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Ocean Law Memo

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Recent Developments in Ocean and Coastal Law, 1986

I. INTERNATIONAL DEVELOPMENTS

A. 1982 U.N. Convention on the Law of the Sea

1. Ratification

Seven states ratified the Convention in 1986: Indonesia (February 3); Trinidad and Tobago (April 25); Kuwait (May 2); Yugoslavia (May 5); Philippines (May 8); Nigeria (August 14); and Guinea-Bissau (August 25). The total number of ratifications now stands at 31. The Convention will enter into force a year after the sixtieth ratification. To date, the states ratifying the Convention have been predominately developing nations. With the exception of Yugoslavia's, 1986 ratifications followed this trend.

Despite the present lack of formal adoption, commentators view many of the Convention's provisions as embodying customary international law.

2. Implementation of the Deep Seabed Regime: Resolution of Overlapping Claims by Seabed Mining Pioneers

During this year's annual session, the Preparatory Commission for the International Seabed Authority (the Commission) adopted an Understanding outlining "procedures and mechanisms" for resolving the overlapping mining claims of "pioneer" investors in the Northeast Pacific. U.N. Doc. LOS/PCN/L.41/Rev. 1/Annex, Sept. 11, 1986, reprinted in 25 I.L.M. 1326 (1986) (the Understanding). The Understanding also proposes a formula for resolving claims overlapping those of U.S. consortia. The Commission is an interim body charged with implementing Resolution II of the Final Act of the Convention which prescribes the rights and duties of "pioneer" seabed investors. Under the Convention, these initial investors receive special rights in exchange for effectively capitalizing the activities of the Enterprise, the operative arm of the International Seabed Authority. Overlaps among the areas covered in applications for registration by France, USSR and Japan prompted the Understanding. Those nations have agreed to submit revised applications subject to Resolution II and the guidelines established in the Understanding. See 25 I.L.M. at 1326.

Paragraph 15, apparently aimed at U.S. consortia and others currently at odds with the Convention's seabed regime, promises "similar treatment" to "potential applicants" who assume obligations similar to those of the pioneer investors and submit their applications before the Convention enters into force. However, paragraph 18 of the Understanding expressly states that these "procedures and mechanisms" do not establish "precedent for the implementation of the regime of seabed mining under the Convention" and in no way alter the Convention.

B. National Ocean Legislation: Mexico

On January 8, 1986, Mexico promulgated draft comprehensive legislation governing conduct of activities within its maritime zones. Mexico, among the first to declare an Exclusive Economic Zone (EEZ) (February 6, 1976), ratified the 1982 LOS Convention on March 18, 1983.

In an explanatory memorandum, Mexico's President stressed both the purpose and necessity of the draft Act. The Act is meant to bring Mexico's "internal positive law into line with [the] new international legal order . . ." established by the 1982 LOS Convention. LOS Bulletin No. 7 at 46 (April 1986). The memorandum also emphasizes the "genuine practical results, especially for developing countries," of the rules established in the Convention. The most important of these rules is the already recognized right of every coastal state to establish a 200 nautical mile (n.m.) EEZ as the "keystone" in the "new international order."

C. Maritime Boundary Delimitations

Many international law scholars theorize that the LOS Convention signals the onset of a significant new era in the law of the sea: the nationalization of the world's oceans. Several recent international maritime boundary delimitations evidence the desire of states to clarify and utilize fully their expanded maritime sovereignty.

The West African nations of Guinea and Guinea-Bissau submitted their maritime boundary dispute, prompted by the prospect of offshore petroleum reserves, to an ad hoc arbitration tribunal. On February 14, 1985 the tribunal drew a single maritime boundary determined in accordance with the principles of the LOS Convention.

On December 10, 1985 the International Court of Justice (ICJ) denied Tunisia's request that the ICJ revise its 1982 decision, see 1982 I.C.J. 18, declaring principles for establishing the boundary between the continental shelves of Libya and Tunisia. 1985 ICJ 192. Tunisia claimed new information merited the revision. As in the Guinea/Guinea-Bissau case, oil reserves were at the heart of the dispute. In 1985 the ICJ also delimited the continental shelf between Libya and Malta. See 1985 I.C.J. 13.

The application of "equitable principles" in light of "relevant circumstances" to determine maritime boundaries in each of these cases further refined this emerging international standard. See generally, Thomas, 27 Harvard International Law Journal 307-13 (1986).

D. International Whaling Commission (IWC)

The IWC held its 38th annual meeting in Malmo, Sweden on 9-13 June 1986. Aboriginal/subsistence whaling and "scientific" whaling were key agenda items. Norway and Japan are concerned about the impact of the IWC's commercial whaling moratorium on their coastal villages which have a whaling tradition. Both nations, long-time opponents of the ban on commercial whaling, sought to liken their whaling to the subsistence hunts in Alaska and Greenland. Next year Japan is expected to propose that the IWC reclassify Japan's coastal whaling as aboriginal/subsistence whaling. To date the IWC has distinguished coastal and aboriginal whaling.

