

Ocean Law Memo

ISSUE 32

February 25, 1988

RECENT DEVELOPMENTS IN OCEAN AND COASTAL LAW, 1987

I. INTERNATIONAL DEVELOPMENTS

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

As of January 1988, thirty-four nations have now ratified the 1982 United Nations Convention on the Law of the Sea. Nations recently ratifying the Convention include Paraguay, which deposited its instrument of ratification on 26 September 1986, followed by Democratic Yemen on 21 July 1987 and Cape Verde on 10 August 1987. The Convention will enter into force twelve months after the deposit of the sixtieth instrument of ratification.

Of the thirty-four ratifications to date, the nations ratifying the Convention have predominantly been third world developing nations. Though the United States refuses to sign or ratify the Convention, it does recognize that many of the Convention's provisions embody current customary international law, with the notable exception of the Convention's provisions regarding deep seabed mining.

B. MARPOL Annex II

Annex II of the 1973 International Convention for the Prevention of Pollution from Ships, as amended by the Protocol of 1978 (MARPOL 73/78), entered into force on 6 April 1987. Annex II sets forth measures to control the discharge of noxious liquid substances carried on board vessels. Included are rules governing the discharge of cargo into receiving tanks on shore and the discharge of residues at sea as well as two codes mandatory under MARPOL 73/78 relating to the carriage of noxious liquid substances.

Under Annex II regulations, ships certified to carry certain substances will be required to be fitted with effi-

cient pumping systems to remove cargo residues. The regulations also mandate tankwashing for the most hazardous substances before the ship leaves port. Port reception facilities are required for a few substances and the port state will be required to ensure that foreign ships comply with Annex II.

C. MARPOL Annex V

The United States Senate on 5 November 1987 unanimously approved Annex V (Regulations for the Prevention of Pollution by Garbage from Ships) of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). Previously, twenty-eight nations, representing 48.02% of the world's tonnage, had ratified Annex V. U.S. ratification adds about 4.91% to the total tonnage and provides enough tonnage to meet the 50% requirement and allow Annex V to enter into force.

Annex V governs the discharge of garbage generated on board vessels into the sea. It prohibits the disposal of all plastics, including but not limited to synthetic ropes, synthetic fishing nets, and plastic garbage bags. [Regulation 3 (1)(a)]. It further regulates the disposal of garbage into the sea by limiting garbage disposal to 25 nautical miles for floatable dunnage, lining, and packing materials, and 12 nautical miles for food wastes and all other garbage. [Reg. 3 (1)(b)].

There are three exceptions to the discharge provisions: (1) disposal necessary for the purpose of securing the safety of the ship or saving life at sea; (2) escape resulting from damage to a ship or its equipment; and (3) accidental loss of synthetic fishing nets or synthetic material incidental to the repair of such nets. [Reg. 6].

The prohibitions apply to all ships and to fixed or floating platforms en-

gaged in mineral exploration, exploitation, and associated offshore processing. Annex V also specifies that governments party to the convention "undertake to ensure the provisions for facilities at ports and terminals for the reception of garbage, without causing undue delay to ships and according to the needs of the ships using them." [Reg. 7 (1)].

D. South Pacific Tuna Agreement

Congress adjourned in December 1987 without having passed legislation implementing the South Pacific Tuna Pact (H.R. 3767). President Reagan submitted the agreement to the Senate for advice and consent on 18 June 1987, and on 6 November the Senate voted 89-0 to authorize the treaty. The Administration had called for prompt ratification of the treaty and enactment of implementing legislation in order to reduce tensions in the area over ongoing U.S. tuna vessels' fishing activities.

The agreement would secure access for U.S. tuna vessels to fishing grounds within the exclusive economic zones (EEZs) and high seas areas enclosed by the EEZs of fifteen island nations in the South Pacific region. The tuna industry is obligated to purchase fishing licenses and provide technical assistance, while the U.S. government will guarantee \$50 million in economic assistance to the South Pacific nations over the five year term of the treaty.

E. U.S.-Japan Governing International Fisheries Agreement

President Reagan on 29 December 1987 signed into law Public Law 100-220 (H.R. 3674) which extended the Governing International Fisheries Agreement between the U.S. and Japan for two years. The previous G.I.F.A. was due to expire 31 December 1987.

F. International Whaling

The Scientific Committee of the International Whaling Commission meeting in December 1987 refused to approve Japan's proposal to catch up to 300 minke whales in Antarctica for "research" purposes. Only Iceland and Norway, which continue commercial whaling operations under the guise of "scientific whaling," supported the Japanese proposal. [For a complete and comprehensive accounting of international regulation of whaling, please see Ocean Law Memo, Issue 31, 15 Oct. 1987.]

II. DOMESTIC DEVELOPMENTS

A. Marine Pollution

1. Legislation

a. Plastics and Litter

Several marine environmental measures were passed by Congress and signed by President Reagan in late December 1987. These measures were attached to the legislation extending the international fisheries agreement between the U.S. and Japan, Public Law 100-220 (H.R. 3674), and contain provisions to implement Annex V of MARPOL 73/78, reauthorize the National Sea Grant College Program, and implement controls on the use of high seas drift-nets.

Title II of Public Law 100-220 implements Annex V and prohibits the disposal of plastic garbage from ships anywhere in the sea and the disposal of all garbage within 12 miles of the shore. The legislation also requires the National Oceanic and Atmospheric Administration to continue its efforts to identify the lethal effects of plastics on marine wildlife and directs the Environmental Protection Agency to identify land-based sources of plastic pollution and other trash and to report on methods to reduce those sources.

Title IV of Public Law 100-220 contains the provisions of H.R. 3584, the Driftnet Fishing Control Act of 1987. The purpose of the act is to assess, monitor, and control the impacts of high seas driftnets on U.S. marine resources. The act authorizes the Secretary of Commerce, acting through the Secretary of State, to enter into negotiations with those nations that allow their vessels to engage in high seas driftnet fishing in order to establish agreements on monitoring and enforcement of those fisheries. If enforcement agreements are not negotiated with a nation, the act provides that the U.S. can embargo imports of fish from that nation.

