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The Development of Outer Continental Shelf Energy Resources

G. KEVIN JONES*

An important source of oil and gas that has sparked much recent debate is the outer continental shelf (OCS). This article traces the history of the development of OCS energy resources as well as the official policies underlying federal governmental actions affecting the OCS. It also spotlights the basic conflict in terms of environmental concerns between coastal states and the federal government regarding their desired roles in the process of controlling OCS development.

There are those who have tried to cast [Outer Continental Shelf] activities as a choice between either oil and gas, or protection of other important values. Experience in the Gulf of Mexico in Federal and State waters, and off southern California in Federal and State waters, shows it is not an either/or question. Offshore energy activities do not preclude a healthy environment, and are, indeed, quite compatible with other ocean uses.\(^1\)

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This article is an expression of the author's personal opinions and does not necessarily reflect the opinions, policies or positions of the Department of the Interior or its offices. The Rocky Mountain Mineral Law Foundation kindly provided a grant to aid in the research.

I. INTRODUCTION

An important element of the Reagan administration's energy policy is the reduction of domestic dependence on foreign energy supplies through rigorous development of oil and gas resources on the Outer Continental Shelf (OCS). To accelerate the development of the nation’s offshore energy potential, former Secretary of the Interior James Watt on July 21, 1982, approved a leasing schedule that will offer almost the entire OCS for exploration and development. The new schedule, replacing the June 1980 final leasing schedule approved by former Interior Secretary Cecil Andrus, will offer for lease nearly one billion acres of federal OCS lands during the five year period from August 1982 to June 1987.

2. There were two changes in the energy situation in the 1970’s that can be identified as elements of the current energy crisis. First, energy prices began to rise at a substantial rate. Second, the United States began importing a large percentage of its energy sources from foreign suppliers. Holcombe, Causes of the Energy Crisis, 29 OIL AND GAS TAX Q. 139-40 (1980). For a discussion on the history of U.S. energy policy, see Nash, Energy Crisis in Historical Perspective, 21 NAT. RESOURCES J. 341 (1981); and Goodwin, Energy: 1945-1980, 1978 WILSON Q. 55.


The outer continental shelf is the submerged lands on the continental margins of the United States which are subject to federal jurisdiction (see Figure 1 for a diagrammatic profile of the OCS region). These lands lie outside the three-mile zone of coastal submerged lands which are reserved by the states. See 43 U.S.C. § 1331(a) (1976).


The offshore leasing plan became final in July 1982, after 19 months of consultation between the Department of the Interior and the 23 affected states. The administrative record contains 5,000 pages and reflects participation by local governments, environmental groups, industry, and the public. The effort has been described by Secretary Watt as “the most comprehensive, exhaustive project in the [Interior] Department’s history.” Senate Hearings on the Five-Year OCS Leasing Plan, supra note 3, at 9 (statement of Interior Secretary James G. Watt): News Release (July 21, 1982), supra note 3.

With Congress unwilling to seriously consider legislation to abolish the Energy Department or hasten decontrol of natural gas prices, Interior Secretary Watt’s controversial program to rapidly accelerate the pace of federal OCS leasing has gained new importance. The plan is the only active element of the Reagan administration’s energy policy. A Quiet Point Man for Oil Leasing, Bus. Week, Aug. 30, 1982, at 75.

5. STAFF OF THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 98TH CONG., 1ST SESS., REPORT ON THE SECRETARY OF THE INTERIOR JAMES G. WATT’S FIVE-YEAR OIL AND GAS LEASING PLAN FOR THE OUTER CONTINENTAL SHELF 5 (Comm. Print 1983) [hereinafter cited
compared to fifty-five million acres under the Carter administration's proposal.6

The approved program schedules forty-one sales over the five year period. One billion acres, divided into 18 planning areas ranging in size from 8 million to 133 million acres, will be considered. In contrast, past lease sales covered about two million acres.7 One-half of the new acreage to be offered will be in Alaska's OCS.8

The Department of the Interior plans for accelerated offshore oil exploration have received extensive criticism from coastal
states, local governments, environmentalists, and citizen groups. Several suits have been filed against the plan in the federal courts. For example, the state of California opposed the accelerated OCS leasing program, particularly lease sale number fifty-three in the Santa Maria Basin. The proposed drilling there would occur near four of northern California's most beautiful beaches, but would only produce a ten-day national supply of petroleum. As a result, congressional and other political sources

9. The OCS program is one of the most controversial programs initiated by former Secretary Watt. The plan has been referred to as "radical, irresponsible, extremist, and wasteful." *Senate Hearings on the Five-Year OCS Leasing Plan, supra* note 3, at 7. The Secretary's plans for accelerated offshore energy leasing were likely to be delayed by escalating criticism of the Interior Secretary himself. Pasztor, *Rising Criticism of Watt is Likely to Delay His Plans for Accelerated Energy Leasing*, Wall St. J., Apr. 27, 1983, at 6, col. 1; Pasztor, *Watt Softens His Lines, But Image As Extremist Cuts His Effectiveness*, Wall St. J., June 2, 1982, at 1, col. 1.

One of the most important results of the political controversy surrounding former Secretary Watt is that "too much of the recent environmental debate has been focused on the personality of the Secretary of Interior instead of the real issues involved. This is unfortunate. Policies must be evaluated on the basis of relative costs and benefits, not on the personal style of the policymaker." *Temporary Surplus Doesn't Mean Oil Development in U.S. Can be Deferred*, Oil & Gas J., May 2, 1983, at 71.

10. California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), aff'd in part and rev'd in part, 683 F.2d 1253 (9th Cir. 1982) (in suit brought by State of California and agencies thereof charging that the defendants violated federal statutes in offering for competitive bidding certain oil and gas leases on tracts in outer continental shelf, court held that Secretary of the Interior violated Coastal Zone Management Act by selling leases without determination of consistency with state coastal zone management plan); see infra notes 353-58 and accompanying text; California v. Watt, 668 F.2d 1290 (D.C. Cir. 1981) (in reviewing oil and gas leasing program to Outer Continental Shelf Lands Acts, court held that Secretary Watt erred in: (1) failing to identify lease locations with greater specificity; (2) failing to consider the need to share developmental benefits and environmental risks among various OCS regions; (3) failing to reconsider relative environmental sensitivity and marine productivity in OCS areas; (4) failing to base timing and location of leasing on standards set forth in statute and failing to strike a balance of environmental coastal zone factors; and (5) failing to qualify environmental costs to the extent that they were quantifiable and to adequately explain his determination of net economic value); California v. Watt, 712 F.2d 584 (D.C. Cir. 1983) (after remand of 668 F.2d 1290, court held on appeal that Secretary of the Interior's revised program had corrected the defects mentioned above).


12. The controversy is illustrated by the remarks of California Congressman John Burton:

So it is obvious that lock, stock and barrel he (Secretary Watt) is in the pocket of the oil industry, he is going to destroy the fishing industry in our area, he is going to destroy the ecology of our area, and he is going to do it all in the name of—I do not know what, but I am sure he can think of something.

I think it is outrageous exploitation. . . . *OCS Oversight Hearings—Part 1, supra* note 6, at 10 (statement of Congressman John Burton).

California Congressman Paul McCloskey, however, questioned the environmentalist's perspective on the lease sale.

[T]he protection of one of the most beautiful coastlines in the world is im-
have also opposed the direction of the OCS leasing program in California. On March 19, 1981, twenty-nine members of the Cali-

portant, but just as serious is the national need to avoid the necessity of going to war in the Persian Gulf.

... I want to confess that in comparing these two perspectives the de-
sire to prevent going to war in the Middle East and to prevent spending an additional $38 million in increased defense expenditures, outweighs the possibility of having to say as a Representative from California, yes, we are willing to go to war to protect our source of oil, but we are not willing to drill off our own coast because of a desire to protect our own environment. The standard environmentalist’s perspective on the lease-sale seems a little hollow unless we have clear evidence that the danger of drilling represents a real danger of environmental damage to the coast.

Another challenge to the environmentalist’s view of OCS development off the California coast was the testimony of Mr. Wallace Stokes, a private citizen, before a House subcommittee hearing on OCS oversight.

Individuals and representatives of organizations have appeared before you today representing almost every creature of the deep in California’s vast offshore inventory of sea life, but who has spoken for man? We speak of protecting man’s environment and yet ignore the fact that man is a social being. An economics guided and energy-consuming creature that is a very important component of the world’s total environment. Today I appear before you as a private citizen attempting to speak for man, particularly the sector of our citizenry who are the urban poor.

On behalf of the urban poor, Mr. Stokes stated:

It is all well and good for those coastline residents to express concerns for preservation of the unique beauty and environment, but it is of little value and absolutely no help to that automobile worker in Milpitas thrown out of a job because of rising energy costs. We can talk about environment protection for the whale, but it doesn’t address the very real human need of the San Francisco Tenderloin resident and her inability to maintain an adequate diet because of escalating energy costs.

Assuming for the moment that the USGS estimates are correct, the oil in leasehold 53 is projected to make 10,000 jobs. Can we neglect this impact on [the] unemployed in this Nation?

The United States Geological Survey estimated that lease sale 53 has a potential of 983 million barrels of petroleum. Opponents of the sale maintained that this amount did not justify the environmental risks of offshore drilling. Industry, however, displayed unusual interest in the petroleum potential of the Santa Maria Basin. The sale drew $2.278 billion in high bids. The offers included one that established a record for the largest bonus for a single tract, as well as the highest per-acre bonus. Rintoui, California’s Staggering Sale, Offshore, July 1981, at 57.

Phillips Petroleum Company and Chevron U.S.A., a subsidiary of Standard Oil Company of California, paid a record $333.6 million for the right to drill for oil on a single 5,700-acre offshore tract in the Santa Maria Basin off Point Arguello, Califor-
fornia congressional delegation wrote President Reagan asking him to overturn Secretary Watt's action and exclude four other northern California basins—Eel River, Point Arena, Bodega, and Santa Cruz—from OCS leasing.\textsuperscript{14}

In response to California's argument that the environmental risks of offshore drilling were too great for the amount of petroleum to be found in sale number fifty-three, former Secretary Watt replied that the risks are extremely limited and "directly associated with the quantity of oil found. Small or no discoveries of oil result in virtually no risk. A theoretically higher risk would occur only if larger quantities of oil are found. And if that is the case, the value of production to the Nation substantially increases."\textsuperscript{15}

Former Secretary Watt maintained that a far bigger danger to the coastal environment than the development of OCS energy resources was the risk of oil spills from giant tankers carrying foreign oil into the United States.\textsuperscript{16} Watt also pointed out that California conducted numerous lease sales within state waters at the same time it opposed federal OCS lease sales.\textsuperscript{17} He further...
noted that California is the largest gas consuming state in the nation and, therefore, has a responsibility to meet its own consumer petroleum needs as well as contribute to the energy supply of the country.\(^{18}\)

If the United States were “to operate on a principle that every time you drill a well it has to carry the potential of carrying the entire Nation for months on end, there would be no drilling at all.”\(^{19}\) Our national supply of petroleum comes from thousands of leases across the country, each contributing its own share of production. Interior officials maintain that exempting offshore tracts from OCS development has resulted in the steady decline of oil production from OCS lands.\(^{20}\) Former Secretary Watt, therefore,

While criticizing us, California has been properly issuing hundreds of drilling permits within State waters. In fact, since 1979, Governor Brown has been issuing offshore oil drilling permits in the Santa Barbara Channel. It must be remembered that the California leases are within three miles of the coastline and the beaches. The State’s activities are what you see; the Federal activities affect the lands far out under the ocean waters. Id.

18. OCS Oversight Hearings—Part 2, supra note 1, at 56 (statement of Interior Secretary James G. Watt).
20. OCS Oversight Hearings—Part 2, supra note 1, at 234 (statement of J. Robinson West, Assistant Secretary for Policy, Budget, and Administration, United States Department of the Interior). Annual OCS oil production declined from 418 million barrels of oil in 1971 to 277 million barrels in 1980, a 33% decrease. Id. at 234, 239.

**Table One**

<table>
<thead>
<tr>
<th>Year</th>
<th>TOTAL U.S. (millions of barrels)</th>
<th>TOTAL OCS</th>
<th>OCS % of U.S.</th>
<th>TOTAL U.S. (trillions of cubic feet)</th>
<th>TOTAL OCS</th>
<th>OCS % of U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>2,357</td>
<td>1</td>
<td>.1</td>
<td>8.4</td>
<td>**</td>
<td>0.2</td>
</tr>
<tr>
<td>1957</td>
<td>2,617</td>
<td>16</td>
<td>.6</td>
<td>10.7</td>
<td>0.1</td>
<td>0.8</td>
</tr>
<tr>
<td>1960</td>
<td>2,575</td>
<td>50</td>
<td>1.9</td>
<td>12.8</td>
<td>0.3</td>
<td>2.1</td>
</tr>
<tr>
<td>1964</td>
<td>2,787</td>
<td>123</td>
<td>4.4</td>
<td>15.5</td>
<td>0.6</td>
<td>4.0</td>
</tr>
<tr>
<td>1968</td>
<td>3,329</td>
<td>267</td>
<td>8.1</td>
<td>19.3</td>
<td>1.5</td>
<td>7.9</td>
</tr>
<tr>
<td>1972</td>
<td>3,456</td>
<td>412</td>
<td>11.9</td>
<td>22.5</td>
<td>3.0</td>
<td>13.5</td>
</tr>
<tr>
<td>1976</td>
<td>2,976</td>
<td>317</td>
<td>10.7</td>
<td>20.0</td>
<td>3.6</td>
<td>18.0</td>
</tr>
<tr>
<td>1980</td>
<td>3,137</td>
<td>277</td>
<td>8.8</td>
<td>20.1</td>
<td>4.6</td>
<td>23.1</td>
</tr>
</tbody>
</table>

* Percentages are computed on unrounded figures.
** Less than 0.5 trillion cubic feet.

claimed that the national interest involved in developing offshore oil and gas reserves goes beyond state objections to offshore drilling under the Department of the Interior's OCS program.\textsuperscript{21} The intergovernmental tension over the direction of OCS leasing will continue as the program implements former Secretary Watt's new procedures. To facilitate understanding of that tension, this study will discuss the historical development of the continental shelf concept and examine the statutory and legal framework for OCS development within our federal system. Of special note will be the opportunities for coastal state involvement in federal offshore leasing decision-making. Finally, the streamlined OCS leasing program initiated by former Secretary Watt will be discussed.

\section*{II. THE UNITED STATES ENERGY SITUATION}

The world has experienced two major oil price disasters in the last decade. The first was a sharp increase in the price of oil which occurred in 1973-74 and was the result of an oil embargo imposed by the Arab oil-producing nations.\textsuperscript{22} The second increase occurred in 1979, following the Iranian revolution and the subsequent reduction in Iranian oil exports.\textsuperscript{23} In just eight years, the world price of oil rose from roughly $3 per barrel to more than $35 per barrel, for an average annual increase of 31\% per year.\textsuperscript{24} The

\begin{footnotesize}
\footnotesize
\footnotetext[21]{\textit{Offshore Leasing Hearings, supra} note 12, at 517 (statement of Interior Secretary James G. Watt). The Secretary explained:

The overriding national interest dictates that the OCS exploration program be carried on. We must know the resources at hand. This is recognized by congressional action and by statute. The criticism raised to date simply does not balance the very small risks as compared to potential value of the likely production. Sale 53 is a step in implementing the intent of Congress to meet the overriding national need to increase domestic oil and gas production. There can be no increase in production until we know if it is there.

\textit{Id.}}


\footnotetext[23]{Levy, \textit{Oil and the Decline of the West}, 58 FOREIGN AFF. 999 (1980); Singer, \textit{supra} note 22, at 32.}


The rapid increase in the cost of petroleum has produced an unsettling effect on the OPEC nations. The "new wealth has compromised the old social institutions and promoted a dangerous reliance on foreign money, labor, and know-how." Pipes, \textit{The Middle East: The Curse of Oil Wealth}, Atlantic, July 1982, at 19 [hereinafter cited as Pipes]. Oil wealth brings major problems to developing countries, including inflation, corruptions and an artificial economy. The traditional eco-
\end{footnotesize}
United States, and most of the world, was caught in a serious energy crisis, characterized as "the greatest peacetime domestic problem in our history."25

Current domestic consumption of petroleum and petroleum products is down. There is a world-wide glut of oil caused by a global economic slowdown that has curbed the demand for energy, and the Organization of Petroleum Exporting Countries (OPEC) escalation of prices which has produced unprecedented conservation by the consuming countries.26

25. H.R. REP. No. 1214, 96th Cong., 2d Sess. 113 (1982) [hereinafter cited as H.R. REP. No. 1214]. While the unprecedented price increase in OPEC imported oil had a significant impact on the economics of Western nations, it had a devastating effect on the non-oil producing third world countries. For these countries, higher oil prices immediately worsened their foreign accounts. For the year 1981, the foreign debt of non-oil developing countries, mostly due to the high cost of their oil imports, was over $400 billion. The importance of high oil prices to the non-oil third world payments deficits is illustrated by the fact that in three of the last four years of the 1970's, three-quarters of the non-oil developing countries deficits were with OPEC nations. In 1972 only Brazil, among non-oil third world countries, had more than 10% of its total import bill due to oil. In 1974, just two years later, 21 developing nations had more than 10% of their imports allotted to foreign oil. Hallwood & Sinclair, OPEC's Developing Relationships with the Third World, 38 INT'L AFF. 270 (1982). See also Dunkerley & Steinfeld, Adjustment to Higher Oil Prices in Oil-Importing Developing Countries, 5 J. OF ENERGY & DEV. 194 (1980); Schraiter, Burdens of Debt and the New Protectionism, in Global Insecurity: A Strategy for Energy and Economic Renewal 290-319 (D. Yergin & M. Hillenbrand eds. 1982); Lowinger, Petroleum Production in Developing Countries: Problems and Prospects, 7 J. OF ENERGY & DEV. 225 (1982).

