



Ocean and Coastal Law Memo

Issue 33

October 1989

Beginning with this issue, the formerly separate publications Ocean Law Memo and Coastal Law Memo have been combined into one publication entitled Ocean and Coastal Law Memo.

RECENT DEVELOPMENTS IN OCEAN AND COASTAL LAW, 1988

I. INTERNATIONAL DEVELOPMENTS

A. Law of the Sea Convention

UNCLOS Preparatory Commission Sixth Session

The Preparatory Commission held its 6th session in New York in late August, 1988. Focus of the session was on the deep seabed mining regime, including the ongoing obligations of the registered pioneer investors (now four: India, USSR, France, and Japan), projections for actual deep seabed mining to be operational, long term protection of the developing land-based producer nations from the potential subsidization of deep seabed mining, technology transfer, training for the "Enterprise" staff, and further development of the International Seabed Authority under the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

B. Marine Debris

MARPOL Annex V

Annex V of MARPOL went into effect on December 31, 1988, 12 months after the U.S. ratified the Convention. Annex V completely bans the discharge of plastic waste at sea. A 25 n.m. limit is placed on non-plastic floating materials, and a 12 n.m. limit on other unground non-plastic or food wastes. A 3 n.m. limit is placed on ground non-plastic or food waste. Special areas can be identified under Annex V which have more stringent regulations.

The Marine Environment Protection Committee (MEPC) of the Intergovernmental Maritime

Organization (IMO) held its 26th annual session in September in London. Implementation guidelines for MARPOL Annex V were finalized. The U.S. announced that it would formally present a proposal to identify the Gulf of Mexico as a "special area," requiring more stringent control measures than under Annex V in general, at the 27th session in March, 1989. Implementation of "special area" status for the Baltic Sea was announced as ready to proceed. A high level priority status, in the form of "particularly sensitive sea areas," will be the subject of criteria to be developed by Friends of the Earth International on behalf of MEPC, to be presented at the 1990 session. In both types of area, Article 211 of the 1982 UNCLOS is viewed as international legal authority.

On April 24, 1989, the U.S. Coast Guard issued interim final rules implementing Annex V. The regulations apply to marine craft of any size and offshore platforms. Disposal of plastic wastes at sea is prohibited and other waste discharges are restricted. The National Oceanic and Atmospheric Administration (NOAA) has published a guidebook for ports in meeting their responsibilities under Annex V.

Marine Plastics Pollution Research and Control

The Marine Plastic Pollution Research and Control Act of 1987 took effect on December 31, 1988. The act bans marine dumping of plastic waste from vessels or offshore facilities. This issue had been excluded from the implementing legislation for MARPOL Annex V, passed in December, 1987.



C. Other International Agreements

Antarctic Minerals Convention

On June 2, 1988, the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) was adopted. The convention regulates minerals development anywhere on the Antarctic continent and islands south of 60 degrees south latitude, including their adjacent continental shelves. Negotiations for a more detailed protocol will begin in 1989. U.S. Senate ratification is expected in 1989.

London Dumping Convention: Ocean Incineration

In October, 1988, the parties to the London Dumping Convention (LDC) resolved that (1) ocean incineration (OI) should be reduced as much as possible by the end of 1991, (2) OI should be evaluated in 1992 by the LDC to attempt to stop all OI before 1995, (3) no export of wastes to non-LDC member countries for OI be allowed, and (4) incinerated waste should be off-loaded only in the country of origin. The LDC also revised Interim Technical Guidelines to be used by members to make decisions concerning ocean incineration.

U.S.-Canada Northwest Passage Agreement

On January 11, 1988, the United States and Canada entered into a bilateral agreement which preserves each nation's basic position on the Northwest Passage. The U.S. agreed to notify the Canadian government of plans to move icebreakers through the passage. Other vessels are not affected by the agreement. The agreement affects neither the U.S. position that the passage is an international strait nor the Canadian view that it is internal waters.

D. Fishing

U.S.-Soviet Union International Fisheries Agreement

For the first time, the Governing International Fisheries Agreement between the U.S. and the Soviet Union gives U.S. fishermen access to the Soviet exclusive economic zone (EEZ). The agreement establishes a framework for joint ventures between the two nations' fishermen. Further consultations regarding high seas capture of salmon and fisheries management in the Bering Sea "donut hole" are expected.

U.S.-Japan International Fisheries Agreement: Driftnet Legislation

As part of the legislation attached to the United States-Japan Fishery Agreement Approval Act of

1987, Pub. Law 100-220 was enacted on December 29, 1987. The act requires the U.S. government to reduce the impact of plastic driftnets on marine wildlife and to seek cooperative agreements with Japan, Taiwan, and Korea to regulate the use and disposal of plastic driftnets. The bill also proposes the establishment of a reward or bounty system to encourage the retrieval of abandoned nets.

South Pacific Tuna Treaty

The South Pacific Tuna Treaty [Treaty on Fisheries between the Governments of Certain South Pacific Island States and the Government of the United States, adopted in Port Moresby, Papua New Guinea, April 2, 1987] was accepted by the Senate on December 21, 1987. The enabling legislation, Senate bill 1989, was passed by the Senate on May 13, and by the House on May 24, 1988. The treaty was ratified by the United States on June 15. The other 12 nations had previously ratified the treaty.

The treaty gives U.S. fishermen access to tuna stocks in various EEZ and adjacent high seas enclaves of the signatories. Fleet licensing fees and U.S. federal assistance are important features of the treaty. The coordinating agency for treaty issues, established under the treaty, is the South Pacific Forum Fisheries Agency. See the South Pacific Tuna Act of 1988, Pub. L. No. 100-330, 102 Stat. 591 (1988).

Atlantic Squid TALFF Challenge Fails: Associated Vessels Services, Inc. v. Verity

688 F. Supp. 13 (D.D.C. 1988). The plaintiffs, who provided support services to the Spanish squid fleet in the U.S. Atlantic EEZ, challenged the final annual total allowable level of foreign fishing (TALFF) catch limits for foreign take of Atlantic Loligo squid (see 50 C.F.R. 655) under the Fishery Conservation and Management Act of 1976 (FCMA) (16 U.S.C. § 1801 et seq.). The district court denied plaintiffs' motions for summary judgment and dismissed the case, finding that "Congress did not intend to create a cause of action on behalf of foreign fishing interests to challenge allocations of TALFF made by the [government]." 688 F. Supp. at 15. Thus this court strongly affirmed the domestic management of offshore fishing, and that TALFF determinations remain within the discretion of the Secretary of Commerce under the authority of the Magnuson Fishery Conservation and Management Act (MFCMA). Foreign take is thus dependent on that perceived portion of the optimum yield for any given fishery not to be harvested by U.S. fishermen.