Title III of Public Law 100-220 reauthorizes the National Sea Grant College Program for three years and includes provisions for a strategic research program which would identify and focus on national ocean research priorities.

b. Marine Paints

Though the House earlier passed H.R. 2210, which restricts the sale of anti-foulant marine paints containing organotins, such as tributyltin (TBT),

the Senate ran out of time before the end of the first session of the 100th Congress to pass a compromise organotin bill. The Organotin Antifouling Paint Act now reflects several compromises between the House and the Senate and most likely will be passed early in the second session. The bill prohibits the use of organotin paints on boats less than 25 meters (82 ft.) in length and includes a provision requiring the Navy to monitor organotins at its facilities. The bill also provides for the continued sale of existing paints for 180 days after enactment and up to one year for application. State programs which are already in place to address the problem of organotins in marine paints would not be preempted by H.R. 2210.

c. Oil Spills

Congress also failed to pass the Oil Pollution Liability and Compensation Act, (H.R. 1632 and S. 1802), in the first session of the 100th Congress. Under legislation passed in 1986 (P.L. 99-509) Congress had until 1 September 1987 to enact legislation establishing a comprehensive oil spill liability and compensation system; otherwise, a compensation fund financing mechanism of 1.3 cents per barrel tax would not go into effect. In addition to oil spill damage, H.R. 1632 would also cover the cost of removal and would permit the maintenance of state compensation funds. The House Ways and Means Committee earlier agreed to a one year extension of the taxing authority for the oil spill fund, which expired on 1 September 1987.

d. Ocean Dumping

A bill has been introduced in the Senate by Senators Lautenberg and Bradley of New Jersey to deter the illegal dumping of wastes in the ocean. S. 1751 would require vessels to manifest the transport of municipal or other vessels' non-hazardous commercial wastes transported offshore in order to ensure that these wastes are not illegally disposed of at sea. The Reagan administration opposes the bill because it offers a federal solution to what the President sees as a local, rather than national, problem.

H.R. 3767, the South Pacific Tuna Pact bill, if enacted would also ban the ocean dumping of sewage sludge after 31 December 1991.

2. Clean Water Act

a. § 404 Violations

The Supreme Court held in Tull v. United States, 107 S.Ct. 1831 (1987),

that the Seventh Amendment's guarantee of the right to a jury trial "in Suits at common law," applies to a government action seeking both civil penalties and injunctive relief under the Clean Water Act, 33 U.S.C. § 1251 et seq., against a real estate developer for dumping fill on wetlands without a permit. The Court did not recognize a right to a jury for the amount of the civil penalty since the amount of a civil penalty is not an essential function of the jury trial, and thus not required by the Seventh Amendment.

b. EPA Override Authority of § 404 Permits

A federal district court recently ruled that the Environmental Protection Agency (EPA) has authority under the Clean Water Act to review § 404 permits, 33 U.S.C. § 1344, issued by the Army Corps of Engineers and to veto the permits if the EPA determines the permits would produce unacceptable effects on the environment. In Bersani v. EPA, Case No. 86-CV-772 (N.D. New York Nov. 1987), Judge Thomas McAvoy upheld the authority of the EPA to preclude a proposed mall on the grounds that the development would detrimentally affect wetlands and that an alternative site had been available to the developer when he purchased the property in dispute.

c. Citizen Suits

The Supreme Court has also limited the ability of citizens to sue polluters for past violations under § 505(a) of the Clean Water Act, 33 U.S.C. § 1365. By a vote of 8-0, the Court held in Swaltney of Smithfield v. Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council, 56 USLW 4017 (1987), that Congress had authorized citizen suits against polluters only when citizen-plaintiffs allege a continuous or intermittent violation and there exists a reasonable likelihood the polluter will continue to pollute in the future. The Court also held by a vote of 5-3 that the Clean Water Act confers jurisdiction over citizen suits when the citizen-plaintiffs make a good faith allegation of a continuous or intermittent violation, even if the allegation later proves unfounded.

3. Water Quality Act of 1987

In February 1987, Congress passed and President Reagan signed into law the Water Quality Act of 1987, Public Law 100-4 (H.R. 1), to amend the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., and to provide for the renewal of the quality of the nation's waters. The act includes funding to

address water quality problems of marine bays and estuaries subject to lower levels of water quality due to the impacts of discharges from combined storm water and sanitary overflows from adjacent urban complexes. [Section 1285 (1)]. The act also authorizes a National Estuary Program, whereby the governor of any state may nominate to the Administrator of the EPA an estuary of national significance and request a management conference to develop a comprehensive management plan for the estuary. [Section 1330 (a)(1)]. The National Estuary Program would also include those portions of tributaries draining into an estuary up to the historic height of migration of anadromous fish or the historic head of tidal influence, whichever is higher. [Section 1300 (k)].

B. Marine Mammals

1. MMPA and ESA Amendments

The Marine Mammal Protection Act, 16 U.S.C. § 1371 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq., were amended by Section 411 of the Omnibus Fisheries Act, Public Law 99-659, to permit the incidental taking of marine mammals from depleted stocks under certain circumstances. The amendments are intended to allow takings for research on the stocks; however, some fear that the language will be utilized to authorize takings for reasons other than research.

2. Dall's Porpoises

A United States District Court Judge on 15 June 1987 enjoined the Secretary of Commerce from issuing a permit to Japanese salmon gillnet fishermen which would have allowed incidental takings of Dall's porpoises and other marine mammals in the U.S. EEZ in the North Pacific. Judge Norma Johnson held in Federation of Japan Salmon Fisheries Cooperative Ass'n v. Baldrige, Case No. 87-1351 (D.D.C. June 1987), that a permit issued by the Commerce Department to the Japanese salmon gillnetters was invalid under the Marine Mammal Protection Act because there was no finding that all the species which would be taken during fishing activities were at or above their optimum sustainable population level.