26. Pauly, Turning Tables on OPEC, Newsweek, May 25, 1981, at 64; Sheets, supra note 24, at 60. The world-wide oil glut and decline in oil prices have led some commentators to predict "the end of the OPEC era." See Tussing, An OPEC Obituary, 70 THE PUB. INTEREST 3-21 (1983); The Crumbling of the Cartel, Newsweek, Mar. 21, 1983, at 57. Saudi Arabia has reduced its oil production from 10 million barrels a day to less than four million recently. Friedman, What Price Oil?, Newsweek, Mar. 21, 1983, at 62.

While declining oil prices are good news for consumers, a sudden drop in oil prices would be disruptive to the world economy. Dramatic price cuts would eliminate any chance that Third World oil producers such as Mexico, Venezuela, and Nigeria could pay off their enormous international debts. The defaults would significantly disrupt the international banking system and damage Western banks.
The United States, however, still faces critical energy supply and payment problems. In 1982, petroleum consumption in this country was 15.3 million barrels per day,²⁷ ²⁸%²⁸ (or five million barrels per day). Oil producing countries are dependent upon oil revenues to finance domestic projects. As these revenues decline, OPEC nations withdraw their holdings in Western banks, thereby reducing available capital and keeping the cost of borrowing (interest rates) high. *Did the Banks Blow It?*, Newsweek, Mar. 7, 1983, at 64; *Oil Prices Hit the Skids*, Newsweek, Jan. 24, 1983, at 54; *A Split in OPEC: Cheaper Oil Ahead*, Newsweek, Feb. 7, 1983, at 50. Latin American nations have discussed the formation of a "debtor's cartel" to manage the region's $310 billion debt. Proposals under consideration include demands to renegotiate loans, and even repudiation of their enormous debts. *Birth of a Borrower's Cartel?*, Newsweek, Sept. 5, 1983, at 56.

The drop in oil prices has devastated the economy of poor oil-producing countries like Nigeria. In the prosperous period of Nigeria's oil boom, foreign workers were welcomed. When oil prices fell in 1982, however, the Nigerian economy crashed and unemployment became a national problem. With presidential elections forthcoming, President Shagari turned on the foreign workers residing in Nigeria as a ready and popular scapegoat for the nation's economic ills. The Nigerian government gave two million foreign workers two weeks to leave the country. Ghana was the hardest hit of all the West African nations, being forced to absorb one million returnees—an increase in the country's population of 10% almost overnight. *Nigeria's Outcasts: The Cruel Exodus*, Newsweek, Feb. 14, 1983, at 32.

Lower petroleum prices have also affected United States energy producers. Lower profits have forced United States oil companies to reduce exploration and lay off oil field workers. The curtailment of exploration activities in turn affects the business of hundreds of oil field suppliers and oil-services companies. Hughes Tool Company, manufacturers of drilling bits, has laid off 25% of its work force. Perhaps the most significant impact of dropping oil prices is the cancellation of expensive projects to develop alternative energy sources. One petroleum expert has observed that "the oil fields of the 1990's are not going to be developed—the expense is just too great." *Oil Prices Hit the Skids*, Newsweek, Jan. 24, 1983, at 45, 55. *See also A Split in OPEC: Cheaper Oil Ahead*, Newsweek, Feb. 7, 1983, at 50; *The Unrigging of Oil Prices*, Newsweek, Mar. 7, 1983, at 62; and *The Dangers of Complacency*, Newsweek, Sept. 12, 1983, at 57.

However, the decline in the cost of energy has assisted the economic recovery in the United States. For every $1 drop in the price of oil, economists calculated the United States will save $1.8 billion. *The Unrigging of Oil Prices*, Newsweek, Mar. 7, 1983, at 65. Third World oil-importing nations will also benefit from lower oil prices. Debt-ridden Brazil will save $260 million on its annual import bill from each $1 decline in the price of oil. "Morgan Guaranty Trust Co. estimates that every 5% increase in imports by the industrial countries translates into an increase of as much as 5% for the twelve largest non-oil-exporting nations in the Third World." *A Split in OPEC: Cheaper Oil Ahead*, Newsweek, Feb. 7, 1983, at 53-54.

barrels)\textsuperscript{29} was imported, and it is projected that net imports of oil will rise to seven million barrels a day in 1985 and remain at this level until 1990.\textsuperscript{30} The United States, which accounted for more than 35% of total world oil consumption in 1979, is projected to remain the largest single user of oil in the free world, consuming 30% of the total in 1990.\textsuperscript{31} In 1982, the United States net oil import payments were $63 billion;\textsuperscript{32} it has been estimated that import payments in 1990 will be approximately $75 to $79 billion.\textsuperscript{33}

This level of imports has been a significant factor in the recent recession and has presented a major obstacle to the nation's economic recovery.\textsuperscript{34} The nation's dependence on foreign sources of

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Total Consumption of Refined Petroleum Products (Million Barrels per Day) & Total Petroleum Imports (Million Barrels per Day) & Total Value Fossil Fuel Imports (Billion Current Dollars) \\
\hline
1952 & 7.3 & 1.0 & 0.7 \\
1957 & 8.8 & 1.6 & 1.6 \\
1962 & 10.4 & 2.1 & 1.9 \\
1967 & 12.6 & 2.5 & 2.5 \\
1972 & 16.4 & 4.7 & 4.7 \\
1977 & 18.4 & 8.8 & 44.2 \\
1982* & 15.3 & 5.0 & 62.8 \\
\hline
\end{tabular}
\caption{UNITED STATES CONSUMPTION, IMPORT, AND VALUE OF PETROLEUM}
\end{table}

* Preliminary

\textit{Id.} at 25, 51, 65.

28. \textit{Id.} at v. United States petroleum imports in 1982 decreased by 16% from the 1981 level. \textit{Id.} at 1. The United States received 42% of its petroleum imports directly from OPEC. \textit{Id.} at v.

29. 1982 \textit{ANNUAL ENERGY REVIEW, supra} note 27, at 47. Table two (\textit{supra} note 27) shows the volume of petroleum imports made by the United States in selected past years.


32. 1982 \textit{ANNUAL ENERGY REVIEW, supra} note 27, at 25. Table two (\textit{supra} note 27) illustrates the value of fossil fuels imported by the United States in selected past years.

33. 1980 \textit{ANNUAL REPORT TO CONGRESS, supra} note 31, at 17.

34. In announcing the proposal to accelerate the OCS leasing schedule, Secre-
petroleum makes the nation vulnerable to another oil embargo, threatens the maintenance of a favorable international balance of payments, and risks national security. Increased domestic discovery and production of oil and gas will reduce the nation's dependence on foreign sources of petroleum.

The OCS has been called "America's best hope for finding additional oil and gas resources and reducing our dependence on foreign oil." Geologically, the continental shelf is the submerged extension of the continental land mass lying immediately adjacent to the shoreline and extending outward into the ocean for a distance that can range from nearly zero to more than 800 miles. The continental shelf has an average depth of 425 feet, and extends an average distance of forty miles offshore. The continental shelf is expected to have the best potential for the discovery of commercially exploitable deposits of oil and gas. Fifty-five to seventy percent of the United States and world offshore petroleum resources are estimated to lie under water depths of less than 200 meters. Furthermore, most of these resources are expected to lie shoreward of the base of the continental slope or within 200 nautical miles from shore. Only 2% of all offshore petroleum resources are estimated to extend beyond the continental rise in the deep ocean.

Beneath the 1.1 million square miles of United States offshore
lands potentially available for oil and gas development, there exists an enormous quantity of energy resources. The United States Geological Survey estimates that the United States OCS contains undiscovered recoverable resources of 17 to 44 billion barrels of oil and 117 to 231 trillion cubic feet of gas.\footnote{40} The average estimate of the energy resource potential of the United States outer continental shelf lands is 28 billion barrels of oil and 167 trillion cubic feet of natural gas.\footnote{41}

While United States offshore oil and gas production in 1982 accounted for approximately 10% of its domestic oil and about 25% of its domestic natural gas,\footnote{42} it has been estimated that the United States OCS can be the "largest domestic source of oil and gas between now and the 1990's."\footnote{43} According to the United States Geological Survey up to 60% of the nation's undiscovered oil and gas resources may be contained on the OCS.\footnote{44}

III. THE ACCELERATION OF OCS LEASING

Former Secretary Watt maintained that accelerating offshore leasing in frontier OCS areas, such as Alaska, is in the national interest.\footnote{45} He claimed that the program "will enhance . . . na-
tional security, provide jobs, and protect the environment while making America less dependent on foreign oil sources." Likewise, he feels the new OCS lease schedule will improve the efficiency of the OCS leasing program, and increase the availability of the offshore energy resources so critical to the United States. The Secretary outlined the major objectives of the revised OCS program as including: (1) a substantial increase in the rate of OCS leasing; (2) early lease sales of frontier areas with high oil and gas potential; (3) larger lease offerings of entire planning areas; and (4) streamlining the OCS program to shorten the presale planning process, and thus reduce the time required to start exploratory drilling in the OCS regions. The main thrust of the program is to accelerate the rate of OCS lease sales.

Although the Reagan administration's decision to speed up offshore leasing is not the first time the OCS program has been accelerated as part of a national energy program, the OCS leasing

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47. OCS Oversight Hearings—Part 2, supra note 1, at 51 (statement of Interior Secretary James G. Watt). In a statement by Secretary Watt before a House Subcommittee, he explained that the revised OCS program would consist of the following:

First, there will be greater emphasis on early entry into areas of high potential. Here we are talking about the frontier areas of offshore Alaska. We are proposing earlier offerings of four of the five high potential basins involved.

Second, we propose early reentry into high potential areas. Spacing between first and second offerings is being decreased from 3 years to 2 years.

Third, we are streamlining the OCS leasing program. This includes proposals for a general reduction in the time needed to hold a lease sale, area-wide environmental and hydrocarbon resource assessments, tiering of NEPA documents, larger lease offerings, and more efficient methods for assuring receipt of fair market value.

The key is streamlining the program, including earlier opening of areas with high potential.

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49. In response to the Arab Oil Embargo of 1973-1974, President Nixon announced "Project Independence", a plan by which the United States would seek to become energy self-sufficient by 1980. In April 1973, the President directed the Secretary of Interior to triple, from one million to three million acres a year, OCS
program approved by former Secretary Watt is a dramatic departure from past lease schedules. While the number of OCS lease sales will not increase significantly, going from thirty-six to forty-one in five years, the number of acres offered for leasing will. For example, the average sale made by Secretary Andrus was 900,000 acres; under Secretary Watt's plan it will be twenty-four million acres.50 Under the accelerated leasing schedule, the Interior Department will offer almost the entire federal OCS, about one billion acres, for oil and gas leasing during 1982-87.51 In contrast, from 1954-80, only forty-one million acres of federal offshore lands were offered for lease and less than half, about nineteen million acres, have been leased.52 The most OCS acreage ever leased in one year was 2.2 million acres in 1981.53

Not only has the acreage for each sale increased, but the total annual acreage offered has also increased. Past annual offerings ranged from 1.8 million acres in 1977 to 7.7 million acres in 1981. However, 1983 total offerings could exceed 350 million acres.54 The average annual OCS acreage offered and leased has been modest. From 1971 through 1980, about 2.9 million acres of OCS lands were offered for lease and approximately 1.2 million acres


51. News Release (July 15, 1981), supra note 48. "One or more times during the five-year period, all of the tracts in each of the 18 OCS planning areas . . . will be offered for lease, excepting tracts eliminated for environmental reasons and to accommodate other uses." Id.

52. ISSUES IN LEASING OFFSHORE LANDS, supra note 6, at 22. See also CONSERVATION DIVISION, GEOLOGICAL SURVEY, UNITED STATES DEPT OF THE INTERIOR, OUTER CONTINENTAL SHELF STATISTICS 1953-1980, 10 (1981) [hereinafter cited as OCS STATISTICS]. From 1954 through the end of fiscal year 1981, fifty million acres of federal offshore lands were offered for leasing of which 22 million acres have been leased. MINERALS MANAGEMENT SERVICE, UNITED STATES DEPT OF THE INTERIOR, FACT SHEET: OUTER CONTINENTAL SHELF FIVE-YEAR LEASING PROGRAM (Sept. 2, 1982) [hereinafter cited as FIVE-YEAR LEASING PROGRAM].


54. THE GREAT GIVEAWAY, supra note 50, at 6.
were leased. From these relatively small areas more than five billion barrels of oil and forty-four trillion cubic feet of gas have been found and produced through December 1979. "From these volumes of production, it is clear that prospects for the discovery of significant amounts of oil and gas in the unexplored portions of the OCS have to be viewed as outstanding."57

Despite this optimistic appraisal of the energy resource potential of the OCS lands, in 1980 only 1% of all outer continental shelf acreage was under lease, only 2% had ever been leased, and less than 4% had ever been offered for lease. Through 1982, only 10% of the acreage leased had been in frontier OCS regions outside the producing areas of the Gulf of Mexico and the Santa Barbara

55. Issues in Leasing Offshore Lands, supra note 6, at 30.

Table Three

<table>
<thead>
<tr>
<th>Year</th>
<th>Offered</th>
<th>Leased</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>56</td>
<td>37</td>
</tr>
<tr>
<td>1972</td>
<td>971</td>
<td>826</td>
</tr>
<tr>
<td>1973</td>
<td>1,515</td>
<td>1,033</td>
</tr>
<tr>
<td>1974</td>
<td>5,007</td>
<td>1,762</td>
</tr>
<tr>
<td>1975</td>
<td>7,247</td>
<td>1,680</td>
</tr>
<tr>
<td>1976</td>
<td>2,827</td>
<td>1,278</td>
</tr>
<tr>
<td>1977</td>
<td>1,843</td>
<td>1,101</td>
</tr>
<tr>
<td>1978</td>
<td>3,141</td>
<td>1,297</td>
</tr>
<tr>
<td>1979</td>
<td>4,412</td>
<td>1,767</td>
</tr>
<tr>
<td>1980</td>
<td>2,563</td>
<td>1,134</td>
</tr>
<tr>
<td>TOTAL</td>
<td>28,582</td>
<td>11,915</td>
</tr>
<tr>
<td>Average per year</td>
<td>(2,858)</td>
<td>(1,192)</td>
</tr>
</tbody>
</table>

56. Id. at 3, 23.

When state submerged lands are included in total United States offshore production statistics, the total increases significantly. Through 1980, United States offshore lands (state and federal OCS) have produced over nine billion barrels of oil and nearly 62 trillion cubic feet of gas. OCS Statistics, supra note 52, at 90-91.

57. OCS Oversight Hearings—Part 2, supra note 1, at 370 (statement of Arthur Spaulding, Vice-President and General Manager, Western Oil and Gas Association and the Alaska Oil and Gas Association).


58. OCS Oversight Hearings—Part 2, supra note 1, at 15 (statement of W. Kenneth Davis, Deputy Secretary, United States Dept of Energy).

Of nearly one billion acres of federal OCS lands only 12 million acres were under lease as of fiscal year 1981. Table Four provides a break-down of acreage under lease through fiscal year 1981.
Channel. At this rate of offshore leasing, it was estimated that it would take 1,736 years to inventory and lease the oil and gas resources on the United States OCS. The Reagan administration has determined that the nation does not have that much time to spare.

By comparison, the continental shelves controlled by the rest of

<table>
<thead>
<tr>
<th>OCS Region</th>
<th>Total Acres Under Lease</th>
<th>Active Leases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlantic</td>
<td>1,491,604</td>
<td>262</td>
</tr>
<tr>
<td>Gulf of Mexico</td>
<td>9,062,030</td>
<td>1,969</td>
</tr>
<tr>
<td>Offshore California</td>
<td>800,353</td>
<td>151</td>
</tr>
<tr>
<td>Offshore Alaska</td>
<td>638,627</td>
<td>129</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>12,037,614</strong></td>
<td><strong>2,511</strong></td>
</tr>
</tbody>
</table>


60. OCS Oversight Hearings—Part 2, supra note 1, at 370 (statement of Arthur Spaulding, Vice-President and General Manager, Western Oil and Gas Association). See also Hedberg, An Emergency Offshore Petroleum Program for the United States, Oil & Gas J., Feb. 15, 1981, at 159. Even under former Secretary Watt's increased rate of leasing, it will still take 137 years to evaluate the energy potential of the federal OCS. OCS Oversight Hearings—Part 2, supra note 1, at 370.

