Ocean and Coastal Law Center · School of Law · University of Oregon · Eugene 97403

Ocean Law Memo

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1983 DEVELOPMENTS IN OCEAN AND COASTAL LAW

I. INTRODUCTION

On March 10, 1983, following the lead of approximately fifty-four coastal nations, President Reagan proclaimed United States jurisdiction over living and non-living resources within an Exclusive Economic Zone (EEZ) extending 200 miles seaward of the coastal baseline. The EEZ proclamation is perhaps the most important of numerous executive, legislative, and judicial actions taken during 1983 that represent significant developments in U.S. ocean and coastal law and policy. This special Ocean Law Memo chronicles those developments; further, it attempts to give the reader insight into current trends and future directions in ocean and coastal policy at the state, federal, and international levels. As the Ocean and Coastal Law Center is considering publishing an annual "recent developments memo" similar to this one, reader comments and suggestions for improvement are especially solicited.

II. INTERNATIONAL DEVELOPMENTS

A. Law of the Sea Convention

Representing the most important development in international ocean law since the 1958 Geneva Conventions, the United Nations Convention on the Law of the Sea opened for signature in Jamaica on December 10, 1982. The Convention's broad scope reflects the international community's common interest in peaceful, comprehensive management of the world's oceans. At this writing, the United States has not signed the Convention because of "several major problems in the Convention's deep seabed mining provisions [that] are contrary to the interests of industrialized nations, and would not help attain the aspirations of developing countries." Statement by the President on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983). Presumably, these "major problems" arise from new duties imposed upon parties to the Convention seeking to mine the seabed, principally the duty to pay a percentage of the value of mineral production from the area to be redistributed among third world nations.

B. Presidential Proclamation of Exclusive Economic Zone

At present, the United States has no interest in assuming the revenue sharing obligations imposed by the Law of the Sea Convention. However, the U.S. has found some provisions in the Convention to "generally confirm existing maritime law and practice and fairly balance the interests of all states." Id. These provisions recognize the coastal nation's right to an EEZ within which the coastal nation exercises full control and sole jurisdiction over economic resources. President Reagan referred to these provisions when issuing Proclamation No. 5030, establishing the United States EEZ "for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed, subsoil and superadjacent waters. . . . " 48 Fed. Reg. 10605 (Mar. 14, 1983).

Adopting language from Article 56 of the Law of the Sea Convention, the President's proclamation asserts U.S. "sovereign rights" over an area extending "to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." Id. The Proclamation is likely to have little impact on U.S. oil and gas development, as the U.S. already has exclusive sovereign rights over the exploration for and the exploitation of oil and gas from the continental shelf. Under the 1958 Geneva Continental Shelf Convention and customary international law, U.S. jurisdiction and control extends at least "to the entire natural prolongation of the continental margin, whether or not the margin extends less or more

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than 200 miles." Implications Of A United States Claim To A 200 Mile Exclusive Economic Zone (summary of a workshop), Center for Ocean Management Studies at the Univ. of Rhode Island 8 (Apr. 11-12, 1983) (hereafter cited as Implications). Similarly, the EEZ proclamation will have little effect on U.S. fisheries, over which jurisdiction has already been asserted out to 200 miles under the Fishery Conservation and Management Act.

The EEZ proclamation is significant from an international perspective because it asserts U.S. jurisdiction over all seabed and water column resources out to 200 nautical miles. Thus, in March, 1983 the Interior Department began preliminary steps to authorize private exploration and development of polymetallic sulfide deposits located on the Gorda and parts of the Juan de Fuca undersea ridge systems, even though the deposits lie beyond the continental margin at depths of between 6000 and 9000 feet, and the technology needed to extract minerals from those depths has yet to be fully developed, as discussed in more detail below.

The President's proclamation recognizes the international community's residual rights within EEZ's to "traditional high seas uses," i.e., navigation, overflight, the laying of submarine cables and pipelines, and "other internationally lawful uses." 48 Fed. Reg. 10606 (March 10, 1983). Unlike the new Law of the Sea Convention, the proclamation contains no provision regulating foreign scientific research within the U.S. EEZ. Yet significantly, the President's ocean policy statement accompanying the proclamation expressly affirms other countries' rights to control such scientific research within their EEZ's "in a manner consistent with international law." Statement by the President on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983). This represents a distinct departure from previous official U.S. policy, which recognized a coastal nation's research jurisdiction only within its territorial sea.

