

OCEAN RESOURCES AND INTERGOVERNMENTAL RELATIONS IN THE 1980'S:
OUTER CONTINENTAL SHELF HYDROCARBONS AND MINERALS

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ABSTRACT

The author utilizes the legal indicia, primarily court opinions, of federal-state conflict over outer continental shelf oil and gas development in the 1980's to support more general observations about intergovernmental relations offshore. The patterns derived from the offshore oil and gas experience are used to predict the probable course of intergovernmental relations in projected offshore hard minerals development and to evaluate proposed improvements in the current scheme.

I. INTRODUCTION

In the 30 years between 1953 and 1983, the federal government received over \$68 billion from outer continental shelf (OCS) oil and gas leases without sharing any with the adjacent coastal states. This fact alone perhaps explains why federal-state relations in the 1980's with respect to OCS oil and gas development generally have been adversarial in nature, despite elaborate statutory provisions for consultation between the federal Department of Interior and affected coastal states.

So far, the federal return from other OCS minerals is basically zero, and the intergovernmental relations track record for such minerals correspondingly is much shorter. However, recent discoveries of exploitable minerals within the U.S. 200-mile Exclusive Economic Zone (some on the inner continental

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shelf), coupled with the Interior Department's assumption of authority over such minerals, unfortunately suggests that the pattern of (predominantly adversarial relations will extend to development of non-hydrocarbon minerals as well. This seems especially likely given Interior's approach and the fact that the coastal states have almost no statutory consultation rights with respect to such minerals in contrast to their extensive consultation rights in regard to oil and gas development.

While this paper emphasizes federal-state relations, it does not ignore the significant adversarial relations with both the federal and state governments concerning offshore oil and gas development that coastal local governments engaged in during the 1980's. See, e.g., Hammond v. North Slope Borough, 645 P.2d 750 (Alaska Sup. Ct. 1982); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980), reversing, 486 F. Supp. 326 (D.D.C. 1979), involving local government opposition to a combined federal-state oil and gas lease sale in the Beaufort Sea. Noteworthy also is the fact that national and regional environmental groups often have joined with state and local governments in the adversarial relations discussed in this paper. See, e.g., Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983), involving Georges Bank lease sale 52 opposed by environmental groups, fishermen, and the State of Massachusetts.

Relying primarily on legal sources, this paper first documents the predominantly adversarial nature of intergovernmental relations concerning OCS oil and gas development in the 1980's. Those relations are examined in detail and applied to projected minerals development activities. The paper then reviews existing and proposed methods of reducing intergovernmental conflict over OCS hydrocarbon and minerals development, assessing their likelihood of implementation and success. Underlying the author's rather pessimistic assessment are some fundamental features of U.S. intergovernmental relations concerning natural resources. These are examined in the paper's concluding section.

This paper also provides a data base of legal events in offshore intergovernmental relations for interpretation and analysis by other interested parties. Comments, especially from those with perspectives and disciplinary backgrounds different from the author's, are hereby solicited.

The federal government is not monolithic in its relations with state and local governments, so this analysis is divided between the three classic governmental branches, legislative, executive, and judicial. Initial emphasis is on the federal courts as resolvers of federal-state OCS disputes. In resolving such disputes the federal courts are interpreting and ruling on the legality of actions of the other two branches, so study of the court decisions is educational regarding intergovernmental relations role played by the other two branches as well.

Immediately obvious is the very significant role of Congress in enacting federal statutes that provide state and local governments with various opportunities to challenge executive branch decisionmakers. Without these statutory assists, state and local governments would be in a very weak position constitutionally to contest federal OCS oil and gas and minerals development decisions.

Generally, the continental shelf is treated by the federal courts as part of the federal public domain subject to disposition by Congress under the Property Clause (art. IV § 3) of the Constitution. Congress' exercise of that power to convey the first three miles of seabed to the coastal states in 1953 is the ultimate illustration of Congressional sympathy for coastal state concerns to date. For reasons discussed later, in the 1980's Congress has continued to be the branch most sympathetic to coastal state concerns.

State and local governments have used the full panoply of federal environmental and ocean legislation (sometimes enacted over a presidential veto), e.g., Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979) (Fisheries Conservation and Management Act and Marine Sanctuaries Act); People of the Village of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) (Alaska National Interest Lands Conservation Act); Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), affirmed, 733 F.2d 605 (9th Cir. 1984) (Endangered Species Act), to assert their positions. However, the three federal statutes most significant to OCS intergovernmental relations have been the National Environmental Policy Act (NEPA), Outer Continental Shelf Lands Act (OCSLA), and the Coastal Zone Management Act (CZMA). They are discussed in that order next, first in connection with oil and gas development, and then minerals development. This is followed by a discussion of other Congressional and administrative actions of special significance to OCS intergovernmental relations in the 1980's.

II. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

A. Oil and Gas Development

Prior to the 1980's, NEPA was practically the only statutory tool coastal state and local governments had available for participating in the OCS oil and gas development process. The OCS Lands Act was not amended until 1978 to include extensive state consultation rights with respect to oil and gas development. Furthermore, most coastal states did not gain federal approval of their coastal management programs developed under the 1972 federal Coastal Zone Management Act until the late '70's, at which time the CZMA's federal consistency obligations applied to those programs as discussed further below.

Pending those significant changes in the OCS leasing process, NEPA procedures became quite elaborate with respect to OCS oil and gas development. The Interior Department prepared and circulated draft and final "programmatic" environmental impact statements (EIS's) on its nationwide program for accelerated OCS oil and gas leasing. In addition, Interior prepared draft and final EIS's on specific sales pursuant to the program.

In connection with Lease Sale 35 off Southern California, California state and local government agencies responded to the multi-volume Interior draft sale EIS with lengthy "counter EIS's" of their own, to which Interior responded with an even lengthier final EIS. Several days of public hearings, at which state and local government representatives testified at length, were held as part of the NEPA process as well. Dissatisfied with Interior's subsequent decision to proceed with Sale 35 pursuant to the nationwide accelerated leasing plan, the state and Southern California local governments unsuccessfully challenged both the nationwide program and Sale 35 in California v. Morton, 404 F. Supp. 26 (C.D. Cal. 1975), affirmed, 608 F.2d 1247 (9th Cir. 1979).

As Interior became more skilled at preparing EIS's which complied with NEPA's procedural mandates, the ability of state and local governments to delay sales which they opposed lessened significantly. See, e.g., Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978), in which the court found the EIS inadequate after it allowed Gulf of Alaska sale 39 to proceed, and County of Suffolk v. Interior, 62 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978), rejecting on appeal state and local government allegations of NEPA defects in Baltimore Canyon sale 40.

Despite the major changes in the OCS Lands Act and the application of the CZMA consistency obligations referred to above, NEPA continues to play an important role in the 1980's in adversarial OCS intergovernmental relations. In the Village of False Pass case cited above, a Bering Sea lease sale was temporarily enjoined due to Interior's violation of the NEPA requirement that a worse-case analysis be performed where data gaps prevent a more certain analysis of potential environmental impacts. In this case, it was uncertain what impacts seismic exploration would have on endangered bowhead whales.

Similarly, in Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), Georges Bank sale 52 was temporarily enjoined because Interior failed to revise the sale EIS to reflect significantly reduced oil and gas resource estimates. And in Massachusetts v. Clark, 594 F. Supp. 1373 (D. Mass. 1984), Georges Bank sale 82 was enjoined because the EIS failed to present an adequate range of alternatives and covered too large a geographical area. Both Georges Bank sales ultimately were cancelled due to lack of industry interest.

Although Interior usually is able to correct such EIS defects and proceed with the sale, temporary injunctions based on NEPA violations decrease industry interest in the sale area. Further, they provide disenchanted state and local governments with time to negotiate with Interior about tracts to be excluded and sale conditions, or to seek a Congressionally imposed moratorium on the sale as discussed later.