61. The total time required after a lease sale to achieve initial production is in the range of four to eleven years, and to obtain peak production requires seven to fourteen years. H.R. REP. No. 590, supra note 35, at 61, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1468. Therefore, the Reagan administration and Secretary Watt would like to inventory the wealth of the nation as soon as possible.

The people of a land cannot understand their resource wealth until the resources have been inventoried and their value and extent is known. With all of America's greatness, we still do not understand our own wealth. We must inventory our lands. Today, we do not know the full extent of our mineral values, our agricultural potential, or our oil and gas reserves. Unfortunately, the only way at this time to inventory our lands to determine the qualities of oil and gas is to drill. Once we have inventoried the lands, we can then make wise decisions with regard to the allocation of wealth that is resident in the land.

the world are more than 40% leased. As a result, in 1981 offshore production accounted for 24% of total world oil production. In 1970, United States offshore production was 21.7% of total world offshore production, but by 1980 it had fallen to 7.6%.

Canada has been more aggressive in leasing offshore lands for oil and gas exploration than has the United States. Canada has 262 million acres of offshore lands under lease or permit whereas the United States has about 10 million acres of OCS under lease or permit. Canada has also been more successful in exploring its arctic waters than has the United States. Almost 300 wells have been drilled in this region, revealing potential reserves in the Canadian arctic of somewhere between 570 million to 3.8 billion barrels of oil and 13 trillion cubic feet of natural gas. In contrast, the United States has drilled very few wells in its arctic waters and those that have been drilled are just test wells. OCS Oversight Hearings—Part 3: Hearings on Provisions of the Proposed Five-Year Leasing Program and its Impact on Offshore Operations and Examine the Goya Report on the Five-Year Program Before the Subcomm. on the Panama Canal/Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2d Sess. 129 (1982) (statement of J. Robinson West, Assistant Secretary for Policy, Budget, and Administration, United States Dept’ of the Interior) [hereinafter cited as OCS Oversight Hearings—Part 3]. Canada has also leased more acreage in Atlantic waters than has the United States. Less than 1.4 million acres have been leased in the United States Atlantic waters. This compares to 123 million acres of the Canadian Atlantic waters covered by leases or permits. Five-Year Leasing Program, supra note 52.

In 1979 the People’s Republic of China authorized foreign petroleum companies to explore 176,000 square miles of China’s offshore. Thus, as someone in the oil industry noted, “in one year the Chinese now know more about an area 6.5 times larger than the total area awarded by the U.S. in 26 years.” Brazil has also announced plans to offer vast areas of its offshore lands for oil and gas exploration. Wassall, Government Indifferent to Need for Offshore Oil Exploration, Oil & Gas J., May 5, 1980, at 221, 222. See also Yuan, China’s Offshore Development: Legal and Geopolitical Perspectives, 18 Tex. Int’l L. J. 107 (1983); Brazil Leads Exploration Off S. America, Offshore, June 20, 1982, at 151; and PRC Ready to Move Skills, Offshore, June 20, 1980, at 181.

63. World Offshore Well Count Show Strength, Offshore, June 20, 1982, at 47; Figures Reflect Offshore Growth, Offshore, June 20, 1982, at 61. The leading producers of offshore oil in 1982 were Saudi Arabia (3 million barrels per day), the United Kingdom (1.8 million barrels per day), Mexico (1.11 million barrels per day), the United States (1.06 million barrels per day), and Venezuela (1.04 million barrels per day). Figures Reflect Offshore Growth, supra, at 61-62. These five countries are the major producers of offshore oil. Together, in 1981, they accounted for 59% of the world’s offshore petroleum production. World Offshore Well Count Show Strength, supra, at 47.

64. OCS Oversight Hearings—Part 3, supra note 62 (statement of J. Robinson West, Assistant Secretary for Policy, Budget, and Administration, United States Dept’ of the Interior). See also News Release (July 21, 1982), supra note 3, at 2.
IV. THE HISTORICAL FRAMEWORK FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF

Development of OCS oil and gas resources is conducted pursuant to presidential proclamation, international agreement, and congressional legislation. Among the more important items are:65 (1) the Truman Proclamation of 1945;66 (2) the 1958 Geneva Convention of the Continental Shelf;67 (3) the Submerged Lands Act of 1953;68 (4) the Outer Continental Shelf Lands Act of 1953;69 (5) the Outer Continental Shelf Lands Act Amendments of 1978;70 (6) the National Environmental Policy Act of 1969;71 (7) the Coastal Zone Management Act of 1972;72 (8) the Endangered Species Act of 1973;73 (9) the Marine Mammal Protection Act of 1972;74 and (10) the Marine Protection, Research, and Sanctuaries Act of 1972.75 The balance of this article will be a brief description of the content and historical impact of each of these important items on OCS development with an emphasis on how they may influence the judicial resolution of the OCS controversy in the future.

A. The Truman Proclamation of 1945

As early as 1894, oil had been extracted from wells off the coast of southern California. Offshore drilling, however, was confined to shallow, near-shore waters because technology was unsophisticated.76 There was little economic interest in offshore exploration until post-World War II technology facilitated penetration to greater depths and revealed the wealth located on continental


73. 16 U.S.C. §§ 1531-1543.


shelves.\textsuperscript{77}

To advance development of continental shelf petroleum resources, President Truman, on September 28, 1945, issued a proclamation which unilaterally declared that "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."\textsuperscript{78} On the same day, President Truman issued an executive order which "set aside the resources of the continental shelf under the high seas and placed them, for administrative purposes, pending legislative action, under the jurisdiction and control of the Secretary of the Interior."\textsuperscript{79}

As stated in the Proclamation, the reasons justifying the exclusive claim by a coastal state to the resources of its continental shelf were: (1) a world-wide need for new sources of petroleum and other minerals; (2) the existence of these resources under the continental shelf and the technological feasibility of their exploitation; and (3) the necessity of an established governance over these resources to further their conservation and prudent utilization.\textsuperscript{80}

The fourth justification, from which the legal theory of the Proclamation is to be extracted, is that "the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by a contiguous nation is reasonable and just."\textsuperscript{81} This assertion is supported with the following arguments:

(1) The effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore.
(2) The continental shelf may be regarded as an extension of the landmass of the coastal nation and thus naturally appurtenant to it.
(3) These resources (under the continental shelf) frequently form a seaward extension of a pool or deposit lying within [United States] territory.
(4) Self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources.\textsuperscript{82}

The Truman Proclamation was not intended as a declaration of

78. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945). The Truman Proclamation is reprinted at 13 Dep’t of State Bull. 485 (1945); 1 NEW DIRECTIONS IN THE LAW OF THE SEA 106 (1973); L. JUDA, supra note 76, at 151.
80. Id. See also Franklin, supra note 37, at 38-44; Waldock, The Legal Basis on Claims to the Continental Shelf, 36 GROTIUS SOC’Y 115, 123-27 (1950).
82. Id.}
absolute sovereignty over the continental shelf.\textsuperscript{83} It stressed that “the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation” were in no way to be affected by the United States claim.\textsuperscript{84} However, the words “jurisdiction and control” over the “natural resources” of the continental shelf, appeared to be the equivalent of a claim of sovereignty.\textsuperscript{85} One commentator wrote:

One cannot read [the Truman] Proclamation without feeling that within the area of its Continental Shelf, the United States is claiming rights which are as large as sovereignty. . . . [I]f the rights claimed over the Continental Shelf and its resources were called sovereignty, they would be not more extensive than what are claimed in the Proclamation.\textsuperscript{86}

The Truman Proclamation on the Continental Shelf was a landmark declaration.\textsuperscript{87} “It laid claim to a greater submarine area than any other claim in history. . . .”\textsuperscript{88} “Prior to 1945 it is clear that there was no internationally recognized appropriation or right of appropriation to submarine areas outside of a nation’s territorial sea.”\textsuperscript{89} The Truman Proclamation marks a period of tran-

\textsuperscript{83} Young, \textit{Recent Developments with Respect to the Continental Shelf}, 42 AM. J. INT’L L. 849, 850 (1948).

\textsuperscript{84} Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

\textsuperscript{85} The Interior Department wanted a declaration of absolute sovereignty over the continental shelf and the waters above it. The Department of State, however, strongly opposed a United States claim to sovereignty over continental shelf lands. The federal government’s assertion of “jurisdiction and control” over the resources of the continental shelf was finally agreed upon. State Department opposition to a United States claim to sovereignty over the entire continental shelf and the waters above it was based on the following four points:

First, it would be difficult to obtain acceptance from other states of a claim to territorial waters far exceeding the generally observed three-mile limit. Second, such a claim by the United States would encourage other states to make similar claims of their own, thus leading to interference with normal American fishing operations in places such as Mexico and Cuba (shrimp) and the west coast Latin American states (tuna). Third, wider territorial seas would make it more difficult for the United States Navy since unfriendly ships could take refuge in neutral territorial waters of correspondingly wide extent. Fourth, there was really no need to claim sovereignty when all that was called for was control over the resources of the seabed of the continental shelf.

L. Juda, \textit{supra} note 76, at 16.

\textsuperscript{86} Hurst, \textit{The Continental Shelf}, 34 GROTUS SOC’Y 153, 162 (1949). \textit{See also} Waldock, \textit{supra} note 80, at 128.

\textsuperscript{87} For a thorough discussion on the shaping of the Truman Proclamation on the Continental Shelf, see A. Hollick, \textit{U.S. Oceans Policy: The Truman Proclama-


\textsuperscript{88} Franklin, \textit{supra} note 37, at 38.

\textsuperscript{89} Krueger, \textit{Mineral Development on the Continental Shelf and Beyond}, 42 CAL. ST. B.J. 515 (1967). One commentator has written that “the Truman Procla-
sition in the relations between the United States and the global oceans. From a regional power primarily preoccupied with domestic concerns, the United States emerged during the Second World War with a vital interest in global maritime issues. The Proclamation incorporates both the domestic and global perspectives of the United States in the post-World War II era.90

The Truman Proclamation provided a precedent for claims by other coastal countries to their continental shelves.91 The Proclamation had an expansionistic approach and was adopted unilaterally rather than through multilateral negotiations with other states.92 The claims by other countries, as might be suspected, were not uniform. Some states claimed their adjacent continental shelves to indefinite lengths and depths while other states restricted their claims by either length or depth.93 Despite the lack of uniformity, the frequency with which they were made and their acceptance by other countries led some commentators to conclude that by the early 1950's "the appropriation—or which is essentially the same, the right of appropriation—of the adjacent submarine areas have become part of international law by custom initiated by the leading maritime powers and acquiesced in by the generality of states."94 If such a regime in fact existed, it remained vague and indefinite. The 1958 Geneva Convention on the


92. L. JUDA, supra note 76, at 24.
93. Krueger, The Convention on the Continental Shelf and the Need for Its Revision and Some Comments Regarding the Regime for the Lands Beyond, 1 NAT. RESOURCES J. 1, 2 (1968); Comment, The Logging Law of the Continental Shelf: Some Problems and Proposals, 22 CATH. U.L. REV. 131, 138 (1972); C. Franklin, supra note 37, at 49-52. The most far-reaching claims to ownership of adjacent continental shelves were made by South and Central American countries. In 1946, Argentina and Panama issued proclamations that claimed sovereignty over their continental shelves. And in 1947, Chile, a nation with practically no continental shelf, claimed sovereignty over "the whole continental shelf of whatever depth" to a distance of 200 miles from shore. Shortly thereafter, Ecuador and Peru followed Chile's claim and asserted jurisdiction over the natural resources of adjacent seas to a distance of 200 miles from their coasts. Morris, The Continental Shelf—an International Dilemma, 1 OSGOODE HALL L.J. 37, 39 (1958); Campbell, International Law Developments Concerning National Claims to and in Offshore Areas, 33 TUL. L. REV. 339, 343-44 (1959); Young, supra note 83, at 851-55; L. JUDA, supra note 76, at 24-27.

For discussion on the claims of various nations to the natural resources of adjacent seabeds that foreshadowed the Truman Proclamation, see Hurst, Whose is the Bed of the Sea?, 4 BRIT. U.B. INT'L L. 34 (1923-1924); Cosford, The Continental Shelf
Law of the Sea, which culminated in the 1958 Geneva Convention on the Continental Shelf, brought some clarity to the emerging doctrine of the continental shelf.

B. The 1958 Geneva Convention on the Continental Shelf

The 1958 Geneva Convention on the Continental Shelf was the first attempt by the international community to define the legal concept of the continental shelf. The convention defined the continental shelf as:

(a) ... the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar areas adjacent to the coasts of islands.


The Convention partitioned the oceans into five jurisdictional zones. Starting landward, these zones are: (1) internal waters; (2) territorial sea; (3) contiguous zone; (4) continental shelf; and (5) high seas. The coastal state exercises complete sovereignty over its internal waters, but has no jurisdictional claim to the outermost zone, the high seas, which is open to all nations. Alexander, National Jurisdiction and the Use of the Sea, 8 NAT. RESOURCES J. 373, 375-76 (1968).

While the 1958 Geneva Convention on the Continental Shelf was the first attempt by the international community to define the legal regime of the continental shelf, the first significant development in continental shelf law was the treaty entered into between Great Britain and Venezuela on February 26, 1942. This treaty settled a controversy between Venezuela and Trinidad over the ownership of the submarine areas of the Gulf of Paria, located between Venezuela and the Island of Trinidad. The treaty authorized petroleum exploitation on the Gulf of Paria continental shelf by dividing the disputed area in half. This treaty foreshadowed the Truman Proclamation of 1945 in that it contained no express claim to “sovereignty” over the submarine areas of the gulf but used language which was equivalent to an assertion of sovereignty. Similarly, the treaty foreshadowed the Truman Proclamation in that it recognized exploitation of the submarine areas of the gulf would not affect the status of the waters of the Gulf of Paria or any rights of navigation through the superjacent high seas. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 636 (1962); Note, The Continental Shelf and the United States, 22 S.C.L. REV. 34, 35 (1970); Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF: A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW 71-74 (1968).

96. Convention on the Continental Shelf, supra note 67, art. 1.
Under this dual standard, the coastal nation has a minimum area of jurisdiction out to 200 meters depth and a maximum that is fixed only by technological ability to exploit the resources of the continental shelf. 97 Pursuant to the depth-of-exploitability definition, the maximum width of the continental shelf capable of exploitation will continue to increase as the world's technology for exploiting the seabed improves. 98

By adding the alternative definition of exploitability beyond the 200 meter depth of superjacent waters, the Geneva Convention recognized several significant facts. First, the continental shelf in certain parts of the world includes areas of depths greater than 200 meters. Thus, by using the alternative depth-of-exploitability definition, a coastal state is not deprived of a part of its continental shelf. Furthermore, the coastal state is best able to exploit the resources of adjacent continental shelves. Second, the convention would otherwise have been outdated as soon as it became feasible to exploit resources at depths greater than 200 meters. The exploitability definition, however, provides flexibility to permit coastal states to extend sovereign rights over adjacent continental shelves as advancing offshore technology permits the exploitation of submarine resources beyond the 200 meter edge. The third fact is the vast inequity in the distribution of continental shelves throughout the world. The exploitability test places coastal states in a more equal position concerning the exercise of national jurisdiction over adjacent continental shelves. 99

The "doctrine of the continental shelf" is essentially the claim that a coastal state has the exclusive rights to exploit the natural resources on and under its adjacent continental shelf. The convention recognized that "the coastal State exercises over the continental shelf sovereign (and exclusive) rights for the purpose of

97. Dean, supra note 77, at 423. For discussion on the outer limit of the continental shelf, see Goldie, Where is the Continental Shelf's Outer Boundary?, 1 J. MAR. L. & COM. 461 (1970); Brown, The Outer Limit of the Continental Shelf, 1968 Juridical Review 111; Finlay, The Outer Limit of the Continental Shelf, 64 AM. J. INT'L L. 42 (1970).

98. C. Franklin, supra note 37, at 25.

exploring it and exploiting its natural resources." The natural resources of the continental shelf over which a coastal nation has sovereign rights were defined to "consist of the mineral and other nonliving resources of the seabed and subsoil together with living organisms belonging to sedentary species." The legal concept of the continental shelf was initiated in the 1945 Truman Proclamation, and formally codified by the Geneva Convention on the Continental Shelf. The continental shelf doctrine is a recognition that petroleum is a valuable resource, that great quantities of petroleum exist on the continental shelf, and that technology has made possible the development of offshore oil.

