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Federal-State Maritime Boundary Issues

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Laura K. Welles
Intern
Resources, Sciences, and Industry Division

Aaron M. Flynn
Legislative Attorney
American Law Division

Eugene H. Buck
Specialist in Natural Resources Policy
Resources, Sciences, and Industry Division

Federal-State Maritime Boundary Issues

Summary

Over the last few decades, new uses for coastal and offshore areas have emerged, including aquaculture and renewable energy (wind, wave, and tidal), while more traditional uses, such as commercial fishing and oil and gas development on the Outer Continental Shelf, have continued to flourish. As technologies improve, companies may increasingly seek to move activities farther offshore and to expand resource development in both state and federal waters. Various interests argue over which policies and regulations will best minimize conflicts between competing offshore resource users while effectively safeguarding already crowded coastal areas from further development.

An issue that is fundamental to the regulation of offshore activities is determining which level of government has primary jurisdiction over particular offshore areas. Who has jurisdiction depends, in part, upon the federal-state maritime boundaries. Unlike most countries, the U.S. federal government shares jurisdiction over its 12-mile (nautical) territorial sea with its coastal states. The 1953 Submerged Lands Act (SLA) generally gives coastal states title to the submerged lands, waters, and natural resources located within three nautical miles of the coastline. The waters, seabed, and natural resources beyond these three miles belong to the federal government. Identifying where a federal-state maritime boundary lies is not always an easy task.

Federal-state maritime boundaries are represented on nautical charts published by the National Ocean Service, part of the National Oceanic and Atmospheric Administration (NOAA). These charts reflect the federal government's official position on where U.S. maritime boundaries (federal and state) are located. Determining the baseline from which federal-state maritime boundaries are determined can be difficult, depending on the geography of the coast. International law, which guides U.S. practice, recognizes different methods for locating a coastal baseline in such circumstances.

The U.S. has traditionally applied a measurement standard that minimizes the extent of state offshore waters. But while setting maritime boundaries is primarily a federal prerogative, states have continued to challenge the National Ocean Service charts. When a U.S. coastal state disagrees with the federal government's position on its maritime boundary, the courts have been called upon to resolve the dispute, often the U.S. Supreme Court under its original jurisdiction under article III of the Constitution.

Congress also may become more involved in maritime boundary and jurisdiction issues as the pace of offshore development increases, and legislation to address some of these issues, such as S. 735, has been introduced in the 109th Congress. This report will be updated as circumstances warrant.

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Introduction

Over the last few decades, new uses for coastal and offshore areas have emerged, including aquaculture and renewable energy (wind, wave, and tidal), while more traditional uses, such as commercial fishing and oil and gas development on the Outer Continental Shelf, have continued to flourish. As technologies improve, companies will likely seek to expand offshore activities and conduct many of them farther from the coast. For example, interest in offshore wind energy has already grown in recent years, resulting in numerous offshore projects being proposed off the coasts of Delaware, Maryland, Massachusetts, New Jersey, New York, and Virginia.[1]

As pressure for development intensifies, various interests argue over how to balance the concerns of resource developers, resource users, and coastal communities.[2] A key factor in determining who can make important decisions on these and related regulatory issues is determining the location of the boundary between federal and state offshore waters.

Established boundaries are key in knowing what laws apply to a particular situation. For example, before a company applies for a permit to build an offshore wind farm, it needs to know whether its proposed project will be in state or federal waters and whether regulatory authority over the project will reside in the federal government, state government, or both. Moreover, the company needs to know whether or not the maritime boundary is likely to change over time, thereby affecting its project and overall investment. All of these uncertainties have arisen in the Cape Wind offshore wind project off the coast of Massachusetts.

Federal-state offshore boundary disputes are not new phenomena. For example, in 1953 the House Judiciary Committee, in considering legislation on who — the

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[1] Betsie Blumberg, *Wind Farms: An Emerging Dilemma for East Coast National Parks*, available at [http://www2.nature.nps.gov/YearinReview/PDF/YIR2003_05_D.pdf], visited Apr. 20, 2005.

[2] As indicated by the Pew Oceans Commission report and the U.S. Commission on Ocean Policy report, there are a variety of arguments concerning which policies and regulations will best minimize conflicts between competing offshore resource users while effectively safeguarding already crowded coastal areas from over-development. Regulating offshore activities raises many issues (e.g., options for offshore permitting) that will not be addressed in this report. Instead, this report focuses on the many intricacies involved in determining federal-state maritime boundaries. The Pew Oceans Commission report is available online at [http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf], visited Apr. 19, 2005. The U.S. Commission on Ocean Policy report is also available online at [http://www.oceancommission.gov/documents/full_color_rpt/welcome.html], visited Apr. 19, 2005.

federal government or the states — should own and control the development of offshore resources, observed:

> [T]he interminable litigation over [offshore] areas involving the Federal and State Governments . . . has added nothing but confusion and controversy . . . . Such a state must not be permitted to exist indefinitely for the best interest of all parties.[3]

The deleterious effects of boundary disputes at a time when Congress saw a vital need to develop offshore oil[4] led to enactment of the Submerged Lands Act (SLA)[5] in 1953. But even though the SLA, discussed further below, clarified the respective maritime jurisdictions of the federal government and the states, litigation continued over how the act should be applied. Since 1953, the U.S. Supreme Court has been called upon to resolve numerous maritime boundary disputes between federal and state governments. No challenge to the SLA's general resolution of jurisdictional issues succeeded,[6] and after decades of litigation, most disputes have been laid to rest.[7] But even today, however, both Alaska[8] and Massachusetts[9] are asserting ownership over waters claimed by the U.S. government. By declaring title to these

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[3] H.Rept. 83-215 at 2 (1953)(describing the "Tidelands Controversy").

[4] Id.

[5] 43 U.S.C. §§ 1301, et seq. This act gave control over the submerged lands, out to three geographical miles, to all coastal states. See United States v. Louisiana, 363 U.S. 1, 7 (1960). The term *submerged lands* refers to the seabed or ocean floor.

[6] Most disputes arise when states are either determining their coastline or their seaward boundary.