Of course, the theory of NEPA is that decisionmakers such as the Secretary of Interior will factor the EIS's environmental analysis into their decision by removing sensitive tracts from the sale, imposing environmentally protective conditions on lessee operations, etc. There is some evidence that EIS's have such an effect, either on the Secretary, or, if he responds inadequately, on Congress. If the June 1985 Congressional committee testimony of the American Petroleum Institute is accurate, more than 63 million acres have been withdrawn from lease sales either by Congress or the Interior Department after publication of the final sale EIS.

API's view was that these large withdrawals nullified the advantages of Interior's current "area wide" approach to lease sale offerings. Perhaps they also demonstrate the effects of EIS's on OCS decisionmaking by both the legislative and executive branches of the federal government. Earlier availability of sale EIS's has been advocated as a way to help state and local governments, and the public, participate even more effectively in the OCS process.

State and local governments also may use NEPA to take part in OCS development stages subsequent to lease sales. In particular, section 25(e) of the OCS Lands Act requires the Secretary of Interior to subject approval of a lessee's development and production plan to the EIS process at least once in all OCS areas other than the Gulf of Mexico. With few major finds outside the Gulf of Mexico to date, experience under this provision is quite limited. One can predict that section 25(e) will yield similar participation benefits to state and local governments as do EIS's prepared in connection with lease sales. Principally, this participation provides opportunities to suggest environmentally protective conditions on oil field development and production concerning such matters as transportation methods and routes, e.g., pipelines vs. tankers. However, like the other state consultation provisions added to the OCS Lands Act in 1978, section 25(2) applies only to OCS oil and gas development, not to OCS minerals development.

B. Minerals Development

In late 1983 Interior prepared a draft EIS for a proposed polymetallic sulfide minerals lease offering in the Gorda Ridge area offshore of Oregon and Northern California. This draft EIS was thoroughly critized at public hearings held on the West Coast as being so legally inadequate that its defects could not be

repaired simply by responding to the critical comments in a final EIS. In part for that reason, Interior established a federal-state task force to perform research and gather data for use in an improved decision document, although the task force would not be compiling an EIS. Use of such task forces both in oil and gas and minerals development is discussed further in connection with the OCS Lands Act below.

The Gorda Ridge process did not provide an auspicious start for federal-state relations in OCS minerals development. Without significant improvements in that process, one can predict resort by disenchanted state and local governments to the NEPA process (their only certain tool) to litigate questions of EIS adequacy such as inclusion of adequate worse-case analyses. NEPA will likely be used to create negotiating leverage and time to pursue legislative remedies with Congress, similar to the process followed in connection with oil and gas lease sales.

C. Conclusion

Milner Ball aptly summarizes how the concept of federalism is buttressed by using the NEPA process in OCS development. In his excellent article, Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf, 12 Environmental Law 623 (1982), Ball explains:

One result of the EIS process has been the technical improvement of decisions. Another result has been the political improvement of the agencies, for impact statements also certify that official decisions have been politically [intergovernmentally] refracted The agency must prepare a sufficient impact statement before it can issue permits to others. The impact statement is thus a kind of permit, and like other permits it is in significant part a political instrument, an aid in making [federal] agencies more representative. . . . [Thus] it is possible to conclude that environmental impact statements are a type of permit that can be used to make [federal] agencies serve as political stages on which citizens [and state and local governments] take active roles. . . .

III. OUTER CONTINENTAL SHELF LANDS ACT (OCSLA)

A. Oil and Gas Development

In 1978 Congress enacted significant amendments to the 1953 OCSLA. Many of those amendments were directed at increasing the involvement of state and local governments in the OCS oil and gas decisionmaking process. The changes wrought by those amendments

are outlined in the table below drawn from the Office of Technology Assessment Report Oil and Gas Technologies for the Arctic and Deepwater 141 (1985):

Table 6-2.—State Role in Offshore Oil and Gas Leasing

Subject	Action	Authority
Outer Continental Shelf Leasing Program	State and local government comments on proposed 5-year plan and on Secretary's annual review of the plan.	OCSLA Sec. 18
Environmental Impacts	Comments by the State on draft environmental impact statements at time of revisions in the 5-year leasing program and at submission of exploration and development and production plans.	NEPA Sec. 102(D) OCSLA Sec. 25
Proposed Lease Sale	Coordination and consultation with State and local officials concerning size, timing or location of proposed lease sale.	OCSLA Sec. 19
Leasing Within 3 Miles of State's Territorial Sea	Consultation with regard to development of shared oil pools.	OCSLA Sec. 8(g)
Geological and Geophysical Exploration Plans	Certification of consistency with State coastal zone management plans.	OCSLA Sec. 11(c) CZMA Sec. 307(c)(3)
Production and Development Plans	Coordination and consultation with State and local officials and certification of consistency of production and development plans with the State coastal zone management program.	OCSLA Sec. 25 CZMA Sec. 307(c)(3)
OCS Oil and Gas Information	Secretary directed to provide information on proposed plans, reports, environmental impact statements, tract nominations, and other information, including privileged information in the custody of the Secretary.	OCSLA Sec. 26

SOURCE: Office of Technology Assessment.

The 1978 amendments provided two major opportunities for state and local participation: (1) the development of a five-year OCS oil and gas lease sale plan under section 18, and (2) Interior consultation with state and local officials concerning individual sales and development and production plans under section 19.

From the state perspective, results under these modifications generally have been unsatisfactory and have led to calls for further changes in the OCSLA. Those experiences, and the amendments proposed in response to them, are discussed next. Also discussed are intergovernmental information sharing under the OCSLA, resolution of federal-state continental shelf boundary disputes, and sharing of revenues from OCS development, all issues of major significance in OCS intergovernmental relations.

1. Section 18 Five-Year Plan Process

OCSLA section 18 requires the Secretary of Interior to develop and revise five-year schedules of "proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity." The Secretary's decisions on size, timing, and location are to be based on several statutory factors, among them the "laws, goals and policies of affected states which have been specifically identified by the governors of such states as relevant matters for the Secretary's consideration." These include the state's federally approved coastal zone management program developed under the Coastal Zone Management Act discussed later. Furthermore, in developing this five-year plan of OCS lease sales, the Secretary must invite, consider, and respond to suggestions from affected governors and local government executives.

California and Alaska successfully challenged Secretary Andrus' first five-year plan in California v. Watt, 668 F.2d 1290 (D.C. Cir. 1981). Secretary Watt's revised plan in response to the court's decision contained mostly minor changes and actually increased the acreage available for leasing from 885 million to slightly over a billion. The most significant change was the deletion of proposed sale 75 in the North Aleutian Basin off Alaska. Although an Interior press release emphasized that this deletion was Alaska's "highest priority," Governor Hammond wrote the Secretary that he was very disappointed that many of the state's other crucial concerns had been summarily rejected. However, California and Alaska's challenge to the legality of the revised plan supported by several other coastal states was rejected in California v. Watt, 712 F.2d 584 (D.C. Cir. 1983).

Since that court decision, legislation has been introduced in several Congressional sessions which would: (1) require the Secretary to accept a governor's recommendations unless he can show that they do not provide a reasonable balance of state and federal interests, i.e. place the burden on the Secretary to show why a state's recommendations are unreasonable; and, (2) require the courts in reviewing secretarial five-year plan decisions to apply the stricter "substantial evidence" standard of review rather than the "arbitrary and capricious" standard applied in the California v. Watt litigation.

These legislative proposals, even if adopted, are an inadequate response to perceived problems with the five-year plan process. The "substantial evidence" standard of judicial review may not be sufficiently different from the "arbitrary and capricious" standard to guarantee meaningful judicial review of secretarial five-year plan decisions, even when combined with a shift of the burden of proof to the Secretary.