E. Whaling

Japanese Antarctic Whaling

Sixteen groups opposed to whaling filed suit in the Federal District Court for the District of Columbia on January 13, 1988, to require the U.S. government to impose economic sanctions against Japan in response to the Japanese "research" voyage to Antarctica. The proposal to take up to 300 minke whales was denied by the International Whaling Commission, which is not binding on Japan. The U.S. State Department reported that a fleet of three vessels sailed on December 23, 1987.

On February 9, 1988, the day Japan notified the U.S. that it was taking Antarctic whales, Secretary of Commerce William Verity officially certified that Japan was in violation of the Packwood amendments to the FCMA for its "research" whaling in Antarctic waters. Certification automatically results in a 50 percent reduction of a foreign state's fish quota in the U.S. EEZ and is the logical precursor to economic sanctions--e.g., an embargo against fisheries products under the FCMA Pelly amendments. The President had 30 days under the Pelly amendments to respond on the economic sanction issue and responded by refusing all fisheries privileges to Japan, the strongest sanction available under the FCMA, and refused Japan's request for allocations of Pacific whiting and sea snails. Nevertheless, while the president will keep the ban in effect until the situation has improved, there was not a 1988 allocation to actually cut off.

International Whaling Commission

The IWC held its 40th annual meeting in Auckland, New Zealand, May 30-June 3, 1988. The Commission dealt with the issue of aboriginal take, gave a generally negative reaction to further "research" whaling proposals by Iceland and Norway, and agreed to review a Japanese proposal for a third category of whaling, termed "small type," to be somewhat greater than "aboriginal" but less than "commercial."

II. DOMESTIC DEVELOPMENTS

A. 12 n.m. U.S. Territorial Sea

President Reagan issued a proclamation declaring a 12 nautical mile territorial sea on December 28, 1988. The short document proclaims a 12 n.m. territorial sea, but does not extend a contiguous zone beyond the 12 mile limit. The proclamation also states that existing domestic law is not affected by the proclamation; international

maritime boundary determination is similarly unaffected.

The Department of Justice Office of Legal Counsel released a memo on the subject in October, 1988, disclaiming the constitutional authority of Congress, e.g., through the bill H.R. 5069 introduced by Mr. Mike Lowry, former Representative from Washington, to extend the territorial sea through legislation, because Congress has never asserted jurisdiction outside of the existing territorial jurisdiction of the United States. The Office of Legal Counsel suggested that an international convention would be the most secure method of extending the U.S. territorial sea, but that the role of the executive in foreign affairs permits unilateral assertion in the form of a proclamation. The Justice Department also stated that an extension would not likely have a direct impact on the Coastal Zone Management Act of 1972 (CZMA). The memo did suggest legislation to assert that an extension by proclamation would not change federal statutes that rely on a territorial sea.

B. Coastal Zone Management

California Coastal Commission not Coerced by NOAA: State of California ex rel. California Coastal Comm'n v. Mack

693 F. Supp. 821 (N.D. Cal. 1988). The California Coastal Commission (CCC) successfully fought off NOAA's attempt to condition federal grant monies under the CZMA. NOAA placed conditions requiring the CCC to modify the approved California coastal management program, particularly to obtain consistency determinations for outer continental shelf (OCS) activities which the Commission has consistently refused, preferring to negotiate on a case-by-case basis. The current CZMA regulations (see 15 C.F.R. § 928.5) provided clear authority to the court for this decision.

Non-Point Source Pollution and the CZMA: Shanty Town Associates Ltd. Partnership v. E.P.A.

843 F.2d 782 (4th Cir. 1988). This developer plaintiff sued the Environmental Protection Agency (EPA) for imposing restrictions on federal grant monies for a municipal sewage system to be located in a coastal floodplain in order to reduce non-point source water pollution. The developer's property is located in West Ocean City, Worcester County, Maryland. The defendant was supported by a number of environmental groups as amici. The ability of the EPA to so regulate was confirmed by the court even though it is the states who are primarily responsible for non-point source pollution.

This form of federal intervention was not viewed by the 4th Circuit to conflict with the CZMA grant of exclusive state control over the management of coastal floodplains. See CZMA § 307(e, f); 16 U.S.C.A. § 1456 (e, f).

CZMA Consistency v. MPRSA/Ocean Dumping Act

The EPA proposed to designate eight sites in the New York Bight as dredged material disposal sites in June, 1988. The agency stated that the ocean dumping designation process did not have to comply with the consistency provisions of the CZMA. The notice of proposed rulemaking purports that the CZMA is preempted by the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), despite the 1987 amendments to the Ocean Dumping Act [§ 106] which clarify the absence of any such preemption, and that the CZMA is directly applicable to activities under the MPRSA.

EPA Region II cited the opinion in Chemical Waste Management v. U.S. Dept. of Commerce, Civ. No. 86-624 (D.C.D.C. 1986) which found that the CZMA did not authorize a state to impose unilateral conditions on the EPA dumping site process. This case was in fact dismissed in a consent decree, and the permit sought was denied by the EPA.

The opposite legal conclusion to the Chemical Waste Management case was reached in County of San Mateo v. Port of Oakland, No. 329870, slip op. (Sup. Ct. Cal. June 9, 1988), which found the CZMA not to have been preempted by the MPRSA.

See below: Town of Huntington v. Marsh, 859 F.2d 1134 (2d Cir. 1988), described under Marine Sanctuaries in this memo.

Coastal Barrier Resources Act Amendments

1988 amendments to the Coastal Barrier Resources Act (CBRA) direct the Department of the Interior (DOI) to recommend areas of the Great Lakes for inclusion in the Coastal Barrier Resources System. Pacific Coast inclusions were not placed into the amendments.

C. Coastal Wetlands and Dredging

Navy Homeport in Everett, Washington Enjoined Friends of the Earth v. Hall

693 F. Supp. 905 (W.D. Wash. 1988). The environmental plaintiffs filed this lawsuit to obtain a permanent injunction against the U.S. Army Corps of Engineers (USACE) from issuing a § 404 permit under the Federal Water Pollution Control Act

(FWPCA) to the U.S. Navy to dredge portions of the Navy's Everett, Washington, homeport project and to deposit the dredged material in Point Gardner Bay in Puget Sound. The Friends prevailed as the district court found that the Navy's and Corps' environmental impact statement (EIS) failed to properly address environmental concerns and that the permits granted violated the FWPCA. The injunction ordered will remain until the government addresses the inadequacies in the EIS and the National Environmental Policy Act (NEPA) and FWPCA violations. Until that time, the Navy is enjoined from obligating or expending any project funds. The court based its decision on the clear risk of environmental injury resulting from the proposal.

The district court had denied the injunction in previous litigation, but the 9th Circuit reversed (841 F.2d 927). On further appeal, an injunction was dissolved (850 F.2d 599) based upon the Washington Shorelines Hearings Board's May 1988 split decision. The present case was filed due to the green light resulting from the Board's decision.