[7] Texas, Louisiana, Mississippi, Florida, Massachusetts, Rhode Island, New York, California, and Alaska have all been involved in boundary litigation with the federal government. See United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960); United States v. Maine, 475 U.S. 89 (1986); United States v. Maine, 469 U.S. 504 (1985); United States v. California, 381 U.S. 139 (1965); United States v. Alaska, 521 U.S. 1 (1997).

[8] Alaska is currently involved in a lawsuit against the federal government, seeking title to the submerged lands located in the Alexander Archipelago. This area comprises more than 1,000 islands and is larger than most states. Oral arguments were heard before the Supreme Court on Jan. 10, 2005.

[9] In *United States v. Maine*, the Supreme Court rejected Massachusetts' claim that Nantucket Sound qualifies as inland waters. 475 U.S. 89, 90 (1986). Instead the Court ruled in favor of the federal government by holding that Nantucket Sound constitutes "partly territorial sea and partly high seas." The Court's decision essentially granted the federal government jurisdiction over certain portions of Nantucket Sound. In mid-February 2005, Massachusetts state officials announced that a pile of rocks found in Nantucket Sound could extend state waters by about twelve miles. "State Pondering Border Move that Could Affect Cape Wind Farm," *Boston Globe*, available at [http://www.wggb.com/archive/environment/windfarm_cape_border.htm], visited Mar. 8, 2005. This discovery may change the location of the Massachusetts coastline.

waters, both states are attempting, by different methods,[10] to extend their coastlines and, with it, their seaward boundaries.

Maritime Jurisdiction Under International Law. The extent of federal/state jurisdiction over offshore waters is related to the broader issue of the dominion of sovereign nations over their coastal waters: as a rule, the same baseline from which the U.S. determines national jurisdiction under international law is used to determine federal v. state jurisdiction within U.S. waters.

Under international law,[11] the world's oceans are divided into numerous jurisdictional zones. Prior to President Truman's Proclamation in 1945 on U.S. rights to seabed resources,[12] only three zones existed: a coastal nation's inland (or internal) waters, the territorial sea (only three nautical miles at the time)[13] and the high seas.[14] Much has changed since 1945. Today the jurisdictional zones include:

- a coastal nation's internal waters,
- the territorial sea (now 12 nautical miles, rather than 3),[15]
- contiguous zone,[16]

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[10] Alaska sought its boundary change through litigation, while Massachusetts applied to the federal government. When litigated, the Supreme Court has jurisdiction to determine maritime boundaries between a state and the federal government. Otherwise, federal-state maritime boundaries are reviewed and later determined by the Ad Hoc Committee on Delimitation of the United States Coastline. This Ad Hoc Committee is discussed later on in this report.

[11] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994). Hereafter referred to as UNLCOS III.

[12] "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," 10 *Fed. Reg*. 12303 (Oct. 2, 1945). With this proclamation, President Truman declared U.S. jurisdiction over the "natural resources of the subsoil and sea bed of the continental shelf." *Id.*

[13] It is "mainly through the action and practice of the United States of America and Great Britain since the end of the eighteenth century, the distance of three miles from shore was more or less formally adopted by most maritime states as ... more definitely fixing the limits of their jurisdiction and rights for various purposes, and in particular, for exclusive fishery." United States v. California, 332 U.S. 19, 33, n.12 (1947) *quoting* Thomas W. Fulton, *Sovereignty of the Sea*, (Edinburgh, Scotland: William Blackwood & Sons, 1911). Most of the European countries adhered to the three nautical mile rule; however, there were some maritime countries that claimed larger belts. These countries included Spain (6 nautical miles), Mexico (9 nautical miles), and the Soviet Union (12 nautical miles). Shalowitz, *Shore and Sea Boundaries*, p. 25.

[14] United States v. Louisiana, 470 U.S. 93, 98-99 (1985).

[15] UNCLOS III art. 3. President Reagan extended the U.S. territorial sea from 3 to 12 nautical miles ("Territorial Sea of the United States of America, Proclamation 5928 of December 27, 1988," 54 *Fed. Reg*. 777 (Jan. 9, 1989)).

[16] The contiguous zone lies seaward of the territorial sea. This zone extends 24 nautical miles from the coastline. (UNCLOS III art. 33.) President Clinton extended the U.S. contiguous zone from 12 to 24 nautical miles. "Contiguous Zone of the United States," 64

(continued...)

- exclusive economic zone,[17]
- continental shelf,[18] and
- the high seas.[19]

While a coastal nation's jurisdiction does extend out to the high seas, the level of authority a coastal nation may exercise increases closer to its own shoreline.[20]

Thus, U.S. authority is greatest in its territorial sea and least in the high seas. Within the territorial sea, countries maintain sovereignty over the air space, seabed, subsoil, and water column.[21] A coastal nation can regulate fish stocks, oil and gas development, and other natural resources. Its jurisdiction over the territorial sea is essentially analogous to the sovereignty a nation possesses over its land territory, subject only to the right of innocent passage.[22] Federal-state boundary disputes concern their respective jurisdictions within the territorial sea only. Jurisdiction beyond the territorial sea is exclusively federal.

History of Federal-State Jurisdiction over the Territorial Sea

At the turn of the 20th century, there was a widely held impression, based on historic practices and general language in case law, that U.S. coastal states held title to the submerged lands beneath those waters "subject to the ebb and flow of the tide" — commonly known as tidal waters, a subset of the navigable waters.[23] A broader

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[16] (...continued)
Fed. Reg. 48701 (Sept. 8, 1999).

[17] The exclusive economic zone (EEZ) lies seaward of the territorial sea and extends 200 nautical miles from the coastline. (UNCLOS III art. 57.)

[18] The continental shelf refers to the seabed and subsoil of the submerged land areas that lie beyond a coastal nation's territorial sea. This area either extends 200 miles from the coastline or beyond, depending upon the geographical composition of the coastal nation's submerged lands. (UNCLOS III art. 76(1).)

[19] The high seas constitute "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State." (UNCLOS III art. 86.) "The high seas are open to all States." (UNCLOS III art. 87.)

[20] U.S. Commission on Ocean Policy, *Appendix 6: Review of U.S. Ocean and Coastal Law*, available at [http://www.oceancommission.gov/documents/full_color_rpt/append_6.pdf], visited Mar. 9, 2005.

