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Resolution of the 'Sea Wars': Coastal Zone Management Act

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Introduction

In the final year of World War II, President Truman issued a unilateral proclamation[1] of global significance whereby the United States essentially claimed jurisdiction over the natural resources of the adjacent Outer Continental Shelf (OCS).[2] It was a farsighted and unique declaration based on a practical need to develop new sources of oil and to establish control over those resources to further conservation and prudent utilization.[3] However, the Truman Proclamation dealt with the sovereignty of the United States over OCS resources solely in the international context. More than a decade passed before domestic policy makers determined the roles federal and state governments were to play in the development of the OCS. The federal/state relationship which evolved has been characterized by Congress as a "partnership,"[4] although it is more accurate to describe the state and federal governments as adversaries in a "sea war."[5]

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[1] The Government of the United States regards "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas, but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

[2] The OCS encompasses all submerged lands under United States jurisdiction lying seaward of the three-mile territorial sea granted to the states under the Submerged Lands Act, 43 U.S.C. §§ 1301(a)(2), 1331(a) (1982).

[3] *See generally* Jones, *The Development of Outer Continental Shelf Energy Resources*, 11 PEPPERDINE L. REV. 9 (1983) (comprehensive description of the development of OCS).

[4] *See* 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Sen. Packwood); *see also* Note, *Federal "Consistency" Under the Coastal Zone Management Act - A Promise Broken by Secretary of the Interior v. California*, 15 ENVT'L L. 153, 169-70 (Fall '84) (Justice O'Connor's interpretation of § 307(c)(1) could hinder state-federal cooperation).

[5] Goldstein, *Conclusion: Landlords of the Sea*, in THE POLITICS OF OFFSHORE OIL 179 (J. Goldstein ed. 1982).

The source of this intergovernmental tension is contained in the conflicting purposes of two federal statutes governing the OCS. The Outer Continental Shelf Lands Act Amendments[6] authorize the federal government to issue oil and gas leases in the OCS, while the Coastal Zone Management Act (CZMA)[7] authorizes the states to protect the environmental balance of the coastal zone.[8]

The controversy between energy development and environmental concerns culminated in a recent Supreme Court decision interpreting the state mandated consistency provisions of the CZMA.[9] The 5-4 decision in *Secretary of the Interior v. California*, reflecting the federal government's position, served to escalate rather than resolve the conflict. The ramifications of this decision were reflected in the increase in the number of leases placed in moratoria and in adjustments to the Department of Interior's (Interior) leasing policy. Other federal programs on the OCS, such as hazardous waste dumping, fishery management plans, regulation of coastal pollution and siting of energy facilities were negatively impacted as a result of the Supreme Court's construction.[10] In addition, the Court's decision increased public interest in the CZMA's reauthorization in 1985[11] and stimulated both Houses of Congress to propose amendments to the CZMA.

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[6] 43 U.S.C. §§ 1331-1356 (1982).

[7] 16 U.S.C. §§ 1451-1464 (1982).

[8] The coastal zone is defined by the CZMA as the coastal waters extending seaward to the outer limits of the "territorial" sea and the adjacent shorelands. 16 U.S.C. § 1453(1) (1982).

[9] Secretary of the Interior v. California, 464 U.S. 312 (1984).

[10] *See* 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Sen. Packwood).

[11] H.R. 6979, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4362 (it appears from the legislative history contained in this report that the CZMA will be considered for reauthorization in 1988); *see* 16 U.S.C. § 1464 (1982) (the last authorization period for appropriations ran from Oct. 1, 1980 to Sept. 30, 1985); 130 CONG. REC. E1592 (daily ed. Apr. 18, 1985) (remarks of Rep. Shumway) (the House proposal for reauthorization planned to reduce federal grants from 80% of costs for funding CZMA plans to 20% over a four year period); 130 CONG. REG. S4413, S4414 (daily ed. Apr. 18, 1985) (remarks of Sen. Danforth and Sen Hollings) (the Senate proposal calls for freezing appropriations for 1986 at the current funding level and allowing a 4.5% increase for subsequent fiscal years); *see also infra* note 40 and accompanying text.

Further revisions were proposed by the National Oceanic and Atmospheric Administration (NOAA).[12]

While the "sea wars" dilemma is a modern creation stemming from recent technological advances, the origins of the conflict can be traced to the ancient tradition of federal-state rivalry.[13] Unfortunately, the promise contained in the Reagan administration's plan[14] to implement the New Federalism has not been extended to OCS activities.[15] Unless a cooperative relationship between the federal government and the coastal states is developed, litigation and controversy over the exploitation of the OCS resources will continue.

I. STATUTORY FRAMEWORK

An understanding of the statutory history of OCS development is essential when evaluating the potential for resolution of the "sea wars." The OCS doctrine that began with the Truman Proclamation was later formalized by the 1958 Geneva Convention on the Continental Shelf.[16] A series of important legislation followed including the Submerged Lands Act of 1953,[17] the

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[12] 50 Fed. Reg. 3798 (1985) (the goal of the NOAA's proposed new regulations is to clarify the effect of the Supreme Court's decision); 15 C.F.R. § 923.2(b) (1981) (NOAA is the administrative agency delegated by the Secretary of Commerce to administer the CZMA).

[13] *See generally* Comment, *Supreme Court Beaches Coastal Zone Management Act*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10161 (Apr. 1984) (analysis of the implications and reactions to *Secretary of the Interior*).

[14] *See* Berger & Saurenman, *The Role of Coastal States in Outer Continental Shelf Oil and Gas Leasing: A Litigation Perspective*, 3 VA. J. NAT. RESOURCES 35, 66-67 (Spring 1983).

[15] The objective of the New Federalism is the delegation of certain regulatory functions to state and local government. *See* Harvey, *Federal Consistency and Outer Continental Shelf Oil and Gas Development: A Review and Assessment of the "Directly Affecting" Controversy*, 13 OCEAN DEV. & INT'L L.J. 481, 514 (1983-84).