The Japanese salmon fishermen had applied for permission to kill or injure 5,500 porpoises, 450 northern fur seals and 25 Stellar sea lions each year during their salmon fishing operations. The Department of Commerce in May 1987 announced that the Federation would be allowed to incidentally take 6,039 Dall's porpoises in the next three

years. 52 Federal Register 19874 (May 28, 1987). In enjoining the permit, the district court stated that the issuance of the permit for Dall's porpoises but not for other marine mammals--fur seals and sea lions--that foreseeably will be taken along with the porpoises was a violation of the MMPA. In July 1987 the United States Court of Appeals refused to grant a motion by the Japanese federation to stay the injunction issued by the district court. Though the 1987 fishing season has ended, if the injunction is not overturned by a higher court the Japanese salmon gillnet fleet will be prevented from returning in 1988.

C. Endangered Species Act

The House in late December approved legislation reauthorizing the Endangered Species Act, 16 U.S.C. § 1531 et seq., for five years. The House refused to adopt an amendment offered by Rep. Solomon Ortiz of Texas which would have suspended the National Marine Fisheries Service (NMFS) regulations which require the use of Turtle Excluder Devices (TEDs) by shrimp fishermen from North Carolina to Texas. NMFS estimates that as many as 4,000 turtles are killed every year in the Gulf of Mexico when they become entangled in the nets of shrimp trawlers, and it believes these casualties could be avoided by the use of a turtle excluder device. NMFS, on 29 June 1987, published final regulations which phase in the use of TEDs by shrimp trawlers 25 feet and longer. 52 Fed. Reg. 24244. On 15 October 1987, NMFS published a technical amendment to these final rules which authorizes the use of a "soft" TED as an approved device. 52 Fed. Reg. 37152. Regulations requiring shrimp trawlers to use TEDs in the southwest Florida area went into effect on 1 January 1988 affecting as many as 600 shrimp vessels in the region.

D. Fisheries

1. Omnibus Fisheries Act

Several pieces of fisheries legislation were contained in Public Law 99-659 (S. 991), the Omnibus Fisheries Act. Title I of the act re-authorizes the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., through fiscal year 1989. In addition, there were several significant amendments to the Magnuson Act, including:

- fishery management council members must be knowledgeable and experienced and the Secretary of Commerce shall, to the extent practicable, ensure a fair representation of

the active participants in the fisheries being managed, [Section 104(a)];

- * councils may provide comments on state or federal activities or plans which affect fish habitats, [Section 104(b)];

- * each appointed council member must disclose his or her financial interest in the fisheries being managed, [Section 104(e)];

- * management plans must consider the safety of vessels and fishermen, [Section 105(a)];

- * fishery management plans must include information on habitats, [Section 105(a)];

- * Secretarial review of fishery management plans is streamlined, [Section 106]; and

- * health and safety standards for U.S. observers on foreign fishing vessels must be followed as a condition of fishing permits, [Section 103(a)].

Title II of Public Law 99-659 is the Fish and Seafood Promotion Act of 1986, which establishes a National Fish and Seafood Promotional Council. [Section 205]. This national council will prepare an annual seafood marketing and promotional plan for all fish and seafood products and will function somewhat like an agricultural commodity marketing board. [Section 206]. In addition, seafood marketing councils for one or more species of fish will be established. [Section 210]. These councils will be voluntary regional councils and/or species specific councils and will be funded by levies on the industry participants.

Title III of Public Law 99-659 is the Interjurisdictional Fisheries Act of 1986. It repeals the Commercial Fisheries Research and Development Act of 1964 (P.L. 88-309) and establishes a matching grant-in-aid program for states to undertake research on interjurisdictional fisheries in need of management.

Title IV of Public Law 99-659 included provisions establishing the Estuarine Programs Office within the National Oceanic and Atmospheric Administration. [Section 406]. The purpose of the office is to develop and implement a national estuarine strategy, assess the condition of estuaries, and identify those estuaries of critical national or regional importance. Included in Section 411 of Title IV are the amendments to the Marine Mammal Protection Act and the Endangered

Species Act regarding the incidental take of marine mammals from depleted populations discussed above.

2. Anti-Reflagging

Congress also approved and President Reagan signed into law the Commercial Vessel Anti-Reflagging Act, Public Law 100-239 (H.R. 2598). The act prohibits the documentation of foreign built fish processing vessels in the U.S. after 25 July 1987. The act requires U.S. vessel owners to rebuild their vessels in U.S. shipyards, that fishing industry vessels be owned by a majority of individuals who are U.S. citizens, and that fishing industry vessels and U.S. merchant vessels be manned by U.S. crews. The act also calls on the Secretary of Commerce to report on the impact of the bill on the development of the U.S. fishing industry.

3. Proposed Fisheries Legislation

a. Fisheries Research

Rep. Don Young of Alaska introduced H.R. 3341 in September 1987 to strengthen fisheries research through the imposition of fees on the harvesting and processing of fish within the EEZ and through the licensing of recreational fishing in the EEZ.

b. Fishing Vessel Safety and Insurance

Rep. Gerry Studds of Massachusetts introduced H.R. 1841 in March 1987 to establish guidelines for timely compensation for temporary injury incurred by seamen on fishing industry vessels and to require additional safety regulations for fishing industry vessels. The bill would restrict the right of a seaman to sue in federal court for temporary illness, disability, or injury under general maritime law or the Jones Act, 46 U.S.C. § 688, if his employer, on a timely basis, pays cure (medical expenses) and maintenance (\$30 per day or 80% of the seaman's wage or share on the voyage). The right to sue would be reinstated if the harm was caused by gross negligence or willful misconduct. The bill also specifies new safety standards for fishing, fish processing, and fish tendering vessels and directs the Coast Guard to issue new regulations governing lifeboats or rafts, exposure suits, emergency radio equipment and other equipment to minimize the risk of serious injury.