[21] UNCLOS III art. 2.

[22] *See* UNCLOS III art. 2.1; Restatement (Third) of the Foreign Relations Law of the United States, §§ 512, 513 (1986). The right of innocent passage refers to a right given to all ships to travel on the surface waters of foreign nation's territorial sea and archipelagic waters. A ship's passage must be continuous and expeditious. A ship may stop and anchor as long as it is "incidental to ordinary navigation or rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress." UNCLOS III art. 18. A ship's passage is considered innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State." UNCLOS III art. 19.

[23] Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892). The Supreme Court (continued...)

assumption also prevailed in this era: coastal states were assumed to hold exclusive property rights to lands beneath inland waters and a stake in the territorial sea (then 3 nautical miles) subject only to federal jurisdiction over commerce and navigation, although there was no clear legal authority for this conclusion.[24] It was the growing importance of seabed resources, especially offshore oil, that finally spurred the federal government to challenge these assumptions directly.

Modern controversies over control of the territorial sea began in the 1920s when the State of California, claiming ownership over its coastal waters, issued certain oil and gas leases for the submerged lands of the Santa Barbara Channel.[25] Applications for oil and gas leases were also submitted to the federal government during this period, and the customary response to such requests was to inform the company that the federal government lacked the necessary authority to grant such leases.[26] Upon looking into the matter more closely, however, Secretary of the Interior Harold Ickes began to assert federal ownership over the submerged lands. Congress also began to weigh in on dominion over submerged lands. On the one hand, the 75th and 76th Congresses considered joint resolutions specifically authorizing the Attorney General to sue California over ownership to the seabed.[27] By contrast, the 79th Congress passed a joint resolution to quitclaim to the states all U.S. interest in the lands lying within three nautical miles of the coastline (excepting previously purchased, condemned or donated lands).[28] President Truman vetoed this measure and the veto was sustained.[29]

With oil and mineral rights at stake, the U.S. government eventually sued California, invoking the original jurisdiction[30] of the Supreme Court. In *United*

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[23] (...continued)
stated "it is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders." Knight v. United States Lands Ass'n, 142 U.S. 161, 183 (1891).

[24] Michael W. Reed, *Shore and Sea Boundaries (Volume 3)*: *The Development of International Maritime Boundary Principles Through United States Practice* 5, (Washington, DC: GPO, 2000).

[25] Shalowitz, *Shore and Sea Boundaries*, p. 3.

[26] Title to Submerged Lands Beneath Tidal and Navigable Waters, Joint Hearings before the Committees on the Judiciary (Feb. 23, 1948). Hereafter referred to as *Submerged Lands.*

[27] S.J. Res. 208, 75th Cong., 1st Sess. (1937) (passed the Senate and favorably reported to the House, but never considered by the full House); S.J. Res. 83 and 92, 76th Cong., 1st Sess. (1939) (hearings held but no further action).

[28] H.J.Res. 225, 79th Cong. 2d Sess. (1946).

[29] 92 Cong. Rec. 10660, 10745 (1946).

[30] Usually the Supreme Court sits in appellate jurisdiction, meaning it is reviewing a lower court's decision. Under Article III of the Constitution, the Supreme Court has original jurisdiction over cases involving states as parties. Original jurisdiction means that the sitting (continued...)

States v. California,[31] the Court held that the federal government, and not the states, had legal authority over the waters and seabed of the territorial sea: "[T]he federal government rather than the state has paramount rights in and power over the belt,[32] ... [as well as] full dominion over the resources of the soil under that water area, including oil."[33] Two other cases soon followed in which the Supreme Court confirmed that the federal government owned the lands and resources under U.S. territorial waters.[34]

Submerged Lands Act

In 1953, Congress exercised its constitutional power to "dispose of federal property"[35] and enacted the Submerged Lands Act.[36] With this act, Congress generally granted the coastal states title to the waters and submerged lands[37] lying beyond the low-water mark out to three nautical miles. This act also gives states the express power to lease, develop, and manage the natural resources found within their waters, seabed, and subsoil.

In delineating jurisdiction in the way it did in the SLA, Congress sought to "fix" the

> law of the land which, throughout our history prior to the Supreme Court decision in [*United States v. California*, 332 U.S. 19 (1947)], was generally believed and accepted to be the law of the land; namely, that the respective states are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.[38]

Beyond setting a three-mile general standard for state jurisdiction, the SLA permitted states bordering the Gulf of Mexico to extend their boundary to three marine leagues

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[30] (...continued)
court has the authority to hear and decide the case before any other court may review it.

[31] 332 U.S. 19 (1947).

[32] Here, *belt* refers to the waters within the territorial sea.

[33] United States v. California, 332 U.S. 19, 38 (1947).

[34] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

[35] U.S. CONST. Art. IV, § 3, cl. 2.

[36] Both Alabama and Rhode Island challenged the constitutionality of the Submerged Lands Act. The Supreme Court held in *Alabama v. Texas* that "Congress not only has the legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress may deal with such lands precisely as a private individual may deal with his farming property" (347 U.S. 272, 273, *quoting* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

[37] The submerged lands referred to here are those lands that lie beneath the territorial sea.

[38] Reed, *Shore and Sea Boundaries (Volume 3)*, p. 18, quoting H.Rept. 695, 82nd Cong., 1st Sess., (July 12, 1951) to accompany H.R. 4484, A bill to confirm and establish the titles of the States to lands beneath navigable waters within State boundaries.

if it could be shown that this outer boundary existed at the time of the state's admission to the Union. The Gulf of Mexico coasts of Texas and Florida qualified under this standard.[39] The SLA also confirmed that those states bordering the Great Lakes hold title to waters out to the international boundary with Canada.

In passing the SLA, Congress also made clear that the natural resources found in those portions of the subsoil and seabed lying seaward of state SLA boundaries would remain under federal control.[40] The SLA grant to the states also included multiple exceptions in favor of the federal government, including lands acquired by the federal government and expressly retained by the federal government at the time the state entered the Union[41] and lands occupied by the federal government under a claim of right.[42] The federal government also retained its authority to regulate commerce, navigation, national defense, power production, and international affairs within coastal states SLA boundaries.