Last year Iceland and South Korea, in an apparent effort to side-step the moratorium on commercial whaling taking effect in 1987, announced plans to conduct "research" whaling. "Research" whaling involves killing large numbers of whales purportedly for scientific research purposes and the selling of the meat to fund the research. The IWC agreed at this year's meeting to sanction such activities only if the whale products were "primarily" for local consumption. The agreement is a far cry from Sweden's proposal at last year's meeting that the IWC direct nations to consider the advice of the Scientific Committee, condition "research" permits on non-lethal takings, and ban international trade in whale products derived from such research. Japan, the Philippines, Norway, and Brazil are reportedly considering similar "research" programs.

II. DOMESTIC DEVELOPMENTS

A. Marine Mammals

1. Whale Protection

In June of 1986 the United States Supreme Court ruled in Japan Whaling Association v. American Cetacean Society, 54 USLW 4929 (1986), reversing Baldrige v. American Cetacean Society, 768 F.2d 426 (D.C. Cir. 1985), that the Pelly Amendment to the Fisherman's Protective Act and the Packwood Amendment to the Magnuson Fisheries Conservation and Management Act (MFCMA) do not impose on the Secretary of Commerce a mandatory duty to certify a nation whose whaling practices violate IWC quotas. Although the Court's decision on the merits was based largely on principles of statutory construction, the decision has considerable international implications for U.S. whale protection policy.

In rejecting the Government's challenge to the plaintiffs' standing to sue, the Court expressed a continuing commitment to individuals' right to contest agency action affecting whales, stating that respondents

> undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected . . . and this type of injury is within the 'zone of interests' [of the Pelly and Packwood Amendments]. Id. at 493n.4.

On the merits, the Court framed the issue as "whether under [Pelly and Packwood Amendments], the Secretary of Commerce is required to certify that Japan's whaling practices 'diminish the effectiveness' of the [IWC] because that country's annual harvest exceeds [IWC quotas]." Id. at 4929. The Court held that under the Pelly Amendment Congress intended to give the Secretary discretion in determining whether a country's actions "diminish the effectiveness" of

an international fishery conservation plan and that the Secretary's decision to negotiate with rather than certify Japan was not an abuse of that discretion. Likewise, the Packwood Amendment to the MFCMA which requires the Secretary of State to reduce a nation's fishery allocation within U.S. waters by at least 50% upon certification, did not alter the initial certification process.

On June 10, 1986 the Secretary of Commerce certified Norway for continuing whaling despite the IWC moratorium. After the Court's decision in American Cetaecean, Norway announced that it would stop commercial whaling at the close of the 1987 season, but intended to begin a "research" whaling program. Reporting to Congress as required by the Pelly Amendment, President Reagan announced on August 4, 1986 that the U.S. would not impose sanctions on Norway; the certification, however, continues until Norway withdraws its objection to the IWC moratorium. Unlike Japan, Norway does not receive an allocation of fish from the U.S. EEZ to which the mandatory allocation reduction provision of the Packwood Amendment would apply.

In Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986), the Ninth Circuit held that there is no irreconcilable conflict between the time limits for permit decisions imposed on the National Marine Fisheries Service (NMFS) by Section 104(d) of the Marine Mammal Protection Act and the National Environmental Policy Act impact assessment process. Id. at 825. However, the court reversed the district court's ruling that NMFS had to prepare an environmental impact statement (EIS) before issuing permits to Sea World, Inc. to capture Orcas ("killer whales") for scientific research and display. Id. at 829. The case was remanded to NMFS on the grounds that the agency had failed to explain adequately its decision not to prepare an EIS. Id. at 828-29.

2. Tuna-Porpoise

NMFS has amended its marine mammal regulations governing U.S. fishermen purse-seining for tuna in association with porpoise in the eastern tropical Pacific. The new regulations are intended to "provide flexibility" regarding porpoise saving gear and techniques. 51 Fed. Reg. 197 (Jan. 3, 1986). Tuna boat operators must continue to use "the best marine mammal safety techniques . . . economically and technologically practicable."

As of October 21, 1986, and for the remainder of 1986, only those U.S. tuna boats carrying observers may fish for bigeye and yellowfin tuna in the eastern tropical Pacific. See 51 Fed. Reg. 32786 (Sept. 16, 1986). The observers will assure that nets are not set on porpoises, the annual kill quota of which was reached earlier in October.

On August 6, 1986 NMFS published advance notice of a rule requiring observers on fishing vessels of any nation wishing to import yellowfin tuna to the U.S. after U.S. fishermen have reached their annual quota on the mortality of porpoise killed in fishing for yellowfin tuna. 51 Fed. Reg. 28320 (Aug. 6, 1986). The observers will verify that "no sets on porpoise were made after the closure date." Id.

On October 20, 1986 the State Department agreed that the U.S. will in effect trade foreign aid for access by U.S. tuna fishermen to Western Pacific tuna. See Marine Fish Management (Oct. 1986) at 1-2. The deal was reached with a number of Western Pacific island states who, unlike the U.S., claim sovereign rights over migratory tuna within their EEZ.