In contrast to the new Law of the Sea Convention, the U.S. EEZ proclamation makes no provision for environmental protection. However, the proclamation does assert U.S. "sovereign rights" over living resources within the EEZ. 48 Fed. Reg. 1065 (Mar. 10, 1983). The "sovereign rights" provision, coupled with existing environmental legislation, provides a regulatory basis for protecting the EEZ environmentally.

The EEZ proclamation has been called a "positive action" that "serves as an effective statement of U.S. marine policy in relation to international law, and attempts to bring offshore resources within the zone under an effective management framework." Implications at 18. Yet the proclamation sets a questionable precedent by affirming only those Convention policies mostly beneficial to U.S. interests. Widespread use of such a "pick and choose" approach could result in a patchwork of conflicting national ocean management regimes. Thus, there is a need for continued U.S. involvement in worldwide efforts to develop comprehensive, mutually agreeable plans for managing the world's oceans.

III. DOMESTIC DEVELOPMENTS

A. Offshore Activities

1. Polymetallic Sulfide Mining

Shortly after President Reagan issued his EEZ proclamation, officials at the Minerals Management Service of the Interior Department announced plans to lease one site potentially rich in polymetallic sulfides for exploration and eventual mineral extraction. This proposed lease sale is one of the first offerings of hardrock minerals from the seabed under U.S. jurisdiction, and it would open up some 12,000 square miles (7.68 million acres) of the Gorda Ridge off Northern California and Southern Oregon for competitive bidding. The 250-mile-long Gorda Ridge stretches from 35 to 250 miles off the coastlines of those states and is unique among potential deposit sites thus far discovered in that it lies mostly within the U.S. EEZ. In contrast, a preliminary Interior Department assertion of jurisdiction over the Juan de Fuca Ridge off the Washington State coast was withdrawn after the Canadian government protested that the site lay beyond U.S. jurisdiction.

Historically, scientific and mining industry attention has focused more on manganese nodules than on polymetallic sulfides. Nonetheless, polymetallic sulfides have recently dominated discussions of deep seabed mining issues, because they contain high concentrations of strategically important minerals, such as cobalt, zinc, copper, and silver. First discovered at seafloor spreading centers in the Eastern Pacific, polymetallic sulfides precipitate out of hot aqueous solutions emitted at "smokers" (hydrothermal vents in the ocean floor), accumulating in vast deposits. Active vent sites are inhabited by unique, previously unknown life forms not dependent on photosynthesis for

their existence. See generally Edmond & Von Damm, Hot Springs on the Ocean Floor, SCI. AM., Apr. 1983, at 78. There is some question as to the actual need for the U.S. to mine the oceans for strategic minerals given the "magnitude of domestic onshore deposits, the international availability of certain minerals, and the decline in international demand." Implications at 9-10. Furthermore, the U.S. Supreme Court's Secretary of Interior v. California decision discussed below makes it unclear whether the Interior Department would have to act consistently with federally approved state coastal zone management programs in carrying out a polymetallic sulfide lease sale.

2. Oil and Gas

Recent legislative and judicial decisions have dramatically altered the Interior Department's plans to lease certain Outer Continental Shelf (OCS) lands for private oil and gas development. For example, despite Office of Management and Budget opposition, President Reagan signed an Interior appropriations bill that imposed leasing moratoriums within critical areas of the Pacific and Atlantic oceans and the Gulf of Mexico. Congress approved these moratoriums in mid-October, 1983; they will remain in effect for one year.

Four areas are primarily affected by Congress' leasing moratoriums. In California, the moratorium prohibits oil and gas production within six miles of both the Channel Islands National Marine Sanctuary and the Hickel Preserve. The Massachusetts moratorium protects much of the important Georges Bank fishery. In the Gulf of Mexico, OCS leasing is prohibited within a buffer zone along most of the western Florida coastline, within the seagrass beds and coral reefs of the Florida middlegrounds, and within certain other areas.