Port of Oakland Wetland Determination Action: Golden Gate Audubon Society v. U.S. Army Corps of Engineers

700 F. Supp. 1549 (N.D. Cal. 1988). This citizen's group sued the EPA and the USACE after the Corps' decision that the dredge spoil site for the Port of Oakland was not a "wetland" for purposes of § 404 of the Clean Water Act. The site is adjacent to San Leandro Bay. This area had been successively filled since 1965 prior to the enactment of the FWPCA. The court held that a remand to the Corps (not the EPA) was required, as the Corps has a mandatory duty to make a correct determination as to the status of the site, and that prior filling, itself unlawful under current law, could not be used to characterize or justify normal site conditions. The issue of correctness was found to be a sufficient basis for a § 505 citizens suit.

Oakland Airport Dredge Permit Action: People ex rel. Van de Kamp v. Marsh

687 F. Supp. 495 (N.D. Cal. 1988). After the Corps of Engineers granted a dredge and fill permit to the Oakland Airport authority for a site in diked portions of San Francisco Bay, the California Attorney General brought this action to set aside the permit. The AG's position was that the Corps had determined not to undertake an EIS prior to issuance, which was a violation of NEPA and the FWPCA which rendered the permit invalid. The site

encompasses seasonal wetlands which provide important waterfowl and bird habitat.

The Corps' decision not to proceed with an EIS was based on their proposal to dedicate another property of 461 acres in Napa County in return for giving the airport project a § 404 permit. The EPA had initially recommended an EIS, but it later approved the project based on an environmental assessment (EA) alone.

The court found that the Corps had violated NEPA by not considering alternatives to the project, by inadequately considering the impacts of filling the wetland, and by not considering the impacts of increased development on the remaining wetland areas adjacent to the project. Further inadequacies were found with regard to noise pollution impacts, water quality degradation, failure to consider cumulative impacts, and an insufficient mitigation plan. The court then vacated the permit and remanded the case back to the Corps so that it might meet NEPA requirements by reconsidering the permit application. An injunction issued by the trial court will remain in effect pending the results of the remand.

Halfmoon Bay to Receive Oakland Airport Spoil: Halfmoon Bay Fisherman's Marketing Association v. Carlucci

857 F.2d 505 (9th Cir. 1988). In June, 1988, the 9th Circuit rejected the attempt by the Halfmoon Bay Fisherman's Marketing Association to enjoin the USACE from granting a FWPCA § 404 dredge and fill permit to dispose of dredged materials from the Oakland Harbor into Halfmoon Bay. The dredging is required for the harbor's project to accommodate the new generation of super container ships which serve the Pacific Rim trade. The court affirmed the district court's denial of an injunction, noting that the EIS prepared for the permit application complies with the FWPCA, NEPA, and the MPRSA.

FWPCA Section 404 Takings Claim from Wetlands Designation: Loveladies Harbor, Inc. v. United States

15 Cl. Ct. 381 (1988). In this case the USACE had refused to grant a FWPCA § 404 wetlands fill permit and the developer plaintiff sought judicial review of the Corps' decision, claiming a 5th Amendment taking. The Claims Court denied the motion of the property owner, finding insufficient evidence that either the government had failed to advance a legitimate governmental interest or that the owners had been deprived of all economic value. The court refused to grant the motions of either side, leaving the case to proceed to a trial on the merits.

The area in dispute is on Long Beach Island in Ocean County, New Jersey. Of 250 original acres on this site, the first 199 to be filled were completed before any federal environmental legislation pertinent to wetlands had been enacted. The remaining 12½ acres is the subject of this action.

Section 404 Enforcement

Effective March 15, 1989, a memorandum of agreement (MOA) between the USACE and the EPA sets forth their respective enforcement responsibilities under FWPCA § 404. The MOA establishes procedures for deciding which agency has investigation duties and which one will pursue enforcement of violations. The MOA does not affect EPA's veto power over wetland developments under section 404(c).

Army Corps of Engineers EIS Regs Limit Scope

The USACE issued final rules which narrow the scope of EA's/EIS's undertaken pursuant to FWPCA § 404 permitting. Under the new rule, an environmental assessment would only have to address the specific activity represented by the permit application, thus not necessarily the entire project. 53 Fed. Reg. 3120 (Feb. 3, 1988).

New York Wetlands Law Challenged: Wedinger v. Goldberger

522 N.E. 2d 25 (N.Y. Ct. App.), cert. denied, 102 S. Ct. 132 (1988). In this case the New York Department of Environmental Quality's jurisdiction under the state's Freshwater Wetlands Act was affirmed by the N.Y. Court of Appeals. The department was found to have the right to designate wetlands under the Act and thus restrict development of such sites. Here, the designation process took place after the plaintiffs had purchased the property for its presumed development potential. Importantly, the court found a continuing jurisdiction on the part of the Department of Environmental Quality with no grandfathering exception based on the timeliness of mapping and identification.

D. Outer Continental Shelf

1. Hard Minerals

MMS OCS Hard Minerals Regulations

1. Geological and Geophysical Regulations. 53 Fed. Reg. 25,242 (July 5, 1988). See 30 C.F.R. part 280.

Final Outer Continental Shelf Lands Act (OCSLA) regulations for the geological and geophysical (G&G) activities related to OCS hard minerals (minerals other than oil, gas, and sulphur) became effective on August 4, 1988. These rules are part of the Mineral Management Service (MMS) regime for regulation of hard minerals in the offshore separate from the OCSLA regime for oil, gas, and sulphur. The regulations require a permit application for all prospecting-related research and some types of scientific research activities, although not of U.S. federal agencies. An application must include a detailed plan, anticipated dates of public availability, drilling plans for cores greater than 300 feet, and expected environmental consequences with monitoring and mitigation measures identified. Data may be retained by MMS and not disclosed to the public for 25 years in conformance with the OCSLA oil and gas G&G regulations. However, once a lease is established, adjacent coastal states will have access to such data.

The regulations assert U.S. regulatory authority beyond the territorial sea, albeit applicable only to U.S. researchers or those under international agreement with the U.S. This is beyond the 1983 U.S. EEZ Proclamation, which specifically did not assert jurisdiction over marine scientific research within the EEZ. It does comport with the 1982 UNCLOS consent procedure for research both on the continental shelf and the EEZ. The U.S. scientific research community has objected in principle to these regulations, claiming a lack of authority in MMS under domestic law to so regulate in the EEZ.