[16] Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

[17] Ch. 65, 67 Stat. 29 (1953) (current version at 43 U.S.C. §§ 1301-15, (1982)). *See generally* Guste, Jr. & Ellis, *Louisiana Tidelands Past and Future* 21 LOY. L. REV. 817 (1975) (analysis of the Submerged Lands Act and the Louisiana Tidelands); Lewis, *A Capsule History and the Present Status of the Tidelands, Controversy*, 3 NAT. RESOURCES L. 620 (1970) (discussion of administrative actions and judicial rulings following passage of the Submerged Lands Act).

Outer Continental Shelf Lands Act of 1953 (OCSLA),[18] the Outer Continental Land Act Amendments of 1978,[19] the National Environmental Policy Act of 1969 (NEPA)[20] and the Coastal Zone Management Act of 1972 (CZMA).[21]

Congress adopted the Submerged Lands Act in response to the controversial Supreme Court decision in *United States v. California*, where the Supreme Court held that, in the interests of national security, the federal government, and not the states, had paramount rights in the natural resources of the OCS.[22] Congress rejected the Supreme Court's decision by enacting the Submerged Lands Act which granted the states ownership and proprietary rights under waters within three miles of their shores.[23]

While the Submerged Lands Act granted the states control over a portion of the coastal waters, it failed to authorize federal oil and gas leasing on the OCS. For this reason, concomitant with the passage of the Submerged Lands Act, the OCSLA was enacted to authorize federal leasing of the OCS.[24] Under the OCSLA, the Secretary of the Interior was given broad discretion to operate the leasing process with a minimum of policy guidance.[25]

The Santa Barbara blowout in 1969 heightened the awareness of environmentalists, coastal states and fishermen to the risks of unfettered OCS development by the Interior.[26] These same groups also expressed concern about the Interior's recent accel-

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[18] Ch. 345, § 2, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356 (1982)). *See generally* Christopher, *The Outer Continental Shelf Lands Act, Key to a New Frontier*, 6 STAN. L. REV. 23 (1953) (legislative history of OCSLA).

[19] Pub. L. No. 95-372, 92 Stat. 632 (codified as amended at 43 U.S.C. §§ 1331-1356 (1982)).

[20] 42 U.S.C. §§ 4321-4370 (Supp. 1981).

[21] Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended as 16 U.S.C. §§ 1451-1464 (1982)).

[22] 332 U.S. 19 (1947) (current reactions to the Supreme Court's decision in *Secretary of Interior* present a similar situation).

[23] 43 U.S.C. §§ 1311(a), 1312 (1964).

[24] Jones, *The Legal Framework for Energy Development on the Outer Continental Shelf*, 10 U.C.L.A. [UCLA]-ALASKA L. REV. 143, 152 (1981).

[25] *Id.* at 153.

[26] The Santa Barbara spill was the largest oil spill in United States history at the time. *See generally* Walmsley, *Oil Pollution Problems Arising Out of Exploitation of the Continental Shelf; The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514 (1972) (discussion of the legal, political and economic considerations of the disaster).

eration of the OCS lease schedule.[27] However, coastal states were unsuccessful in their attempt to protect state lands from expanded federal encroachment because the OCSLA had neglected to provide the states with any formal decision-making powers.[28] In response to the states' interests, Congress developed amendments to the OCSLA to:

> achieve a balance between the need for expedited development in the OCS and protection of the coastal environment. In its attempt to combine these seemingly incompatible national policies, Congress placed balancing mechanisms in the act so that governmental officials can balance environmental *and* energy factors in their decision-making responsibilities.[29]

The OCSLA amendments authorized the Interior to lease land for offshore oil and gas production. In theory, the amendments were promulgated to serve national energy needs and to generate revenue from OCS lease sales.[30] In practice, implementation of the amendments continued to conflict with the emphasis state agencies' placed on environmental protection in their coastal zone management plans.[31]

While the CZMA acts as the coastal states' charter for the protection of the environment, the NEPA serves as the national equivalent. The NEPA requires an Environmental Impact Statement (EIS) to be prepared for all proposed "major federal actions significantly affecting the quality of the environment."[32] The Interior used the EIS to determine if an OCS lease sale

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[27] H.R. REP. No. 590, 95th Cong., 1st Sess. 53 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1460. The lease schedule acceleration was the Interior's response to the Arab oil boycott of 1973-74 and to the demands of the Reagan administration for increased domestic energy production.

[28] *Id.* at 54.

[29] Jones, *supra* note 24, at 167 (emphasis added); *see* Heller, *The Federal Outer Continental Shelf Leasing Program*, 11 NAT. RESOURCES L. 66 (1979) (for further discussion of the OCSLA Amendments).

[30] Yi, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL. L. REV. 159, 161 (1982).

[31] *Id.*

[32] Jones, *supra* note 24, at 168 (quoting 43 U.S.C. § 4332(2)(c) (Supp. 1981)). *See generally* McDermott, *Expanded Offshore Leasing and the Mandates of the Demise of NEPA*, 10 NAT. RESOURCES L. 531 (1977).

should be held or if specific tracts should be deleted to avoid environmental damage.[33]

An EIS is mandated at three stages of the leasing process in order to strike the appropriate balance between environmental risks and economic benefits.[34] The first EIS was prepared during Nixon's tenure to determine the impact of accelerated leasing promoted by Project Independence.[35] Prior to every lease sale, a second, general EIS is conducted because specific tracts have not yet been selected.[36] Development and production cannot be initiated until a third EIS is undertaken on particular leased tracts. Some experts believe the EIS significantly delays development of the OCS while others have found regulatory delays caused by the EIS to be minimal.[37]

Although one commentator stated that the NEPA had become the "major vehicle" for states to challenge federal OCS leasing,[38] the CZMA was enacted in 1972 primarily to give states a role in the decision-making process of offshore leasing.[39] Congress offered federal grants[40] and the promise of greater state influence as incentives for states to participate in the development of state coastal zone management programs.[41] Before receiving these benefits, the state is required to prepare a

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[33] Jones, *supra* note 24, at 168.

