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processes for dealing with land and water use decisions of more than local significance." 37/

The big question these general statements leave unanswered, of course, is the precise location of the line between state and federal jurisdiction.

Prior to the expansion of the territorial sea, the coastal states' seaward boundaries generally were coextensive with the seaward limit of the territorial sea -- i.e., three miles off shore. 38/ It accordingly made little or no practical difference whether Congress defined the line between state and federal jurisdiction in terms of state boundaries, three miles, or the territorial sea. For all intents and purposes, they were one and the same.

Now that the limit of the territorial sea no longer is coextensive with the coastal states' three mile boundaries, however, the precise statutory formulation employed by Congress takes on much greater significance. Where Congress has expressly defined state jurisdiction in terms of the territorial sea, a strong argument can be made that the extension of the territorial sea also extended state jurisdiction to twelve miles.

For example, Congress defined the "coastal zone" in the Coastal Zone Management Act as extending "seaward to the outer

37/ 16 U.S.C.A. § 1451(i) (1985).

38/ The two exceptions are off the Texas coast and Florida's Gulf of Mexico coast, where the boundaries are nine miles off shore. See n. 33 supra and accompanying text.

limit of the United States territorial sea." 39/ Under that Act, activities in the coastal zone must be consistent with the state's coastal management program; activities outside the coastal zone are subject to much less state control. Under the express terms of the Act, then, it would seem that the expansion of the territorial sea from three to twelve miles significantly expanded coastal states' jurisdiction under the Coastal Zone Management Act.

President Reagan clearly intended that the expansion of the territorial sea from three to twelve miles have no effect on domestic legal issues like the allocation of jurisdiction between the states and the federal government. The Proclamation expressly states that nothing in it "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." 40/ Some may think that this disclaimer puts an end to the matter, and that the proclamation simply could not have had any effect on domestic law.

The question, however, is not that simple. With respect to the Coastal Zone Management Act's definition of "coastal zone" in terms of the territorial sea, 41/ for example, the disclaimer in the Proclamation can be read two ways. First, it can be read as not modifying the express terms of the statute. In that case,

39/ 16 U.S.C.A. § 1453(1) (1985).

40/ Proclamation 5928, supra n. 1.

41/ 43 U.S.C.A. § 1453(1) (1985).

state authority therefore still extends to the seaward limit of the territorial sea -- which now simply happens to be twelve miles off shore and not three.

On the other hand, the disclaimer can be read as attempting to keep the limit of state authority as it was before the Proclamation was issued -- i.e., at three miles off shore. This, however, would require that it be read as amending the Act's definition of coastal zone, substituting a three mile limitation for the definition's reference to the territorial sea. Under the separation of powers doctrine, of course, the President has no constitutional power to amend Acts Congress; only Congress can do so. 42/

Prior to the issuance of the Proclamation, the United States Department of Justice recognized that there was a serious question in this regard. Although stating that "the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act (CZMA)," it concluded that "the effect of the Proclamation on the CZMA is not entirely free from doubt and that the effect of the expansion on other federal statutes raises complex questions." 43/ The Justice

42/ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (the President cannot make laws; "[t]he Constitution limits his functions in the lawmaking process to recommending laws he thinks wise and the vetoing of laws he thinks bad").

43/ Memorandum for Abraham D. Sofar, Legal Adviser, Department of State, from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice (October 4, 1988) at 2.

Department accordingly recommended that legislation be sought "to conclusively preclude" any determination that the Proclamation had an effect on the Coastal Zone Management Act or any other federal statute. 44/

In a somewhat more thorough analysis, the California Department of Justice reached a contrary conclusion: "regardless of the analysis used, the effect of the President's proclamation is to extend the seaward boundary of the federal coastal zone from three miles to twelve miles from the shoreline." 45/ The California analysis makes four points in support of its conclusion. The first point is that Congress was well aware that the seaward limit of the territorial sea could be altered, yet nonetheless chose that statutory formulation for delimiting the line between state and federal jurisdiction. Second, Congress was capable of limiting the seaward extent of the territorial sea for statutory purposes when it desired to do so, and in fact did so in the Federal Water Pollution Control Act Amendments of 1972, 46/ enacted the same year as the Coastal Zone Management Act. Third, the legislative history of the Coastal Zone Management Act indicates that Congress intended any extension of the territorial sea to extend the coastal zone as well. Finally, the

44/ Id. at 36.

45/ March 15, 1989 letter to Peter Douglas, Executive Director, California Coastal Commission, from John A. Saurenman, Deputy Attorney General, California Department of Justice, at 3.

46/ P.L. 92-500; see 33 U.S.C.A. § 1362(8) (1986).

structure and purpose of the Coastal Zone Management Act suggest that the seaward boundary of the coastal zone was not limited to three miles.

The point here is not to try to resolve the competing viewpoints expressed by attorneys for California and the United States. Instead, the simple reality is that there are serious and substantial legal questions regarding the effect of the extension of the territorial sea on the allocation of jurisdiction over ocean resources between the states and the federal government. 47/ Until these questions are answered, this jurisdictional uncertainty will

47/ There also are numerous other questions regarding the effect of the extension on domestic law. A Congressional Subcommittee was told that a computer search found "territorial sea" or "territorial waters" in a total of 151 separate sections of the United States Code and 218 sections of the Code of Federal Regulations. When combined with related terms such as "high seas," "navigable waters," "domestic voyages," and "waters under U.S. jurisdiction," the numbers are 392 and 614, respectively. Testimony of William N. Myhre, Hearing on the Presidential Proclamation Extending the United States Territorial Sea before the Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, 101st Cong., 1st Sess., March 21, 1989, cited in M. Cummisky, Expansion of the Territorial Sea: A Congressional Response, 3 ABA Law of the Sea Committee Newsletter 15, 18 n. 7 (Summer, 1989). The federal tax code alone uses the phrase "in the United States" more than 2,000 times. D. Slade, The New Twelve Mile Territorial Sea and Role of the Coastal States, 3 ABA Law of the Sea Committee Newsletter 23, 24 (Summer 1989). The Federal Aviation Administration has extended its domestic jurisdiction under the Federal Aviation Act of 1958, P.L. 85-726, 49 U.S.C. §§ 1301 et seq., from three to twelve miles off shore. See Applicability of Federal Aviation Regulations in the Airspace Overlying the Waters Between 3 and 12 Nautical Miles from the United States Coast, 54 Fed. Reg. 264 (January 4, 1989) (to be codified at 14 CFR Parts 71 and 91). While not necessarily implicating the allocation of jurisdiction between the states and the federal government, additional legal questions regarding the effect of the extension of the territorial sea on domestic law clearly exist.

complicate matters for everyone concerned with activities between three and twelve miles off shore.

III. Congress, and not the courts, should resolve these questions.

While legal questions regarding the effect of the extension of the territorial sea on the allocation of jurisdiction under federal statutes undoubtedly could be resolved through litigation in the courts, comprehensive Congressional resolution of these issues from the perspective of fundamental policy would be far better. Litigation in the courts is certainly available as an alternative, but it has several disadvantages.

To begin with, it is a lengthy and not very efficient process, 48/ leading to a substantial period of time during which activities between three and twelve miles would be conducted in an atmosphere of legal uncertainty.

In addition, the constitutional requirement that there be an actual case and controversy before the courts have jurisdiction 49/ requires both that there be an actual dispute as opposed to a hypothetical one, and that it be limited to the narrow specific question presented. The first consequence of this

48/ For example, the very narrow question whether a federal oil and gas lease sale on the outer continental shelf constitutes an action "directly affecting the coastal zone" under 16 U.S.C. § 1456(c)(1) such that it must be consistent with a state coastal management plan required almost three years to resolve. Secretary of Interior v. California, 464 U.S. 312, 319-20 (1984).

49/ United States Constitution, art. III, sec. 2; see generally The Constitution of the United States, Sen. Doc. No. 92-82, 92nd Cong., 2nd Sess. 630-669 (1972).

requirement is that questions cannot be resolved judicially until there is a genuine conflict -- i.e., long after an answer is needed from the standpoint of advance planning. Another consequence is that questions cannot be resolved comprehensively because the courts are limited to the consideration of only the precise statutory question presented. In other words, the litigation alternative would require separate and discreet adjudication of the many statutes involved, precluding any kind of comprehensive consideration from the standpoint of overall policy.

Litigation, moreover, necessarily would focus on jurisdictional schemes enacted while the territorial sea was virtually coextensive with state boundaries. Although Congress may have contemplated that the coastal zone for purposes of the Coastal Zone Management Act would be extended by an extension of the territorial sea, 50/ it is certainly possible (if not probable) that Congress in some cases employed the territorial sea formulation in federal statutes without considering the possibility that it might be extended. While courts may be competent to construe those statutes in light of the new reality of an extended territorial sea, 51/ they clearly would be performing the legislative function of making law, and not the judicial function of interpreting it, in the absence of any indication that Congress

50/ See March 15, 1989 letter to Peter Douglas, supra n. 45.

51/ 2A J. Singer, Sutherland Statutory Construction (Sands 4th Ed.) § 49.02 (1984).

intended one result or another.

Finally, court decisions do not allow full participation by all interested parties, and are subject to change without the opportunities for public involvement which the Congressional legislative process affords. Only the actual parties to a controversy may participate fully in litigation. And while the principle of stare decisis -- literally, "to stand by decided matters" 52/ -- causes courts to think carefully before overruling earlier decisions, they nonetheless will do so in appropriate cases. 53/

Congressional action to address these questions, on the other hand, would allow them to be resolved on the basis of fundamental policy -- i.e., under our federal system, in which areas should the states have jurisdiction and in which areas should

52/ Webster's Third New International Dictionary 2226 (1976).