Historically, nations of the world have asserted jurisdiction over a narrow belt of adjacent coastal waters ranging from three to twelve miles from shore. Today, however, most coastal states claim sovereignty over an exclusive economic zone extending 200 miles from their coasts where they exercise exclusive rights to exploit submarine resources. The exclusive economic zone concept was endorsed by the United States on March 10, 1983, when President Reagan issued a proclamation that confirmed the rights of all states within an Exclusive Economic Zone. This move-

100. Convention on the Continental Shelf, supra note 67, art. 2(1), (2).
101. Id. at art. 2(4). For discussion on article 2(4) of the Convention, see Goldie, Sedentary Fisheries and Article 2(4) of the Convention of the Continental Shelf—A Plea for a Separate Regime, 63 AM. J. INT'L L. 86 (1969).
103. Kunz, Continental Shelf and International Law: Confusion and Abuse, 50 AM. J. INT'L L. 828, 829 (1956); Hurst, supra note 86, at 158.
104. For a detailing of the technological reasons behind the Truman Proclamation, see the White House press release reprinted in L. Juda, supra note 76, at 156-57.
105. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea zone extending 200 nautical miles from the baseline of the territorial sea. Within this zone, the United States has, to the extent permitted by international law:
(a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil in the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction
ment toward partition of the world's oceans into national lakes presents a serious challenge to the traditional concept of freedom of the seas articulated by Hugo Grotius in 1609, and observed by the international community for nearly 300 years.106

C. The Submerged Lands Act of 1953

Beginning in 1921, California and several other coastal states began granting oil and gas leases to offshore lands lying adjacent to their coasts.107 The claim of state ownership to these submerged lands was based in part on an 1845 decision by the United States Supreme Court in *Pollard's Lessee v. Hagan*108 which held that the states owned lands underlying navigable waters within their jurisdictions. That decision stated in dictum that if state boundaries extended out from the coastline, state ownership of submerged lands extended into the sea as well.109

The federal government initially recognized coastal states' title to the lands and resources beneath the marginal belt110 extending out three miles from the shore.111 This federal policy was reversed in 1945, when the federal government claimed jurisdiction

with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

Although the Proclamation was a unilateral declaration, the United States pledged to exercise these sovereign rights and jurisdiction in accordance with international law. The Proclamation does not change existing United States policies concerning the continental shelf, marine mammals, or fisheries. Furthermore, the United States claim does not affect the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea. *Id.*


108. 44 U.S. (3 How.) 212 (1845).

109. *Id.* at 230. See also *Manchester v. Massachusetts*, 139 U.S. 240, 264 (1891) ("the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State").

110. The marine belt is defined as: "That portion of the main or open sea, adjacent to the shores of a given country, over which the jurisdiction of its municipal laws and local authorities extends. Territorial waters, is defined by international law as extending out three miles from the shore." BLACK'S LAW DICTIONARY 872 (5th ed. 1979).


As late as 1933, then Secretary of the Interior, Harold L. Ickes, refused to grant a federal oil lease on lands under the Pacific Ocean adjacent to the California coast
over the offshore areas which had been leased by the states for oil and gas exploration. The federal government filed suit against the state of California and asserted federal ownership of submerged lands.

The Submerged Lands Act of 1953 (SLA) was the result of the Supreme Court's historic decisions in United States v. California, United States v. Louisiana, and United States v. Texas. In these cases, commonly known as the Submerged Lands Cases, the Supreme Court held that the federal govern-

because "title to the soil under the ocean within the three-mile limit is in the State of California, and the land may not be appropriated except by the State." Id.

Congress' failure to enact legislation claiming federal ownership over submerged lands and its enactment of House Joint Resolution 225 confirming coastal state ownership to such lands (which was vetoed by President Truman) established that Congressional policy has consistently recognized state ownership of the three-mile marginal belt adjacent to shore. Id. at 34, reprinted in 1953 U.S. CODE CONG. & AD. NEWS, at 1427.

Prior to 1937, the policy of the executive departments of the federal government was consistently to recognize state ownership of the submerged lands as evidenced by approximately thirty opinions issued by the Department of the Interior, and the War Department's request that the states grant these lands to the United States for military use. Id. at 34.

From 1842 to 1935 the Supreme Court, in more than thirty cases, expressed in dictum that the states owned the lands and resources beneath the tidewaters. Id. at 34-35, reprinted in 1953 U.S. CODE CONG. & AD. NEWS, at 1428-29.

ment, rather than the states, had paramount rights in, and full dominion and power over, the submerged lands, including the right to extract oil and other resources. The Court reasoned that protection and control of the area is a function of "national external sovereignty" and explained: "The marginal sea (three-mile belt off the coast) is a national, not a state concern. National interest, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area."121

In *United States v. California*, the Court established federal ownership over submerged lands.122 The litigation began in 1945 when the United States brought an original action in the Supreme Court against the state of California. The federal government alleged that the state, without authority, was granting leases for the extraction of oil in the three-mile marginal belt along the California coast, an area outside the inland waters of the state, and that the United States had paramount rights in the submerged lands.123

California claimed that pursuant to *Pollard's Lessee v. Hagan*, it owned the resources of the submerged lands under the three-mile marginal belt as an incident of sovereignty which it exercised over that water area. The state noted that its original constitution, adopted in 1849 prior to its admittance to the Union, included within the state's boundary the water area extending three English miles from the shore;125 that the Enabling Act, which admitted California to the Union, ratified the territorial boundary thus defined; and that California was admitted "on an equal footing with the original states in all respects whatever."126

The federal government did not deny that under the *Pollard* rule California owned lands under inland navigable waters such

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119. 332 U.S. 19, 38-39. "The paramount-rights doctrine [was] used in the submerged lands cases to obtain for the United States what amounts to all the aspects of ownership of an area, without the necessity for any formal congressional declaration of annexation." BARTLEY, *supra* note 118, at 252. For discussion of the doctrine of federal paramount powers as articulated in the *California* case, see BARTLEY, *supra* note 118, at 247-73.
120. 332 U.S. at 34; 339 U.S. 699, 704.
121. 339 U.S. at 704.
123. 332 U.S. at 23.
124. 44 U.S. (3 How.) 212 (1845). *See supra* notes 93-114 and accompanying text.
125. CAL. CONST. art. XII.
126. 332 U.S. at 29-30.
as rivers, harbors and tidelands down to the low water mark, but argued that the Pollard rule should not be extended so as to apply to lands under the ocean.\footnote{127} It stressed that the thirteen original colonies did not own the marginal belt; that the federal government did not assert its superior rights to this area until after the formation of the Union; and that it has not granted any of these rights to the states, retaining them as subjects of national sovereignty. Further, the government maintained that no previous Supreme Court case had decided conflicting claims of a state and the federal government to the three-mile belt in a manner which required the Court's extension of the Pollard inland water rule to the submerged lands.\footnote{128}

The Court was not persuaded to apply the Pollard rule of ownership to the submerged lands.\footnote{129} In holding for the United States,\footnote{130} the Court declared that:

California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.\footnote{131}

The federal government later brought and won similar suits.

\footnote{127} Id. at 30-31.
\footnote{128} Id. at 31.
\footnote{129} Id. at 36.
\footnote{130} Id. at 31-32.
\footnote{131} Id. at 38-39. Past cases of possible interest include: Appleby v. City of New York, 271 U.S. 364 (1926) (rights to land under water must reside in those who have ownership); Manchester v. Massachusetts, 139 U.S. 240 (1891) (the minimum limit of territorial jurisdiction of a nation over tidewaters is approximately three miles from its coast); McCready v. Virginia, 94 U.S. 391 (1876) (states hold exclusive control over fishing rights for their citizens, subject to free flow of navigation in the waters, and such control is a property right rather than a mere privilege or immunity of citizenship); Martin v. Waddell's Lessees, 41 U.S. (16 Pet.) 367 (1842) (fishing rights were vested in the state for the benefit of all citizens).
against Louisiana,\textsuperscript{132} Texas,\textsuperscript{133} and Maine.\textsuperscript{134} Congress, however, did not agree with the Supreme Court's holdings.\textsuperscript{135} In 1952, Congress sent Senate Joint Resolution Twenty to President Truman quitchclaiming all federal interests in the submerged lands to the coastal states,\textsuperscript{136} and restoring to the coastal states the ownership of the submerged lands in the three-mile limit.\textsuperscript{137} President Truman, a firm proponent of federal ownership of offshore resources, vetoed the Senate Joint Resolution because "it would turn over to certain States, as a free gift, very valuable lands and mineral re-

\begin{quote}
\textsuperscript{132} United States v. Louisiana, 338 U.S. 699 (1950). The only significant difference between the \textit{California} and \textit{Louisiana} cases is that California claimed rights in the three-mile belt while Louisiana claimed rights twenty-four miles seaward of the three-mile belt. \textit{Id.} at 705. For discussion on the Louisiana legislation extending the Louisiana seaward boundary see Loret, \textit{Louisiana's Twenty-Seven Mile Maritime Belt}, 13 \textit{Tul. L. Rev.} 253 (1959); Note, \textit{International Law—Power of a State to Extend its Boundary Beyond the Three Mile Limit}, 39 \textit{Colum. L. Rev.} 317 (1939).

\textsuperscript{133} United States v. Texas, 339 U.S. 707 (1950).

\textsuperscript{134} United States v. Maine, 420 U.S. 515 (1975) (thirteen states bordering on the Atlantic Ocean sought to exercise jurisdiction over lands located under the tidewaters of their states to a distance extending to the outermost jurisdiction of the United States. The Supreme Court held, however, that protection and control of the area was instead a function of national external sovereignty, in accordance with United States v. California, 332 U.S. 19, 31-34 (1947)).

\textsuperscript{135} Wulf, \textit{Freezing the Boundary Dividing Federal and State Interests in Offshore Submerged Lands}, 8 \textit{San Diego L. Rev.} 584, 590 (1971); Illig, \textit{supra} note 113, at 53.

\textsuperscript{136} S.J. Res. 20, 82d Cong., 2d Sess. (1952).

\textsuperscript{137} Bartley, \textit{supra} note 118, at 214.
\end{quote}
sources [owned by] the United States as a whole." 138 No attempt was made to override the veto, 139 and numerous similar bills introduced in Congress which would have quitclaimed the lands and resources underlying the three-mile marginal belt 140 were also consistently opposed as "giveaway" legislation. 141

With General Eisenhower's election to the presidency, Truman's efforts to preserve federal ownership of submerged lands were quickly reversed. 142 On May 22, 1953, President Eisenhower signed the SLA into law. 143 This Act granted the states ownership to and proprietary use of all lands under their navigable waters for a distance of three geographical miles from their coastlines, or to the historic seaward boundaries as they existed at the time the states became members of the Union. 144 A state, therefore, could claim ownership beyond three miles if it had a greater boundary at the time the state became a member of the Union or if Congress had approved a boundary in excess of three miles prior to


142. A. Hollick, supra note 89, at 111-114.


May 22, 1953.145 “But in no event shall the term ‘boundaries’ or the term ‘lands beneath navigable waters’ be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues [about 10.5 miles] into the Gulf of Mexico.”146

The constitutionality of the SLA was challenged by Alabama and Rhode Island.147 These states denied that “Congress has any power to dispose of the national interest in the ocean or its uncaptured resources.”148 They argued “that whatever power the United States has over the Ocean is an inseparable part of national sovereignty which cannot be irrevocably parcelled out or delegated to states, individuals or private business groups.”149 In a per curiam decision, the Court held that the Submerged Lands Act was constitutional, stating that the power the Constitution provides Congress to dispose of property belonging to the United States is without limitation.150

The enactment of the SLA did not resolve federal-state conflict over title to offshore lands and submerged petroleum resources. In 1969, the United States invoked the original jurisdiction of the United States Supreme Court and filed a complaint against Maine and the twelve other states bordering on the Atlantic Ocean151 seeking a declaration that these states had interfered with the federal government’s exclusive proprietary rights in continental shelf lands and resources beyond the three-mile marginal sea.152

The litigation was prompted when Maine issued permits for oil

146. Id. at § 1301(b) (1976). The Submerged Lands Act also confirmed United States jurisdiction and control over the natural resources of that portion of the subsoil and seabed of the continental shelf lying seaward and outside of the three-mile limit of inland state waters. Id. at § 1302. Subsequent litigation provided that, for historic reasons, the boundaries of Texas and Florida (along the Gulf of Mexico side) would be three marine leagues, while the boundaries of three of the other states bordering on the Gulf of Mexico (Louisiana, Mississippi, and Alabama) would be only three marine miles into the Gulf. Stone, Legal Aspects of Offshore Oil and Gas Operations, 8 NAT. RESOURCES J. 478, 480 n.16 (1968).
148. Id. at 277 (Black, J., dissenting).
149. Id.
151. In addition to Maine, the United States joined twelve other Atlantic coast states in the litigation, including: New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. United States v. Maine, 420 U.S. 515, 516-17 (1975). Connecticut was not joined as a defendant because it borders on Long Island Sound, which is considered inland water rather than open sea. Id. at 517 n.1.
152. Id. at 517. For a discussion of Maine, see Morris, The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds, 74
and gas exploration in 3.3 million acres of submerged lands in the Atlantic Ocean, well beyond the three-mile limit.\textsuperscript{153}

The Atlantic states opposed the federal government’s assertion of sovereignty over the seabed and subsoil off the Atlantic coast beyond the three-mile marginal sea. They based their claim to this area on English law, and specific colonial grants and charters from the British Crown to the colonies.\textsuperscript{154} The Supreme Court rejected the Atlantic states’ claims to the seabed beyond the three-mile marginal sea and held: as an incident of national external sovereignty, the United States, to the exclusion of the Atlantic coastal states, had sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward of the three-mile marginal sea to the outer edge of the continental shelf.\textsuperscript{155} The Supreme Court reasoned that the California, Louisiana, and Texas cases, as well as the Submerged Lands Act, were squarely at odds with the Atlantic states’ claims to the seabed beyond the three-mile marginal sea.\textsuperscript{156}

\textsuperscript{153} Taylor, supra note 152, at 373; Henri, supra note 113, at 832.

\textsuperscript{154} 420 U.S. 515, 517-18; Henri, supra note 113, at 827; Morris, supra note 152, at 1056.

\textsuperscript{155} 420 U.S. at 519-28.

\textsuperscript{156} Id. at 528. The United States was also forced to assert its paramount rights to the outer continental shelf in United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969). In Ray, the United States obtained an injunction to prevent private construction atop several coral reefs underlying the high seas about four miles off the Florida coast. Private entrepreneurs claimed that the reefs were islands, discovered by them, and subject to their colonization as an island nation. The federal government, however, maintained that the proprietary interests in the coral reefs belonged to the United States. The court concluded that all private proprietary claims to the reefs were without merit. Id. at 542. For a discussion of the Ray case, see Note, International Law—Continental Shelf—Proprietary Interest of United States in Continental Shelf Precludes Claims of Acquisition by Private Entrepreneurs, 6 SAN DIEGO L. REV. 487 (1969); Note, Law of the Sea—The Continental Shelf—United States Proprietary Claim to the Continental Shelf Gives Rise to a New Public Domain, 5 LAND & WATER L. REV. 509 (1970).
The SLA established the coastal and seaward boundaries for federal and state governmental jurisdiction and provided the states with “the right and power to manage, administer, lease, develop, and use” the submerged lands and their resources in accordance with applicable state law. The SLA did not authorize federal leasing for OCS oil and gas resources. The Act merely established that the seabed and subsoil in the OCS beyond state boundaries appertained to the United States and was subject to its jurisdiction and control. The Truman Proclamation of 1945 also did not provide for the leasing of the OCS by the federal government—a power vested in Congress, not the President. The Proclamation only asserted jurisdiction and control in the United States of the natural resources of the subsoil and seabed of the adjacent continental shelf. Further, it was held that offshore submerged lands were not covered by the Mineral Lands Leasing Act of 1920. Therefore, the federal government was unable to lease oil and gas resources on the continental shelf.

To remedy this situation, Congress enacted, concurrent with and as a corollary to the SLA, the Outer Continental Shelf Lands Act of 1953 (OCSLA). The OCSLA provided the federal government with authority to lease mineral resources on the sub-

162. Stone, supra note 146, at 484-85.
164. The Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. V 1981), authorizes the Secretary of the Interior to lease lands owned by the United States for development and production of oil, gas, and certain other minerals. Attempts were made to obtain leases to offshore minerals under the Act but it was held that offshore submerged lands were not covered. Justheim v. McKay, 229 F.2d 29, 30 (D.C. Cir. 1956).
merged lands lying seaward of the state waters to the edge of the continental shelf. This area was titled “Outer Continental Shelf” because of its location on the continental shelf outside coastal state waters. The OCSLA declared “that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition.” The OCSLA is “best viewed as a legislative implementation of the 1945 Truman Proclamation and the 1958 Geneva Convention on the Continental Shelf.” Accordingly, the OCSLA focused primarily on the need to develop OCS oil and gas resources, and provided the Secretary of the Interior with broad authority to conduct the leasing program with little or no policy guidance.

