id.* § 1814.
217. *Id.* § 1842(a)(1). *See generally* MacKenzie & Smith, *The Fisherman's Contingency Fund: Resolving Gear Conflicts Between Outer Continental Shelf Hydrocarbon Development and Commer-*

for damages to, or loss of, fishing gear and any resulting economic loss to commercial fishermen due to activities related to oil and gas.[218] Limited in amount to two million dollars,[219] the Fisherman's Contingency Fund is also financed by means of an OCS levy.[220] Payments cannot be made from it when the damage is ascertained as having being caused by "the commercial fisherman making the claim."[221] There are, in any case, limits to recoverable amounts.[222] Unlike the Offshore Oil Pollution Compensation Fund, the Fisherman's Contingency Fund is not intended as an alternative to fault liability.

9. Federal Controls over the Disposition of Hydrocarbons

There are three significant controls that the OCSLAA gives the federal government over OCS oil and gas. Section 27 gives the Secretary of the Interior the right to demand that all OCS royalties or net profit shares be paid in kind.[223] It further gives the United States the right to purchase 16⅔% of all OCS oil and gas production from leases granted under the OCSLAA.[224] Such purchase must be at the regulated or fair market price[225] and is reducible by the volume of oil and gas that the United States receives from royalties and profit shares.[226] Lastly, section 12 notes that in time of war, or at any time that the President shall decide, the United States shall have "the right of first refusal" to buy all or any fraction of total OCS production.[227]

D. *Post-OCSLAA Developments*

The OCSLAA was an attempt to expedite OCS exploration and production, to provide detailed policy guidance for DOI, and to help allay

cial Fishing, 3 VA. J. NAT. RESOURCES L. 105 (1983) (describing the enactment and implementation of the Fisherman's Contingency Fund).

218. 43 U.S.C. § 1843(c)(1) (1982).
219. *Id.* § 1842(a)(1).
220. *Id.* § 1842(b)(1).
221. *Id.* § 1843(c)(2)(A).
222. *Id.* § 1843(c)(2)(D).
223. *Id.* § 1353(a)(1).
224. *Id.* § 1353(a)(2).
225. *Id.* Until 1981 there was a system of controls which governed the price of oil. To encourage domestic oil production and conservation, President Carter in 1979 initiated a program of gradual decontrol. Oil price regulation, however, was not completely lifted until after the Reagan administration took office in 1981. For a history of the previous system of oil price control, see Lilly & Seymour, *The 1980 Crude Oil Windfall Profit Tax: An Overview From An Industry Perspective*, 24 How. L.J. 125 (1981).
226. 43 U.S.C. § 1353(a)(2).
227. *Id.* § 1341(b).

the fears of, and attract the participation and support of, coastal states and other interested parties. It should be noted, however, that the OCSLAA does little to assist in the expansion of offshore activity. Indeed, many of the new provisions, particularly those relating to the five-year program requirement[228] and the new leasing procedures,[229] make the offshore process more time consuming and complex. The OCSLAA also expressly encourages private litigation by enabling any private citizen with a valid legal interest to bring a civil action to compel any person, including the Secretary of the Interior, to comply with the statute.[230] If the issue relates to the Secretary's approval of a five-year leasing program, the action must be brought in the District of Columbia Court of Appeals.[231]

At the time of the passing of the OCSLAA, many legislators felt that since the coastal states' role in federal offshore leasing was now enshrined, future OCS programs would be subjected to less dissent.[232] But other legislators foresaw that another possible result of the OCSLAA would be to give coastal states and those who might oppose a particular OCS program the opportunity to use the new legislation's exhaustive provisions as a delaying mechanism.[233]

The Shah of Iran was toppled from power a year after the enactment of the OCSLAA. America, along with much of the free world, then faced further oil supply problems and yet another round of substantial price increases. As President Carter's administration journeyed into its last year, the vulnerability of the United States had once again been underscored. In 1980 America spent a vast eighty-two billion dollars on foreign oil[234] and, despite the various efforts of successive administrations, the United States was still about forty percent dependent on foreign oil imports in the latter years of the 1970's.[235] By the end of the

228. *See supra* notes 128-49 and accompanying text.

229. *See supra* notes 150-73 and accompanying text.

230. 43 U.S.C. § 1349(a)(1) (1982).

231. *Id.* § 1349(c)(1).

232. *See* H.R. REP. NO. 590, 95th Cong., 2d Sess. 50-51, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1457-58.

233. Rep. John Breaux (Democrat, La.), who was a majority member of the House Ad Hoc Select Committee on the Outer Continental Shelf, remarked that "[t]he bill is stuffed with features to delay activities on the Outer Continental Shelf. . . ." *Id.* at 298-99, 1978 U.S. CODE CONG. & AD. NEWS at 1651.

234. *OCS Oversight—Part 2: Hearings Before the Subcomm. on the Panama Canal/Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess. 10 (1981) (testimony of James B. Edwards, Secretary of Energy) [hereinafter cited as *OCS Oversight—Part 2*].

235. Palmer & Kelly, *America's Five-Year Offshore Leasing Plan—Its Importance in Increasing Domestic Petroleum Reserves and the Role of Industry in Its Development and Implementation*, in 21

decade, it became clear that a major initiative would be required to prevent American production from declining further. Yet the trend in the 1970's was for the United States to consume more oil than was being discovered. In 1978, for example, only 479 million barrels were discovered, a mere seven percent of the total consumption in the United States for that year.[236]

Nowhere was the failure of governmental attempts to boost United States oil production more pointed than in the OCS.[237] From 1954 to 1980 only two percent of an OCS believed to possess up to sixty percent of presently undiscovered American oil and gas reserves[238] had been leased.[239] In fact, according to the Under Secretary of the Department of the Interior, J.J. Simmons III, "[p]ast policies called for us to continue leasing at only one-tenth of one percent a year."[240] American offshore production had actually decreased thirty-four percent between 1970 and 1980,[241] while America's share of world offshore oil production had decreased from 21.7% in 1970 to 7.6% in 1980.[242] By 1980 there was still no production from any part of the OCS other than the western Gulf of Mexico and the Santa Barbara Channel in California.[243] The Alaskan OCS, estimated to hold forty-four percent of the OCS's total undiscovered oil reserves, was left practically untouched.[244]

If these trends in American energy production were to continue into the 1980's, then there would be no alternative to an increased reliance on OPEC. The Middle East was the only oil-producing region in the world with the available capacity to feed the appetite of the largest oil consumer on earth. A reversal of these trends with their attendant strategic and economic disadvantages would necessitate either a radical decrease in American consumption, a massive expansion in American production, or a combination of both.

EXPLORATION & ECON. OF THE PET. INDUSTRY 224 (1983); Hart, *Energy and National Security*, 36 REC. A.B. CITY N.Y. 280 (1981).

236. Ivanhoe, *Will there be enough oil in the 1980s?*, WORLD OIL, Oct. 1980, at 175, 181.

237. Palmer & Kelly, *supra* note 235, at 225.

238. *Id.*

239. *Consideration of Legislation*, *supra* note 3, at 901 (statement of J.J. Simmons III, Under Secretary, Dep't of the Interior).

240. *Id.*

241. *Id.* at 902.

242. Palmer & Kelly, *supra* note 235, at 225.

243. *See* MINERALS MGMT. SERVICE, *supra* note 63, at 57-65.

244. Jones, *supra* note 38, at 172 n.166.

III. AMERICAN OFFSHORE OIL DEVELOPMENT UNDER THE REAGAN ADMINISTRATION

In the presidential election of 1980, Ronald Reagan, the Republican candidate, won a convincing victory over the incumbent, Mr. Carter. Solidly backed by the oil industry, Mr. Reagan vowed that his administration would " 'do whatever is necessary' to produce more domestic oil and natural gas."[245]

The President chose Mr. James Watt as his Secretary of the Interior. Watt's previous record was varied and impressive. A graduate of the University of Wyoming, he had been an advisor to former Senator Milward Simpson of Wyoming and a lobbyist in Washington with the United States Chamber of Commerce. During the first Nixon administration he had been Under Secretary (1969) and Deputy Assistant Secretary (1969-72) of the DOI. He was the Director of the Bureau of Outdoor Recreation from 1972 to 1975, and was later appointed to the Federal Power Commission. During much of the Carter administration, Watt was President and Chief Legal Officer to the Mountain States Legal Foundation, a public interest law firm specialising in challenges to federal environmental policy.[246]

Secretary Watt regarded the goal of expanding oil and gas exploration and production as a primary objective. He believed that such an expansion would help inventory America's resources, ensure a stable source of oil supply, and increase the nation's economic and strategic independence.[247] Mr. Watt thought that earlier attempts to accelerate OCS activity "fell far short of the type of effort needed to fully explore and develop the hydrocarbon resources of our offshore lands."[248] James Watt's ambitious plans envisaged a major boom for the oil industry and the economy generally, with bonus and royalty payments swelling federal coffers.[249] He hoped that a reduction in foreign imports would channel billions of dollars that would otherwise be spent abroad into the domestic economy.[250] Mr. Watt was emphatic that it would take private enterprise to go out and achieve these goals; the federal authorities could merely fashion an appropriate offshore regime for the oil companies to

245. Rogers, *Washington in 1981*, WORLD OIL, Feb. 15, 1981, at 29, 29; *see also* Rogers, *Where the candidates stand*, WORLD OIL, June 1980, at 37, 45-47 (analysing President Reagan's pre-election views on energy development).
246. *OCS Oversight—Part 2*, *supra* note 234, at 48.
247. *Id.* at 49-51.
248. *Id.* at 51.
249. *Id.* at 49-52.
250. *Id.* at 50.

work under.[251] Despite the expansion-oriented nature of these policies, DOI remained committed to the preservation of America's environment: "We must reduce our dependency on those foreign imports, not only for the economical reasons with which we read so much about, billions, tens of billions going out each year to foreign countries but, we must protect our environment."[252]

Generally, the offshore goals of the Reagan administration are: (1) to expedite and expand OCS exploration and production, to provide a secure source of domestic petroleum, and to lessen America's reliance on foreign oil; (2) to inventory the resources of the OCS; (3) to facilitate a boom for the oil industry with attendant wider economic and fiscal effects; (4) to rely on the private sector to undertake the exploitation; and (5) to continue protection of the environment.[253] It should be noted that these goals do not involve any departure from the national policies stipulated in the OCSLAA. Indeed, Mr. Watt and the Republican administration viewed the OCSLAA as a mandate for their plans to expedite market-oriented OCS operations. Be this as it may, the OCSLAA was to provide the ammunition for many of the legal challenges later levelled against the Secretary's decisions.