53/ For a discussion of four factors which the Supreme Court considers in deciding whether to overrule a prior decision, see *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 695-701 (1978). The likelihood that an earlier case will be overruled may be increased when the earlier case was by a closely divided court, or there have been relevant extrajudicial events. A case involving the allocation of off shore jurisdiction between the states and the federal government fitting all three of these circumstances is *Secretary of the Interior v. California*, 464 U.S. 312 (1984). In that case, the Court held in a five to four decision that federal outer continental shelf oil and gas lease sales did not "directly affect" the coastal zone such that they had to be consistent with state coastal management plans. Two members of the majority -- Chief Justice Warren E. Burger and Justice Lewis F. Powell -- have since resigned and been replaced by Justices Antonin Scalia and Anthony M. Kennedy, respectively. A relevant extrajudicial event, of course, is the recent extension of the territorial sea from three to twelve miles.

the federal government have control? Congressional resolution also would facilitate a comprehensive, coordinated approach to these matters, allowing for orderly implementation and bringing necessary predictability to the process.

The questions, moreover, are the direct result of Congress' use of various statutory formulations for defining the boundaries of state and federal jurisdiction. It is only logical that Congress be the one to resolve the questions raised by its own actions.

Finally, the Congressional legislative process provides all interested parties with a full and complete opportunity to present their views, and cannot be reversed without going through the same legislative process.

When the two alternatives -- litigation versus resolution by Congress -- are compared, there simply can be no question that Congressional resolution is preferable.

IV. From the standpoint of public policy, questions of state and federal jurisdiction raised by the extension of the territorial sea should be resolved in favor of the states.

There are several policy reasons why Congress should resolve the questions regarding the allocation of jurisdiction between the states and the federal government in the newly expanded twelve-mile territorial sea in favor of the states.

The most fundamental of these is the basic notion of federalism underlying the United States Constitution. President Reagan's Working Group on the Status of Federalism of the Domestic Policy Council noted that the framers of the Constitution rejected

the notion of a single, all-powerful national government, and opted for one in which the states would retain a significant measure of sovereignty. 54/ Although a proponent of a strong national government, Alexander Hamilton stated that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by [the Constitution], exclusively delegated to the United States." 55/ Indeed, his view seemed to be that the states would possess somewhat greater authority than the federal government: "there is greater probability of encroachments by the [states] upon the federal head than by the federal head upon the [states]." 56/ The Tenth Amendment to the United States Constitution formalized those concepts, making clear that the powers of the national government are limited to those expressly delegated to it under the Constitution, while all other powers are retained by the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Two of the powers expressly delegated to the federal government are the powers to conduct foreign affairs 57/ and to regulate foreign and interstate commerce. 58/ Neither of those,

54/ The Status of Federalism in America (1986) 7-12.

55/ The Federalist Papers, No. 32 (C. Rossiter ed. 1961) 198 (emphasis in original).

56/ Id., No. 31, at 197.

57/ United States Constitution, art. II, sec. 2, cl. 2.

58/ Id., art. I, sec. 8, cl. 3.

however, conflicts with state resource jurisdiction over the territorial sea. Once the federal government has claimed national jurisdiction over the territorial sea as against foreign nations, it has completed the exercise of its foreign relations power; the subsequent allocation of that jurisdiction between the states and the federal government is purely a domestic question. 59/ And the early off shore jurisdiction cases establish that the primary federal jurisdictional interest with respect to the regulation of foreign and interstate commerce relates to control over navigation, not resources. 60/

Under the Constitution, all remaining governmental authority is vested in the states. The only exceptions, where exclusive federal governmental power is authorized, are for the seat of national government (Washington, D.C.) and lands purchased, with the consent of the legislatures of the states in which they are located, for military and "and other needful Buildings." 61/

The basic principles of federalism accordingly auger strongly for state jurisdiction over the newly expanded territorial sea.

State jurisdiction would also acknowledge the far more direct interest the coastal states have in activities directly off their shores. Congress has recognized this substantial state

59/ United States v. California, 332 U.S. 19, 43-46 (1947) (Frankfurter, J., dissenting).

60/ See part II.B supra.

61/ United States Constitution, art. I, sec. 8, cl. 17.

interest in a wide variety of statutes, many of which present serious allocation of jurisdiction questions. 62/

Of particular concern to the private sector interested in off shore resources, state jurisdiction would result in more efficient and more effective management. One state spokesperson described the situation for a Congressional subcommittee in these words: 63/

[The states] are better able, in terms of fiscal resources and administrative abilities, to manage these relatively nearshore fisheries, minerals, oil and gas, and other resources that are so close to our state borders.

For example, Alaska now manages a multi-billion dollar a year seafood industry which includes the world's largest salmon fisheries and several world class salmon runs. We already exclusively manage some fisheries in federal waters such as the shelf commercial rockfish fishery, king and tanner crab, and the troll salmon fishery. The State of Alaska spends \$20 million dollars annually to manage its regional fisheries -- ten times the federal government's expenditure to manage fisheries in the vast area of federal waters off Alaska's coasts. Further, the State has taken the lead in joint efforts with the U.S. State Department on reducing foreign interception of salmon and other living marine resources, and has years of experience in negotiating the harvest of anadromous species with other states and with foreign nations.

Alaska has had a successful offshore mining

62/ See n. 36 and 37 supra and accompanying text.

63/ Testimony of Suzanne Iudicello, Associate Director for Fisheries and the Environment, Alaska Governor's Office, Hearing on the Presidential Proclamation Extending the United States Territorial Sea before the Subcommittee on Oceanography and Great Lakes, House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess., March 21, 1989.

program since statehood. The State's program has provided minerals such as gold and platinum to industry while providing for environmental protection. State regulations and the coastal zone management program ensure that offshore mining leases go through strict review by all state resource agencies. In contrast to the federal government, which has never issued a single offshore mining lease off the coast of Alaska, there are currently nine active offshore leases which have been issued by the State and more than 200 offshore prospecting permits, giving Alaska the benefit of experience in this area.

Looking at oil and gas resources, the State also has a successful track record of evaluating oil and gas potential, completing timely permitting, and balancing complex interests such as subsistence whaling and oil development. The federal government currently takes an average of five years to plan an oil and gas lease sale in the three to 12 mile zone, while Alaska typically completes a similar rigorous evaluation and analysis in two to three years. The state also maintains a consistent and predictable leasing schedule, providing oil companies a better opportunity to plan and execute exploration budgets. In addition, the State's stipulations and mitigating measures for oil and gas exploration and development offer better environmental protection for marine life, the multi-million dollar fishing industry, and the subsistence lifestyle of many coastal residents. Again, we believe Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government.

In another initiative regarding ocean resources, the State of Alaska already is working with other Pacific states to assess the resource potential of the EEZ in the Northeast Pacific Ocean. This includes an effort to identify priorities for research and management, and to analyze capabilities for ocean governance.

Less than a week after that testimony was given, the EXXON Valdez ran aground on Bligh Reef in Prince William Sound. The subsequent efforts to assess the natural resource damages

caused by the spill provide a clear example why the states, and not the federal government, should have primary resource jurisdiction over the newly expanded territorial sea.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 64/ provides for the appointment of state and federal trustees to assess natural resource damages "for natural resources under their trusteeship." 65/ Alaska Governor Steve Cowper appointed the Alaska Commissioner of Fish Game as the state trustee; President Bush appointed the Secretaries of Agriculture, Commerce, and Interior.

Problems arose almost immediately because of the distance between the site of the spill in Alaska and the federal trustees' location in Washington, D.C. In an effort to minimize those problems, the federal trustees appointed representatives in Alaska to work with the state trustee. Unfortunately, and all too typically, the federal trustees' Alaska representatives were given authority to negotiate, but were not given the power to make decisions. As a result, all damage assessment plans developed were subject to further review by federal officials in Washington who (1) had not participated in the discussions leading up to their development, and (2) had absolutely no knowledge of local conditions and requirements. The first set of plans were in fact

64/ 42 U.S.C. §§ 9601 et seq.

65/ 42 U.S.C.A. § 9607(f)(2) (1983).

rejected outright by federal officials in Washington, D.C., unnecessarily complicating the damage assessment effort.

Another reality favoring state jurisdiction is the difference in the amount of time it takes the states and the federal government to act. The difference in the time needed to prepare and conduct an offshore oil and gas lease sale has already been noted. 66/ The EXXON Valdez spill provides another example. Within three weeks of the spill, the Alaska Legislature had appropriated \$20 million for expenditures necessitated by the spill; 67/ expenditure of an additional \$39.2 million was subsequently authorized. 68/ To date, the federal government has appropriated no money for spill related expenditures.

Finally, states find it much easier to develop policies with respect to ocean resources, and adhere to those policies once developed. The federal government, on the other hand, is a model of inconsistency. As one example, Congress in the Outer Continental Shelf Lands Act adopted a policy that the outer continental shelf "should be made available for expeditious and orderly development." 69/ Despite this national policy, however, Congress has repeatedly thwarted outer continental shelf development through moratoriums imposed in appropriations

66/ See n. 63 supra and associated text.

67/ Secs. 1 and 2, ch. 13, Session Laws of Alaska 1989.

68/ Secs. 55 and 56, ch. 87, Session Laws of Alaska 1989.

69/ 43 U.S.C.A. § 1332(3) (1986).

bills. 70/

In light of the foregoing, public policy considerations clearly favor state jurisdiction over the newly expanded territorial sea.

V. Conclusion: The questions regarding state and federal natural resource jurisdiction off shore present an opportunity to make the system work.

As shown above, there are serious and substantial questions regarding the effect of the extension of the territorial sea on the allocation of off shore resource jurisdiction between the states and the federal government. Those questions should be resolved by Congress and not in the courts. From the standpoint of public policy, they should be resolved in favor of the states.

In all likelihood, the federal government will oppose such a resolution. The federal government has frequently accused the states of making extreme, outrageous, and unwarranted claims to off shore jurisdiction, 71/ and there is no reason to believe that its position has changed.