2. Leasing and Post-Lease Operation Regulations. 53 Fed. Reg. 31,442 (Aug. 18, 1988). See 30 C.F.R. parts 281, 282.

The leasing regulations allow initiation by either the government or an interested party. 30 C.F.R. 281.11. In the absence of specific limits, a lease will allow development of all minerals on the leasehold other than oil, gas, and sulphur. 30 C.F.R. 281.9. Oil and gas leases are perceived to be feasibly coextensive. The initial lease term will be at least 20 years, except that aggregate leases will have a 10 year term.

Through a judicial proceeding MMS may cancel a lease or suspend operations for noncompliance with the lease regulations or the OCSLA. A cancellation prevents any claim for compensation. 30 C.F.R. 281.47(b). Additional cancellation criteria include the probability of harm to aquatic life, property, minerals, national security, or the environment.

Joint federal-state task forces are promoted in the leasing regulations. Notices of proposed leasing will be sent to the governors of affected states in addition to being published in the Federal Register. If a lease will be near the federal-state boundary offshore, joint management agreements are suggested. 30 C.F.R. 281.10.

MMS rejected the need for a programmatic EIS, suggesting that EA's be conducted on a lease sale basis. An EIS is expected when the initial lease sale in a given area is offered. See 53 Fed. Reg. 31,428 (Aug. 18, 1988).

Under the operation regulations a mining operation will require distinct plans for delineation, testing, and mining. A state OCSLA consistency evaluation is required at the testing plan stage. 30 C.F.R. 282.33.

Norton Sound Offshore Mineral Lease DEIS

53 Fed. Reg. 48,045 (Nov. 29, 1988). The MMS released a draft EIS for the Norton Sound mineral lease area in federal waters off Nome, Alaska. A public hearing was held January 5, 1989, in Nome. The sale is planned as part of a federal-state cooperative effort to develop the area's placer resources.

Gorda Ridge Final EIS Cancelled

In September, 1988, the U.S. Navy submersible Sea Cliff discovered unusual hot springs and associated geological and biological phenomena at 1660 fathoms in the Gorda Ridge area, approximately 100 n.m. off the Oregon coast. The springs were found to contain high quantities of minerals including copper, lead, zinc, and iron, with temperatures reaching 500° F. The dive was part of the 1988 Dive Program under the Gorda Ridge Technical Task Force, the federal-state working group organized by the Interior Department, Oregon, and California. The purpose of the dives is to map geological resources and undertake biological sampling in specific areas of the Gorda Ridge. In the meantime, MMS has cancelled further development of a final EIS for the Gorda Ridge OCS. The 1984 draft EIS is to be shelved.

Oregon Placer Technical Task Force Established

In October, 1988, Interior Secretary Hodel and Oregon's Governor Goldschmidt established a federal-state task force to study economic, strategic, and environmental aspects of developing

heavy-metal placer deposits located off the Oregon coast in federal and state waters.

2. Oil and Gas

1987-1992 OCS 5 Year Plan Litigation: Natural Resources Defense Council v. Hodel

865 F.2d 288 (D.C. Cir. 1988). In this significant case the D.C. Circuit had an opportunity for the third time to review the current (1987-1992) 5 year outer continental shelf leasing program plan approved by Secretary Hodel on July 2, 1987. The D.C. Circuit essentially upheld the Secretary and the Plan. However, the court found that the program response to the final EIS sections on the cumulative impacts on highly migratory species, e.g., salmon, did not meet NEPA requirements and remanded those portions to the Secretary for further action. 865 F.2d at 297-300. Based upon a deferential standard of review (the court appeared to rely on the earlier components of this litigation, i.e., Watt I, 688 F.2d at 1300-03, and Watt II, 712 F.2d at 590-91), the court used a loose standard of "substantial evidence" to review the Plan under the mandate of the OCSLA. The court found the Plan to be a "permissible interpretation of the statute." 865 F.2d at 302.

The State of California, one of the plaintiffs, challenged the Plan under section 111 of Public Law 99-591 (Continuing Appropriations Act, 100 Stat. 3341 (1986)) which gives California the right to make recommendations to the Secretary concerning OCS regulations. This challenge was also rejected by the court, which noted that the OCSLA had not been amended to affirmatively link section 111 to the OCSLA planning process as a requirement. The court thus deferred to Congress on the issue.

While many NEPA claims were rejected, the court admonished the Secretary to ensure that the EIS consider alternatives "even if they do not reduce the need for OCS leasing," referring to conservation alternatives. 865 F.2d at 296. However, the final EIS was held by the court to be adequate and was not remanded on this issue.

The result of this decision will require opponents of the OCS 5 year plan to undertake alternative challenges on a lease sale and site specific basis.

Bristol Bay Litigation

The 9th Circuit Court of Appeals upheld the Secretary of Interior's actions to offer Lease Sale 92 in Bristol Bay, Alaska in Tribal Village of Akutan v.

Hodel. 859 F.2d 651 (9th Cir. 1988). Objections to the sale under OCSLA § 19, NEPA, the Endangered Species Act (ESA), and Administrative Procedure Act (APA) § 705(2)(D) were all rejected by the Court.

The National Marine Fisheries Service has described Bristol Bay as the single most important region of the United States for fisheries and marine mammals, and the agency has opposed the leasing of oil and gas rights in the area. The annual value of Bristol Bay fisheries exceeds the total bids received by MMS in the October 1988 lease offering, which occurred despite the pending litigation. Drilling may begin in the summer of 1989.

Limited Leasing Moratorium

Congress voted to place a moratorium on leasing OCS oil and gas for FY 1989 in three areas: (1) Georges Bank, (2) Florida west coast OCS, and (3) Lease Sale 91 area, Northern California OCS.

Oregon/Washington Pacific Northwest OCS Task Force

Oregon Governor Neil Goldschmidt and Washington Governor Booth Gardner developed a regional OCS task force with former Secretary Hodel to coordinate state responses to OCS leasing activities, particularly regarding lease sales offshore Oregon and Washington. Members include representatives from both states, the Department of the Interior, the Columbia Intertribal Fish Commission, and the Northwest Indian Fisheries Commission.

E. Deep Seabed Mining

DSHMRA Preservational Reference Areas

Pursuant to the 1980 Deep Seabed Hard Mineral Resources Act (DSHMRA) and Regulations (see 15 C.F.R. parts 970, 971), Ocean Mining Associates (OMA) submitted two proposed preservational reference areas within its manganese nodule license area. A 6,520 sq. km. preservational reference area was given interim NOAA approval on May 18, 1988. NOAA will use this as a reference for further delineating required criteria for these areas. A 4,630 sq. km. impact reference area was also proposed.

A preservational reference area is required of a licensee to ensure that benchmark data are available to determine the impact of mining in the adjacent area. An impact reference area is

designed to focus on actual mining impacts. In each, data is required to be made available for scientific study.