Under section 18, lease sales may be held only in areas included in the five-year plan, which provides up to five years notice to affected state and local governments adjacent to

scheduled sale areas, and a minimum five year respite to state and local governments adjacent to unscheduled areas. However, only Washington and Oregon benefited from this latter aspect under both the Andrus and Watt version of the first five-year plan as sales were scheduled in all areas except off Washington and Oregon.

More generally, Richard Burroughs has questioned the ability of the five-year plan process to successfully mediate, and where possible avoid, conflicts between oil and gas developers and other ocean resource users. Finally, both section 18 and section 19 discussed next may be unrealistic in their assumptions about the ability of local governments, especially in previously undeveloped "frontier" areas, to meaningfully participate in the OCS decisionmaking process.

Compared to the lower forty-eight states, Alaska faces a dramatic increase in OCS exploitation under both the first and proposed second five-year plans, which comprise roughly one-half of the OCS leasing program. Yet Alaska presents special operating difficulties related to seismic activities, severe ice and storm conditions, and native subsistence cultures dependent on endangered species. Plus, it is thousands of miles from the ultimate markets for any oil and gas produced.

Also, local planning capabilities in many Alaskan coastal areas are very limited. As an extreme example, the city of Yakutat, a potential staging area for Gulf of Alaska OCS activity, had a 1973 population of approximately 600, mostly Indians engaged in fishing, timber, and tourism activities, and an annual city budget of \$95,000. Such a small total budget is certainly inadequate to support a planning department capable of dealing with the effects of OCS exploration and development activities without major state or federal assistance. However, federal funding to aid state and local participation in the OCSLA process such as Coastal Energy Impact Program grants pursuant to Coastal Zone Management Act sections 308(c)(1) and (2) has been reduced in the 1980's.

2. Section 19 Consultation Process

Under OCSLA section 19, the affected state's governor, and the executive of any affected local government "may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." States with federally approved coastal management programs also have the opportunity to rule on the consistency with those programs of development and production plans as discussed later.

Section 19 distinguishes between gubernatorial and local government recommendations as to the obligation of the Secretary to accept them. The Secretary must accept recommendations of the governor and may accept local government recommendations if "they

provide for a reasonable balance between the national interest and the well-being of the citizens of the affected states." With respect to gubernatorial recommendations only, the Secretary must communicate in writing his reasons for incorporating or disregarding the recommendations.

In reaching decisions under section 19, the Secretary must provide the governor and local government executives the opportunity for consultation. However, according to section 19, the Secretary's decision whether or not to incorporate recommendations is "final and shall not, alone, be a basis for [judicial] invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."

Despite the broad discretion accorded the Secretary under section 19, state and local governments have sued to enforce section 19's requirements in situations where they have felt their recommendations have not been given sufficient weight. Of the five federal trial courts to rule on alleged section 19 violations to date, three have found the Secretary violated section 19, California v. Watt, 17 ERC 1711 (C.D. Cal. 1982) (Southern California Sale 68); Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983) (Georges Bank Sale 52); Massachusetts v. Clark, 594 F. Supp. 1373 (D. Mass. 1984) (Georges Bank Sale 82), and two have upheld the Secretary's response to state and local recommendations, California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1982) (Central and Northern California Sale 53); Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983) (Bering Sea Sale 70).

However, the only appellate court decision to date considering section 19 suggests that the Secretary has wide discretion both substantively and procedurally in responding to state recommendations under section 19. In California's dispute with Interior over Sale 53, Secretary Watt consulted only very briefly with Governor Brown, and sent the Governor a letter explaining his reasons for rejecting most of the Governor's recommendations after deciding to proceed with the sale and after California had filed suit. Nevertheless, the Ninth Circuit Court of Appeals in California v. Watt, 683 F.2d 1253 (9th Cir. 1982), held that the Secretary had complied sufficiently with what it characterized as the "technical" requirements of section 19.

For other sales, section 19 consultation appears to have produced results satisfactory to both Interior and affected states. For example, California's Governor Deukmejian successfully sought several environmentally protective conditions for Sale 73 off Central California, and several sales have proceeded in Alaskan waters without litigation after the negotiation of environmentally protective conditions between Alaska's governor and Interior.

But the overall experience to date has led the states and environmental groups to seek a statutory change in the standard

of review under section 19 from the loose "arbitrary and capricious" standard to the "substantial evidence" standard discussed above in connection with the section 18 five-year plan process. They also seek to clarify the statutory criteria applicable to the Secretary's lease sale decision. To be effective in meeting coastal state concerns, the new criteria would have to move beyond the usual unprioritized laundry list of factors to be balanced, ranging from serving national energy needs to avoiding pollution. Instead they should specify that the Secretary must give greater weight to traditional state concerns such as the risk of oil spills, the lack of onshore support facilities, and conflicts with commercial fishing activities.

OCSLA section 5(a) authorizes the Secretary to suspend or cancel a lease if environmental problems develop after issuing it to the highest qualified bidder. The Secretary may do so with or without compensation to the lessee, depending on the circumstances. No explicit state or local government role is provided by section 5 other than a general mandate to the Secretary to cooperate with affected states in the enforcement of safety, environmental, and conservation laws and regulations. However, judicial review of secretarial suspension and cancellation decisions is available under section 23, the OCSLA's "citizen suit" provision.

Congress has encouraged a litigious attitude by coastal state and local governments with respect to Interior compliance with sections 5, 18, and 19 and other aspects of the OCSLA. This encouragement results from section 23's authorization of "any person" (defined to include state and local governments) adversely affected to sue to compel compliance with the act. Section 23 further authorizes courts hearing such cases to award any party reasonable attorney and expert witness fees.

How likely the federal courts are to exercise their discretion to make such awards remains unclear. In Village of Raktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982), the appeals court reversed a district court judgment awarding the unsuccessful plaintiffs in the North Slope Borough litigation cited above \$59,000 in attorney's fees under the OCSLA and the Endangered Species Act.

3. Intergovernmental Information Sharing

The OCSLA contains several general provisions regarding information sharing between the Interior Department and state and local governments. Like the consultation provisions just discussed, the information sharing provisions apply only to OCS oil and gas development, not the development of other OCS minerals.

OCSLA Section 20 requires Interior to conduct environmental studies of areas or regions included in oil and gas lease sales

and share that information with affected state and local governments. Pursuant to section 26, lessees and permittees must share all data and information gathered during exploration, development, and production with Interior. Interior must pass on summaries of such information to affected state and local governments, subject to conditions designed to protect the confidentiality of the lessee's or permittee's proprietary information. In United States v. Geophysical Corporation of Alaska, 732 F.2d 693 (9th Cir. 1984), permit conditions and regulations requiring exploration permit holders to disclose their data to Interior and authorizing Interior to publicly disclose them pursuant to section 26 were upheld.

More generally, section 19(e) authorizes Interior to enter into cooperative agreements with affected states regarding the sharing of information, the joint utilization of available expertise, and joint monitoring of OCS oil and gas operations.

A major problem with the foregoing information sharing regime is that Interior requests state and local governments to express their views on such matters as the environmental sensitivity of the area being considered prior to a lease sale. However, the act is oriented toward providing state and local governments with information at the lease sale stage and thereafter. Prior to the lease sale stage, Interior has in fact gathered geologic and environmental information on the general area to be leased but is not obligated to share it with state and local governments. One frustrated local government unsuccessfully challenged the lack of information sharing at stages preliminary to a lease sale in County of San Diego v. Andrus, 10 ERC 1681 (S.D. Cir. 1977), claiming a violation of NEPA.

One partial remedy for the problem would be earlier circulation to state and local governments and the public of the draft EIS's Interior prepares in connection with proposed lease sales. Another would be to make industry submissions to the five-year plan process available to selected state and local planning officials from scheduled sale areas on a confidential basis. Interior currently protects such information from disclosure during the life of the plan.