At the same time, it is the United States that first claimed the outer continental shelf off its shores as against the

70/ See, e.g., secs. 110-113, P.L. 100-446, 102 Stat. 1801 (1988).

71/ For example, the United States made the following allegation in a complaint against Alaska: "By its conduct and claims, the State of Alaska casts uncertainty on the position of the United States as to the location of its territorial seas and threatens to embarrass the United States in the conduct of foreign affairs and thereby cause great irreparable injury to the United States." Complaint, United States v. Alaska, United States Supreme Court No. 84, Original, October Term, 1978.

rest of the world in 1945 72/ and more recently claimed a 200-mile exclusive economic zone authorized under an international convention which it has refused to sign. 73/ By comparison, state claims are the epitome of reasonableness.

The basic point, however, is that these questions must be resolved. The Congressional process for resolution of such questions allows thorough consideration of all points of view, and generally produces a viable result.

Through active advocacy by the states and the concerned private sector, state jurisdiction over the newly expanded territorial sea can become a reality. If it does, it will be because those interested in the question of state and federal off shore jurisdiction viewed it as an opportunity, not an obstacle, and took that opportunity to make the system work.

72/ See n.2 supra.

73/ Id.

THE ROLE OF CONGRESS IN ESTABLISHING U.S. SOVEREIGNTY OVER THE EXPANDED TERRITORIAL SEA

Jack H. Archer and Joan M. Bondareff *

I. INTRODUCTION AND BACKGROUND

On December 27, 1988, President Reagan extended the territorial sea of the United States from three to twelve geographical miles and asserted U.S. sovereignty over this new zone.¹ The President stated that "[e]xtension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States."² Thus, the major purpose of the Proclamation was to provide a greater defense perimeter for the United States, presumably to keep foreign intelligence-gathering and naval vessels farther off the coast of the United States.³

At the same time, the President asserted that nothing in the Proclamation extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.⁴ The President's attention was to extend the U.S. territorial sea to twelve miles solely for

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1. Proclamation No. 5928, 54 Fed. Reg. 777 (1989) [hereinafter "Territorial Sea Proclamation"].
2. *Id.*
3. Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. Times, Dec. 29, 1988, at A-17. See also Schachte, *History of the Territorial Sea from a National Security Perspective*, 1 Terr. Sea J. 143 (1989) (this issue).
4. Territorial Sea Proclamation, *supra* note 1.

international legal and national security purposes while denying or limiting any effect of the Proclamation on domestic law.³

Uncertain about the underlying authority of the President unilaterally to assert U.S. sovereignty over territorial lands and waters, the Department of State sought the advice of the Department of Justice's Office of Legal Counsel before issuance of the Proclamation.⁴ The Department of State posed three questions to be answered by the Department of Justice (Justice):

First, does the President have the authority to declare, by Presidential Proclamation, the proposed extension of the territorial sea?

Second, assuming the President does have the authority, what effect would such a Proclamation have on domestic legislation, such as the Coastal Zone Management Act (CZMA)?⁵

Third, can the President limit the effect the Proclamation will have on domestic legislation?⁶

5. A particular concern of the Administration before issuing the Proclamation was the potential effect of the extension upon the authority of coastal states to manage and protect their coastal zones under the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1989). Under the CZMA, a state with a coastal management program approved by the federal government has broad authority to control the activities of federal agencies in and affecting the land and water uses and natural resources of the coastal zone, 16 U.S.C. § 1456. See generally, Eichenberg and Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism"*, 14 *Ecol. L.Q.* 9 (1987). Because the CZMA does not explicitly establish the seaward extent of the coastal zone at the three-mile limit, but arguably permits an extension of the seaward limit of the coastal zone in tandem with the expansion of the territorial sea, the Administration feared an enlargement of the states' authority over such federal activities. See Memorandum from John K. Van de Kamp, Attorney General, California Department of Justice, to Peter Douglas, Executive Director, California Coastal Commission (March 15, 1989) reprinted in Saurenman, *The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?* 1 *TERR. SEA J.* 39 (1990) (this issue).

6. Memorandum for Abraham D. Sofaer, Legal Adviser, Department of State from the Office of Legal Counsel, U.S. Department of Justice, (Oct. 4, 1988), prepared for Abraham D. Sofaer, Legal Adviser, Department of State, [hereinafter Justice Memorandum] reprinted in Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 *TERR. SEA J.* 1 (1990) (this issue).

7. See CZMA, *supra* note 5.

The Justice Reply Memorandum (Justice Memorandum) found that the President's constitutional authority to conduct the foreign relations of the United States provided the Executive with the necessary authority to assert jurisdiction over an expanded territorial sea, consistent with international law.⁹ With considerably less confidence, Justice also found a sufficient reason for the President's unilateral claim of sovereignty over an expanded territorial sea (the new "zone" from three to twelve miles) in a claim of "discovery and occupation" of such territory.¹⁰ In response to the second question, the Justice Department acknowledged that the intention of Congress in enacting the CZMA would determine whether the coastal zone would automatically expand upon an extension of the territorial sea. Examining the history of the Act, Justice argued that "the better view" was that Congress had no such intention, but admitted that its conclusion was not "free from doubt."¹¹ Justice also advised the Administration to seek enactment of legislation that would declare that "no federal statute is affected by the President's proclamation" -- an apparent admission that the President lacks the authority unilaterally to limit the Proclamation's effect upon domestic law.¹²

This article focuses upon the role of Congress in establishing the sovereignty of the United States over new lands and waters -- a role that Justice found would be restricted to instances when Congress, pursuant to its constitutional authority, admits new states to the Union.¹³ As argued below, we believe that Congress' role and interests in the extension of the territorial sea were either insufficiently acknowledged or not recognized at all by the Reagan Administra-

9. *Id.* at 6-12.

10. *Id.* at 12, 14-18. The Supreme Court has upheld the exercise of jurisdiction by the United States over "discovered" territory pursuant to the Guano Act. See *infra* notes 98-103 and accompanying text.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation . . . when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession . . . of territory unoccupied by any other government or its citizens. . .

Jones v. U.S., 137 U.S. 202, 212 (1890).

11. Justice Memorandum, *supra* note 6, at 2, 36. A contrary view is held by the California Department of Justice. See Saurenman, *supra* note 5.

12. Justice Memorandum, *id.* at 37.

tion and in the Justice Memorandum. We examine part of the historical record considered in the Justice Memorandum, and conclude that Congress must play its constitutional role when the sovereignty of the United States is extended to a greatly expanded territorial sea. Finally, we discuss briefly the extension of the territorial sea in the context of the serious coastal and ocean resource management policy issues that have occupied federal and state officials, Congress, the courts, interest groups, and the public for many years. On the basis of this analysis, (1) we conclude that Congress has the authority and the duty to act to resolve any uncertainty about the sovereign status of the new "zone" from three to twelve miles and (2) we recommend that Congress should also seek to resolve at least some of the fundamental policy issues that currently divide the executive and the states with respect to coastal and ocean resource management.¹⁴

A. The U.S. Territorial Sea

Until the Reagan Territorial Sea Proclamation, the United States had always maintained a three mile territorial sea. The U.S. territorial sea was initially established by the Washington Administration in response to pressure from the French and British Governments to declare how far seaward from its shores the United States would extend its "territorial protection."¹⁵ Secretary of State Jefferson sent letters to the French and British "provisionally" fixing the limit at "one sea league or three geographical miles from the sea-shores."¹⁶ This "provisional" three mile U.S. marginal or territorial sea lasted for almost two hundred years.

The Reagan Proclamation represents a change in long-standing U.S. policy which may be attributed both to a changing perception of U.S. national security interests and to changing principles of international law.¹⁷ A twelve mile

14. Many of these issues are analyzed in PROCEEDINGS, NATIONAL CONFERENCE ON THE STATES AND AN EXTENDED TERRITORIAL SEA, Dec. 9-11, 1985, TEXAS A&M UNIVERSITY TAMU-SG-87-114 (March 1987).

15. See *infra* note 49 and accompanying text.

16. U.S. v. California, 332 U.S. 19, 33 (1947) citing letter from Thomas Jefferson to the British Foreign Minister (Nov. 8, 1793); For an interesting account of the circumstances leading to this initial assertion of the U.S. territorial sea, see Justice Memorandum, *supra* note 6, at 6-11.

territorial sea is now consistent with the modern practice of nations,¹⁸ customary international law,¹⁹ and U.S. ocean policy.²⁰ Accordingly, we do not question the right of the United States as a sovereign nation to extend its territorial sea to twelve miles as a matter of international law. Our inquiry concerns, rather, the capacity of the political branches of the U.S. government to acquire new lands and waters on behalf of the United States as sovereign territory.

The issue of which political agency has the capacity to acquire new territory on behalf of the United States arises because of the nature of the territorial sea in international law. Within its territorial sea, a nation exercises virtually complete sovereignty.²¹ A nation's authority in its territorial sea is equivalent to the authority it exercises within its terrestrial territory, subject only to the right of innocent passage for foreign vessels.²² Thus, the extension by the United States of its territorial sea from three to twelve miles is the same as the acquisition of a new "zone" of marine territory circling the United States, its territories, and possessions.²³

B. The U.S. Constitution

The U.S. Constitution does not expressly address the authority of the United States to acquire new territory; therefore, it should not be surprising that questions have arisen at times in the Nation's history respecting the branch or branches of government which should bear this responsibility.²⁴ In fact, this

18. One hundred and seven nations, including the United States, now claim a twelve-mile territorial sea. *Examination of the President's Proclamation Extending the Territorial Sea of the United States from 3- To 12-Miles: Hearings Before the Subcomm. on Oceanography the Comm. on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 136 (1989)* (statement of Brian J. Hoyle, Director, Office of Ocean Law and Policy, U.S. Department of State).