[34] *Id.*

[35] *Id.* The first EIS, known as the programmatic environmental impact statement (PEIS) was conducted in 1975 to determine the environmental impact of such a major program and will not be repeated unless federal OCS leasing changes significantly. For further discussion, see generally Grayson & Canaday, *Issues of Competition on the Outer Continental Shelf*, 3 VA. J. NAT. RESOURCES L. 69, 75-77 (1983); Comment, *infra* note 38.

[36] *See* Jones, *supra* note 24, at 168.

[37] *Id.* at 169 (preparation of the EIS takes approximately eight or nine months).

[38] Comment, *Prospects for Increased State and Public Control over Outer Continental Shelf Leasing: The Timing of the Environmental Impact Statement*, 21 SAN DIEGO L. REV. 709, 726 (1984).

[39] *See* 16 U.S.C. § 1451(i) (1982). *See generally* Rubin, *The Role of the Coastal Zone Management Act of 1972 in the Development of Oil and Gas from the Outer Continental Shelf*, 8 NAT. RESOURCES L. 399 (1975) (discussion of national interest in prompt exploration and development of the OCS).

[40] 16 U.S.C. § 1455a(b) (1982); *see also* 130 CONG. REC. E1592 (daily ed. Apr. 18, 1985) (statement of Rep. Shumway); 16 U.S.C. § 1455a(d)(1) (1982) (the federal government has traditionally provided eighty percent of the funding for development and operation of state coastal zone management plans).

[41] 16 U.S.C. § 1452 (1982).

comprehensive coastal zone land use plan which must be approved by the Secretary of Commerce.[42] Approval of the plan depends upon a finding by the Secretary that the state has adequately balanced national energy needs with local interests.[43]

The major incentive for states to participate in the coastal zone management program are the consistency provisions of the CZMA.[44] Section 307(c)(1) provides that once a state CZMA plan has been approved: "each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."[45] Activities which are subject to a federal consistency determination are:

> (1) those activities conducted or supported by a federal agency which directly affect the coastal zone; (2) development projects undertaken by federal agencies in the coastal zone; (3) OCS post-lease sale activities which require a federal license or permit; and (4) plans submitted by any person to the Secretary of the Interior for the exploration or development of, or production from any area leased under OCSLA when the planned activity affects any land or water use in the coastal zone.[46]

Uncertainty as to whether federal offshore lease sales are subject to a consistency determination is one limitation on a state's influence in offshore leasing. Another limitation is the Interior's unilateral power to decide if a consistency determination is required by section 307 of the CZMA and the ineffectiveness of a state's objection to a consistency determination.[47] Such restrictions on a participating state's powers, particularly in light of the Reagan administration's emphasis on delegation of responsibility to the states, have contributed substantially to the present controversy.[48]

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[42] 16 U.S.C. § 1454(h) (1982).

[43] *See* 16 U.S.C. § 1455(c)(8) (1982).

[44] 16 U.S.C. § 1456(c) (1982). Regulations implementing the consistency requirements are codified at 15 C.F.R. §§ 930.1-930.145 (1981).

[45] 16 U.S.C. § 1456(c)(1) (1982).

[46] 16 U.S.C. § 1456(c), (d) (1982).

[47] Comment, *supra* note 38, at 716, n. 67.

[48] Harvey, *supra* note 15, at 514.

II. *SECRETARY OF THE INTERIOR V. CALIFORNIA*

Former Secretary of the Interior James Watt planned to lease almost the entire OCS[49] between 1982-86. As a result, the coastal states most likely to suffer the negative impacts from the program sought a larger role in the decision-making process.[50] One situation representative of this conflict occurred off the California coast and involved lease sales 48, 53 and 68. Prior to each lease sale, the California Coastal Commission, relying on section 307(c)(1) of the CZMA, requested that the Interior determine whether the sale was consistent with the California Coastal Management Plan. The Department refused to conduct a consistency determination on the grounds that the OCS lease sale did not directly affect the California coastal zone and that the governor's request to delete certain tracts failed to strike a reasonable balance between national and local interests.[51]

The Interior then issued a final notice of sale,[52] which prompted California to file suit to enjoin the lease sale. The District Court concluded that the final notice of sale would directly affect the coastal zone "in all but the most unusual case—a case that could only be posed as a hypothetical."[53] The Ninth Circuit upheld the District Court's decision, but was reversed by the Supreme Court in *Secretary of the Interior v. California*.[54]

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[49] Grayson & Canaday, *supra* note 35, at 99 (about one billion OCS acres).

[50] Comment, *supra* note 38, at 710.

[51] Secretary of the Interior v. California, 464 U.S. 318 (1984); *see also* 30 C.F.R. § 256.31 (1985). Within 60 days after notice of a proposed lease sale the Governor may submit recommendations to the Secretary regarding the size, timing or location of the proposed lease sale. The Secretary shall accept such recommendations if he determines they provide for a reasonable balance between national and local interests. The purpose of the Act is looked at in order to ascertain the national interest. *Id.*

[52] 30 C.F.R. § 256.32 (1985) (a notice of sale, upon approval by the Secretary, shall be published in the Federal Register at least 30 days prior to sale and include a description of areas offered for sale, the stipulations, terms and conditions of the sale).

[53] California v. Watt, 520 F. Supp. 1359, 1380 (C.D. Cal. 1981).

[54] State of California, Etc. v. Watt, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of Interior v. California, 464 U.S. 312 (1984) (the Interior is not compelled to disapprove a federal activity in the face of a state's objection).