In contrast, Interior's revised OCS five-year lease sale plan recently withstood attack in the District of Columbia Court of Appeals. California v. Watt (5-year plan), 712 F.2d 584 (D.C. Cir. 1983). California's challenge to the original plan had resulted in the court's remanding the plan to Interior to correct violations of the OCS Lands Act. Secretary Watt vastly increased the area of OCS lands available for lease in the revised plan, thus prompting new challenges from conservation groups and the states of Oregon, Florida, Washington, and California. The court determined that while the challenges to the original plan had addressed Interior's incorrect interpretation of the OCS Lands Act, the new challenges involved the Secretary's consideration of statutory factors, an area in which courts defer more to agency decision-making. Consequently, the court had little trouble finding that Secretary Watt had "considered" each statutory factor and it summarily upheld Interior's revised plan. Id. at 611.

California v. Watt (5-year plan) did not represent the only challenge to OCS leasing decisions during 1983. In Conservation Law Foundation (CLF) v. Watt, 560 F. Supp. 561 (D. Mass. 1983), the court enjoined Interior from conducting Sale 52 on the resource-rich Georges Bank off the Massachusetts coast. Immediately before publishing its final Environmental Impact Statement (EIS), Interior received new resource estimates that radically decreased the estimated oil and gas reserves in the lease sale area. CLF asserted that these new estimates upset Interior's "careful balancing" of environmental costs against economic opportunities (as required under the National Environmental Policy Act (NEPA) and the OCS Lands Act). Ruling in favor of CLF, the court stated that "a change by several orders of magnitude in the benefits to be obtained from a proposed action amounts to 'substantial changes' in the proposed action, directly relevant to the reasoned decision-making and balancing of environmental costs against economic benefits that NEPA requires." Id. at 571.

Conservation Law Foundation seems especially significant in comparison to the Ninth Circuit's decision in California v. Watt (Sale 53), 683 F.2d 1253 (9th Cir. 1983). Both cases involved similar facts, except that the new estimates for Sale 53 off Central California indicated the existence of far greater oil and gas reserves than previously believed. Because new EIS's based on latest available estimates would be required at later stages of exploration, development, and production, the Ninth Circuit permitted Interior's EIS for Sale 53 to stand unaltered, even though it used old oil and gas estimates to describe potential environmental impacts.

The Conservation Law Foundation court emphatically rejected the Ninth Circuit's analysis. Emphasizing that NEPA requires informed and reasoned decision-making, the CLF court concluded that reasoned decisions cannot be made where the information supporting them is substantially incorrect. Conservation Law Foundation was affirmed by the First Circuit Court of Appeals, which noted that Secretary Watt had possessed a Secretarial Information Document and an

Environmental Assessment at the time the final EIS was drafted. Both documents indicated that the likely environmental harms resulting from the proposed lease sale had changed in light of the revised resource estimates. The court found that under these circumstances the final EIS could not have given Interior a reasonably adequate picture of the potential environmental harms arising from a decision to lease Georges Bank lands. See Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

The Federal District Court of Alaska further considered questions of EIS adequacy in the context of OCS lease sales in Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), involving 479 tracts in the St. George Basin of Alaska's Bering Sea (Sale 70). The court found Interior's EIS deficient because it failed to include a "worst case" analysis of noise impacts on endangered species. The Council on Environmental Quality's NEPA regulations require (under certain circumstances) agencies to identify potential environmental impacts about which scientific uncertainty exists or information is missing. 40 CFR § 1502.22. An agency preparing a worst case analysis must "weigh the need for the proposed action [against proceeding] in the face of uncertainty." Id.

After extensively reviewing Interior's record, the False Pass court applied NEPA's worst case requirements to the pre-exploration stage of OCS development. The court found that because seismic disturbances are possible during the pre-exploration period, consideration of preliminary exploration and seismic activity impacts is essential to making a reasoned choice among alternatives. If sufficient seismic information is unavailable for EIS inclusion, the Secretary must prepare a worst case analysis. However, because oil spill risks are minimal until the separately regulated exploration stage of development, no worst case oil spill analysis is required prior to the lease sale. The False Pass court enjoined Interior from proceeding with Sale 70 until it complied with NEPA (and Endangered Species Act) requirements by supplementing the EIS, and the Ninth Circuit Court of Appeals affirmed, No. 83-3989 (March 12, 1984).