B. Fisheries

1. Foreign Fishing

Congress has elected to use foreign fishing permit fees as a means to induce foreign compliance with United States fisheries management policy. An amendment to section 204(b)(10) of the MFCMA imposes escalated permit fees on nations harvesting U.S. origin anadromous fish "at a level unacceptable to the Secretary" or "failing to take sufficient action to benefit the conservation and development" of U.S. fisheries. (emphasis added). 100 Stat. 123. The basic formula for fee determination remains unchanged: at minimum, fees charged foreign vessels must be that percentage of the total cost of implementing the MFCMA each fiscal year that is directly proportional to the foreign component of the aggregate catch in both territorial sea and FCZ waters during the preceding year. For those nations whose practices meet criteria of amended Sec. 204(b)(10), fees will be that percentage of the total cost which is directly proportional to the foreign component of the total catch in the FCZ. The amendments require the Secretary of Commerce, in consultation with the State Department, to review foreign harvesting practices in light of the criteria triggering imposition of higher fees and report his findings to Congress. NOAA has promulgated a proposed fee schedule implementing the statutory change. 51 Fed. Reg. 36569 (Oct. 24, 1986).

2. Indian Fishing Rights

In a case with far-reaching implications for Indian fishing rights, the

U.S. Court of Appeals for the Ninth Circuit held that the Department of the Interior (DOI) had the authority to ban commercial fishing on the Hoopa Valley Reservation in Northern California even though the ban effectively abrogated tribal rights. United States v. Eberhardt, 789 F.2d 1354, 1361 (9th Cir. 1986). In the two cases consolidated on appeal, district courts had dismissed indictments filed against members of the Yurok tribe, occupants of the Hoopa Reservation, for taking and selling anadromous fish on the grounds that DOI's moratorium impermissibly abrogated tribal fishing rights. Id. 1358-59. The Ninth Circuit reversed and held that "the general trust statutes in Title 25" conferring on the secretary "authority to enact regulations to protect and conserve the fishery resource . . ." were sufficient to sustain the moratorium. Id. at 1360. In the court's view, DOI had balanced the tribes' right of commercial fishing against the rights of ceremonial and subsistence fishing and given the latter priority. Id. at 1359. The court did not reach the issue of whether the regulations imposing the ban were "arbitrary and capricious or discriminatory" since that issue was not raised below. Id. at 1362.

In a concurring opinion, Judge Beezer expressed his "deep concerns" that the Indians of the Hoopa Reservation are the "primary victims" of the "disjoined" and uncoordinated management of the Klamath River basin anadromous fishery by DOI and the Commerce Department. Id. at 1363. Judge Beezer pointed to alleged mismanagement of the basin's fishery by the Pacific Fisheries Management Council and "over-harvesting by the ocean fisheries" as the primary causes for the depleted fish runs which prompted the DOI moratorium. He suggested that the federal government's Indian trust responsibility binds not only DOI but federal agencies managing ocean resources. Id.

Regarding better management of Klamath basin fisheries, on October 27, 1986 President Reagan signed legislation establishing the Klamath River Basin Conservation Area. P.L. 99-552. The act creates an 11-member Klamath Fishery Management Council directed to develop a long-term management plan to restore the basin's anadromous fish runs. The act provides for $21 million of federal funding over the next 20 years to be matched by funds from Oregon and California whose border lies along the Klamath's drainage.

3. Enforcement

In Lovgren v. Byrne, 787 F.2d 857 (3rd Cir. 1986), the Third Circuit Court of Appeal rejected appellant's arguments that NMFS's regulations authorizing warrantless search of dockside facilities exceeded the authority conferred on the agency by the MFCMA and violated the Fourth Amendment. Appellant Lovgren had verbally and physically intimidated a NMFS inspector and so prevented inspection of his catch that had been landed. An Administrative Law Judge found Lovgren guilty of violating two NMFS regulations prohibiting denial of access to dockside facilities and "forcible interference" with inspections. The district court upheld an imposition of civil penalties. The Third Circuit agreed and held that the agency's authority to promulgate regulations necessary to carry out fishery management plans supported the regulations. Inspection of such areas, the court reasoned, was "necessary in order to monitor compliance with the requirements of the plan and obtain necessary management data." Id. at 864. In rejecting appellant's Fourth Amendment claim, the court found that Lovgren "had little if any reasonable expectation of privacy on his dock," that government interests for the searches were "compelling," and that the act and regulations were carefully tailored to avoid "unnecessary intrusion on privacy." Id. at 865.

4. Columbia Basin Fisheries

The constitutionality of the Northwest Power Planning Council was upheld in Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986). The Council's Columbia Basin Fish and Wildlife Program aims to restore and enhance anadromous fish runs injured by hydroelectric power development of the Columbia-Snake River system. A successful challenge to the Council's constitutionality would have been a major setback for those restoration efforts.

5. Interstate Fisheries Management

On October 1, 1986 President Reagan signed Congress' reauthorization of the Atlantic Striped Bass Conservation Act. The act, P.L. 99-432, will fund two more years of research on the striped bass pursuant to Section 7 of the Anadromous Fish Conservation Act. The Department of Justice unsuccessfully opposed the bill on the grounds that it violated Article 1, Section 7 of the Constitution by mandating executive enforcement of standards developed by an advisory commission made up of state officials.