OMA is one of the four "potential applicants," all seabed mining consortia, who will be allowed to become registered pioneer investors under the 1982 UNCLOS seabed mining regime as long as they apply prior to the Convention coming into force. All four consortia have received exploration licenses under the DSHMRA. The consortia are represented in the Preparatory Commission for the 1982 United Nations Convention on the Law of the Sea by the nations they are connected to.

F. Marine Pollution/Ocean Dumping

Amoco Ordered to Pay \$85.2 Million In re Oil Spill by the "Amoco Cadiz" off the Coast of France

MDL Docket No. 376, D.N. Ill. (1988). The Amoco Corporation was ordered by the Federal District Court for the Northern District of Illinois to pay damages of \$85.2 million (258.8 million French francs) to the Government of France and other French plaintiffs in this final chapter in the Amoco Cadiz litigation. See In re Oil Spill, 699 F.2d 909 (7th Cir. 1984) and predecessors resulting from the March 16, 1978, oil spill offshore France from the tanker Amoco Cadiz. The 1984 decision of the 7th Circuit established the liability of Amoco Corp., rather than only its foreign subsidiary, and has had a significant effect on marine pollution law. This decision on damages is the largest award resulting from a marine pollution incident.

EPA Gulf Regulation Challenges: Natural Resources Defense Council v. EPA

863 F.2d 1420 (9th Cir. 1988). The Natural Resources Defense Council (NRDC) challenged the EPA general permit for discharges from oil and gas operations in the Gulf of Mexico. See 51 Fed. Reg. 24,897 (1986). This opinion is a consolidation of the NRDC suit and two others concerning the same regulation, including a challenge by the State of Florida in the 11th Circuit and one by the American Petroleum Institute (API) (based on opposite view) in the 5th Circuit. The NRDC viewed the permit provisions as too lenient, while the API thought them too restrictive. Florida was trying to assert its offshore regulatory authority by applying state water quality standards. The court upheld the EPA action on the existing permit in most respects, remanding to the agency only those provisions relating to alternative toxicity limits and regulatory limits for cadmium and mercury. There continues to be no requirement for reinjection of production water. The

Florida claim was also rejected; thus only federal regulation is valid more than 3 n.m. offshore.

EPA Regs for BAT in Alaska Offshore Affirmed: American Petroleum Institute v. EPA

858 F.2d 261 (5th Cir. 1988). The American Petroleum Institute was not successful in its challenge to the EPA regulations which restrict offshore oil operations in Alaskan waters. The regulations require alternative technology in the form of mineral oils to replace diesel oil as a lubricant in drilling muds. The EPA determined in the regulations that a best available technology (BAT) approach was required to regulate offshore drilling, requiring the substitute technology. The court found that the agency had adequately supported its position and denied the API petition. The court also rejected API's requested cost-benefit correlation (858 F.2d at 265n.5).

USACE Sued Regarding Dredged Disposal in Long Island Sound: Town of Huntington v. Marsh

859 F.2d 1134 (2d Cir. 1988). This appeal is from the order of the federal Eastern District Court of New York which permanently enjoined the Corps of Engineers from issuing § 404 permits under the FWPCA for an open water dredged material disposal site in western Long Island Sound. The trial court had determined that the Ocean Dumping Act regulations (33 U.S.C. § 1401 et seq.) applied to the initial designation of the site. The 2d Circuit affirmed that the Corps EIS was inadequate under either the Ocean Dumping Act or NEPA. The EIS had been based on consideration of the designation process only, and it failed to address the impacts of issuing permits on actual dumping activities or alternatives to the site and activities. The USACE did not apply the Ocean Dumping Act criteria in the EIS. However, the court vacated the permanent injunction, remanding the case to the district court for further action. The case is not yet resolved, other than the requirement that an adequate EIS be prepared prior to issuance of any permit.

Ocean Dumping Ban Act of 1988

The Ocean Dumping Ban Act of 1988, Pub. L. No. 100-688, 102 Stat. 4139 (1988), provides a partial ban on ocean dumping, effective on January 1, 1992. The act will prohibit the dumping of sewage sludge and industrial waste. A fee schedule of \$15 per dry ton for parties which will meet the deadline and a much higher schedule for those not actually meeting it will help to persuade waste operators to find alternative sources of

disposal. Operators wishing to continue dumping after January 1, 1992, will do so only by paying \$600 per dry ton with a 10 percent escalation per year. Eighty-five percent of the fees collected will be deposited in a trust fund to be used by municipalities in the development of alternatives to ocean dumping.

Organotin Antifouling Paint Control Act of 1988

The Organotin Antifouling Paint Control Act of 1988, Pub. L. 100-333, 102 Stat. 605 (1988), was signed by President Reagan on June 16, 1988. The act prohibits vessels less than 82 feet in length from using tributyltin (TBT) based antifouling paints. TBT-based paints with a release rate greater than 4 micrograms/sq. cm./day are banned from sale. The EPA is directed under the act to monitor TBT concentrations in selected estuaries and coastal waters for 10 years, and the Navy is required to similarly monitor TBT in home ports serving naval vessels painted with these compounds.

Medical Wastes

The public reaction to the sudden emergence of dumped medical wastes on East Coast beaches has resulted in a number of legislative responses by Congress. The Medical Wastes Tracking Act, Pub. L. No. 100-582, 102 Stat. 2950 (1988), establishes an EPA controlled demonstration program to develop the ability to accurately track medical wastes. The EPA published interim final rules implementing the act at 54 Fed. Reg. 12,326 (March 24, 1989). See also the Medical Waste Anti-Dumping Act contained within the Ocean Dumping Ban Act, Pub. L. No. 100-68, 102 Stat. 4139 (1988).

G. Marine Mammals

The Japanese Gillnet Fleet and the MMPA: Kokechik Fisherman's Assoc. v. Secretary of Commerce

839 F.2d 795 (D.C. Cir. 1988), stay denied, U.S. Sup. Ct., June 9, 1988. In this case the Federation of Japan Salmon Fisheries Cooperative Association appealed the invalidation of the Secretary of Commerce's Marine Mammal Protection Act of 1972 (MMPA) permit which allowed the taking of thousands of marine mammals incidental to salmon fishing in the U.S. EEZ in the North Pacific. See 52 Fed. Reg. 19,874 (1987). Three groups, including the Kokechik Fisherman's Association, the Japanese Federation, and the Center for Environmental Education (CEE), had filed for judicial review after the administrative rulemaking procedure was finalized. The cases were consolidated and a hearing was held to address motions for a preliminary injunction. 679 F. Supp. 37 (D.D.C.

1987). The district court granted the injunction motions of Kokechik and the CEE on June 15, 1987, thus preventing the Japanese fleet from fishing for salmon in those waters. The Japanese Federation and the Secretary of Commerce appealed in this action.