In Hammond v. North Slope Borough, 645 P.2d 750 (Alaska Sup. Ct. 1983), the Alaska Supreme Court considered facts similar to those in False Pass. The Hammond litigation sprang from the Alaska Natural Resources Commissioner's decision to lease state lands beneath the three-mile territorial sea portion of the Beaufort Sea adjacent to a federal lease sale. Addressing the issue of how much information the Commissioner must have before conducting lease sales, the Court stated: "The Commissioner must have some information as to the project's effects in order to decide whether or not [the project] is in the state's best interests." Id. at 79. The Court did not require complete certainty, however. Rather, the Court suggested that only where the Commissioner has no information whatsoever on project effects can he make no reasonable decision as to whether a project serves the state's best interests. Id. at 759.

The Hammond decision contains an enlightening discussion of Alaska's Coastal Management Program (ACMP). Alaska regulations provide that the state may authorize only those uses or activities in the coastal zone that are consistent with the ACMP. Alaska Admin. Code Title 6, § 80.010(6). Moreover, the ACMP is federally approved; therefore, under the federal Coastal Zone Management Act (CZMA), "federal agencies conducting or supporting activities directly affecting the coastal zone" must be "consistent" with Alaska's plan "to the maximum extent practicable." 16 U.S.C. § 1456(c)(1) (1976). In general, disputes over the levels at which federal agencies are required to comply with CZMA consistency provisions have engendered much recent litigation, culminating in the Supreme Court's Interior v. California decision discussed below.

Two lower federal courts considered the proper application of CZMA consistency provisions in the context of OCS oil and gas leasing during 1983. In Kean v. Watt, 13 ELR 20618 (D.N.J. 1982), the court refused to extend the CZMA consistency provisions to cover the potential economic impacts of an OCS sale on offshore fishermen. The Kean decision contrasts sharply with the ruling in Conservation Law Foundation v. Watt, 560 F. Supp. 561 (1983). The CLF court held that OCS preleasing activities on the Georges Bank must be consistent with Massachusett's state coastal management plan "to the maximum extent practicable." The court found that Interior failed to meet the CZMA's "maximum extent practicable" standard, because its consistency determination was based solely on (1) similar aims and goals in both the OCSLA and Massachusett's scheme for orderly OCS development; and (2) the significant amount of state participation expected at the exploration and production stages of OCS leasing. Id.

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court's analysis of the relationship between CZMA consistency provisions and OCS oil and gas leasing was undercut severely by the U.S. Supreme Court on January 11, 1984. In Department of Interior v. California (Sale 53), 104 Sup. Ct. 656, 52 U.S.L.W. 4043 (1984), the Court held five to four that Interior's sale of OCS oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of the CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1), quoted above. The Court reversed the holdings on this point of the Ninth Circuit, California v. Watt, 683 F.2d 1253 (9th Cir. 1982) and the district court, California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981). Significantly, the Court's holding is expressly limited to activities associated with the lease sale stage of OCS oil and gas leasing. The Court noted that other CZMA consistency provisions (see 16 U.S.C. § 1456(c)(3)(B)) will apply at the exploration, development, and production stages of OCS leasing, and that "lease purchasers acquire no [absolute] rights to explore, produce, or develop" on OCS lands. 52 U.S.L.W. at 4070 (1984).

Problems interpreting CZMA consistency provisions have arisen in contexts other than oil and gas leasing. For example, Cape May Greene v. Warren, 698 F.2d 179 (3d Cir. 1983), involved a New Jersey municipality's request for an EPA grant to fund construction of sewage treatment facilities. The Third Circuit used the consistency provisions to hold that the EPA acted arbitrarily and capriciously when it conditioned the grant on the municipality's agreement to restrict residential development in a floodplain. The court found it significant that New Jersey's coastal management agency had previously approved the proposed development unconditionally. Some analytical problems with the Third Circuit's opinion are discussed in Hildreth and Holt, Coastal Zone Consistency, 7 THE COASTAL SOC'Y BUL. no. 1, at 10 (1983).