The major issue the Supreme Court addressed was whether the Interior's actions "directly affect[ed]" the California coastal zone when it sold oil and gas leases immediately adjacent to California's coastal zone.[55] First, the Court held that section 307(c)(1) of the CZMA applied only to activities within the coastal zone itself or in a federal enclave within the coastal zone and was not applicable to activities on the OCS.[56] Second, the Court emphasized that even if section 307(c)(1) applied to the sale of OCS oil leases, the OCSLA amendments only entitled the purchaser to conduct very limited "preliminary activities" on the OCS. In the Court's opinion, preliminary activities associated with a lease sale did not trigger consistency review because the effect on the coastal zone was not direct.[57]

A comparison of the majority and dissenting opinions reveals how the plain meaning of the term "directly affecting," the legislative history of the CZMA and OCSLA, the purpose of the CZMA and OCSLA amendments, and OCSLA policy arguments all can be interpreted in different ways to reach a desired result.

A. The Plain Meaning

The majority found that the meaning of the term "directly affecting" as used in section 307(c)(1) had not been defined anywhere in the CZMA.[58] The court stated that the "alternative verbal formulations" proposed by each party were superficially plausible but were without support in the Act itself.[59] The dissent cited rules of statutory construction in support of its finding that "directly affecting" should be defined to apply to activities that occurred outside as well as inside the coastal zone.[60]

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[55] *Secretary of Interior*, 464 U.S. at 344 (Stevens, J., dissenting).

[56] *Id.* at 322.

[57] *Id.*

[58] *Id.* at 321-22.

[59] Interior defined the term to mean having a direct, identifiable impact on the coastal zone. 464 U.S. at 321 (citing Brief for Federal Petitioners 20). California construed the phrase as initiating a series of events of coastal management consequence. *Id.* at 321 (citing Brief for Respondent 10).

[60] *Secretary of Interior*, 464 U.S. at 321.

B. Legislative History

The dissent found additional support in the legislative history of the CZMA for its position that the sale of OCS leases is an activity "directly affecting" the coastal zone within the meaning of section 307(c)(1). Although the original House and Senate versions of the CZMA applied only to activities "in the coastal zone," the purpose of the CZMA was to prevent adverse effects on the zone.[61] This purpose could not have been effectuated without considering the impact activities conducted outside the coastal zone would have had on the coastal zone.[62] Therefore, the replacement of "in the coastal zone" with "directly affecting the coastal zone" expanded the scope of the consistency obligation[63] to any federal activity which had an effect in the coastal zone.[64]

The majority's explanation for the substitution of the words "directly affecting" for "in the coastal zone" rested in the different definitions of "coastal zone" contained in the original House and Senate bills.[65] The Senate definition of "coastal zone" excluded federal lands within the coastal zone from compliance with state management plans. In contrast, the House bill interpreted federal lands to be "fully subject to section 307(c)(1)'s consistency requirement."[66] However, neither bill included *federal lands in the OCS* in its definition of coastal zone. As a result, the majority concluded that federal activities in the OCS

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[61] *Id.* at 345-46 (Stevens, J., dissenting); *see* Caminetti v. United States. 242 U.S. 470, 485-86 (1917) (stating the plain meaning rule of statutory construction which provides that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them").

[62] *Secretary of Interior*, 464 U.S. at 347 (Stevens, J., dissenting); *see* H.R. 14146, 92d Cong., 2d Sess., *reprinted in* 118 CONG. REC. 26502 (1972); S. 3507, 92d Cong. 2d Sess. § 314(b)(1) (1972) *reprinted in* 118 CONG. REC. 14190 (1972); *see also* 16 U.S.C. § 1452(1) (1982) (the expressed purpose of the CZMA was to promote the preservation of natural resources in the coastal zone).

[63] *Secretary of Interior*, 464 U.S. at 347 (Stevens, J., dissenting). "An oil well adjacent to the zone will affect the zone in precisely the same way whether it is in a federal enclave or in federal water just outside the zone." *Id.* at 348 n.6.

[64] *Id.* at 346-53 (Stevens, J., dissenting) (this expansion meant that if any activity outside the zone has an effect in the zone then that activity is subject to the consistency provision of § 307(c)(1)).

[65] *Id.* at 322; *see supra* note 61.

[66] *Secretary of Interior*, 464 U.S. at 323.

were excluded from 307(c)(1)'s consistency provisions.[67] Moreover, provisions which would have enabled the state to play a crucial role in requiring federal OCS leasing to be consistent with state management programs were rejected by Congress as likely to create conflicts with existing continental shelf legislation.[68] The Court felt compelled to conclude that the "directly affecting" language of section 307(c)(1) applied only to federal lands within the coastal zone and not to OCS lease sales.[69]

The final legislative history argument used by the Court to show that section 307(c)(1) did not apply to OCS leasing involved an analysis of other paragraphs of the CZMA.[70] The Court decided that section 307(3) is more relevant to the sale of OCS leases.[71] Upon examination, the Court concluded that the legislative history of section 307(c)(3) did not require a consistency determination for OCS lease sales.[72]

C. *The Purpose of the CZMA*

The purpose of the CZMA reinforced the minority's position that under section 307(c)(1) federal OCS activity was subject to a consistency review at the lease sale stage. Several provisions of the CZMA "indicate a preference for long range planning

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[67] *Id.*

[68] *Id.* at 327; *see* H.R. CON. REP. No. 1544, 92d Cong., 2d Sess. 15, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4825.

[69] *Secretary of Interior*, 464 U.S. at 330.

[70] *Id.* at 332. (the majority found § 307(c)(1) inapplicable to OCS lease sales because hydrocarbon drilling on the OCS is not an activity "conduct[ed] or support[ed]" by a federal agency).