Since 1981, the Japanese Fleet has been subject to the MMPA when fishing in U.S. waters. Prior to 1981, Japan had been exempted under the North Pacific Fisheries Treaty. See 4 U.S.T. 380, T.I.A.S. No. 2786. In 1981 NOAA issued to Japan an MMPA permit which allowed the incidental taking of 5,500 Dall's porpoise, 450 northern fur seals, and 25 northern sea lions annually. 46 Fed. Reg. 27,056 (1981). This permit was extended by Congress but eventually expired on June 8, 1987, resulting in this litigation. Upon the Japanese Federation's application to the National Marine Fisheries Service for a new 5 year permit to extend to 1992, rulemaking procedures were initiated to which the litigants here responded. During this process, an environmental assessment on the impact of Japanese fishing on the Dall's porpoise was undertaken.

The court here finds that the MMPA was enacted to effectively place "a moratorium on the taking of marine mammals." 839 F.2d at 800. As an exception to this rule, a permit allowing any taking must be consistent with the MMPA and authorized through rulemaking procedures. *Id.* The essential goal of the MMPA is not, notes the court, to benefit commercial exploitation of fisheries resources. *Id.* Here, since the Secretary did not determine the impact on northern fur seals or sea lions, the court found the permitting action to be inconsistent with the MMPA. Finally, in upholding the injunction and rejecting the permit, the court noted that if foreign commercial fishermen are to be granted exceptional rights under the MMPA, it is for Congress, not the Secretary, to determine.

Marine Mammal Protection Act Reauthorization

MMPA reauthorizing legislation, Pub. L. No. 100-711, 102 Stat. 4755 (1988), provides a 5 year reauthorization and amendments to the act which give NOAA greater authority to restrict foreign tuna fishing not meeting U.S. standards for protection of marine mammals, including an embargo of tuna products. A NOAA rule effective January 1, 1989, covers sundown set restrictions, explosive devices, experimental fishing techniques, and the continuing exemption procedure. Other amendments include studying the effect of noise devices and the status of fur seal and sea lion populations and night fishing restrictions. The act grants a 5 year (until

October 1, 1993) interim exemption to commercial fishermen on certain of the incidental take restrictions. Regulations classifying 167 fisheries for purposes of the incidental take exemption were published by NOAA in the April 20, 1989, Federal Register.

H. Endangered Species

Sea Turtle Excluder Regulations Affirmed: State of Louisiana ex rel. Guste v. Verity

853 F.2d 322 (5th Cir. 1988). A Louisiana shrimper's group and the state of Louisiana challenged the regulations issued by the NMFS under the Endangered Species Act (ESA, 16 U.S.C. § 1531 et seq.) to reduce sea turtle mortality incidental to shrimp fishing. See 50 C.F.R. §§ 222.21, 227.71. In June, 1987, NMFS promulgated the final sea turtle excluder device (TED) regulations. The basis for industry compliance is boat length, with all vessels greater than 25 feet which operate offshore required to install certified TED's.

At trial, the district court entered judgment for the Secretary. 681 F. Supp. 1178 (E.D. La.), aff'd, 850 F.2d 211 (5th Cir. 1988). The present case is the further appeal of the judgment and stay issued pending appeal. The challenge under the Administrative Procedure Act that the regulations were arbitrary and capricious was again rejected by the court. A constitutional argument founded on the Equal Protection clause was similarly refused. The court noted that sea turtle mortality due to shrimping is uncontroverted so that the TED regulations are required to attempt to protect the animals under the mandate of the ESA. The court described the primary purpose of the regulations to be the prevention of unlawful taking of all five threatened or endangered sea turtle species. 853 F.2d at 529.

I. Fisheries

Atlantic Billfish Regulations Challenge

The National Fisheries Institute and the Southeastern Fisheries Association have sued the Secretary of Commerce in the U.S. District Court for D.C., alleging that the Atlantic billfish regulations exceed the authority of the NMFS under the Magnuson Fishery Conservation and Management Act.

The MFCMA fishery management plan for Atlantic billfish was adopted on September 1, 1988, and is a joint effort by the New England, Mid-Atlantic, South Atlantic, Gulf of Mexico, and Caribbean fishery management councils. The plan

essentially prohibits commercial take of Atlantic billfish, thus promoting a recreational fishery only. The case is still pending.

1988 Columbia Fish Plan Approved: United States v. State of Oregon

699 F. Supp. 1456 (D. Ore. 1988). The 1988 Columbia River Fish Management Plan was approved by court order in this suit by the United States and various Indian tribes as interveners. In the Columbia fishing litigation this case represents the continuing efforts of many parties with diverse interests to reach a comprehensive agreement on the allocation of the Columbia River fisheries. Despite the objections of Idaho (a party to the plan) and the Shoshone-Bannock Tribe (not a party), the court upheld the plan and found that U.S. trust responsibilities toward the tribes had not been violated. The court noted that, in spite of some objections, the plan represented a high degree of cooperation by the majority of the parties.

1986 Salmon Season Battle: Northwest Environmental Defense Center v. Gordon

849 F.2d 1241 (9th Cir. 1988). The environmental plaintiffs sued federal agencies to challenge portions of the 1986 salmon fishing season in the Northwest. The case was decided after the season closed but the 9th Circuit found that there were sufficient longer term issues so as not to render the entire complaint moot. The court remanded the case back to the District Court for Oregon in June, 1988. The Northwest Environmental Defense Center's statutory (FCMA) and constitutional (regarding the composition of the Pacific Fishery Management Council) claims were required to be further considered on remand, and are still pending.

Kingfish Zero Quota Upheld: Islamorada Charter Boat Association v. Verity

676 F. Supp. 244 (S.D. Fla. 1988). The south Florida charter captains sought a preliminary injunction under the FCMA to prevent application of a regulation imposing a zero bag limit on recreational king mackerel fishing in federal waters off the Florida Keys. See 50 C.F.R. 642.22. The NMFS had determined that the quota for kingfish had been reached, and under its existing regulatory authority (as modified in 52 Fed. Reg. 23,838 (June 25, 1987)) it could reduce the recreational limit to zero. The court found that it was in the public interest to carefully manage the king mackerel fishery, that the regulations did not discriminate

against Florida fishermen, and that the acknowledged economic harm to the charter fleet was not evidence alone to grant the injunction.

Alaska Groundfish Plan Challenge: Alaska Factory Trawler Association v. Baldrige

831 F.2d 1456 (9th Cir. 1987). The trawler fishermen plaintiffs filed this action to challenge the Gulf of Alaska groundfish management plan. In this November 1987 decision the 9th Circuit denied the petition and affirmed the plan as amended by the North Pacific Fishery Management Council. Under the arbitrary and capricious standard of review for administrative decision making the court found that the Secretary of Commerce correctly followed FCMA procedures and utilized a rational basis for his decisions. The court found that the Secretary did not violate NEPA by failing to file an EIS on the effect of Plan Amendment 14, the longline fishing provision which allocates optimum yield for sablefish. As a result of the plan and this court decision, the pot-fishing of sablefish was entirely phased out on January 1, 1989.