C. Dredge and Fill

The Army Corps of Engineers (Corps)

has issued a final rule revising the Corps' dredge and fill regulatory program under section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act. 51 Fed. Reg. 41206 (Nov. 13, 1986). The new regulations, reforms initiated by the Reagan administration, include several changes of particular relevance to the ocean and coastal zones. The regulations establish standards for siting and construction of artificial reefs under section 203 of the National Fishing Enhancement Act (NFEA). NMFS will be involved in permit issuance under the National Artificial Reef Plan which NFEA directs DOC to develop. The regulations also clarify the relationship between the Corps' nationwide permits and the consistency requirements of section 307 of the Coastal Zone Management Act (CZMA). Where a state has not concurred that a nationwide permit meets the requirements of its federally approved coastal zone management program, the Corps will not issue a permit until the applicant submits a consistency determination with which the affected state concurs. As a general matter, the Corps recognizes that dredge and fill permits "for activities affecting the coastal zones" of CZMA participants are subject to the consistency requirement. Other changes include clarification of the Corps enforcement and mitigation policies, designed to increase program "flexibility."

The Corps also has proposed regulations revising operations and maintenance regulations for its own civil works projects involving dredge spoil discharges. 51 Fed. Reg. 19694 (May 30, 1986). The most controversial aspect of the regulations is the Corps' interpretation of the relationship between section 106 of the Ocean Dumping Act (ODA) and the CZMA consistency requirements. The Corps noted that there is a "legal question" whether the ODA overrides the consistency requirements as well as CWA section 401 which requires dischargers to obtain state water quality certification. Id. at 19701-02. Nevertheless, the Corps announced its intention, "voluntarily" and with reservation of its legal rights, to seek both state certifications for dumping proposals within the territorial sea. Id. Apparently, the Corps does not believe its spoils dumping activities beyond the territorial sea are subject to the CZMA consistency requirements.

The relationship between the CWA section 404 dredge or fill discharge permit process and the "takings" clause of the Fifth Amendment was at issue in Florida Rock Industries, Inc. v. U.S., 16 ELR 20671 (Fed. Cir. 1986). Florida Rock contested the Corps' denial of a section 404 permit for a limestone mining operation planned for 98 acres of a 1560 acre tract on the grounds that the denial was a "taking" requiring payment of just compensation. Florida Rock filed a Tucker Act suit in the U.S. Claims Court, which ruled from the bench that even though the Corps properly exercised its regulatory authority, the denial "was a taking because it left the plantiff no reasonable economic uses for the property." Id. at 20672. However, in a written opinion issued a year later, the Claims Court questioned and held unfounded the Corps' conclusion that the mining operations would have adverse environmental impacts. Id.

The Federal Circuit vacated and remanded the Claims Court's decision on several grounds. First, the Administrative Procedure Act, not the Tucker Act, is the proper vehicle for contesting unauthorized acts of government officials, thus the Claims Court's review of the public interest factors motivating the Corps' decision exceeded the Court's jurisdiction. Second, the unexplained switch in the trial court's position was held improper. Third, the court held that the Claims Court applied the wrong standard for determining whether lawful acts of the Corps constituted a taking. Relying on U.S. v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459n.4 (1985) for the proposition that Corps denial of a section 404 permit may constitute a taking "if its effect on a landowner's ability to put his property to productive use is sufficiently severe," the court found the Claims Court's methodology objectionable because it turned the case into "one to recover over frustration of business expectations." Id. at 20675. On remand, the Claims Court is to consider the relationship of Florida Rock's investment to the tract's fair market value before and after the permit denial and the owner's opportunity to recoup losses stemming from the denial.

In Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986), FOE and other environmental organizations sought judicial review of the Corps' issuance of a 404 permit authorizing ITT Rayonier, Inc. (Rayonier) to fill a 17 acre wetland area in the Bowerman Basin mud flats of Gray's Harbor on the Washington coast. Rayonier plans to construct a timber export complex on the site. The United States District Court for the Western District of Washington had granted the defendants' motion for summary judgment. Before the Ninth Circuit, appellants raised four main objections to issuance of the permit: (1) Rayonier's activity was not "water

dependent;" (2) practicable alternatives existed; (3) Rayonier's activities would adversely affect water quality; and (4) the conditional nature of the permit's mitigation requirements did not sustain the Corps' decision not to prepare an EIS.

On the water dependency issue, the Ninth Circuit held that the Corps reasonably concluded the nature of Rayonier's venture necessitated that "the (log) storage area . . . be adjacent to the ship-loading facility and therefore is a water dependent activity." Id. at 832. The court also found that the Corps made the proper analysis and weighed the correct factors in making its determination that no feasible alternatives existed. The court then held that appellants' failure to challenge the Washington Dept. of Ecology's certification that Rayonier's fill activity complied with water quality standards foreclosed raising that issue as to the section 404 permit.

The court rejected appellants' claim that restoration of an Elk River wetlands site "inadequately mitigates Rayonier's fill activity so as to excuse preparation of an EIS." Id. at 837. Appellants' claim was based solely on the contention that "off-site" mitigation cannot excuse preparation of an EIS. On that narrow question, the court concluded that "under appropriate circumstances" off-site mitigation is sufficient. Id. at 838. The court expressly reserved the question "whether and under what circumstances off-site mitigation should be weighed or evaluated differently from on-site mitigation." Id. at 838n.17.