[71] *Id.* at 333. 16 U.S.C. § 1456(c)(3)(b) (1982) provides in pertinent part:

> [A]ny person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act . . . shall with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone . . . [certify] that each activity . . . complies with [the] state's approved management program. . . . No Federal official or agency shall grant such person any license or permit for any activity . . . until [the state concurs or] . . . the Secretary finds . . . that each activity . . . is consistent with the objectives of [CZMA] or is otherwise necessary in the interest of national security.

[72] *Id.*; *see* H.R. CON. REP. No. 1298, 94th Cong., 2d Sess. 30, *reprinted in* 1976 U.S. CODE CONG. AND AD. NEWS 1768, 1827-28.

and for close cooperation between federal and state agencies in conducting or supporting activities that directly affect the coastal zone."[73] Application of the consistency requirement at the lease sale stage would fulfill this purpose[74] and promote more efficient development of the OCS. For example, reassurance at the pre-lease stage that a lessee's plans were consistent with the state's management plan would save time and money for the lessee, the public and the government.[75]

In addition, if OCS lease sales by the federal government were not subject to the consistency provisions, congressional intent to ensure a consistency determination of federal activities would be completely circumvented.[76] This conclusion was inescapable because the only federal activity in the development of the OCS occurred at the lease sale stage as all subsequent activities were conducted by lessees.[77] The majority found that "broad arguments about CZMA's structure, the Act's incentives for the development of state management programs, and the Act's general aspirations for state/federal cooperation cannot support the expansive reading of section 307(c)(1)."[78]

D. The CZMA Amendments

Although section 307(c)(3) was amended in 1976, House and Senate proposals to add the word "lease" in order to require consistency for lease sales, were rejected by Congress.[79] The majority further noted that section 307(c)(3)(B) as amended provided that only applicants for federal licenses or permits must certify consistency with state plans before exploration or production.[80] Since lease sales were not included in the express

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[73] *Secretary of Interior*, 464 U.S. at 356 (Stevens, J., dissenting); *see supra* note 61 and accompanying text.

[74] *Secretary of Interior*, 464 U.S. at 357 (Stevens, J., dissenting).

[75] *Id.* at 357-58. For further discussion, see Yi, *supra* note 30, at 182-83; Note, *Watt v. California: Supreme Court Sinks Consistency Review of Offshore Oil Leases*, 10 COLUM. J. ENVTL. L. 131, 141 (1985).

[76] *Secretary of Interior*, 464 U.S. at 359 (Stevens, J., dissenting).

[77] *Id.*; *see also* Berger and Saurenman, *supra* note 14, at 48.

[78] *Secretary of Interior*, 464 U.S. at 332.

[79] *Id.* at 334-35.

[80] *Id.*; *see supra* notes 71-72 and accompanying text.

consistency clause of section 307(c)(3)(B), the court concluded that a determination is not required when a lease is sold.[81]

The dissent detailed a "dramatically different congressional understanding" of the deletion of the term "lease" from the proposed amendments.[82] The legislative history indicated that the word "lease" was omitted "not because of disagreement with the concept of applying section 307 to OCS leasing, but because the conferees saw no reason to amend section 307(c)(3) since there was widespread agreement in 1976 that section 307(c)(3)(1) already applied to OCS leasing."[83] The addition of section 307(c)(3)(B) was meant to extend the consistency requirement from the lease-bid stage to subsequent steps[84] involving production or development.

E. The 1978 OCSLA Amendments

The 1978 Amendments to the OCSLA fragmented the OCS leasing process into four distinct steps. The four stages were planning, lease sales, exploration and production.[85] The majority decided that the first two steps of the leasing process involved some consultation with the states. However, a consistency determination with state coastal management plans was not mandated by the Amendments until the last two steps.[86]

The Court found that since the Amendments required federal approval prior to exploration or development by OCS lessees, the mere sale of a lease did not involve the consistency requirement of section 307(c)(1) of the CZMA.[87] Moreover, the sale of a lease did not directly affect the coastal zone because a lease was subject to cancellation if it failed to meet with federal approval.[88] The majority rationalized the distinction between the four stages on policy grounds, asserting that Congress had de-

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[81] *Secretary of Interior*, 464 U.S. at 335.

[82] *Id.* at 364 (Stevens, J., dissenting).

[83] H.R. REP. No. 878, 94th Cong., 2d Sess. 52 (1976).

[84] *Id.*; *see* H.R. CON. REP. No. 1298, 94th Cong., 2d Sess. 30, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1828.

[85] 43 U.S.C. §§ 1344, 1337(a), 1340, 1351 (1982).

[86] *Id.* at 1340(c)(1), 1351(d).

[87] *Secretary of Interior*, 464 U.S. at 338.

[88] *Id.* 339; *see* Yi, *supra* note 30, at 182-83 (discussing problems with this approach).

cided it was better to postpone consistency requirements until further information on specific tracts was available.[89]

Four arguments raised by Justice Stevens' dissent evidenced legislative intent to require a consistency determination pursuant to the CZMA at the leasing stage. First, there was an explicit savings clause in the OCSLA amendments to preserve the provisions of the CZMA.[90] Second, the only House report made during consideration of the OCSLA amendments required a consistency review of OCS leasing.[91] Third, section 18(f) of the OCSLA provided that state management plans must be considered by the Secretary at the leasing stage.[92] Fourth, a lease sale did not have an indirect effect, because the natural consequence of selling a lease was development.[93] As the Ninth Circuit stated:

> [D]ecisions made at the lease sale stage establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of onshore construction.[94]

The dissent agreed with the Ninth Circuit that leasing sets into motion a chain of events resulting in development directly affecting the coastal zone.[95]

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[89] *Secretary of Interior*, 464 U.S. at 342-43; *see* Berger & Saurenman, *supra* note 14, at 47-48.