But although Congress did confirm the seaward boundary of coastal states in the SLA, the SLA provides no guidance for determining a state's coastline, the baseline from which the seaward boundary is determined.[43] Delimiting a maritime boundary can be a complicated endeavor, especially when states with jagged or otherwise irregular coasts assert that certain adjacent waters constitute inland waters, a separate category of waters that are inside the coastline and under primary state control. The Supreme Court has relied on principals of international law to guide it in boundary controversies.[44]

Determining a State's Coastline

As stated above, the SLA sought to settle boundary controversies surrounding federal-state maritime jurisdiction. The act did resolve most basic issues, but it also prompted new legal battles between coastal states and the federal government over

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[39] 43 U.S.C. § 1301(b).

[40] 43 U.S.C. § 1302. In the same year it passed the SLA, Congress further established federal dominion seaward of the coastal state's three nautical mile boundary in the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331(a), 1332(1)).

[41] The Supreme Court dealt with this exemption clause in *United States v. Alaska*, 521 U.S. 1 (1997). The issue was whether or not the federal government expressly retained ownership of submerged lands within the Arctic National Wildlife Refuge and the National Petroleum Reserve at Alaskan statehood. The Supreme Court held that the federal government had retained title to these submerged lands and that ownership to these lands did not transfer to Alaska at statehood.

[42] 43 U.S.C. § 1313. *See also* Reed, *Shore and Sea Boundaries (Volume 3)*, p. 19. The "claim of right" clause seeks to preserve those "unperfected claims of federal title from extinction under [Section 1311's] general 'conveyance or quitclaim or assignment.'" United States v. California, 436 U.S. 32, 38 (1978) quoting language from the SLA. 43 U.S.C. §§ 1311, 1313(a).

[43] *See* United States v. Louisiana, 363 U.S. 1, 33 (1960).

[44] United States v. California, 381 U.S. 139, 165 (1965); United States v. Louisiana, 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89, 93-94 (1986).

about how and where the coastline should be measured.[45] After the SLA passed, about a dozen original actions were filed in the Supreme Court associated with defining a state's coastline.[46] It was soon clear that Congress had left this job of defining a state's coastline to the courts.[47]

Under the SLA, a state's coastline is 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." The first part of this definition seems fairly straightforward. Locating the "seaward limit of inland waters," however, has proven more difficult, especially without more specific guidance from Congress.[48] Absent domestic legislation pertaining to inland waters, the Supreme Court decided to adopt the definitions found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, a treaty ratified by the United States and generally now recognized as customary international law.[49] In adopting these definitions, the Supreme Court dispelled concerns associated with future changes in international law by freezing the meaning of inland waters to that of the 1958 Convention.[50] Moreover, the Court established "a single coastline for both the administration of the [SLA] and the conduct of [the federal government's] future international relations."[51]

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[45] Michael W. Reed, "Litigating Maritime Boundary Disputes: The Federal Perspective" *Rights to Oceanic Resources*, D.G. Dallmeyer and L. DeVorsey, Jr., eds. (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1989), pp. 61-73.

[46] There were additional SLA lawsuits, but they dealt with other issues (e.g., claim of right exception and breadth of the territorial sea (Florida and Texas)).

[47] Reed, *Shore and Sea Boundaries (Volume 3)*, p. 23.

[48] Legislative history indicates that Congress left the definition of inland waters to the courts. United States v. California, 381 U.S. 139, 150-61 (1965). An early definition for inland waters was included in the original bill. The provision stated that inland waters include "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." This definition was later removed by the Senate Committee. *See also* George W. Skladel, *The Coastal Boundaries of Naval Petroleum Reserve* (No. 4) (Anchorage, Alaska: Alaska Sea Grant, 1974).

[49] United States v. California, 381 U.S. 139, 164-65 (1965). The Supreme Court stated that "the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." 1958 Geneva Convention on Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607 [1964]. Hereafter referred to as the 1958 Convention. The United States ratified the 1958 Convention in 1961. United States v. California, 381 U.S. 139, 165 n.32 (1965).

[50] United States v. California, 381 U.S. 139, 167 (1965). The Supreme Court recognized the importance in having definite boundaries. The Court stated that "before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the [SLA]; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define."

[51] United States v. California, 381 U.S. 139, 165 (1965).

Straight Baselines (or Closing Lines)

Article 3 of the 1958 Convention states that the "breadth of the territorial sea" is to be measured from a normal baseline (or coastline). This *normal baseline* is the low-water mark along the shore "as marked on large-scale charts officially recognized by the coastal [nation]." There are some exceptions.

Under special circumstances, international law permits a coastal nation to draw straight closing lines between two distant coastal points in determining its coastal line, rather than closely tracking the contours of its ordinary low-water mark. Article 4 of the 1958 Convention specifically states that "where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," straight baselines "may be employed in drawing the baseline from which the breadth of the territorial sea is measured."[52] The language "may be employed" indicates that Article 4 is not mandatory and instead is an optional provision.[53] Thus, it is ultimately the coastal nation's decision as to whether it wants to use straight closing lines to determine Article 4 inland waters.

In providing a coastal nation the opportunity to establish an otherwise complex boundary through the use of straight baselines, Article 4 has the concomitant effects of (1) including waters within inland waters that would be part of the territorial sea under a strict contour system of measurement and (2) pushing maritime boundaries farther off shore (**Figure 1**).[54]

The United States has not adopted the straight-base-line system under Article 4.[55] This federal government policy has frustrated many coastal states who argue that portions of their coastlines are well suited for the straight-base-line method. California, Louisiana, and Alaska have all attempted to use the straight-base-line system despite the federal government's position.[56] The Supreme Court has consistently held that "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States."[57] In *United States v. Louisiana*, the Court further reasoned that the decision to use the straight-base-line

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[52] Article 4 also authorizes nations to consider economic interests involved when determining a particular baseline.

[53] See Reed, *Shore and Sea Boundaries*, Vol. 3), p. 343.

[54] Shalowitz, *Shore and Sea Boundaries*, p. 69.