A. *Industry's Perspective*

However else the government might encourage OCS development, it was clear that the primary task would have to be the creation of an offshore regime which would make it possible and economically feasible for industry to commit the enormous amounts of capital and technology that would be required. Since the participation of industry is so critical for offshore development, it is essential, before going on to look in detail at the Watt innovations, to briefly illuminate the outlook of the oil industry.

Industry was impatient with what it saw as the delays and overregulation of the 1970's. The policies of the past, it was believed, had been totally ineffectual in opening up the one billion acres of the OCS; too little acreage had been offered, too slowly, and in the wrong places. The environmental statutes and their attendant regulations were regarded as a foolish and debilitating overreaction. Industry believed that its environmental record was second to none. Oil men pointed out that leaks from offshore operations had been shown by a report undertaken for the

251. *See id.* at 52.
252. *Id.* at 50.
253. *See id.* at 49-55.

National Academy of Science to cause approximately five percent of the oil pollution in the world's oceans.[254] The same study went on to show that from 1975 to 1978 the American offshore industry contributed about 0.05% to total oceanic oil pollution.[255]

Industry wanted a speedy opening of America's offshore, a stable regime conducive to long-term planning, and less government regulation. Economically speaking, the goal of the oil corporations was to expand exploration and production, a set of objectives similar to those espoused by DOI.

B. *The New Offshore Regime*

In October 1978 the then Secretary of the Interior, Cecil Andrus, began drawing up a five-year leasing program for the OCS. A draft of the proposed plan was sent to governors of affected states in March 1979. Because of various delays, a final proposed plan was not sent to President Carter and the Congress till over a year later. The plan envisaged thirty-six lease sales, ten of which were to be in the Alaskan OCS. On June 16, 1980, Secretary Andrus approved the program. In response, California, Alaska, and various environmental organisations filed suit against the new OCS plan in the United States Court of Appeals for the District of Columbia Circuit.[256] These states and groups wanted the plan to be remanded to the Secretary[257] in accordance with section 23(c)(6) of the OCSLAA.[258]

In December 1980, while litigation was pending, Cecil Andrus began a review of his program, a review which James Watt eventually continued in 1981. Finding that the Andrus program was not an appropriate vehicle to further his policy goals, Watt began the preparation of a new OCS plan.[259] A draft of the proposed program was sent to the governors of coastal states on April 16, 1981.[260] This program provided for a dramatic expansion in the availability of quality acreage and for the streamlining of certain leasing procedures. On July 31, 1981, the plan was published in the *Federal Register*, and the ninety day comment

254. NATIONAL RESEARCH COUNCIL, SAFETY AND OFFSHORE OIL 62 (1981).
255. *Id.* at 63.
256. California v. Watt, 668 F.2d 1290 (D.C. Cir. 1981). For a more detailed description of the events that occurred after October 1978 and before the filing of suit, see *id.* at 1299-1300.
257. *See id.* at 1300.
258. 43 U.S.C. § 1349(c)(6) (1982).
259. *OCS Oversight—Part 2, supra* note 234, at 51 (testimony of Secretary James G. Watt).
260. Dep't of the Interior, News Release (April 16, 1981).

period began.[261]

On October 6, 1981, the D.C. Court of Appeals issued its decision on the challenge by California, Alaska, and others to the Andrus program. In *California v. Watt*[262] (*Watt I*) the court decided that Secretary Andrus's schedule of leasing had failed, on a number of points, to properly follow the required analysis set out in section 18 of the OCSLAA.[263] The plan was remanded to the Secretary, who was directed to remedy the deficiencies. On March 15, 1982, Secretary Watt announced his tentative proposed five-year plan in accordance with the court's directions.[264] By the summer of 1982 the complex procedures for review and comment had been completed and the plan was approved.

C. *The Watt Plan and Associated Policies*

One way to effect the goals of the Reagan administration would have been to alter the OCSLAA and the environmental statutes so as to widen DOI's discretion in the leasing process and, therefore, reduce the possibilities for litigious challenges. Providing that such legislation would be passed by Congress, this seemed to be a plausible suggestion. Nevertheless, Secretary Watt did not adopt this course. Instead, he blamed the failure of the past not on statutes, but on government. Referring to Project Independence he said, "President Nixon, 10 years ago, called for leasing 10 million acres a year. We never met it. Mainly, the government has not allowed it."[265] Secretary Watt's policies did not involve any substantial changes to offshore legislation. He approved of the participation that the states and the public were given in the OCS process. Instead of changing statutes, Secretary Watt attempted to create a market-oriented system of leasing by using the discretion that existing legislation gave him.[266]

Nevertheless, the Watt plan for OCS development did envisage

261. *See* 46 Fed. Reg. 39,226-28 (1981).

262. 668 F.2d 1290 (D.C. Cir. 1981).

263. *Id.* at 1303-22. For a discussion of *Watt I*, see Smyth, *An Analysis of Section 18 of the Outer Continental Shelf Lands Act as Interpreted in* California v. Watt: *Has it Accomplished its Purpose?*, 14 NAT. RESOURCES L. NEWSLETTER 1 (1982); Casenote, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLAMETTE L. REV. 535 (1982); Comment, *The Seaweed Rebellion Revisited: Continuing Federal-State Conflict in OCS Oil and Gas Leasing*, 20 WILLAMETTE L. REV. 83 (1984).

264. *See* 47 Fed. Reg. 11,980 (1982).

265. *OCS Oversight—Part 2*, *supra* note 234, at 59.

266. Concerning his new five-year program, Watt emphasised that "implementation of the draft proposed 5-year program and the attendant prelease streamlining proposals can be achieved administratively under the act [OCSLAA] as it now stands." *OCS Oversight—Part 2*, *supra* note 234, at 54 (testimony of Secretary James Watt).

some substantive changes in regulations and changes in the mode of their observance. It was alleged by many in the oil industry that the previous administration had often foregone development when it appeared that there was any chance of risk to the environment. As Paul L. Kelly, an industry witness supporting Watt's nomination for the post of Secretary of Interior put it, "the administration during the past 4 years has adopted what is practically tantamount to a 'zero risk' approach to OCS management."[267] As reflected by the fact that Watt leased twice as much acreage in 1981, using the Andrus schedule, as his predecessor had done in 1980,[268] the new Secretary obviously hoped to pursue a less cautious policy. Mr. Watt's proposals for harnessing industry to achieve the nation's energy goals embodied the following four main facets: (1) a large increase in the number of prospective areas to be leased; (2) the introduction of areawide environmental analysis, areawide leasing, and telescoping; (3) the retention of the bonus bid as the bidding variable; and (4) the introduction of new tract evaluation techniques.[269]

1. The Number of Lease Sales and Their Location

The number of lease sales was to be increased from thirty-six to forty-one. Sixteen of these lease sales were to be in the Alaskan OCS, and twelve were to be in the Gulf of Mexico.[270] Many of the most lucrative areas were to be leased first. Given the fact that the new lease sales were to utilise the areawide method discussed immediately below, the program's effect was to open up vast sections of the OCS to industry.[271] Expansion into the Alaskan OCS, where so much of the undiscovered oil was thought to lie, was the linchpin of the program. As Watt himself had promised, "there will be greater emphasis on early entry into areas of high potential. Here we are talking of the frontier areas of offshore Alaska."[272] The program, if fully implemented, would result in up to one billion OCS acres being considered for leasing by 1987.[273] By com-

267. *James G. Watt Nomination: Hearings Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 386 (1981) (testimony of Paul L. Kelly).

268. Sec. Watt leased 2.23 million acres in 1981, whereas Sec. Andrus leased 1.13 million acres in 1980. Dep't of the Interior, News Release (Jan. 11, 1982).

269. *See OCS Oversight—Part 2*, *supra* note 234, at 49-64 (testimony of Secretary James G. Watt).

270. Dep't of the Interior, News Release (July 21, 1982).

271. *See generally* Kelly, *Furor building over OCS Program*, DRILLING CONTRACTOR, Sept. 1982, at 66, 66-82 (chronicling reaction to accelerated OCS leasing).

272. *OCS Oversight—Part 2*, *supra* note 234, at 51 (testimony of Secretary James G. Watt).

273. Letter from Secretary James G. Watt to President Ronald Reagan (Jan. 20, 1983), *reprinted in* MINERALS MGMT. SERVICE, DEP'T OF THE INTERIOR, A YEAR OF SUCCESS 3 (1982-83).

parison, Secretary Andrus's program would have considered fifty-eight million acres. In fact, as of April 26, 1983, only 84.8 million acres had been considered since the OCS program began in 1954.[274]

2. The Areawide Concept, Telescoping, and Their Ramifications

Before the new streamlined lease procedures introduced by Secretary Watt can be evaluated, it will be necessary to give a brief synopsis of the former system. Under the old system, once a lease sale had been scheduled for a particular date, the first important pre-lease step would be the publishing of a Call for Nominations in the *Federal Register*.[275] In the Call, the BLM would designate a small to moderate amount of acreage that would be considered for leasing. Industry was then invited to forward details of specific tracts that were of interest. Wider public comment was also invited. In Lease Sale 42, for example, held off the shores of New England, the BLM in 1975 invited nominations with respect to 15.8 million acres. In that particular instance, eighteen companies nominated 10.9 million acres as being desirable.[276] The BLM's tendency (especially marked in frontier areas) was to recommend for further pre-lease analysis only the most heavily nominated tracts. Thus in Lease Sale 42 this meant that 1.2 million acres, thirteen percent of the acreage that industry had shown an interest in, was included in the Tentative Tract Selection[277] decided by the Secretary of the Interior.[278] Under the old system, an average of about sixteen percent of industry-nominated tracts were included in the Tentative Tract Selections.[279]

Only after Tract Selection had occurred could compliance with NEPA begin. This was done in two stages. First, a Draft Environmental Impact Statement (DEIS) would be prepared; the DEIS discussed the likely effects of oil and gas leasing on each OCS tract to be offered. After the DEIS had been circulated for public review and comment, a Final Environmental Impact Statement (FEIS) would be drawn up on the same tract-specific basis.[280] At least one month after the FEIS had been completed, a Proposed Notice of Sale would be published in the *Federal*

274. MINERALS MGMT. SERVICE, *supra* note 63, at 12.

275. 43 C.F.R. § 3313.1 (1981).

276. Am. Pet. Inst., Draft Comments on Areawide Leasing (May 4, 1982).

277. For previous regulations dealing with tract selection, see 43 C.F.R. § 3314.1 (1981).

278. Am. Pet. Inst., *supra* note 276.

279. *OCS Oversight—Part 2*, *supra* note 234, at 54 (testimony of Secretary James G. Watt).

