FILLING IN A JURISDICTIONAL VOID: THE NEW U.S. TERRITORIAL SEA*

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I. INTRODUCTION

On December 27, 1988, President Ronald Reagan issued a Proclamation extending the U.S. territorial sea from three-to-twelve nautical miles for international purposes.[1] Reagan was advised by the Department of Justice[2] that, by virtue of his role as the sole representative of the United States in foreign affairs, he had the power to acquire sovereignty over this territory, despite the absence of any express constitutional or statutory authority. In his analysis of the impact of this proclamation on federal statutes regulating offshore waters and federal-state jurisdictional divisions, Douglas W. Kmiec of the Department of Justice recognized that intent of Congress is the key factor in determining whether domestic statutes would be affected by this territorial sea extension. In relation to the Coastal Zone Management Act[3] (CZMA), he concluded that the expansion of the territorial sea would not extend the Act's coverage.[4] In an apparent attempt to prevent the proclamation from expanding coastal state jurisdiction, former President Reagan included a proviso stating that "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . ."[5]

The constitutionality of this Proclamation has come under fire from several commentators[6] who argue that acquisition of territory is a legislative rather than a presidential power. Others have argued that even if the President had the authority

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1. Proclamation No. 5928, 54 Fed. Reg. 777 (1989) [hereinafter Territorial Sea Proclamation].

2. Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1, 16 (1990), *reprinting* a memorandum prepared for Abraham D. Sofaer, Legal Adviser, Department of State, from the Office of Legal Counsel, U.S. Department of Justice (October 4, 1988).

3. 16 U.S.C. §§ 1451-64 (1988).

4. Kmiec, *supra* note 2, at 37.

5. Territorial Sea Proclamation, *supra* note 1.

6. *See infra* notes 22-57 and accompanying text.

to assert sovereignty over an extended territorial sea, the proviso quoted above is ineffective absent express congressional approval.[7]

These contrasting views illustrate the ambiguous nature of the ocean management regime now governing the territorial sea. The Proclamation has created a zone without clear jurisdictional authority, where a case-by-case analysis is needed to determine the rights, duties, and responsibilities of citizens, the government, and foreign nationals and nations. This situation is not only inefficient, but absurd. Although Congress recently legislated that the territorial sea expansion does not apply to the CZMA,[8] questions remain, for instance, whether jurisdiction is conferred under the Endangered Species Act in the three-to-twelve mile zone or if several other protectionary measures[9] can be applied throughout a twelve-nautical-mile territorial sea.

This article examines these constitutional and statutory ambiguities, considers historical and current federal-state tensions surrounding the management of nonliving and living resources, and suggests several alternative approaches Congress could take to produce a comprehensive ocean management regime for the United States. It asserts that affirmative Congressional action is preferable to resorting to the judicial

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7. *See infra* notes 24, 28, 31, 45-48, 54, 57, and accompanying text. Congress did not expressly give effect to the proviso in either of the sessions of the 101st Congress; H.R. 1405 (Section 4) would have made it clear that "[each state's] jurisdiction or authority . . . shall not [be] extend[ed] beyond . . . [the] previous geographical limits by the extension of the territorial sea of the United States."

8. The 1990 Coastal Zone Management Act Amendments struck references to "the United States territorial sea" (16 U.S.C. § 1453(1)), and inserted in lieu thereof "the outer limit of State title and ownership under the Submerged Lands Act . . ."

Furthermore, § 1456(c)(3)(B) was amended to require that any area leased under OCSLA "affecting any [land use or water use in] *land or water use or natural resource of* the coastal zone of the state . . . must be consistent . . . [with] *the enforceable policies of*" the coastal state's management plan. This amendment effectively overturned Secretary of the Interior v. California, 464 U.S. 312 (1984) (holding that the act does not apply to oil and gas leases) because of the undeniable impact leasing will have on the natural resources of the coastal zone.

Section 1456(d) was also amended to clarify the Act's application to federal activities whether "in or outside of the coastal zone" which affect any land or water use or natural resource of the coastal zone.

9. Among other statutes made ambiguous by the Proclamation are the Ocean Dumping Act; the Deep Water Ports Act; the International Regulations for Preventing Collisions at Sea; the Prevention of Pollution from Ships; Shore Protection from Municipal or Commercial Waste; and the Independent Safety Board Act. *See infra* notes 61-161 and accompanying text.

process and is the best way to resolve these problems. Thus it is in the best interests of coastal states to push for legislation that would clarify the nature of this zone.

II. THE CONSTITUTIONALITY OF THE UNILATERAL PRESIDENTIAL EXTENSION OF THE U.S. TERRITORIAL SEA TO TWELVE NAUTICAL MILES

A. Introduction

Several commentators have examined the constitutionality of President Reagan's unilateral executive action extending the U.S. territorial sea.[10] Their analyses raise questions regarding the President's authority to exercise power in this fashion. This section summarizes the arguments supporting unilateral acquisition of territory by the President, and contrasts these with the arguments for a more restrictive interpretation of Presidential powers.

B. Sources of Presidential Power

1. Foreign Affairs Power

Although the most legally secure method of extending the territorial sea would be by treaty, the President's authority to act alone through a Presidential Proclamation has been justified by virtue of the President's constitutional role as the sole representative of the United States in foreign relations.[11] Although the Constitution does not specifically address the power to acquire territory on behalf of the United States, the Supreme Court in *Mormon Church v. United States*[12] stated that the powers of the several branches of government to make war, to make treaties, and to

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10. *See e.g.*, Kmiec, *supra*, note 2; Jack H. Archer and Joan M. Bondareff, *The Role of Congress in Establishing U.S. Sovereignty Over the Expanded Territorial Sea*, 1 TERR. SEA J. 117 (1990); Burns, *A Discussion of the Constitutional Issues Raised by Executive Extension of the Territorial Sea Limit* (unpublished student paper prepared for Second-year Seminar at the University of Hawaii, William S. Richardson School of Law, April, 1990).

11. Kmiec, *supra* note 2.

12. 136 U.S. 1, 42 (1890); *see also* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.")

govern the territory of the union provide the necessary authority. The Justice Department focused on practical considerations to support the President's authority to assert sovereignty: "As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation."[13]

The same constitutionally derived authority that arguably allows the President to acquire territory by discovery and occupation could conceivably be cited as additional justification of Presidential power to proclaim sovereignty over an extended territorial sea. This power was judicially recognized in *Louisiana II*,[14] where the Court stated that the President has the power "to determine how far this country will claim territorial rights in the marginal sea as against other nations."[15] *United States v. Curtiss-Wright Export Corp.*[16] also seems to authorize Presidential assertion of sovereignty in the absence of a specifically enumerated constitutional power.[17]

The only definitive constitutionally-based power authorizing Congress to acquire territory, on the other hand, derives from the constitutional power of Congress to admit new states into the union. Congress has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States.[18] Congressional

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13. Kmiec, *supra* note 2, at 16.

14. United States v. Louisiana, 363 U.S. 1 (1960).

15. *Id.* at 34.

16. 299 U.S. 304 (1935).

17. The President's foreign relations power arises from both "the inherent sovereign authority over foreign relations [obtained] when [the United States] secured its independence from Great Britain" (*Curtiss-Wright*, 299 U.S. at 318), and the fact the President exercises many of the powers formerly vested in the British crown that are not enumerated in the Constitution as belonging to Congress. *See* Kmiec, *supra* note 2, at 6 n.16.

In *Curtiss-Wright*, the court stated that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." 299 U.S. at 318.

18. Kmiec, *supra* note 2, at 18.

assertions of jurisdiction or sovereignty in areas of the ocean[19] were all enacted *after* initial Presidential proclamations on behalf of the United States.[20] The Justice Department argues that this history illustrates the operation of constitutional restraints on the power of Congress to proclaim jurisdiction or sovereignty over offshore areas.[21]

The propriety of a President's unilateral assertion of "sovereignty" (as opposed to claiming "jurisdiction" alone) over this area is, however, not free from doubt.[22] One commentator has argued that neither express nor implied constitutional authority for unilateral executive extension of the United States' territorial sea exists.[23] Under this view, the extension of the territorial sea limit can be properly achieved only by congressional action, whether or not in conjunction with an executive initiative. The broad language used by Justice Sutherland in *Curtiss-Wright* relating to Presidential powers can be characterized as *dicta* because the facts of the case reveal that Congress gave the President the power to ban the sale of arms to certain countries.[24] *Curtiss-Wright* cannot be cited as holding that the President has authority to exercise foreign affairs initiatives, such as asserting sovereignty over new territory, in the absence of specifically enumerated constitutional power. The implied powers justifying unilateral acquisition of territory by the President simply do not apply to the territorial sea.[25]

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19. Specifically, the Neutrality Act of 1794, 51 U.S.C. §6 (1988); other federal statutes relating to customs authority, 14 U.S.C. § 89 (1988), and 19 U.S.C. § 1581 (1988); and the OCSLA, 43 U.S.C. §§ 1331-56 (1988).

20. Kmiec, *supra* note 2, at 18 n.54.

21. *Id.* at 18 (at least for international purposes).

22. The advocates of Presidential authority acknowledge this doubt themselves. *Id.* at 36.

23. *See, e.g.*, Burns, *supra* note 10, at 1.

24. Curtiss-Wright, 299 U.S. at 319-20.

25. Other possible modes of acquiring territory are clearly inapplicable to the present territorial sea extension. The most usual method of acquiring territory is through a treaty, but that approach requires participation of the Senate. Purchase and cession are typically accomplished through a treaty. Conquest cannot be relied upon because the necessary factors are not present; in The American Insurance Co. v. Canter, 26 U.S. (1 Peters) 511, 542-43 (1828), the court found the holding of conquered territory to be

(continued...)

The need for caution, secrecy, swift action, and specialized information in the negotiation process (better accomplished by the President than by Congress) generally justifies expansive foreign relations powers for the President. One critic has found these concerns "simply inapplicable to the territorial sea issue," however, because "[t]here is no need for secrecy, swift action or specialized information in extending the territorial sea."[26] He further asserts that whether the President is best situated to announce the assertion of U.S. sovereignty[27] is also irrelevant to the question of how territory is actually acquired because the President could satisfy his role in foreign affairs by simply announcing previously-made Congressional decisions to the world.[28] If Presidential power is to be relied upon, therefore, it must be found in other parts of our constitutional structure.

2. Commander-in-Chief

The apparent purpose of the territorial sea extension was to provide a greater defense perimeter for the United States, specifically to keep foreign intelligence-gathering and naval vessels farther off the coast of the United States.[29] Because the U.S. Constitution places control of the nation's defenses in the Chief Executive, unilateral Presidential action appears to be justified at first glance. The Territorial Sea Proclamation, however, goes beyond merely establishing new boundaries necessitated by modern technology. Although it might be argued that the President's assertion of sovereignty over an extended territorial sea was not intended to intrude

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25. (...continued)
only a temporary military occupation until a treaty is entered into. Furthermore, in Fleming & Marshall v. Page, 50 U.S. (9 Howard) 603, 614 (1849), the Court held that extension of the boundaries of the United States can be accomplished only through the treaty-making power or by legislative authority. Annexation has never been exercised by the President alone, but has been utilized by Congress twice. Burns, *supra* note 10, at 4-7.

26. Burns, *supra* note 10, at 11.

27. Kmiec, *supra* note 2, at 16.

28. Burns, *supra* note 10, at 16.

29. Archer and Bondareff, *supra* note 10, at 117. *See also* U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATION AND DOCUMENTS 603-604 (1957) (listing defensive sea areas established by the President pursuant to 18 U.S.C. § 2152), cited in Kmiec, *supra* note 2, at 11 n.32.

into legislative affairs,[30] the President's powers as Commander-in-Chief do not automatically confer authority to act without participation by Congress.[31]

3. Congressional Acquiescence

In the face of Congressional acquiescence, the Territorial Sea Proclamation might be defensible as a valid executive acquisition of territory. The question becomes whether Congressional action has been sufficient and timely. For example, the initial assertion of jurisdiction over the territorial sea by Secretary of State Thomas Jefferson in 1793 ripened into a claim of sovereignty over time, even though such rights were not clear when the executive branch made its original unilateral claim.[32] It has been noted, however, that Congress acted quickly to

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30. *See* Kmiec, *supra* note 2. The Department of Justice's interpretation of the effect of the Presidential Proclamation on the Coastal Zone Management Act may not necessarily have been crucial to the President's designs.

One commentator has stated that the language of the Proclamation prohibiting domestic impact "avoids the awkward domestic political and legal consequences that would follow a unilateral Presidential attempt to modify Congressional allocation of authority between federal and state governments concerning the coastal zone." *See* Noyes, *United States of America Presidential Proclamation No. 5928: A Twelve-Mile Territorial Sea*, 4 INT'L. J. ESTUARINE & COASTAL L. 142, 146 (1989).

Similarly, in the ABA's Law of the Sea Committee Newsletter, vol. 3, no. 2 (1989), Donald Carr stated that the President "recognized that the domestic legislative consequences involved the authority of Congress" (at 10) and that common sense suggested that each of the statutes should be considered separately. According to Carr, therefore, the proclamation was merely an exercise of the President's foreign affairs authority, leaving domestic legislation unchanged.

On the other hand, the Coastal States Organization has interpreted the President's attempted limitation on domestic statute as going farther than the Justice Department was willing to go. *Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 64, 70 (1989) (statement of Chris Shafer, Chair, Coastal States Organization).

31. *But see infra* note 39 and preceding text for a potential argument to the contrary based on implied "Nuclear Age" powers.