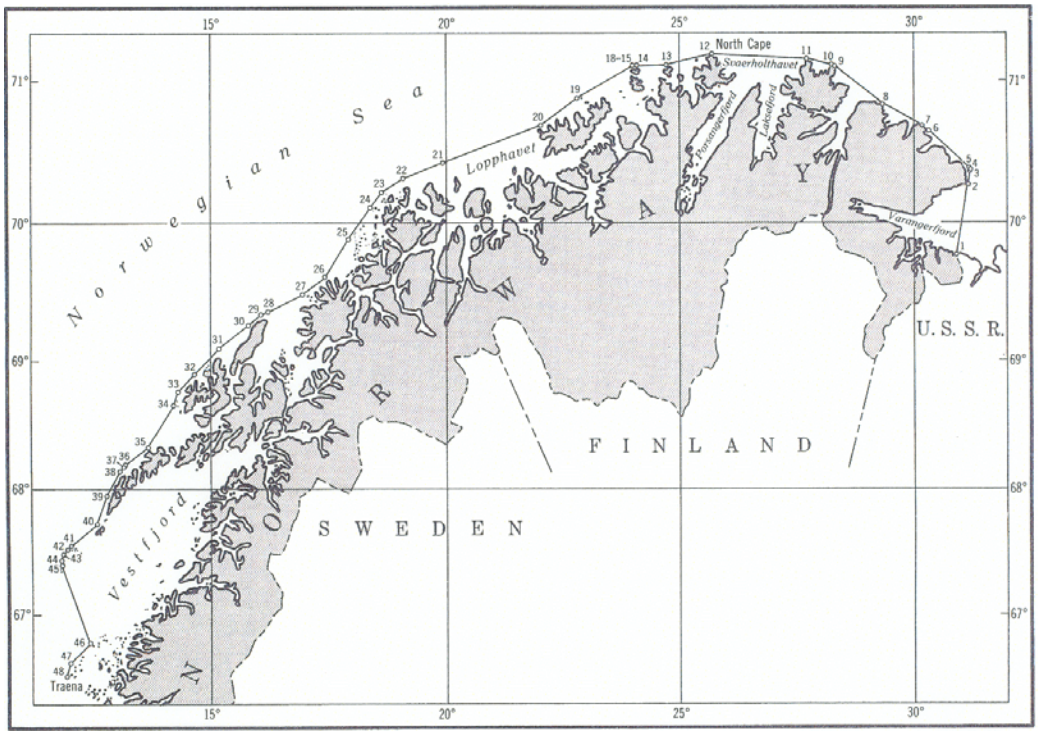
[55] Skladel, *The Coastal Boundaries*, p. 4. The United States has opted not to use Article 4 straight baselines primarily for foreign policy reasons. As stated earlier, coastal nations are obligated to recognize the right of innocent passage within their territorial sea. This right of innocent passage does not extend to inland waters. Thus, if a coastal nation uses Article 4 closing lines, then it is extending its authority to keep other nations from traveling freely within their coastal waters.

[56] *See* United States v. California, 381 U.S. 139 (1965); United States v. Louisiana, 394 U.S. 11 (1969); United States v. Alaska, 521 U.S. 1 (1997).

[57] United States v. California, 381 U.S. at 168.

method "should be left to the branches of Government responsible for the formulation and implementation of foreign policy."[58]

Figure 1. Norway's Straight Baselines



Inland Waters

Article 3 of the 1958 Convention dictates that the "breadth of the territorial sea" is measured from a coastal nation's low-water mark. However, even under a low-water mark measurement, the 1958 Convention permits certain bodies of water that would normally qualify as territorial waters (i.e., waters beyond the coastline) to be treated as inland waters (i.e., waters landward of the coastline). Most of these "inland water" exceptions under the Convention also are applied in determining a U.S. coastal state's SLA boundary,[59] and many U.S. coastal states have tried to capitalize on these exceptions by asserting to the Supreme Court that portions of their coastlines constitute inland waters. If the Supreme Court determines that a body of water fits within the definition of inland waters, then the coastline is moved seaward accordingly.[60]

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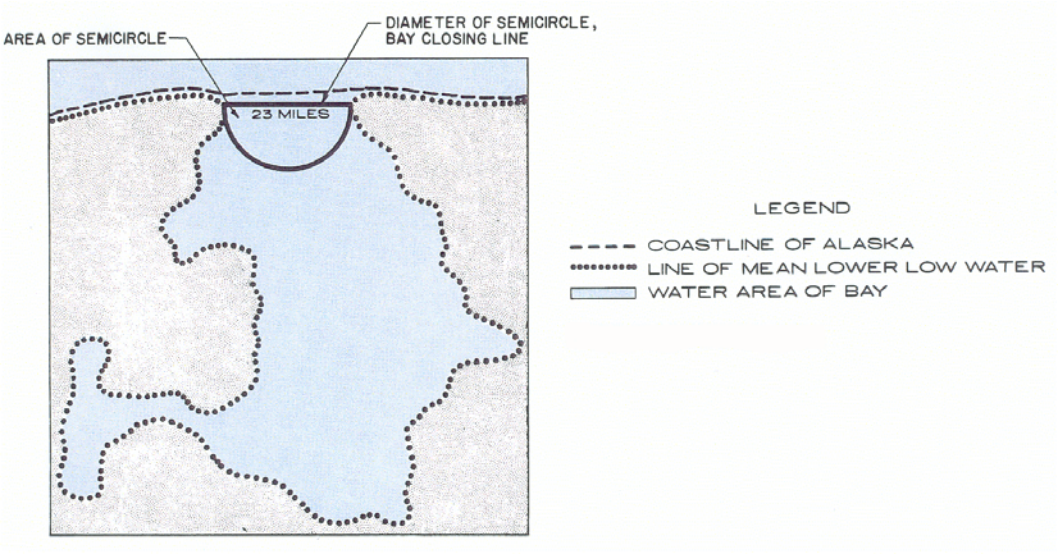
[58] United States v. Louisiana, 394 U.S. at 73.

[59] As discussed above, Article 4 closing lines cannot be used by U.S. coastal states.

[60] In 1986, Congress added the following language to the SLA: "except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory." 43 U.S.C. § 1301(b). *See also* Reed, *Shore and Sea Boundaries (Volume 3)*, p. 378.