280. H.R. REP. No. 590, 95th Cong., 2d Sess. 62-63, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1469-70.

Register.[281] The Proposed Notice of Sale would refer to such matters as details of tracts to be leased, measures to avoid adverse environmental impacts, and conditions which might be included with reference to leases on certain tracts. The Proposed Notice of Sale would be sent to the governors of the affected state or states, followed by the sixty-day comment period provided for by section 19 of the OCSLAA.[282] Thirty days would then be given for review by the Department of Energy[283] (DOE), followed by publication of a final Notice of Sale in the *Federal Register*. The lease sale itself would ensue not less than thirty days afterwards. Before the sale, the BLM would also undertake a fairly exhaustive economic evaluation of each tract to be offered in order to obtain an accurate idea of fair market value.[284] On the average, these successive procedures took forty-two months to complete.[285] Much depended, of course, on how quickly the environmental analysis could proceed, and whether there were any delays caused by litigation.

Secretary Watt proposed very extensive changes in this pre-lease procedure. In particular, he planned to use the areawide concept and the idea of telescoping, two approaches that will be explained as the new procedures are described. The new pre-lease stage begins with a statement in the *Federal Register* giving notice of MMS's intent to prepare an EIS for the lease sale. It initiates a "scoping" process whereby important issues of environmental concern are quickly brought to DOI's attention.[286] This process consists in the early identification of areas of particular environmental concern and the formulation of appropriate evasive measures. The environmental analysis required by NEPA begins before the input of industry is solicited. Under the old system, this would have been impossible because the EIS process was undertaken on a tract-specific basis. This is no longer the case. Secretary Watt divided the OCS regions into planning areas. Each lease sale relates to a particular area. The EIS is undertaken on an areawide basis less any tracts which are found early on to be unavailable.[287] The scope and the purpose of such an EIS is different from the older variety since its task is to consider the

281. *See id.*; 43 C.F.R. § 3315.1, .2 (1981).
282. 43 U.S.C. § 1345(a), (b) (1982).
283. 43 C.F.R. § 3315.3 (1981).
284. For a short description of the former system, see *OCS Oversight—Part 2*, *supra* note 234, at 58 (testimony of Secretary James G. Watt).
285. MINERALS MGMT. SERVICE, U.S. DEP'T OF THE INTERIOR, FROM POLICY TO PRODUCTION—OFFSHORE LEASING AND OPERATIONS 4 (1983).
286. 40 C.F.R. § 1501.7 (1983).
287. *OCS Oversight—Part 2*, *supra* note 234, at 233 (statement of J. Robinson West, Assistant Secretary for Policy, Budget and Administration, Dep't of the Interior).

risks which may affect the area if the region as a whole develops its estimated reserves. As J. Robinson West, Assistant Secretary for Policy, Budget, and Administration for the DOI, stated, "the EIS prepared for the first offering in a planned area under the new concept will emphasize analysis, rather than description."[288] This DOI policy was assisted by CEQ regulations which permit "tiering,"[289] an idea which holds that federal agencies should tailor their environmental assessments to suit the decision in question. For example, an environmental analysis (which may not necessarily involve an EIS) is always undertaken before exploration plans can be approved.[290] It would be futile and repetitive, reasoned the CEQ, for a pre-lease EIS to prematurely relate information relevant to a particular exploration application.

About a year after the Notice of Intent, the MMS publishes a Call for Information in the *Federal Register*,[291] which shows acreage designated by the MMS as being of geological or hydrocarbon potential. In addition, the nominations of industry are sought for any part of the entire planning area which may be of interest, excepting those parts already deleted because of environmental unsuitability. The Call for Information also solicits comments from the public on issues ranging from environmental hazards to multiple use problems. When the comments from the Call have been received and scrutinised, an Area Identification is made.[292] This decision by the Secretary is given on the basis of MMS designations and industry nominations. Industry can thus be almost certain (barring the rejection of tracts later on in the process) that its desired acreage will be available. "Areawide leasing," as it is called, reflects the administration's desire to rely on industry expertise to develop the OCS.

The DEIS is completed after the Area Identification has taken place. Although this document is prepared on the previously described areawide basis, it does try to focus on the areas selected by the Secretary at the Area Identification stage.[293] After a public review period, the FEIS is published. Many planning areas were scheduled to be leased twice in Secretary Watt's program. It was envisaged that the EIS for the second sale would be able to utilise much of the information compiled in the first sale, and subsequently collected by ongoing studies.[294]

288. *Id.*
289. 40 C.F.R. § 1502.20 (1979).
290. *See* 30 C.F.R. § 250.34-1(a)(2)(i) (1983).
291. *Id.* § 256.23.
292. *Id.* § 256.26.
293. MINERALS MGMT. SERVICE, *supra* note 285, at 5.
294. *See OCS Oversight—Part 2*, *supra* note 234, at 233 (testimony of J. Robinson West).

A Proposed Notice of Offering is then published, generally in the same month as the FEIS.[295] This cuts the pre-lease timetable by two months. Moreover, the Department of Energy's sixty-day comment period is now run concurrently with the statutory sixty-day period rather than consecutively.[296] This results in another month being saved. Both procedures are excellent examples of the concept of "telescoping," which involves the idea of differing procedures being carried on simultaneously instead of successively.

After the elapse of the comment period, a Notice of Sale is published in the *Federal Register*.[297] The sale itself can take place at any time more than thirty days after the notice. The Department of the Interior no longer undertakes tract evaluation for fair market value before a lease sale. The new procedures reduce the average pre-lease period from forty-two to twenty-one months.[298]

The main advantage accruing to industry from areawide leasing and telescoping is that more quality acreage becomes available at a faster pace. However, a number of other significant benefits were also projected by Secretary Watt. First, it was hoped that the new procedures would ensure that industry's resources would be channeled towards the most prospective acreage.[299] Mr. Watt considered it wasteful to concentrate exploration in less desirable parts of the OCS. Second, if the Watt plan was able to achieve its goal of increased exploration, additional offshore data would become available to the oil industry. While not all drilling results are open to market inspection, such data is often bought or swapped. In this way risk would be reduced and further and more intelligent offshore commitments would be encouraged. Under the old system, industry had to have its geophysical or geological work completed before the Call for Nominations if it wanted any of its desired acreage to be included in the lease sale. But with the new, shorter pre-lease period, planning deadlines have eased.[300] The BLM's tendency to recommend only a small percentage of nominated tracts for Tentative Tract Selection wasted a great deal of corporate money on fruitless analysis.[301] With the assurance that almost all industry nominations would now be accepted, the likelihood of finances being wasted on geophysical or geological ex-

295. *Id.*
296. *Id.*
297. *See* 30 C.F.R. § 256.32 (1983).
298. Kelly, *supra* note 271, at 70.
299. MINERALS MGMT. SERVICE, *supra* note 285, at 70.
300. Am. Pet. Inst., *supra* note 276.
301. *Id.*

ploration receded. Finally, it was also envisaged that the practice of accepting for consideration a large majority of industry-nominated areas would encourage innovative exploration strategies.[302] Small companies, for instance, often explore in an unorthodox fashion. It is important to encourage such exploration because in many OCS areas all the structures which can obviously harbor hydrocarbons have been penetrated. If oil and gas exists in such areas (an example of which is the Baltimore Canyon), then it must lie in areas known as "obscure traps," reservoirs which lack the standard features of normal petroleum deposits. Under the old system, tracts with such reservoirs would not have attracted nominations from the many companies using conventional exploration techniques, and thus would never have been leased.

3. The Bidding System Under the OCSLAA

It was noted above that the OCSLAA authorises four basic types of bid variables for OCS oil and gas leasing.[303] Soon after the enactment of the OCSLAA, a controversy arose over the extent of the Secretary of the Interior's discretion to select a single bid variable for constant use. In *Energy Action Educational Foundation v. Andrus*,[304] consumer groups, two California state agencies, and a number of private individuals filed for an injunction in the United States District Court for the District of Columbia against Secretary Andrus's continuing exclusive use of the cash bonus as the OCS bid variable. The Department of the Interior contended that it had complied with the requirement that at least twenty percent of all OCS acreage to be leased must employ a system different from the cash bonus bid with fixed royalty,[305] by planning the promulgation of regulations for other bid variables.[306] But since the enactment of the OCSLAA, no bid variable other than the cash bonus had been used.[307] Three days after suit was filed and just prior to a planned lease sale, the plaintiffs moved for a preliminary injunction against the sales.[308]

302. AM. PET. INST., *supra* note 1, at 78.

303. *See supra* text accompanying notes 176-79.

304. 516 F. Supp. 90 (D.D.C.), *aff'd*, 654 F.2d 735 (D.C. Cir. 1980), *rev'd sub nom.* Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981). For a more extensive discussion of the progressive stages of the case, see Note, Watt v. Energy Action Educational Foundation: *Secretarial Discretion to Select Lease Bidding Systems*, 3 VA. J. NAT. RESOURCES L. 163 (1983).

305. 43 U.S.C. § 1337(a)(5)(B) (1982).

306. 516 F. Supp. at 94-95.

307. *See* Note, *supra* note 304, at 164-68.

308. Energy Action Educ. Found. v. Andrus, 479 F. Supp. 62 (D.D.C.), *aff'd*, 631 F.2d 751 (D.C. Cir. 1979).

The district court refused the motion[309] and, on appeal, the United States Court of Appeals for the District of Columbia affirmed the lower court's holding and remanded the case back to district court.[310] On remand, both parties sought a summary judgment, and plaintiffs again requested a preliminary injunction.[311] The district court denied all of the motions[312] and the plaintiffs appealed to the D.C. court of appeals.[313] The court of appeals held that in light of the legislative history behind the OCSLAA, it was impossible to conclude that the Secretary had been granted discretion to ignore those options which did not rely on the front end cash bonus as the bidding variable.[314] The court believed that one of the most important purposes of the OCSLAA had been to attempt to discover the most desirable bidding variable, and that such a goal could only be accomplished by experimentation with bid variables other than the cash bonus.[315]

The Department of the Interior consequently appealed to the United States Supreme Court. While the appeal was pending the Reagan administration took office. When the Supreme Court eventually decided *Watt v. Energy Action Educational Foundation*[316] in favor of the petitioners, it noted that the plain language of the statute clearly indicated that the Secretary had discretion to exclusively utilise the cash bonus bid variable in offshore leasing.[317] The real limitation on the Secretary's discretion, according to the Court, was that he could not use the cash bonus with fixed royalty system for more than eighty percent of the total OCS lease acreage.[318] The Court also pointed out that even this limitation had to be qualified by language in section 11, which granted the Secretary the right to override the latter provision if he determined that it was inconsistent with the purposes and policies of the OCSLAA.[319]

The respondents, in turn, argued that the cash bonus bid variable could not secure fair market value for OCS leases as required in section 18 of the OCSLAA.[320] The Court rejected this line of reasoning by ob-

309. 479 F. Supp. at 63.
310. 631 F.2d at 761.
311. *See* 516 F. Supp. 90.
312. *Id.* at 98.
313. *See* 654 F.2d 735.
314. *Id.* at 747.
315. *Id.* at 746-47.
316. 454 U.S. 151.
317. *Id.* at 163.
318. *Id.*
319. *Id.* (citing 43 U.S.C. § 1337(a)(5)(B) (Supp. III 1979)).
320. 454 U.S. at 163-64.

serving that since Congress had expressly required that forty percent of all OCS acreage be leased under the cash bonus with fixed royalty system, it could not have believed that the cash bonus method was incapable of producing fair market value.[321] Therefore, the Court's decision effectively removed any doubts regarding the scope of the Secretary's discretion in his choice of bidding systems.[322]

To fully comprehend the rationale of Secretary Watt's choice of OCS bidding systems, it will be necessary to consider the pros and cons of the four basic bid variables authorised by the OCSLAA.

a. The cash bonus bid

It was noted above that a cash bonus is a large, up-front payment for an oil and gas lease.[323] McDonald states that in economic terms a bonus tends under competitive circumstances to be "the present value of expected net cash flow beyond the point of leasing."[324] The purchase of offshore leases is always, to a greater or lesser extent, fraught with uncertainty. In most cases it is impossible to determine at the pre-lease stage whether there are hydrocarbons underlying the lease acreage. The size of the bonus offered will therefore depend on the prospective lessee's perception of the mineral value of the lease and the costs associated with it. If bidders act in a state of uncertainty, widely varying offers will be received, and hopefully the highest possible payment will be obtained.