32. *See* Archer and Bondareff, *supra* note 10, at 126: "It is not clear whether Jefferson and the Washington administration intended to assert U.S. *jurisdiction* to one sea league for defensive purposes only or to acquire new territory subject to U.S. *sovereignty* three miles seaward." (Emphasis added.) *See also* Kmiec, *supra* note 2, at 9 n. 24, *quoting* Oct. 16, 1793 letter of George Washington: "[T]he *extent* of Territorial jurisdiction at Sea, has not yet been fixed." *Compare with* Kmiec, *supra* note 2, at 17 n.51:

(continued...)

affirm the Jefferson claim by passing the Neutrality Act of 1794.[33] Passage of the Submerged Lands Act in 1953 also suggests that Congress has not deferred to the executive with regard to the territorial sea. Other historical events show that Congress has not previously acquiesced in unilateral executive acquisition of territory. Most United States' acquisitions have been accomplished by treaty. Congress has twice asserted its own authority to acquire territory by annexing Texas and Hawaii. Congress displayed an intention to participate in the acquisition of territory through the Guano Islands Act of 1856. And the Senate has voted to cut off funds for construction of military bases overseas as a means of protesting the President's acquisition of those bases by executive agreement rather than by treaty.[34]

Similarly, it does not appear that Congress has yielded to Presidential authority as exercised in 1988. One commentator notes that the Territorial Sea Proclamation is "in legal limbo until such time as Congress either passes legislation to give it effect or fails to act, in which case their acquiescence would soon be interpreted as impliedly authorizing the Proclamation to take effect."[35] Congressional failure to act in the near future may lead to an interpretation of implied authorization of

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32. (...continued)

> There may be an argument that President Washington's unilateral assertion of sovereignty over the original territorial sea is now underpinned by longstanding congressional acquiescence. . . . [T]here is at least arguable recognition by the legislature of the President's power in its explicit desire that the United States exercise full sovereignty over the territorial sea claimed by our first president.

33. 51 U.S.C. §6 (1988).

34. Burns, *supra* note 10. *See also*, Protocol of a Conference Held at the Foreign Office, Dec. 9, 1850, 18 Stat. (Part 2) 325-26:

> There is a third example of unilateral acquisition by the President by executive agreement. In this regard, President Fillmore entered into an executive agreement in 1850 in which Great Britain "cede[d] to the United States such portion of the Horseshoe Reef as may be found requisite" for a lighthouse in Lake Erie near Buffalo.

5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 905-28 (H. Miller ed. 1937) (describing the acquisition of Horseshoe Reef), *reprinted in* Kmiec, *supra* note 2, at 15 n.44.

35. Burns, *supra* note 10, at 32.

executive power by acquiescence.[36] The necessary time period for congressional action is "probably very short."[37] Although Congress has yet to pass legislation implementing the Proclamation, its recent attention to this issue suggests that it does not intend to acquiesce.[38]

4. Nuclear Age Powers

In the nuclear age, the imminent and unpredictable threat to national security interests suggests the need for broad Presidential authority in the defense of our country. The President must be allowed to take swift action in response to nuclear attack, because in such situations insufficient time will be available for Congress to deliberate. This power cannot be cited as a source for unilateral Presidential action, however, because no such immediate need exists for an extension of the territorial sea. The Territorial Sea Proclamation is instead, a "momentous break with tradition [that should have] require[d] lengthy debate at the highest levels of government."[39]

C. The Separation of Powers Issue

The constitutional structure on the foreign affairs power suggests that neither the executive nor legislative branch was intended to have exclusive authority. Uncertainty concerning the proper source of authority for asserting sovereignty over an extended territorial sea creates a "classic separation of powers conflict."[40] The quintessential separation of powers case, *Youngstown Sheet & Tube Co. v.*

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36. *Id.* at 22.

37. *Id.*

38. See *supra* note 8. The Coastal Zone Management Act reauthorization amendments illustrate the fact Congress has not yielded authority to legislate with regard to domestic jurisdiction in the U.S. territorial sea.

39. Burns, *supra* note 10, at 1.

40. *Id.* at 9.

Sawyer,[41] although primarily a domestic affairs case, can be validly used to examine separation of powers conflicts in foreign affairs.[42]

Under the *Youngstown* framework, the President's unilateral extension of the territorial sea falls in a twilight zone where he can rely only upon his independent powers. Once in this zone, either (i) congressional inertia, indifference, or acquiescence, or (ii) a consistent administrative policy can be said to authorize executive action.[43] The potential argument that the original territorial sea claim represents a consistent administrative policy is not dispositive. The real issue is the executive policy toward unilateral acquisition of territory. Proper consideration of this issue necessitates an analysis of historical examples of U.S. territorial acquisitions.

D. Historical Examples of Territorial Acquisition

1. Executive Acquisitions

The executive branch acted without participation by Congress in asserting the original claim to the three-nautical-mile territorial sea in 1793 by President Washington and Secretary of State Jefferson.[44] Sovereignty is the "indispensable concomitant" of a nation's territorial sea, however, and therefore prevents the extension of the territorial sea (without changing the definition of "territorial sea" itself) for jurisdictional purposes only.[45]

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41. 343 U.S. 579 (1952) (The Steel Seizure Case).

42. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 414 (1986).

43. *See e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Zemel v. Rusk, 381 U.S. 1 (1965); and Haig v. Agee, 453 U.S. 280 (1980).

44. *See supra* note 32; Archer and Bondareff, *supra* note 10, at 124; and Burns, *supra* note 10, at 17. Archer and Bondareff acknowledge the independent claim of territorial sea jurisdiction by the executive branch, but qualify its precedential value by reference to its limited purposes: (1) to preserve U.S. neutrality and (2) to provide "territorial protection." These authors also note that Congress acted quickly to affirm the Jefferson claim by enacting the Neutrality Act of 1794. Burns also acknowledges the lack of Congressional participation in the 1793 claim. He feels, however, that Jefferson's reference to "Territorial *jurisdiction* at Sea" was not meant to be an assertion of sovereignty. (Emphasis added.)

45. Burns, *supra* note 10, at 11.

Two examples of Presidential acquisition are Midway Islands and Wake Island, both arguably accomplished by discovery and occupation.[46] Such claims are not dispositive of the issue, however. The Midway Islands claim was acted upon by Congress after the annexation of Hawaii; thus the acquisition is traceable through the Republic of Hawaii rather than to a claim based on discovery and occupation. Similarly, the 1899 claim to Wake Island was acted upon by Congress, but not until 1934.[47] Wake Island appears to be the only clear instance[48] when the executive has asserted a right to acquire and govern territory without some color of legislative approval. Nonetheless, some scholars argue that the discovery and occupation of relatively small atolls and islands in the Pacific in the nineteenth century is irrelevant to the unilateral Presidential extension of the territorial sea.[49] Even if unilateral executive action were assumed in these cases, their precedential value is diminished substantially by analogy to the much more significant acquisitions of territory by

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46. The precedential value of Wake Island is unclear because of a continuing controversy over true ownership of the three atolls that make up Wake Island. *See* Heine & Anderson, *Enen-Kio: Island of the Kio Flower*, 19 MICRONESIAN REPORTER 34 (1971). Although the claim was dormant from 1885 to 1986, the Marshall Islands claim the atolls as Enen-Kio, by virtue of discovery and traditional use centuries prior to U.S. occupation. The Marshalls have no written ancient history with which to support their claim, but Enen-Kio is claimed by one of their chiefs. The long, hard voyage to Enen-Kio was motivated by fear, because Marshallese custom called for human sacrifice to provide bones to be used in the tattooing process. Potential victims' lives were spared only if they could provide a substitute bone as strong as a human bone. The wing of a large sea bird found on Enen-Kio was thus their only way to escape death. The Marshallese apparently stopped going to Enen-Kio after the arrival of Christianity, but still feel strongly that the atolls will forever be theirs.

Cf. D. LEFF, UNCLE SAM'S PACIFIC ISLETS (1940); and PACIFIC ISLANDS YEARBOOK (J. Carter ed., 14th ed. 1981). The United States attempted to take formal possession of Wake Island on January 17, 1899, through the claim of Commander Edward D. Taussig of the U.S.S. Bennington. In a 1923 scientific expedition, the only sign of life found was an abandoned Japanese feather gatherer's living site. In 1934, Wake Island was formally placed under Navy Department jurisdiction and is now the responsibility of the Air Force, which requires permission of its Hawaii office before any aircraft may land on the island. Currently about 400 people live at Wake. A weather station and a branch of the National Oceanographic and Atmospheric Administration are located there.

47. *See* Lawson Reno, *The Power of the President to Acquire and Govern Territory*, 9 GEO. WASH. L. REV. 251, 255-75 (1941). Reno states that apparent executive assertion of sovereignty over Midway and Wake was actually gained by virtue of the annexation of Hawaii by Congress.

48. *But see supra* note 46.

49. Archer and Bondareff, *supra* note 10, at 130.

Congress of every other piece of territory in the United States;[50] at most, "acquisition of the islands represents nothing more than an exception to the rule."[51]

2. Congressional Acquisition[52]

The historical precedents of treaty acquisitions,[53] the annexations of Texas and Hawaii, and the Guano Islands Act illustrate the existence of a congressional role in the acquisition of new territory by the United States. The U.S. Constitution expressly gives Congress the power to admit new states into the Union. That power was clearly exercised in the annexation of Texas. The precedential value of the annexation of Hawaii, on the other hand, is inconclusive because Hawaii was not annexed as a state but as a territory.

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50. *See infra* notes 52-56 and accompanying text.

51. Burns, *supra* note 10, at 16.

52. *See supra* notes 18-20 and accompanying text.

53. *See* Treaty Between the United States and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 200, 201, T.S. No. 86 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Feb. 22, 1819, art. 2, 8 Stat. 252, 253 (cession of Florida by Spain); Treaty with Great Britain, June 15, 1846, art. 1, 9 Stat. 869, T.S. No. 120 (Oregon Compromise); Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the Mexican Republic, Feb. 2, 1838, art. 5, 9 Stat. 922, 926-27, T.S. No. 207 (cession of California by Mexico); Treaty with Mexico, Dec. 30, 1853, art. 1, 10 Stat. 1031, 1032, T.S. No. 208 (Gadsden Purchase); Treaty with Russia, March 30, 1867, art. 1, 15 Stat. 539, T.S. No. 301 (cession of Alaska by Russia); Treaty of Paris Between the United States and Spain, *done* Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343; Isthmian Canal Convention, Nov. 18, 1903, arts. 2 & 3, 33 Stat. 2234, 2234-35, T.S. No. 431 (cession of Panama Canal Zone by Panama); Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, art. 1, 39 Stat. 1706, T.S. No. 629 (purchase of the Virgin Islands from Denmark).

See also Cession of Tutuila and Aunuu, Chief of Tutuila to United States Government, April 17, 1900, *reprinted in* American Samoa Code Annotated 2 (1981), and Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220, 229-30 n. 76 (1980); the Manua Islands were ceded in a separate document in July 1904, *reprinted in* American Samoa Code 9-11 (1973). Congress did not formally accept this cession until 1929, 43 Stat. 1253 (Feb. 20, 1929), now codified in 48 U.S.C. § 1431. Swains Islands became a part of American Samoa by joint resolution of Congress, approved on March 4, 1925. H.R.J. Res. 244, 68th Cong., 2d Sess., 43 Stat. 1357 (1925); Guam was acquired by the United States through a treaty of cession concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 1754, T.S. No. 343.

Perfunctory dismissal by the Justice Department of the impact of the Guano Islands Act,[54] through the bare statement that "[the Act] does not appear to be an explicit claim of territory by Congress,"[55] is not warranted. The Act clearly provides a mechanism for legitimizing territorial claims entered by U.S. citizens on behalf of the U.S. government. According to Justice Sutherland, "[n]o action or lack of action on the part of the President could destroy [the] potentiality . . . [of an existing law]. Congress alone could do that."[56]

E. Conclusion

The U.S. expanded territorial sea is a direct result of evolutionary changes in international law.[57] No closely analogous historical acquisition of territory exists. Although failure of Congress to act in the near future likely will not create a constitutional crisis, the dangers of individualized judicial assessment of each federal statute referring to the territorial sea should be heeded.[58] Congress need not accommodate the Justice Department's suggestion that legislation be passed negating the expansion of domestic coverage. Rather, a thoughtful analysis of domestic law affected by the Proclamation should be undertaken, followed by passage of well-coordinated amendments that reflect a comprehensive national oceans policy with a minimum of intergovernmental resource conflicts. The next section presents a survey of statutes impacted by the Territorial Sea Proclamation.

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54. 48 U.S.C. § 1411 (1988).

55. Kmiec, *supra* note 2, at 21, n.65.

56. Archer & Bondareff, *supra* note 10, at 136, citing Curtiss-Wright, 299 U.S. at 322. *See also* Argentine Republic v. Amerada Hess Shipping Corp, 488 U.S. 428, 441 n.8 (1989), in which the Supreme Court suggests that extension of the U.S. territorial sea to twelve miles may affect how domestic laws are interpreted.

57. Archer & Bondareff, *supra* note 10, at 130.

58. *See supra* note 9 and accompanying text.

III. A SURVEY OF STATUTES REFERRING TO THE TERRITORIAL SEA

A. Introduction

This section examines provisions in federal statutes that refer to the territorial sea and evaluates the ambiguities in their interpretation engendered by President Reagan's Territorial Sea Proclamation.[59] Some statutes specifically limit the extent of their applicability to a three-mile territorial sea; others do not address the width of the territorial sea at all. Our research found relatively few serious ambiguities. The statutes discussed below are classified in three ways: serious ambiguities, minor ambiguities, and no ambiguities.