19. See 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 511, 512 (1986).

20. See Statement by the President on U.S. Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383-85 (MAY 14, 1983).

21. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512, comment at 36 (1986).

22. *Id.* See also Justice Memorandum, *supra* note 6, at 2-5.

23. Justice Memorandum, *supra* note 6, at 12.

24. G. SHERBURN, CONSTITUTIONAL POWERS AND WORLD AFFAIRS 52 (1919); W. WILCOX, THE

issue, it is said, seriously troubled President Jefferson in the case of the Louisiana Purchase.²⁵ The matter was soon resolved, however, when Chief Justice Marshall sustained the power of the United States to acquire new territory on the basis of its treaty and war-making powers.²⁶ Such power may also be considered to inhere in the authority of a sovereign nation.²⁷

Accordingly, it is no longer open to question that the United States may acquire new lands and waters despite the lack of explicit constitutional authority addressing the government's acquisition of new territory.²⁸ The record of U.S. territorial acquisitions, however, does not authoritatively determine whether the executive branch of government may exercise this right independently of the Congress. Further, nothing in this record suggests that the Congress is prohibited from originating legislation to incorporate new territory into the United States and must defer to the President in this matter. This record, and the constitutional or other authority upon which certain territorial expansions have been grounded, is discussed below.

II. ASSERTING SOVEREIGNTY OVER NEW TERRITORY

Despite the lack of explicit constitutional authority, certain powers in the Constitution acting singly or in combination have been found to authorize both the acquisition of and the extension of U.S. sovereignty over new territory. These powers include the following:

1. The power of the Congress to admit new states into the Union;²⁹
2. The power to declare and carry on war;³⁰ and

25. See *Downes v. Bidwell*, 182 U.S. 244, 252-253 (1901) for a discussion of the history of the Louisiana Purchase.

26. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

27. *Mormon Church v. U.S.*, 136 U.S. 1, 42-43 (1890); *Jones v. U.S.*, 137 U.S. 202, 212 (1890); *Downes v. Bidwell*, 182 U.S. 244 (1901); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

28. *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

29. U.S. Const., art. IV, § 3, cl. 1.

3. The power of the President to make treaties with the advise and consent of the Senate.³¹

In addition to these constitutional powers, the inherent sovereign power acquire territory by "discovery and occupation" has been recognized.³²

The United States has acquired new territory and extended its sovereignty exercising all of these powers. Pursuant to its authority to admit new states Congress acquired and extended the sovereignty of the United States over Texas and Hawaii by enacting joint resolutions, presented to and approved by the President.³³ In the case of territory acquired by the United States through war, sovereignty has been established through treaties of cession, negotiated by the President and approved by the Senate.³⁴

The most extensive acquisitions, however, have been accomplished by use of the treaty-making power. By treaty, the United States has acquired the Louisiana Purchase,³⁵ the Gadsden Purchase,³⁶ the Oregon Territory,³⁷ California

31. U.S. Const., art. II, § 2, cl. 2.

32. W. WILLOUGHBY, *supra* note 24, at 408.

33. Texas was added to the Union by joint resolution of the Congress in 1845. Joint Res. 8, Stat. 797 (1845). Hawaii was made a territory of the United States by joint resolution in 1898. S.J. Res. 55, 30 Stat. 750 (1898). See *infra* notes 84-97 and accompanying text for a full discussion of the cases of *Texas* and *Hawaii*.

34. Guam, for example, was acquired by the United States through a treaty of cession concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 175, T.S. No. 343. According to one legal writer, after an extensive review of the cases involving extensions of U.S. territory as a result of conquest, "In those cases the principle was established that, while military occupation may give the conqueror all rights of sovereignty, it cannot give him sovereignty itself, which remains unchanged until formal cession results from treaty or permanent conquest uncontroverted by arms." Reno, *The Power of the President To Acquire An Govern Territory*, 9 GEO. WASH. L. REV. 251, 254 (1941).

35. Cession of Louisiana Treaty, April 30, 1803, U.S.-France, art. I, 8 Stat. 200-201, T.S. No. 86.

36. Gadsden Treaty, Dec. 30, 1853, U.S.-Mexico, art. I, 10 Stat. 1031-1032, T.S. No. 208.

37. Oregon Treaty, June 15, 1846, U.S.-United Kingdom, art. I, 9 Stat. 869, T.S. No. 120.

38. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mexico, art. 5, 9 Stat. 922, 926-27, T.S. No. 8.

Alaska,³⁹ the Panama Canal Zone,⁴⁰ and the Virgin Islands.⁴¹ As noted above, the U.S. Supreme Court early recognized the treaty-making powers of the Constitution as authorizing the first large territorial acquisition by the United States - the Louisiana Purchase.⁴² By 1907, the Court noted that it was "too late in the history of the United States to question" the Nation's right to acquire new lands by treaty.⁴³

Common to the several constitutional powers briefly discussed above is the necessity of action by both the Executive and the Congress to acquire new territory. In the case of territory acquired by treaty, at least one House of Congress, the Senate, must approve the treaty presented by the President by two-thirds majority of senators.⁴⁴ Lacking approval, the Executive is checked in its desire to acquire new territory.⁴⁵ In the case of territory acquired by means of legislative action by the Congress to admit new states, the President may veto the legislation and defeat the acquisition of new territory, subject of course to an override under the Constitution by a two-thirds majority of both Houses of Congress.⁴⁶

A. Presidential Claims

The extension of the territorial sea, however, was carried out by the President acting independently from Congress. According to the view argued in the Justice Memorandum, Congress in effect has no role of any kind to play in the extension of sovereignty to this large, new "zone" of territory, nine miles wide surrounding

39. Cession of Alaska Treaty, March 30, 1867, U.S.-Russia, art. 1, 15 Stat. 539, T.S. No. 301.

40. Isthmian Canal Treaty, Nov. 18, 1903, U.S.-Panama, art. 2-3, 33 Stat. 2234-5, T.S. No. 41.

41. Cession of Danish West Indies Treaty, Aug. 4, 1916, U.S.-Denmark, art. 1, 39 Stat. 1706, T.S. No. 629.

42. *American Insurance Co. v. Canter*, *supra* note 26.

43. *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

44. U.S. CONST., art II, §2, cl. 2.

45. For example, the first attempt to annex Texas by treaty was defeated in the Senate. See *infra* note 85 and accompanying text.

Nation's shores.⁴⁷ To support this claim of executive branch authority to act unilaterally, Justice relies upon the following instances of past Presidential actions: (1) the claim advanced by the Washington Administration and evidenced by the Jefferson letters to a three-mile territorial sea; and (2) the "discovery and occupation" of Midway and Wake Islands. We examine each of these instances in turn.

1. The Jefferson Claim

Secretary of State Jefferson is generally credited with asserting the Nation's right to a three mile marginal or territorial sea in which the "territorial protection of the United States shall be exercised."⁴⁸ The claim was first put forth in a letter from Jefferson to the British and French Foreign Ministers, containing the following statement:

The President of the United States, thinking that before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the regulation of the seas on our coasts.

The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated as one sea league. . . . Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to his officers acting under his authority to consider those heretofore given to be as restrained for the present to the distance of one sea league or three geographical miles from the seashores.⁴⁹

We do not question that the three mile U.S. territorial sea dates from the extension of territorial jurisdiction made in the Jefferson letters.⁵⁰ This assertion

⁴⁷ Justice Memorandum, *supra* note 6, at 21-22.

⁴⁸ Letters from Secretary Jefferson to British and French Ministers, dated November 8, 1793, cited in J. MOORE, DIGEST OF INTERNATIONAL LAW, § 145, at 702 (1906) [hereinafter J. MOORE].

by the Washington Administration sought to preserve U.S. neutrality as well as to provide "territorial protection," and Congress quickly acted to legislate the claim put forth by Jefferson in 1793 by enacting the Neutrality Act of 1794.⁵¹ This initial claim of jurisdiction has ripened over time into a claim of sovereignty over the territorial sea, acknowledged and acted upon by the executive, legislative, and judicial branches of the United States government.⁵² But it is not clear whether Jefferson and the Washington Administration intended to assert U.S. jurisdiction to one sea league for defensive purposes only or to acquire new territory subject to U.S. sovereignty three miles seaward.⁵³ One contemporaneous U.S. Supreme Court decision, cited in the Justice Memorandum, speaks of the authority of a nation within its own territorial sea as "absolute and exclusive."⁵⁴ But in light of President Jefferson's well-known misgivings about the constitutional authority of the United States to acquire the Louisiana Territory,⁵⁵

and the fact that in late eighteenth-century international legal practice the territorial nature of the marginal sea was unclear,⁵⁶ it is unlikely that Jefferson thought that he had acquired new territory on behalf of the United States merely by informing the French and British ministers of the United States' intention to claim neutrality and to defend its coast out to one sea league.⁵⁷

It cannot be demonstrated with any certainty that Jefferson was asserting sovereignty over the three-mile marginal sea rather than asserting the right of the United States to preserve its neutrality and to take certain defensive action within its marginal sea extending three miles from shore. Therefore, the Jefferson letters do not constitute a convincing precedent for the claim that the President may unilaterally establish U.S. sovereignty over this new "zone." Over time, and with the change in practice among nations respecting the status of the marginal sea, the sovereignty of a coastal state over its territorial sea has been recognized; but it was not so in 1793.