Bonus bidding has a number of important negative and positive characteristics. The main difficulty arises from the considerable initial economic burden which is laid upon the lessee. The federal government receives its up-front payment regardless of whether the tract is productive or not. It is the lessee who must put up the substantial monies necessary for successful OCS bidding. The lessee corporation must then attempt to recoup its costs from minerals which may or may not exist. There can be no doubt that this aspect of the bonus system impairs the capacity of small oil companies to compete in the market for OCS leases.[325]

A more positive feature of the bonus bid is that it does not tend to

321. *Id.*

322. *Id.* at 163-65.

323. *See supra* notes 10-11 and accompanying text.

324. McDonald, *The Economics of Alternative Leasing Systems on the Outer Continental Shelf*, 18 HOUS. L. REV. 967, 969 (1981).

325. For a more extensive coverage of the anti-competitive effect of bonus bidding, see *id.* at 972; Jones, Mead, & Sorensen, *supra* note 112, at 895; McDonald, *Federal Energy Resource Leasing Policy*, 18 NAT. RESOURCES J. 747, 751 (1978).

affect post-lease development decisions.[326] Once the up-front payment has been made, the government receives no further revenue from the lease operations, except the fixed royalty (or whatever happens to be the fixed component of the leasing formula) and taxes. This constitutes a strong reason to develop lease acreage diligently.[327] The following example will serve to illustrate this point. Suppose *X*, an oil and gas lessee, pays fifty million dollars in bonus money for his lease; he further spends five million dollars in exploration and development, and his well, which has an estimated life of ten years, yields him two million dollars a year. *X* will have a financial incentive to operate this well for ten years because its production is reducing his previously incurred operating costs. The bonus itself does not add to the cost of exploration and development, and so further activity is encouraged. The bonus bid then, has both advantages and disadvantages. The main disadvantage, the anti-competitive effect mentioned above, was the main reason why Congress authorised the other bid variables.[328]

b. The royalty bid

Unlike bonus bidding, the royalty method involves no large front end payment. Instead, the federal government is offered a continuing share in the gross value of production. The great advantage of the royalty bid is that it increases participation in bidding.[329] In October 1974, DOI conducted an OCS lease sale using the royalty bid method. A later analysis of the experiment concluded that "royalty bidding may bring more bidders into OCS auctions . . . including more new bidders, and may also make independents more competitive in the auctions."[330] It is as easy for small corporations to bid high royalty rates as it is for large corporations. Because the government receives no revenue till the lessee finds and produces oil, the risks of the venture are more evenly spread.

The main defect inherent in royalty bidding is that the royalty tends to become a burden on the future development of the lease.[331] A rational lessee will only produce that quantity of hydrocarbons which will leave him with a profit after operating costs and royalties have been paid. If an

326. McDonald, *supra* note 324, at 970-71.
327. *Id.*
328. H.R. REP. No. 590, 95th Cong., 2d Sess. 139, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1540, 1545.
329. *See* Jones, Mead, & Sorensen, *supra* note 112, at 897.
330. OFFICE OF OCS PROGRAM COORDINATION, U.S. DEP'T OF THE INTERIOR, AN ANALYSIS OF THE ROYALTY BIDDING EXPERIMENT IN OCS SALE 36, at 18 (1977).
331. Jones, Mead, & Sorensen, *supra* note 112, at 897-99.

operator has contracted to pay a high royalty rate to the government, reserves which could otherwise be developed economically may be prematurely abandoned. Royalty bids therefore tend to be high because it is easy to make such a future commitment. The Department of the Interior, commenting on the above-mentioned 1974 royalty bidding experiment, said, "[c]ompetitive bidding drives royalty rates to levels that seriously erode the potential commercial value of a tract."[332] In fact, commentators such as McDonald believe that the royalty method encourages speculative bidding.[333]

c. *The profit share bid*

This system differs from the royalty bid in that it uses as the bid variable a share of net profits rather than a share in the value of gross production. The profit share bid encourages participation for the same reasons that the royalty bid does. Profit share bidding is also relevant to post-lease investment, though it is not so likely to create an incentive to abandon.[334] This is because with profit share bidding, the government's economic rent is a portion of whatever profit the lessee has made after operating costs have been deducted from gross profits. Profit share bids, however, tend, like royalty bids, to be high. Again, this is because it is easy for corporations to commit themselves to paying high future shares of net profits. California and the City of Long Beach have utilised this system of bidding in oil and gas leasing of state and local waters.[335] In the case of Long Beach, the highest bid amounted to 95.56%.[336] With profit share bids for the best prospects reaching this level, many successful bidders would be likely to channel future investment into more rewarding projects. Still another problem with profit sharing lies in the fashioning of an appropriate system for allocating costs between a company's various oil and gas operations, a notoriously difficult task.[337]

d. *The work commitment bid*

The work commitment bid is in some ways similar to the bonus bid. It is based on a dollar amount pledge to undertake certain exploration.

332. OFFICE OF OCS PROGRAM COORDINATION, *supra* note 330, at 18.

333. *See* McDonald, *supra* note 324, at 974. For a further discussion of royalty bidding, see K. DAM, *supra* note 6, at 148-53.

334. *See* McDonald, *supra* note 325, at 753.

335. Jones, Mead, & Sorensen, *supra* note 112, at 903.

336. *Id.*

337. For an enumeration of the problems involved, see *id.* at 901-02.

Like the bonus bid it tends to reduce bid participation and, after the stipulated exploration has been undertaken, becomes irrelevant to further investment decisions. Its worst feature is not shared by any other system. Specifically, if the lessee fails to complete his exploration pledge he loses the dollar amount difference between his bid and his costs, and therefore has an incentive to continue unprospective, wasteful exploration in the hopes of finding something.[338]

4. The Watt Bidding Strategy

Secretary Watt's strategy was designed to utilise only the bonus bid variable. The Secretary used the cash bonus bid with a stipulated sliding scale royalty and fixed net profit share to fulfill his obligation to experiment.[339] He found that the bonus bid variable was the most appropriate method to facilitate his goals of expanding exploration and production. He relied on two factors, joint bidding and an increase in available acreage, to overcome its anti-competitive effects.

a. Joint bidding

This bidding scheme entails the submission of one bid for a tract by two or more prospective lessees. Joint bidding has been a feature of OCS lease sales since the early auctions in the 1950's.[340] The practice is the means by which many small companies, who individually could not contemplate solo development of a tract, enter the OCS market. Joint bidding, by spreading risks, increases participation and allows consortia to put together the repertoire of differing offshore specialties such as drilling, equipment maintenance, and chemical supply, which are essential for proper development. In addition, it allows for widespread availability of exploratory data, thus encouraging more corporations to consider bidding.[341] Theoretically, joint bidding, with its element of "clubbing together," could actually decrease the number of bids. However, studies tend to show that joint bidding, by attracting so many more bidders, has actually increased competition.[342] To ensure that the large multinational

338. For a further discussion of the work commitment bid, see *id.* at 904-05; McDonald, *supra* note 325, at 754; McDonald, *supra* note 324, at 977-78.

339. *See* Note, *supra* note 304, at 168.

340. Grayson, Canaday, Brumbaugh, Sherman, & Sutherland, *Issues of Competition on the Outer Continental Shelf*, 3 VA. J. NAT. RESOURCES L. 69, 92 (1984) [hereinafter cited as Grayson & Sutherland].

341. For a further discussion of joint bidding, see *id.* at 92-98; McDonald, *supra* note 324, at 979-80.

342. *See* Gilley, Karels, & Lyon, *The Economics of Oil Lease Bidding*, 18 HOUS. L. REV. 1061

corporations did not begin joint bidding among themselves and so gain an unfair and anti-competitive advantage over the rest of the market, the Energy Policy and Conservation Act of 1975[343] provided that an oil company that has a daily production of over 1.6 million barrels cannot enter into a joint bid with another company producing that amount.[344] The Reagan administration has retained the ban. However, there is nothing to stop a corporation affected by the statute from participating in a joint bid with a smaller oil company.

b. The large increase in acreage available

It was mentioned above that the Watt plan entailed a dramatic expansion of lease offerings. The plan assumed that there would be a demand for the mass of quality acreage on the market and that the bonus rate would consequently fall: supply would outstrip hitherto unsatisfied demand. As James Watt said, "[i]f you limit the acres available, then you only allow a few companies to compete, and when two companies join together to bid $333 million for 9 square miles of water, that forces out a lot of other competition,"[345] and "I would rather supply energy to consuming Americans at a lower price than to simply restrict that to allow a few companies to make big profits selling a little bit of oil."[346] Because there would be so many available tracts, small companies would, it was hoped, find it much easier to be successful in bidding. It was also expected that the increase in leasing would further encourage joint bidding.[347] In fact, since so many of the lease sales were to be located in difficult frontier areas, there would be considerable reason for even the multinational corporations to cooperate with the smaller, more specialised companies. Moreover, because so much of the acreage would be prospective, there would be a strong incentive for corporations to try to

(1981); Jones, Mead, & Sorensen, *Free Entry into Crude Oil and Gas Production and Competition in the U.S. Oil Industry*, 18 NAT. RESOURCES J. 859, 870-72 (1978); McDonald, *supra* note 324, at 980.

343. Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of 5, 10, 15, 30, 42, 50 U.S.C.).