3. Fisheries Management

Federal fisheries management is yet another activity potentially affected by the CZMA's consistency requirements and the Interior v. California decision. Fishermen and conservation groups have often questioned whether regional fishery management plans developed pursuant to the Fishery Conservation and Management Act "directly affect" the coastal zone within the CZMA's meaning. In his letter of November 24, 1982 National Oceanic and Atmospheric Administration (NOAA) Administrator John Byrne suggested that FMP's "directly affect" the coastal zone when "the fishery resource to be managed by the FMP [also] is found in state waters, the fish caught under the FMP are landed in the state, and there are other effects on the natural resources of the coastal zone." NOAA Administrator's letter No. 37 (November 24, 1982); see also Ray, Administration of the Fisheries Conservation and Management Act, OCEAN LAW MEMO No. 23 (May 1983); Taylor & Reiser, Federal Fisheries and State Coastal Zone Management Consistency, 3 TERRITORIAL SEA No. 1 (May 1983).

The NOAA Administrator's suggestion that federal fisheries activities beyond the territorial sea might "directly affect" the coastal zone must be reevaluated in light of Interior v. California discussed above. In refusing to extend the CZMA to cover OCS lease sales, the court noted that "every time it faced the issue in debate, Congress deliberately and systematically insisted that no part of the CZMA was to extend beyond the three-mile territorial limit." 52 U.S.L.W. at 4066. Further, the court construed the CZMA's "directly affecting" language narrowly, finding it "aimed [sólely] at activities conducted by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act." Id. at 4068. Thus the court's opinion seems to suggest that federal offshore fisheries management activities not involving the issuance of a federal license or permit do not "directly affect" the coastal zone so as to trigger CZMA's § 307(c)(1) consistency requirement.

4. Ocean Dumping

An activity that may "directly affect" the coastal zone severely is the dumping of low level radioactive wastes offshore. In December, 1982 Congress amended the Ocean Dumping Act (ODA) to impose a two-year moratorium on ocean disposal of these wastes. 33 U.S.C. § 1414(h)(i). After the moratorium ends, the amendments require an applicant seeking to dump radioactive materials offshore to prepare an impact statement. The statement must include a determination by the affected states that the proposed dumping is consistent with approved state coastal zone management programs. 33 USC § 1414(i)(1)(F) (West Supp. 1983).

Shortly after Congress passed the ODA amendments, the California legislature enacted a law requiring California's coastal commission to "use any means available" to prevent radioactive waste dumping offshore in a manner inconsistent with the state's coastal management plan. CAL. HEALTH & SAFETY CODE

§ 25613(b) (West 1984). The California legislature further declared that the offshore scuttling of radioactive nuclear submarines could "adversely affect" California's coastal zone, thereby triggering the CZMA consistency provisions. Id. § 25613(a). The legislature's declaration reflects statewide concern over a U.S. Navy proposal to dispose of more than 100 decommissioned nuclear submarines off the California coast over the next thirty years. Because the Navy has considered waters off North Carolina as an alternate disposal site, that state has expressed concerns similar to California's over the potential effects of offshore radioactive waste dumping.

B. Onshore Activities

1. Dredging and Filling

Over the years, Congress and state legislatures have established a number of regulatory regimes governing activities in the coastal zone. For example, private coastal developers and nonfederal public agencies altering wetlands or waterways must comply with the permit provisions of section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1976), section 404 of the Clean Water Act, 33 U.S.C. § 1344 (Supp. V 1981), and similar state laws. These provisions are designed to minimize the environmental harms associated with dredge and fill operations. The section 404 requirements were recently reviewed by the Fifth Circuit Court of Appeals in Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).

Avoyelles involved a group of landowners seeking to clear and fill a 20,000 acre tract for soybean cultivation. Land-clearing activities were already in progress when the federal Environmental Protection Agency (EPA) declared 80% of the tract to be wetlands subject to Army Corps of Engineers (COE) permit jurisdiction. Upon review of EPA's determination, the federal district court held that over 90% of the tract was wetlands (including portions already cleared) and that the landowners' clear and fill activities required a section 404 permit.

The district court's decision was reviewed by the Fifth Circuit Court of Appeals, which looked first to the administrative record. The record failed to indicate that EPA's "80% wetlands" determination was in any way arbitrary or capricious. Consequently, the Fifth Circuit reversed the district court's "90% wetlands" determination, ruling that the court should have deferred to EPA's administrative discretion. On the more significant issue of whether the landowners' clear and fill activities mandated a section 404 permit, both courts agreed that a section 404 permit was required because (1) the landowners' bulldozers and backhoes constituted point sources of pollution; and (2) in filling sloughs and leveling the land, the landowners discharged pollutants (e.g., dredged materials) into navigable waters.