2. "Discovery and Occupation"

Justice has grounded the President's unilateral extension of the territorial sea from three to twelve miles in the right of nations to acquire territory by "discovery and occupation."⁵⁸ We examine the two instances cited by Justice in its Memorandum and consider the relevancy of these precedents to the new "zone" from three to twelve miles offshore.

a. Midway Islands

According to international legal records, Midway Islands, situated about 1,100 miles west of Honolulu, were formally occupied by the captain and crew of the U.S.S. *Lackawanna* in 1867.⁵⁹ As described in a later account of this dis-

51. 1 Stats. 381, June 5, 1794. The Neutrality Act conferred jurisdiction upon federal courts to decide cases of captures made "within the waters of the United States, or within a marine league of the coasts or shores thereof." See also Fisher, *Understanding the Role of Congress in Foreign Policy*, 11 GEO. MASON U.L. REV. 153, 158 (1988): "This policy [of extending jurisdiction over the marginal sea] was not a presidential monopoly; it was shared with Congress."

52. *U.S. v. California*, 332 U.S. 19, 34 n.18; *Jones v. U.S.*, 137 U.S. 202, 212 (1890).

53. The Justice Memorandum clearly distinguishes between the exercise by the United States of "jurisdiction" over an area and the claim of "sovereignty" over territory. The President's authority to extend the jurisdiction of the United States from three to twelve miles in accordance with international law is not in serious dispute. Justice Memorandum, *supra* note 6, at 6-12. There are, as noted in the Memorandum, well-established precedents for the exercise of such jurisdictional authority by the President, including the Truman Fisheries Proclamation of 1945 reprinted in 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 954-55 (1965), the Truman Proclamation on the Natural Resources of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1945), and, in contemporary history, the 1983 Reagan EEZ Proclamation, Proc. No. 5030, 3 C.F.R. § 22 (1984).

54. In *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804), the U.S. Supreme Court acknowledged that Portugal might seize a U.S. vessel "beyond the range of its batteries" in order to uphold a law prohibiting trade with its colonies, on the ground that the "law of nations" recognized a nation's right to take measures for its own security even beyond the limits of its marginal or territorial sea. The statement that the right of a nation within its own territory to protect itself is "absolute and exclusive" was offered to demonstrate that there was no question that Portugal possessed authority to seize foreign vessels violating its laws within the marginal sea.

55. See *supra* notes 25 and 35. See also, e.g., E. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812 28-9 (1920) (Jefferson believed "that Congress did not have the power of admitting new states into the Union outside the territory owned at the time of the adoption of

56. See *U.S. v. California*, 332 U.S. 19, 33 (1947); see also *U.S. v. Louisiana*, 363 U.S. 1, 34 (1960) in which Justice Harlan noted that "such a boundary [the territorial sea limit], even if it delimits territorial waters, confers rights more limited than a land boundary."

57. In 1849 and 1862 respectively, Secretaries of State Buchanan and Seward were still speaking of the marginal sea in terms of maritime jurisdiction. See J. MOORE, *supra* note 48, § 145, at 705.

58. Justice Memorandum, *supra* note 6, at 16. "The acquisition of Midway and Wake Islands by the Navy confirms that the President has the constitutional authority to acquire territory by discovery and occupation."

covery,⁶⁰ the Secretary of the Navy ordered the *Lackawanna* to explore and occupy Midway Islands at the request of American shipping companies who were seeking to establish a coaling station there. But, according to this account, the United States does not appear to have acted on this claim until after the annexation of Hawaii in 1898.⁶¹

In 1900, after the annexation of Hawaii, the State Department asserted the American claim to these islands in a communication to Japan, and in 1902, the President by proclamation, granted his consent to the laying of the Pacific cable by way of Midway Islands. In the same year these islands were listed as a part of the public lands held by the Navy Department for use as coaling stations. During 1903, the Commercial Pacific Cable Co. asked the Navy Department to erect navigation aids on the islands and also to station a force of marines there "to enforce the law and preserve order," adding that there was then no law on the islands. In response, an Executive Order . . . placed the public lands on these islands under the "jurisdiction and control of the Navy Department," and a force of marines was placed thereon. An act of the Hawaiian Territorial Legislature of 1905 . . . placed these islands within the City and County of Honolulu.⁶²

Further, this account relates the earlier exploration (1857) of the Midway and Kure groups of islands by an American citizen in command of a Kingdom of Hawaii vessel. This resulted in territorial claims by the United States in 1936 on the ground that the Kure Islands were said to have come under the sovereignty of Hawaii in 1857 and to have passed to the United States upon the annexation of Hawaii in 1898.⁶³

Reconsidering the situation of the Midway Islands in the light of the action in regard to the Kure Islands . . . and remembering also that no overt act of authority was performed therein by the United States prior to the annexation of the Hawaiian Islands, it would seem that the claim of [the

United States] to the Midway Islands is traceable through the Republic of Hawaii rather than to the explorations and claims of 1867.⁶⁴

Therefore, the discovery and occupation of Midway Islands in 1867 may have been the means by which these islands came under U.S. sovereignty reasonable case can be made that Midway Islands came to the United State part of the territory of the Kingdom (later Republic) of Hawaii, to which it "rightfully" belonged,⁶⁵ as a result of the 1857 exploration described above.

b. Wake Island

The second instance of discovery and occupation of territory relied upon Justice concerns Wake Island. The U.S. claim to Wake Island is recorded in a letter from an Assistant Secretary of State, dated February 27, 1900:

The United States claims jurisdiction . . . over the atoll, known as Wake's Island, . . . possession of which was taken by the U.S.S. *Bennington* on January 17, 1899.⁶⁶

But, according to one writer:

It does not appear . . . whether [the Commander of the *Bennington*] acted on his own initiative or under order, nor, if the latter, what agency of the government was the source of those orders. Nor is it clear whether this act was intended to establish simple jurisdiction or complete sovereignty. No further action seems to have been taken until 1934 when Wake Island became important as a base for the operation of the trans-Pacific aerial line.⁶⁷

The acquisition of Wake Island appears to be the only clear instance when the Executive has asserted a right to acquire and govern territory "without so color of legislative approval."⁶⁸

60. Reno, *The Power of the President To Acquire And Govern Territory*, 9 GEO. WASH. L. REV. 251, 274 (1941).

61. *Id.* at 275.

62. *Id.* at 275 (citations omitted).

64. *Id.* at 275.

65. *Id.* at 285.

66. Reprinted in 1 J. MOORE, *supra* note 48, at 555.

67. Reno, *supra* note 60, at 277.

B. "Discovery and Occupation" is Inappropriate Authority

The basis claimed by Justice for the President's unilateral extension of the territorial sea appears to be better grounded in the discovery and occupation of remote islands in the Pacific than in the precedent of the Jefferson letters discussed above.⁶⁹ But the relevance of unilateral claims by the President, based upon discovery and occupation, to incorporate the zone of territory between three and twelve miles from U.S. shores merits further examination. First the discovery and occupation of relatively small atolls and islands in the Pacific in the nineteenth century hardly seems relevant to the action taken by the President in proclaiming an expanded territorial sea. This new zone from three to twelve miles was not "discovered" in any sense similar to the discovery of Wake and Midway Islands.⁷⁰ Rather, a coastal state's sovereignty over its territorial sea is the result of the evolutionary change in international law according to which the nations of the world have come to recognize such authority.⁷¹

Further, as discussed more fully below, even before the issuance of the Territorial Sea Proclamation, this zone was and continues to be subject to the jurisdiction of the United States. Nor, according to international law, was this zone subject to the occupation by any power other than the United States as a consequence of its status as part of the U.S. continental shelf.⁷² Thus, the rationale of a claim to an extended territorial sea based upon the principle that the power first discovering and occupying unclaimed territory may assert

69. Justice Memorandum, *supra* note 6, at 16.

70. See *Jones v. U.S.*, 137 U.S. 202, 212 (1890).

71. See 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 (1986).

72. Geneva Convention on the Continental Shelf, April 29, 1958, art. 2, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

jurisdiction and sovereignty over such territory against any other claimant is inappropriate.

This new zone is already subject to the jurisdiction of the United States under both existing treaty and statutory law. According to the provisions of the Geneva Convention on the Continental Shelf,⁷³ to which the United States is a party, the term "continental shelf" refers to the seabed and subsoil of the ocean "outside the area of the territorial sea."⁷⁴ Under the Outer Continental Shelf Lands Act (OCSLA),⁷⁵ the term "outer Continental Shelf" is defined, by reference to the Submerged Lands Act,⁷⁶ to begin beyond the "line three geographical miles" from the coastline of each state.⁷⁷ Further, the OCSLA declares that the resources of the "outer Continental Shelf" "appertain to the United States" and are subject to its "jurisdiction and control."⁷⁸ This declaration of U.S. authority over the outer Continental Shelf (which is less than sovereign) is at odds with the assertion of sovereignty over the new zone from three to twelve miles in the Territorial Sea Proclamation. Thus, the President's unilateral claim of sovereignty over an expanded territorial sea appears to raise a separation of powers issue,⁷⁹ and to require new legislation to reconcile his action with existing law.⁸⁰

73. Geneva Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

74. *Id.*, art. 1.

75. 43 U.S.C. §§ 1331-1356 (1986 & Supp. 1989).

76. 43 U.S.C. §§ 1301-1315 (1986 & Supp. 1989).

77. 43 U.S.C. § 1331(a).

78. 43 U.S.C. § 1332.

79. See *infra* note 106 and accompanying text.

80. I am uncertain about the effect of the President's Territorial Sea Proclamation upon domestic law. I also recommend that the Administration seek legislation. See Justice Memorandum, *supra* note 6, at 36-37.

C. Congressional Assertions of Sovereignty or Jurisdiction

As discussed above, the Congress has an essential role to play in the acquisition of territory through the Senate's power to approve treaties.⁸¹ Congress has also originated legislation to acquire territory on behalf of the United States by exercising its power to admit new states into the Union⁸² and by acting upon the Government's inherent power as a sovereign nation to acquire territory through discovery and occupation.⁸³ In this context, we examine the annexations of Texas and Hawaii by the Congress as well as its claim of jurisdiction over numerous small islands under the Guano Act.