B. Serious Ambiguities

1. Endangered Species Act[60]

The Endangered Species Act prohibits the taking, possessing, selling, delivering, carrying, transporting and shipping of listed threatened and endangered species "within the United States or the territorial sea of the United States."[61] Because Congress did not define the territorial sea in the Act, its provisions may be unenforceable in the three-to-twelve nautical mile zone.[62] The ambiguity particularly effects the protection of nonmammals such as turtles and seabirds (compare the Marine Mammal Protection Act, discussed below).

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59. Territorial Sea Proclamation, *supra*, note 1. A computer search of all references to territorial seas or territorial waters in the United States Code was done to identify ambiguities. Included in the analysis are statutes using "coastal waters" or similar terms when they appear to refer to the territorial sea.

60. 16 U.S.C. §§ 1531-1543 (1988).

61. 16 U.S.C. § 1538(a)(1).

62. Although it is the policy of the National Marine Fisheries Service to enforce the Act in the 3-12 mile zone (and further to the limits of the United States' exclusive economic zone), that authority is not expressly granted by the text of the Act. Telephone interview with Gene Witham, NMFS enforcement agent in Honolulu, November 20, 1990.

2. Ocean Dumping Act[63]

The Ocean Dumping Act regulates the intentional dumping of materials into the ocean.[64] Before dumping material transported from outside the United States into the U.S. territorial sea or contiguous zone, one must obtain a permit from the Environmental Protection Agency.[65] The EPA must deny a permit request if the disposition of the material, except for dredged material, would unreasonably impair navigation in the territorial sea of the United States.[66] The Territorial Sea Proclamation creates three interesting problems. First, can the EPA cite adverse impacts on navigation in the three-to-twelve nautical mile zone as a reason to deny a permit? Second, under the Act, the contiguous zone is defined such that it is *defacto* co-extensive with the twelve-mile territorial sea. Within this zone, a permit from EPA is required if the dumping "may affect the territorial sea or the territory of the United States."[67] Even if the words "territorial sea" in this phrase reflect the three-mile limit, the "territory of the United States" could nonetheless include the twelve-mile territorial sea as the Proclamation was clearly intended to expand the seaward boundary, and thus the territory, of the United States. If so, permits are now required for dumping that affects the three-to-twelve mile zone. Third, the Proclamation is silent in regards to extension of the U.S. contiguous zone from twelve to twenty-four miles. Should such an extension occur, Congress should consider whether to amend the Ocean Dumping Act to reflect the extension.

3. Deepwater Ports Act[68]

The Deepwater Ports Act controls the ownership, construction and operation of deepwater ports. For purposes of the Act, deepwater ports are defined as certain

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63. 33 U.S.C. §§ 1401-1445 (1988).

64. "'Ocean waters' means those waters of the open seas lying seaward of the baseline from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and Contiguous Zone." 33 U.S.C. § 1402(b).

65. 33 U.S.C. § 1411(b).

66. 33 U.S.C. § 1416(c).

67. 33 U.S.C. § 1411(b).

68. 33 U.S.C. §§ 1501-1524 (1988).

structures located beyond the territorial sea.[69] It is unlikely that the Proclamation divests Congress of authority over deepwater ports located within the three-to-twelve nautical mile zone. However, to prevent challenges to the Secretary of Transportation's authority and to ensure that existing and future ports meet federal criteria for licensing, Congress should amend the Act to clarify when a license is required.

4. Prevention of Pollution From Ships[70]

The International Convention for the Prevention of Pollution from Ships (MARPOL), codified domestically as the Act to Prevent Pollution from Ships, is designed to reduce intentional and negligent marine pollution incidents through regulation of ships' operating procedures.[71] Congress adopted separate jurisdictional standards for applicability of Annex V and Annexes I and II. Regulations under Annex V apply to ships of any MARPOL country while in the navigable waters or EEZ of the United States;[72] Annexes I and II apply only in U.S. navigable waters.[73] Because Congress failed to define "navigable waters," and because that term has several meanings in U.S. law, Annexes I and II might not apply in the three-to-twelve mile zone. Annex V clearly does, because it encompasses the EEZ.

Under Article 5 of MARPOL, both the flag state and a coastal state in which a violation occurs may proceed against an offending vessel. Although some ambiguity exists on the international level, a clear trend is emerging that favors preventing the ocean from becoming an unrestricted reservoir for human waste

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69. "'[D]eepwater port' means any fixed or floating man-made structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States." 33 U.S.C. § 1502(10).

70. 33 U.S.C. §§ 1901-1911 (1988).

71. Convention for the Prevention of Pollution From Ships, *done* November 2, 1973, T.I.A.S. 10561, 12 I.L.M. 1319 (1973); Protocol to the Convention with Annexes, *done* February 17, 1978, 17 I.L.M. 546 (1978).

72. 33 U.S.C. § 1902(a)(3) (1988).

73. 33 U.S.C. § 1902(a)(1).

materials.[74] As a matter of sound ocean policy, the Act should be made applicable to a ship from a MARPOL country that illegally dumps waste in the three-to-twelve mile zone.

5. Death on the High Seas by Wrongful Act[75]

The fundamental question of the domestic impact of the Territorial Sea Proclamation is raised under the Death on the High Seas by Wrongful Act legislation. Section 767 explicitly excludes "waters within the territorial limits of any state"[76] from the Act's requirements. An argument might be made that the reference to *state* limits manifests congressional intent to limit application of the act to state jurisdiction as it existed when the act was passed (under the Submerged Lands Act). On the other hand, if the Presidential Proclamation did not succeed in limiting its effect to the international arena, then the territorial boundary of the states may have been extended to twelve nautical miles.

6. National Transportation and Safety Board Act[77]

This Act authorizes an independent National Transportation and Safety Board to investigate major marine casualties involving private vessels "on the navigable waters or territorial seas of the United States."[78] Absent further definition, the geographic extent of the Board's jurisdiction beyond three miles is in doubt.

7. Vessels in United States Territorial Waters[79]

Under this Act, the President is granted emergency powers to regulate anchorage and movement of vessels in the territorial waters of the United States during national

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74. M. Casey Jarman, *Disposal of Waste and Right of Passage* 15 (paper presented at the 24th Annual Conference of the Law of the Sea Institute, Tokyo, Japan, July, 1990) (publication forthcoming).

75. 46 U.S.C. app. §§ 761-768 (1988)

76. 46 U.S.C. app. § 767.

77. 49 U.S.C. app. §§ 1901-1905 (1988).

78. *Id.*, § 1903(a)(1)(E).

79. 50 U.S.C. §§ 191-198 (1988).

emergencies.[80] Because the Territorial Sea Pro-clamation's purpose was to claim a broadened territorial sea for national defense purposes, and this Act is directed towards protection of our national security, Congress likely intended this Act to apply to the U.S. territorial sea, at whatever distance. However, the critical nature of the powers granted necessitates Congressional action to clarify the ambiguity.

8. Foreign Sovereign Immunities Act[81]

The Foreign Sovereign Immunities Act authorizes federal and state courts to decide claims of foreign states to sovereign immunity. Immunity is waived for actions based upon commercial activities carried on in the United States[82] or involving property present in the United States.[83] The United States is defined to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[84] Absent further guidance from Congress, it is unclear whether waiver of immunity can be asserted for activities in the three-to-twelve nautical mile zone.

9. Ocean Thermal Energy Conversion Act[85]

The Territorial Sea Proclamation raises an interesting problem under the Ocean Thermal Energy Conversion Act (OTECA). OTECA provides for regulation of the construction, location, ownership and operation of ocean thermal energy conversion (OTEC) facilities.[86] For facilities owned by American citizens, OTECA clearly applies within the three-to-twelve mile zone.[87] For foreign-owned OTEC facilities,

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80. *Id.*, § 191.

81. 28 U.S.C. §§ 1602-1611 (1988). *See also* 47 U.S.C. § 33 (1988).

82. *Id.*, § 1605(a)(2).

83. *Id.*, § 1605(a)(3).

84. *Id.*, § 1603(c).

85. 42 U.S.C. §§ 9101-9168 (1988 & Supp. 1989).

86. *Id.*, § 9101 (1988).

87. *Id.*, § 9111(a).

however, OTECA jurisdiction extends to only those facilities "connected to the United States by pipeline or cable or located in whole or in part between the high water mark and the seaward boundary of the territorial sea of the United States."[88] Therefore, owners of foreign-owned OTEC facilities, unless the facility is a vessel,[89] may not be subject to OTECA in the three-to-twelve mile zone.

C. Other Ambiguities Needing Clarification

1. Travel Control of Citizens and Aliens During War or National Emergency--Restrictions and Prohibitions on Aliens[90]

This law restricts the entering and departing of aliens from the United States during times of war or other national emergency.[91] The United States is defined to include "all territory and waters, continental and insular, subject to the jurisdiction of the United States."[92] Although not much of practical significance may be at stake here, both the Territorial Sea and Exclusive Economic Zone Proclamations[93] would permit Congress to expand authority under this Act out to 200 miles. Whether it does so automatically is unclear.

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88. *Id.*, § 9101(a).

89. Arguably, an OTEC vessel could not operate in the 3-12 mile zone, because the innocent passage regime is applicable to foreign vessels in the extended territorial sea. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, *reprinted in* 21 I.L.M. 1261 (1982), arts. 17-32. Carrying on OTEC activities falls outside the definition of innocent passage and is therefore precluded. *Id.*

90. 8 U.S.C. § 1185 (1988).

91. *Id.*, § 1185(a).

92. *Id.*, § 1185(c).

93. Territorial Sea Proclamation, *supra* note 1; Presidential Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).

2. Tariff Act of 1930[94]

Ambiguity under this Act is raised in relation to civil penalties for aviation smuggling. Certain penalties apply to enumerated acts "performed within 250 miles of the territorial sea of the United States."[95] Without Congressional clarification, application of this section will extend either 253 or 262 miles seaward of the coast, depending on the definition of the territorial sea.

3. Deep Seabed Hard Mineral Resources Act[96]

The continental shelf in this law is defined in reference to the territorial sea:

> 'Continental Shelf' means -- (A) the seabed and subsoil of the submarine areas adjacent to the coast, but outside of the area of the territorial sea . . . to a depth of exploitability.[97]

The statute contains no language similar to the Submerged Lands Act[98] specifically defining the territorial sea according to Congressional grant, thereby creating an ambiguity. No serious problem exists, however, because it is clear that Congress intended this act to apply to mining beyond the continental shelf.

4. International Navigational Rules Act[99]

By statute, Congress has authorized the President to adopt the International Regulations For Preventing Collisions at Sea.[100] However, vessels "while in the waters of the United States shoreward of the navigational demarcation lines dividing

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94. 19 U.S.C. §§ 1401-1677k (1988).

95. *Id.*, § 1590(g).

96. 30 U.S.C. §§ 1401-1473 (1988).

97. *Id.*, § 1403(2).

98. See discussion, *infra* notes 171-77 and accompanying text.

99. 33 U.S.C. §§ 1601-1608 (1988).

100. *Id.*, § 1602.

the high seas from harbors, rivers, and other inland waters of the United States"[101] are not subject to international regulations. "High seas" is defined in the law to mean "all parts of the sea that are not included in the territorial sea or in the internal waters of any nation."[102] Because the demarcation lines are already drawn,[103] the ambiguity is largely irrelevant.

5. Merchant Marine Act of 1920[104]

Under the Merchant Marine Act, it is illegal to transport merchandise by water or by land and water "between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws. . . ."[105] Despite the absence of a specific reference to the territorial sea, the boundary issue could arise in the context of the language quoted above if, for example, an artificial island located six miles offshore were used as a transshipment point. The answer depends upon whether the Proclamation is a constitutionally valid acquisition of territory that conferred U.S. sovereignty over the three-to-twelve nautical mile zone.

6. Outer Continental Shelf Lands Act[106]

The Outer Continental Shelf Lands Act establishes a system for leasing minerals on the U.S. outer continental shelf. For purposes of the Act, federal jurisdiction over resources on the continental shelf begins at the seaward boundary of the coastal states as defined by the Submerged Lands Act.[107] Among the purposes of the Act are provisions for federal assistance to states to ameliorate adverse affects to their coastal zones and for state participation in policy and planning decisions regarding

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101. *Id.*, § 1604(a).

102. *Id.*, § 1601(2).

103. *See* 33 C.F.R. pt. 80 (1990).

104. 46 U.S.C. app. §§ 861-889 (1988 & Supp. 1989).

105. *Id.*, § 883. *See also id.* §§ 801, 883-1, and 5101.

106. 43 U.S.C. §§ 1331-1348 (1988).

107. *Id.*, § 1331.

development of outer continental shelf mineral resources.[108] The term "coastal zone" is defined as extending "seaward to the outer limit of the United States territorial sea."[109] Monies to assist the state are to come from §8(g) revenues.[110] Although not a major problem, a question exists as to whether states can apply for 8(g) monies to use in projects in the three-to-twelve mile zone.

D. No Apparent Ambiguity

1. Tariff Act of 1930[111]

Vessels receiving merchandise while in customs waters beyond the United States territorial sea are subject to arrival, reporting and entry requirements under the Tariff Act.[112] For foreign vessels subject to treaty or other negotiated arrangement, customs waters are those defined in the treaty or agreement.[113] For all other foreign vessels, customs waters extend to four leagues from the U.S. coast.[114] Because four leagues are equivalent to twelve nautical miles, no practical problem exists.

2. Atlantic Striped Bass Conservation Act[115]

State authority under the Atlantic Striped Bass Conservation Act extends to "any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting

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108. *Id.*, § 1332(4)(A), (B).

109. *Id.*, § 1331(e).

110. *Id.*, §§ 1332(4), 1337(g).

111. 19 U.S.C. §§ 1401 to 1677k (1988).

112. *Id.*, § 1401(k).

113. *Id.*, § 1401(j).