[90] *Secretary of Interior*, 464 U.S. at 372 (Stevens, J., dissenting). 43 U.S.C. § 1866(a) (1982) provides that: "Except as otherwise expressly provided in this Charter, nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ."

[91] *Secretary of Interior*, 464 U.S. at 373 (Stevens, J., dissenting); H.R. REP. 590, 95th Cong., 2d Sess. 153, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1559 n. 52.

[92] 43 U.S.C. § 1344(f) (1982); *Secretary of Interior*, 464 U.S. at 372 (Stevens, J., dissenting).

[93] *Secretary of Interior*, 464 U.S. at 372 (Stevens, J., dissenting).

[94] California v. Watt, 683 F.2d 1253, 1289.

[95] *Secretary of Interior*, 464 U.S. at 364 (Stevens, J., dissenting).

III. RAMIFICATIONS OF *SECRETARY OF THE INTERIOR V. CALIFORNIA*

The majority of the Supreme Court held that the Interior's sale of OCS oil and gas leases was not an activity which directly affected the coastal zone and as a result lease sales did not trigger the consistency provisions of section 307(c)(1) of the CZMA. Since a consistency review was not required, the Court decided it was not necessary to define the terms "directly affecting" and "to the maximum extent practicable."[96] Despite the Supreme Court's cursory treatment of this statutory language, Congress plans to retain and clarify these terms with more concise language in the proposed amendments to the CZMA.[97]

The Court's restrictive interpretation of the scope of the CZMA consistency provisions seriously eroded the ability of the states to influence pre-lease and lease sale activities on the OCS.[98] After *Secretary of the Interior*, the only activities clearly subject to a state consistency determination were federal activities in the coastal zone which affected the zone. Prior to the majority's decision, "the threshold for a consistency determination under section 307(c)(1) had been a function of the extent to which a Federal activity affects the coastal zone, not of the activity's geographic location."[99]

The territorial restrictions on the scope of the CZMA mandated by the Court's decision affected other activities which occured outside the coastal zone. For instance, one company filed a memo with the NOAA contending that its permit application to incinerate hazardous waste outside the coastal zone did not trigger state consistency review under the CZMA.[100] It is also unclear whether the Interior's plans to lease ocean mining tracts in the Pacific Northwest are subject to a state consistency determination.[101] The decision will affect the ability of states to respond to activities such as ocean dumping of radioactive wastes,

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[96] *Id.* at 342-43; *see* Comment, *supra* note 13, at 10166.

[97] *See infra* notes 117-25 and accompanying text.

[98] *Id.*; *see* Comment, *supra* note 38, at 728-30 (for further discussion).

[99] 130 CONG. REC. 48 (daily ed. Jan. 23, 1984) (statement of Rep. Ranetta).

[100] 130 CONG. REC. E31 (daily ed. Jan. 23, 1984) (statement of Rep. D'Amours).

[101] 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Sen. Packwood).

regulation of coastal pollution, and the siting of energy facilities.[102]

In addition, the geographic limitations imposed on the scope of the CZMA by the majority's position may detrimentally affect certain activities which necessarily transgress state lines and occur within the coastal zone. The management of marine fishery resources by a regional council pursuant to the Magnuson Fishery Conservation and Management Act[103] is one such activity. Mandatory state review may undermine the regional concept embodied in the program.[104] For this reason, the proposed Senate version of section 307(c)(1) would exclude activities pursuant to this act from consistency review.[105]

Another ramification of the court's holding has been the increased utilization by coastal states of the moratoria mechanism to prevent federal OCS leasing of potentially environmentally sensitive tracts.[106] A congressionally-imposed lease moratorium is a viable alternative to the protection offered by the consistency provisions of the CZMA. However, the placing of OCS acres in moratoria is effective for a limited period. For example, while drilling bans have been renewed off the coast of such controversial states as California and Massachusetts, a ban off the Gulf Coast of Florida has been allowed to lapse and the House Appropriation Committee has decided not to prohibit drilling off Alaska's Bristol Bay.[107]

The Court's opinion had some positive effects, such as limiting the rights of lessees to conduct only preliminary activities until a consistency determination has been made, and strengthening the review provisions of section 307(c)(3) so that consistency is mandatory at the exploration stage.[108] A permit or licensing

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[102] 130 Cong. Rec. E30 (daily ed. Jan. 23, 1984) (statement of Rep. D'Amours).

[103] 16 U.S.C. §§ 1801-1882 (1982).

[104] 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Rep. Packwood).

[105] S. 2324(c)(1)(a)(iv), 98th Cong., 2d Sess., 130 CONG. REC. 1506-07 (1984); *see* 130 CONG. REC. S1507 (daily ed. Feb. 22, 1984) (statement of Sen. Hollings).

[106] 130 CONG. REC. E1460 (daily ed. Apr. 5, 1984) (statement of Rep. Jack Fields quoting Threet, *OCS Moratoriums Harm Nation's Best Energy Hope* (prior to 1982, 736,000 acres were placed in moratoria; however, between 1982-84 alone, 52 million acres were placed in mortoria).

[107] 130 CONG. REC. S9255 (daily ed. July 25, 1984) (statement of Sen. Goldwater).

[108] *See* Secretary of Interior v. California, 464 U.S. 312, at 339-43 (1984).

agency now has the affirmative obligation to insist that licensees meet state consistency requirements. Finally, any leases which do not comply with a state's plan may be cancelled at the discretion of the Interior.[109]

IV. PROPOSED LEGISLATION

The effect of the Supreme Court's decision in *Secretary of the Interior* is analogous to that of a pebble thrown into a pond. Although the pebble has long since touched the bottom, the ripples continue to expand. The greatest ripples or ramifications flowing from the Court's holding are the varying responses of the Interior, the NOAA and Congress.