Disputes concerning the extent of COE jurisdiction under section 10 of the Rivers and Harbors Act also resulted in important court decisions during 1983. In 1902 Atlantic Ltd. v. Hudson, 19 E.R.C. 1927 (E.D. Va. 1983), the court considered COE assertion of section 10 jurisdiction over a man-made borrow pit. The triangular pit was contained within the embankments of three artificial structures. The area surrounding the pit was largely industrial. The pit was originally located in an upland area not subject to COE jurisdiction. Sometime after 1954, unknown persons dug a trench from the pit to a nearby creek, thus subjecting the pit to tidal influences. Under these circumstances, the court held that the pit was "not the type of waterbody contemplated by Congress to be within section 10 of the Rivers and Harbors Act." Id. at 1938-39. Conversely, the court easily found COE jurisdiction over the pit under the Clean Water Act's exceedingly broad definition of navigable waters as "waters of the United States." 33 U.S.C. § 1362(7). However, the court held that the COE's refusal to grant a section 404 fill permit was arbitrary and capricious because the COE overemphasized the fact that the landowners' proposed project was not water-dependent, and ignored the danger, practical non-navigability, and general uselessness of the open pit.

Federal regulations that unduly restrict a landowner's potential property uses may constitute a "taking," requiring payment of "just compensation" under the Fifth Amendment to the Constitution. Thus, a COE refusal to grant a section 10 or section 404 dredge and fill permit often elicits a "takings" claim from the disappointed landowner. In Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Clms. 1981), cert. denied, 102 S. Ct. 1712 (1982), the COE, citing "overriding national factors of the public interest," denied dredge and fill permits to a developer seeking to construct a "water oriented residential community." Addressing the Deltona Corporation's "takings" claim, the court held that because the residual value of Deltona's land was enormous (the restricted parcels constituted only 34% of the developable land), the corporation's

property interests suffered only a non-compensable "diminution in value." In contrast, in the more recent case of Lachney v. United States, 2 Ct. Cl. 244, 19 E.R.C. 1198 (1983) the court held that where the COE's permit denial was solely the result of an interagency dispute and completely deprived the innocent landowner of all economically viable uses of the land for three years, the landowner might have a "takings" claim against the United States.

2. Coastal Property Ownership and Boundaries

Some fundamental principles of coastal property ownership and boundaries recently received important judicial attention. In California v. United States, 102 S. Ct. 2432 (1982), the Supreme Court considered a conflict between California and the United States over ownership of accreted lands. The Court unanimously concluded that, where a dispute involves accretion to ocean-front property owned by the federal government, federal law controls. The Court also stated that federal law controls "where title . . . [is] derived from the Federal government." Id. at 2438. Because large portions of western coastal lands were once federally owned, the Court's broad statement could prove a major impediment to effective West Coast state shorelines management, including state management of tidelands under the public trust doctrine discussed below.

3. Public Trust Doctrine

In National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), cert. denied U.S. Sup. Ct. (1984), the California Supreme Court considered application of the public trust doctrine to water rights obtained by prior appropriation. Under the public trust doctrine all lands conveyed by the state below the high water mark generally remain subject to the public's paramount rights of navigation, commerce and fishing. The National Audubon Society sued to enjoin the Los Angeles Department of Water and Power's (DWP) water diversions from Mono Lake, classified as a navigable water body, on the theory that the lake's shores, bed, and waters were protected by the public trust doctrine. Mono Lake, "a scenic and ecological treasure of national significance," had been dramatically reduced in size by the city's diversion of vast quantities of water.

The California Supreme Court held that the state's authority to provide continuous supervision and control over its navigable waters was at the heart of the public trust doctrine. That authority extends to tributary waters and bars DWP along with all others from claiming a vested right to divert water where that diversion harms public trust interests. Recognizing that the prosperity and habitability of much of California depends upon water diversions, the Court held that the State must be able to grant the right to appropriate water even if public interests are harmed. However, the Court concluded that prior to approving diversions, courts and regulatory agencies must consider the effects on public trust interests, and, so far as is feasible, minimize harm to those interests.