4. Offshore Boundary Disputes and Revenue Sharing

No analysis of OCS intergovernmental relations would be complete without reference to the continuing litigation between the federal and coastal state governments over the exact location of the federal-state dividing line offshore (generally three miles). See, e.g., United States v. Maine (Rhode Island and New York Boundary Case), 105 S.Ct. 992 (1985). Difficulties in resolving federal-state offshore boundaries without litigation are due in large part to the potential oil and gas revenues which follow seabed ownership.

Under the current system, any revenues derived from oil and gas leasing within the state's offshore boundary go to the coastal state's treasury, while revenues derived from beyond go to the federal treasury without any sharing with the adjacent coastal state. This contrasts with the revenue sharing and in-lieu of tax payments made to states by the federal government from development of federal lands onshore.

Legislation mandating federal sharing of OCS oil and gas revenues with the coastal states has been introduced in each recent session without passage by Congress. Lack of Congressional action is, in part, due to administration concerns about the federal deficit and the negative fiscal effects of sharing OCS revenue. The executive branch is very protective of OCS revenue, since the leasing of these lands is the second largest federal revenue producing program after the income tax. However, without meaningful OCS revenue sharing the generally adversarial nature of OCS intergovernmental relations will probably continue.

The original 1953 OCSLA anticipated disputes over oil and gas resources near the federal-state boundary. Therefore, section 7 authorizes the Secretary of Interior to negotiate and enter agreements with coastal states concerning the continuance of oil and gas development and production pending resolution of federal-state jurisdictional controversies. Given the amounts of money involved, it is not surprising that disputes have arisen over the interpretation of federal-state agreements reached under section 7. See, United States v. Louisiana, 448 U.S. 253, rehearing denied, 447 U.S. 930 (1980).

Section 8(g) requires the sharing of revenues from OCS leases which include oil and gas pools spanning the federal-state boundary. Such revenue sharing must be based on case-by-case agreements negotiated by the Secretary and the relevant coastal state governor. Failing agreement, the federal district courts are to make a "fair and equitable disposition" of the revenues. Five coastal states and Interior so far have been unable to reach agreement on the division of \$5.8 billion held in escrow pursuant to section 8(g). Since the escrow account was established in 1978, only one federal-state allocation agreement had been reached, while Texas and Louisiana sued to force distribution of the funds and received favorable rulings from the district courts. These rulings have been appealed to the Fifth Circuit Court of Appeals. See Texas v. Interior, 580 F. Supp. 1197 (E.D. Texas 1984) (disputed revenues split 50-50).

The sympathetic treatment of the coastal states by the courts regarding section 8(g) revenues contrasts with the results in the boundary dispute cases decided by the United State Supreme Court. Exercising its original jurisdiction, the Supreme Court has tended to side with the federal government going back all the way to its 1947 decision United States v. California, 332 U.S. 19 (1947), in awarding the entire continental shelf to the federal

government vis-a-vis the states. Congress modified this decision by returning the first three miles to the coastal states under the 1953 Submerged Lands Act.

Regarding disposition of the 8(g) revenues remaining in escrow, a summer 1985 House budget resolution called for a 27%/73% state-federal split of the \$5.8 billion currently held in escrow. Under the resolution, which reportedly gained administration support, the federal government would receive \$4 billion. The remaining \$1.8 billion would be divided among the seven affected coastal states as follows: Alabama, \$70 million; Alaska, \$44 million; California, \$375 million; Florida, \$.03 million; Louisiana, \$485 million; Mississippi, \$14 million; and Texas, \$375 million.

If implemented, this proposal would provide not only a legislative model for disposition of future 8(g) revenues, but also one for federal-state division of OCS revenues generally. Left out of such a split, of course, are the inland states who only benefit indirectly from the portion going into the federal treasury. To gain their political support, proposals like Senate Bill 130, 94th Cong., 1st Sess. 1975, which would have split revenues 50/25/25 among the federal government, the coastal states adjacent to OCS development, and the other states, should be reexamined.

For the special problem of developing common pools spanning the federal-state line, one approach is joint federal-state lease sales such as the Beaufort Sea sale recently conducted with Alaska. Alternatively, the pool could be leased separately, but by closely-timed federal and state lease sales on either side of the line such as in the Santa Barbara Channel. In similar situations, Canada and Australia have used joint management and revenue sharing agreements negotiated with the relevant province or state successfully.

Whether such an approach would work in the United States remains to be seen. Expansion of the territorial sea claimed by the United States from three to twelve miles would provide an opportunity for a major Congressional reassessment of intergovernmental relations offshore. For example, legislation amending the Submerged Lands Act to expand state ownership an additional nine miles based on the judicially resolved three-mile boundary line would relieve some but not all of the tensions currently hindering resolution of offshore boundary and revenue sharing questions.

B. Minerals Development

The legal regime under the OCSLA governing minerals development is remarkably simple compared to the relatively elaborate one governing oil and gas development, especially with respect to intergovernmental relations. Under section 8(k), the Secretary of Interior is authorized to lease minerals other than

oil, gas and sulfur to the highest cash bonus bidder upon such terms and conditions as he may prescribe. Of the several federal-state interactions listed in Table 6-2 above for oil and gas leasing, only the NEPA EIS process previously discussed, and, arguably, the Coastal Zone Management Act consistency process discussed below are applicable to minerals development.

In addition, OCSLA section 7 would support federal-state minerals development agreements pending resolution of jurisdictional controversies. At this time, resolution of federal-state boundary disputes seems less relevant to OCS minerals development because exploration and recent discoveries have been in deeper waters relatively far offshore.

However, Interior has reported some significant concentrations of minerals in seabed deposits on the inner continental shelf 10-50 miles off Virginia and Georgia. Also, Interior has proposed leasing Alaska sand and gravel deposits and Atlantic Coast phosphorite deposits closer to shore without revenue sharing. Depending on the extent and location of the resource, these proposals could generate federal-state boundary disputes and increase intergovernmental tensions generally. One simple legislative response would be to extend the OCSLA oil and gas intergovernmental consultation provisions to OCS minerals development. It is questionable how satisfactory such a response would be from the coastal states' perspective, given their experiences with OCS oil and gas intergovernmental relations to date.

An alternative approach to reducing federal-state conflicts and litigation would be expanded use of the regional task forces first created by Interior in connection with offshore oil and gas development. More recently, this approach was used as a federal-state coordination device in connection with Interior's proposed Gorda Ridge polymetallic sulfide mineral lease sale off Southern Oregon/Northern California. The 15-member Gorda Ridge Technical Task Force, composed of scientists and state and local government representatives from Oregon and California, was the product of discussions between Governor Atiyeh of Oregon and then-Secretary of Interior Clark.

The task force's principal purpose was to help fill data gaps concerning exploitation of mineral resources on the Gorda Ridge. It was not intended that it compile an EIS-type document; instead, it identified areas of concern to be investigated and considered in Interior's decisionmaking process. Creation of the Gorda Ridge task force has made available federal funds for researchers from state government and state universities to begin filling major data gaps concerning both the mineral resources and the potential environmental impacts of mineral exploration and exploitation of the Gorda Ridge.

More generally, OCS-regional task forces such as that assembled for Gorda Ridge can serve the useful purpose of

assuring the consideration of state and local concerns with offshore activities before the decisionmaking process has progressed significantly. It must be emphasized, however, that the task force is primarily a non-statutory advisory group. Its effectiveness ultimately depends on the willingness of the Interior Department to seriously consider the advice offered. The Department's consideration of such advice in its decisionmaking process is not subject to judicial review, even under the loose arbitrary and capricious standard.

C. Conclusion

Milner Ball's previously quoted article pointed to the 1978 OCSLA amendments as offering the potential for revitalizing federalism offshore. After remarking that evidence of federalism could not be found in the old systems of continental shelf leasing (p. 663), he then notes the changes made (p. 677):

A formerly closed operation has been opened a little to states, local governments, environmentalists, fishermen, and others so that they may begin to play the superintending, governing parts intended for them by federalism. Moreover, the activities now permitted on the continental shelf do not necessarily represent a one-time, once-and-for-all decision. There is a continuous series of decisions, and its increments are marked by permits. The government of marine and coastal affairs is becoming more of a rolling judgment containing Secretarial approval, state and local government consultation, and judicial review.