In 1983, former Secretary of the Interior James Watt adopted the controversial area-wide leasing program. Area-wide leasing replaced the traditional nomination or tract by tract system and reflected the Reagan administration's aggressive approach to offshore leasing.[110] Although Watt's successor, William Clark, refused to discontinue area-wide leasing, he did adhere to the position that the "[d]epartment [would] try to identify the precise areas of interest to allow earlier assessment of environmental and coastal impacts, and [would] give the states earlier notice."[111] The area-wide leasing policy has been further tempered[112] by the latest Secretary of the Interior, George Hodel.[113]

There is no doubt that the Interior will have to make more compromises between the goals of area-wide leasing and the deletion of environmentally sensitive tracts. One oil company spokesman explained that fewer companies were bidding because "sales became less and less attractive as [the] Interior steadily snipped out tracts of interest to the Navy, environmentalists and

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[109] *Id.* at 333-34.

[110] 47 Fed. Reg. 11,980, 11,982 (1982); *see* Grayson, *supra* note 49, at 74-77 (for a discussion of areawide leasing).

[111] Comment, *supra* note 13, at 10168.

[112] 131 CONG. REC. S1141 (daily ed. Feb. 6, 1985) (George Hodel was confirmed by the Senate as Secretary of the Interior, replacing William Clark on February 6, 1985).

[113] 130 CONG. REC. H5834 (daily ed. July 17, 1985) (remarks of Rep. Panetta) (Discussing a preliminary agreement reached between the Secretary and representatives of California releasing 150 tracts of the 6,460 in moratoria to be offered for leasing. The remaining tracts would be protected until the year 2,000 except in event of a national emergency.).

fishing interests [until] many, if not most of the interesting tracts were deleted."[114]

The NOAA proposed a new rulemaking limited to modifications necessitated by the Supreme Court's decision.[115] The most significant change was that oil and gas lease sales were to be excluded from the list of activities subject to state and federal CZMA consistency requirements.[116] In addition, the NOAA has conducted a Federal Consistency Study which documented the experiences of states, federal agencies, industry and public interest groups in implementing the federal consistency provisions.[117] The results of the study enabled the NOAA to "decide which issues will need to be addressed in future rulemakings; which requires legislative remedies, possibly as part of the Congressional reauthorization process for the CZMA scheduled for 1985; and which do not require revision."[118]

Not only is the CZMA to be reauthorized in 1985 but both Houses of Congress felt compelled to propose legislation which would allow states to voice concerns over the impact of a wide range of federally sponsored activities upon their coastline.[119]

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[114] 130 CONG. REC. H10908, H10909 (daily ed. Oct. 2, 1984) (statement of Rep. Panetta). Similarly, not a single bid was submitted for the Georges Bank sale off the coast of Massachusetts, 130 CONG. REC. E4437 (daily ed. Oct. 10, 1984) (statement of Rep. Markey).

[115] The Court dismissed the legislative history of regulations promulgated by the NOAA in its administration of the CZMA, stating the agency has walked a path of such "tortured vacillation and indecision" in its interpretation of § 307(c)(1) that the regulations were of no help. *Secretary of the Interior*, 464 U.S. at 320 n.6.

Although NOAA has recently prevaricated on whether lease sales directly affected the coastal zone and thereby triggered a consistency determination, prior to 1981, NOAA's long-held opinion was that pre-leasing activities were subject to a consistency review. California v. Watt, 683 F.2d at 1261.

[116] 50 Fed. Reg. 3,800 (1985).

[117] 50 Fed. Reg. 18,546 (1985). Sections I & II of the Draft Federal Consistency Study summarize the statistical information on the use of the Federal consistency process to review Federal activities, licenses and permits, and funding assistance during fiscal year 1983. Section III looks at the operation of the Federal consistency process including: "(1) interpreting the language of the CZMA; (2) achieving improved consultation and coordination through consistency; (3) conducting a consistency review; (4) reaching agreements on the consistency of an activity; and (5) using formal mechanisms to help resolve disagreements between Federal and State agencies". *Id.*

[118] 50 Fed. Reg. 3,800 (1985).

[119] 130 CONG. REC. H8 (daily ed. Jan. 23, 1984) (statement of Rep. Panetta); 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Sen. Packwood).

The purpose of H.R. 4589 is to clarify Section 307(c)(1) and to effectuate the intent of the CZMA. This would ensure that states and localities are involved in decisions affecting the coastal zone.[120]

First, paragraph (A) removes the geographic limitation of federal activities "in the coastal zone" by explicitly stating that activities "whether within or landward, or seaward of, the coastal zone" which affect the coastal zone must be consistent with state programs "to the maximum extent practicable."[121] House discussion of the bill clarifies the phrase "to the maximum extent practicable." The term is defined as it currently appears in Commerce Department regulations.[122]

Second, paragraph (B) specifically lists activities which directly affect the coastal zone beginning with activities requiring conduct or support which "(i) produces identifiable physical, biological, social or economic consequences in the coastal zone."[123] If the first provision does not cover an activity, the second provision may trigger a consistency review if the activity "(ii) initiates a chain of events likely to result in any such consequences."[124]

Third, paragraph (C) excludes activities from a consistency determination if prohibited by Federal law or an unforeseen circumstance.[125] The latter exclusion may become a point of contention, if it is interpreted broadly.[126] This paragraph also provides that activities directly affecting the coastal zone shall be conducted in a manner "fully consistent" with approved management programs.[127] It is difficult to foresee whether the "fully consistent" standard will fare any better than the controversial "to the maximum extent practicable" standard.

Senate Bill 2324 parallels the House amendment by clearly requiring offshore oil and gas leasing by the Interior to be

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[120] 130 CONG. REC. H20-21 (daily ed. Jan. 23, 1984) (statement of Rep. Levine).

[121] H.R. 4589(c)(1)(A), 98th Cong., 2d Sess. (1984) amending 16 U.S.C. § 1456(c)(1) (1982).