D. Environmental Impact Analysis

On April 25, 1986 the Council on Environmental Quality issued a final rule amending 40 C.F.R. Sec. 1502.22, which concerns the duties of federal agencies faced with "incomplete" or "unavailable" information when preparing an EIS. 51 Fed. Reg. 15618. The amended regulation requires that for incomplete or unavailable information relevant to "reasonably foreseeable significant adverse impacts" the EIS include (1) a statement that such information is incomplete or unavailable; (2) the information's relevance; (3) "a summary of existing, credible scientific evidence" relevant to impact evaluation; and (4) the agency's methods and evaluations regarding impacts. Although the amended regulation does not use the term, a shadow of the previous "worst case analysis" requirement persists in the definition of "reasonably foreseeable" which includes catastrophic but low probability occurrences demonstrable by credible scientific evidence and "within the rule of reason."

E. Coastal Zone Management

The National Oceanic and Atmospheric Administration (NOAA) has announced its intention to issue new regulations to implement changes to section 306(g) of the Coastal Zone Management Act (CZMA) made by Congress in reauthorizing the CZMA. See P.L. 99-272, § 6043 (1986). As amended, section 306(g) requires prompt notification by states proposing changes in their federally approved coastal zone management programs. The Commerce Department may withhold all or part of the CZMA funds awarded to a state pending state submission of proposed changes which must be approved before the state implements them and federal consistency obligations apply to them.

F. Seabed Mining

1. Deep Seabed

The Deep Seabed Hard Mineral Resources Act (DSHMRA) was reauthorized by P.L. 99-507 through fiscal year 1989 without significant change. NOAA proposed regulations governing permits for "commercial recovery of deep seabed mineral resources . . . ." 51 Fed. Reg. 2674 (July 25, 1986). The regulations define the "deep seabed" as the area beyond any nation's continental shelf. Although commercial recovery operations are prohibited by the DSHMRA until 1988, NOAA issued the regulations to facilitate industry planning, data collection, and financing. The new regulations will complement the exploration licensing program NOAA established in 1981. See 15 C.F.R. § 970, et seq.

As written, the regulations lack specific regulatory standards. NOAA attributes this to the "infancy" of the industry, the lack of information on the seabed environment, and the agency's mission to encourage development of a new industry. NOAA addressed the "information deficit" by requiring licensees and permittees to conduct monitoring programs "to ensure early and accurate detection of significant adverse impacts on the environment . . . ." 51 Fed. Reg. 2680. The regulations do not define significant adverse impact, leaving it to case-by-case determination. Moveover, NOAA concluded that the occurrence of such impacts due to commercial scale mining is unlikely.

2. Outer Continental Shelf (OCS)

The Department of Interior (DOI) announced its intention to issue regulations to govern post-lease operations on the outer continental shelf for the recovery of minerals other than oil,

gas, and sulphur. 51 Fed. Reg. 12163 (Apr. 9, 1986). Pursuant to section 8(k) of the OCS Lands Act, DOI previously had published advance notices of proposed rule-making for exploration (49 Fed. Reg. 27871 (Dec. 7, 1984)) and leasing (50 Fed. Reg. 15590 (April 19, 1985)) of such minerals. DOI stated that its current regulations governing oil and gas operations are inappropriate for seabed mining operations.

G. Federal-State Boundary Determination

The Supreme Court in U.S. v. Maine, 106 S. Ct. 951 (1986), rejected Massachusetts' claim that Nantucket Sound is within the state's internal waters rather than partly territorial sea and partly high seas as the United States argued. The state claim rested entirely on the doctrine of "ancient title." Under that doctrine, occupation as an original mode of territorial acquisition and an assertion of exclusive authority vests the occupant with clear title if the "occupation" began before freedom of the high seas became part of international law. The doctrine is recognized by Juridical Regime of Historic Waters, Including Historic Bays, 2 Y.B. Int'l L. Comm'n 1 (1962), a United Nations study upon which the Supreme Court has relied in prior federal-state boundary determinations. See, e.g., Alabama and Mississippi Boundary Case, 105 S. Ct. 1074, 1080 (1985). Assuming arguendo the legitimacy of claims based on "ancient title," Justice Marshall dismissed this claim on the grounds that the state failed to demonstrate the "existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed." 106 S. Ct. at 956.

As part of the Budget Reconciliation Act of 1985, P.L. 99-272, Sec. 8005, Congress amended Section 2(b) of the Submerged Lands Act, 43 U.S.C. Sec. 1301(b), to provide that once they are fixed by a decree of the Supreme Court, the coordinates delineating a federal-state offshore boundary "shall remain immobilized . . . and shall not be ambulatory." This provision does not appear to apply to lateral seaward boundaries between states, but a Supreme Court decree fixing such boundaries could itself provide that the decreed boundary shall be fixed rather than ambulatory with physical changes in the coastline. See Texas v. Louisiana, 426 U.S. 465 (1976).

H. Outer Continental Shelf Oil and Gas

1. Lease Sales

DOI issued a final rule, amending 30 C.F.R. § 256.29(c), announcing that the agency will no longer publish notice of proposed OCS lease sales in the Federal Register. 51 Fed. Reg. 37177. In lieu of the notice, DOI will publish a "notice of availability" of the sale proposed. Id. DOI reasons that most interested parties are on the agency's mailing list and receive the notice concurrently with the Federal Register notice. Others may request to be on the mailing list.