Federal OCS leasing proceeded slowly during the 1950's and 1960's with its impact confined to the Gulf of Mexico and the southern California coast. The nation’s energy stores were secure and it was expected that offshore production of oil and gas resources would serve as a supplement to production from onshore fields. There was, therefore, little national interest and minimal congressional oversight of OCS leasing activities. A major change occurred in the public's perception of offshore oil and gas operations when an OCS drilling project in the Santa Barbara

167. Id. at §§ 1334, 1337.
168. Murphy & Belsky, OCS Development: A New Law and a New Beginning, 7 COASTAL ZONE MGMT. J. 297, 300 (1980). See also Christopher, supra note 164, at 24-28; H.R. REP. No. 215, supra note 113, at 6, reprinted in 1953 U.S. CODE CONG. & AD. NEWS, at 1390. Thus, the Act defined the OCS as all lands lying seaward and outside of state waters (three miles) "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (1976).
Channel was the scene of a massive blowout in January, 1969. The resulting oil spill damage to the local ecology focused national attention on the federal OCS leasing program.\textsuperscript{175}

In 1974, OCS resources again became the focus of national interest. Concerned about decreasing onshore domestic energy supplies, increasing dependence on foreign imports, and exacerbated by the Arab oil boycott of 1973-74, President Nixon directed the Secretary of the Interior to increase the amount of acreage on the OCS to be leased to private industry in 1975 to ten million acres. The acceleration of OCS leasing was to occur primarily in frontier areas off the coast of Alaska.\textsuperscript{176} The ten million acre lease proposal crystalized growing concern by environmental and citizen organizations, fishing interests, and coastal states over the possible adverse impact of the proposed rapid development.\textsuperscript{177}

Coastal states and local communities were especially concerned about the acceleration of the OCS leasing program, arguing that it was their beaches, estuaries, and other shoreline areas which could be severely damaged by an OCS-related spill. It was their onshore coastal lands which would be the sites for the necessary support facilities. It was their coastal communities which would experience possible "boom town" effects from the offshore development.\textsuperscript{178} Despite the state and local interests, OCS leasing remained a federal decision and a federally administered program.


In the aftermath of the oil spill, the Secretary of the Interior, Walter Hickel, attempted to suspend indefinitely further offshore lease activity in the Santa Barbara Channel. Union Oil initially prevailed in a suit brought against the Department when the court of appeals upheld Union's contention that an open-ended, indefinite suspension of the right to install a platform amounted to a cancellation of Union's lease and, therefore, a taking which required compensation under the fifth amendment. See Union Oil Co. of Cal. v. Morton, 512 F.2d 743 (9th Cir. 1975) (later vacated, remanded for reconsideration of issues not covered). For a discussion on the \textit{Union Oil} litigation, see Note, \textit{Governmental Suspension of Outer Continental Shelf Oil Drilling Operations}, 30 Okla. L. Rev. 930 (1977).


\textsuperscript{178} Id. at 89, reprinted in 1978 U.S. Code Cong. & Ad. News, at 1496.
over which coastal states received no financial assistance. Monies received from OCS bonuses, rentals, and royalties were and are deposited into the United States Treasury—not the treasuries of the affected coastal states—and there is no revenue sharing program between the federal and state governments.\textsuperscript{179}

Coastal states and local governments also disapproved of the OCSLA leasing process in which the affected state governments had no significant participation and no access to essential information.\textsuperscript{180} The OCSLA of 1953 provided an open-ended grant of authority to the Secretary of the Interior to conduct mineral leasing on the OCS.\textsuperscript{181} The OCSLA was characterized in a congressional report as "essentially a carte blanche delegation of authority to the Secretary of the Interior."\textsuperscript{182} The report further noted that specific mechanisms were needed to involve coastal states, local governments, and the public in OCS decision-making.\textsuperscript{183}

The OCSLA's grant of total discretion to the Secretary of the Interior enabled major oil companies to exercise a dominant role in the setting of national OCS policy. In \textit{Energy Under the Oceans}, a study prepared by the University of Oklahoma, it was stated that:

\textsuperscript{179} Id.
\textsuperscript{180} Id. The executive director of the California Coastal Zone Conservation Commission testified before a congressional committee:

[T]he thing that makes planning in regard to the OCS oil so difficult is it is impossible to understand what the full ramifications are on the basis of anything we have received from the Interior Department . . . . It is just the uncertainty that makes this so exceedingly difficult to deal with.


State and local officials also testified that their dealings with the Department of Interior were unsatisfactory and that the federal government frequently disregarded the interests of state and local governments, as well as those of the taxpayer. \textit{H.R. REP. No. 590, supra note 35, at 104, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1510.}

\textsuperscript{181} Id. at 100, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1507.
\textsuperscript{182} Id. at 54, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1461.
\textsuperscript{183} Id. The report explained:

Federal administration of the leasing program and Federal regulation of offshore oil and gas development have been essentially a closed process involving the Secretary of the Interior and the oil industry. . . . Decision-making for the development of offshore oil and gas must be opened so that the coastal and other States affected by offshore oil and gas activities may participate in the process on a regular basis and so that affected local communities and the public at large may have an opportunity to be heard. . . .

\textit{Id.}
In the case of making and administering OCS policy, direct, continuous participation has been largely limited to the petroleum industry and government. . . . Since government and industry have had almost identical policy objectives, policy has been made and administered with extraordinary ease. . . .

Within the Department itself, many of the Secretary's advisors are either recruited from industry or are persons who have spent a part of their careers in industry.

At the operational level, detailed OCS orders regulating OCS development have been and are the product of a process of industry-government cooperation.

. . . .

It is clear that the pattern of government-industry relationships which has been developed has produced a very closed system for making and administering OCS policies.184

Dissatisfaction with the OCS developmental framework in the OCSLA led to increased congressional oversight of the program. Congressional concern over the direction of the OCS leasing program led to the establishment of the House Ad Hoc Select Committee on the Outer Continental Shelf.185 The creation of this committee in the 94th Congress resulted from public concern about the direction the OCS leasing program was taking under the authority of the OCSLA. Furthermore, Congress was concerned that delay and parliamentary confusion would result from the multiple referrals required to amend the OCSLA, due to overlapping jurisdictions within the House committee structure. Bills to amend the OCSLA would be referred to three or more House committees. The Ad Hoc Select Committee would consolidate

184. D. KASH, I. WHITE, K. BERGEY, M. CHARTOCK, M. DEVINE, R. LEONARD, S. SALOMON, & H. YOUNG, ENERGY UNDER THE OCEANS: A TECHNOLOGY ASSESSMENT OF OUTER CONTINENTAL SHELF OIL AND GAS OPERATIONS 108 (1973) [hereinafter cited as ENERGY UNDER THE OCEANS], reproduced in H.R. REP. No. 590, supra note 35, at 103, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1509-10. The study also stated that the "government and the petroleum industry shared common goals for the development of OCS oil and gas. . . . The relationship was and continues to be close. In fact, many individuals move into and out of both government and industry. . . ." ENERGY UNDER THE OCEANS, supra at 103-04. See also H.R. REP. NO. 590, supra note 35, at 54, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1461 (suggesting coastal and other states affected by offshore oil and gas activities participate in the decisionmaking process for development of such activities).

185. In discussing needed changes in the OCS Lands Act of 1953, Senator Jackson stated that the OCSLA:

did not provide clear policy guidance to govern [OCS] leasing. The bill has never been amended, though times and conditions have changed drastically in the intervening years. These developments (improved technology, decline of onshore production, increased importance of OCS resources, increased environmental and coastal awareness, new intergovernmental cooperation efforts, and accelerated lease schedules) emphasize the need for legislation that reflects the changes of the last 20 years and the growing importance of this great national resource.

multiple committee jurisdictions and thus simplify and expedite consideration of the OCS legislation.\textsuperscript{186} This involvement, intended to provide comprehensive guidelines for secretarial action, culminated in the 1978 amendments.

E. The Outer Continental Shelf Lands Act Amendments of 1978

The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA),\textsuperscript{187} the product of five years of congressional study,\textsuperscript{188} respond to four criticisms of the 1953 OCS Lands Act. The first criticism was directed at the leasing method. Consumer activists and political liberals claimed that the primary leasing method in use (cash bonus bidding with a fixed royalty) had not produced competitive results, that the federal government had not received fair market value for its leases, and that the major petroleum companies had enjoyed an unfair advantage in the lease-sale market because of the substantial amounts of capital required to successfully bid on OCS tracts. Second, land use planners wanted the federal government to increase significantly its economic planning role in respect to the development of OCS oil and gas resources. Third, there was a lack of specific mechanisms to meaningfully involve coastal states in OCS decisions.\textsuperscript{189} Finally, no provision of the OCSLA existed for coordination and compensation for injury to other users of the OCS. The OCSLA did not impose liability for the effects of oil pollution resulting from activities on the OCS. Therefore, private groups, such as fishermen whose use of the OCS conflicted with offshore energy development, wanted financial protection against the risk of loss which they might bear as a result of OCS energy development.


\textsuperscript{188} Krueger & Singer, \textit{supra} note 36, at 910.

\textsuperscript{189} Governors of coastal states argued that they should be given increased authority over decisions concerning the location, timing, and scope of OCS energy operations conducted in adjacent offshore waters.
These groups wanted economic impact or damage insurance funds in the event of another Santa Barbara-type incident, thereby avoiding litigation.190

The OCSLAA "is a comprehensive rewriting of the original 1953 OCS Act and involved substantial revision of existing practices and regulation."191 Thirteen important goals were identified, and each will be discussed briefly.192

1. National Policy for the Outer Continental Shelf

The OCSLAA declares that the OCS "is a vital national resource reserve held by the Federal Government for the public,


191. H.R. REP. NO. 1214, supra note 25, at 13. "With the exception of one limited amendment, the OCSLA remained untouched until 1978, although statutes were passed that applied to OCS areas and operations." Id. at 5.

192. The goals were:

(1) Declare a national policy for OCS development.
(2) Improve the provisions for lease administration.
(3)Require the submission by the lessee of exploration, development and production plans.
(4) Provide for the suspension or temporary prohibition of lease activities, or lease cancellation.
(5) Revise the bidding systems.
(6)Direct the Secretary of the Interior to prepare a five-year leasing plan.
(7) Provide coastal states with an increased role in federal OCS decisions.
(8) Provide for an OCS information program.
(9) Provide for safety standards, including the use of the best available and safest technology where economically achievable.
(10) Provide procedures for citizen suits to enforce provisions of the Act.
(11) Establish an Offshore Oil Spill Pollution Fund.
(12) Establish a Fishermen's Contingency Fund.
(13) Establish the Coastal Energy Impact Program to provide federal grants to impacted coastal states.

which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”

It expressly recognizes that in view of the impacts on the coastal zone from OCS development, the coastal states may require assistance in protecting their coastal zones and should participate in OCS policy and planning decisions.

The OCSLAA provides that the OCS program must be guided by five main policy objectives. These are: (1) rapid development of OCS petroleum resources; (2) balancing OCS energy development with protection of the environment; (3) insuring the public a fair return in exchange for development of the resources of the OCS; (4) preserving and maintaining free enterprise and competition among firms bidding for OCS oil and gas leases; and (5) providing coastal states with an opportunity to participate in policy and planning decisions relating to OCS development. These policies are intended “to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.”

2. Administration of the OCSLA and the Leasing Process

The discovery, development, and production of oil and gas from the OCS in the United States is performed by the private sector. Individual companies lease from the federal government the rights to perform these activities. Within the federal government primary responsibility for OCS supervision is given to the Secretary of the Interior. Within the Department of the Interior, the Bureau of Land Management (BLM) administered the leasing provisions of the OCSLAA and the United States Geological Survey (USGS) had the primary responsibility for overseeing the development of a tract once it had been leased.

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194. Id. at § 1332(4).
195. Id. at § 1802(2-6), § 1332(4).
196. Id. at § 1802(1).
197. Id. at §§ 1331(b), 1334(a), 1337(a), 1344.

The BLM: (a) received tract nominations and selected tracts to be included in a lease sale; (b) prepared an environmental impact statement for each sale; (c) pre-
On January 19, 1982, former Interior Secretary Watt established the Mineral Management Service (MMS).\(^{199}\) One of its purposes was to manage all OCS activities, supervision of which, before the consolidation, was scattered throughout the Interior Department.\(^{200}\) Watt explained that moving all OCS activities into the new MMS would:

1. Establish accountability to the secretarial and congressional (OCS) oversight committees.
2. Save costs by avoiding duplication of effort and overlapping functions.
3. Enable [the] Interior [Department], through a more efficient leasing program, to more effectively balance protection of the marine and coastal environments with developmental and security needs of the nation.\(^{201}\)

In addition to reorganizing the Interior Department’s administration of the OCS program, Secretary Watt approved proposals to streamline the pre-sale planning process. These changes in the OCS leasing system were designed to reduce the planning time of sales, increase the amount of acreage offered in each sale, permit early entry into OCS areas with high energy potential, and utilize market forces to select areas for offshore leasing and

pared an economic, engineering, and geological evaluation of tracts to be sold; (d) received the bids and determined whether the leases should be awarded to the highest bidders on individual tracts; (e) received revenues from lease sales; and (f) granted rights-of-way for pipelines. \(\textit{Id.}\)

The USGS: (a) issued and enforced detailed regulations and special OCS orders and notices covering operational activities; (b) issued pre-lease geophysical and geological exploration permits; (c) approved post-lease exploration and development plans, including the issuing of permits for both exploratory and development drilling; and (d) collected royalties. \(\textit{Id.}\)

\(^{199}\) Office of the Secretary, United States Dep’t of the Interior, Secretarial Order Number 3071 (Jan. 19, 1982).


Secretarial Order No. 3071 carried out a recommendation of the Linowes Commission which Secretary Watt had previously appointed to study measures the federal government could take to save some of the money lost through poor management of oil and gas lease receipts. On May 10, 1982, the Secretary expanded MMS responsibilities by signing Secretarial Order No. 3071, Amendment No. 1, consolidating Interior’s OCS functions within the MMS. Thus, the MMS was the result of allegations of royalty mismanagement under the USGS’s conservation division. The organizational structure of the MMS closely resembles the United States Geological Survey’s conservation division. It has been reported that the “MMS was created ... by simply changing the name of the Geological Survey’s Conservation division to the MMS.” Jennrich, \textit{supra} at 67; Office of the Secretary, United States Department of the Interior, \textit{Outer Continental Shelf Fact Sheet 2} (May 28, 1983).

\(^{201}\) Jennrich, \textit{supra} note 200, at 67. For a discussion of conflicts that may arise between federal agencies in managing the OCS, see Finn, \textit{Interagency Relationships In Marine Resource Conflicts: Some Lessons From OCS Oil and Gas Leasing}, \textit{4 Harv. Envtl. L. Rev.} 359 (1980).
exploration.202

The streamlined leasing program initiated by Secretary Watt introduced three basic changes into the pre-lease planning process:203 pre-call activities, call for information, and area identification.204 Pre-call activities are activities that take place prior to the call for information. These activities include the preparation by the MMS of a geology report, environmental analysis, exploration report, and modeling studies concerning socio-economic effects, oil spills, and air quality. Under the new program, the early submission of geology, exploration and development reports, and the area-wide offering concept under the streamlined


203. The following is a brief description of the OCS leasing process under the traditional procedures, and under the streamlined method:

Under the traditional procedures, the Department issued a "call for nominations on large areas encompassing tens of millions of acres. Industry, States, and other concerned groups responded to the call by nominating specific tracts to be included or deleted from the lease sale. Using the industry nominations" and U.S. Geological Survey evaluations of potential hydrocarbon resources as a guide, DOI then narrowed the area to those tracts which appeared to be the most promising for lease. An environmental impact statement (EIS) was then prepared on these tracts. Additional tracts were deleted if the EIS showed them to be especially sensitive to environmental damage. USGS then calculated a value of the resources in each tract. The tracts remaining after this extensive narrowing process were then offered for lease.

Under the Secretary's streamlining changes, the call for nominations will be replaced by a call for information on an entire planning area ranging from 6 million to 133 million acres. Industry will define its areas of interest in the call for information. An environmental impact statement will then be prepared on the entire planning area. The method of resource evaluation will be changed, and the evaluations will be performed after the sale rather than before. The EIS will be published at the same time as the proposed notice of sale, 4 months before the date of sale. The exact tracts to be leased will be announced in the final notice of sale, 1 month before the sale.

process will accelerate the eventual preparation of the final Environmental Impact Statement (EIS) by about twenty-two months.\textsuperscript{205}

The second major change involves an increase in private industry involvement during the early stages of the leasing process. Whereas in the past the Department of the Interior personnel made unilateral determinations as to the areas to be leased, the new process utilizes a call for information to be issued to the private sector inviting comments from potential bidders regarding desirable leasing areas.\textsuperscript{206} The Secretary wanted "the market and not the Government [to] decide which tracts are the most promising [for the discovery of oil and gas], and which merit a priority in terms of scarce U.S. investment dollars."\textsuperscript{207} The petroleum in-

\textsuperscript{205} Final EIS Supp. on the Five-Year OCS Lease Schedule, supra note 204, at 22-29; Collignon, Outer Continental Shelf Oil, Gas Information Program: Gulf of Mexico Index, Dec. 1980-Aug. 1982 20-21.

\textsuperscript{206} Final EIS Supp. on the Five-Year OCS Lease Schedule, supra note 204, at 19; Collignon, supra note 205, at 21-22. For a description of the "call for nominations" process used under the traditional leasing procedures, see supra note 200.

\textsuperscript{207} Senate Hearings on the Five-Year OCS Leasing Plan, supra note 3, at 14, 15 (statement of Interior Secretary James G. Watt). The rationale for area-wide offerings is as follows:

(1) Significant domestic energy resources are believed to be located on the OCS, but the precise quantities and locations are unknown because promising frontier areas have not been explored thoroughly.