A comparable safety bill has been introduced in the Senate (S. 849) and Rep. Mike Lowry of Washington introduced

a separate bill in the House (H.R. 1836) in March 1987 that focuses exclusively on safety with the primary issue being the licensing of operators and the inspection of fishing vessels smaller than 200 gross tons.

E. Outer Continental Shelf

1. Oil and Gas

California, Florida, Massachusetts, Oregon, and Washington have filed separate suits challenging the Department of Interior's five-year outer continental shelf oil and gas leasing plan. The suits were filed in the U.S. Court of Appeals for the District of Columbia and allege among other things that Interior Secretary Hodel did not adequately balance the potential for adverse coastal impacts with the potential for discovering oil and gas resources. Oral arguments before the court are not expected until sometime in spring 1988.

2. Subseabed Nuclear Waste Burial

Congress in December adopted an amendment, offered as a rider to the energy and water appropriation bill, which calls for the creation of an Office of Subseabed Disposal Research within the Department of Energy. The office would be in charge of all aspects of subseabed disposal of high level nuclear waste and spent nuclear fuel. The legislation requires a report to Congress within 270 days which includes an assessment of the current state of knowledge of subseabed disposal; an estimate of the cost; an analysis of institutional factors, including international ramifications; a discussion of the environmental and public health issues; and recommendations on the structure of a research, development, and demonstration program of subseabed disposal of high level radioactive materials. The Department also is directed to establish a "Subseabed Consortium" comprised of leading oceanographic universities, and institutions, national laboratories and other organizations to investigate the technical and institutional feasibility of subseabed disposal of nuclear waste. In early January 1988, President Reagan agreed to the fiscal year 1988 Budget Reconciliation Conference Report passed by Congress which contains the above provisions; however, no funds were appropriated for the Office of Subseabed Disposal Research.

The rider offered by Sen. Bennett Johnston of Louisiana amends the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq., to encourage research on

the subseabed disposal of nuclear waste and is similar to H.R. 3499, a bill introduced in the House in October by Rep. Walter Jones of North Carolina. H.R. 3499 would establish within the Department of Energy an Office of Alternative Disposal Methods to continue a research program which previously had been conducted by private universities and laboratories. In 1986 the Department of Energy ended a twelve-year program on research into the alternative of subseabed disposal of high level nuclear waste.

F. Seabed Mining

1. MMS Proposed Regulations

The Minerals Management Service (MMS) of the Department of the Interior has proposed rules under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., for prelease hard mineral prospecting. 52 Fed. Reg. 9758 (March 26, 1987). The rules would apply to marine mining, defined as the recovery of minerals other than oil, gas, and sulphur, on the continental shelf of the U.S. The proposed regulations represent the first step toward what will eventually be a comprehensive three-tiered program of pre-lease, lease, and post-lease regulations.

2. Proposed Regulations for Commercial Recovery of Deep Seabed Mineral Resources

The National Oceanic and Atmospheric Administration (NOAA) on 14 September 1987 published supplemental proposed regulations to govern commercial recovery of manganese nodules and to revise some of the regulations currently applicable to exploration. 52 Fed. Reg. 34748. Proposed regulations for the commercial recovery of deep seabed mineral resources under the 1980 U.S. Deep Seabed Hard Minerals Resources Act were first published in the Federal Register on July 25, 1986. 51 Fed. Reg. 26794. Final regulations are expected to be published early in 1988.

3. Proposed EEZ Mining Bill

Rep. Mike Lowry of Washington has reintroduced his bill (H.R. 1260) to establish a program for the exploration and commercial recovery of hard mineral resources on those portions of the seabed subject to the jurisdiction and control of the United States. The National Seabed Hard Minerals Act of 1986 would establish a program for the exploration and development of hard mineral resources in the U.S. exclusive economic zone under the joint administration of the Interior Department and

NOAA.

G. Alaskan Native Rights Offshore

In a unanimous 9-0 decision, the Supreme Court in Amoco Production Co. v. Village of Gambell, 107 S.Ct. 1396 (1987), lifted an injunction that had halted exploration in Norton Sound and the Navarin Basin of the Bering Sea in connection with a dispute over native Alaskan subsistence fishing and hunting rights. Several Alaskan native villages, including Gambell and Stebbins, brought suit to enjoin the Secretary of the Interior's sale of oil and gas leases for federal outer continental shelf land off Alaska. The villages claimed that the Secretary had failed to consider the possible adverse impacts of exploration on subsistence hunting and fishing as required by Section 810(a) of the Alaska National Interest Land Conservation Act (ANILCA), 16 U.S.C.A. § 3120. The U.S. District Court for the District of Alaska granted the Secretary's motion for summary judgment and the villages appealed. The Ninth Circuit affirmed and reversed in part and remanded, 746 F.2d 572 (1984), upon which the District Court denied the villages' consolidated motion for a preliminary injunction. The villages again appealed and the Ninth Circuit once more reversed and remanded, granting the injunction. 774 F.2d 1414 (1985).

In the majority opinion, Justice White held that the villages were not entitled to a preliminary injunction and that ANILCA, which sets forth procedures to be followed before allowing lease, occupancy, or disposition of public lands that would significantly restrict Alaskan natives' use of lands for subsistence, does not apply to the outer continental shelf. By ANILCA's plain language, § 810(a) applies only to federal lands within the State of Alaska's boundaries, 107 S.Ct. at 1398, and includes coastal waters only out to the three mile limit. Based on the Court's decision the Interior Department is likely to restart the planning process for OCS Sale #92 in Bristol Bay which has been enjoined since January 1986.

H. Navigation

1. Navigation Improvements

On 17 November 1986 the Water Resources Development Act of 1986, Public Law 99-662 (H.R. 6), was signed into law to provide for the conservation and development of water and related resources and the improvement and rehabilitation of the nation's water resources infrastructure. The act authorizes the

Secretary of the Army to construct various projects for harbor construction and maintenance (Title II), improvements to inland waterways (Title III), and shoreline protection (Title V).