[122] 130 CONG. REC. H8 (daily ed. Jan. 23, 1984) (remarks of Rep. Panetta).

[123] H.R. 4589(c)(1), 98th Cong., 2d Sess. (1984).

[124] *Id.*

[125] *Id.* at H.R. 4589(c)(1)(i), (ii).

[126] For example, this exclusion may encompass an event such as another Arab oil embargo.

[127] H.R. 4589(c)(1)(c), 98th Cong., 2d Sess. (1984).

consistent with state coastal management plans.[128] Paragraph (A) replaces "directly affecting" with "significantly affecting" the coastal zone. "Significantly affecting" may create the same statutory construction problems as "directly affecting" unless the new term is clearly defined. The Senate replaced the phrase "to the maximum extent practicable" with the obligation that federal activities be "fully consistent" with state management plans.[129] A precise definition of this term may succeed in eliminating one source of potential conflict. Activities excluded from a consistency determination under the Senate's plan include those which involve questions of national security, national emergency, conflicts with Federal law, and any activities pursuant to the Magnuson Fishery Conservation and Management Act.[130]

The outraged reaction of Congress to the Supreme Court's interpretation of the CZMA can be appreciated by examining the proposed amendments as well as the comments of an original author of the CZMA, Senator Hollings:

> With the pen strokes of the majority opinion suddenly we are being told that a Federal-State relationship founded over 10 years ago in this legislation is not at all what the Congress and the States believed it to be. And in the place of this established partnership we now have a simple-minded description for which there is no basis in legislative history or legislative context. What the Court has done is freed the Department of Interior of its duty to review offshore oil and gas leasing plans for consistency with the CZMA plans of adjacent states, while this duty is exactly what Congress intended to impose in this provision of law.[131]

Senator Hollings' attitude is prevalent among members of Congress, environmental groups and coastal states, but certainly

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[128] *See* 130 CONG. REC. S1506 (daily ed. Feb. 22, 1984) (statement of Senator Packwood).

[129] S. 2324(c)(1)(A), 98th Cong., 2d Sess. (1984), amending 16 U.S.C. § 1456(c)(1) (1982).

[130] S. 2324(c)(1)(a)(i)-(iv) (1984). There could be a danger that the national security exclusion could be interpreted broadly. For example, the national security argument was used by the federal government to invoke areawide leasing. *See* Grayson, *supra* note 35, at 99.

[131] 130 CONG. REC. S1507 (daily ed. Feb. 22, 1984) (statement of Senator Hollings).

not among federal agencies and the oil industry. Such conflicting interpretations of the applicability of the consistency requirements to offshore leasing do not bode well for the potential of a cooperative federal/state partnership. Indeed, the passage of the proposed amendments will meet with resistance from the NOAA as "the bill has the potential to elevate coastal state interests above national interests in OCS development."[132]

However, this fear that state decision-making will pre-empt federal concerns has been addressed repeatedly by House and Senate members. The proposed legislation does not give coastal states veto power "de facto or otherwise" over federal activities affecting the coastal zone. It merely gives states the right to object to federal activities which affect the zone.[133]

Conclusion

In conclusion, neither the CZMA nor the OCSLA amendments were enacted to benefit exclusively state or federal interests. Each Act emphasized balancing national interests of efficient energy production with coastal states' concerns regarding the environmental impacts of offshore development. One factor in the present polarization of state and federal interests can be traced to the Interior's confrontational posture under former Secretary of the Interior Watt in implementing the OCSLA amendments. A second factor is the Interior's exclusion of coastal states from sharing in the revenues generated by offshore oil production.

Although former Secretary Watt has long since resigned, a legacy of distrust of the federal government by coastal states remains. Secretary Hodel has begun to moderate his predecessor's approach to offshore leasing in his relations with the states. For example, Secretary Hodel was recently praised for his efforts to accommodate California's environmental interests when he negotiated a lease moratorium agreement.[134] This is an encour-

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[132] *Testimony on behalf of the Southeastern Fisheries Association, Inc., regarding H.R. 4589 presented to the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries*, 98th Cong., 2d. Sess. (1984) (statement of Eldon V. C. Greenberg).

[133] *See* CONG. REC. H8 (daily ed. Jan. 23, 1984) (remarks of Rep. Panetta).

[134] *See* CONG. REC. H5765, H5766 (daily ed. July 17, 1985) (statement of Rep. Bosco); *see also supra* note 113 and accompanying text.

aging gesture toward the establishment of a cooperative federal/state relationship.

Another step in the right direction would be to involve the states in a revenue sharing plan which would compensate coastal states for such OCS development risks as pollution and possible boomtown effects of support facilities.[135] Legislation calling for such a plan has been proposed in the event the CZMA amendments are not adopted.[136] These funds would replace recommended CZMA appropriation cuts and enable coastal states to attain parity with inland states which traditionally have shared in oil revenues. This approach would enable the states to implement a cost/benefit analysis which would involve weighing potential negative environmental impacts with revenue generated from offshore production.[137]

Revenue sharing encourages states to work in concert with the federal government in developing natural resources. A cooperative federal/state relationship in OCS development would reduce the lead time from lease bid to full lease production and virtually eliminate time-consuming litigation. Although *Secretary of the Interior* was intended to end the "vexatious litigation," it is only the opening volley of the "sea wars." A final "truce" or cooperative partnership between federal and state governments will be established when a practical solution involving moderation and revenue sharing is reached.

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[135] *See* Shirley, *The Imperative for Offshore Development*, THE POLITICS OF OFFSHORE OIL 173 (Goldstein ed. 1982) (for a general discussion of revenue sharing).

[136] H.R. 5, 98th Cong., 1st Sess. (1983); S. 800, 98th Cong., 1st Sess. (1983) (allocating a portion of federal OCS revenue to the states for continued management of coastal resources).

[137] *See* Shirley, *supra* note 135.