1. The Annexation of Texas

The United States annexed the Republic of Texas by joint resolution of both Houses of Congress approved by President Polk in 1845.⁸⁴ The Congress used this method of annexation because the treaty of annexation submitted earlier by President Tyler failed to gain the necessary two-thirds majority of the Senate for approval. The treaty had been rejected by a coalition of antislavery forces and partisan senators.⁸⁵

Rebuffed by the Senate, President Tyler encouraged the House to find another way to accomplish the annexation.⁸⁶ Secretary of State Calhoun proposed that "what was sought to be effected by the treaty might be secured by joint resolution, which would have the advantage of requiring only a majority of the two Houses, instead of two-thirds of the Senate."⁸⁷ The joint resolution was justified on the constitutional ground that Congress had the power to admit new

81. See *supra* note 31.

82. See *supra* note 33 and accompanying text.

83. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Mormon Church v. U.S.*, 136 U.S. 1 (1890); *American Insurance Co. v. Canter*, 26 U.S. (1 Pet. 511, 542) (1828); See I J. MOORE, *supra* note 48, §1, at 1028.

84. A detailed history of the annexation of Texas is found in I MOORE, *supra* note 48, § 103, at 446-457.

85. A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 496-505 (1935).

86. *Id.* at 499.

states into the Union.⁸⁸ The resolution itself expressed Congress' "consent" that the territory properly included within and rightfully belonging to the Republic of Texas might be erected into a new State, to be called the State of Texas"⁸⁹

2. The Annexation of Hawaii

The Hawaiian Islands were also acquired by the United States by joint resolution of both Houses of Congress. Two previous attempts had been made to gain approval of the annexation of Hawaii by treaty. In February 1893, President Harrison submitted a treaty of annexation of the Hawaiian Islands to the Senate for approval. Less than one month later, the new President Cleveland withdrew the treaty from consideration because of his concerns regarding the distance of the Hawaiian Islands from the continental United States and the overthrow of the constitutional government of Hawaii.⁹⁰ After a series of revolts against Queen Liliuokalani and the promulgation of a new constitution for Hawaii in 1894, a second treaty of annexation was concluded in June 1897 and submitted to the Senate by President McKinley.⁹¹ While this treaty was pending before the Senate, a joint resolution "to accomplish the same purpose by accepting the offered cession [of the Hawaiian Islands] . . . into the Union was adopted by the Congress and approved July 7, 1898."⁹²

Unlike Texas, the Hawaiian Islands were incorporated into the Union as a territory, not a state. The annexation of Hawaii by legislation was "strenuously contested at the time both in Congress and by the press,"⁹³ but, the annexation of Texas was cited as a precedent.⁹⁴ Although there remains some doubt concerning the aptness of the annexation of Texas as a precedent in the case of Hawaii,⁹⁵ the acquisition of Hawaii may be securely supported on the basis of Congress'

88. A. McLAUGHLIN, *supra* note 85, at 500.

89. I J. MOORE, *supra* note 48, at 454-455.

90. *Id.* at 496-98.

91. *Id.* at 503.

92. *Id.* at 509. See also *supra* note 33.

93. W. WILLOUGHBY, *supra* note 24, at 427.

94. *Id.*

exercising the inherent power of a sovereign nation to acquire territory.⁹⁶ Further, the acquisition of the Hawaiian Islands by joint resolution approved by the President has never been seriously challenged.⁹⁷

3. The Acquisition of the Guano Islands

In the Guano Act,⁹⁸ Congress provided for the discovery and occupation of islands containing deposits of guano. The Act provides in part that whenever any citizen of the United States discovers "a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government," and takes peaceable possession, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.⁹⁹ If the President is satisfied that the discoverer meets the conditions in the Act, the islands can be regarded as belonging to the United States.¹⁰⁰

The Supreme Court sustained the constitutionality of the Guano Act in *Jones v. United States*.¹⁰¹ The decision involved the challenge by the defendant in a trial for murder occurring on Navassa Island in the Caribbean Sea. To sustain the indictment, the United States had to prove that Navassa Island belonged to the United States by virtue of the implementation of the Guano Act and that Congress possessed the authority to pass the Act. The Court upheld the Guano Act on the ground that any nation may acquire dominion over new territory by discovery and occupation, "and may exercise such jurisdiction and for such period

96. W. WILLOUGHBY, *supra* note 24, at 429.

The annexation of Hawaii by legislative act was constitutionally justified upon the same ground that the extension of American sovereignty over the Guano Islands was justified, namely, as an exercise of a right springing from the fact that, in the absence of express constitutional prohibition, the United States as a sovereign nation has all the power that any sovereign nation is recognized by international law and practice to have with reference to such political questions as the annexation of territory.

97. *Id.* at 430.

98. 11 Stat. 119 (1856).

99. *Id.*

100. 1 J. MOORE, *supra* note 48, § 115, at 558-59; MOORE contains a listing of the islands that were discovered and occupied by the United States under the Guano Act. *Id.* § 115, at 566-569.

as it sees fit over territory so acquired."¹⁰² The Guano Act and the Supreme Court decision upholding its constitutionality have been accepted by later courts and constitutional writers as an accepted means for the Congress to acquire new territory.¹⁰³

III. ASSERTIONS OF SOVEREIGNTY REQUIRE CONGRESSIONAL ACTION

In sum, the more substantial extensions of U.S. territory have been accomplished by treaty.¹⁰⁴ Further, significant annexations in the cases of Texas and Hawaii were achieved by legislative action. Although the constitutional basis for the acquisition of Texas and Hawaii is found in the power of the Congress to admit new states into the Union, these acquisitions are also grounded in the inherent authority of the United States as a sovereign nation to acquire new territory.¹⁰⁵ Such acquisitions, although initiated by the Congress through legislation, nevertheless require the approval of the President to become law and therefore may be regarded as requiring the combined action of the political branches of the U.S. Government (or the override of a Presidential veto as provided by the Constitution) in order to be implemented.¹⁰⁶

Some relatively minor islands in the Pacific (Wake Island and possibly the Midway Islands) were acquired by Executive action, although in the case of the Midway Islands, the acquisition may be based upon the subsequent annexation by the United States of the Hawaiian Islands to which these islands may be regarded to belong. More importantly, the discovery and occupation of these

102. *Id.* at 212.

103. *U.S. v. Curtiss-Wright*, 299 U.S. 304, 318 (1936); See also W. WILLOUGHBY, *supra* note 24, at 429.

104. See *supra* notes 35-43 and accompanying text.

105. W. WILLOUGHBY, *supra* note 24, at 429.

106. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850), concluding that new territory can only be acquired through the treaty-making power or legislative authority. See also Q. WRIGHT, *supra* note 95, at 276 (1922): "We conclude that courts in applying international law and the President in the exercise of his diplomatic powers may recognize minor acquisitions of territory by operation of international law, and that more considerable bodies of territory may be acquired by treaty or joint resolution of Congress." But see also *U.S. v. Louisiana*, 363 U.S. 1, 35 (1960), where the Supreme Court, in dicta, would recognize the authority of the President to claim territorial rights in the marginal sea as against foreign nations, while assigning to the Congress

small, remote islands is not a compelling precedent for the authority of the President unilaterally to extend the territorial sea to encompass a vast area of the ocean as sovereign U.S. territory, for the reasons discussed above.

Because the President cannot unilaterally alter or amend law enacted by the Congress or the states, the proviso in the Territorial Sea Proclamation that nothing in the Proclamation "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom" is at best only a statement of intent or, at the least, wishful thinking on the part of the Executive. As stated above, Justice recommended that the Administration should seek legislation to achieve such a result and recognized that the question whether the Territorial Sea Proclamation affects domestic law is strictly a matter of Congress' intent in enacting a particular statute that refers to the territorial sea of the United States or employs a related term.¹⁰⁷ In his oft-quoted decision on the extent of the legislative power of the Congress, Justice Sutherland concluded that "[n]o action or lack of action on the part of the President could destroy [the] potentiality" of an existing law. "Congress alone could do that."¹⁰⁸

In view of our conclusion that Congress must act to extend sovereignty to the new zone from three to twelve miles offshore the United States, what may be said of the President's unilateral action in extending the territorial sea? First, lacking action by the Congress, the new zone is not sovereign territory of the United States, although subject to its jurisdiction, and any action taken by the United States as the holder of title to the submerged lands and resources of the new zone may be subject to challenge.¹⁰⁹

Second, the status of the expanded U.S. territorial sea is made more complicated. Under international law, foreign nations may regard the jurisdiction of the United States over its territorial sea as extending twelve miles from

107. Justice Memorandum, *supra* note 6, at 36.

108. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 332 (1936); *see also* *Argentine Republic v. Amerasia Lines Shipping Corp.*, 57 U.S.L.W. 4121, 4125 n.8 (1989), in which the Supreme Court suggests that extension of the U.S. territorial sea to twelve miles may affect how domestic laws are interpreted.

109. For example, in protecting natural resources found in the new zone, such as coral reefs and other submerged formations and associated species, the United States may not assert a claim for damages based upon its ownership of such resources, although it may make such a claim based upon other authority. See the provisions of the Marine Sanctuaries Act, 16 U.S.C.A. § 1431-1445 (West 1985, Supp. 1989), and Bondareff, *The M/V Wellwood Grounding: A Sanctuary Cave*

its shores. But under the Constitution and domestic law, the expanded territorial sea must be regarded as divided into two "zones": (1) the old "territorial sea" extending three miles from shore, subject to state ownership and regulation of its submerged lands and resources, and (2) the new "zone" from three to twelve miles, subject to existing federal and state legal authorities with respect to its resources and to activities occurring there. Uncertainties have already arisen concerning the interpretation of the Presidential Proclamation, and other problems concerning the implementation and enforcement of federal and state laws may be expected to appear.¹¹⁰ In addition, because many federal laws employ the term "territorial sea" either with or without a reference to "three geographical miles" from the U.S. coast line, technical amendments may be necessary to conform such laws to the Territorial Sea Proclamation.¹¹¹

Finally, the Justice Memorandum argues not only that the President may unilaterally extend sovereignty over the new zone from three to twelve mile offshore, but that Congress lacks the authority to do so: "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."¹¹² This categorical statement denies a substantive role for the legislative branch in such a critical matter of national interest as setting the territorial limits of the United States. It claims a larger, exclusive area of government subject to Executive fiat than has yet been claimed, and, if unopposed, alters our constitutional system of checks and balances in the President's favor.