(2) Different geologists develop different interpretive views on the probable location of oil and gas in any one planning area.

(3) The best way to accelerate discovery of significant oil and gas deposits is to encourage companies to pursue unique and diverse exploration strategies based on these different views.

(4) In the [past] process the Federal government makes judgements [sic] about which tracts are or are not likely to be bid on. The streamlined process will allow companies to concentrate their efforts on tracts they consider most promising, unless those tracts have been deleted for other reasons through the pre-sale planning process.

(5) The diverse exploration strategies which will be tested under the streamlined process are necessary in order to fully test an area. Only a small percentage of a planning area can be expected to contain economically producible resources and it would probably slow the geologic delineation of an area if small portions of it are made available on a piecemeal basis.

Final EIS Supp. on the Five-Year OCS Lease Schedule, supra note 204, at 23.

The history of the search for hydrocarbons contains numerous examples of years of fruitless drilling in a region, followed by a successful commercial discovery, introducing an era of continued drilling success. Prudhoe Bay in Alaska, the Hibernia field in the Canadian Atlantic, and the North Sea are all examples of this drilling scenario. The Interior Department believes that by broadening the range of possibilities from which industry can select to drill, it will expedite the discovery of commercial deposits of oil and gas in the OCS. \textit{Id.} Secretary Watt maintained that the streamlined leasing process "will attract many competitors who will invest millions and billions of dollars in drilling operations that will prove successful in delivering oil and gas to American consumers." Senate Hearings on the Five-Year OCS Leasing Plan, supra note 3, at 12 (statement of Interior Secretary James G. Watt).
dustry supports replacing the call for nominations with a call for information, and maintains that "this broader scale evaluation of a region is the most significant aspect of the [revised OCS] program."\(^\text{208}\)

The third major change in the pre-lease planning period is the substitution of area identification for the tentative tract selection process used previously. Area identification formally announces the area on which the EIS analysis will be focused, and the area which will eventually be considered for leasing. Unlike the tentative tract selection process which focused its EIS analysis on specific individual tracts, the area identification process will prepare an EIS for the entire planning area.\(^\text{209}\)

3. Exploration, Development, and Production Plans by the Lessee

Prior to commencing exploration operations under an oil and gas lease, the lessee submits an exploration plan to the Secretary of the Interior for approval.\(^\text{210}\) The Secretary must approve the exploration plan within thirty days of its submission unless the proposed activity "would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral... to the national security or defense, or to the marine, coastal, or human environment," and the proposed activity cannot be modified to avoid these impacts.\(^\text{211}\) In addition to the exploration plan, accompanying environmental reports must be submitted.\(^\text{212}\) An assessment of the expected direct effects on the...
onshore and offshore environments is also made.213

Before development and production activities can begin under an oil and gas lease in any area of the OCS other than the Gulf of Mexico,214 the lessee must submit a development and production plan and an environmental report to the Secretary.215 The development and production plan is accompanied by a statement describing onshore facilities and operations other than those on the OCS, proposed by the lessee to be used in the development and production of oil and gas from the lease area.216

employed; (3) boat and aircraft traffic patterns and the probable location of onshore transportation terminals; (4) the quantity and composition of wastes and pollutants likely to be generated by exploration operation; (5) major supplies, services, and resources needed for implementation of the exploration plan; and (6) environmentally sensitive or potentially hazardous areas, including archaeological and cultural sites. 30 C.F.R. § 250.34-3(a)(1) (1982).

213. *Id.* at § 250.34-3(a)(1)(ii). The exploration plan and environmental report must be accompanied by a certificate of coastal zone consistency wherever the activities described would significantly affect land and water uses in the coastal zone of a state which has developed an approved coastal zone management program. Any lessee conducting activities in their own leased area must do so in accordance with an approved exploration plan and environmental report. In addition to an approved exploration plan and environmental report, lessees must obtain a permit prior to exploratory drilling. 43 U.S.C. § 1340(c)(1),(2), (d), (e)(2) (Supp. V 1981); 30 C.F.R. §§ 250.34-1(a)(1), 250.34-1(a)(6)(ii), 250.34-3(a)(1)(iii), 250.36, (1982); 15 C.F.R. §§ 930.70-930.86 (1982).

214. Congress determined that it was inappropriate to require the submission of development and production plans in non-frontier areas, such as the Gulf of Mexico, which had already undergone substantial OCS activity, unless the Secretary were to find that a plan was in the public interest. H.R. REP. No. 590, supra note 35, at 165, *reprinted* in 1978 U.S. CODE CONG. & AD. NEWS, at 1571.

215. 43 U.S.C. § 1351(a)(1) (Supp. V 1981). The development and production plan provides information on the nature and extent of the proposed development, including: (1) the specific work to be performed; (2) a description of drilling vessels, platforms, pipelines, or other facilities and operations located on the OCS to be directly related to the proposed development and the labor, material, and energy requirements associated with the facilities and operations; (3) the location of each well; (4) current interpretations of all available relevant geological and geophysical data; (5) a description of environmental safeguards and safety standards; (6) a time schedule of development and production activities; and (7) such other relevant information as the Secretary may require. 43 U.S.C. at § 1351(c); and 30 C.F.R. § 250.34-2(a)(1) (1982). The environmental report includes a description of: (1) the location, type, and size of offshore and onshore operations; (2) the requirements for land, labor, material, and energy for the operations; (3) a schedule of the onshore and nearshore development activities; (4) any environmental monitoring systems proposed for use by the lessee; (5) pollution prevention contingency plans and cleanup equipment; (6) the existing biological, physical, and human environment with an emphasis placed on those environmental values that may be affected by the proposed development; and (7) an air quality analysis. An assessment of the direct effects of implementation of the plan on the onshore and offshore activities is also included. 30 C.F.R. §§ 250.34-3(b)(1)(i)-(iii), 34-3(b)(4)(ii), 250.57 (1982).

The Secretary may approve, disapprove, or require modification of the proposed production and development plan. The Secretary may disapprove a plan only if: (1) a lessee fails to demonstrate that he can comply with the requirements of applicable federal law; (2) a plan cannot be modified so as to be, to the maximum extent possible, consistent with approved coastal zone management programs of coastal states; (3) operations threaten national security or national defense; or (4) the plan would probably cause serious harm to an exceptional marine or coastal environment.\(^{217}\)

4. Suspension or Temporary Prohibition of Lease Activities and Lease Cancellation

Suspension can occur at the request of the lessee to facilitate proper development of a lease, to allow for the construction or negotiation for use of transportation facilities or, more generally, to further the national interest.\(^{218}\) The intention of this provision is to provide for suspension so as to allow, for example, unitized exploration or development, common pipeline placement, or safe delivery by tankers.\(^{219}\)

Suspension is also permitted without any request by, and even over the objection of the lessee, if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, or mineral deposits of the environment.\(^{220}\) Suspension may also occur where the lessee fails to comply with a provision either of the Act, of the lease, or of the regulations.\(^{221}\) The lessee can seek review of any such suspension through a proceeding in a United States district court.\(^{222}\)

The Secretary is authorized to cancel any lease or permit at any


\(^{222}\) 43 U.S.C. § 1349(b)(1)(B) (Supp. V 1981). As the reason for the suspension is usually not the fault of the lessee, any permit or lease affected by a suspension or temporary prohibition is to be extended for the period of such suspension or prohibition. However, if a suspension is the result of gross negligence or willful violation of the terms of a lease or permit or of applicable regulations, no such extension is permitted. Id. at § 1334(a)(1)(B).
time for environmental reasons, for improper activities, or noncompliance by a lessee or permittee. An environmental cancellation of a lease or permit is usually without any fault by the lessee or permittee and cannot occur until the operation under the lease has been under continuous suspension or temporary prohibition by the Secretary, with due extension of the term of the lease for a period of five years or, upon the request of the lessee, for a lesser period of time. Thus an environmental cancellation is a classic balancing of the harm or damage with the advantages of continued activity over a designated period of time.

While a lease may also be cancelled for improper activities or noncompliance, if the lease is a producing lease, such cancellation must be by proceeding in an appropriate United States district court. A nonproducing lease, however, may be cancelled by the Secretary, subject to judicial review, if noncompliance continues for thirty days after a mailing of notice to the lessee of the improper activities. A lease cancellation for noncompliance or improper activities by the lessee would ordinarily preclude compensation to a lease holder.

5. Revised Bidding Systems

The OCSLAA authorizes the Secretary of the Interior to conduct a competitive bid lease sale. The Department has trad...
tionally leased OCS lands for oil and gas development under a bonus bid, fixed royalty rate bidding system. Under this system, companies submit cash bids, commonly called bonuses, for the right to explore and develop OCS tracts. These bonuses are paid before exploration and are not refundable. If production should occur, companies pay the federal government a fixed royalty—traditionally 16 2/3% of the value of oil and gas produced. Under this system, whoever puts up the most “front-end” money is awarded the lease. The advantages of the traditional cash bonus bidding system are clear: (1) it is easy to administer, because leases are awarded on the basis of the total amount of dollars offered; (2) it provides an incentive for early development and is popular with industry; and (3) it affords the government a secure, early return of revenue whether or not petroleum is discovered.

However, exclusive use of the cash bonus bidding method also has disadvantages. First, it limits participation and competition in OCS sales because of the large up-front bonus money needed to obtain a lease. Second, the return to the federal government is fixed no matter how much petroleum is eventually produced from the tract. Therefore, the OCSLAA was designed to reduce the front-end cash bonus, to make it easier for smaller oil companies to enter the OCS development, and to increase the government’s return on actual production of petroleum.

To achieve these goals, the OCSLA was amended to authorize new bidding systems while retaining the competitive, sealed bidding procedures and bonus and royalty bids. Bidding systems

the bids received. After the bid opening, the MMS/OCS regional office conducts a review of the bids to determine which is the highest valid bid. Id. For discussion on competitive bidding for offshore oil and gas leases, see A. Smiley, Competitive Bidding Under Uncertainty: The Case of Offshore Oil (1979); Gilley & Karels, The Competitive Effect in Bonus Bidding: New Evidence, 12 Bell. J. Econ. 637 (1981).


other than front-end bonus bids are to be applied to not less than twenty-percent and not more than sixty-percent of the total area offered for leasing each year during the five-year period beginning on the date of enactment of the OCSLAA, unless the Secretary determines that the requirements are inconsistent with the purposes and policies of the Act. In this fashion, the OCSLAA was seeking to promote four economic goals to guide OCS leasing policy: (1) economic efficiency; (2) competition among oil companies; (3) securing a fair rate of return on the disposition of OCS resources; and (4) administrative efficiency in administering the leasing system.

6. Five-Year Leasing Program

One significant section of the OCSLAA directs the Secretary of the Interior to weigh environmental and other risks against energy potential in determining how, when, and where OCS land should be made available. To implement the policies of the OCSLAA, the Secretary is to prepare, approve, and maintain a five-year leasing program, to review it at least every year, and to review and reapprove it as appropriate. "The leasing program shall consist of a schedule of proposed lease sales indicating . . . the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval."

Management of the OCS leasing program is to be a balance of the economic, social, and environmental impacts of oil and gas activities. In determining the timing and location of future oil and gas operations in the various geographic regions, the leasing program must consider the existing characteristics of the regions, the need to share developmental benefits and environmental risks among the various regions, the location of these regions with respect to the needs of the various regional energy markets, the locations of the regions with respect to other uses of the sea and seabed, the interest of oil and gas developers in a particular off-

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236. These sections, see S. McDonald, The Leasing of Federal Lands for Fossil Fuels Production 95-120 (1979); McDonald, supra note 233. For a discussion of the federal energy leasing policy, see McDonald, Federal Energy Resource Leasing Policy, 18 NAT. RESOURCES J. 747 (1978).
238. Id. § 1344(a)(1).
shores, the environmental nature and marine productivity of the various OCS areas, and relevant environmental or predictive information concerning the different OCS areas. In addition, the Secretary is to consider the views of affected coastal states as to any relevant laws or policies which have been specifically identified by the Governors of such states. The selection, timing, and location of leasing areas must, to the maximum extent possible, maintain a proper balance between the potential for environmental damages, petroleum discovery, and adverse impact on the coastal zone. Finally, leasing activities must assure receipt of fair market value for the tracts leased and the permits granted by the Federal Government.

7. Coordination and Consultation with Affected States and Local Governments

As previously noted, the OCSLA provided an open-ended grant of authority to the Secretary to conduct leasing on the OCS to the exclusion of the coastal state and local governments. One assessment of the process noted:

[In the case of OCS development, States and localities find themselves limited to reacting to Federal decisions which set in motion chains of events that can affect population levels, employment patterns, requirements for State and local expenditures for public facilities and services, and social patterns. With key OCS decisions being made at the Federal level, States can only approve or disapprove location of refineries, platform construction sites, and service bases, or react favorably or unfavorably to general oil company efforts to build OCS-support facilities. They cannot participate in the process which leads to such decisions. Their only option is to try to exercise their legal rights to choose whether or not to approve OCS-related facilities after the fact of Federal decisions, oil company investment, and actual oil discoveries.]

This authority was based on the assumption that offshore production would be a relatively small supplement to the nation's onshore production.
This situation led to demands by coastal states for more meaningful participation in offshore leasing policy decisions. Although such demands were ignored for many years, in 1975 the Interior Department established an OCS Advisory Board composed of designated state representatives. Its function, however, was limited to overseeing offshore environmental monitoring programs and the board quickly passed a resolution in 1977 declaring the need for greater state participation in the OCS process.244

In response to the concern for state and local input, the OCSLAA included a section which provided that any governor of an affected coastal state may make specific recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or on a proposed development and production plan within sixty days after notice of a proposed lease sale or after receipt of a development and production plan.245 The Secretary shall accept such recommendations if he determines that they provide a reasonable balance between the national interest and the well-being of the citizens of the affected states. The determination of the national interest is to be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the

246. Id. at § 1345(b).
findings, purposes, and policies of the Act. Any rejection by the Secretary of a governor's recommendation is final and is not, by itself, a basis for invalidating a proposed lease sale or a proposed development and production plan.

A similar procedure has been combined with the requirements of the National Environmental Policy Act of 1969 (NEPA) to ensure state and local government participation prior to final approval of development and production plans. Ordinarily, approval of each development and production plan submitted by lessees will not be a "major federal action" mandating the preparation of an EIS. However, the OCSLAA requires the Secretary to declare the approval of a development and production plan to be a major federal action mandating the preparation of an EIS at least once in each frontier region of the OCS. When approval of a development and production plan is not found to be a major federal action by the Secretary, the governors of affected states and interested citizens may submit comments and recommendations.

The Secretary is also authorized by OCSLAA to enter into cooperative agreements with affected states. Such agreements may provide for the sharing of information and joint utilization of expertise in order to facilitate permit procedures, joint planning and review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable federal and state laws, regulations, and stipulations relevant to OCS operations.

8. OCS Information Programs

To provide the Secretary with sufficient environmental and exploratory information to make informed decisions about OCS development, the OCSLAA established an Environmental Studies Program and an OCS Oil and Gas Information Program. The Environmental Studies Program, referred to as baseline and mon-

247. Id. at § 1345(c).
248. Id. at § 1345(d).
249. Id. at § 1351(a)(3).
250. Id. at § 1351(e)-(f).
251. Id. at § 1351(g).
252. Id. at § 1345(e).
253. Id. at § 1345(e).
254. Id. at § 1352. For a discussion of the OCS information programs, see Comment, The Outer Continental Shelf: Bridging the Information Gap Through Regulation, supra note 190.
itoring studies, develops information concerning the environment in an area to be leased, which is analyzed and then used as a basis to monitor effects. If an area or region is to be included in a lease sale, a study is to be undertaken to establish baseline information concerning the status of the environment of the OCS area involved and of the coastal areas which may be affected by exploration, development, and production in that area. 255 The baseline studies must include predictions of possible impact on the marine environment resulting from oil spills, by-products of drilling activities, the laying of pipelines on the ocean floor, and the impact of offshore development on affected onshore coastal areas. 256 Monitoring studies continue during OCS exploration, development, and production to monitor changes in the OCS environment by providing time-series data trend information which can be compared with the original baseline data. 257

The OCS Oil and Gas Information Program complements the Environmental Studies Program by requiring lessees or permittees conducting exploration for oil and gas to provide the Secretary with access to all data and information obtained from such activities. 258 The Secretary must make available to the affected coastal states, and upon request to any affected local government, a summary of data designed to assist them in planning for the onshore impacts of possible OCS development. This summary report shall include estimates of: (1) the oil and gas reserves in OCS areas leased or to be leased; (2) the projected size and timing of development; (3) the location of pipelines; and (4) the general location and nature of onshore facilities. 259

The disclosure provisions of the Oil and Gas Information Program help assure that the federal government receives fair market value for the submerged lands leased, and assists the Secretary in balancing the benefits of production in a specific area of the OCS against the possible environmental consequences. 260 Furthermore, the Program enables the Secretary to conduct a continuing investigation of the availability of the oil and gas resources on the OCS. 261 The Program also makes energy informa-

257. Id. at § 1346(b). For a discussion of baseline and monitoring studies as a technique in meeting management needs associated with the development of OCS lands, see Burroughs, OCS Oil and Gas: Relationships Between Resource Management and Environmental Research, 9 COASTAL ZONE MGMT. J. 77 (1981).
259. Id. at § 1352(b)(2).
260. Id. at § 1352(b)(1).
261. Id. at § 1865(c).
tion available to the Department of the Interior, as well as other federal agencies.\textsuperscript{262}

Congress was concerned that they relied too heavily on unverified information from industry sources in determining the availability of petroleum resources on the OCS. The investigation is to be made independently by individuals outside the industry and is to include an independent evaluation of industry and trade association data and a collection of data from other federal, state, and local agencies. The Secretary of the Interior is to evaluate this data and make an independent estimate of present and potential OCS resources and the effect of these estimates on the energy requirements of industry, commerce, and the national defense. In order to provide for a proper investigation, the Secretary must develop standardized objective criteria for comparison purposes.\textsuperscript{263}

9. Safety Standards and Enforcement

The OCSLAA recognized the need to provide for safe operations on the OCS. The OCSLAA makes it an explicit policy that:

\begin{quote}
operations in the Outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.\textsuperscript{264}
\end{quote}

\textsuperscript{262} Id. at \$ 1865(a). The investigation conducted pursuant to this section was the result of the congressional finding that:

1. there is a serious lack of adequate basic energy information available to the Congress and the Secretary of the Interior with respect to the availability of oil and natural gas from the Outer Continental Shelf;
2. there is currently an urgent need for such information;
3. the existing collection of information by Federal departments and agencies relevant to the determination of the availability of such oil and natural gas is uncoordinated, is jurisdictionally limited in scope, and relies too heavily on unverified information from industry sources;
4. adequate, reliable, and comprehensive information with respect to the availability of such oil and natural gas is essential to the national security of the United States; and
5. this lack of adequate reserve data requires a reexamination of past data as well as the acquisition of adequate current data.