114. *Id.*

115. 16 U.S.C. §§ 1851 (Historical and Statutory Notes) (1988).

the territorial sea of the United States. . . ."[116] Because no new pockets would be created by the extension of the territorial sea from three-to-twelve miles, this statute does not need amendment. The second use of territorial sea in the Act is not impacted by the Proclamation because it is referenced to the baseline rather than the seaward limit.[117]

3. Shore Protection Act of 1988[118]

This law prohibits the transport of municipal or commercial waste in coastal waters without a permit.[119] Because "coastal waters" are defined to include both the territorial sea and the EEZ,[120] the Proclamation does not affect jurisdiction under this Act.

4. Longshore and Harbor Workers' Compensation Act[121]

This Act provides coverage for personal injuries occurring on the navigable waters of the United States. The term "United States" is defined to include the territorial waters of the coastal states, the territories, and the District of Columbia.[122] Courts have construed the term "navigable waters" broadly to include both state waters and high seas areas beyond twelve miles.[123] Therefore, no practical ambiguity has resulted.

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116. *Id.*, § 1856(2).

117. *Id.*, § 1851 (Historical and Statutory Notes).

118. 33 U.S.C. §§ 2601-2623 (1988).

119. *Id.*, § 2602(a).

120. *Id.*, § 2601(2).

121. 33 U.S.C. §§ 901-950 (1988).

122. *Id.*, § 902(a).

123. St. Julien v. Deamond M. Dulley, 403 F. Supp. 1256 (E.D. La. 1975); Reynolds v. Ingalls Shipbuilding Division, Litton System, Inc., 788 F.2d 264 (5th Cir. 1986).

5. Oil Pollution Act of 1990[124]

The Oil Pollution Act of 1990 governs liability for removal costs and damages associated with oil discharged from vessels or facilities into navigable waters, the adjacent shoreline, or the EEZ. Because the territorial sea is defined in the Act to extend seaward to a limit of three miles,[125] no ambiguity exists.

6. Atlantic Tunas Convention[126]

For purposes of implementing the Atlantic Tunas Convention, Congress has defined fisheries zones to include "the waters included within a zone contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State . . . [to] two hundred nautical miles. . . ."[127] Here the territorial sea is equated with the seaward boundary of each coastal state, which is determined under the Submerged Lands Act (SLA). SLA boundaries are not affected by the territorial sea proclamation, so no ambiguity is created here.

7. Jellyfish or Sea Nettles, Other Such Pests, and Seaweed in Costal Waters: Control or Elimination[128]

This Act authorizes the Secretary of Commerce to assist states in controlling and eliminating jellyfish in coastal waters.[129] Absence of a definition of coastal waters makes it unclear whether the Secretary can assist state efforts in the three-to-twelve nautical mile zone. The broad purpose of the Act, however, suggests that such authority extends into the ocean as far as necessary.

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124. 33 U.S.C. §§ 2701-2761 (1988).

125. *Id.*, § 2701(35).

126. 16 U.S.C. §§ 971-971i (1988).

127. *Id.*, § 971(4).

128. 16 U.S.C. §§ 1201-1205 (1988).

129. *Id.*, § 1201.

8. Comprehensive Environmental Response, and Compensation Liability Act (CERCLA)[130]

This Act establishes a complex system for financing the cleaning up of hazardous waste sites. It applies both on land and in the navigable waters of the United States, which are defined as including the territorial sea.[131] The territorial sea is defined in reference to the Submerged Lands Act,[132] thereby negating any potential ambiguity raised by the Proclamation.

9. General Navigation Rules[133]

This law authorizes the Coast Guard to differentiate between inland waters and the high seas for a variety of purposes. The boundary is to be located within twelve nautical miles from the baseline from which the territorial sea is measured.[134] On its face, this provision does not reflect any ambiguity as the Coast Guard's authority is not tied to the seaward boundary of the territorial sea. However, because "high seas," "territorial seas," and "inland waters" have specific meanings in the context of international law, it would be helpful if Congress would attempt to follow more closely the international definitions. For example, application of the term "high seas" to what are clearly waters of the territorial sea should be abandoned.

10. Eastern Pacific Tuna Fishing[135]

This law refers to the territorial sea only in the context of its association with the baseline from which it is measured ". . . but the Agreement Area does not

130. 42 U.S.C. §§ 9601-9675 (1988).

131. *Id.*, § 9601(15).

132. *Id.*, § 9601(30).

133. 33 U.S.C. § 151 (1988).

134. *Id.*, § 151(b).

135. 16 U.S.C. §§ 972-972(h) (1988).

include the zones within twelve nautical miles of the baseline from which the breadth of the territorial sea is measured. . . ."[136] Therefore, no ambiguity exists.

11. Marine Mammal Protection Act[137]

The Marine Mammal Protection Act (MMPA) regulates the exploitation of marine mammals in U.S. waters. Waters under the jurisdiction of the United States for purposes of the MMPA include both the territorial sea and the EEZ.[138] This broad definition renders the twelve-mile extension irrelevant to jurisdiction under the Act.

12. North Atlantic Salmon Fishing Act[139]

This Act refers to the territorial sea only to describe the baselines;[140] therefore the Proclamation does not affect it.

13. International Narcotics Control Act[141]

This Act states that "[w]ith the agreement of a foreign country, [prohibition of an officer or employee of the United States making an arrest as part of any foreign police action] does not apply with respect to maritime law enforcement operations in the territorial sea of that country."[142] Although reflective of the United States' willingness to recognize other nations' twelve-nautical-mile territorial seas, the United States' territorial sea is not at issue here.

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136. *Id.*, § 972(2).

137. 16 U.S.C. §§ 1361 - 1407 (1988).

138. *Id.*, § 1362(14).

139. 16 U.S.C. §§ 3601-3608 (1988).

140. *Id.*, § 3606(a). "It is unlawful for any person, or any vessel, subject to the jurisdiction of the United States-- (1) to conduct directed fishing for salmon in waters seaward of twelve miles from the baselines from which the breadths of the territorial seas are measured." *Id.*

141. 22 U.S.C. §§ 2291 (1988).

142. *Id.*, § 2291(c)(4),

14. Sea Grant Act[143]

The Sea Grant Act establishes a nationwide, university-based marine research program. The marine environment includes the ocean, coastal and Great Lakes resources, including those of the coastal zone (as defined in the Coastal Zone Management Act), the Great Lakes, territorial sea, EEZ, OCS and high seas.[144] The broad definition in this Act encompasses the twelve-nautical-mile zone.

15. Ports and Waterways Safety Act[145]

Among other things, the Ports and Waterways Safety Act authorizes the designation of traffic separation schemes for vessels operating in the U.S. territorial sea and high seas approaches to ports.[146] When reasonable and necessary, the Secretary of Transportation can mandate the use of traffic separation schemes for certain categories of vessels operating in the territorial sea of the United states and on the high seas beyond the territorial sea.[147] No problem is presented here under domestic law because the traffic separation schemes are to be created wherever needed, without regard to the status of the waters.

16. Federal Water Pollution Control Act (FWPCA or Clean Water Act)[148]

The Clean Water Act regulates the discharges of pollutants into the navigable waters of the United States, which include the territorial sea.[149] The territorial sea

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143. 33 U.S.C. §§ 1121-1131 (1988).

144. *Id.*, § 1122(6).

145. 33 U.S.C. §§ 1221-1236 (1988).

146. *Id.*, § 1223(c)(1).

147. *Id.*, § 1223(c)(5)(B).

148. 33 U.S.C. §§ 1251-1387 (1988).

149. Several sections apply to the territorial sea: § 1311(h) refers to the discharge of effluents from publicly owned treatment works into the territorial sea; § 1343(a) requires a National Pollution Discharge Elimination Permit for discharges into the territorial sea; § 1344 sets up permit system for disposal of (continued...)

is defined in the Act as extending seaward for three nautical miles.[150] Therefore, the Proclamation does not affect federal or state agency authority under the Clean Water Act.

17. National Ocean Pollution Planning Act[151]

The Ocean Pollution Research and Development and Monitoring Planning Act directs preparation of a plan for pollution research and monitoring of the marine environment. By definition, the marine environment encompasses the territorial sea, EEZ, OCS and high seas.[152] Because application of the Act is so broad, the extension of the territorial sea to twelve nautical miles should have no impact.

18. Vessel Documentation Act[153]

Congress has set out vessel documentation requirements that are prerequisites for employing vessels in certain trades.[154] Certificates of documentation may be endorsed with a registry endorsement that designates the trade the vessel is authorized to engage in.[155] A fishery endorsement is needed to fish in the territorial sea and fishery conservation zones adjacent to Guam, American Samoa, and the Northern Mariana Islands.[156] The breadth of the fishery conservation zone makes the distinction between a three and twelve mile territorial sea irrelevant.

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149. (...continued)
dredge and fill materials into navigable waters, including the territorial sea; and § 1362(7) includes the territorial sea in the definition of navigable waters of the United States.

150. *Id.*, § 1362(8).

151. 33 U.S.C. §§ 1701-1709 (1988).

152. *Id.*, § 1702(4).

153. 46 U.S.C. §§ 12101-12122 (1988).

154. *Id.*, § 12103.

155. *Id.*, § 12110.

156. *Id.*, § 12108(c).

19. Maritime Drug Law Enforcement Act[157]

No ambiguity is present in this statute since it refers only to the territorial seas of foreign nations.[158]

E. Conclusion

The above discussion points out the need for Congressional action to clarify ambiguities in domestic laws that implicate the territorial sea. The diverse nature of the problems created militates against a Congressional approach that would apply one definition to all references in current law to the territorial sea. The preceding review and the discussion that follows also demonstrate the need for Congressional flexibility in dealing with federal-state relationships in the marine waters adjacent to the United States.

IV. MANAGEMENT OF NONLIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

A. Introduction

Historically, both the federal and state governments have made competing claims to ownership (*dominium*) and regulatory authority (*imperium*) over resources in offshore areas. Initially, lack of assertion of authority by the federal government left management of offshore mineral resources in the hands of the adjacent states. President Truman's 1945 claim of United States jurisdiction and control over the resources of the subsoil and seabed of the continental shelf[159] set the stage for federal encroachment. Even though a press release accompanying the 1945 Proclamation stated that the policy established United States jurisdiction "from an international standpoint" and did not "touch upon the question of Federal versus

157. 46 U.S.C. app. §§ 1901-1904 (1988).

158. 46 U.S.C. app. § 1903(c)(1) states: a "vessel subject to the jurisdiction of the United States" includes "(D) a vessel located in the customs waters of the United States, and (E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States."

159. Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (September 28, 1945).

State control,"[160] the federal government soon asserted claims against states with valuable offshore mineral resources, suggesting that the Proclamation served a dual purpose: establishing an international claim and altering the balance of state/federal relations.[161] Although the Submerged Lands Act (SLA)[162] specifically granted title to the submerged lands adjacent to coastal states out to a certain distance[163] (and thus *not* to the extent of an expanding U.S. territorial sea),[164] the history of competing federal-state claims suggests the possibility of renewed state claims beyond the three-nautical-mile limit.

B. Previous Federal-State Conflicts

In the landmark case of *United States v. California*,[165] the U.S. Supreme Court held that the federal government, through its foreign policy power as sovereign, has paramount rights in the submerged lands. The Court was persuaded that no previous case decided conflicting claims between a state and the federal government to the

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160. White House Press Release, September 28, 1945, *reprinted in* 13 DEP'T ST. BULL. 484 (1945).

161. Nicol, *Hawaii's Territorial Sea and Exclusive Economic Zone: Analysis and Assessment of the State's Right to Manage Resources in Extended Ocean Zones* 11 (unpublished student paper prepared for Second Year Seminar, University of Hawaii Law School, April 1987).

162. 43 U.S.C. §§ 1301-1315 (1988)

163. 43 U.S.C. §§ 1301(a), 1311.

164. It is not clear whether the SLA grants to states ownership of the water column and water surface. The language of U.S.C. § 1314(a) reserving federal rights refers to the navigable waters, but the language granting state ownership, use, and management rights speaks only of "lands and natural resources." Section 1311(d) expressly preserves federal authority over navigation, flood control, and production of power; the awareness of ocean thermal energy efforts at that time suggests that Congress considered water column uses, but that inference is not convincing in light of the Act's focus on development of the energy resources of the seabed.

Resolution of this uncertainty would have a direct impact upon the interpretation of statutory ambiguities, discussed *supra* in Section III.

165. 332 U.S. 19 (1947) [hereinafter *California I*].

three-mile belt in a way that required extension of the *Pollard's Lessee v. Hagan*[166] inland-water rule to the ocean area.[167] The Supreme Court also rejected the State of California's historical claim to the three-mile marginal sea because the concept of the territorial sea was not settled in the international community at that time. The original U.S. territorial sea claim was made by Secretary of State Thomas Jefferson *after* the formation of the union; therefore, none of the original thirteen states ever owned the submerged lands of the marginal sea (and consequently neither did California).

In *United States v. Texas*,[168] the U.S. Supreme Court maintained that the "national external sovereignty" rationale of *California* was compelling, despite strong historical claims of *dominium* resulting from Texas's prior status as an independent nation. It held that where property interests are so subordinated to the rights of sovereignty, as here, they will follow sovereignty. Furthermore, consistency with *California, United States v. Louisiana*,[169] and the equal footing doctrine required the national government to prevail.[170]

C. Initial Congressional Response Failed to Resolve Conflict

In 1953, the SLA overturned the *California I, Louisiana*, and *Texas* decisions, giving coastal states exclusive rights to the resources of the seabed within three miles of their coasts.[171] In addition, states bordering the Gulf of Mexico were

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166. 44 U.S. (3 How.) 212 (1845) (holding that the states owned the inland navigable tidewaters in trust for their people, and that because Alabama was admitted to the union on an equal footing with the other states it thereby became owner of the tidelands within its boundaries).