IV. AN EXPANDED TERRITORIAL SEA AND NATIONAL MARINE POLICY

Our article to this point has concerned the authority of the two political branches of government to acquire new sovereign territory. We have argued that precedents cited by Justice do not support the unilateral action taken by the President and that the role of the Congress in extending the territorial sea has been skirted. Further, the Territorial Sea Proclamation has already become

110. The claim by California that the "coastal zone," as defined in the CZMA, is automatically expanded to twelve miles as a result of the President's expansion of the territorial sea is one example. See Saurenman, *supra* note 5.

111. The CZMA defines the "coastal zone" as extending seaward to the "outer limit of the United States territorial sea," but does not, as many other federal statutes, specify a three-mile limit. 16 U.S.C. 1453(1). The OCSLA also uses the term "coastal zone" as defined in the CZMA without reference to a three-mile territorial sea. 43 U.S.C. § 1331(e).

led in and measurably complicates U.S. coastal and ocean policy debates. For example, we note that the Justice Memorandum provides a lengthy analysis of the effects of the Proclamation upon U.S. coastal and ocean resource management issues, and that the response by the California Attorney General is directed almost exclusively to these matters.¹¹⁷

One question naturally arises: what should the Congress do? To do nothing would imply that Congress acquiesces not only in the unilateral extension of the territorial sea by the President but in the extension of presidential authority at the expense of the Congress. But if the Congress is persuaded to act in its own national and constitutional interests, what action is appropriate?

A range of options has been suggested, from affirming the Territorial Sea Proclamation through legislation and codifying the status quo prior to the Proclamation, to extending state ownership and control to twelve miles.¹¹⁸ Two eminent marine policy specialists have recommended that Congress enact legislation establishing a joint federal-state mechanism to manage the resources of the new nine-mile zone cooperatively.¹¹⁹ This proposal and others would seem to recognize that the expansion of the territorial sea occurs in the context of a long history of conflict between federal and state governments concerning the management of coastal and ocean space and resources.¹²⁰ This

¹¹⁷ See *supra* notes 5 and 6. Serious concerns have also been expressed by Hawaii and other states about the effects of the Territorial Sea Proclamation. See Sen. Concurrent Resol. 15th Leg., Reg. Sess., 1989 Hawaii, requesting that the U.S. Congress consider the impact of the Proclamation on "domestic law and federal/state relations and rights in the three to twelve mile zone and the related question of federal/state relations and rights in the U.S. Exclusive Economic Zone."

¹¹⁸ A bill was introduced in the first session of the 101st Congress by Congressman Normy (R-Cal.), which purported to preserve the status quo. H.R. 1405, 101st Cong., 1st Sess. Although scheduled for mark-up by the Subcommittee on Oceanography, consideration of the bill was delayed because of opposition by members and the coastal states. See also Knecht, *Expansion of the Territorial Sea: A Congressional Response*, 3 ABA LAW OF THE OCEAN NEWSLETTER 15-22 (Summer 1989).

¹¹⁹ Knecht and Cicin-Sain, *The Role of Values in National Ocean Policy*, Paper Presented at the Conference on Values and the American Ocean: Philosophical, Historical, Legal and Policy Perspectives, The University of California at Santa Barbara, Santa Barbara, Ca., June 26-27, 1988.

¹²⁰ For example, see Knecht, Cicin-Sain, and Archer, *National Ocean Policy: A Window*

conflict has been well chronicled and need not be discussed here.¹¹⁷ We hope only to recommend (and revive) a proposal that will assert and protect Congress' role in establishing the sovereignty of an expanded territorial sea, while creating a mechanism that may lead to the resolution of at least some of the intergovernmental conflicts in U.S. coastal and marine resource management. In this respect, our proposal recognizes that the Territorial Sea Proclamation must be addressed in the context of U.S. marine policy-making and that Congress is an essential actor in shaping this policy.

In 1988, the House of Representatives passed H.R. 5069, sponsored by the former Chair of the Subcommittee on Oceanography, Congressman Mike Lowry (D-Wa.).¹¹⁸ H.R. 5069 would have expanded the territorial sea to twelve miles, thereby accomplishing the defense and foreign policy goals of the United States, and would have established a seventeen-member National Oceans Policy Commission charged with advising both the President and the Congress on a comprehensive oceans policy, including implementing the territorial sea expansion. H.R. 5069 would have required a report and recommendations from the Commission within two years, and would have preserved the legal status quo during the interim, pending action by the Congress in response to the Commission's recommendations. We believe that the approach described in H.R. 5069 would be an appropriate response by the Congress to the Territorial Sea Proclamation.

First, in response to the Territorial Sea Proclamation, Congress should act quickly to assert its authority to acquire new sovereign territory on behalf of the United States. Because the legal status quo will be preserved during the period in which the Oceans Policy Commission conducts its study, coastal states will be less likely to object to the legislation.¹¹⁹

Second, Congress is evidently not yet prepared to act on any marine policy proposals that seek to reduce the level of intergovernmental conflict in a

¹¹⁷ For a partial listing of articles examining federal-state conflicts in coastal and ocean resource management, see Eichenberg and Archer, *supra* note 5, at 9 n.2, and 18 n.56.

¹¹⁸ See *A Bill to Establish a 12-Mile Territorial Sea and a 24-Mile Contiguous Zone, to Establish the National Oceans Policy Commission, and for other purposes: Hearing on H. R. 5069 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries, 100th Cong., 2d Sess., (1988) [hereinafter *Hearings on H. R. 5069*].*

¹¹⁹ H.R. 5069 was sponsored by the Coastal States Delegation and other state representa-

omprehensive fashion.¹²⁰ A suitably constituted Oceans Policy Commission may be able to produce legislative recommendations to improve federal-state cooperation in managing marine and coastal resources that will command sufficient support from Congress to be enacted into law. It may emerge that a well-coordinated series of amendments to several federal laws (e.g., the CZMA and the OCSLA) would resolve at least some of the current major coastal and marine resource management conflicts, without the need for more substantial changes in existing programs.¹²¹

120. Although many proposals have been considered by Congress during the past, and several proposals have been included in bills passed by either the House of Representatives or the Senate, none has passed both chambers. For example, proposals to restore state authority to review federally-conducted oil and gas lease sales under the federal consistency provisions of the CZMA have been introduced in several bills, including S. 2324 passed by the Senate in 1984; S. REP. NO. 512, 98th Cong., 2d Sess. (1984); H.R. 4589, 98th Cong., 2d Sess. (1984); H.R. 1445 99th Cong., 1st Sess. (1985); S. 1412, 100th Cong., 1st Sess. (1987); H.R. 3202, 100th Cong., 1st Sess. (1987); and S. 1189, 101st Cong., 1st Sess. (1989).

Proposals to share revenues between the coastal states and the federal government from offshore oil and gas development have repeatedly been made, and, on at least one occasion, were almost passed by the Congress. See Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 UCLA J. ENV'T. L. POL'Y 1 (1985) and Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. No. 272, 100 Stat. 82 (1986); H. REP. NO. 453, 99th Cong., 1st Sess. 436 (1985).

Amendments to section 19 of the OCSLA, 43 U.S.C. § 1345, that would have significantly limited the discretion of the Secretary of the Interior to conduct outer Continental Shelf lease sales and approve development and production plans were in fact passed by both the Senate and the House of Representatives in 1985, but strenuous lobbying by the oil and gas industry defeated the amendments in conference. Consolidated Omnibus Budget Reconciliation Act of 1985. *Id.*

A significant proposal to establish a new regime for the exploitation of hard minerals in the U.S. exclusive economic zone, involving a high degree of federal-state cooperation and joint action, was introduced first in 1986 by the former Chair of the House Subcommittee on Oceanography, H.R. 5464, 99th Cong., 2d Sess. (1986). The bill was re-introduced in 1987 and in 1988 reported by the House Committee on Merchant Marine and Fisheries, H.R. 1260, "National Seabed Hard Minerals Act of 1988," 101st Cong., 1st Sess. (1987); see H.R. REP. NO. 1103, 100th Cong., 2d Sess., pt. 1 (1988). This bill has been re-introduced in 1989 under the same title by the Chair of the House Committee on Merchant Marine and Fisheries, but has not yet been reported from committee. H.R. 2440, 101st Cong., 1st Sess., 135 CONG. REC. E1812 (1989). Although congressional interest in resolving at least some of the major disputes in coastal and ocean resource management remains relatively high, a consensus has yet to coalesce around any specific proposals.

121. For example, amendments to the OCSLA and the CZMA to reduce the almost total discretion given to the Secretary of the Interior to determine the schedule and scope of the

V. CONCLUSION

Based on the analysis provided above, we conclude that Congress possesses the authority to determine the status of the new "zone" from three to twelve miles and that it should act to resolve any question of its sovereign character. In addition, and in recognition of the marine policy context in which the expansion of the territorial sea has been accomplished, we recommend that the Congress seize the opportunity to seek a resolution of the serious intergovernmental conflicts that have become endemic to coastal and ocean resource management in the United States.