\textsuperscript{263} Id. at \$ 1865(a). The purpose of this investigation is to study the present and potential OCS resources, based on verified, independent information, so as to enable rational decision making by the Secretary of the Interior and the Congress as to how to meet possible energy emergencies, and as to the establishment of energy pricing and conservation policies. Id. at \$ 1865(b).

\textsuperscript{264} Id. at \$ 1332(6).

The world's largest offshore oil rig, the Ocean Ranger, collapsed in a severe
On all new drilling operations, the best available and safest technology economically achievable is required. On existing facilities, the safest technology available is required wherever practicable.265

In determining whether and when to require the use of the safest technology available, the Secretary is charged with balancing the increase in safety against any undue economic hardship on the lessee or permittee. The existence of an undue economic hardship is determined by weighing the incremental benefits against the incremental costs. If the incremental benefits are clearly insufficient when compared to the incremental costs, the new technique, procedure, or equipment is not to be required.266

10. Citizens’ Suits and Judicial Review

The OCSLAA includes procedures by which concerned citizens and governmental officials can participate in the enforcement of the Act. Any person having a valid legal interest, which is or may be adversely affected, has the right to commence a civil action on his own behalf to compel compliance with the Act or regulations promulgated thereunder. The action may be brought against any person, including the United States, and any government agency for alleged violation of the Act.267 The term “valid legal interest,” which confers standing to sue, applies to those who have an economic interest, those who have suffered or will probably suffer a tortious injury, and those who may have a definable aesthetic or environmental interest.268

The OCSLAA provides a different procedure for challenges to certain decisions of the Secretary of the Interior. Congress noted that review of the five-year leasing schedule would involve consid-
eration of various regional interests and problems; determination of the propriety of the leasing program would necessitate balancing the needs and problems of regional areas as well as those of the federal government. In order to provide for consolidated proceedings, judicial review of the leasing schedule is conducted only in the United States court of appeals for the District of Columbia. In contrast, review of an exploration plan or a development and production plan would be in the United States court of appeals for a circuit in which an affected state is located, closer to the area for which the plan was submitted. Suits concerning actions by the Secretary may be brought only by a person who: (1) participated in the administrative proceedings related to the action; (2) is adversely affected or aggrieved by the action; (3) filed a petition for review of the Secretary's action within sixty days after the date of such action; and (4) promptly transmitted copies of the petition to the Secretary and the Attorney General.

11. Offshore Oil Pollution Compensation Fund

The risk of oil pollution can be expected to increase as OCS leasing activity accelerates. Congress, therefore, provided in the OCSLAA for an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of OCS development and for any damage to public or private interests caused by such spills or discharges.

The Offshore Oil Pollution Compensation Fund was established in an amount not to exceed $200 million to be administered by the Secretaries of Transportation and Treasury. Injured parties may assert claims for two types of economic loss arising out of or directly resulting from oil pollution—removal costs and damages.


271. Id. at § 1349(c)(3).


273. 43 U.S.C. § 1812(a) (Supp. V 1981). The fund is financed by the imposition of a fee of three cents per barrel on all oil produced from the OCS and by revenue obtained through fines, penalties, and reimbursements. Id. at § 1812(b), (d)(1).

274. Id. at § 1813(a). Claims for damages include injury to real or personal property or natural resources; the loss of profits or impairment of earning capacity.
While there are limitations placed upon the claims, the Compensation Fund in effect imposes strict liability upon the owners and operators of vessels (other than public vessels) or offshore facilities for all types of losses caused by oil pollution. The amount of their liability, however, is limited except when the incident causing the oil pollution is the result of willful misconduct, gross negligence, or the violation of safety standards of the federal government. Notwithstanding these limitations, an owner or operator of an offshore facility or vessel from which an oil discharge occurs will be liable for all costs of removal incurred by any federal, state, or local governmental official or agency.

To ensure government compensation, OCSLAA requires owners or operators of offshore facilities and vessels to demonstrate adequate financial responsibility to cover the liability requirements of the Act. Any vessel which fails to comply with the financial responsibility requirement may be denied entry to any United States port or place, or may be detained at any United States port.

due to injury to real or personal property or natural resources; and loss of tax revenue for a period of one year due to injury to real or personal property. Id. at § 1813(a)(2).

275. Id. at § 1813(a)-1813(c). Any resident of the United States, the federal government, a state government, or political subdivision may assert a claim for removal costs, injury to real or personal property, and for loss of use of real or personal property or natural resources. Further, any of the above parties which derive at least twenty-five percent of their earnings from activities which utilized damaged property or natural resources may assert a claim for loss of profits or impairment of earning capacity from injury to that property or those natural resources. However, only the President, as trustee for OCS resources, and state governments may assert a claim for injury to natural resources. The federal government and any state or political subdivision thereof may assert a claim for loss of tax revenues for a period of one year due to injury to real or personal property. Id.

276. Id. at § 1814(a).

277. When these exceptions do not apply, the liability of the owner or operator of a vessel is limited to the greater of $250,000 or $300 per gross ton. The limitation of liability does not apply when the owner or operator of a vessel fails or refuses to cooperate with federal officials in furtherance of cleanup activities. The owner or operator of an offshore facility is liable for the total cost of removal and cleanup, and an amount limited to $35 million for total damages. Id. at § 1814(b).

278. Id. at § 1814(d). An owner or operator of an offshore facility or vessel which is the source of oil pollution is not liable for any loss caused solely by an act of war, by an unanticipated natural disaster, or by the negligent or intentional act of the damaged party or any third party. Id. at § 1814(c).

279. Id. at § 1815(a)(1), (b). The owner or operator of any vessel or offshore facility which has the capacity for transporting, storing, transferring or otherwise handling more than one thousand barrels of oil at any one time, shall establish and maintain “evidence of financial responsibility” in the amount of $35 million. Evidence of such financial responsibility may be established by any one of four methods: (1) evidence of insurance; (2) guarantee; (3) surety bond; or (4) qualification as a self-insurer. Id. at § 1815(a)(1).

280. Id. at § 1814(a)(2).
The Offshore Oil Pollution Compensation Fund is an alternative to recovery of cleanup costs and actual damages through prolonged, expensive, and uncertain civil litigation. It is immediately available to governmental agencies to finance the removal of spilled oil and efforts to ameliorate a spill's impact on public property.281

12. The Fishermen's Contingency Fund

There has been substantial local opposition to OCS leasing in such frontier areas as the Georges' Bank off the Atlantic seaboard and Alaskan waters by fishermen who fear negative impacts resulting from OCS operations.282 Congress acknowledged these concerns and provided a mechanism to protect commercial fishermen against economic loss resulting from OCS leasing. OCSLAA established a Fishermen's Contingency Fund in an amount that may not exceed two million dollars to provide compensation for damages to commercial fishing gear and any resulting economic loss to commercial fishermen caused by OCS oil and gas development activities.283

The Fishermen's Contingency Fund was not designed to supplant liability where responsibility or fault could be shown. There are, therefore, restrictions on the payments of claims from the fund.284 Commercial fishermen suffering injury may file claims,

281. Id. at § 1812(c).
283. 43 U.S.C. § 1842(a)-1842(b) (Supp. V 1981). The fund is financed by the collection of an amount that shall not exceed $5,000 per year from the holders of OCS leases, permits, easements, and pipeline rights-of-way. Payments from the fund are to be made for demonstrated actual and consequential damages. Such damages include, but are not limited to, repair or replacement of the damaged fishing items and loss of profits due to the damage of fishing gear by materials, equipment, tools, containers, or other items associated with OCS activities. Id. at § 1842(c).
284. Id. at § 1843(c)(2).
which are presumed to be valid,\textsuperscript{285} for compensation. Such claims are then referred to hearing examiners.\textsuperscript{286} In the absence of a request for judicial review, a successful claimant is paid by the fund, and the Secretary of Commerce acquires, by subrogation, all rights of the claimant against any person found to be responsible for the damage.\textsuperscript{287}

13. Amendments to the Coastal Zone Management Act of 1972—The Formula Grant Sections of the Coastal Energy Impact Program

As previously noted, states do not receive revenue from federal OCS leasing, but experience the social, economic, and environmental impacts from OCS development. In response to coastal states' requests for a portion of the revenues which accrue to the federal government from the sale of leases on the OCS, Congress passed the Coastal Zone Management Act Amendments of 1976 (CZMAA).\textsuperscript{288} The CZMAA was enacted to provide federal financial assistance to those states experiencing coastal energy development.\textsuperscript{289}

The Coastal Energy Impact Program (CEIP), the principal provision of the CZMAA, is composed of three parts. Planning grants are provided to states if their coastal zones are likely to be affected by energy facilities or OCS energy activity. The eighty-percent grants are to be used by states to study and plan for any economic, social, or environmental consequences which result from the location or operation of energy facilities in the coastal zone, or to assist states in carrying out their responsibilities under the OCSLA.\textsuperscript{290} The second part of CEIP involves loans and

\textsuperscript{285} Id. at § 1844. A claim for damages filed pursuant to the provisions of the Fishermen's Contingency Fund is presumed valid if the claimant establishes that:

- (1) the commercial fishing vessel was being used for fishing and was located in an area affected by Outer Continental Shelf activities;
- (2) a report on the location of the material, equipment, tool, container, or other item which caused such damages and the nature of such damages was made within five days after the date on which such damages were discovered;
- (3) there was no record on nautical charts for the Notice to Mariners on the date such damages were sustained that such material, equipment, tool, container, or other item existed in such area; and
- (4) there was no proper surface marker or lighted buoy which was attached or closely anchored to such material, equipment, tool, container, or other item.

\textsuperscript{286} Id. at § 1845.

\textsuperscript{287} Id. at § 1845(h)(2).


\textsuperscript{289} 16 U.S.C. § 1456a (1982).

bond guarantees to coastal states to assist them in financing public facilities and public services required as a result of coastal energy activity. The third part, the provision amended by the OCSLAA, is the formula grant section. This provision provides grants to coastal states impacted by OCS energy activity.

To achieve a better balance in the distribution of formula funds between coastal states presently engaged in OCS development and frontier areas beginning to move into production, the formula grant section of the CZMAA was amended by the OCSLAA.

291. Id. at § 1456a(d).
292. Id. at § 1456a(b). Despite the enactment of the 1976 CZMAA, coastal states continue to seek federal funding to help finance the public facility, public service, and environmental protection requirements brought about by OCS energy operations. Coastal state representatives question the workability of the CEIP and, in particular, the OCS formula grants, identifying six major problems.

First, the authorization level for the grants was not adequate to provide sufficient funds to affected states. Second, the statutory provision that the grants are to be used to ameliorate the negative impacts from new or expanded OCS operations precludes the use of the money for present impacts occurring from past or ongoing OCS development in the Gulf of Mexico. The Gulf states argued that this provision penalized them for their cooperation in developing offshore petroleum resources. Third, the CEIP formula, which computes each state's share of the grant money, is confusing because it is based on the difficult concept of a state's "adjacency" to a lease sale. The North Atlantic states have relatively small coastlines but may be major support areas for OCS development. Therefore, these states argued that "adjacency" did not accurately determine actual impact for OCS explorations. Fourth, frontier states object to the lack of funds available for lease sales when a considerable amount of "start-up" costs would be incurred. Fifth, states object to the formula grant restriction that prohibits states from using grant money unless money in the loans and bond guarantee funds were unavailable. Finally, ambiguity in the disbursal method caused coastal states to conclude that the grants would not be transmitted to them promptly after the Secretary had made the calculations under the formula. H.R. REP. No. 590, supra note 35, at 194-95, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1600.

293. H.R. REP. No. 590, supra note 35, at 195-96, 295-97, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, at 1601-02, 1648-50. The amount of the grant allotted to an eligible coastal state is determined through a complicated formula which takes into account newly leased OCS acreage adjacent to the coastal state, the volume of oil and natural gas produced from the adjacent OCS, and the volume of oil and natural gas first landed in the coastal state. 16 U.S.C. § 1456a(b) (2) (1982); 15 C.F.R. § 931.125(c)(1) (1983). The term "first landed" in a particular coastal state refers to "oil and natural gas produced from the OCS that is first unloaded from tankers or barges within that state, or is brought to shore in pipelines that first touch non-submerged land and create a significant impact in that state." Id. at § 931.121(a). For calculations of formula grant allotments, OCS acreage and production shall be considered "adjacent" to a particular coastal state if "such acreage and production lies on that state's side of the extended lateral seaward boundaries of that state." Id. at § 931.80. Federal regulations governing the determination of lateral seaward boundaries for the purpose of calculating formula grant allotments under the CEIP are located at 15 C.F.R. §§ 931.80-85(1983). For a
The authorization level for formula grants was raised, with a 37 1/2% ceiling on the amount that any single state may obtain in a fiscal year, and a two percent minimum floor for each state which is adjacent to OCS acreage newly leased or involved with landing OCS oil and gas. A system for the proportional reduction in each state's allotment if sufficient funds are not available in any fiscal years was included, and the chronological order for disbursing grants to coastal states was clarified. The Reagan administration, however, has eliminated federal funding for CEIP and the CZMAA program.

14. OCSLAA in General

The OCSLAA is intended to achieve a balance between expedited development of OCS oil and gas resources and protection of the coastal environment. According to one commentator, however, "the amendments have one glaring deficiency—the failure to expedite OCS production." One study estimated that the OCSLAA could create additional delays of up to six years in developing OCS oil and gas resources. The minority views of Congress also expressed concern that certain provisions of the OCSLAA would add unnecessary, costly, and time-consuming steps to those now required to be taken before new production can be made available to the public.

F. The National Environmental Policy Act of 1969

national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. NEPA requires all agencies of the federal government to "identify and develop methods and procedures... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." To implement the duty to consider environmental values in administrative decision making, NEPA requires that all federal agencies prepare a detailed EIS for all proposed "major federal actions significantly affecting the quality of the human environments."

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303. The congressional purposes of NEPA are:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.


304. In order to carry out the policy set forth in NEPA, Congress placed the responsibility upon the federal government to use all practicable means to improve and coordinate federal plans, functions, programs, and resources to the end that the United States may:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id. at § 4331(b).


The Department of the Interior's procedures under NEPA include preparing an EIS and holding public hearings before the Secretary decides whether specific tracts should be issued with restrictions or stipulations.307 Therefore, an EIS is required at each of three stages in the OCS leasing process308 because the information necessary for a meaningful balance of environmental impacts against the benefits of OCS oil and gas development in a particular area is collected over a period of time. In the initial stage, an EIS is prepared to examine the proposed OCS five-year oil and gas leasing schedule. This EIS analyzes the environmental impacts estimated to result from the adoption of the five-year leasing schedule. It will not be repeated unless new federal policy toward OCS development is adopted.