167. *California I*, 332 U.S. at 31.

168. 339 U.S. 707 (1950).

169. 339 U.S. 699 (1950).

170. *Texas*, 339 U.S. at 719.

171. It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in

(continued...)

provided the opportunity to extend boundaries to three marine leagues (nine nautical miles) if they could prove that such a boundary was either previously approved by Congress or existed prior to admission to the union.[172] The federal government's resistance to Gulf State claims of submerged lands beyond three miles from shore prompted suits by Louisiana, Texas, Mississippi, Alabama,[173] and Florida.[174]

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171. (...continued)
accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C. § 1311(a) (1988).

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources.

Id., § 1311(b).

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power.

Id., § 1311(d).

172. The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. § 1312 (1988).

173. United States v. Louisiana, 363 U.S. 1 (1960).

174. United States v. Florida, 363 U.S. 121 (1960).

Only Texas and Florida succeeded in persuading the court to recognize three-marine-league boundaries.

The ambiguity of the SLA with respect to inland boundaries has also sparked litigation. The SLA grant contains the following limiting language: "in no event . . . [t]o be interpreted as extending from the *coast line* more than three geographical miles. . . ."[175] The "coast line" was defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[176] The term "inland waters," however, was not defined in the Act. In *United States v. California*[177] *(California II)*, the Court defined inland waters by reference to standards found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. This Convention allows either a) straight baselines or b) baselines determined by the arcs and circles method. Accepting the federal government's position that application of straight baselines, a method the United States was opposing internationally, would hurt its international posture, the Court applied the arcs and circles test. The *California II* decision has been criticized for abandoning the consideration of historical evidence that had guided the Court in *California I* and for maintaining the "fiction" of national external sovereignty.[178] In the opinion of Professor Milner S. Ball, the protection of national interests would be best achieved by state ownership with a concurrent federal government interest in those rights as outlined in the Constitution -- power over commerce, navigation, national defense, and international affairs.[179]

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175. 43 U.S.C. § 1301(b) (1988) (emphasis added).

176. 43 U.S.C. § 1301(c) (1988).

177. 381 U.S. 139 (1965).

178. Milner S. Ball, *Good Old American Permits*, 12 ENVTL. L.J. 623 (1982).

179. *Id.* at 635. Consider also:

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by § 1311 of this title.

43 U.S.C. § 1314(a) (1988).

President Reagan's Territorial Sea Proclamation appears to have eliminated the security interests behind the federal government's claim to control the offshore waters beyond three miles, thus undercutting the rationale of earlier Court decisions. Coastal state control of areas in the three-to-twelve nautical-mile zone would not now present any significant problems for national security. A strong argument can be made, therefore, that the states should now have substantial powers over the three-to-twelve mile area.

D. Secondary Response Also Ineffective

State opposition to federal offshore development activities prompted 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), which make numerous references to federal-state cooperation.[180] Read with their accompanying

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180. [S]uch States, and through such States, affected local governments, are entitled to an *opportunity to participate*, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.

43 U.S.C. § 1332(4)(C) (1988) (emphasis added).

[T]he rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be *considered and recognized.*

Id., § 1332(5) (emphasis added).

During the preparation of any proposed leasing program under this section, the Secretary shall *invite and consider suggestions* for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program. The Secretary may also invite or consider any suggestions from the executive of any affected local government in such an affected State, which have been previously submitted to the Governor of such State, and from any other person.

Id., § 1344(c)(1) (emphasis added).

Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan.

Id., § 1345(a).

(continued...)

rules, the OCSLA amendments obviously were intended to give the states an opportunity to participate more extensively in federal offshore decisions. For example, section 8(g)[181] requires the Department of Interior to consult with the governor of a state adjacent to a proposed lease of submerged lands where a possibility of common pools or fields exists (recognizing the problem of drainage of hydrocarbons from beneath state lands through wells located in the federal outer continental shelf). Disagreeing with the Interior Department's position that it is not required to *act* on the governor's recommendations, the states of Louisiana and Texas each brought suits to enjoin certain offshore lease sales by the Interior Department.[182] This action represented a drastic step for Louisiana, a producing state whose economy is directly linked to oil and gas revenues. The federal government won the suit and proceeded with the sale of the contested lease, but all monies received from 8(g) common pools (as part of the lease) were placed in escrow by court order. Congress responded to the drawn-out litigation with 1986 amendments to the OCSLA[183] providing for lump sum payment of $1.4 billion from the Section 8(g) fund to the coastal states.

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180. (...continued)

> The Secretary is authorized to enter into *cooperative agreements with affected States* for purposes which are consistent with this chapter and other applicable Federal law. ' Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 1352 of this title), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore.

Id., § 1345(e) (emphasis added).

> The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in *cooperation with affected States.*

Id., § 1346(c) (emphasis added).

181. 43 U.S.C. § 1337(g)(1)(B) and (D) (1988).

182. Mary Ellen Leeper, *Offshore Oil and Gas, in* PROCEEDINGS: NATIONAL CONFERENCE ON THE STATES AND AN EXTENDED TERRITORIAL SEA 58, 62 (Lauriston R. King and Amy Broussard, eds. 1987) [hereinafter PROCEEDINGS].

183. Pub. L. No. 99-272, 100 Stat. 148, 150 (1986) (codified at 43 U.S.C. § 1337(g)).

Uncertainties regarding Congressional intent and statutory interpretation have had a detrimental effect upon the already tense federal-state relations in other states as well.[184] The history of federal-state conflicts illustrates the willingness of the states to fight for their rights in the marginal sea. It is likely, therefore, that the territorial sea extension will lead to renewed litigation of both regulatory (particularly with respect to federal-state cooperation) and proprietary issues. Potential impacts upon other legislation[185] present even further prospects for litigation. These inconsistencies could be addressed through the process of statutory construction, but a much better solution would be for Congress to resolve the uncertainties through establishing a comprehensive and comprehensible national ocean policy.

E. Equities Favoring Coastal State Control

The Territorial Sea Proclamation has arguably tilted the balance of offshore resource interests toward the states. If accepted, this view provides a rational basis for extending state ocean boundaries. At the very least, the Proclamation provides an opportunity to reevaluate the balance of power in offshore resource management. Notions of equity favor such reconsideration. For example, coastal states not only must supply sites and facilities for construction, transportation, processing, and storage but also must bear the environmental burden of these support industries. In addition, the coastal state must provide a governmental and social infrastructure for the offshore workers, a costly undertaking.

Congress should also consider the practical effectiveness of the OCSLA's Section 8(g) and consultation provisions. Evidence suggests that these provisions have not sufficiently protected state interests. Throughout years of contention with the federal government, state frustration has been compounded by the Interior Department's apparent refusal to address state concerns adequately. Despite diligently following the cooperative provisions of the OCSLA, states sometimes have received a mere paragraph in response from the Interior Department stating that their

184. *See, e.g.*, Crystal R. Brand, Casenote, *The Seaweed Rebellion: Federal-State Conflicts over Offshore Oil and Gas Development*, 18 WILLAMETTE L. REV. 535 (1982); Gregory R. Razo, Comment, *The Seaweed Rebellion Revisited: Continuing Federal-State Conflicts in OCS Oil and Gas Leasing*, 20 WILLAMETTE L. REV. 83 (1984); Secretary of Interior v. California, 464 U.S. 312 (1984).

185. *See supra*, Section III "Statutory Ambiguities."

concerns were noted but rejected.[186]

The Department of the Interior's lack of responsiveness created such political pressure from the State of California that Congress has established a moratorium on federal leases off the California coast.[187] In addition to affecting oil and gas development, the shutdown has retarded ocean mining efforts, with a likely continuing negative impact on future mining efforts in the area. The mechanisms in place are ineffective. Without a meaningful right to consultation for states,[188] the federal government has little incentive to act in a manner that takes into account state interests and concerns.

Political and economical advantages are to be gained by making concessions to the coastal states. For example, the Interior Department and the State of Hawaii have entered into a Joint Planning Agreement over offshore hard mineral mining in

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186. Leeper, *supra* note 182, at 65. In one case, a state provided input at each stage of the process, filing over 500 pages of comments to the Interior Department's draft environmental impact statement. The comments did not cause a single change to Interior's planning.

187. *See e.g.*, §§ 110-113 of Pub. L. 100-446, 102 Stat. 1774, 1801 (1988) (moratorium on offshore federal oil and gas leasing included in appropriation measure).

188. *But see* Kem Lowry, M. Casey Jarman & Susan Maehara, *Federal/State Cooperation in Coastal Management: An Assessment of Federal Consistency Provisions of the Coastal Zone Management Act* (publication forthcoming in OCEAN & SHORELINE MGMT.) and discussion *infra* notes 244-246 and accompanying text. This study could be interpreted to show that consultancy has been effective in some circumstances. In 1983, only 432 (or six percent) of the federal consistency reviews were objected to by the states; six percent of the consistency reviews in states responding to a 1988 survey were objected to. *Id.* at 6.

The 1983 and 1988 surveys indicate that state and federal agency officials do resolve many disputes through informal negotiation. Disposition of formal appeals between 1983 and 1991 show that the Secretary of Commerce is reluctant to override state decisions. Of 75 filed appeals, six state objections were overridden and eight upheld; one has been stayed pending further negotiations; twenty-six were withdrawn by mutual consent; sixteen are currently pending approval; and eighteen have been dismissed for good cause. *Id.* at 14. This apparent even-handedness, however, may be misleading. In five of the six cases in which a state agency has sought mediation, the federal agency has refused to participate (the sixth case led to litigation, Secretary of the Interior v. California). *Id.* at 13. The Secretary's written opinions on formal appeals have construed "competing national interest" broadly against the states, finding that the national interest benefits of OCS energy development outweigh potential adverse environmental impacts. *Id.* at n.2, 14, citing Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and 'New Federalism'*, 14 ECOL. L.Q. 9, 41-46 (1987).

the EEZ surrounding Hawaii.[189] Interior's willingness to give Hawaii a substantial role in the preparation of the environmental impact statement and subsequent decision-making has paved the way for future mining efforts. This experience provides a stark contrast to California's experience with offshore oil and gas leasing. Interior's reticence to cooperate fully under the Coastal Zone Management Act created additional political and economic costs, further exacerbating federal-state tension in the offshore area. Interior's refusal to provide consistency certification for oil and gas leases offshore California led to protracted litigation that ultimately reached the U.S. Supreme Court.[190] In *Secretary of the Interior v. California*,[191] the Court agreed with Interior. Although the case vindicated the Interior's legal position, it did nothing to alleviate the political problems. Moratoria continue in waters off California and at the end of its 1990 session, Congress overturned the Supreme Court by extending the CZMA's consistency provision to activities within and outside the coastal zone, including oil and gas leases.

The SLA, OCSLA, and CZMA all recognize the significance of state interests in offshore mineral resource decision-making. Interior's continual ignoring of these interests, coupled with diminished federal security interests in the zone, suggest the need for re-ordering of decision-making in the extended territorial sea.

F. Prospects for Cooperation -- Revenue Sharing

Should the federal government be unwilling to relinquish its control over nonliving resources in the three-to-twelve mile zone, several other options can be pursued. One remedy is for Congress to implement some form of revenue sharing between the state and federal governments.[192] Coastal states would be more supportive of offshore development if they had the financial wherewithal effectively to research, plan, manage, and propose mitigation measures concerning OCS leasing

189. Cooperative Agreement Between the Department of the Interior and the State of Hawaii for Marine Mineral Joint Planning and Review (1988).

190. Secretary of the Interior v. California, 464 U.S. 312 (1984).

191. *Id.*

192. Attempts by Congress to date have been unsuccessful. *See e.g.* S.B. 341 (Title VIII, Impact Assistance) introduced by Senator Johnston; S.B. 49 (Coastal Resources Enhancement) introduced by Senator Stevens; H.R. 94 (Revenue Sharing) introduced by Representative Fields.

impacts, and particularly if they had a positive financial stake in OCS development. The costs of revenue-sharing would be offset by the increased federal receipts that would flow from a more orderly leasing process. More than simply correcting long-standing inequities, revenue sharing represents a small, but critical investment that will ensure timely production and a sound marine/coastal resource management scheme.

In support of their claim[193] for a 50% share of section 8(g) common pool revenues, coastal states analogized their situation to that of states that receive 50% of all revenues derived from mineral leasing of federal lands within their borders. Coastal states, therefore, should receive comparable payment for the inclusive federal leasing of the states' (common oil field) submerged lands.[194]

To counter foreseeable opposition by land-locked inland states, Richard Littleton has proposed a modified revenue sharing plan.[195] He believes that unified support for coastal state expansion, *via* sharing with all 50 states, would increase the chances for a veto override in the Senate, if necessary. The states could be convinced by the argument that coastal resource money going directly into state treasuries would be more secure than federal appropriations. The federal interests in Congress could be appeased by stressing that the proposal changes none of the established rights and duties of the states and the federal government vis-a-vis each other; rather, the proposal is merely a *reallocation* of revenues. And it creates an added benefit: increased ocean awareness. A nation-wide move to institute stronger resource and energy conservation measures would develop naturally out of the realization by inland states that wasteful or careless production procedures reduce the amount of revenues flowing to their individual states.

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193. Leeper, *supra* note 182, at 63. Texas was ultimately successful in obtaining a 50% share where the state was the original lessor, reserves were proven, and the federal lease brought a significantly higher bid as a result of the information obtained from state leasing. The court did not, however, take into account Louisiana's argument regarding the possibility of a state's lands being devalued as a result of unsuccessful adjacent federal exploration.

194. *Id.*, pursuant to the Mineral Leasing Act of 1920.