344. *Id.* § 105, 89 Stat. at 879-80; *see* 30 C.F.R. § 260.303 (1984). The American Petroleum Institute disputes the contention that pre-1975 bidding was in some measure uncompetitive because of joint bidding among the majors: "Studies have shown that . . . following imposition of the ban . . . the number of bids per tract in frontier area OCS offerings dropped from 1.5 to 1.1 bids per tract." Am. Pet. Inst., Response Paper (Nov. 10, 1982); *see also* Gilley, Karels, & Lyon, *supra* note 342, at 1070 (suggesting that competition is not lowered by joint bidding).

345. *OCS Oversight—Part 2*, *supra* note 234, at 59 (testimony of James Watt, Secretary of the Interior).

346. *Id.* at 63.

347. *See* Grayson & Sutherland, *supra* note 340, at 100.

spread their lease equity so as to be involved in as many discoveries as possible.

The rejection of the other methods as bid variables was the result of many of the reasons discussed in the analysis of each alternative. The bonus system, it was believed, would encourage both efficient and exhaustive pre-lease exploration work and continuing post-lease development. The royalty and net profits systems, however, would tend to encourage speculative bidding and early abandonment. Both of these methods would also result in extremely high bids being made for the very best acreage[348] and, therefore, would discourage the discoveries that both government and industry hoped for. The work commitment system was rejected partly because of its wasteful aspect, and partly because the idea of government trying to maximise exploration before the optimum decision-making time (i.e., the post-lease stage) was reached was also contrary to Secretary Watt's market-oriented ethos. Work commitment meant government involvement in, as opposed to government regulation of, the oil industry.[349]

5. The New System of Tract Evaluation

Tract evaluation for fair market value is the process that the DOI uses to ensure that bids for OCS tracts are not significantly lower than the marketplace can afford. Evaluation was undertaken pursuant to the old procedures on a tract specific basis before leasing took place.[350] Since only about half of the tracts offered were actually leased, many of the evaluations were wasted.[351] It would have been extremely difficult, if not impossible, to continue this practice under the areawide leasing regime, as there would have been far too many tracts for DOI to cope with, and because less than half of these tracts would have been leased. New procedures were adopted on February 22, 1983.[352] Tract evaluation was

348. *See OCS Oversight—Part 2, supra* note 234, at 19 (testimony of Robert LeGassie, Acting Assistant Secretary for Fossil Energy, Dep't of Energy).

349. "[I]t is questionable whether government officials who must approve such leases are in a position to determine the most efficient work program." Jones, Mead, & Sorensen, *supra* note 112, at 904.

350. *See OCS Oversight—Part 2, supra* note 234, at 234 (statement of J. Robinson West, Assistant Secretary for Policy, Budget and Administration, Dep't of the Interior).

351. Referring to this issue, Secretary Watt said, "I think my figures were that only about 47% of those areas made available for lease were actually leased, so 53% of the lands surveyed, at taxpayer's cost, were not leased by the corporations." *OCS Oversight—Part 2, supra* note 234, at 58 (testimony of James Watt, Secretary of Interior).

352. Letter from Secretary James G. Watt to Vice-President George Bush (March 1, 1983), *reprinted in* MINERALS MGMT. SERVICE, U.S. DEP'T OF THE INTERIOR, PROCEDURES FOR OCS BID ADEQUACY (1983).

switched from the pre-lease to the post-lease stage. The MMS now conducts evaluations only on tracts which have received bids. But the method as well as the timing of the evaluation has changed. The new technique, like many of the other Watt procedures, is more market-oriented. There is now a greater, though not exclusive, reliance on how industry values tracts in the bidding process.

The new system has two phases.[353] In Phase One all tracts which are bid on are reviewed individually. All legal high bids are accepted on tracts identified by the MMS as nonviable prospects. A legal high bid is a bid of $150 or more per OCS acre.[354] A lower bid will never be accepted under any circumstances. If a tract is designated as a development or drainage tract, it will automatically be referred to Phase Two.[355] All legal high bids (after screening for anomalously low bids) for prospective wildcat or proven tracts are accepted if the tract attracted three or more bids or more than the average number of bids for prospective tracts bid upon in the sale, whichever is more.[356] If the prospective wildcat or proven tract bids fail this test, the bids are further scrutinised under another method. If the geometric mean bid value for such a prospective wildcat, or proven tract, is greater than the median of geometric mean bid values of prospective wildcat and proven tracts bid on in the sale, the bid will be accepted.[357] If the bid fails this test it passes on to Phase Two. It will be seen that this procedure for evaluating Phase One bids relies on arithmetical analysis and industry consensus, rather than on government surveying. The Department of the Interior estimated that about fifty-five percent of all bids on prospective wildcat or proven tracts would be accepted under Phase One.[358] Phase One evaluation al-

353. *See* Letter from Dan Miller, Assistant Secretary, Energy and Minerals, United States Dep't of the Interior, to Secretary James G. Watt (Feb. 18, 1983), *reprinted in* MINERALS MGMT. SERVICE, U.S. DEP'T OF THE INTERIOR, PROCEDURES FOR OCS BID ADEQUACY (1983); Am. Pet. Inst., New Procedures for Determining OCS Bid Adequacy (March 1983) (briefing paper).

354. MINERALS MGMT. SERVICE, *supra* note 285, at 103.

355. A "development tract" is a tract which has proven oil and gas deposits adjacent to it, but not, so far as is known, under it. Am. Pet. Inst., *supra* note 353, at 4. A "drainage tract" is a tract which might suffer drainage of hydrocarbons if wells were drilled nearly. *Id.*

356. Letter from Dan Miller, *supra* note 353. "Screening" is conducted using the "one-eighth rule." Am. Pet. Inst., *supra* note 353, at 4. As an example of the way in which screening operates, suppose that tract *X* receives three bids: the first bid is for $100 million, the second bid is for $80 million, and the third bid is for $1 million. The third bid will be eliminated because it is less than one-eighth of the next highest bid. Thus, for the purposes of MMS calculations, only two bids would be considered from tract *X*. A "prospective wildcat tract" is a tract in an area where no drilling has taken place but geophysical or geological surveying has indicated possible reserves. *Id.* A "proven tract" is a tract where it is known from previous drilling that hydrocarbons are present. *Id.* at 4-5.

357. Letter from Dan Miller, *supra* note 353.

358. Am. Pet. Inst., *supra* note 353, at 2.

lows bids to be accepted about three days after a lease sale has been held.[359]

Phase Two evaluation, a more complex process, is mainly done by sampling analysis. About thirty percent of bids on a predetermined basis, and five percent on a random basis, receive the type of highly detailed scrutiny (which may involve MMS geophysical or geological surveying) that was applied to all offered tracts under the old procedure.[360] The results of this and other statistical evaluations are used by the MMS in reaching their final decisions.

D. *Objections to the Five-Year Plan*

When Secretary Watt approved his new OCS plan in the summer of 1982, he encountered strident opposition[361] from some coastal states (particularly California, Alaska, and Massachusetts), from environmentalists, and from fishermen and other coastal industries which might be affected by the proposed program. There was also some concern among consumer groups and the general public that the Watt proposals were selling the country's resources at a discount.

A major fear was that the dramatic increase in available acreage caused by the extensive lease sales and areawide leasing would pose a grave environmental threat. Senator Edward Kennedy asserted that the program underestimated " 'the potential for significant damage to the environment.' "[362] Elizabeth R. Kaplan, Legislative Director of Friends of the Earth, commenting on areawide environmental analysis, said, "the impact of such a system on California could be very serious, but on Alaska it would be catastrophic."[363] States and local governments, it was believed, could not adequately plan for such an expansion.

Another serious complaint was that the expedited leasing program would flood the market with leases and drive bonuses down, a problem likely to be exacerbated by the termination of the thorough tract evaluation procedures of the past. It was also felt that the dropping price of oil would tend to discourage companies from expending large amounts of capital on OCS bidding. As Senator Howard Metzenbaum remarked, "if we want to get a fair return for our oil and gas resources, this is not the

359. Letter from Dan Miller, *supra* note 353.
360. *Id.*
361. *See* Kelly, *supra* note 271, at 70-78.
362. *Id.* at 76.
363. Kaplan, *supra* note 66, at 25.

market."[364]

California, Alaska, and various environmental groups eventually filed suit against the Watt program in the United States Court of Appeals for the District of Columbia in *California v. Watt*[365] (*Watt I*). In *Watt I*, the petitioners contested Secretary Watt's interpretation of section 18 of the OCSLAA.[366] The D.C. Court of Appeals agreed with the contention that Secretary Watt had misinterpreted section 18, and therefore ordered that the Watt leasing plan be revised in accordance with the OCSLAA.[367] In *California v. Watt*[368] (*Watt II*), the same petitioners challenged the adequacy of the analysis used by the Secretary in the revised plan.[369] Although all of the petitioners' claims were eventually dismissed, two of the arguments advanced nevertheless merit special attention. One argument relates to areawide leasing, while the other relates to fair market value.

Section 18(a) of the OCSLAA requires the Secretary of the Interior to develop a "schedule of proposed lease sales indicating as precisely as possible the size, timing, and location of leasing activity."[370] The petitioners in *Watt II* argued that the plan lacked specificity because MMS had made it clear that only certain sections of each area designated in the five-year program would actually be leased.[371] This argument was rejected by the court because the Secretary could not know what parts of a planning area would be leased before a Call for Information and subsequent procedures could be carried out.[372] Section 18(a) only required as much specificity "as possible."[373] The petitioners also contended that the sheer size of the planning areas meant that it was impossible to indicate with any degree of exactitude the size of the offerings.[374] But the court of appeals, referring to the OCSLAA, said that the plain words of the statute merely required that the size as known at the program stage be given

364. *Watt Defends Five Year Leasing Program on OCS*, OIL & GAS J., Sept. 13, 1982, at 48, 48-49.

365. 668 F.2d 1290 (D.C. Cir. 1981); *see supra* notes 262-63 and accompanying text.

366. *Id.* at 1302-22.

367. *Id.* at 1326.

368. 712 F.2d 584 (D.C. Cir. 1983). *See generally* Kelly, *Court ruling supports OCS leasing plan*, OFFSHORE, Oct. 1983, at 56 (discussing the practical effects of the case); Smyth, *A Further Analysis of Section 18 of the Outer Continental Shelf Lands Act:* California v. Watt, *a Common Sense Interpretation*, 16 NAT. RESOURCES L. NEWSLETTER 1 (1983); Comment, *supra* note 263, at 104-12.

369. *Id.* at 590-612.

370. 43 U.S.C. § 1344(a) (1982).

371. 712 F.2d at 590.

372. *Id.* at 591-94.

373. 43 U.S.C. § 1344(a) (1982).