Elsewhere in that article (pages 660 and 673-74), Ball points out that true Madisonian federalism requires not only the spirit and form of popular government but also the assurance of protection for the powerless. He bravely suggests the treatment of Alaskan Eskimos in the oil and gas development decisionmaking process will be the ultimate test of the OCSLA as true federalism: "Were the Eskimos to be forced on the scales and weighed against oil, the permit system for offshore oil and gas development would fail absolutely to realize the Madisonian desideratum."

Unfortunately, the results to date in the North Slope Borough, Village of Kaktovic, Village of False Pass, and People of Gambell cases cited above suggests that the process may be failing from this Madisonian perspective. In each case, the courts have refused to rule that Alaskan Eskimos and their subsistence lifestyle must be guaranteed survival in the context of Arctic OCS oil and gas resource development. See also Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) holding that there are no aboriginal property rights offshore Alaska that must be accounted for in Arctic OCS oil and gas development.

Several coastal states including Massachusetts, California, and Alaska, probably would agree with the assessment that the OCSLA is insufficiently federalist in structure and operation despite the extensive consultation provisions. The Coastal Zone Management Act discussed next goes beyond consultation in structuring intergovernmental relations, especially in its provisions requiring federal agencies to act consistently with federally approved state coastal management programs. These coastal management programs frequently provide substantive policies against which federal decisions such as those concerning OCS development can be measured for consistency. This aspect of the Coastal Zone Management Act led the author to comment that it emphasized the role of the states as mediator between the national and local levels of government, thus preserving federalism in energy decisions. The author further noted that use of the CZMA process for coastal energy questions would test the viability of federalism in energy decisions generally, while others were criticizing the act's scheme as unworkable.

IV. COASTAL ZONE MANAGEMENT ACT (CZMA)

A. Oil and Gas Development

Two incentives are offered under the CZMA for increased state attention to coastal zone management: federal funds for program development and administration, and a federal commitment to act consistently with state coastal zone management programs. The CZMA's consistency aspects have assumed greater importance in the 1980's, while the flow of federal funds has been reduced.

The CZMA consistency provisions have played a large role in the predominantly adversarial intergovernmental relations with respect to OCS oil and gas development. Three separate consistency provisions are relevant to oil and gas development: (a) section 307(c)(1), which was applied to lease sale consistency questions; (b) section 307(c)(3)(B), applicable to exploration, development, and production plans; (c) section 307(c)(3)(A), applicable to OCS-related permits not encompassed by exploration, development, and production plans.

1. Lease Sale Consistency Under Section 307(c)(1)

Section 307(c)(1) states "each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with [federally] approved state [coastal] management programs." During the 1980's much attention has been focused on the interpretive question of whether section 307(c)(1) applies to Interior's lease sale decisions. The question was answered in the negative by the United States Supreme Court in Interior v. California, 104 S.Ct. 656 (1984).

That decision has been much discussed and critized elsewhere so it will not be dwelt on here, other than to point out that after an initial flurry of mostly adverse reaction, proposed legislative and administrative corrections to the decision have not made significant progress. In addition, the Supreme Court's reversal of the Ninth Circuit Court of Appeals' decision (683 F.2d 1253) failed to deal with three important issues address by the Ninth Circuit. First, the Ninth Circuit's decision contained disturbing loose interpretations of section 307(c)(1)'s "maximum extent practicable" language. Second, it incorrectly applied the 307(c)(3) secretarial override process discussed below to 307(c)(1) questions. Third, it held that environmental groups have standing to enforce the CZMA's consistency requirements. Finally, the decision has major ramifications for the consistency process outside of OCS oil and gas development, especially the consistency process for OCS minerals lease sales as discussed below.

Prior to the Supreme Court's decision, four federal trial courts had sided with state claims that OCS lease sales "directly affect" state coastal zones within the meaning of section 307(c)(1). These courts held, therefore, that OCS lease sales must be consistent with the coastal management programs of adjacent states before they proceed. See the Conservation Law Foundation case cited above; Kean v. Watt, 18 ERC 1921 (D.N.J. 1982), reversed and dismissed as moot, Nos. 82-5679 and 82-5752 (3rd Cir., opinion filed March 21, 1984); California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1982) (Sale 53); California v. Watt, 17 ERC 1711 (C.D. Cal. 1982) (Sale 68).

The one attempt to mediate rather than litigate the section 307(c)(1) interpretive question occurred between California and Interior in connection with Lease Sale 48. However, this failed when Interior rejected the federal mediator's non-binding decision which sided with California's interpretation of 307(c)(1).

That failed mediation is the one use to date of CZMA section 307(h)(2). This section provides for voluntary, non-binding mediation by the Secretary of Commerce (who administers the CZMA) of disputes arising between federal agencies and coastal states in connection with state's administration of its federally approved coastal management program. In five other situations, federal agencies have refused state requests to engage in such mediation.

Even against a highly charged, litigation oriented background, the author contends that the results of applying section 307(c)(1) consistency to OCS lease sales were mostly positive, both from a national interest and a state perspective. Prior to the Interior v. California decision removing lease sales from that process, the states appeared to have been reasonable in litigating specific consistency disputes with Interior. Even in the hotly contested Sale 53 dispute, the

California Coastal Commission's recommendations would have allowed leasing of over 80% of the oil and gas resources included in the proposed sale which was otherwise alleged to be inconsistent with California's coastal management program. Oregon joined California and Alaska's challenge to Interior's first five-year OCS sale plan discussed above in part because the state had asked Interior to specify at which stage in Interior's proposed streamlined sale process consistency determinations would be made, and Interior did not respond.

Furthermore, the states did not oppose all OCS sales in all areas, and expedited consistency reviews in many sale areas. Early court decisions favoring the states on the consistency issue appeared to promote settlement of subsequent Interior-state disputes about lease sales. For example, Alaska and Interior reached agreement quickly on changes to OCS Sale 71 stimulated in part by the Ninth Circuit's decision in California v. Watt (Sale 53) favoring California's position on the consistency issue.

Quite appropriately, Charles Colgan has suggested that many of these controversies should not be viewed as clashes of state interests with national interests, but as situations of conflicting national interests in ocean development. For example, the continued productivity of the Georges Bank fishery and its development for oil and gas resources are each potentially conflicting national interests. However, the responsibility to attempt their resolution is forced upon the state by default through the consistency process.

According to the April 1985 Office of Ocean and Coastal Resource Management Federal Consistency Study Draft, the pattern of reasonable accommodation of state and federal interests in OCS lease sales continued during the 17 months the Interior v. California case was pending before the Supreme Court. During that time Interior prepared 28 consistency determinations for nine lease sales involving 18 coastal states. The affected states concurred with 18 of those 28 Interior consistency determinations. Of the ten state inconsistency objections, five were resolved through Memoranda of Understanding negotiated between coastal state governors and Interior pursuant to the consultation provisions of OCSLA section 19.

The states filed suit with respect to the remaining five objections, but four of the suits were dismissed and the sales took place either as scheduled, or with a one or two month delay. In the fifth case, involving Georges Bank sale 52, the sale was temporarily enjoined and then cancelled by Interior due to lack of industry interest.

2. Exploration, Development, and Production Plan Consistency Under Section 307(c)(3)(B)

Added to the original 1972 CZMA in 1976, section 307(c)(3)(B) requires OCS lessees submitting exploration,

development, and production plans to Interior to certify that all activities described in those plans "affecting any land use or water use in the coastal zone" comply with the state's federally approved coastal management program and will be carried out in a manner consistent with the program. No federal licenses or permits for such activities may be issued until the state concurs in the applicant's consistency certification, or, the Secretary of Commerce overrides the state's inconsistency objection by finding either that the activity is consistent with the objectives of the CZMA or "is otherwise necessary in the interest of national security." The section 307(c)(3)(B) consistency obligation is specifically reinforced and repeated in OCSLA sections 11 and 25 regarding Interior approval of lessee exploration, development, and production plans.