The fiscal year 1987 Interior appropriations bill imposed moratoria on the sale of oil and gas leases on major portions of the OCS off California and Georges Bank off the New England coast. The California moratorium precludes oil and gas lease sales (but not DOI's pre-lease actions) until 1989. The prohibition of leases on Georges Bank was extended through fiscal year 1987. The Georges Bank moratorium disallows sales within 50 miles of the coast, the Bank's Great South Channel, shallow waters on the Bank, or lobstering canyons.

2. Lessee Operations

The DOI proposed regulations to "reform the rules governing oil and gas operations in the OCS." 51 Fed. Reg. 9316 (March 18, 1986). The new regulations would consolidate in one document the multi-tiered rules affecting offshore oil and gas operations. Other objectives include deletion of redundant provisions, addition of performance standards, updating safety and environmental standards, and streamlining reporting requirements.

In American Petroleum Institute (API) v. EPA, 787 F.2d 965 (5th Cir. 1986), API challenged EPA permit conditions regulating discharge of various constituents of drilling muds and drill cuttings into the Beaufort and Bering seas. The permits purportedly were the first in the nation imposing Best Available Technology (BAT) and Best Conventional Pollution Control Technology (BCT) standards for offshore oil and gas operations. In the absence of promulgated national effluent standards, the limitations were based on EPA's "best professional judgment." See 40 C.F.R. § 125.3.

The Fifth Circuit held that EPA had failed to follow its own regulations in enacting the prohibition on discharge of drilling fluid containing diesel oil and therefore remanded that permit condition to the agency. The court upheld effluent limitations on barite, drilling-mud toxicity, and biocides, as well as the static sheen and gas chromotography monitoring tests required by the permits. Lastly, the court concluded that

the prohibition in the Bering Sea permit on discharge of drilling muds between the shoreline and the two-meter isobath during the open-water season was consistent with EPA's duty under section 403(c) of the Clean Water Act (CWA) to prevent unreasonable degradation of the marine environment. In response to the API decision, EPA issued notice of a proposed modification of the Bering and Beaufort seas general permits. 51 Fed. Reg. 29600 (August 19, 1986). EPA will regulate diesel oil as an "indicator" of CWA-listed toxics and thus prohibit its discharge.

I. Marine Pollution

1. Oil Spill Liability and Compensation

On October 21, 1986 President Reagan signed P.L. 99-509 creating an oil-industry trust fund from which federal and state governments and private citizens will be compensated for damages and cleanup expenses resulting from an oil spill. See id. 8031 et seq. A 1.3 cent per barrel tax on oil will provide the revenues to be deposited in the trust fund. The fund will not be operative, however, until enactment of legislation establishing the standards of liability for oil producers and transporters. The tax measure gives Congress until September 1, 1987 to pass the companion bill.

2. Toxic Wastes

Presidential approval of the 1986 Superfund Amendments, P.L. 99-799, a five-year reauthorization earmarking $8.5 billion for the toxic waste cleanup program, came on October 17, 1986. Of the $8.5 billion, $2.75 billion will be generated by taxes on petroleum. The legislation "overrules" the Supreme Court's decision in Exxon v. Hunt, 106 S. Ct. 1103 (1986), which held that the Superfund legislation preempts state tax funds intended to pay costs potentially recoverable through the Superfund program. Of particular relevance to marine resources are provisions for damage suits by municipalities serving as trustees for natural resources.

3. Clean Water Act (CWA)

Deterred by the $18 billion price tag, President Reagan vetoed the proposed 1986 Amendments to the Clean Water Act shortly after the close of the 99th Congress. The amendments contained a number of provisions designed to improve pollution control in coastal areas including: establishment of EPA-sponsored management conferences to develop plans to correct estuarine pollution problems, and funding for projects designed to check pollution of bays and estuaries by overflow from sewers and storm drains. Additional measures were aimed at restricting ocean dumping. The legislation would have limited sewage dumping in the New York Bight to those currently using the site. Use of the 106-mile site off New Jersey would have been limited to those now using the New York Bight. Lastly, the City of Boston, ordered to end its sludge dumping operations at the 106-mile site, would have received $100 million to modernize its sewage treatment facilities in Boston Harbor. Early in 1987, the 100th Congress repassed these amendments to the CWA and overrode a Presidential veto of them.

4. National Resources Damage Assessments under Superfund and the CWA

The Department of Interior issued a final rule detailing "a process for determining proper compensation to the public for injury to natural resources" that result from discharge or release of a substance covered by the CWA or Superfund. 51 Fed. Reg. 27674 (Aug. 1, 1986). The National Wildlife Federation (NWF) and other environmental groups have filed suit in the D.C. Court of Appeals to challenge the regulations. NWF's challenge centers around alleged polluter dominance of the assessment process and the rules' "market value" approach to quantifying the public's losses.

Currently pending in federal district court in Massachusetts is a suit brought by NOAA and the state charging six industrial defendants with contaminating New Bedford Harbor, Massachusetts with PCB's. The suit marks the first assertion by a federal agency of its role as trustee for non-federal lands under the Superfund program. A jury will assess the damages done to fishery resources in the coastal zone and EEZ off Massachusetts.

5. Ocean Incineration

EPA denied Chemical Waste Management, Inc. (CWM), a permit to conduct a research burn at sea. 51 Fed.Reg. 20344 (June 4, 1986). CWM proposed to burn 708,958 gallons of fuel oil containing 10-30% PCB's over a 19 day period at a site 104 miles east of the Delaware River. EPA decided to deny the permit pending promulgation of final ocean incineration regulations which address issues such as the application of other federal statutes including the CZMA, performance and operational standards, and liability and financial responsibility.