374. 712 F.2d at 592.

as precisely as possible.[375] There was nothing to limit the size if it was given to the best of the Secretary's knowledge.[376]

The petitioners went on to submit that the Secretary had violated the provisions of section 18(a) by delegating to industry the responsibility for tract selection.[377] This argument was also unsuccessful. The court reasoned that the OCSLAA, a pyramidic statute, was designed to elicit input from parties having an interest in OCS development.[378] The Call for Information, which attempts to elicit comments from states, local governments, and others, as well as industry, was a legitimate example of OCS participation.[379] With the dismissal of these arguments, areawide leasing was effectively given judicial approval.

Another major legal challenge was mounted by the petitioners on the basis of section 18(a)(4) of the OCSLAA, which requires the Secretary to lease OCS lands in a fashion that assures fair market value.[380] Because the term "fair market value" for the purposes of section 18 is not defined in the OCSLAA, the Secretary adopted the common law definition, which holds that fair market value is the price that a knowledgeable and willing seller would accept from a knowledgeable and willing, but not obligated, buyer.[381] The petitioners also suggested that the large expansion in available tracts would reduce the bonus per acre rate,[382] a situation the Secretary was quite prepared to accept as the probable result of his program.[383]

The court found that the petitioners' concept of fair market value merely focused on the size of the bonuses and the goal of obtaining maximum up-front revenue.[384] But this was not the same thing as fair market value. Included in the latter notion was the concept of socially optimal supply. The court believed that the supply of leases under the Watt program would satisfy competitive demand.[385] The court further noted that despite the administration's heavy reliance on market competition to pro-

375. *Id.*
376. *Id.* at 592-93.
377. *Id.* at 593.
378. *Id.*
379. *Id.* at 593-94.
380. 43 U.S.C. § 1344(a)(4) (1982).
381. 712 F.2d at 606. Although in actuality there is a definition of "fair market value" in the OCSLAA, this definition relates only to the sale of minerals reduced to ownership. *See* 43 U.S.C. § 1331(0) (1982).
382. 712 F.2d at 606-08.
383. *See supra* text accompanying notes 345-49.
384. 712 F.2d at 607.
385. *Id.*

vide fair market value, Secretary Watt had retained a system of post-lease tract evaluation.[386] Thus, despite the petitioners' attack on its adequacy, it could not be conclusively shown that the new tract evaluation method was unreasonable.

The court might have added that another important factor built into Secretary Watt's concept of fair market value was the measure of return for government from the fixed component (usually a 16⅔% royalty) of lease bids and taxes.[387] These returns depend on discoveries and production — the central objectives of the new offshore regime. The MMS estimates that only twenty-five percent of future OCS revenues will come from bonuses,[388] and that seventy-five percent will be derived from royalties and taxes. The DOI forecasts that the ratio may be even higher in frontier areas.[389]

E. *The Effect of the Environmental Statutes on the Watt Plan*

It was mentioned above that the environmental statutes were a major factor in the failure of the proposed expedited OCS programs of the 1970's.[390] The Reagan administration did not make any substantial changes in this legislation, even though the Watt program proposed a dramatic increase in the leasing of frontier areas of the OCS. As many of the states adjacent to these frontier waters had a history of environmental consciousness, it would have been surprising if the states and their resident environmentalists had not used statutes such as NEPA, CZMA, and ESA to attempt to slow the pace of the new lease offerings.

It has already been noted that NEPA plays an integral role in the OCS pre-lease process.[391] It also has a role in the post-lease stage. If the MMS feels that the approval of exploration, or development and production plans, constitutes a "major federal action" then an EIS must be prepared with respect to the relevant tracts.[392] The CEQ had also

386. *Id.*

387. *See* MINERALS MGMT. SERVICE, *supra* note 285, at 98-100; Palmer & Kelly, *supra* note 235, at 243-46.

388. *Outer Continental Shelf Lease Sales and the Department of the Interior's 5-Year Leasing Plan: Oversight Hearings Before the Subcomm. on Oversight and Investigations and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st & 2d Sessions, 153 (1984) (testimony of David Russell, Deputy Director, Minerals Mgmt. Service).

389. *See* Palmer & Kelly, *supra* note 235, at 244.

390. *See supra* notes 107-10 and accompanying text.

391. *See supra* notes 280-298 and accompanying text.

392. 42 U.S.C. § 4332(C) (1982). "At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action." 43 U.S.C. § 1351(e)(1) (1982).

promulgated regulations establishing "tiering" before the election of the Reagan administration.[393] After the 1980 case of *North Slope Borough v. Andrus*,[394] the legality of tiering was no longer in doubt. Accordingly, later NEPA challenges tended to be based on the adequacy of the EIS. In *Massachusetts v. Watt*,[395] for instance, the United States Court of Appeals for the First Circuit affirmed a lower court judgment holding that the FEIS for Lease Sale 52 was insufficient to meet legal standards.[396] In the lower court ruling it was determined that the EIS cost-benefit analysis had been undertaken on the basis of there being reserves of 1.73 billion barrels of oil and 5.25 trillion cubic feet of gas in the planning area.[397] Exploratory drilling from another earlier lease sale, however, had indicated that this estimate was probably twenty times too large.[398] This information was merely included by way of addendum in the FEIS for Lease Sale 52.[399] Based upon these lower court findings, the court of appeals held that such an FEIS would defeat NEPA's purpose of ensuring that federal decisions are taken after their potential environmental consequences have been properly scrutinised.[400]

The litigation caused by the CZMA[401] was finally resolved by the United States Supreme Court in *Secretary of the Interior v. California*,[402] a case which arose out of Lease Sale 53. The fourth lease sale of Secre-

393. *See* 40 C.F.R. § 1502.20 (1984).

394. 642 F.2d 589 (D.C. Cir. 1980).

395. 716 F.2d 946 (1st Cir. 1983), *aff'g* 560 F. Supp. 561 (D. Mass. 1983). For a pre-1980 case upholding the adequacy of an EIS prepared by the DOI for exploration of the Mid-Atlantic OCS, see County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977). For a discussion of the implications of *County of Suffolk*, see Casenote, *Offshore Oil Development and the Demise of NEPA*, 7 B.C. ENVTL. AFF. L. REV. 83 (1978); Casenote, *Standards of Adequacy for an EIS for Offshore Leasing*, 18 NAT. RESOURCES J. 667 (1978).

396. 716 F.2d at 953.

397. Conservation Law Found. v. Watt, 560 F. Supp. 561, 569 (D. Mass.), *aff'd sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

398. *Id.* at 569-70.

399. *Id.*

400. 716 F.2d at 952-53.

401. For a further discussion of CZMA issues, see Berger & Saurenman, *The Role of Coastal States in Outer Continental Shelf Oil and Gas Leasing: A Litigation Perspective*, 3 VA. J. NAT. RESOURCES L. 35 (1983); Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent With State Coastal Zone Management Programs?*, 14 U.C.D. L. REV. 105 (1980); Harvey, *Federal Consistency and OCS Oil and Gas Development: A Review and Assessment of the "Directly Affecting" Controversy*, 13 OCEAN DEV. & INT'L L. 481 (1984); Moore, *Outer Continental Shelf Development and Recent Applications of the Coastal Zone Management Act of 1971*, 15 TULSA L.J. 443 (1980); Comment, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401 (1984); Comment, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL. L. REV. 159 (1982); Casenote, *supra* note 263, at 550-58; Comment, *supra* note 263, at 112-40.

402. 104 S. Ct. 656 (1984).

tary Andrus's five-year program, Lease Sale 53 was scheduled to be held for the Central and North Californian OCS in May 1981. California has, pursuant to the CZMA, an approved California Coastal Zone Management Plan (CCZMP), which is administered by the California Coastal Commission (CCC).[403] In July 1980, the CCC requested Secretary Andrus to submit a consistency determination in accordance with section 307(c)(1) to the effect that Lease Sale 53 was in conformity with the CCZMP.[404] In October, the Secretary replied that since Lease Sale 53 had no "direct effects" on California, no determination was required.[405] When Secretary Watt took over in early 1981 the CCC addressed the same request to him. Again, the response received by the CCC was negative. On April 29, 1981, California filed for an injunction against the lease sale in the United States District Court for the Central District of California.[406]

The district court allowed for the acceptance and opening of the bids, but not for the awarding of leases. A preliminary injunction which prevented the DOI from accepting or rejecting the submitted offers was granted in May of 1981.[407] District Judge Pfaelzer's full opinion of August 18 focused on interpreting the words "directly affecting" as used in section 307(c)(1) of the CZMA.[408] The Secretary maintained that "directly affecting" was used in the CZMA in a straightforward physical context and therefore was intended to encompass "effects resulting from an activity without an intervening cause."[409] If this interpretation was correct, OCS leasing would indeed have no direct effect on a coastal zone because various post-lease procedures were necessary before any drilling could occur. California contended that "directly affecting" could refer to wider social and economic effects resulting from the choice of tracts and lease conditions or stipulations which are adopted at the leasing stage.[410]

Judge Pfaelzer agreed with the plaintiffs' perspective of section 307(c)(1) and held that the section was ambiguous.[411] Judge Pfaelzer further found that the legislative purpose of the CZMA had been to enable the coastal states to effectively plan for OCS oil and gas develop-

403. *See* Comment, *supra* note 38, at 799-801.
404. California v. Watt, 520 F. Supp. 1359, 1366 (C.D. Cal. 1981), *aff'd*, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 104 S. Ct. 656 (1984).
405. *Id.* at 1366-67.
406. *Id.* at 1367.
407. *See id.*
408. *See* 16 U.S.C. § 1456(c)(1) (1982).
409. 520 F. Supp. at 1378.
410. *See* Casenote, *supra* note 263, at 554-55.
411. 520 F. Supp. at 1368-69.

ments.[412] It was at the leasing stage that "critical decisions are made as to the size and location of the tracts, the timing of the sale and the stipulations to which the leases are subject."[413] If the "physically affecting" test of the DOI had been correct, the states would only be "consulted after the plans are drawn and the parameters for exploration and development are set."[414]

An issue the court did not address directly was who, given the correctness of California's case, was to be the judge of what constituted "to the maximum extent practicable"? Section 307(c)(3), which deals with consistency with respect to exploration and development and production plans, provides that the state, or in certain circumstances, the Secretary of Commerce, may decide.[415] But no such procedures are included in section 307(c)(1).[416] Judge Pfaelzer's remedy, however, cast some light on her concept of the resolution of this issue. She invalidated leases awarded with respect to certain tracts which, according to California, could not be leased consistently with the CCZMP. Specifically, she held that these tracts could not be leased till all the requirements of the CCZMP had been met.[417] The implication of this reasoning was that it was up to state authorities to decide what constituted "to the maximum extent practicable." Had this interpretation of the CZMA been accepted, states having CZMP's would then have had very significant influence over the exploration and development of the OCS. Accordingly, the DOI appealed the decision to the United States Court of Appeals for the Ninth Circuit. Pending the appeal, the DOI's policy in dealing with OCS lease sales was to regard the Secretary's literal analysis of section 307(c)(1) as being correct.[418]

The Ninth Circuit decided the case in much the same fashion as the district court.[419] Although the views and legislative interpretation of Judge Pfaelzer were affirmed, the issue of jurisdiction to decide maximum practicability provoked a disagreement with the district court's finding that a state's perception of consistency should "ultimately be controlling."[420] The court of appeals believed that if the state refused to

412. *Id.* at 1369.
413. *Id.* at 1371 (footnote omitted).
414. *Id.*
415. 16 U.S.C. § 1456(c)(3) (1982).
416. *See id.* § 1456(c)(1).
417. 520 F. Supp. at 1389.
418. Berger & Saurenman, *supra* note 401, at 61-62.
419. California v. Watt, 683 F.2d 1253 (9th Cir. 1982), *aff'g* 502 F. Supp. 1359 (C.D. Cal. 1981), *rev'd sub nom.* Secretary of the Interior v. California, 104 S. Ct. 656 (1984).
420. *Id.* at 1266.

concur with the Secretary of the Interior's consistency determination, the disagreement should be referred to the Secretary of Commerce pursuant to the procedures laid down in section 307(c)(3)(B).[421] The court thus held that section 307(c)(3)(B) procedures applied to section 307(c)(1).[422]

Reflecting its difference with the judgment of the district court, the Ninth Circuit varied the latter's remedy. The invalidation of the bids was overturned and Lease Sale 53 was enjoined with respect to the contested tracts till the outcome of the submission of DOI's consistency determination became apparent.[423] The Secretary of the Interior appealed again, this time to the Supreme Court.