Federal Fisheries Management Guidelines

On December 30, 1988, NOAA issued a proposed rule to revise the standard guidelines for fishery conservation and management. See 50 C.F.R. part 602.

Striped Bass Reauthorization

The Atlantic Striped Bass Conservation Act was amended and extended through FY 1991 on November 3, 1988. See Pub. L. No. 100-589, 102 Stat. 2984 (1988). The act directs the NMFS to study the problems facing the striped bass fishery, recommend a restoration program, and promulgate regulations under the FCMA to control bass fishing in the U.S. EEZ; it directs the appropriate fishery management councils to develop management plans in their respective jurisdictions.

Fishing Industry Safety

Effective December 9, 1988, the Commercial Fishing Industry Vessel Safety Act of 1988, Pub. L. No. 100-424, 46 U.S.C. § 4501 et seq., establishes specific safety requirements for many vessels involved in the commercial fishing industry. The requirements include various types of safety equipment which must be on board the vessels.

J. Marine Sanctuaries

National Marine Sanctuaries Program Authorization Act

The National Marine Sanctuaries Program Authorization Act of 1988 (Pub. L. No. 100-627, 102 Stat. 3213 (1988)) incorporates a liability regime for damages to marine sanctuaries with retention of damage awards for restoration work. Damages from groundings, oil spills, and toxic pollution are covered. The 1984 grounding of the Cypriot M/V Wellwood in the Key Largo National Marine Sanctuary and the 1987 sinking of the oil tanker M/V Puerto Rican near the Gulf of Farallones National Marine Sanctuary exemplify the need for such a liability regime.

Other amendments to the MPRSA require faster decisions by NOAA to identify and designate marine sanctuaries. Candidate sites must be identified from submissions within 165 days, and a 30 month time frame for designation must be subsequently met. Special commercial use permits are available under the amendments. New MPRSA marine sanctuaries identified in the 1988 MPRSA amendments for imminent designation include: (1) Cordell Banks, TX (by December 31, 1988), (2) Flower Garden Banks, TX (by March 31, 1989), (3) Monterey Bay, CA (by December 31, 1989), and (4) Outer Washington Coast (by June 30, 1990). Five additional sites, to be finally determined within 2 years (by October 1990), include: Alligator Reef, American Shoal, and Sombrero Key (Florida Keys), Stellwagen Bank (Massachusetts), and Santa Monica Bay (California).

1984 Marine Sanctuaries Amendments: Final Regulations

53 Fed. Reg. 43,801, October 28, 1988. NOAA has also issued final regulations to implement the Marine Sanctuaries Amendments of 1984. The regulations cover the Marine Sanctuary Program goals, site evaluation procedures, and designation standards. A consultation procedure with the regional fishery management councils is contained in the regulations.

K. State Ocean Resources Management

Abandoned Shipwreck Act

The Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (1988), was enacted to vest title to certain historic shipwrecks buried in state submerged lands in the states, and to clarify state management authority and retain federal

powers. Of approximately 50,000 estimated shipwrecks, 5-10 percent are presumed to have historic significance. The act directs the states to develop management policies for preservation, access, and recovery, where appropriate, of designated wrecks. The National Parks Service is to develop federal guidelines. Section 6 of the act asserts federal title to all such wrecks and allows the transfer of such title to the states. The act affects neither the rights previously granted to the states under the Submerged Lands Act nor the federal navigational servitude nor the authority of the Secretary of the Army to remove navigational obstructions under the Rivers and Harbors Act of 1899.

Florida Asserts Historic Preservation Jurisdiction: Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel

691 F. Supp. 1377 (S.D. Fla. 1988). The plaintiff salvage company in this case could not prevail under federal admiralty law to claim title to a shipwreck in Florida waters. The court found that the state had jurisdiction over such property and that the 16th century Spanish galleon submerged in 10 to 20 feet of water approximately 100 yards offshore the coast of Florida in Jupiter Inlet was subject to Florida licensing procedures.

Alaska Ice Harvesting Permits

The Alaska Department of Natural Resources issued two permits for the harvesting of ice from calved icebergs in Alaskan waters to AK-Pacific, Inc. The company may harvest up to 1,000 tons per month for a single fee of \$50 a permit. The Japanese market value is approximately \$3 a pound for processing into gourmet ice cubes.

During a two year initial period, the impacts of this new form of resource extraction are to be studied with no additional permits available. The permits are area-specific and contain restrictions designed to avoid impacts on tourists and marine mammals.

L. Public Trust Doctrine

Supreme Court Finds for Mississippi's Tidelands: Phillips Petroleum Co. v. Mississippi

108 S. Ct. 791 (1988), 98 L. Ed. 2d 877. The U.S. Supreme Court in this important tidelands decision ruled that all tidelands in Mississippi, and not only shorelands to navigable waters, are subject to the public trust interests. The oil company and others argued that only shorelands to navigable

waters are subject to public, rather than private, ownership. The court found for the state that the public trust had attached to these lands under the sovereignty of the state as vested upon entry into the Union. The Court reached back, e.g., the seminal public decision in Shively v. Bowlby, 152 U.S. 1 (1894) (Oregon's title to submerged lands in the Columbia River mouth near Astoria, Or.) to confirm Mississippi's interest. The decision will affect more than 9 million acres of coastal wetlands. 98 L. Ed. 2d at 897 (dissenting opinion of O'Connor et al.). For the opinion of the Mississippi Supreme Court see Cinque Bambini Partnership v. Mississippi, 491 So.2d 508 (Miss. 1986).

Public Trust Applied in Washington Tidelands: Orion Corporation v. State of Washington

747 P.2d 1062 (Wash. Sup. Ct.), cert. denied, 108 S. Ct. 1996 (1988). The Washington Supreme Court interpreted the Washington Shoreline Management Act (West's RCWA 90.58.010 et seq.) to provide a regulatory scheme which, inter alia, protects the public trust easements for navigation, commerce, and fishing in state waters designated as navigable under the act. The tideland owner plaintiff's inverse condemnation action was rejected as to its takings claim due to the courts recognition of the public trust as attached to the property. This case was a second review in this dispute (see 693 P.2d 1369 (Wash. 1985)) which concerns a portion of Padilla Bay, an 11,000 acre estuary in Puget Sound near Anacortes, Washington. This ruling will substantially restrict development options.

Prescriptive Rights in State Submerged Lands Rejected: North Carolina v. Credle

369 S.E.2d 825 (1988). In this case the North Carolina Supreme Court refused to recognize a private claim of exclusive prescriptive rights based on usage since 1917 to harvest oysters from the bottom of a coastal bay. Recognition of such prescriptive rights would be inconsistent with the public trust doctrine principles governing the disposition and public use of such bay bottoms.