In March 1986 CWM filed suit in the U.S. District Court for the District of Columbia challenging various conditions imposed by New Jersey in its CZMA consistency determination regarding the

proposed burn. CWM also has charged that the Commerce Department violated the CZMA by permitting Maryland, in whose waters none of the proposed activities would take place, to review CWM's permit application for consistency with the Maryland state coastal zone management program. CWM also may challenge EPA's permit denial.

6. Ocean Dumping

Congress amended the ocean dumping provisions of the Marine Protection, Research, and Sanctuaries Act (MSA). See P.L. 99-272, Sec. 6063. The amendments, which contemplate development of "regional management plans," are aimed at coordinating federal and state disposal of waste materials at sea.

J. Marine Sanctuaries

NOAA proposed rules to conform the agency's procedures and standards for designation of National Marine Sanctuaries to the Marine Sanctuaries Amendments of 1984, P.L. 98-498. See 51 Fed. Reg. 21369 (June 12, 1986); Ocean Law Memo No. 26.

K. Beach Access

1. California

The United States Supreme Court is scheduled to decide whether the California Coastal Commission (CCC) can condition permits for development of privately owned, beach-front property on dedication of public access to the dry-sand area abutting the permittee's property. In Nollan v. Cal. Coastal Comm'n, 223 Cal. Rptr. 28 (1986), a private homeowner applied to the CCC for a permit to demolish a small beach bungalow and build a new, three-story home on a beach-front lot in Ventura County. The CCC, following the statutory directive of California's Coast Act, approved the permit application conditional on provision of "lateral access to the public . . . between the mean high tide line to the toe of a revetment located on the property." Id. at 28. The California trial court invalidated the condition because the CCC had failed to demonstrate that the proposed construction would itself burden the public's access to the beach. Relying on a recent precedent, Grupe v. CCC, 212 Cal. Rptr. 578 (1985), the California court of appeals reversed and held that the collective burden on public beach access caused by projects like Nollan's justified requiring a dedication in this case. The court also rejected Nollan's "taking" claim: "Although [the public access condition] caused a diminution in value, it did not deprive the Nollan's of reasonable use of the property." 223 Cal. Rptr. at 30.

2. Texas

Several other state courts also rendered significant decisions delineating public rights of beach access and use in 1986. In Villa Nova Resort, Inc. v. State, 711 S.W.2d 120 (Texas Ct. App. 1986), the court affirmed the trial court's ruling that the public had acquired a right of access to, use of, and an easement over appellant's property by prescription and implied dedication. Under the Texas Open Beaches Act, the foreshore areas lying between the vegetation line and the mean low tide line are declared to be subject to the public's right of use or easement. Appellant argued unsuccessfully that the disputed area, dry sand extending approximately 65 feet in front of a sea wall, was shoreward of the vegetation line. The court ruled that the trial court's conclusion that the sea wall and vegetation line were in fact coextensive was supported by sufficient evidence. Equating easement by prescription with adverse possession, the court held long standing public use had resulted in such an easement. In addition, the court ruled the area had been dedicated to the public: relying on the "inducement" of a competent owner that the beach was open to the public, the public had accepted that "offer" through use of the beach for recreational purposes.

In Matcha v. Mattox, 711 S.W.2d 95 (Texas Ct. App. 1986), another Texas appellate court held that the public's right of access and use of beach front areas moves with the natural movements and fluctuations of the line of mean low tide and the natural line of vegetation. Determinations of the vegetation line are not subject to res judicata, but "under the doctrine of changed circumstances . . . always open to relitigation." Id. at 100. In addition, the court held that under the doctrine of custom the public's rights in the contested stretch of Galveston Island beach exist by virtue of use since time immemorial. The Matcha's beachfront home had been damaged by a 1983 hurricane which had eroded the vegetation line so that their house site subsequently lay approximately 150 feet seaward of the vegetation line. The court enjoined the Matcha's from rebuilding their home and thus interfering with the public's right of free access to and over the beach.

3. Oregon

Public access also was supported by recent court decisions in Oregon. In Hay v. Dept. of Transportation (DOT), 301 Or. 129, 719 P.2d 860 (1986), the Oregon Supreme Court upheld a state agency regulation authorizing public parking on the sands in front of appellant's beach-front motel. The court

found the regulation to be within the agency's statutory authority under ORS 390.668(1) to "establish zones on the ocean shore where travel by motor vehicles . . . shall be restricted or prohibited." In Rendler v. Lincoln County, 709 P.2d 721, 726-27 (Or. App. 1985), aff'd on other grounds, Ore. Sup. Ct. Nov. 1986, the Oregon Court of Appeals held that open and continuous use of privately owned lands abutting a designated but long-neglected county road had created a prescriptive easement by which the public gained access to a neighboring beach for recreational purposes. An Oregon trial court held in McDonald v. Halvorson, No. A-85-05-05317 (Multnomah County Cir. Ct. 1986), that public rights established in State ex rel Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), to use all dry sand areas between the mean high tide and vegetation lines encompass beach areas not expressly designated for public use by the "Oregon Beach Bill," ORS 390.605. The court reasoned that "(t)he public's rights . . . (were) not and cannot be diminished by the legislature."