Secretary of the Interior v. California[424] was decided by the United States Supreme Court on January 11, 1984. Justice O'Connor, who wrote for the majority, found, as had both lower courts, that section 307(c)(1) was ambiguous.[425] Recourse had to be made to the legislative history of the CZMA. The Court reasoned that under a strict reading of the legislative history, the key to understanding "directly affecting" was to analyse the geographic extent of the "coastal zone."[426] Federal lands, including parks, military installations, and Indian reservations lying on or near the coast, are not coastal lands for CZMA purposes because of their federal ownership. Therefore, the purpose of section 307(c)(1), the Court believed, was to ensure that federal activities in those enclaves were, to "the maximum extent practicable," in conformity with the state CZMP.[427] Section 307(c)(1), the Court held, was never intended to apply to the OCS.[428] Consequently, the Supreme Court's decision means that there is now no mandatory CZMA pre-lease procedure.

It has also been observed that the ESA, because of its strong substantive and procedural provisions, is one of the most potent environmental statutes.[429] The ESA's substantive requirements could cause particular difficulty for expedited OCS leasing because lucrative frontier areas such as California, Alaska, and the Georges Bank have a very wide variety of wildlife. Indeed, this is particularly true of Alaska, a key to the Watt program. But problems in ESA compliance comprehend a wider

421. *Id.* at 1265-66.
422. *Id.* at 1266.
423. *Id.* at 1266-67.
424. 104 S. Ct. 656 (1984).
425. *Id.* at 662-63.
426. *Id.* at 662.
427. *Id.* at 672.
428. *Id.* at 666, 672.
429. *See supra* notes 86-95 and accompanying text.

scope than the large variety of wildlife; they also extend to the complexity of differing ecosystems. According to Elizabeth Kaplan, "[s]o little is known about the living resources of the 30,000 miles of pristine Alaskan coast and its waters that it would be impossible to assess the impacts of drilling in much of the OCS."[430]

These concerns became the object of litigation in *Village of False Pass v. Watt*.[431] Lease Sale 70, relating to the St. George Basin area of the Alaskan OCS, had been planned for February 1983. A number of local Alaskan residents, fishermen, and environmentalists challenged the sale, arguing that Lease Sale 70 was in violation of the ESA.[432] The Secretary had, they submitted, failed to use all methodologies and procedures to ensure that there would be no likelihood of jeopardy to whales.[433] Although it was later found that there was insufficient information available to determine whether offshore activity would be likely to endanger the whales, pre-lease studies had shown that two possible dangers arose in the form of oil spillages and noise pollution. The United States District Court for the District of Alaska held that while the Secretary had taken all steps appropriate at the leasing stage to minimise the risk from oil spills, he had not taken adequate measures to deal with noise pollution.[434] The Secretary's main failure was that he neglected to ensure that the whales would be as safe as possible from the adverse effects of pre-exploration, but post-lease, seismic work.[435] The court ordered that leases should not be awarded for Lease Sale 70 OCS tracts until the Secretary had remedied this defect.[436]

While the ESA does not require that a decision be halted if environmental analysis indicates a lack of information, section 7(d) prohibits any irretrievable commitment which might later foreclose alternative courses of action facilitating compliance with section 7(a)(2).[437] Pre-lease biological assessments may often return a verdict of insufficient information in

430. Kaplan, *supra* note 66, at 25.

431. 565 F. Supp. 1123 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984).

432. *Id.* at 1159.

433. The ESA does not expressly require that federal agencies use all methodologies and procedures to avoid jeopardy to endangered species. *See* 16 U.S.C. § 1536(a) (1982). Such a requirement, however, has resulted from earlier interpretations of the Act. *See, e.g.*, Roosevelt Campobello International Park v. E.P.A., 684 F.2d 1041, 1049 (1st Cir. 1982) (agency has duty to use "all methods and procedures which are necessary . . . to prevent the loss of any endangered species, regardless of the cost.").

434. 565 F. Supp. at 1161-62.

435. *Id.* at 1162-63.

436. *Id.* at 1165-66.

437. *See* 16 U.S.C. § 1536(d) (1982).

the Alaskan OCS. If the envisaged lease sales are held, a very difficult question may arise as to whether subsequent federal approval of exploration, or development and production plans, would constitute an irretrievable commitment within the meaning of section 7(d) of the ESA.

The environmental statutes are undoubtedly a major influence in contemporary OCS leasing. NEPA, for example, is a cornerstone of the offshore planning process. The statutes have also caused a significant amount of litigation. But opponents of the Reagan administration's OCS plans have not been able to use the environmental legislation to disembody the expansion program. The large scale delays and cancellations of the 1970's have not, on the whole, been repeated. Court challenges have, at the time of writing, resulted in the cancellation of only one lease sale so far in this decade.[438] However, environmental litigation has caused a considerable number of delays and tract deletions. This has been particularly true of the Californian OCS where every lease sale of this decade has been delayed.[439] But the principal issue in the Californian litigation was the meaning of section 307(c)(1) of the CZMA. This question has now been finally resolved in favor of DOI. Two of the four Alaskan lease sales have been delayed for short periods. In addition, leases have now been awarded for Lease Sale 70[440] (St. George Basin). Two out of the three Atlantic sales have passed without incident, though Lease Sale 52 was cancelled. Not a single environmental challenge has been mounted against Gulf of Mexico lease sales since the inception of the present administration.[441] All told, this is not a record of excessive disruption. Indeed, it is the recent actions of Congress which have proven much more disruptive.

F. *Important Legislative Developments and Issues*

The concerns of coastal states have been addressed not only in the courts but also in the Congress. Three topics of particular relevance to the goals of the Reagan administration—lease moratoria, coastal revenue sharing, and CZMA consistency—are dealt with below.

438. The cancelled lease sale was Lease Sale 52. *See supra* notes 395-400 and accompanying text.

439. Lease Sales 53, 68, and 73 were delayed pending litigation relating to CZMA consistency issue. For the effects of the litigation on the first two sales, see Berger & Saurenman, *supra* note 401, at 37-66. Lease Sale 80 was delayed because of the congressional moratoria. *See infra* notes 442-58 and accompanying text.

440. *See* Rintoul, *Operators to Begin Bering Sea Drilling*, OFFSHORE, June 1984, at 35, 36.

441. Louisiana did, however, unsuccessfully attempt to enjoin Lease Sale 81 (Central Gulf) on the basis of the OCSLAA. *See* Louisiana v. Clark, No. 84-1886 (E.D. La. April 23, 1984).

Congressional opponents of the Watt program have in the last four years attempted to include provisions in the yearly DOI appropriations bills which would exclude funding for offshore leasing in certain parts of the OCS. These efforts have met with increasing success. In fiscal year 1982, 736,000 acres of the OCS were put off limits for oil and gas leasing.[442] Funding was withheld for leasing activities relative to thirty-six million acres for fiscal year 1983.[443] The leasing moratoria were further extended for fiscal year 1984, when President Reagan signed the DOI appropriations bill for that year, H.R. 3363, into law on November 4, 1983.[444] As enacted, H.R. 3363 severely restricted or curtailed finances for Lease Sale 79 (Eastern Gulf of Mexico),[445] Lease Sale 80 (Southern California),[446] and Lease Sale 82 (North Atlantic).[447] Thus despite the lobbying efforts of the oil industry,[448] the moratoria relating to fiscal year 1984 effectively excluded more than fifty-two million acres from scheduled lease sales.[449] The DOI appropriations bill for fiscal year 1985 continued to restrict or curtail finances for Lease Sale 80[450] and Lease Sale 82.[451]

The recent OCS leasing moratoria have dealt a considerable blow to the administration's offshore goals. Both DOI and the oil industry are particularly concerned with the effect on access to the lucrative Pacific OCS.[452] In fiscal year 1984, thirty-seven million acres were withdrawn from the Californian OCS.[453] This withdrawal amounts to eighty-five percent of the entire federal offshore area adjacent to California.[454] The MMS estimates that OCS areas affected by the 1984 moratoria contain

442. AM. PET. INST., *supra* note 1, at 18.

443. *Id.*

444. Department of the Interior and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-146, 97 Stat. 919 (1983).

445. *Id.* § 109, 97 Stat. at 936-37.

446. *Id.* § 113, 97 Stat. at 938.

447. *Id.* § 108, 97 Stat. at 934-36.

448. Talk by John McMahon, Senior Counsel for Shell Offshore, Inc., American Bar Association Meeting in New Orleans (Nov. 1983).

449. AM. PET. INST., *supra* note 1, at 18.

450. Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 111, 98 Stat. 1837, 1855-56 (1984).

451. *Id.* § 108, 98 Stat. at 1853-55.

452. *See generally Oil and Gas in Washington*, WORLD OIL, Feb. 1, 1984, at 23 (noting that recent OCS sales, particularly Lease Sale 73, have been relatively unsuccessful).

453. *Department of the Interior and Related Agencies Appropriations for 1985: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies of the House Comm. on Appropriations—Part 5*, 98th Cong., 2d Sess. 472 (1984) (statement of Paul L. Kelly, Vice-President of Industry and Government Relations, Rowan Companies, Inc., Houston, Tex.).