The U.S. Supreme Court presently is reviewing another important California Supreme Court public trust decision, City of Los Angeles v. Venice Penninsula Properties, 31 Cal. 3d 228, 644 P.2d 792, 182 Cal. Rptr. 599 (1982). In Venice Properties the California Supreme Court considered whether the public trust doctrine extends to parts of the California coastline formerly owned by Mexico and never owned in fee simple by either California or the United States. The Court held that because Mexican law had recognized the public right to tidelands use in a manner similar to the public trust doctrine, the United States could do no more than succeed to these interests at the time a federal patent to the disputed property was issued. The California court held that prior ownership by the state or the federal government is not a prerequisite for the establishment of the public trust in tidelands granted by Mexico to private parties. The Supreme Court granted certiorari to review Venice Properties on March 23, 1983. See Summa Corp. v. State of California, 103 S. Ct. 1425 (1983).

4. Barrier Beaches and Islands

Through the Coastal Barrier Resources Act, 16 U.S.C.A. § 3501 et. seq., enacted in 1982, Congress ended most federal subsidies for construction on designated undeveloped barrier islands off the Atlantic and Gulf coasts. For example, the act renders new construction on these islands ineligible for federal flood insurance, and V.A. or F.H.A. home loans. Federal financial assistance is also prohibited for construction of new bridges, airports, highways or sewers. The act does not restrict the rights of private or non-federal public owners to develop barrier islands, but those who do so proceed at their own risk rather than

the federal taxpayer's. The act contains significant exceptions to the termination of federal subsidies for energy development, maintenance of navigational channels and facilities, activities related to national defense or the Coast Guard, enhancement of fish and wildlife, and shoreline stabilization in areas of coastal erosion.

5. Congressional Vetoes of Federal Agency Ocean and Coastal Regulatory Decisions

Five legislative veto provisions contained in ocean and coastal statutes were rendered potentially unconstitutional by the U.S. Supreme Court decision in INS v. Chadha, 103 S. Ct. 2764 (1983). In Chadha the issue was whether individual rights (against deportation) under a specific statute (the immigration laws) may be determined by Congress without presentation of the action to the President for signature. The Court held that Congress cannot constitutionally undercut or sidestep Presidential power through the legislative veto mechanism. Writing for the majority, Justice Burger stated that "the bicameral requirement, the [Presidential] Presentment Clauses, [and] the President's veto were intended to erect enduring checks on each branch. . . . [To] accomplish what has been attempted by one House of Congress in this case requires. . . passage by both Houses and presentment to the President." 103 S. Ct. at 2787. The Chada decision's implications for other legislative veto provisions remain unclear.

The five ocean and coastal statutes containing legislative veto provisions potentially affected by Chada are: The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1337(a)(4)(A), 1354(c), providing that an oil and gas leasing system established by the Secretary of Energy may be disapproved by a resolution of either house and the export of oil and gas may be disapproved by concurrent resolution; the Coastal Zone Management Act, 16 U.S.C. § 1463(a)(2), providing that regulations promulgated by the Secretary of Commerce may be disapproved by concurrent resolution; the Marine Sanctuaries Act, 16 U.S.C. § 1432(b)(2)(B), providing that the designation of a marine sanctuary may be disapproved by concurrent resolution; the Ocean Dumping Act, 33 U.S.C.S. § 1414(i)(4)(B) and (D), providing that the EPA Administrator may not issue a permit for dumping radioactive waste materials in the ocean unless Congress so approves by joint resolution within ninety days; and the Fishery Conservation and Management Act, 16 U.S.C. § 1823, providing that governing international fishery agreements may be disapproved by concurrent resolution. Because joint resolutions (except joint resolutions proposing amendments to the Constitution) are sent to the President for approval, the Ocean Dumping Act's joint resolution provision is less likely to be held unconstitutional than the concurrent resolution and one-house veto provisions in the other ocean and coastal statutes.

IV. CONCLUSION

The foregoing discussion of the Supreme Court's Chadha decision illustrates the statutory fragmentation that often hampers effective ocean and coastal resources management in the United States. This Memo's principal purpose has been to survey 1983 developments in ocean and coastal law; however, it also demonstrates the interconnections among ocean uses. Fisheries management cannot be considered apart from OCS oil and gas exploration and development, which in turn, as confirmed by the Supreme Court's Interior v. California decision, must be carried out in a manner consistent with federally approved state coastal zone management programs. Until Congress creates a broader-based ocean management regime that takes into account the multiple, often conflicting uses of ocean and coastal resources (perhaps through legislation implementing the President's Exclusive Economic Zone Proclamation), one can only forecast an increasing number of significant legal disputes involving the ocean and the coastal zone.