The second EIS is prepared before each individual OCS lease sale. This EIS is general in scope, because it is not known where and in what volume petroleum resources may be located. Basic data are collected and analyzed which include the geology, climate, physical oceanography, biological environment, and natural phenomena unique to the particular area of the proposed sale.309 Mitigating measures, alternative proposals, the technology necessary for exploration, and possible onshore socioeconomic impacts are also described in this EIS.310

The third EIS is prepared prior to development and production of leased tracts within a particular area. The OCSLAA provides that the approval of a development plan in any new area or region is a major federal action within the meaning of NEPA and requires the preparation of an EIS. This EIS need not be prepared for each leased tract, but rather for each major new area where development and production is about to occur.311

To accommodate the streamlined leasing process and the new definition of sale area, the Interior Department has adopted a different approach to the preparation of environmental impact statements. Essentially it involves the tiering of NEPA documents.312

308. These stages were identified in Comment, The Outer Continental Shelf: Bridging the Information Gap Through Regulation, supra note 188, at 635-36.
312. Edwards, Reagan Administration Brings New Approach to Federal OCS
The EIS prepared for the first offering in a planning area will emphasize analysis rather than description, and will provide an assessment of expected cumulative effects of exploration and development activity that might occur within the entire planning area if all the petroleum resources in the planning area are developed. The NEPA document prepared for the second area-wide offering will update the EIS for the first offering. Additional information will include results of ongoing environmental studies and monitoring projects as well as data from any exploration activities that may have taken place.313

The NEPA process provides the federal policy-maker with sufficient information to consider the environmental consequences of a particular proposed action. NEPA procedures are intended to provide environmental information to public officials and concerned citizens before decisions are made and action is taken.314 The NEPA requirement of an EIS for OCS leasing will create significant delays because drafting an EIS usually takes from five to ten months,315 and court challenges to the sufficiency of the EIS cause further delays.316

Litigation has slowed the accelerated OCS leasing programs ini-

Tiering an EIS eliminates repetitive discussions of the same issues and focuses on the actual issues ripe for decision at each level of environmental review. Tiering is appropriate:

Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

40 C.F.R. §§ 1502.20, 1508.28 (1982).

313. OCS Oversight Hearings—Part 2, supra note 1, at 233 (statement of J. Robinson West, Assistant Secretary for Policy, Budget, and Administration, United States Dep't of the Interior); FINAL EIS SUPP. ON THE FIVE-YEAR OCS LEASE SCHEDULE, supra note 205, at 20.

314. 40 C.F.R. § 1500.1(b), (c) (1982).


tiated in the 1970's, affecting both the leasing of offshore lands and subsequent exploration and development activities. An examination of the major court actions brought against OCS leasing and development during the 1970's and 1980's reveals that the majority of cases involved NEPA challenges. Failure to comply with the OCSLA and its amendments was the second most cited offense, with challenges based on Coastal Zone Management Act requirements cited to a lesser degree. Some cases have been resolved quickly; others have gone on for two years. The fact that a particular sale or the program has been challenged produces uncertainty in the leasing program. However, court decisions have provided a certain amount of definition as to how the OCSLA and other statutes applicable to offshore activities are to be implemented.\(^{317}\)

G. The Coastal Zone Management Act of 1972

In the late 1960's there was a general recognition that the coastal areas of the United States represent some of our most valuable national assets. At the same time, the country became aware of the intense pressures being applied to the coastal zone,\(^{318}\) and the inability of local governments to cope with conflicting and competing coastal interests.\(^{319}\)

To achieve a rational balancing of competing pressures on

\(^{317}\) Comptroller General, United States General Accounting Office, Report to the Congress, Pitfalls in Interior's New Accelerated OCS Leasing 6-7 (EMD 82-86) (Dec. 18, 1981).


The uses of valuable coastal areas generate issues of intense State and local interest, but the effectiveness with which the resources of the coastal zone are used and protected often is a matter of national importance. Navigation and military uses of the coasts and waters offshore clearly are direct Federal responsibilities; economic development, recreation, and conservation interests are shared by the Federal Government and the States. Rapidly intensifying use of coastal areas already has outrun the capabilities of local governments to plan their orderly development and to resolve conflicts. The division of responsibilities among the several levels of government is unclear, and the knowledge and procedures for formulating sound decisions are lacking.

coastal resources, Congress passed the Coastal Zone Management Act (CZMA) in 1972. The CZMA was enacted to encourage and assist coastal states in developing and implementing management programs to preserve, protect, develop, and where possible, to restore or enhance the resources of our nation's coasts by the exercise of planning and control over activities occurring in their coastal zones.

The CZMA is a federal land and water use planning act which authorizes the use of federal resources, both technical and financial, to encourage and assist coastal states in the development and operation of comprehensive management programs for their coastal zones. While cooperation in the coastal zone management program is voluntary on the part of the states, the Act incorporates two incentives to encourage state participation.

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323. Rubin, The Role of the Coastal Zone Management Act of 1972 in the Devel-
First, two types of federal funding are made available to coastal states. The federal government will fund up to eighty percent of the cost of developing and administering a coastal zone management program. Federal grants are also available through the Coastal Energy Impact Program to assist coastal states in planning for and financing public facilities and public services required as a result of OCS energy activity. Second, the CZMA provides that once a state’s plan is approved by the Secretary of Commerce, federal activities that affect the state’s coastal zone must be consistent with the state’s approved coastal zone management plan.

The most significant part of the CZMA for OCS oil and gas purposes is the consistency requirement. The federal activities subject to the consistency provisions include: (1) activities conducted or supported by a federal agency and directly affecting the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal licenses or permits where the proposed activities will affect land or water in the coastal zone; (4) plans for the “exploration or development of, or production from, any area which has been leased under the [OCSLA]” that affects land or water in the coastal zone; and (5) federal programs which provide funding to state and local governments for projects which will affect the coastal zone.

The most important consistency provision governs exploration, development, or production plans. This provision provides that after approval of the state coastal zone management program, any person submitting an OCS exploration, development, or production plan...
tion plan to the Secretary of the Interior for approval must, with respect to the activities described in the exploration, development, or production plan and affecting the coast, certify that each activity complies with the state’s coastal management program. No federal licenses or permits required for any activity described in the exploration, development, or production plan may be granted until the state has satisfied itself that the activity is consistent. The state has six months in which to object to the certification or its concurrence is conclusively presumed. If the state objects to the activities described in the exploration, development, or production plan, the Secretary of Commerce may override the objection if each activity described in the plan is consistent with the objectives of the CZMA or is necessary in the interest of national security. If the state concurs or the Secretary of Commerce overrides the state’s objections to the proposed activities, then no further consistency determinations are required for any activity described in detail in the exploration, development, or production carried out in accordance with the plan. If a state’s objection is not overridden or activities are not conducted in accordance with the submitted plan, then a new or amended plan must be submitted to the Secretary of the Interior and the state has only three months in which to notify the Secretary of the Interior of its objections.

H. The Endangered Species Act of 1973

Congressional concern about rapidly deteriorating fish, wildlife, and plant habitats, and increasing numbers of species becoming extinct and threatened with extinction resulted in a series of legislative actions culminating in the enactment of the Endangered Species Act of 1973 (ESA). The ESA was enacted to provide a

334. 16 U.S.C. §§ 1531-1543 (1982). The ESA was the result of the congressional finding that:
   (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
   (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
   (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people.
For the legislative history of the Endangered Species Act, see S. REP. No. 307,
program for the protection of endangered and threatened species, and the conservation of the ecosystems on which endangered and threatened species depend. The primary purpose of the ESA "is to prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems." 

The principal substantive import of the ESA for OCS purposes is the requirement that the Secretary of the Interior insure that "agency action" is not likely to jeopardize the continued existence of an endangered or threatened species, or its critical habitat. A "consultation" process is outlined whereby the agency with jurisdiction over the endangered species issues to the Secretary of the Interior a "biological opinion" examining the nature and extent of the impact on that species by the proposed agency action. The "irreversible or irretrievable" commitment of resources is forbidden with respect to the agency action if the investment would foreclose reasonable and prudent alternative measures and violate the ESA.

The provisions of the ESA apply to OCSLA lease sales and all resulting activities conducted under the OCSLA. The ESA applies to major actions taken by the Secretary of the Interior after the lease sale is held. Therefore, any contract which the Secretary enters into (and any OCS oil and gas lease) which requires further action by the Secretary (approval of plans) will contain, as an implied term, a condition that the Secretary will not violate the ESA. Thus, if the Secretary determines that a lessee's OCS exploration or development and production plan will jeopardize an endangered or threatened species or its critical habitat, the

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335. The Act provides five criteria for determining whether a species is endangered or threatened: "(1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, sporting, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1) (1982).

336. Id. at § 1531(b)-(c).


339. Id. at § 1536(b).

340. Id. at § 1536(d).


342. 623 F.2d at 715.
proposal will not be allowed to proceed.343

I. The Marine Mammal Protection Act of 1972

The Marine Mammal Protection Act (MMPA)344 was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels.345 In passing the MMPA, Congress responded to the growing concern about the decline of certain marine mammal species,346 and recognized the important role that marine mammals play in the ecosystem as well as their economic, aesthetic, and recreational value.347 The MMPA established a moratorium on the taking of marine mammals unless the population of an animal is determined to be at its optimum sustainable level.348

The significant provision of the MMPA, as it relates to OCS oil and gas development, is the provision “that efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions.”349 Federal courts have interpreted this provision to apply to OCS lease activity. The federal government “must proceed with caution to ensure that agency action does not eventually violate the [MMPA].”350

The ESA, OCSLA, and the MMPA all authorize the Secretary of the Interior to monitor activities taking place under OCS leases on an ongoing basis and to suspend any such activity which jeopardizes the environment.351 The MMPA and ESA also require the Secretary to prevent harm to protected wildlife. The MMPA and the ESA forbid any person to "take" a marine mammal or endangered species of fish or wildlife from waters within the jurisdic-

346. Id. at § 1361(1).
347. Id. at § 1361(6).
348. Id. at § 1371.
349. Id. at § 1361(2).
tion of the United States.\textsuperscript{352}

Plaintiffs have also sought to enjoin OCS lease sales by arguing that a “taking” under the MMPA and the ESA would result from the leasing of certain offshore tracts. In \textit{California v. Watt},\textsuperscript{353} the State of California and the Natural Resources Defense Council requested injunctive relief enjoining the Department of the Interior from offering for competitive bidding in OCS lease sale No. 53 certain oil and gas leases on tracts located in the Santa Maria Basin, offshore California. Plaintiffs argued that an unlawful “taking” under the ESA and MMPA would result from the leasing of tracts in the northern Santa Maria Basin. The court rejected plaintiff’s ESA and MMPA argument, and concluded that Lease Sale No. 53 did not violate the taking prohibition of the ESA or the MMPA. The court reasoned: “Assuming \textit{arguendo} that the proposed leasing activities do constitute a threat to the continued survival of species protected by these statutes, such a threat would still not constitute a ‘taking’ under the statutes.”\textsuperscript{354}

However, in \textit{North Slope Borough v. Andrus},\textsuperscript{355} representatives of environmental organizations and native Alaskans brought suit to enjoin the Secretary of the Interior from carrying out an OCS lease sale off the north coast of Alaska in the Beaufort Sea. Plaintiffs argued that the lease sale violated the “taking” provisions of the ESA and the MMPA. They asserted that offshore petroleum development would threaten the existence of the Bowhead whale, an endangered species hunted by the Inupiat Eskimo. In the \textit{North Slope Borough} case, the court did conclude that the taking provisions of the ESA and the MMPA obliged the Secretary of the Interior to ensure that OCS lease activity did not become prejudicial to protected wildlife. The court held, however, that the Secretary had fulfilled the mandate of the ESA and MMPA and refused to enjoin the lease sale.\textsuperscript{356} If the lessee’s OCS operations become harmful to wildlife, the Secretary must sue to enjoin or prosecute for a “taking.”\textsuperscript{357}

\textbf{J. The Marine Protection, Research, and Sanctuaries Act}

The Marine Protection, Research, and Sanctuaries Act

\textsuperscript{354} \textit{Id.} at 1387-88.
\textsuperscript{355} 642 F.2d at 595 (1980).
\textsuperscript{356} \textit{Id.}
\textsuperscript{357} \textit{Id.}

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(MPRSA), passed in 1972,358 has influenced offshore oil and gas development by its control of two ocean activities. The MPRSA authorizes the Environmental Protection Agency (EPA) to regulate the dumping of all materials into ocean waters through establishment of a permit program for such ocean dumping.359 This would include any waste materials transported from an OCS drilling site to another ocean area for purposes of disposal.360 The Marine Sanctuaries Program was also established and is administered by the Department of Commerce’s National Oceanic and Atmospheric Administration.361 The Secretary of Commerce, with presidential approval, is authorized to designate areas of the ocean and certain other waters as marine sanctuaries for the purpose of “preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values.”

The most significant aspect of the MPRSA for OCS purposes is the authorization to designate portions of the OCS as marine sanctuaries which would give the Secretary of Commerce authority to issue and enforce regulations controlling activities within the sanctuary. The Secretary of Commerce “could exercise this power to exclude all drilling operation [within the sanctuary] and otherwise take steps to conserve and protect the natural resources of the region.”363 Environmental organizations, coastal

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360. OCS Oversight Hearings—Part I, supra note 6, at 248-49 (statement of R. Sarah Compton, Deputy Assistant Administrator, Office of Water Enforcement and Permits, Environmental Protection Agency).


363. Massachusetts v. Andrus, 594 F.2d 872, 884-85 (1st Cir. 1979). For example, the Key Largo Coral Reef off the coast of Florida was permanently withdrawn from OCS mineral leasing and designated a preserve by presidential proclamation issued on March 17, 1960. After MPRSA was enacted, the Key Largo Reef was designated a marine sanctuary. Comptroller General, United States General Accounting Office, Marine Sanctuaries Program Offers Environmental Protection and Benefits Other Laws Do Not 12-13 (CED 81-37) (Mar. 4, 1981). For an illustration of the types of activities prohibited within marine sanctuaries,
states, and native Alaskans have sought to enjoin OCS lease sales by relying upon MPRSA. Although federal courts have refused to enjoin the proposed sale of OCS oil and gas leases on MPRSA grounds, the courts have held that an EIS prepared in connection with such an OCS sale should discuss the possible applicability of the MPRSA. The EIS discussion of alternatives must include the possible management of the OCS region as a marine sanctuary. This would include focusing attention upon the question of whether or not there are any portions of the proposed OCS sale area that are so uniquely valuable that they should be identified for special protective status as a marine sanctuary.\textsuperscript{364} The marine sanctuaries program has also been used by the executive branch to prohibit offshore oil and gas development. The focus of the marine sanctuaries program was significantly changed during the Carter administration from a program whose purpose was to promote marine research to one utilized to restrict OCS petroleum development.\textsuperscript{365}

Although development of OCS petroleum resources is conducted pursuant to numerous federal laws, there are three major statutes which govern the development of OCS resources. The OCSLA delegates authority over the OCS to the Department of the Interior and prescribes the manner in which the Interior Department may develop OCS energy resources. The CZMA requires certain activities to be conducted consistent with state management programs developed under the CZMA and subjects other proposed activities to scrutiny by the affected coastal state before OCS lessees may proceed pursuant to permits from the Department of the Interior. Finally, NEPA requires federal agencies to evaluate the environmental consequences of a proposed action and to prepare an EIS before proceeding with the proposal.

\textbf{V. Conclusion}

This article has considered the natural conflict which arises when the federal government increases its efforts to lease acreage on the OCS for energy development. Although the nation as a whole reaps the benefits of increased production of domestic en-

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\textsuperscript{364} 594 F.2d 872, 884-86; 486 F. Supp. 332, 349.

energy sources, local interests may be subject to negative environmental and economic impacts as a result. The potential negative effects have led coastal states to seek a greater voice in federal OCS decisions. Several opportunities exist for local involvement in such decisions, but such involvement tends to delay the rate of exploitation which the federal government seeks.

Although the makers of national policy on OCS development have seen the participation of coastal zone states in the planning process as vital to its success, the Department of the Interior, under the auspices of former Secretary James Watt, determined that the national interest in rapid exploitation of OCS resources outweighed the coastal states' concerns.\textsuperscript{366} It is anticipated that neither Mr. Watt's resignation nor the appointment of William P. Clark to the Secretary of the Interior position will change this policy.\textsuperscript{367} While the development of the OCS has been the subject of recent legislation, it is apparent that the courts will be the final arbiters of preserving a delicate balance between the competing concerns of national and local interests.

\textbf{ADDENDUM}

\textit{The United States Supreme Court on January 11, 1984 announced its 5-4 decision interpreting the CZMA's requirements for state involvement in federal OCS lease sales. The Court held that the Department of the Interior's sales are not an activity directly affecting the coastal zone within the meaning of the CZMA and, therefore, a consistency review is not required before making such sales. Secretary of the Interior v. California, 52 U.S.L.W. 4063 (U.S. Jan. 10, 1984). Among other reasons the Court noted that Congress has distinguished between the sale of a lease and the later stages of exploration, development, and production where state input is required. While this new decision appears to be a victory for pro-development forces, only time will tell whether the announced intention of new Secretary of the Interior, William Clark, to reduce emphasis of OCS development will have a greater impact.}

\textsuperscript{366} See supra note 21.

FIGURE 1

THE CONTINENTAL MARGIN AND DEEP SEABED

- Shoreline
- 12 Mile territorial sea
- 200 Mile exclusive economic zone
- 200 meter isobath

SEA LEVEL

Continental SHELF SLOPE RISE

Continental Margin Abyssal Plain (Deep seabed)