454. *Id.*

1.35 billion barrels of oil equivalent,[455] and that revenues from lost bonuses would have amounted to $372 million.[456] The American Petroleum Institute projects that if the present restrictions are continued for five years, United States oil production will be reduced by 124,000 barrels a day by 1993.[457] Conflicting signals concerning OCS leasing now emanate from Congress. The OCSLAA requires an expedited offshore program with "an equitable sharing of developmental benefits and environmental risks among the various regions,"[458] yet the moratoria, on the contrary, put significant sections of the OCS out of bounds.

A second important legislative issue is the concept of coastal revenue sharing.[459] Coastal states have, as has been noted above, mineral jurisdiction over their own state waters, which usually extends for three miles.[460] But coastal states do not receive any revenue from bonuses, royalties, or taxes accruing from OCS oil and gas. This revenue goes to the federal government,[461] even though the main social and economic effects of OCS development are on adjacent coasts. Against the backdrop of the Watt program with its expanded lease sales, representatives from coastal states again began to question the division of offshore revenues. A development which contributes to this phenomenon is the fact that federal funding for approved state CZMP's and Coastal Energy Impact Programs (CEIP) is being phased out.[462]

Various bills introduced into Congress over the last few years have unsuccessfully attempted to legislate particular revenue sharing schemes. The Ocean and Coastal Resources Management and Development Block Grant Act of 1982,[463] for example, would have provided coastal states with finances designed to boost the faltering CZMP and CEIP schemes, as well as the National Sea Grant Program. Ten percent of all federal

455. *Id.*

456. *Id.* at 472-73.

457. AM. PET. INST., *supra* note 1, at 27.

458. 43 U.S.C. § 1344(a)(2)(B) (1982).

459. *See generally* Comment, *Outer Continental Shelf Revenue Sharing for Coastal States*, 3 VA. J. NAT. RESOURCES L. 131 (1984) (exploring the ramifications of the OCSLAA on state revenue sharing).

460. *See supra* notes 46-51 and accompanying text.

461. An exception to this rule occurs when a reservoir underlies both state and federal offshore lands. If federal leasing results in hydrocarbons being drained from state tracts, then a procedure is available to ensure that the state can obtain a "fair and equitable" percentage of federal revenues. *See* 43 U.S.C. § 1337(g) (1982).

462. The CEIP is an additional federal funding program designed to help assist coastal states cope with OCS energy impacts. *See* Pub. L. No. 95-372, §§ 501-04, 92 Stat. 629, 660 (1980) (codified at 16 U.S.C. §§ 1456-56a (1982)); *see also* Miller, *supra* note 401, at 422-24 (discussing the CEIP and recent Congressional attempts to devise OCS revenue sharing).

463. H.R. 5543, 97th Cong., 2d Sess. (1982).

revenues from new OCS developments starting from a base year of 1982, and up to a maximum of $300 million,[464] would have been allocated to a special block grant fund known as the Ocean and Coastal Resources Management and Development Fund.[465] This fund would have been divided between the coastal states on the basis of concentration of OCS activity.[466] Substantially similar bills were also unsuccessfully introduced in 1983[467] and 1984.[468]

The stance of industry has been to support coastal revenue sharing.[469] Industry has hoped that if states like California and Alaska are given a financial stake in the development of the OCS then much of the current opposition will recede.[470] The Reagan administration, however, is opposed to the concept[471] since, in this time of financial deficits, the Treasury needs all of the OCS revenues that can possibly be obtained.[472]

Lastly, the recent decision of the Supreme Court relative to the proper interaction between CZMA consistency and federal OCS oil and gas leasing[473] has prompted representatives of coastal states to respond with the introduction of remedial legislation in Congress. H.R. 4589,[474] introduced by Representatives D'Amours, Panetta, and Studds, and S. 2324,[475] introduced by Senator Packwood, would have required that OCS lease sales be made consistent with state CZMP's.[476] As might be expected, the DOI was strongly opposed to these suggested measures. Speaking against both bills in March 1984, the Director of the MMS, William D. Bettenberg, said, "[t]he proposed legislation would set state interests above national interests, cause conflicts rather than resolve them and impose inordinate administrative and litigative burdens on federal agencies."[477]

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464. *Id.* § 3(b)(1), (2).
465. *Id.* § 3(a).
466. For a further discussion of H.R. 5543, see Comment, *supra* note 459, at 155-60.
467. *See* H.R. 5, 98th Cong., 1st Sess. (1983).
468. S. 2463, 98th Cong., 2d Sess. (1984).
469. Palmer & Kelly, *supra* note 235, at 249-52.
470. Talk by John McMahon, *supra* note 448.
471. Comment, *supra* note 459, at 158-60.
472. Palmer & Kelly, *supra* note 235, at 250.
473. *See supra* notes 424-28 and accompanying text.
474. H.R. 4589, 98th Cong., 2d Sess. (1984).
475. S. 2324, 98th Cong., 2d Sess. (1984). For further details concerning both bills, see AM. PET. INST., *supra* note 1, at 84-86; Comment, *supra* note 263, at 140.
476. *See* Davis, *Senate Commerce Moves Bill on Offshore Leasing Actions*, 42 CONG. Q. WEEKLY REP. 1138 (1984).
477. *See* AM. PET. INST., *supra* note 1, at 85-86.

G. *A New Secretary and Some Changes*

In October 1983 Secretary Watt resigned. His successor, William P. Clark, took office on November 21. Previously, Mr. Clark had been National Security Advisor to the President. Upon assuming the Office of Secretary of the Interior, William Clark was instructed by the President to undertake a thorough evaluation of DOI's OCS policy.[478] In December he made certain organisational changes,[479] and in January 1984 he delivered a major statement on policy.[480] Secretary Clark focused on the security risk associated with foreign oil imports and the economic waste involved in sending billions of dollars abroad.[481] OCS oil and gas, he believed, was the best available opportunity to rectify the trend of foreign reliance. His policy for the federal offshore was the same as that established by Congress in 1978: to simultaneously expedite development and protect the environment.[482] He announced a general satisfaction with the market-oriented alterations in the OCS leasing process for which Secretary Watt had been responsible: "The basic concept of areawide consideration still has validity—there is no reason to depart from it at this time."[483]

Secretary Clark's approach in implementing these policies, however, turned out to be somewhat, though not substantially, different from his predecessor. The main differences were reflected in the pre-lease procedure and lease offerings. While areawide leasing was maintained, certain refinements were also made. Industry was asked to identify areas of interest with much more specificity at the Call for Information stage. The process of "scoping" was upgraded, and an increased number of public meetings were established to review the DEIS. Secretary Clark hoped that these changes would facilitate the resolution of most disputes by the time that Area Identification decisions were made.[484] Tract evaluation

478. *See* Matthews, *Clark makes positive moves at Interior*, OFFSHORE, May 1984, at 151, 155-56.

479. *Id.* at 151.

480. Remarks of Secretary William Clark to the United States Dep't of the Interior OCS Policy Committee, in Washington, D.C. (Jan. 12, 1984).

481. *Outer Continental Shelf Leasing Activities: Hearing Before the Subcomm. on Energy Conservation and Supply of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 74-75 (1984) (statement of William Clark, Secretary of the Interior) [hereinafter cited as *Hearing*].

482. "Our OCS policy must and will remain as stated by Congress in 1978. We are committed to expeditiously exploring the OCS and to encouraging production while protecting the ocean and the coastal environment." *Id.* at 79.

483. *Id.*

484. *See Briefing by the Secretary of the Interior: Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. 115-17 (1984) (testimony of Secretary William Clark) [hereinafter cited as *Briefing*].

was undertaken in a somewhat stricter fashion, with more high bids being rejected at Phase One.[485] Despite the fact that the Supreme Court in *Secretary of the Interior v. California* held that the consistency requirement of the CZMA does not relate to OCS lease sales,[486] Secretary Clark continued to elicit at the pre-lease stage the opinion of coastal state authorities on the probable interaction between future exploration and development, and the provisions of any approved CZMP. This information was sought at the Call for Information.[487]

After consultations with the Alaskan congressional delegation and the Governor of Alaska it was decided that Lease Sale 85 (Barrow Arch) would be cancelled.[488] About eighty percent of Lease Sale 92 (North Aleutian Basin) has been deleted because of that area's importance to the fishing industry.[489] Half of the acreage to be offered in Lease Sale 87 (Diapir Field) was deferred to future sales.[490] The major reason underlying this deletion was the relatively low estimated hydrocarbon potential of the tracts in question. The appropriations moratoria, as well as international boundary, fishing, and military concerns, have been responsible for delaying Lease Sale 80 and Lease Sale 82[491] (Southern California and the North Atlantic).

Author's Note: In the wake of President Reagan's landslide reelection, a new Secretary of the Interior, Donald Hodel, was appointed in the fall of 1984. In the spring of 1985, Secretary Hodel released details of a new five-year oil and gas leasing program. The program contains proposals for thirty-three lease sales, five frontier exploration sales, and five supplemental sales.[492] With the exceptions of the central and western Gulf of Mexico, which will continue to have annual sales, the other fifteen areas selected for leasing will have triennial sales.[493] A commitment has also been made to concentrate on leasing better quality acreage. The potential effects of this latter decision on areawide leasing are still unknown.

One of the innovations in the proposed five-year program, the fron-

485. Conversation with John McMahon, Senior Counsel for Shell Offshore, Inc., in New Orleans (Sept. 12, 1984).
486. *See supra* notes 424-28 and accompanying text.
487. *Briefing, supra* note 484, at 147.
488. *See Hearing, supra* note 481, at 93.
489. *See id.*
490. *Id.*
491. *See id.* at 93-94; *see also supra* notes 446-51 and accompanying text (chronicling the effects of the leasing moratoria).
492. Dep't of the Interior, News Release (March 21, 1985).
493. *Id.*

tier exploration sale, allows the DOI to respond to oil embargoes, rising oil prices, or large new OCS discoveries with an enhanced degree of flexibility.[494] All five of the exploration sales are located in parts of the Alaskan OCS described by the MMS as being "tentative."[495] In addition to the frontier exploration sales, the proposed five-year program includes an accelerated sales procedure for certain lucrative areas.[496] The supplemental sales, to be held yearly, are designed to give industry a chance to bid on selected drainage and development tracts, and on tracts which have been the subject of previously rejected bids.

If implemented, the new five-year program would constitute a considerable reduction in the pace of OCS leasing. The reasons for this reduction are twofold. First, the price of oil has continued to decline and seems unlikely to rise sharply during the remainder of 1985 and early 1986. Second, the Congress is expected to continue its anti-offshore development stance at least until the next congressional elections and probably until the end of President Reagan's second administration. As noted previously,[497] about forty-five million acres situated off the shores of California and Massachusetts were excluded from oil and gas leasing in fiscal year 1985.

494. *Id.*
495. *Id.*
496. *Id.*
497. *See supra* notes 450-51 and accompanying text.