With expansion of the OCS oil and gas program continuing in the 1980's, federal approval of coastal management programs in most states adjacent to significant OCS leasing activity, and the termination of section 307(c)(1) review of lease sales, section 307(c)(3)(B) consistency reviews have assumed central importance in OCS intergovernmental relations. In fiscal year 1983 alone, OCS lessees submitted 432 consistency certifications on exploration, development, and production plans to coastal states. The states concurred with 97% of those certifications.

The most contentious geographic area has been the Santa Barbara Channel. There, conflicting national interests in navigation, defense, commercial fishing, marine mammal habitat, a national marine sanctuary, and greatly expanded oil and gas activity in both federal and state waters have been sorted out through the section 307(c)(3)(B) consistency process. Four appeals to the Secretary of Commerce for override of state inconsistency determinations have been filed in connection with Santa Barbara Channel oil and gas development as discussed below. Even there, the section 307(c)(3)(B) process has provided a vehicle for state-lessee negotiated agreements allowing operations to proceed without litigation or an appeal to the Secretary of Commerce.

The Supreme Court in Interior v. California placed great weight on state review of exploration, development, and production plan consistency in deciding Congress had not intended to subject lease sales to section 307(c)(1) consistency review. In fact, the court went so far as to state that under section 307(c)(3)(B) states can "veto" inconsistent lessee plans submitted to Interior. Although the designated state coastal agency manages the consistency process, local government concerns can be expressed through that agency and come into play through local land use plans formally incorporated into state coastal management programs. Lower federal courts ruling both prior to and subsequent to Interior v. California have placed great weight on the availability of post-lease consistency reviews in rejecting state and local government attempts to enjoin lease sales.

Given the great weight being placed on it by the courts is there adequate respect for state and local interests, and the interests of special groups like Alaskan natives, in the section 307(c)(3)(B) process? Arguably not, given the statutory power of the Secretary of Commerce to override state inconsistency objections which the Supreme court failed to recognize in stating that states can "veto" inconsistent lessee plans. The limited nature of any judicial review of secretarial override decisions based on the arbitrary and capricious standard suggests that secretarial administration of the override process will be a key component of section 307(c)(3)(B)'s overall operation.

Three secretarial decisions have been rendered in the four Santa Barbara Channel override appeals filed to date, none of which has been challenged in the courts. One decision sustained California's inconsistency objection to protect the thresher shark fishery through seasonal drilling restrictions. Another overrode California's objection to exploratory drilling near a vessel traffic lane partially within the boundaries of the Channel Islands National Marine Sanctuary and near breeding colonies of the endangered California brown pelican. The third ruled preliminarily in favor of expanded use of an anchored vessel to store and treat produced oil to which California objected based on the risk of oil spills and adverse affects on coastal zone air quality.

Although the CZMA's legislative history indicates that secretarial overrides based on "national security" were to be tied to national defense needs, both the regulations implementing the override process (see 15 C.F.R. 930.121 and .122) and the three secretarial decisions to date, almost inevitably tend to equate "national security" with broader national interests such as energy supply. This view raises the possibility of secretarial override any time a state inconsistency objection significantly interferes with energy development and production. Such overrides in the alleged national interest contradict the Commerce Secretary's original approval of the state's coastal management program (upon which the states' inconsistency objection is based). To approve a state's program, the Secretary must find that it adequately balanced state and national interests, including national interests in energy facility planning and siting.

Another problem hampering effective state use of the section 307(c)(3)(B) process is that the states usually make their consistency rulings prior to the availability of EIS's evaluating the environmental impacts of the proposed exploration, development, or production activities. Correcting this problem probably would necessitate legislation revising and coordinating decision timetables under NEPA, the CZMA, and the OCSLA.

3. Consistency of Other OCS-Related Permits Under Section 307(c) (3) (A)

For Federal OCS related licenses and permits not included in an exploration, development, or production plan under section 307(c) (3) (B), section 307(c) (3) (A) applies. This section provides that the permit applicant shall certify to the federal permitting agency that the proposed activity complies with the state's coastal management program and will be conducted consistent with it, and that the state must concur in the certification before the permit may be issued. The two principle permits issued by Interior under the OCSLA affected by section 307(c) (3) (A) are pipeline rights of way issued pursuant to OCSLA section 5(e), and pre-lease geophysical exploration permits issued pursuant to section 11(a). During Fiscal Year 1983 the coastal states concurred in forty such permits processed by Interior pursuant to section 307(c) (3) (A).

Perhaps the most notable and successful use of section 307(c) (3) (A) with respect to Interior permits occurred following the December 1980 destruction of over 1200 crabpots by a seismic survey vessel. This vessel was operating off the Oregon and Washington coasts pursuant to an Interior-issued geophysical exploration permit. Subsequently, Oregon and Washington successfully invoked the consistency process and negotiated Memoranda of Agreement (which Interior entered pursuant to OCSLA section 19(e)) to protect their crab fishermen from such incidents in the future. These memoranda scheduled seismic survey operations to coincide with periods of low fishing activity and provided early notification to the state's fishermen of the time, extent, and nature of permitted operations. Pursuant to them, repetition of the December 1980 incident so far has been avoided.

Section 307(c) (3) (A) also provides states with very important rights regarding OCS-related permits issued by federal agencies other than Interior. Most significant here are the so-called "general" permits issued by the federal Environmental Protection Agency (EPA) for various OCS areas for discharges from OCS oil and gas operations (such as drilling muds) pursuant to section 402 of the Clean Water Act. During Fiscal Year 1983 EPA issued such general permits for OCS oil and gas operations off Louisiana, California, and Alaska. These states concurred in their issuance pursuant to section 307(c) (3) (A). However, prior to concurring in their consistency, Alaska and California engaged in significant negotiations with EPA over the terms and conditions of the permits, and EPA subsequently included important permit conditions sought by those states. For example, one condition subjected all new oil and gas facilities within 1,000 meters of California waters to an individual discharge permit process, rather than extending the general permit's blanket coverage to them.

B. Minerals Development

Similar to the situation under the OCSLA, the CZMA consistency regime for OCS minerals development is less elaborate than the consistency regime for oil and gas development. As discussed above, the OCSLA does not require exploration, development, and production plans for OCS minerals development. Therefore, CZMA section 307(c)(3)(B), requiring such plans to be consistent with state coastal management programs, probably does not apply to OCS minerals development. However, section 307(c)(3)(B) is not expressly limited to oil and gas exploration, development, and production plans, and Interior has considered using the exploration plan process for OCS minerals development.

More likely, Interior-approved exploration plans and Interior-issued permits for OCS minerals development will be subjected to the very similar section 307(c)(3)(A) process just discussed in connection with oil and gas development. As with oil and gas development, section 307(c)(3)(A) also would apply to OCS minerals-related permits issued by other federal agencies such as the Environmental Protection Agency.

In perhaps the only use of section 307(c)(3)(A) consistency in connection with seabed minerals mining activities to date, EPA initially contended that its proposed Clean Water Act general permit for deep seabed mining and exploration activities would not affect Hawaii's coastal zone and therefore no consistency determination was necessary. When Hawaii expressed concern about possible negative effects on certain atolls and inter-island channel waters, EPA agreed to certify the consistency of the permitted discharges (which included vessel deck drainage, sanitary wastes, uncontaminated bilge water, and cooling water) as consistent with Hawaii's coastal program. Hawaii then concurred with EPA's consistency certification upon the condition that the permittees inform the state of any anticipated or unanticipated discharges that would by-pass the treatment system and therefore technically violate the EPA permit. The permitted deep seabed mining and exploration activities at issue were being carried out under the United States Deep Seabed Hard Minerals Resources Mining Act, rather than the OCSLA.