The act also contains local cost sharing requirements for the construction, operation, and maintenance of harbors (Title I, Section 101). Under the cost sharing provisions, non-federal interests will have to make payments during and after construction, the percentage of the cost dependent on the depth of the project. The non-federal interest must also provide the lands, easements, rights of way, relocations of utilities, and dredged material disposal areas required for the project. The cost sharing provisions also include a section which allocates the costs of damages due to erosion or shoaling caused by the project in the same proportion as the cost sharing provisions applicable to the project causing the erosion or shoaling.

2. Federal Navigation Servitude

In Ballam v. United States, 806 F.2d 1017 (Fed. Cir. 1986), a property owner brought an action under the Little Tucker Act, 28 USC § 1346(a)(2), claiming just compensation for erosion of her upland property resulting from waves on a portion of an artificial waterway constructed on her land by the United States pursuant to an easement. The United States District Court for South Carolina, 552 F. Supp. 390 (1982), upheld the property owner's claim and awarded \$8,804, of which \$664 was for land already lost due to the erosion and the remainder for the anticipated cost of protecting the remaining land from further erosion through sloping and revetment. The Fourth Circuit Court of Appeals reversed, 747 F.2d 915 (1984), and the property owner petitioned the Supreme Court for certiorari. The Supreme Court granted certiorari, vacated the judgment and remanded with directions to transfer the case to the Federal Circuit, 106 S.Ct. 844 (1986). The Court of Appeals for the Federal Circuit found no taking was shown and therefore no just compensation was due, 806 F.2d 1017 (1986). That court held the property owner does not have a right to shift the cost of safeguarding against future erosion to the government and that any damage that does occur is due to the owner's failure to prevent erosion. In April 1987, the United States Supreme Court denied certiorari, 107 S.Ct. 1849 (1987). Thus the federal navigation servitude and the "no compensation" rule for erosion caused by federal navigation projects appears to apply to artificially created littoral

lands as well as natural ones.

I. Beach Access

1. California

In a 5-4 vote the United States Supreme Court reversed a decision of the California Court of Appeals, 177 Cal. App. 3d 719 (1986), and held on the particular facts presented that the California Coastal Commission could not condition a permit for re-developing privately-owned beach-front property on the granting of a lateral easement aiding public access between two public beaches. Justice Scalia's majority opinion in Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987), did state that although the outright taking of an uncompensated, permanent public access easement would violate the Takings Clause of the Fifth Amendment, the Coastal Commission's conditioning of a property owner's building permit on the granting of an easement would be a lawful land use regulation if such a condition substantially furthered a governmental purpose that would justify denying the permit. However, the majority found the Coastal Commission's justification for the particular access requirement (obstruction of the view from the nearest public road) insufficiently related to the public access seaward of a seawall it mandated.

The Court also decided two other important "takings" cases in 1987. In Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S.Ct. 1232 (1987), the Court upheld Pennsylvania's Subsidence Act which requires that 50 percent of the coal beneath structures and public facilities be kept in place to provide support; and First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378 (1987), where the Court held a landowner may recover damages for the time a land use regulation constitutes a taking of his property.

2. Texas

The United States Supreme Court denied certiorari in Matcha v. Mattox, 107 S.Ct. 1911 (1987), thereby upholding a decision by a Texas appellate court, 711 S.W. 2d 95 (Tex. App.-Austin 1986). The Matcha's beachfront house was damaged in 1983 by a hurricane which eroded the vegetation line and left their house 150 feet seaward of the vegetation line. The Matchas were enjoined from rebuilding their home and interfering with the public's right of access to and over the beach seaward of the vegetation line. The court stated that the public's right of access to and use of the

beach existed under the common law doctrine of custom and the public easement for use of a beach shifts with the natural movements of the beach.

3. Oregon

A dispute over access to a small coastal inlet known as Little Whale Cove will provide the first occasion for Oregon appellate courts to examine the relationship between the Oregon Beach Bill, ORS 390.605-.770, and the decision in Thornton v. Hay, 254 Or. 584 (1969), which declared that the dry sand area of Oregon's coast between the mean high tide line and the visible vegetation line is subject to a public right of access for recreational purposes. Little Whale Cove is located slightly above the mean high tide line and is cut off from the ocean by a shelf of basalt which lies across the mouth of the cove. Frequently during periods of high waves and storms, waves feed into the pool which supports exclusive forms of marine plant and animal life. While Little Whale Cove is seaward of the actual visible line of vegetation, it is also landward of the statutory vegetation line created by the Oregon Beach Bill.

The trial court in McDonald v. Halvorson, No. A-85-05-05317 (Multnomah Cir. Ct. 1986), held that Thornton controls the case because there is nothing in the Beach Bill to indicate that the legislature intended to supersede or redefine the common law rights of use. Though the court found that Little Whale Cove was technically in the area between the mean high tide line and the visible vegetation line, it held the cove was not subject to Thornton. The trial court ruled that the dry sand area of the cove is a beach abutting a pool situated entirely on private land and that Little Whale Cove is not part of the ocean. In essence, the trial court grafted an additional requirement onto the holding of Thornton. Not only must the dry sand area be located between the mean high tide line and the visible vegetation line, there must be independent proof that it is intrinsically "beach" or "ocean" property. A decision is expected from the Oregon Court of Appeals early in 1988.

J. Public Trust Doctrine

1. Mississippi

In November 1987 the United States Supreme Court heard oral arguments in Phillips Petroleum Company v. State of Mississippi, 107 S.Ct. 1284 (1987), an appeal from Cinque Bambini Partnership v. State, 491 So.2d 508 (Miss. 1986). In Cinque, the Mississippi Supreme Court

held that fee simple title to all lands naturally subject to tidal influence inland to the current mean high water mark is held by the state of Mississippi in trust and that lands brought within the ebb and flow of tide by avulsion or by artificial or non-natural means are owned by their record titleholders. The partnership, of which Phillips is a member, sought to confirm and remove clouds from its title to 2400 acres of largely undeveloped property near the Mississippi Gulf Coast. The partnership held the property under Spanish land grants which pre-dated Mississippi statehood in 1817.