195. Richard Littleton, *Coastal States, Inland States and a 12-Mile Territorial Sea*, 17 J. MAR. L. & COMM. 539 (1986).

G. Prospects for Cooperation -- Joint Partnerships

The Joint Planning Agreement between Hawaii and the Department of the Interior mentioned earlier demonstrates that a mutually acceptable agreement that accounts for respective interests of states and the federal government can be reached. Although this example may not work in other areas,[196] it is a model for successful federal-state interaction. The state and federal governments had identical interests in this situation; where environmental concerns produce conflict between the two divisions of government, similar cooperative efforts will be less likely to succeed.

H. Conclusion

Ownership of submerged lands out to three nautical miles was granted by the SLA to all coastal states, with the exception of Texas and Florida who have three leagues in the Gulf of Mexico. The federal government argues that the December 1988 Proclamation extending the territorial sea has no legal impact on the proprietary status of submerged lands beyond those boundaries. However, uncertainty regarding the status of this new U.S. territory presents a compelling opportunity for a comprehensive re-examination of federal ocean policy and for reconsideration of the states' role in territorial sea management. These important policy matters should not continue to be accomplished in piecemeal fashion or by default, but in an integrated manner. As Congress has already recognized in the CZMA, "the increasing and competing demands upon the lands and waters of our coastal zone . . . have resulted in . . . permanent and adverse changes to ecological systems."[197] Mere consultative rights, which are often ignored anyway, do not prevent the coastal states from being subjected to the whims of the federal government. Although no single geographic definition will satisfy the needs of all coastal states, a new functional approach to resource management is needed.

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196. *See supra* note 189. The isolation of the Hawaiian islands eliminates conflicts that otherwise exist between adjacent states. The distance from the continental U.S. also presents a problem of overextension for federal management agencies, thereby providing an incentive to seek cooperation from the state.

197. 16 U.S.C. § 1452(1) (1988).

V. MANAGEMENT OF LIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

A. Introduction

Proper management of living resources in United States waters is clearly a matter of crucial importance. Nearly 90% by weight and 70% by value of our fishery resources are caught within twelve miles of the coast.[198] Technological advances over the years have improved the efficiency of the fishing industry, but have also decimated our finite and nonexpanding fishery resources. Contrary to the guiding principles of prior fisheries management efforts, the collapse of some of our managed fisheries have taught us that we have no "under-utilized" species.[199] Consequently, existing management theories must be restructured to incorporate higher conservation standards and encourage the development of enhancement programs. Any proposed alternative approach to living resource management must acknowledge present confusion regarding regulatory authority in the three-to-twelve nautical mile zone.

B. Sources of Conflict, Past and Potential

Under existing statutory arrangements, states have jurisdiction over the resources in the first three miles offshore,[200] but a state can effectively exercise jurisdiction beyond this area with federal acquiescence.[201] Conversely, the federal government can preempt state authority in the territorial sea in exceptional cases involving fisheries found predominantly outside the territorial sea. This action has been taken

198. Timothy R.E. Keeney, *Impact of Extended Territorial Sea on NOAA's Marine Resource Responsibilities, in* PROCEEDINGS *supra* note 182, at 73, 75.

199. Donald F. Squires, *Existing and Potential Resources in Offshore Waters of the United States, in* PROCEEDINGS, *supra* note 182, at 22, 27.

200. *See, e.g.*, Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1861 (1988); Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988).

201. *See, e.g.*, State v. Bundrandt, 546 P.2d 530 (Alaska, 1976); Skiriotes v. Florida, 212 U.S. 69 (1941) discussed *infra* at notes 211-14 and accompanying text. *See also* Jeffery Ballweber & Richard Hildreth, Summary of Fishery Management Implications of the Territorial Sea Extension (Draft for Comment, May 31, 1989).

only twice since 1976,[202] indicating that relations between the states and the federal government under the Magnuson Act have been generally successful.[203]

C. Problems Arising From Exclusive State Control

Any proposed management alternative must be carefully considered, as resolution of federal-state conflicts by granting coastal states control of the twelve-nautical-mile territorial sea could create its own problems. The MFCMA Regional Councils are concerned that their authority will be limited if states are granted jurisdiction over the three-to-twelve-mile zone. Similarly, commercial fishers are afraid that states will use the extended coastal zone to exclude nonresident commercial fishers from state waters. Federal officials have warned that the grant of full fishery management authority to the states would prompt a return to interstate "beggar-thy-neighbor" squabbles.[204] Cooperative interstate management efforts prior to the MFCMA failed largely because each state sought to protect its own fishing industry at the expense of its neighbors. The clear danger is that narrow-minded and uncoordinated management efforts could have a devastating impact on the operation of sound conservation programs.

D. Problems Arising From Preemptive Federal Control

The problems foreseen in the previous paragraph are not necessarily determinative. Leniency of the federal government has been a cause of major problems in the management of living resources.[205] The *Baldrige* cases[206] showed that as long

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202. *See* Milner S. Ball, *The States and the Territorial Sea, in* PROCEEDINGS, *supra* note 182, at 11, *citing* the following two cases for the proposition that the line drawn on water at three miles is not an effective division between state and federal interests:

> Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (a federal statute was found to prevent Virginia from enforcing certain of its fishing laws); and
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> California v. Zook, 336 U.S. 725 (1979) (holding that where there is a need for national uniformity, federal interests prevail; where there is a need for diversity and local approaches, then state interests should dominate).

203. Keeney, *supra* note 198, at 75.

204. *Id.*

205. Charles R. McCoy, *Observations on a Twelve-Mile State Fisheries Jurisdiction, in* PROCEEDINGS, *supra* note 182 at 46, 48.

as federal regulations allow the use of gear prohibited by state law, the state will be unable to enforce its own prohibition unless actual use of prohibited gear in state waters is observed. In *Baldrige*, a suit was brought by the State of Florida against the U.S. Department of Commerce seeking to prevent implementation of parts of the federal management plans addressing mackerel and grouper fisheries in the Gulf and Atlantic. Florida's claim was based on the fact that the federal plans were in direct conflict with Florida law (which prohibits the use of purse seines and fishtraps to take fish); therefore, the Department of Commerce was in direct violation of the consistency provisions of the CZMA.[207] The obstruction of preventive measures resulted in the collapse of the particular fishery involved in the *Baldrige* cases, dramatically illustrating the practical effect of divergent management approaches.[208] Clarification of the federal consistency requirement through the 1990 CZMA reauthorization[209] should reduce the likelihood of *Baldrige*-type conflicts.[210] Amendments to federal statutes could remove some of the difficulties inherent in preemption by declaring that the federal law out to twelve miles is the same as the law that would apply within the adjacent state's territorial waters. An even better option would be to apply minimum federal standards to state and federal waters and allow the more restrictive state regulations to apply in federal waters as well. This approach would enable coastal states to manage their migratory resources more

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206. *Id.* at 47, originally filed as *Florida v. Department of Commerce* (cite not provided).

207. 16 U.S.C. § 1456 (1988). *See* Robert A. Taylor and Alison Rieser, *Federal Fisheries and State Coastal Zone Management Consistency: Florida Tests the Waters*, III TERR. SEA (May, 1983).

208. McCoy, *supra* note 205, at 47.

209. *See supra* note 8.

210. Another example of conflict between federal and state management of living resources involves the Tortugas Shrimp Bed off the coast of Florida. *See* Bateman v. Gardner, 716 F.Supp. 595 (S.D. Fla. 1989), *aff'd*, 922 F.2d 847 (11th Cir. 1990). More permissive federal regulations allowing certain kinds of fishing gear that state regulations prohibit have hampered state law enforcement. State officers can only enforce state law when it can be shown that the offensive fishing gear was used in state waters because the less restrictive federal regulations justify mere possession (the fishers need only say that they are headed for federal or unregulated waters). Extension of Florida's jurisdiction to 12 miles would resolve some of the existing confusion by narrowing (but not eliminating) the band of unregulated waters sandwiched between Florida territorial waters and the northwestern corner of the federal marine sanctuary boundary. A 12-mile limit would certainly be more uniform than the three- and nine-mile limits currently in place.

effectively; consistency would at least require federal prohibition of fishing gear prohibited by state law, effectively eliminating the problems encountered in *Baldrige*.

E. The Legal Regime of High Seas Living Resource Management

The conflicts discussed above do not reflect the norm for management of living ocean resources. For the most part, absence of federal regulatory efforts permits states to exercise jurisdiction beyond three miles from shore. This authority was established in *Skiriotes v. Florida*,[211] a case where the state prosecuted some of its citizens for violating Florida's prohibition on shrimping, despite the fact that the act was committed outside state waters. The United States Supreme Court found "no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters which the State has a legitimate interest and where there is no conflict with acts of Congress."[212] Later, the Alaska Supreme Court, in *State v. Bundrant*,[213] interpreted the Outer Continental Shelf Lands Act (OCSLA) to create an intended distinction between the inorganic resources of the subsoil and seabed (principally oil), which were within the exclusive domain of the federal government, and the living marine resources, which were not affected by the act.[214] The court thus permitted the State of Alaska to regulate the taking of Alaskan King Crab beyond its territorial waters.

The federal government typically acquiesces where a state has a legitimate stake in the specific resource involved and shows through the investment of money and talent that it is willing to manage the resource with some sophistication and care. For example, the Alaskan government in particular has made significant expenditures to regulate fishery resources.[215] As a result of these efforts, the interests of both the federal and state governments have been advanced through the state's salmon management and enhancement program. At the same time, the two governments

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211. 212 U.S. 69 (1941).

212. *Id.* at 77.

213. 546 P.2d 530 (Alaska, 1976).

214. *Id.* at 546.

215. *See infra*, Section VI, notes 236-237 and accompanying text. Jill Bubier, *Alaska King Crab: State Assumes Larger Role in Federal Management*, V TERR. SEA 1 (April, 1985).

have avoided rivalries regarding jurisdictional limits. Alaska also has had success regulating crabbing far beyond the three mile limit and into the high seas.

F. Advantages of Increased State Control

The state is the most logical administrator of these resources as the entity most directly affected by management efforts and closest to the resource. The federal government, however, maintains a significant role in negotiating treaties with foreign nations and by exercising primary responsibility for administration of the MFCMA. The impact on foreign relations must be considered in evaluating any proposal for altering fishing rights in the exclusive economic zone (EEZ). Although little foreign fishing occurs within three to twelve miles from shore, some important factors need to be weighed. Amendment of the MFCMA to prohibit foreign fishing throughout the extended territorial sea will destroy the potential for foreign-processing/domestic-harvesting joint ventures in the three-to-twelve-mile zone. Additionally, the symbolic effect of further reducing the area within the U.S. EEZ in which foreign nationals may harvest surplus stock must also be considered.[216]

In the final analysis, however, the more compelling state interests predominate. The direct impact of management efforts on state lands, waters, and inhabitants, and the proximity to the area make the state the most logical administrator. The state has much greater interests at stake and is, therefore, more likely to enforce appropriate regulations.

Modification of other living resource management regulations would be less controversial. An extension of state authority from three to twelve miles would be an effective way to promote the purposes of the Endangered Species Act,[217] because state regulations are often more protective than their federal counterparts. Similarly, an extension of state jurisdiction could enhance the protection provided by the Marine Mammal Protection Act,[218] particularly if a renewed interest in the return of marine mammal management authority is pursued by states like Alaska, Oregon and California.

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216. Ballweber & Hildreth, *supra* note 201.

217. 16 U.S.C. §§ 1531-1543 (1988). *See supra* notes 60-62 and accompanying text.

218. 16 U.S.C. §§ 1361-1407 (1988). *See supra* Section III(D).

The remaining living resource, highly migratory species, may also present a problem now that the federal government has changed its position; Congress recently amended the MFCMA to bring highly migratory species under its regulatory authority, effective January 1, 1992.[219]

Increased state control should be seriously considered, especially in light of the Department of Commerce's past determination that the issuance of uniform federal fishing regulations applicable beyond state territorial waters would not be appropriate.[220] The substantial differences in both the kinds of fish caught and the different fishing methods employed throughout the states[221] undoubtedly present a significant challenge to federal regulatory efforts. Those states with the ability to manage living resources effectively should, therefore, be given the opportunity to adopt regulatory measures appropriate for their special circumstances.

G. Conclusion

Federal-state conflicts can be successfully addressed by applying minimum federal standards to state and federal waters while allowing more restrictive state regulations to extend into federal waters. In those states where the capacity, interest, and commitment necessary for efficient management of living resources is apparent, there is no need to divide the territorial sea into two zones (one-to-three and three-to-twelve nautical miles offshore). These states will be able to implement management policies, carefully tailored to their own special needs and circumstances, through laws that are necessarily more stringent than the federal minimums. The arbitrariness of the three-mile limit, on the other hand, would be appropriate where a coastal state lacked the resources needed for designing and implementing rational management of the area. Minimum federal standards would protect fragile resources in the entire twelve-mile zone without unduly infringing upon state sovereignty. Granting states authority in the entire territorial sea, to twelve miles, would eliminate many of the conservation problems that have occurred in the past. At the same time, minimum federal standards would provide protection in those areas where the

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219. Pub. L. No. 101-627, 104 Stat. 4436 (1990) (codified at 16 U.S.C. § 1801(b)(1)).

220. *See* State v. Bundrant, 546 P.2d 530 (Alaska, 1976), citing to a 1974 report by the Department of Commerce.

221. Jon M. Van Dyke et al., The Legal Regime Governing Alaskan Salmon 40 (A Report to the University of Alaska Sea Grant Program, June 1988).

adjacent state is unable or unwilling to act, as well as insuring against exploitation of resources by greedy state fishing industries.