The Interior v. California decision has raised a large question as to whether CZMA section 307(c)(1) applies to OCSLA minerals lease sales as contrasted with oil and gas lease sales which the court clearly held it did not. As mentioned above, the court relied heavily upon post-lease consistency review of exploration, development, and production plans under section 307(c)(3)(B) in deciding that Congress did not intend 307(c)(1) to apply to the lease sale stage. However, as just discussed, 307(c)(3)(B) probably does not apply to exploration, development, and production plans for mineral leases. If so, an important point is thereby removed from the foundation upon which the Court built its conclusions. On the other hand, throughout the opinion the Court referred to oil and gas lease sales and OCS lease sales

indiscriminately, without clearly indicating whether it was limiting its ruling to oil and gas lease sales.

In April 23, 1985 letter opinions, the Justice Department and the National Oceanic and Atmospheric Administration (NOAA, the agency within the Commerce Department administering the CZMA) disagreed on this very issue. The Justice Department contended that the Court intended to exclude all OCS lease sales from 307(c)(1) consistency, and NOAA contended that mineral lease sales remained subject to 307(c)(1).

Factors supporting the NOAA view include: (1) the lack of mandatory preparation of consistent exploration, development, and production plans under the OCSLA minerals regime previously discussed; (2) the fact that critical cumulative impacts of a lease sale are best reviewed at the sale stage rather than tract-by-tract, permit-by-permit after the lease sale; and (3) the fact that sunk investment costs tend to tilt post-lease sale decisions (such as secretarial override decisions under CZMA 307(c)(3)(A)) toward allowing operations to continue despite environmental risks.

A simple legislative correction to the problems of mineral lease sale consistency would be a clarification that section 307(c)(1) applies to mineral lease sales under the OCSLA (and perhaps oil and gas lease sales too!). Another improvement would be to apply section 307(c)(3)(B) to a sequence of exploration, development, and mining plans required by corresponding changes in the OCSLA minerals development regime discussed above.

C. Conclusion

Some commentators have objected to the CZMA consistency provisions as allowing the states to block plans in the courts, instead of joining in the original development of plans as part of the federal agency administrative process. But, from the data reviewed above, the predominate mode of consistency operation has been one of negotiation and collaboration among OCS lessees and permittees, the Interior Department and other federal agencies, and state coastal management agencies.

Unfortunately, the CZMA consistency era in offshore federalism may be on the wane. This is due to: (1) expanded use of the secretarial override process under section 307(c)(3)(A) and (B); (2) reduced federal funding for state coastal management programs which could result in the programs being disapproved by the Secretary of Commerce for failing to continue to comply with the CZMA's minimum program requirements (thereby ending the applicability of the consistency provisions); (3) and blatant federal disregard of state coastal management programs in federal energy and economic development decisionmaking as has recently occurred in Delaware in connection with a proposed offshore coal loading facility.

The departments of Commerce and Justice have filed amicus curiae briefs supporting litigation challenging the validity of Delaware's Coastal Zone Act which prohibits offshore bulk transfer operations in order to protect the Delaware Bay ecosystem. The irony is that the Delaware Coastal Zone Act, including its prohibition on offshore bulk transfer operations, was specifically included in Delaware's coastal management program. The program was approved by the Secretary of Commerce under the CZMA as adequately balancing state and national interests in energy development (coal transshipment) and environmental quality (concerns about coal dust impacts on air and water quality and secondary shoreline development).

Such deliberate federal disregard of state coastal management programs is particularly discouraging given almost 15 years of federal, state and local government effort to develop state coastal management programs containing meaningful coastal development policies based on sound scientific information. The scientific and policy basis for decisionmaking under the CZMA contrasts dramatically with the mostly political decisionmaking that has occurred in connection with OCS oil and gas development. Frustrated in their dealings with the Interior Department over oil and gas development, the coastal states successfully sought Congressional moratoria on oil and gas development in particularly sensitive offshore areas as discussed next.

V. CONGRESSIONAL INTERVENTION ON BEHALF OF THE STATES

After enacting NEPA, the CZMA, and significant amendments to the OCSLA in the 1970's, Congress remained sensitive to coastal state concerns about OCS development in the 1980's by enacting moratoria on oil and gas lease sales in specific areas. These sometimes formed the basis for subsequent negotiated settlements between the states and the Interior Department. Generally acting through appropriations legislation, at various times Congress has protected areas off Massachusetts, Florida, and California from OCS oil and gas development for the duration of the next budget cycle. On a more permanent basis OCSLA section 11(h) prohibits the issuance of leases or exploration permits within 15 miles of the Point Reyes, California National Seashore unless California allows the exploration and development of adjacent state submerged lands.

These enactments reflect national political recognition of coastal state dissatisfaction with Interior Department decisions reached under the NEPA, CZMA, OCSLA statutory framework discussed above. Interestingly, the areas excluded from leasing pursuant to Congressional moratoria often have coincided with the 40 to 55 million acres in various areas of the OCS which the Department of Defense has requested be excluded from leasing. Interior Secretary Hodel has stated that potentially one billion barrels of oil are recoverable in areas covered by Congressional moratoria.

Similar to the threat of litigation on the consistency of lease sales, the threat of Congressional moratoria has increased Interior willingness to negotiate with coastal state representatives, especially their Congressional delegations, about the size, location, and timing of OCS oil and gas lease sales adjacent to their coasts. A July 1985 tentative agreement reached between Secretary Hodel and some members of the California Congressional delegation illustrates political nature of the results reached. Under the tentative agreement, OCS oil and gas development adjacent to California would be shifted north off the more sparsely populated Central and Northern California coasts where public opposition is more muted than in the Santa Barbara Channel, Santa Monica Bay, and San Diego areas where leasing is most vigorously opposed. Following the announcement of the tentative agreement, the House Appropriations Committee voted not to extend the California moratorium, limiting the 1986 moratorium to Georges Bank.

The continued viability of the Congressional moratoria process has been questioned by several knowledgeable individuals in state government, the oil industry, and the federal government. They point out that the 1985 moratorium legislation passed by only one vote in the House Appropriations Committee, that Alaska's summer 1985 effort to have Bristol Bay included in a moratorium failed before the House Interior Appropriations Subcommittee, and that some coastal states now are more receptive to a second round of exploratory drilling in some frontier areas where the first round of drilling provided no major discoveries.

Use of the Congressional moratoria process seems less likely for OCS mineral lease sales given the greater distance of most known mineral resources from state coastlines. However, use of the moratorium process, principally as a political weapon, should not be ruled out, given the sometimes highly visible, rhetoric-filled approach Interior has taken to OCS minerals development discussed next.

VI. ADMINISTRATIVE ACTIONS OFFENSIVE TO MANY COASTAL STATES

During the 1980's the generally adversarial nature of OCS intergovernmental relations has been significantly affected by Reagan administration positions and executive branch agency actions. These administrative actions weaken state and local government roles offshore, and run contrary to the commonly understood tenets of the "new federalism." So long as they are maintained, one can safely predict that the pattern of adversarial intergovernmental relations for OCS oil and gas development will continue and extend into OCS mineral development as well.

With respect to adversarial relations over oil and gas development, the more significant administration actions include: opposition to OCS oil and gas revenue sharing with the coastal

states; failure to agree on distribution of OCSLA section 8(g) revenues held in escrow; continuation of the area-wide leasing program opposed by many states and environmental groups; opposition to expansion of the territorial sea from three to twelve miles and the use of straight baselines to measure the territorial sea where appropriate under international law; proposed elimination of federal funding for state coastal management programs; and Commerce Secretary overrides of state objections to activities inconsistent with their coastal management programs.