The Chancery court held that the state owned approximately 140 of the 2400 acres as trustee under the federally created public trust. The Supreme Court of Mississippi affirmed in part and ruled that even though the 1814 Spanish land grants, to which the partnership traced its title, pre-dated Mississippi statehood, the public trust still attached because the Mississippi territory, within which the granted lands lay, was annexed to the U.S. in 1812 and thus the grants came too late to avoid inclusion in the public trust. On February 23, 1988, the United States Supreme Court affirmed the Mississippi Supreme Court's decision.

2. Washington

The Washington State Supreme Court in Caminiti v. Boyle, 107 Wash.2d 662 (1987), declared that a state statute allowing owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands without payment to the state did not violate the public trust doctrine. The court held that the statute, RCW 79.90.105, gave up relatively little right of control over the jus publicum and did not improperly constitute conveyance of title to any state-owned tidelands or shorelands. The court also held that the statute promoted the interests of the public in the jus publicum in its practical recognition that one of the many beneficial uses of public tidelands and shorelands abutting private homes was the placement of such docks so homeowners and their guests could obtain recreational access to navigable waters. In addition, the court held that the statute did not violate the equal protection clause of the State Constitution.

The Washington State Supreme Court in December 1987 reaffirmed its decision in Caminiti that a public trust doctrine has always existed in Washington. In Orion Corporation v. State, 109 Wn.2d

621 (1987), a corporation owning tideland property in a designated estuarine sanctuary filed an action alleging in part an inverse condemnation and taking of property without just compensation through excessive regulation by the state acting pursuant to the Shoreline Management Act, RCW 90.58.010 et seq. Orion had acquired several thousand acres of tideland to develop a residential Venetian style community next to Padilla Bay in Skagit County but was prevented from doing so by state and county land use regulations.

The Supreme Court affirmed the trial court's decision that Orion acquired its tideland subject to the requirements of the public trust doctrine and as a result Orion had no right to use or develop the property in a manner which would substantially impair the public's right of navigation, including recreational navigation, fishing and other incidental uses. The Supreme Court did, however, remand the case back to the trial court for a factual determination whether Orion's tideland property is adaptable to any use that does not impair the public trust.

On the regulatory taking issue the court cited the United States Supreme Court's recent trio of takings cases, Nollan, Keystone Coal Ass'n and First Evangelical Lutheran Church (see above) and held that a land use regulation does not require the payment of just compensation for the taking of private property under the Fifth Amendment if the regulation serves a legitimate public purpose of prohibiting uses of property injurious to the public health, the environment, or the fiscal integrity of the community.

K. Coastal Zone Management

Three recent court decisions have strengthened state coastal zone management roles. The Ninth Circuit Court of Appeals in Exxon Corp. v. Fisher, 807 F.2d 842 (1986), reversed a district court declaratory judgment, Case No. CV 84-2362 (C.D. Cal. Oct. 1985), that the California Coastal Commission violated the Federal Coastal Zone Management Act's (CZMA), 16 U.S.C. § 1451 et seq., consistency requirements in objecting to aspects of Exxon's proposed Santa Ynez Unit OCS oil and gas development and production plan. The Coastal Commission objected to Exxon's drilling of proposed well B, based on the disruptive effect the drilling would have on the thresher shark fishery. The Coastal Commission agreed that Exxon could drill during the fishery's winter off-season but Exxon refused, citing cost and scheduling problems. On appeal to the Secretary of

Commerce, the Secretary sustained the Coastal Commission's objections and found that well B was not consistent with the CZMA's purposes and that drilling during the off-season was a reasonable alternative. Exxon did not appeal the Secretary's decision but filed a separate suit in federal district court.

The Ninth Circuit, in reversing the declaratory judgment in favor of Exxon, found that the Secretary was acting in a judicial capacity insofar as he addressed the issues presented to the district court, and that since Exxon litigated the issue before the Secretary, it could not relitigate the issue in a collateral proceeding. The court stated that Exxon's proper course was to seek judicial review of the Secretary's decision pursuant to the Administrative Procedure Act. The court did not address the issue of whether Exxon could have by-passed secretarial review of the issue and gone directly to district court. In May, the court modified its opinion slightly and denied Exxon's petition for a rehearing. 817 F.2d 1429 (9th Cir. 1987).

The United States Supreme Court has upheld the authority of a state to regulate private mining activities on federal forest land under the Coastal Zone Management Act. In California Coastal Commission v. Granite Rock Co., 107 S.Ct. 1419 (1987) the Court held that the California Coastal Commission could enforce the California Coastal Act's permit requirements on a private mining company's use of national forest lands to mine limestone. A lower court had denied Granite Rock's motion for summary judgment but the Ninth Circuit reversed and ruled that Granite Rock was not required to get a development permit from the Coastal Commission since the permit requirement was preempted by U.S. Forest Service regulations. 768 F.2d 1077 (1985).

The Supreme Court found no express intent in the Forest Service regulations that a company authorized to mine in a national forest would be exempt from compliance with state environmental regulations. The Court found legislative intent to preempt state land use planning in the national forests but found no legislative intent to preempt the environmental regulation of national forest land. The Court went on to state that Congress had distinguished between land use planning and environmental regulation by delegating land use and environmental regulatory authority to different federal agencies. The Court also found that Congress, in passing the CZMA, had specifically disclaimed any intent to override preexisting state

authority and therefore there was no automatic preemption of state regulation of activities on federal lands, even though Congress had excluded such lands by definition from the state coastal zone in the CZMA.

The Third Circuit Court of Appeals in Norfolk Southern v. Oberly, 822 F.2d 388 (1987), held that the Delaware Coastal Zone Act, which bans bulk product transfer facilities in Delaware's coastal zone, does not violate the Commerce Clause of the U.S. Constitution. Norfolk Southern proposed a coal lightening service at Big Stone Anchorage in Delaware Bay which would enable deep draft supercolliers to sail fully loaded and reduce average shipping costs. Big Stone is the only naturally protected anchorage between Maine and Mexico that is deep enough to accommodate fully loaded supercolliers. The Delaware Coastal Zone Industrial Control Board, in a decision affirmed by the Delaware Supreme Court, 492 A.2d 1242 (1985), had ruled that the proposed top-off service was a "bulk product transfer facility" and thus was barred by Delaware's Coastal Zone Act (CZA).