VI. CONGRESSIONAL ALTERNATIVES FOR ADDRESSING OCEAN RESOURCE MANAGEMENT IN AN EXTENDED TERRITORIAL SEA

Earlier sections of this article identified constitutional and statutory ambiguities created by the President's Proclamation unilaterally extending the U.S. territorial sea. Investigation of these uncertainties revealed intergovernmental and interagency conflicts that will require important policy decisions. In formulating an appropriate management regime, the legislative branch must consider the following issues: equity, political feasibility, management capability, technical merit, and administrative complexity.[222]

Under the heading of equitable considerations, it is important to note that 180,000 square miles of new "stateless" U.S. territory (approximately the size of Texas) was created by the Territorial Sea Proclamation.[223] Nearly all previous expansions of United States territory have led to statehood or incorporation into existing states. The five current exceptions are island communities that have local governments as authorized by Congress, either as a commonwealth (Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico) or a territory (Guam, Virgin Islands, American Samoa). In only a few instances has federally acquired territory remained totally in federal hands. Midway, Johnston, and Wake Islands are administered by the Department of Defense; these sites are exceptional because they are quite small, resources are not being developed there, and they are of national security value. The uninhabited guano islands of Navassa, Swan, Howland, Baker, and Jarvis can also be distinguished because of their relative isolation. These islands lack an obvious administrative body other than the federal government; the same can be said for Palmyra and Kingman Reef. The extended territorial sea is very different from these situations.

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222. *See, e.g.*, Letter from Robert W. Knecht to Marc Hershman *et al.*, regarding a Western States Territorial Sea Study (March 11, 1989) (on file with the authors).

223. *See Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcomm. on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Comm.*, 101st Cong., 1st Sess. 64, 65 (March 21, 1989) (Statement of Chris A. Shafer, Chairman, Coastal States Organization) [hereinafter CSO Testimony].

Several commentators have argued convincingly that control over the extended territorial sea is now a purely domestic question, despite the fact that national security interests prompted President Reagan to expand the U.S. territorial sea to twelve miles.[224] The extended territorial sea is undeniably linked to the adjacent coastal states. These states have direct and inherent interests in the management of adjacent seas. The impacts of ocean development affect these states on ecological, social, economic, and political levels. Under the current regulatory scheme, the burdens of development appear to be falling disproportionately upon the coastal states.

A proper consideration of political feasibility and administrative complexity must first acknowledge existing inadequacies in federal ocean management. Present inefficiencies in coastal and ocean management have produced conflicts that have delayed the orderly survey and development of promising ocean resources. According to Biliana Cicin-Sain and Robert Knecht, this growing intergovernmental complexity and conflict exists because priorities have not been established.[225] The polarized efforts of development and conservation interest groups have created a disjointed approach to management that lacks both clearly articulated over-arching policies and coordination among the several agencies with planning and management

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224. Although the following two statements were made with regard to the 200-mile exclusive economic zone, they apply *a fortiori* to the extended territorial sea.

In a study prepared by the Coastal States Organization, COASTAL STATES AND THE U.S. EXCLUSIVE ECONOMIC ZONE [hereinafter CSO STUDY] (April 1987), it was stated that the question of how to manage the resources of the EEZ is an internationally recognized sovereign (*i.e.*, domestic) matter. "In terms of U.S. federal law, this is a fundamental change with potentially profound domestic consequences." *Id.* at 14.

In Bruce A. Harlow & Richard Grunawalt, Recognition of Hawaiian Jurisdiction and Control Over the Resources in its Exclusive Economic Zone: Challenge and Opportunity (Report to the State of Hawaii, January 1986) [hereinafter HARLOW REPORT], the authors argue that the separation of the EEZ resource regime from other rights recognized in the international community has invalidated the premise upon which federal dominance was founded.

Also, in Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209, 253 (1988), it was noted that international considerations were irrelevant to the domestic purposes of the Submerged Lands Act. Resource management that does not conflict with the rights of other nations is, therefore, a wholly internal matter.

225. Biliana Cicin-Sain & Robert Knecht, *The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone*, 15 OCEAN DEV. & INT'L. L. 289, 301 (1985).

responsibilities.[226] The problem of clashing legal mandates was well illustrated when local governments seeking to enforce air quality standards onshore under the Clean Air Act[227] were unable to control air emissions from offshore oil and gas projects that are solely regulated by Interior under the OCSLA.[228]

Robert Knecht, Biliana Cicin-Sain, and Jack Archer[229] warn that undue delay, or outright failure to act, will prolong existing confusion and undermine the effectiveness of existing federal ocean law. Similarly, the American Bar Association's Law of the Sea Committee presented a unified call for congressional action in order to ensure the orderly, uniform implementation of the territorial sea extension.[230] In other words, the state of national ocean policy requires that some form of change be implemented. The question is which of several approaches should be taken?

The technical merit and management capability of the different proposals for ocean resource management are evaluated in the remainder of this article. The political feasibility and administrative complexity of each approach are also addressed, where appropriate.

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226. John Noyes, *United States of America Presidential Proclamation No. 5928: A 12-Mile Territorial Sea*, 4 INT'L J. ESTUARINE & COASTAL L. 142 (1989), citing Robert Knecht, Biliana Cicin-Sain & Jack Archer, *National Ocean Policy: A Window of Opportunity*, 19 OCEAN DEV. & INT'L L. 113 (1988).

227. 42 U.S.C. §§ 7401-7626 (1988).

228. 43 U.S.C. §§ 1331-1357 (1988). *See generally*, Knecht, Cicin-Sain & Archer, *supra* note 226, at 122. The authors cite the Secretary of Commerce's Findings and Decisions in the Matter of the Appeal by Exxon Co., USA to the Consistency Objection by the California Coastal Commission to EXXON's Proposed Development of the Santa Ynez Unit by Means of Development Option A (February 18, 1984). Section 328(a)(3) of the Clean Air Act, 42 U.S.C. § 7627(a)(3) (1991 Supp.), now authorizes states adjacent to an OCS source to regulate emissions, subject to federal approval. The U.S. Environmental Protection Agency retains concurrent enforcement authority.

229. *Id.* at 125.

230. LAW OF THE SEA COMMITTEE NEWSLETTER: Section of International Law and Practice, vol. 3, no. 2 (American Bar Association, Summer 1989).

A. Coastal State Control

"It is neither feasible nor desirable for the national government to attempt to represent all of the public interests in ocean activities beyond the territorial sea."[231] This position, adopted by the Coastal States Organization (CSO), is tied directly to its interpretation of the following Executive Order on Federalism issued by President Reagan: "In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level."[232] Although the CSO tempered its recommendation to include the possibility of an equal federal-state partnership, it implicitly considered primary state control to be the way to govern the extended territorial sea for the broadest and best public good.[233]

The demonstrated competence of coastal states in managing both living and nonliving resources in the adjoining ocean justifies extension of state authority to twelve miles. In its testimony to Congress, the CSO provided a lengthy account of the coastal states' wide-ranging experience in ocean resource management.[234] The

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231. From a Policy Statement of the Coastal States, appended to CSO Testimony, *supra* note 224.

232. CSO Testimony, *supra* note 224, at 73, *referring to* Executive Order No. 12612 (October 26, 1987).

233. *Id.* at 14.

234. [A]ll states bordering the territorial sea have statutes governing mineral exploration and mining on State lands. . . . Ten States are currently participating with the Interior Department in joint federal-state task forces. . . . The Governors of American Samoa, Guam, the Commonwealth of Northern Marianas Islands and Hawaii have completed an assessment of the importance of the resources in the 200 mile Exclusive Economic Zone (EEZ) off their shores, and are in the process of establishing an EEZ Coordinating Council. For the last twelve years the coastal States have cooperated with the federal government and the private sector . . . [under] the Magnuson Fishery and Conservation and Management Act.

Some coastal States have long-standing laws for the development of oil and gas resources within their coastal and territorial waters, . . . long-standing expertise in a variety of pollution programs, . . . coastal or ocean sanctuary programs, . . . [29] States, and possibly 30 by next year, have federally approved coastal zone management programs. Historic shipwrecks have been managed by many coastal states for years, and under the Historic Shipwreck Act of 1988 all coastal States are now managing these "national treasures."

(continued...)

testimony mentioned several areas of demonstrated coastal state ability, including ocean mining, fisheries management, joint federal-state task forces, pollution control, sanctuary programs, and coastal zone management. "[F]rom the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond twelve miles."[235]

Suzanne Iudicello testified before the House Committee on Oceanography and Great Lakes that the State of Alaska has demonstrated particular competence in balancing the goals of protection, conservation, and utilization through joint efforts with the U.S. State Department to reduce foreign interception of salmon; through exclusive management of shelf commercial rockfish, king and tanner crab, and troll salmon in federal waters (spending ten times the outlay of the federal government in the management of its regional fisheries); and through accumulated negotiation experience with other states and foreign nations with regard to anadromous

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234. (...continued)

> Several states have developed specific ocean resource policy or management initiatives. For example, North Carolina in 1984 completed a comprehensive ocean policy analysis, and is presently preparing a report on the economic feasibility of mining phosphorate deposits. . . . Oregon is in the midst of preparing an ocean resources management plan. . . . Hawaii has legislatively authorized . . . implementation of an updated Ocean Resources Management Plan. . . . , has also initiated a program to evaluate potential impacts of marine mining industry, and has prepared an environmental impact statement on ocean mining for the recovery of cobalt-rich manganese crusts off its shores. Legislation is pending in the legislatures of Alaska and California to inventory ocean resources and establish state ocean management programs.
>
> Since entering the Union the Great Lakes States have had exclusive management authority over extensive areas of water and submerged lands, and the aquatic resources found there . . . the *shortest* State territorial water boundary is 21 miles offshore of Pennsylvania in Lake Erie . . . Michigan . . . manages resources out, in some locations, more than 72 miles . . . [and] alone owns 37,500 square miles of submerged lands.
>
> Thus from the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles. Further, we have done so in concert with a foreign country . . . the international institutions created by the Great Lakes States and Canada are testimony to our ability to manage our own resources.

Id. at 11-12.

235. *Id.* at 12.

species.[236] Further testimony indicated that the management capability of the Alaskan government has also been superior to that of the federal government in some instances. The Alaskan government has issued nine active and 200 prospective ocean mining leases off the Alaskan coast; the federal government has not issued any. The Alaskan government also has a two-to-three year waiting period for a predictable and consistent leasing schedule, while it takes five years for an oil and gas lease sale to be issued in the three-to-twelve mile zone. In addition to reducing administrative complexity (to the benefit of oil companies), Alaskan management incorporates better environmental protection of the area. With regard to oil and gas development, "Alaska can more efficiently and competently manage this resource in the three-to-twelve mile zone than can the federal government."[237]

Alaska also cites, through Iudicello, the sound policy behind the 1953 Submerged Lands Act grant, stating that state ownership of the extended territorial sea is equally valid. Furthermore, unified jurisdiction and ownership of the zero-to-twelve mile zone makes sense for the coherent exercise of police power. Otherwise enforcement can be complicated by the cross-purposes of federal and state agencies. To avoid the problems of interstate squabbles, where each state seeks to protect its own resources at the expense of other states, minimum federal standards could be developed. If these standards were also required to be consistent with state law, enforcement would be greatly enhanced.[238]

B. Coastal States As Equal Managing Partners

As noted above, many coastal states have been willing to devote money and talent to ocean resource management; the success of their efforts illustrates that some states are quite competent to manage the vast resources of an extended territorial sea. The variation in need among the coastal states, however, might warrant legislation providing for optional participation by states in the planning and management of the

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236. *Extension of the Territorial Sea: Hearings on H.R. 1405 Before the House Comm. on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Comm.*, 101st Cong., 1st Sess. 82, 85 (March 21, 1989) (statement by Suzanne Iudicello, Associate Director for Fisheries and the Environment for Alaska).

237. *Id.* at 5.

238. *See* McCoy, *supra* note 205, at 46.

three-to-twelve mile zone.[239] Optional participation by a state that has demonstrated ocean management capacity would be consistent with the principles of the Coastal Zone Management Act. For coastal states like Hawaii, Alaska, Oregon, Washington, Louisiana, and Texas, and for territories like American Samoa and Guam, the existence of important resources and interests highlights the need to develop a management program. Coastal states with few resources or uses of immediate interest, however, may not have a compelling need for altering the present arrangements.

Governor John Waihee of Hawaii has stated his belief that the two portions of the territorial sea should be part of an integrated management process that is guided by a single comprehensive set of coastal policies. A necessary element of state control would be the elimination of the existing regime's arbitrary (three-mile) jurisdictional boundaries.[240] Waihee reports several examples of Hawaii's leadership role in integrating ocean development to support the state's position: the existing local partnership between the state and its counties, an agreement signed with the Secretary of Interior initiating the nation's first joint federal-state management program regarding mineral resources in the EEZ, and the cooperation between state/federal governments and the private sector in the development of ocean science and technology at the Natural Energy Laboratory on the Island of Hawaii.[241]

On equitable grounds, the people of Hawaii feel that culturally, historically, and economically, the ocean is theirs to value, respect, and nurture. National security and international navigational interests are recognized, but these interests are consistent with Hawaii's legitimate concerns: the proper stewardship of renewable resources, a fair return on the use of the ocean and its resources, the regulation of ocean activities to protect public health and welfare, and planning for future use of ocean resources and the growth of Hawaii's economy.[242] There is no need to bind

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239. *Ocean Issues: Hearings on Reauthorization of the Coastal Zone Management Act, Hard Mineral Resources in the Exclusive Economic Zone, Fisheries Issues, and Extension of the Territorial Sea Before the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2nd Session 86, 92 (Honolulu, January 8, 1990) (Statement of John Waihee, Governor, State of Hawaii) [hereinafter Waihee Statement].

240. *Id.* at 92.

241. *Id.* at 89.