L. Public Trust Doctrine

1. Virgin Islands

The issue before the court in West Indian Company, Ltd. (WICO) v. Virgin Islands, Civil No. 1986/293 (D.V.I. 1986) (preliminary injunction) was whether WICO's rights, "now contained in a contract to which the [Virgin Islands] is a party, may be extinguished by the presently sitting legislature" pursuant to policy powers reserved under the public trust doctrine. The court held for the plaintiff and enjoined the territorial government from interfering with WICO's dredge and fill operations in the Long Bay area of St. Thomas.

WICO's rights in the submerged lands stemmed from a 1913 grant from Denmark. Negotiations concerning the 1917 treaty between Denmark and the U.S. making the Virgin Islands a U.S. possession clarified that WICO's rights were in perpetuity. However, in 1968, the U.S. filed suit to declare WICO's rights terminated. Settlement of that suit resulted in a "Memorandum of Understanding" which preserved WICO's reclamation rights in a measurably reduced area of the bay. Two subsequent addenda amended but preserved WICO's rights. The territorial legislature ratified the Memorandum as well as the second of the two addenda; the territory's attorney general had advised that the first addenum, dealing with a purely technical matter, did not merit legislative consideration. Citizen opposition to WICO's dredging activities in June of 1986 prompted a bill repealing WICO's rights.

In issuing the injunction, the court held that WICO had demonstrated likely success on its claim that the legislative repeal violated the Contract Clause, Art. I, Sec. 10, of the U.S. Constitution. First, the court reasoned the public trust doctrine did not invalidate the prior ratification of the Memorandum since the legislature had concluded WICO's activities would advance, not impair, the public interest. See, e.g., Appleby v. New York, 271 US 364, 394 (1926). Further, the prior ratification was "clearly a contract." Second, the court found the repeal was an unjustified exercise of the territory's police power: WICO's contractual rights had been substantially impaired by legislation which addressed no broad public policy. Having found the repeal invalid, the court did not reach WICO's alternative claim that the repeal was a "taking" requiring just compensation.

2. Mississippi

In Cinque Bambini Partnership v. State, 491 So.2d 508, (Miss. Sup. Ct. 1986), the Mississippi Supreme Court held that fee title "to all lands naturally subject to tidal influence inland to today's high water mark" is held in trust by the state. However, lands which became subject to tidal influence through avulsion or non-natural means are retained by their private record titleholders. Id. at 510-11. The plaintiff partnership brought the action to remove clouds from its title, stemming from pre-statehood Spanish land grants to 2400 acres of undeveloped wetlands along Mississippi's Gulf Coast. Mississippi claimed title as trustee of the public trust created when Mississippi became a state in 1817. The pragmatic issue before the court was who will enjoy the revenues from anticipated oil and gas exploration. The fundamental legal issue involved the inland reach of the trust boundaries: whether at the time of statehood tidally influenced non-navigable waters were included in state-owned public trust lands.

Recognizing the issue as one of federal law, the court turned to federal case law and concluded that regardless of navigability, lands beneath all waters subject to the ebb and flow of the tides and up to the mean high water mark had passed to Mississippi in 1817. The court rejected the partnership's argument that judicial expansion of the public trust to include lands beneath freshwaters "navigable in fact" had removed from the trust lands merely subject to the "ebb and flow" of the tides. The court ruled that even though the 1814 Spanish land grants to which appellant traced its title pre-dated Mississippi statehood, the public trust

still attached. Id. at 518. Mississippi territory, within which the granted lands lay, was annexed to the U.S. in 1812; therefore, the grants came too late to avoid inclusion in the public trust.

3. Maine

Numerous courts have articulated the growing list of public rights in lands subject to the public trust. The rights of property owners with holdings contiguous to public trust lands have received less attention. In Harding v. Commissioner of Marine Resources, 510 A.2d 533, 557 (1986), the Maine Supreme Court held that the state need not consider effects on adjacent private property values in decisions to grant aquaculture leases in the state's submerged lands. Pursuant to statute, the Maine Department of Marine Resources (DMR) had granted leases to two aquaculturists for state-owned submerged lands adjacent to Harding's property. Harding, who had intervened in the administrative process, appealed the DMR's decision to the superior court which vacated the leases on the grounds that the Department failed to consider allegedly adverse effects on the value of Harding's property. The Maine Supreme Court reversed because it found no such requirement in the statute. Moreover, the court was "unpersuaded that public trust considerations require inclusion of individual property values in the legislative formulation."

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PUBLICATION UPDATE

TITLE: Update 1 for Federal Fisheries Management: A Guidebook to the Magnuson Fishery Conservation and Management Act

DATE: March 1987

-ABSTRACT-

An update to the 1985 edition of FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT (Jon L. Jacobson, Daniel Conner, and Robert Tozer, editors) is now available. The UPDATE covers statutory and regulatory changes to the MFCMA and other important fisheries-related developments. The UPDATE is published as loose-leaf replacement pages to the 1985 Guidebook.

Notification of the UPDATE's availability will be sent to current Guidebook subscribers. For further information about the UPDATE, or to order a copy of the Guidebook ($5.00) contact:

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