Figure 2. Hypothetical Juridical Bay



Bodies of Water That Constitute Inland Waters: Juridical Bays and Historic Waters

Under the 1958 Convention, a bay may qualify as an inland body of water if it meets certain measurements.[61] Bays meeting the requirements set forth in Article 7(2) of the 1958 Convention are known as *juridical bays*. To qualify as a juridical bay, a bay must be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and more than a mere curvature of the coast." The indentation must be "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." The closing line drawn between the natural entrance points must not exceed 24 miles (**Figure 2**[62]). Waters lying landward of the closing line constitute inland waters, while those lying seaward are part of the territorial sea. To date, the Supreme Court has held that Monterey Bay[63] and the combined Long Island and western Block Island Sounds[64] constitute juridical bays.

Article 7 of the 1958 Convention also permits *historic waters,* including *historic bays,* to be designated as inland waters. While the Convention clearly states that historic waters need not comply with the geographic tests required for a juridical bay, the precise definition the term is not immediately clear. As the 1958 Convention fails to define historic bays and similar terms, Supreme Court decisions have come to refer to a study conducted by the United Nations.[65] Among other things, this study

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[61] 1958 Convention, art. 7.

[62] Skladel, *The Coastal Boundaries of Naval Petroleum Reserve*, p. 7.

[63] United States v. California, 381 U.S. 139, 169, 173 (1965).

[64] United States v. Maine, 469 U.S. 504, 526 (1985).

[65] U.N. Secretariat, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc.

(continued...)

concluded that *historic waters* is not a term limited to bays, but may also be applied to other bodies of water, including "straits, archipelagoes and generally all those waters which can be included in the maritime domain of a State."

The U.S. Supreme Court has addressed numerous *historic water* claims. Alaska, California, Florida, Louisiana, Massachusetts, Mississippi, New York, and Rhode Island have all asked the Supreme Court to determine whether certain waters along their coastlines constitute *historic waters*.[66] For waters to be labeled historic, a coastal nation must have "effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of [nation] States."[67] Three factors are usually considered in determining whether a body of water is historic: "(1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations."[68] A fourth factor is also widely used: the "vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense."[69] The Supreme Court has held that both Mississippi Sound and Vineyard Sound constitute historic waters. Other examples, declared administratively, include Chesapeake Bay and Delaware Bay.[70]

By successfully defending a claim that certain waters are historic U.S. waters, a U.S. coastal state can effectively change the location of its coastline. The new coastline will be drawn farther offshore so that the historic waters are located on the landward side of the coastline. Again, this new coastline will constitute the U.S. international coastline.

Aboriginal Title to the Seabed and Natural Resources

Much attention has been drawn to those maritime disputes between coastal states and the federal government; however, other maritime disagreements do exist within U.S. borders.[71] Since the early 1980s, certain native tribes of Alaska have

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[65] (...continued)
A/CN.4/143 (1962). Hereafter referred to as the *U.N. Juridical Regime*.

[66] United States v. Alaska, 521 U.S. 1 (1997); United States v. California, 381 U.S. 139 (1965), United States v. Florida, 420 U.S. 531 (1975); United States v. Louisiana, 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); United States v. Louisiana, 470 U.S. 93 (1985); and United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985).

[67] United States v. Louisiana, 470 U.S. 93, 102 (1985), quoting the *U.N. Juridical Regime*.

[68] United States v. Louisiana, 470 U.S. 93, 101-02 (1985).

[69] United States v. Louisiana, 470 U.S. 93, 102 (1985).

[70] Report of Gregory E. Maggs, Special Master, United States v. Alaska (Mar. 2004) (No. 128, Orig.). *See also* United States v. Alaska, 422 U.S. 184, 186 n.1 (1975).

[71] The federal government has also been involved in maritime disputes with certain islands that fall under U.S. sovereignty (Commonwealth of the Northern Mariana Islands v. United
(continued...)

tried to enforce an "Indian right of occupancy" to the seabed and ocean off the coast of Alaska (outer continental shelf).[72] After two decades of litigation, it is difficult to say with certainty whether or not a native group may occupy offshore areas beyond the territorial sea of Alaska.[73]

Many coastal nations recognize an indigenous tribe's pre-existing rights to land and water.[74] This right is known internationally as native, Indian, or aboriginal title. Aboriginal title arises by virtue of indigenous people using, enjoying, and occupying an area prior to colonization.

It has long been the policy of the United States to respect and observe the doctrine of aboriginal title. This policy was first established in *Johnson v. McIntosh* when the Supreme Court stated that the federal government and the states hold title to the lands found within their designated borders, "subject only to the Indian right of occupancy...."[75] The Court went on to explain that this right of occupancy may be extinguished only by the plain intent[76] of Congress.

When assessing whether or not aboriginal title exists, three questions are usually asked. The first is whether the federal government exercises sovereignty over the area in question. If so, then the next question is whether Congress has clearly extinguished aboriginal title to such lands. If not, then it needs to be determined whether the "claimed aboriginal title existed in fact."[77]

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[71] (...continued)
States, 399 F.3d 1057 (9th Cir. 2005)).

[72] Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984); Amoco Production Company v. Village of Gambell, 480 U.S. 531 (1987); Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989); Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998) *cert. denied* 527 U.S. 1003 (1999); Eyak v. Daley, 375 F.3d 1218 (9th Cir. 2004).

[73] After the *Gambell* cases, the law surrounding aboriginal title to offshore areas seemed settled. The *Eyak* case that followed brought more confusion. *See* David J. Bloch, "Colonizing the Last Frontier," 29 *Am. Indian L. Rev*. 1 (2004).

[74] Such countries include the United States, New Zealand, Canada, and Australia (Johnson v. McIntosh, 21 U.S. 543, 584-85 [1823]; Te Runanga o Wharekauri Rekohu Inc. v. Attorney General [1993] 2 NZLR 301; Calder v. Attorney General [1973] SCR 313; Mabo v. State of Queensland [1992] 107 A.L.R. 1).

[75] Johnson v. McIntosh, 21 U.S. 543, 584-85 (1823). The *Johnson* Court explained that "[the native people] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it." The Supreme Court had addressed aboriginal title earlier, in *Fletcher v. Peck*, but the *Johnson* decision stands out as the case that ultimately defined Indian property rights.