The district court rejected Southern Norfolk's claim that the CZA provision prohibiting offshore bulk product transfer facilities violated the Commerce Clause. 632 F. Supp. 1225 (D.Del. 1986). In granting summary judgment, the district court found that Congress through the CZMA and the Secretary's approval of the Delaware Coastal Management Plan had consented to Delaware's CZA and thus the CZA was immune from Commerce Clause scrutiny. The Third Circuit affirmed but on different grounds, finding that the CZMA does not authorize states to engage in otherwise unconstitutional regulation and thus there is no Congressional consent. Instead, the appellate court ruled that Norfolk Southern had failed to allege any unconstitutional burden on interstate or international commerce.

L. Federal-State Boundary Disputes

The United States has been awarded title to land exposed by the artificial recession of Mono Lake, around which the U.S. owns approximately 70% of the uplands. The Ninth Circuit Court of Appeals held in State of California, ex rel. State Lands Commission v. United States, 805 F.2d 857 (1986), that federal law governs disputes over claims that there has been reliction or accretion to federal lands. The U.S. based its claim to title of the land in part on Section 5(a) of the Submerged Lands Act (SLA), 43 U.S.C. § 1301 et seq., which excepts accretions to federal

lands from grants or confirmations of submerged lands to the states. The court ruled that in determining federal law, the court may not borrow from state law a rule which would divest the U.S. of ownership of relicted land. The court also ruled that Section 5(a) of the SLA comes into play only in disputes between the U.S. and a state claiming land by virtue of its sovereign ownership of submerged lands and does not affect disputes concerning the rights of other riparian or littoral owners. In October 1987 the United States Supreme Court denied certiorari, thus allowing the Ninth Circuit's decision to stand. 108 S.Ct. 70 (1987).

A U.S. District Court has refused to enjoin a federal lessee's production of hydrocarbons on the outer continental shelf or to order the Secretary of the Interior to negotiate with the state of Louisiana to achieve unitization of an allegedly common hydrocarbon pool underlying both state and federal submerged lands. The court in State of Louisiana v. United States, 656 F. Supp. 1310 (1986), held that the 27% share of revenues automatically paid to Louisiana under the Outer Continental Shelf Lands Act (OCSLA) Section 8(g), as amended in 1986, from federal tracts within three miles of the state's offshore boundary was intended to compensate the state for a federal lessee's drainage of common hydrocarbon reservoirs. In addition, the court held that the negotiated revenue sharing agreement authority also contained in OCSLA Section 8(g) is permissive and that it is within the Secretary of the Interior's discretion whether or not to negotiate a unitization or a royalty sharing agreement with the adjacent state. The court also ruled that a determination that a common pool exists does not trigger a duty to enter into a revenue sharing agreement.

M. State Ocean Resource Management

1. Oregon

The 1987 Oregon Legislature passed a number of ocean resources related bills, the most important being S.B. 630 which establishes the Oregon Ocean Resources Management Task Force and requires the Task Force to develop a coordinated and comprehensive plan for the management of ocean resources off Oregon in both state and federal waters. The new statute sets out clear policies to guide the task force's planning effort, including:

- priority to renewable marine resources over non-renewable;
- encouraging environmentally

sound, economically beneficial ocean resources development;

- coordinated ocean management through improvements in Oregon's federally approved coastal management program;

- asserting Oregon's interests as a partner with federal agencies in EEZ resources management;

- promoting marine research and understanding of the ocean; and,

- encouraging marine technology research.

The task force has until July 1990 to complete the ocean resources management plan. The plan itself will have four major elements:

- an analysis of state and federal laws, programs, and regulations affecting ocean resources within the planning area, including gaps, overlaps, and conflicts;

- a study of present and future ocean uses off Oregon and an analysis of the state's management regime for those uses;

- maps and other information in computer format about ocean conditions, uses, and resources to provide a basis for decisions; and,

- recommendations to develop or improve state agency programs for managing ocean resources.

The act also requires an interim plan by July 1988 focusing on oil, gas, and non-energy mineral issues so that state agencies, the Governor, and the Legislature will have coordinated positions. Both Oregon and Washington have filed suit to challenge the Interior Department's inclusion of oil and gas lease sale #132 off the Washington-Oregon coast scheduled for April 1992 in the Department's new 5 year sale schedule. As discussed above, other states and environmental groups have challenged the 5 year schedule as well. The act also requires the State Department of Land Conservation and Development to prepare and adopt by November 1989 administrative rules which implement Goal 19, the state's Ocean Resources Goal governing state agency decisions affecting ocean resources. The act also requires the State Land Board to adopt by July 1991 a resource management plan for the three miles of submerged and submersible lands managed by the state pursuant to the federal Submerged Lands Act.

Other ocean resources legislation passed by the Oregon legislature in 1987 included S.B. 606 which authorizes the issuance of exploration contracts for hard mineral deposits in state submersible and submerged lands. S.B. 606 prohibits development leases from being issued until the State Land Board's management plan required by S.B. 630 is approved.

The Legislature also passed H.B. 2439 requiring the State Fish and Wildlife Commission to establish a restricted entry system for the sea urchin commercial fishery, and S.B. 551 which proscribes the sale or use of tributyltin-based marine antifouling paints. Low-leaching tributyltin-based marine antifouling paints or coatings may be used on aluminum hulls, or on a ship that is more than 25 meters (82 ft.) in length. The statute also allows the sale and use of low-leaching TBT paints in spray cans if the paint is commonly referred to as an outboard or lower drive unit paint. As discussed above similar federal legislation has not yet been passed by Congress.