The Public Trust Litigated in Alaska: CWC Fisheries, Inc. v. Bunker

755 P.2d 1115 (Alaska, 1988). In this public trust doctrine case the Alaska Supreme Court held that a conveyance of tideland by the state is subject to the public trust continuing easements for navigation, commerce, and fishing unless the conveyance was made specifically in furtherance of some explicit public trust purpose. As a result of

this decision, the fisherman defendant Bunker may continue to fish in the area whose title was conveyed to CWS Fisheries, Inc. for a fish cannery.

Public Trust Denied Based on Mexican Land Grant: Los Angeles v. Venice Peninsula Properties

253 Cal. Rpt. 331 (Cal. Ct. App. 1988). This dispute over the attempted imposition of public trust rights and easements concerns an area of Los Angeles known as the Ballona Lagoon. The lagoon is connected to the sea by way of the Marina Del Rey channel and the Venice Canals. The appeal court in 1984 began this process by reversing the original trial court's imposition of the trust. The U.S. Supreme Court eventually reversed the California Supreme Court's later affirmation of the trial judge, and the present opinion is the result of the U.S. high court's remand to the state. See Summa Corporation v. California, 466 U.S. 198, 104 S.Ct. 1751. The area was part of an 1839 Mexican land grant and was first patented directly by the U.S. in 1873. The present owners were found to derive their title from the original Mexican grantees and not the state. Since there subsequently had not been any express or implied dedication to public use, public trust easements could not now be imposed by the city or state.

M. Beach Access

Public Rights Narrowly Construed in Maine and Massachusetts

In Bell v. Town of Wells (Maine Sup. Ct. No. YOR-87-430, March 30, 1989), the Maine Supreme Court invalidated a state statute declaring that public rights of fishing, fowling, and navigation over privately owned tidelands included a right to use those tidelands for "recreation." The court held the statute to be an unconstitutional staking of private rights in the tidelands. In Town of Wellfleet v. Gage, the Massachusetts Supreme Court held that the protections afforded public rights of fishing over private tidelands did not extend to shellfish aquaculture operations carried out pursuant to leases from the town in which the private tidelands are located.

N. Native Rights Offshore and on the Coasts

Tribes Halt Puget Sound Marina: Muckleshoot Indian Tribe v. Hall

698 F. Supp. 1504 (W.D. Wash. 1988). A number of tribes sued to prevent the construction of a 1200 slip marina on the north side of Elliott Bay in Puget Sound, Washington. The plaintiffs identified

the marina site as a "usual and accustomed fishing ground," thus reserved to their continuing use under the 1855 Treaty of Point Elliott (12 Stat. 927 (1855)). The developer applied for and received a permit to construct the facility from the USACE under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and § 404 of the FWPCA. A record of decision following the production of a final EIS was filed to allow the project to proceed.

The court granted the plaintiff's preliminary injunction, noting that the treaty right to fish does not envision a displacement or removal of access rights. Here, the tribes clearly established that the marina site encompasses part of their historic fishing grounds. Thus the court was able to use the doctrine of reserved Indian fishing rights (United States v. Winans, 198 U.S. 371 (1905)) while conceding that the Puyallup litigation foresees limitations to rights for conservation purposes. This case posed no such issue. The preliminary injunction, granted on the basis of irreparable harm, will remain until the tribes have litigated their treaty violation claim on the merits.

Washington Fisheries Litigation: United States v. Lummi Indian Tribe

841 F.2d 317 (9th Cir. 1988). The Lummi sued to attempt to receive recognition of a portion of Puget Sound as their usual and accustomed fishing grounds, an area already designated as that of the Tulalip Tribe. See, e.g., United States v. Washington, 520 F.2d 672 (9th Cir. 1975) aff'g 384 F. Supp. 312 (W.D. Wash. 1974), cert. denied, 423 U.S. 1086, 96 S. Ct. 877 (1976). Under previous actions treaty tribes in the Northwest were eligible to take up to 50 percent of available fish at their usual and accustomed fishing grounds.

The Tulalip Tribe in this case initiated a lawsuit to determine additional fishing grounds in the waters identified in the earlier litigation. These additional waters in the San Juan Island group, off Whidby Island and near Point Roberts, had been traditional fishing grounds for the Tulalips, Lummi, and other groups. All other tribes in the area, except the Lummi, had settled with the Tulalips. The district court adopted the report of the special master which excluded the Lummi from these areas. The Lummi appealed. The 9th Circuit affirmed the judgment of the district court. The disputed areas are thus the fishing grounds of the Tulalips.

Aboriginal Rights on the OCS: People of Village of Gambell v. Hodel

869 F.2d 1273 (9th Cir. 1989). The 9th Circuit Court of Appeals held that Alaskan natives may assert aboriginal rights to subsistence hunting and fishing on the OCS beyond state waters. On remand, the federal district court is to decide (1) whether such subsistence rights do in fact exist; (2) whether drilling and other oil company activities would significantly interfere with any rights that do exist; and (3) whether the OCSLA extinguishes subsistence rights in the OCS as a matter of law.

USFWS Proposes to Limit Native Sea Otter Take

The U.S. Fish and Wildlife proposed to prohibit the taking of northern sea otters (Enhydra lutris lutris) by Alaskan natives for any purpose other than actual subsistence. Thus, the animals could not be harvested for an expanded native crafts industry. Proposed 50 C.F.R. 18, 53 Fed. Reg. 45,788 (Nov. 14, 1988).

Neil C. Skinner
August 1, 1989

Ocean and Coastal 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 and Coastal Law Memo, contact Professor Jon L. Jacobson or Professor Richard G. Hildreth, Ocean and Coastal Law Center, University of Oregon School of Law, Eugene, OR 97403-1221. Tel. (503) 686-3845.

PUBLICATION UPDATE

TITLE: Update 2 for Federal Fisheries Management: A Guidebook to the Magnuson Fishery Conservation and Management Act

DATE: April 1989

-ABSTRACT-

A 1989 update to the 1985 edition of FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT (Jon L. Jacobson, Daniel Conner, and Robert Tozer, editors) is now available. The UPDATE covers statutory and regulatory changes to the MFCMA and other important fisheries-related developments. The UPDATE is published as loose-leaf replacement pages to the 1985 Guidebook.

To order a copy of Update 2 (\$4.50) please send check or money order to:

Ocean and Coastal Law Center
University of Oregon School of Law
Eugene, OR 97403-1221
(503) 686-3845

Copies of the Guidebook (\$5.00) and Update 1 (\$2.00) are also available.

Extension/Sea Grant Program
Oregon State University
Administrative Services Bldg. 422-A
Corvallis, Oregon 97331-2119

Address correction requested

A Member of the
State System of Higher Education