[76] Plain intent is needed to extinguish aboriginal title. United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941).

[77] Bloch, *Colonizing the Last Frontier*, p. 26. This three-part inquiry was established by the (continued...)

Congress may extinguish aboriginal title by treaty, purchase, or exercise of absolute dominion (taking).[78] Congress is under no obligation to provide compensation for abrogating aboriginal title.[79] Moreover, once title is extinguished, all aboriginal rights, except those expressly reserved, are extinguished.

The maritime disputes in Alaska relate to aboriginal title, but not within the State of Alaska's border. In enacting the Alaska Native Claims Settlement Act,[80] Congress expressly extinguished aboriginal title to Alaska's territorial sea. While this issue has thus been put to rest, aboriginal rights in the continental shelf adjacent to Alaska have not.[81]

In *Eyak v. Trawler Diane Marie*, the Ninth Circuit considered whether certain native Alaskan villages held aboriginal title, including "exclusive rights to use, occupy, possess, hunt, fish, and exploit the waters, and mineral resources," to the outer continental shelf.[82] The Ninth Circuit held that the "federal paramountcy doctrine,"[83] as established in the 1947 *United States v. California* Supreme Court case,[84] preempts any claims of aboriginal title to the outer continental shelf.[85]

The *Eyak* decision clearly states that all aboriginal title claims to the outer continental shelf will be barred under the federal paramountcy doctrine. However, since this decision, the village of Eyak has filed a new claim, asking the court to confirm "nonexclusive" aboriginal rights.[86] On July12, 2004, the Ninth Circuit, sitting as a whole, ordered the federal district court in Alaska to determine "what aboriginal rights to fish beyond the three-mile limit, if any, the [native residents of

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[77] (...continued)
Supreme Court in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345-46 (1941). The third question relating to actual aboriginal occupancy is a question of fact and must be handled as other questions of fact (United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 345 (1941)).

[78] United States v. Sante Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941).

[79] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[80] P. L. 92-203, codified, as amended, at 43 U.S.C. §§ 1601-1629e.

[81] Congress failed to expressly extinguish aboriginal title to areas beyond Alaska's territorial sea.

[82] 154 F.3d 1090, 1096 (9th Cir. 1998).

[83] The federal paramountcy doctrine refers to the federal government's "paramount power" to regulate the ocean and its seabed. The federal government, as the Supreme Court articulated in *United States v. California*, must have these "paramount rights" to fulfill its responsibilities to protect its people from wars and to govern international commerce. 332 U.S. 19, 35 (1947).

[84] 332 U.S. 19 (1947).

[85] The Supreme Court denied the Village of Eyak's petition for Writ of Certiori (appeal) (527 U.S. 1003 (1999)).

[86] In the first *Eyak* case, the villages were asserting sovereign rights over the outer continental shelf. Here, the village of Eyak is asserting certain aboriginal rights, such as hunting and fishing.

the village of Eyak] have."[87] The district court has yet to release an opinion detailing the aboriginal rights, if any, involved in this issue. Until the district court rules, the village of Eyak's aboriginal rights to fish on the outer continental shelf are left intact.[88]

Charting Maritime Boundaries

While this report has focused on many of the legal disputes involved in determining where to draw a state's low-water mark, not all coastlines need to be decided by litigation. Regardless of whether the coastline is determined in or out of courts, the line must be represented on an official chart (nautical map). As indicated in Article 3 of the 1958 Convention, maritime zones are measured from the low-water mark as identified on "large-scale charts officially recognized by the coastal [nation]." Therefore, the breadth of the U.S. territorial sea is measured from the low-water mark found on charts recognized by the U.S. government. Prior to 1970, there was no uniform system for determining "official" maritime boundaries. Instead federal agencies would construct their own lines without consulting any coordinating entity.[89]

To remedy this lack of uniformity, an Ad Hoc Committee on Delimitation of the United States Coastline was formed on August 17, 1970.[90] The agencies represented on the Committee included the Departments of State, Commerce, the Interior, Justice, and Transportation. The Committee's first task was to review and locate the entire U.S. coastline.[91]

On finishing its first review, the Committee saw that its job was not complete. Due to the ambulatory nature of the U.S. coastline,[92] the Committee recognized that

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[87] Eyak v. Daley, 375 F.3d 1218, 1219 (9th Cir. 2004).

[88] The Ninth Circuit ordered that "the district court should assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law."

[89] Reed, *Shore and Sea Boundaries (Volume 3)*, pp. 344-45. Examples of these agency lines include the Coast Guard line, Census line, Chapman line, and Executive Branch lines.

[90] This committee was formed in response to the Secretary of Commerce's suggestion that the federal government have a uniform "position on the limits of our inland waters, territorial sea, and contiguous zone." Reed, *Shore and Sea Boundaries (Volume 3)*, p. 359. This Committee still meets on an as-needed basis, and is chaired by the Secretary of State. Currently, the Minerals Management Service (MMS) is conducting a nationwide review of the SLA boundary. Thus, the Committee is meeting more regularly. *MMS Announces Cape Cod Boundary Survey Results*, available at [http://www.mms.gov/ooc/press/2005/press 0222b.htm] visited Mar. 29, 2005. Hereafter referred to as the *MMS Survey*.

[91] The Committee, in reviewing the U.S. coastline, must apply the principles of the 1958 Convention. Reed, *Shore and Sea Boundaries (Volume 3)*, p. 360.