With respect to projected adversarial intergovernmental relations over OCS minerals development, significant administration actions have included the Justice Department opinion interpreting the Interior v. California decision as excluding OCS mineral lease sales from the CZMA 307(c)(1) consistency process, and the Interior Department's hasty assertion of jurisdiction over seabed mineral deposits beyond the geographic continental shelf but within the 200-mile Exclusive Economic Zone (EEZ). Establishing national jurisdiction over such mineral deposits clearly was a primary motivation for President Reagan's March 1983 EEZ Proclamation, but many coastal states would prefer to see their mining administered by NOAA pursuant to the Deep Seabed Mining Act rather than Interior under the OCSLA.

In its eagerness to establish jurisdiction vis-a-vis NOAA, Interior has offended coastal states by: (1) unilaterally and prematurely claiming jurisdiction over polymetallic sulfide deposits on the Juan De Fuca Ridge, an action which also offended Canada due to its overlapping jurisdictional claim; (2) giving very shallow treatment of the jurisdictional question in the draft EIS for its proposed Gorda Ridge Polymetallic Sulfide Lease Offering in December 1983; (3) releasing in May 1985 an Interior Solicitor's opinion supporting Interior's Gorda Ridge jurisdiction which is an advocacy document rather than a reasoned analysis effectively dealing with arguments contrary to Interior's predetermined position; and (4) issuing in January 1985 a nationwide call for information on non-energy minerals.

The call extended to the entire United States' EEZ and OCS and covered minerals ranging from phosphorites to cobalt-manganese minerals. Study areas delineated pursuant to the call would be reviewed by Interior for possible leasing. Interested parties were asked to identify areas that should be excluded from leasing and to provide the rationale for such exclusion. Thus coastal states were faced with reviewing the entire EEZ and OCS adjacent to their coasts in order to be able to meaningfully participate in Interior's approach to OCS and EEZ minerals development.

VII. CLOSING

As the ultimate example of adversarial OCS intergovernmental relations, the litigation concerning the three oil and gas lease sales the Interior Department attempted to conduct on Georges Bank resulted in at least thirteen federal court decisions. To date, the exploration that has taken place on Georges Bank has resulted in no significant finds of oil and gas resources. Such results raise the question of whether the costs of Interior's adversarial approach are worth the benefits?

Obviously, this is a difficult question to answer, but from the perspective of those willing to litigate to prevent leasing in special areas like Georges Bank, the Santa Barbara Channel, Bristol Bay, and Alaskan Arctic areas, very large costs are worth incurring to avoid irreversible impacts on irreplaceable resources. If the uniqueness of those areas is accepted, a further question arises as to whether state and local governments, environmental and fishermen's groups, and Alaskan natives are suitably equipped or should be entrusted with making the factual case for their special treatment under existing procedures. This question is especially critical because Congressional intervention in the form of moratoria is available only as an uncertain backup.

The major exception to the pattern of adversarial relations to date is the Gulf of Mexico where there has been very little litigation and a great deal of oil and gas production. Active leases and total acres under lease in the Gulf outweigh the totals for the other three OCS regions (Alaska, Atlantic, and Pacific) combined roughly 4 to 1. Even there, however, Florida was forced to resort to the Congressional moratorium process in order to get the Flower Garden Banks area excluded from recent sales.

Barring a radical restructuring of the offshore ownership and jurisdiction rules, a certain irreducible amount of intergovernmental conflict over OCS development can be expected. This appears inevitable due to differing federal, state, and local perceptions as to the allocation of benefits and costs from OCS development. When consultations between federal administrative agencies and state and local governments are exhausted regarding such key decisions as whether to allow OCS oil and gas development in Bristol Bay, our constitutional structure currently provides two avenues of relief, the federal courts and Congress.

Many commentators agree that recent federal appellate court decisions such as Interior v. California incorrectly have supported central national authorities and policy makers who often are insulated from the practical implications of their decisions. They feel the courts may be placing too high a value on predictable results (e.g., "in case of alleged conflict, the national government wins") instead of taking a more neutral (or

Madisonian federalist) position, utilizing intergovernmental conflict to clearly expose for political accountability purposes the goals and values of the respective governments who are in conflict.

Without more judicial sensitivity to the values of federalism regarding offshore resources, federal administrative decisions routine in appearance may escape meaningful judicial and legislative-political review. Yet these "routine" decisions may have significant consequences for OCS intergovernmental relations, e.g., Commerce Secretary inconsistency overrides, Commerce Secretary disapprovals of state and local coastal management programs, and federal agency disregard of key elements of federally approved state coastal management programs (as occurred in Delaware).

Given their political connection to state electorates, it is not surprising that coastal state Congressional delegations are more sensitive to coastal state concerns than either the judicial or executive branches. The state roles created by Congress in NEPA, the CZMA, and the OCSLA have been the principal focus of this paper. Some may view those provisions as an unacceptable transfer of responsibility to state governments. However, along with those relatively modest enactments built around consultation and coordination, Congress also has delegated significant responsibilities offshore to coastal states. These delegations of responsibility began with the 1953 Submerged Lands Act awarding the states the first three miles of ocean seabed. They are exemplified to the fullest under the Deepwater Ports Act by the granting of veto power to coastal states over federally licensed deepwater ports located more than three miles off their coasts.

Some of the techniques Congress has used to create coastal state offshore roles are preferable to others. The current complex of federal statutes governing oil spill liability is unsatisfactory in merely providing that the states are not preempted from enacting similar laws. Such provisions merely entrust exact delineation of federal-state responsibilities to the same federal courts whose recent decisions in this area were criticized above. Also, jurisdictional lines drawn on water, like the Submerged Lands Act, ignore the fluidity of the ocean environment, important national interests in territorial sea management, and legitimate state environmental and economic interests that extend beyond three miles. (Over 30 years after passage of the SLA, a comprehensive evaluation of state territorial sea management efforts seems long overdue.) When compared to management decisions based on science and policy, the temporary, inconsistent, and excessively political nature of Congressional OCS oil and gas drilling moratoria makes them an unsatisfactory tool over the long term.

Instead, the goal to be achieved is better statutory articulation of decision formulas which are sensitive to

intergovernmental concerns. The author previously has advocated explicit recognition and weighing in federal decisionmaking processes of individual state contributions to the national interest, fully recognizing the difficulties of calculating such individual state contributions. In any case, Congressional delineation of the respective federal and coastal state roles offshore will continue to be a difficult process, which is not surprising given the resources at stake.

As fiscal year 1985 draws to a close, states rights with respect to ocean resource matters in general and OCS hydrocarbon and minerals development in particular are at a low ebb. Paradoxically, they run counter to the tenets of the "new federalism," which has meant the return of considerable power and responsibility to the states in other functional areas. The federal government consciously has strengthened its hand vis-a-vis the states offshore, basically viewing concerned coastal state and local governments as obstructing the national ("security") interest in oil and gas and strategic minerals development.

This trend can be expected to extend at least through the balance of President Reagan's second term, and probably would be continued by a succeeding Republican administration. However, over the longer term, the Congressional enactments and court decisions interpreting them will be quite significant in comparison to the policies of individual administrations. After all, oil and gas development from leasing through production takes from 8 to 15 years, thereby spanning at least two presidential administrations. The timetable for minerals development is expected to be even longer.

However, even at low ebb, there is more natural resources federalism offshore than onshore. The onshore situation has been described as one of cooptive federalism or managerial federalism built around a strongly dominant federal government. Thus important participants in onshore intergovernmental relations such as Arizona's Governor Babbitt have yearned for something akin to the CZMA consistency process to apply to federal public lands management decisions onshore, despite the fact that there is revenue sharing with affected states onshore but not offshore! This suggests that the state participation, consultation, and consistency rights discussed in this paper are and should be highly valued by the states, taken seriously by the federal government, and not viewed cynically as state leverage for gaining access to the substantial OCS oil and gas revenues currently flowing into the federal treasury.

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