2. Washington

The Washington Legislature also enacted several pieces of ocean resources legislation in 1987. Substitute House Concurrent Resolution No. 4407 calls for the creation of a joint select legislative committee on marine and ocean resources to review existing state and federal laws and policies for the management, development, and use of marine resources and to identify changes in policies and laws as needed. Also passed was Substitute Senate Bill No. 5533 which directs the director of the Washington Sea Grant Program to conduct an ocean resources assessment for Washington and to conduct a comprehensive synthesis and analysis of existing data and studies about human, environmental, and natural resource values that are associated with and potentially affected by an oil and gas lease sale on the outer continental shelf adjacent to the coast of Washington.

Washington Substitute Senate Bill No. 5986 as enacted mandates a study of Washington state's method of assessing damages from oil spills and other states' methods of assessing oil spill damages. The act also directs that a model contingency plan for dealing with oil spills be drawn up for incorporation into the state and local emergency management plans. The Washington Legislature also banned the sale or use of tributyltin in marine antifouling paints. Substitute Senate Bill No. 5978, however, does not apply to the sale or use

of low-leaching TBT-based marine antifouling paints or coatings that are used on aluminum hull boats.

3. Hawaii

The Hawaii State Legislature adopted a resolution which "asserts and proclaims, on behalf of the citizens of the State of Hawaii, direct and inherent rights and responsibilities pertaining to the protection, conservation, and development of the living and nonliving resources now under domestic jurisdiction within the U.S. Exclusive Economic Zone." Senate Concurrent Resolution No. 100 also resolves that the State of Hawaii must be made a full partner in the decision making and management of U.S. EEZ activities and share in an equitable division of benefits derived from the development of resources in the EEZ. The resolution further states that the congressional delegates of all the coastal states are urged to take appropriate action to ensure that their states achieve full partnership status with the federal government in the management of the U.S. EEZ.

David J. Baugh
February 25, 1988

Ocean Law Memo is an aperiodic publication of the University of Oregon Ocean and Coastal Law Center (OCLC), and is distributed by the Oregon State University Extension/Sea Grant Program. OCLC is funded by the Oregon State University Sea Grant College Program, which is supported cooperatively by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, by the State of Oregon, and by participating local governments and private industry.

For further information on subjects covered in the Ocean Law Memo, contact Professor Richard Hildreth, Co-Director of the Ocean and Coastal Law Center, University of Oregon School of Law, Eugene, Oregon 97403. (503) 686-3845.

NEW PUBLICATIONS

TITLE: Summary of Significant Court Decisions Regarding Federal-State Offshore Resource Ownership, Management and Boundary Questions.

AUTHOR: Greg Skillman

DATE: 1987

PUBLICATION NO.: ORESU-R-85-030

-ABSTRACT-

The author reviews major court decisions on questions that have pitted states against the federal government. The areas of conflict covered are boundary determinations, pollution control, and living resource management.

Reprinted from Proceedings: National Conference on the States and an Extended Territorial Sea, December 7-11, 1985, Texas A&M University Sea Grant College Program.

TITLE: EEZ Governance in Australia, Canada, the United States and New Zealand

AUTHOR: Richard G. Hildreth

DATE: 1987

PUBLICATION NO.: ORESU-R-87-008

-ABSTRACT-

Australia, Canada, the United States and New Zealand claim 200-mile exclusive resource zones based on the 1982 Law of the Sea Convention's exclusive economic zone (EEZ) and continental shelf provisions. These relatively new zones have been superimposed upon the more traditional marine zones recognized by international law--internal waters, territorial sea and continental shelf--and an English common law heritage. Constitutional arrangements with respect to federal-state (Australia, United States) and federal-provincial (Canada) roles offshore historically have followed remarkably similar paths that now are diverging in important ways which are the focus of this paper. New Zealand illustrates progressive EEZ management uncomplicated by the difficult federalism questions present in the other three. Australia and Canada illustrate creative approaches to overcoming EEZ federalism issues that have

hindered improvements in United States EEZ management. From these experiences, suggestions for restructuring U.S. EEZ governance are derived.

Reprinted from Coastal Zone '87 WW Div./ASCE, Seattle, Washington, May 26-29, 1987.

TITLE: Territorial Sea Management by the State of Oregon

AUTHORS: James W. Good and Richard G. Hildreth

DATE: 1987

PUBLICATION NO.: ORESU-R-87-009

-ABSTRACT-

The institutional capability of the State of Oregon to manage the territorial sea under its jurisdiction recently was examined by the authors. Oil and gas development, marine mineral mining, kelp harvesting, oil spills, and waste disposal were reviewed. In addition to resource and legal analyses, the authors identified problems and suggested solutions for user-group conflicts, outmoded laws, gaps or overlaps in responsibility, and state and federal interagency coordination. This paper presents the authors' major conclusions along with suggestions regarding the usefulness of such studies to other coastal states.

Reprinted from Coastal Zone '87 WW Div./ASCE, Seattle, Washington, May 26-29, 1987.

To obtain copies of the above publications write to:

Sea Grant Communications
AdS 402
Oregon State University
Corvallis, OR 97331

JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION



"WHEN THE LAW IS GOOD AND WISE WE WILL ENFORCE THE LAW. WHEN IT IS NOT, WE WILL DISSEMINATE IDEAS. PERHAPS WE WILL USE THE NAME OF THE LAW, BUT WE WILL DEAL IN IDEAS. AND, DAY BY DAY, PERSON BY PERSON, WE WILL CHANGE MINDS."

Reprinted from a speech delivered by Professor Charles Wilkinson at the Fifth Annual Western Public Interest Law Conference, University of Oregon, Spring 1987. The entire text of this speech is reprinted in Volume 2 of THE JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION.

THE JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION provides a national, unbiased forum for the discussion and presentation of new theories and ideas in environmental and natural resource law. Published annually, subscriptions are \$8 for one issue and \$14 for two issues.

SEND YOUR SUBSCRIPTION TO:

JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION
LAW CENTER, UNIVERSITY OF OREGON
EUGENE, OREGON 97403