[92] The "normal erosion and accretion of the shoreline" cause the coastline (or baseline) to shift. Artificial structures (e.g., jetties, breakwaters, and other beach re-nourishment structures) may also affect the coastline, thereby affecting offshore boundaries. To ensure

(continued...)

its official coastal lines would shift over time. To keep maritime boundaries up to date, the Committee developed a system where new coastal lines would be reviewed first by the National Oceanic and Atmospheric Administration (NOAA).[93] After this initial review, the State Department's geographer would then comment on the changes and later submit the proposals to the entire Ad Hoc Committee.[94] Once the entire Committee considered the new proposals, a final decision would be made by the Committee as to how the official coastal lines should be altered. In those circumstances where the Supreme Court rules against the federal government's position,[95] the Committee would incorporate the Court's ruling in an updated chart.[96]

Members from the Departments of State, Commerce, the Interior, Justice, and Transportation all collaborate to ensure that accurate charts are published.[97] The charts issued represent the federal government's official position on where U.S. maritime zones are located.[98] Any alterations to the "coastline" must go through the

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[92] (...continued)
artificial structures do not disrupt coastlines on a regular basis, MMS must review Corps of Engineers Section 10 permits (e.g., construction of jetties or breakwaters). If a proposed Section 10 permit alters a maritime boundary, then the Solicitor's Office is notified and it, in turn, notifies the Corps. The Corps responds by requesting that the affected state "prepare a waiver to any extension of the base line resulting from the proposed permitting action." Piers cannot be used to extend the coastline. U.S. Dept. of the Interior, Minerals Management Service, *Boundary Development on the Outer Continental Shelf*, available at [http://www.mms.gov/itd/pubs/1999/99-0006.pdf], visited Apr. 7, 2005. Global climate change could also cause a state's coastline to shift if sea levels continue to rise. Instead of extending seaward, waters would move inland, causing a state's SLA boundary (and federal waters) to contract.

[93] MMS is also involved in determining maritime boundaries. In 1997, MMS and NOAA entered into a "Memorandum of Understanding to produce, quality assure and maintain" accurate depictions of the U.S. coastline. See U.S. Dept. of Commerce, National Oceanic and Atmospheric Admin., *Office of Coast Survey — GIS*, available at [http://nauticalcharts.noaa.gov/csdl/ctp/GIStrial.html] visited Apr. 8, 2005. Hereafter referred to as NOAA, *Coast Survey*.

[94] NOAA, *Coast Survey*.

[95] The federal government's position refers to the maritime boundary represented on an official chart.

[96] Once a coastal line is determined by the Supreme Court, the boundary is "fixed" forever and cannot change (43 U.S.C. § 1301(b)).

[97] The Organic Act of 1807 gave the Office of Coast Survey the authority "to construct and maintain the nation's nautical charts." This agency is a part of the National Ocean Service, which is under NOAA. All nautical charts are available to the public. National Oceanic and Atmospheric Administration, National Ocean Service, *Marine Navigation*, available at [http://www.nos.noaa.gov/topics/navops/marinenav/welcome.html], visited Apr. 20, 2005.

[98] For coastal management purposes beyond depicting maritime boundaries, a Committee on National Needs for Coastal Mapping and Charting has found a need to collect more detailed geographical data on coastal areas, to better coordinate mapping of onshore and offshore areas, and to make more sophisticated geographical data on coastal zones generally available through a single web portal. A National Research Council summary of this report (continued...)

Committee process, with the exception of those maritime boundaries changed by a Supreme Court decree.

Current Litigation Concerning Inland Waters

Although the legal battles concerning federal-state maritime boundaries have dwindled, there is currently a case before the Supreme Court. The State of Alaska is claiming title to three separate areas within the Alexander Archipelago, based in part upon the theory that these bodies of water constitute inland waters.[99] In addition, Alaska is asserting title to the outer perimeter of the Alexander Archipelago based on the theory that the area meets the requirements for a juridical bay.[100] The Supreme Court, sitting in original jurisdiction, heard oral arguments on January 5, 2005.[101]

Current Changes to Federal-State Maritime Boundaries

Changing a federal-state maritime boundary is now rare. Still, the State of Massachusetts has an application pending to have its maritime border redrawn.[102] During the fall of 2004, the Minerals Management Service (MMS) conducted scientific surveys of the waters within Nantucket Sound. The results indicated that certain rock formations[103] seaward of Hyannis were naturally formed; and therefore, should be considered as valid baseline (or coastline) points. If these new baseline points are used, the Massachusetts' SLA boundary would be extended seaward by about two-and-a-half miles, and would expand Massachusetts' jurisdiction by twelve square miles.[104] In late February 2005, MMS issued a press release that

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[98] (...continued)
may be found at [http://dels.nas.edu/rpt_briefs/coastal_mapping_final.pdf].

[99] Petitioner's Brief 4, Alaska v. United States (No. 128, Orig.).

[100] Petitioner's Brief 4, Alaska v. United States (No. 128, Orig.), p. 6.

[101] The transcripts of the oral arguments in *Alaska v. United States* are available at [http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html], visited Mar. 18, 2005.

[102] In 1986, the Supreme Court ruled that Nantucket Sound does not qualify as inland waters (United States v. Maine, 475 U.S. 89). Therefore, portions of Nantucket Sound fall under federal jurisdiction. Under the SLA, a maritime boundary fixed by a Supreme Court decree may not be changed (43 U.S.C. § 1301(b)). Thus, it would appear that Massachusetts' application for a border change should be barred. Massachusetts' application, however, involves portions of Nantucket Sound that were not at issue in *United States v. Maine*. Therefore, in this instance, Massachusetts' SLA boundary may be altered.

[103] The rock formations are referred to as "Bishop, Clerks, and Bull Rock." See *MMS Survey*.

[104] This new boundary extends state jurisdiction all the way out into an area where Cape Wind proposes to build its wind farm. Fortunately for Cape Wind, the extended boundary will only affect "about 10 of its proposed 130 wind turbines." See Cape Cod Times, State Jurisdiction in Sound Expands, available at [http://www.capecodonline.com/special/windfarm/statejurisdiction16.htm], visited Apr. 22, 2005.

acknowledged the survey's results[105] and has published the revised boundary in the Federal Register.[106]

Conclusion

The success and outcome of offshore development depend, in part, on establishing clear federal-state maritime boundaries within the territorial sea. Though Congress and the Supreme Court, through the SLA and a series of judicial opinions, respectively, have addressed many of the legal uncertainties attendant to establishing maritime boundaries, disputes continue. As new offshore uses (aquaculture and wind farms) arise and move farther offshore, Congress may see increasing interest in proposals that seek to establish a uniform approach to governing federal-state maritime boundary and jurisdiction changes.

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[105] *See MMS Survey*.

[106] "Availability of Revised North American Datum of 1983 (NAD 83) Outer Continental Shelf Official Protraction Diagrams," 70 *Fed. Reg*. 9104 (Feb. 24, 2005).