242. *Id.* at 88.

security and navigation to other interests in the ocean which can be more effectively managed by the state that is most directly affected by them. In any event, "without *effective* local participation in the decision-making process, no amount of 'national interest' justification is likely to overcome local opposition."[243]

Other studies indicate that participation is not an impossible goal. A study of federal consistency under the CZMA[244] noted that the requirement of federal-state cooperation in coastal management has resulted in states concurring with 97% of all federal consistency applications.[245] The figures presented provide reason to be optimistic about the potential for increased federal-state cooperation. Nonetheless, the authors concluded that the consistency requirement "should not be viewed as a general bromide for dealing with the fragmentation of management authority," but rather as a modest experiment in mandating interagency and intergovernmental coordination.[246] The approach should be seen simply as leading to more specific analysis of the conditions and techniques that result in genuine collaboration.

Criticism by the federal government of undue administrative complexity and inconvenience, created by increased state participation, will be outweighed by the environmentally sound decisions that result from increased review. The interactions between coastal states and their adjacent oceans clearly demand a prominent state role in management of the extended territorial sea. Governor Waihee of Hawaii suggests the creation of a "federal ocean resources council" consisting of the key ocean agencies, such as the National Oceanic and Atmospheric Association, the Environmental Protection Agency, the Department of Interior, and the Department of Defense.[247] The council would be convened by NOAA, as needed, to assist states in the development of management programs for the extended territorial sea. The operation of this council would improve coordination at the federal level, the

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243. ROBERT W. KNECHT, THE COASTAL STATES AND THE U.S. EXCLUSIVE ECONOMIC ZONE 15 (CSO, Washington, D.C. 1987).

244. Lowry, Jarman, & Maehara, *supra* note 188.

245. *Id.* at 38.

246. *Id.* at 39.

247. Waihee Statement, *supra* note 239, at 93.

lack of which has made it difficult for states to work with the federal government on ocean and coastal matters in the past.

In the Coastal States Organization study mentioned previously, the Deepwater Ports Act[248] and the Ocean Thermal Energy Act[249] are cited as setting the precedent for shared decision-making.[250] The concept of "shore-linked" impacts of ocean development provides the basis for gauging the roles of the state and federal governments in ocean management. In the past, the interests of the states and local communities have usually been projected from the shoreland seaward, and terminated arbitrarily at the boundary of state ocean waters. A more appropriate approach, however, is to start from the location of the activities and project the effects and impacts shoreward to the state coastal zone and shorelands. Long-term commitments for the exclusive use of ocean space, and the resultant long-term commitment of the shoreside support facilities, require the concurrent approval of both the federal government and the involved coastal states.[251]

C. Regional Management

A modified alternative to federal-state cooperation is the formation of new, and the expansion of existing, regional management schemes. A blue-ribbon panel review of the MFCMA resulted in a recommendation that cooperative management through regional councils be retained, but proposed separate fishery conservation and allocation determinations.[252] Under the modified scheme, conservation determinations would be made by NOAA and allocation decisions by the regional councils. By counteracting the administration's refusal to share decision-making authority with coastal states, increased participation would significantly reduce tension between the

248. 33 U.S.C. §§ 1501-24 (1988).

249. 42 U.S.C. §§ 9101-67 (1988).

250. CSO STUDY, *supra* note 224, para. 2, at 20.

251. *Id.* at 21.

252. Knecht, Cicin-Sain & Archer, *supra* note 226, at 126.

federal government and the states. The policy stalemate in oil and gas development might have been avoided if the coastal states were given greater authority.[253]

Efforts to implement regional cooperation should be carefully formulated to avoid compounding the already fragmented ocean management regime. Information sharing and coordination must be promoted. In attempting to balance national and regional interests, including the costs and benefits of ocean activities, the management framework should also have the capability of ranking specific uses and resources when necessary.[254]

D. Multiple-Use Approach

The complex nature of the ocean as an interdependent ecological system provides much of the reasoning behind a third alternative, multiple-use management. The multiple use approach requires the establishment of clear legislative guidelines, possibly even priorities, to govern ocean management. For example, Oregon has crafted an integrated regime for nearshore ocean management that includes legislatively-set priorities, favoring living over nonliving marine resources in cases where multiple use conflicts occur.[255] Possibilities on the national level include creation of a multiple-use federal oceans agency (or federal regional commissions) for ocean management.[256] This entity would have plenary authority analogous to that of the Corps of Engineers in the Coastal Decision Framework.[257] It would

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253. *Id.* at 125-26.

254. Cicin-Sain & Knecht, *supra* note 225, at 315. *See* Alexander & Hanson, *Regionalizing Exclusive Economic Zone Management, in* PROCEEDINGS OF OCEANS, 1984 (Marine Technology Society, 1984), and Gather, *A Public Authority to Manage the Atlantic Outer Continental Shelf*, 2 COASTAL ZONE MGMT. J. 59-64 (1975) for other versions of the regional approach.

255. Knecht, Cicin-Sain & Archer, *supra* note 226, at 133, citing JAMES GOOD & RICHARD G. HILDRETH, NEARSHORE OCEAN MANAGEMENT IN OREGON (Oregon Department of Land, Conservation and Management, draft 1986).

256. Cicin-Sain & Knecht, *supra* note 225, at 312, Table 2.

257. The structure of the coastal decision framework involves decisionmaking at all three levels of government and involves multiple agencies within each level. Certain agencies have primary power over certain aspects of a decision, but only a secondary role in other aspects of the decision. The Army Corps of Engineers provides the balance of power as the ultimate decision authority. Over the years, the coastal

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provide the forum for integrating the preferences of many special purpose agencies and interests.[258]

Ocean resources and processes are highly fluid, mobile, and intertwine over great distances. It is clear that a mismatch currently exists between the realities of the ocean system and the government's sectoral approach to its management. Instances of split or shared authority persist. For example, the Department of the Interior has jurisdiction over sea turtles while on land, but NOAA has jurisdiction over them in the ocean.[259] Because many of the most important ocean activities traverse or impact all three jurisdictions (local, state and federal governments), complexity is added to the planning and management of these activities. Furthermore, the benefits and costs of ocean resources exploitation frequently fall disproportionately on different jurisdictions, exacerbating inter-jurisdictional frictions.[260]

The lack of a plenary law for ocean decision-making creates an organizational vacuum in the ocean arena. An important policy objective should be to fill this vacuum; the Corps of Engineers' public interest review process is the best model we have.[261] The Corps of Engineers has general jurisdiction over coastal waters, and reviews all discharges of dredged or filled materials.[262] The public interest review process requires consideration of diverse factors, applying a balancing test to assure that the benefits of a proposed action outweigh the foreseeable detriments. The process is open to all public and private organizations and individuals. By law the

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257. (...continued)
decision process has developed norms to guide decisions based on constitutional, public trust and environmental principles reflecting the prevalent societal values of the times.

258. Marc J. Hershman, *The Coastal Decision Making Framework as a Model for Ocean Management, in* PROCEEDINGS, *supra* note 182, at 92, 99.

259. Cicin-Sain & Knecht, *supra* note 225, at 299.

260. Knecht, Cicin-Sain & Archer, *supra* note 226, at 134.

261. Hershman, *supra* note 258, at 96.

262. Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 547 (1977).

Corps must integrate the objectives of a wide range of federal and state laws.[263] The Corps acts as a clearinghouse to ensure that conflicts are identified and resolved among the real parties in interest, requiring participants to try to resolve their differences through negotiation and project modification.[264] The mutual education and trading of information often facilitates trade-offs or at least the establishment of guidelines for addressing problems that may arise in the future. A general and flexible system will allow regional experimentation and trial and error that will lead to a system that arises out of real decisions and real circumstances.[265]

In addition to the problems of split and shared authority, numerous other faults in the present ocean management system can be recited. Examination of consequences to proposed ocean uses is biased toward protection or development depending upon the particular law in question. Decisionmakers have few opportunities to debate overall priorities or to make trade-off decisions. No one has jurisdiction over conflicts among different sectors (e.g., controversies surrounding the Santa Barbara Channel, the Beaufort Sea, and the Georges Bank). Litigation addresses only *actual* rather than *potential* conflict, often excludes crucial viewpoints because of narrowly defined rules of evidence, and involves damaging delays. Decisionmakers are not encouraged to conduct advanced ocean planning. And finally, the difficulty of estimating the impact of long-range activities often leads to the preclusion of some uses and species from the ocean management regime.[266]

In addition to the need to address organizational defects, the United States needs to understand better the interactions between marine ecosystems and the impacts of certain ocean activities, and also of the cumulative impacts resulting from multiple ocean uses. At the very least, appropriations should be made to support the pursuit of such knowledge. Meanwhile, to minimize the uncertainty caused by the complexity of ocean processes, operationally-linked monitoring programs could be used for new and existing ocean uses. After performing baseline studies, agreement should be reached among the potentially affected interests on thresholds that trigger pre-agreed changes in the operation of an activity. This approach would eliminate

263. Hershman, *supra* note 258, at 94-95.

264. Cicin-Sain & Knecht, *supra* note 225, at 302-05.

265. Hershman, *supra* note 258, at 96.

266. Cicin-Sain & Knecht, *supra* note 225, at 302-305.

the problems caused by the inflexibility inherent in earlier governmental management procedures.[267]

The multiple-use approach will not be easy to implement and will take time to become fully operational. It has been recommended, therefore, that realistic field testing of regional approaches (discussed *supra*) might serve as a stepping stone toward the greater goal of multiple-use ocean management.[268] This approach may not reduce complexity in ocean management, but it may reflect all that we can expect in a pluralistic society and under a federalist system of government, where democratic principles prevail.[269]

E. Revenue Sharing

Another way to placate coastal state opposition to federal management of the extended territorial sea is to share the revenues obtained from resource exploitation in the area. A proposal by Richard Littleton calls for sharing with all 50 states.[270] Reallocation of resources would not change fundamental federal-state rights and duties, and a consequential increase of ocean awareness will necessarily result in better monitoring of oil and gas production. This approach would provide an immediate and more concrete mechanism for organizing the coastal zone than an abstract framework for future federal-state cooperation. Establishing a single decisionmaker out to twelve miles could directly resolve some federal-state tensions, while reducing the intensity of other disputes by moving the focus of tension twelve miles from shore.

In general, the states are clearly capable of managing the area. Extended management is practiced by the Great Lakes states, Alaska, Florida, Texas, and Puerto Rico. Active state participation in the administration of the oceans, coupled with a positive program to mobilize coastal states' industrial bases -- which facilitates the recovery and processing of offshore resources -- could provide the

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267. CSO STUDY, *supra* note 224, para. 2, at 21.

268. Cicin-Sain & Knecht, *supra* note 225, at 315.

269. Hershman, *supra* note 258, at 99.

270. See Littleton, *supra* note 195 and accompanying text.

basis for equitable federal-state sharing of revenues.[271] Hawaii's Governor, John Waihee, has advocated a 50/50 division between the federal government and the adjacent state for oil and gas development as well as hard minerals.[272] The fundamental role of the coastal state in such an arrangement would be to provide a cost-effective and reasonably flexible regulatory scheme that reduces the multiple permit burden to a minimum.[273] This reduction in administrative complexity alone might be enough to rally the support of industry and allow the states to present a unified proposal for congressional action.

F. Statutory Modification and Other Action

The National Governors Association and Western Governors have issued resolutions suggesting that Congress mandate that each federal ocean agency analyze the legislation governing its programs and make a determination as to the extent to which this legislation should be interpreted to extend to the twelve-nautical-mile limit of the territorial sea.[274] Congress could then either accept and confirm executive branch interpretations or modify the particular pieces of legislation to conform to Congressional intentions. See also Section III of this article entitled "A Survey of Statutes Referring to the Territorial Sea" for suggested modifications.

Other issues identified[275] as topics requiring attention include the removal of gaps in the regulatory schemes involving hard minerals and ocean incineration; providing for the identification of potential conflict; establishment of NOAA as an independent agency; amendment of the OCSLA to provide greater protection for marine and coastal resources and uses; and the incorporation of conflict resolution, negotiation and joint planning procedures.

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271. Harlow and Grunawalt, *supra* note 224, at 91.

272. Waihee Statement, *supra* note 239, at 94.

273. Harlow and Grunawalt, *supra* note 224, at 96.

274. Waihee Statement, *supra* note 239.

275. Cicin-Sain & Knecht, *supra* note 225, generally; and Knecht, Cicin-Sain & Archer, *supra* note 226, generally.

G. Conclusion

The resolution of intergovernmental and interagency conflicts is crucial to the goal of efficient management of ocean resources. Although our understanding of ocean processes is still far from complete, it is clear that our first generation approach to management has become overloaded. The Territorial Sea Proclamation provides a compelling opportunity to address the need for reform. Equitable considerations require that the federal government share with the states the decision-making authority it has assumed in the extended territorial sea.

The possible approaches to improving our national ocean management effort presented in this article are as follows:

(A) increase state control to twelve miles--state ownership would be subject only to the federal navigational servitude for the constitutional purposes of commerce, navigation, national defense, and international affairs;

(B) create a partnership between the federal government and the willing and capable coastal states;

(C) promote regional cooperative management schemes--analogous to the MFCMA regional councils;

(D) pursue a multiple use approach--where competing values are balanced by a federal oceans agency with plenary authority over U.S. waters;

(E) develop a revenue-sharing scheme in which federal dominion would be maintained and the states would be placated with a secure source of funds; and

(F) modify statutes individually, but comprehensively.

The individual policy approaches listed above are not meant to be exhaustive, nor mutually exclusive. They are recommendations to be considered in formulating an appropriate response to the territorial sea extension. Until some comprehensive action of this sort is taken, the potential for development of this important area will never be achieved.