Steven Holmes
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PUBLICATIONS

TITLE: FEDERAL FISHERIES MANAGEMENT: A Guidebook to the Fishery Conservation and Management Act, *Revised Edition*

EDITORS: Jon L. Jacobson and Daniel K. Conner

DATE: FALL 1984

Like the original, the revised edition of this book speaks to a broad range of readers, but especially to those who are most affected by the workings of the bureaucratic machine created by the Fishery Conservation and Management Act (FCMA). Its purpose is to provide useful information and analysis to seafood processors, fisheries managers, legislators, and the interested public. Specifically, the authors address two hypothetical readers. One is a commercial fisherman, a person whose livelihood is directly regulated by the FCMA. The other is a lawyer with no special training in fisheries law, but who may be confronted with fisheries management problems through his clients.

This edition will be published unbound and punched for standard three-ring binders. As the FCMA is amended or new regulations adopted, additional or substitute pages will be furnished for insertion in the new loose-leaf edition. This will provide an inexpensive method of keeping up with the fast-moving field of fisheries law and regulation. The price of the new publication will be $5.00 or less, depending on costs of printing and mailing. A nominal subscription fee for updates will be charged annually.

It is anticipated that the revised edition will be available by early Fall. To reserve a copy, write:

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TITLE: *THE LAW OF THE PACIFIC SALMON FISHERY: Conservation and Allocation of a Transboundary Common Property Resource*

In

THE UNIVERSITY OF KANSAS LAW REVIEW, Vol. 32, No. 1 (Fall 1983)

By

Charles F. Wilkinson, Professor of Law
School of Law, University of Oregon

and

Daniel Keith Conner, J.D. 1984, Research Associate
Ocean & Coastal Law Center, School of Law
University of Oregon

Copies available FREE from: Sea Grant Communications
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OREGON LAW REVIEW

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Vol. 63, No. 1

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Foreword by Jon L. Jacobson

The Law of the Sea: Its Past and Its Future, by Arvid Pardo

The Law of the Deep Seabed Post UNCLOS III, by Jonathan I. Charney

An Overview of the Second Committee Negotiations in the Law of the Sea Conference, by Thomas A. Clingan

The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction, by William T. Burke

Sea Law and Ocean Research: View from the Northwest, by Warren S. Wooster

The United States and the Law of the Sea -- Marine Environmental Concerns, by Clifton E. Curtis

Comment on Port Equalization Tariffs

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The Ocean and Coastal Law Statement of Completion

The national Sea Grant College Program, administered by NOAA, was created by Congress partly to promote professional training in several fields, including law, associated with the development of marine resources. As part of this national effort, the Ocean and Coastal Law Center offers two programs for training University of Oregon upper-class law students for professional service in ocean law. Successful completion of either leads to the granting of an Ocean and Coastal Law Statement of Completion by the law school.

The *research assistant* program provides multifaceted education and training for specially selected students. To obtain the Ocean and Coastal Law Statement of Completion, each student must not only satisfactorily complete one of the two special courses in Law of the Sea and Ocean and Coastal Law, but also must perform at least one academic year of ocean- or coastal-law research and advisory work, and must write a publishable paper on some significant aspect of ocean or coastal law.

Other second- and third-year law students may choose *course study*. This route to an Ocean and Coastal Law Statement of Completion requires successful completion of the Law of the Sea and the Ocean and Coastal Law courses in addition to satisfactory performance in several other related courses selected from a list which includes International Law, Admiralty, Pollution Control Law, and Environmental Law.

The Ocean and Coastal Lawyer in the Profession

The training to which the Ocean and Coastal Law Statement of Completion attests is rare in today's legal profession. Yet the need for professional ocean-law services is growing rapidly. Too often, law schools train future lawyers to meet the problems of the past. Through the Ocean and Coastal Law Center, the University of Oregon Law School is educating for the present and for the future.

For more information, write or call:

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