121. (...continued)

history of program funding moratoria imposed upon the Department of the Interior by the Congress prohibiting oil and gas lease sales offshore California, Massachusetts, Florida, and other states is the best evidence of the loss of confidence in the offshore energy development process. See Appropriation Acts for the Department of the Interior; P.L. 394, H.R. 7356, 97th Cong., 2d Sess. (1982) (Central and No. Cal., and New England); P.L. 146, H.R. 3363, 98th Cong., 1st Sess. (1983) (W. Coast Fla., Central and No. Cal., and New England); P.L. 190, H.J. RES. 465, 99th Cong., 1st Sess. (1986) (Central and No. Cal., and New England); P.L. 591, H.J. RES. 738, 99th Cong., 2d Sess. (1986) (Central and No. Cal., and New England); P.L. 121, H.R. 2788, 101st Cong., 1st Sess. (1989) (East. Gulf of Mex., No. Aleutian Basin, No. Central and So. Cal., New England, Mid-Atl. States, and Georges Bank). See also U.S. GEN. ACCOUNTING OFFICE, EARLY ASSESSMENT OF INTERIOR'S AREA-WIDE PROGRAM FOR LEASING OFFSHORE LANDS, GAO/RCEID-85-86 (1985); T. Fichtenberg and A. Solow, *Rethinking Federal Offshore Energy Policies* 16-17, Paper Presented at the Marine Policy Center Alumni Symposium, Woods Hole Oceanographic Institution (April 5-7, 1987) (available at the Marine Law Institute). The expected reforms which were to be achieved as a result of the 1978 amendments to the OCSLA have not been realized. See H.R. REP. NO. 590, 95th Cong., 1st Sess. 300-106 (1977).

H J R

32

SENATE COMMITTEE REPORT

NUMBER

RES

3/31/89

DATE TURNED INTO OFFICE

Mr. President:

OIL & GAS

HJR 32 am

Committee considered

oil and gas drilling on the North Aleutian Basin Outer Continental Shelf

and recommended

- replace with B CS HJR 32 (O&G) same title
- or adopt _____ CS _____ new title
- attached amendment(s) and 1 mgmt do pass technical title change (HB only)
- _____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

DFN

- FISCAL NOTE(S) zero fiscal impact appropriation no FN
 new updated previous
 same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Tim Kell
Rick Halford
Paul Smith

SCS & DFN following

Irue [unclear] - DO Pass
 Chairman signature and recommendation

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SCSH.1R32 (OSG) ^(Resources)
PUBLISH DATE: 4/3/89

FISCAL NOTE

REQUEST: _____

REVISION DATE: _____ AGENCY: _____
TITLE: Relating to oil and gas BRU: _____
drilling on the North Aleutian Basin
SPONSOR: House Rules COMPONENTS: _____
REQUESTOR: _____

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERS. SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND/BUILD.	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS/CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS:

*Changes in the Resources CS
have no fiscal effect. This
fiscal note is appropriate*

PREPARED BY: *Drue Pearce*
Senator Drue Pearce, Chair
Senate Special Committee on Oil and Gas

DATE: April 3, 1989

PHONE No.: 465-4993

DC
4/14/89

STATE OF ALASKA BILL VERSION: SCSHJR32(O&G)
 1989 LEGISLATIVE SESSION PUBLISH DATE: 4/3/89

FISCAL NOTE

REQUEST: _____

REVISION DATE: _____ AGENCY: _____
 TITLE: Relating to oil and gas BRU: _____
drilling on the North Aleutian Basin
 SPONSOR: House Rules COMPONENTS: _____
 REQUESTOR: _____

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERS. SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND/BUILD.	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS/CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

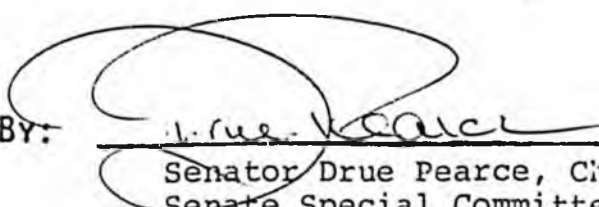
FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS:

PREPARED BY: 
 Senator Drue Pearce, Chair
 Senate Special Committee on Oil and Gas

DATE: April 3, 1989

PHONE NO.: 465-4993

go0999hJ
Chenoweth
4/11/89

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 SENATE CS FOR HOUSE JOINT RESOLUTION NO. 32 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 Relating to oil and gas drilling on
6 the North Aleutian Basin Outer
7 Continental Shelf.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the state fully supports the prudent and orderly development
10 of the state's outer continental shelf oil and gas resources in an environ-
11 mentally acceptable manner; and

12 WHEREAS the state has been very responsive to the nation's need to
13 decrease its dependence on foreign oil; and

14 WHEREAS there are presently 10 Alaskan planning areas on the Federal
15 Outer Continental Shelf leasing schedule, encompassing approximately
16 480,000,000 acres; and

17 WHEREAS, with the exception of the North Aleutian Basin, the state has
18 not requested a ban or moratorium on oil and gas leasing and drilling on
19 any of Alaska's outer continental shelf planning areas; and

20 WHEREAS the North Aleutian Basin lease sale area has relatively low
21 hydrocarbon potential; and

22 WHEREAS over 1,300,000 marine mammals inhabit or migrate through the
23 North Aleutian Basin area; and

24 WHEREAS virtually the entire world's population of black brant and
25 emperor geese stage in nearby coastal areas during the fall migration;
26 and

27 WHEREAS an annual average of 45,000,000 to 60,000,000 adult salmon
28 have migrated through the North Aleutian Basin each year since 1978; and

29 WHEREAS domestic Bristol Bay fisheries have an average wholesale value

1 of \$250,000,000 and employ over 10,000 people annually; and

2 WHEREAS the Bristol Bay area coastal habitats and fish and wildlife
3 resources are highly vulnerable to oil spill damage and disturbance; and

4 WHEREAS, the Alaska rural population depends heavily on commercial and
5 subsistence use of these fish and wildlife resources; and

6 WHEREAS significant gaps exist in understanding the distribution,
7 abundance, and population dynamics associated with many of these renewable
8 resources; and

9 WHEREAS industry has failed in its efforts to contain or control the
10 catastrophic oil spill in Prince William Sound even under favorable metero-
11 logical and oceanographic conditions; and

12 WHEREAS industry has not demonstrated the ability to adequately con-
13 tain and clean up oil spills under the extreme meteorological and ocean-
14 ographic conditions common in Bristol Bay; and

15 WHEREAS the people of the state, acting through their duly elected
16 representatives, have delayed oil and gas leasing in adjacent state waters;
17 and

18 WHEREAS by delaying leasing in state waters and delaying drilling in
19 federal waters in the Bristol Bay area, the opportunity exists to gain
20 additional knowledge and develop additional technologies that will protect
21 fish and wildlife resources in the presence of oil and gas activities, and
22 further assess potential impacts to these resources from the presence of
23 oil and gas activities; and

24 WHEREAS, given the facts stated above, it is not in the nation's or
25 the state's best interest to permit drilling in the North Aleutian Basin at
26 this time;

27 BE IT RESOLVED that the Alaska State Legislature respectfully requests
28 the Secretary of the United States Department of the Interior to suspend
29 and reevaluate the approval or permitting of any drilling, exploration

1 activity, or other development on the North Aleutian Basin Outer Conti-
2 nental Shelf; and be it

3 FURTHER RESOLVED that the legislature respectfully requests the Presi-
4 dent to suspend Lease Sale 92, to include oil and gas leasing in Bristol
5 Bay and the North Aleutian Basin to the work assigned to the President's
6 Special Task Force set up to measure the potential for environmental damage
7 in the offshore areas of California and Florida, and to direct the Special
8 Task Force to consider and recommend whether the Department of the Interior
9 should buy back the Bristol Bay and North Aleutian Basin leases; and be it

10 FURTHER RESOLVED that the legislature respectfully requests the Con-
11 gress of the United States to prohibit the expenditure by the Department of
12 the Interior of any money for the conduct of leasing or the approval of
13 permitting of any drilling or other exploration activity on the North
14 Aleutian Basin Outer Continental Shelf at this time.

15 COPIES of this resolution shall be sent to the Honorable George Bush,
16 President of the United States; the Honorable Dan Quayle, Vice-President of
17 the United States and President of the United States Senate; the Honorable
18 Robert C. Byrd, President Pro Tem of the United States Senate; the Honor-
19 able Jim Wright, Speaker of the United States House of Representatives; the
20 Honorable Manuel Lujan, Secretary of the Interior; the Honorable James D.
21 Watkins, Secretary of Energy; the Honorable Richard G. Darman, Director,
22 Office of Management and Budget; the Honorable William K. Reilly, Director,
23 Environmental Protection Administration; William E. Evans, Administrator,
24 National Oceanic and Atmospheric Administration; and Robert E. Kallman,
25 Director, Minerals Management Service; and to the Honorable Ted Stevens and
26 the Honorable Frank Murkowski, United States Senators, and the Honorable
27 Don Young, United States Representative, members of the Alaska delegation
28 in Congress.

STATEMENT OF TOM COOK
FOR CHEVRON U.S.A. INC
ON SENATE COMMITTEE SUBSTITUTE FOR HJR NO. 32
BEFORE THE SENATE RESOURCES COMMITTEE
IN THE SIXTEENTH LEGISLATURE
OF THE STATE OF ALASKA

April 10, 1989
Juneau, Alaska

Good afternoon Madam Chair and members of the Committee. My name is Tom Cook and I am employed by Chevron U.S.A. Inc. as Exploration Representative for Alaska in Anchorage, Alaska. I appreciate this opportunity to testify in opposition to Senate Committee Substitute for HJR No. 32 which asks the Secretary of the Interior to suspend and reevaluate existing leases and plans for future leasing in the North Aleutian Basin.

I realize it is difficult to keep the impact of various petroleum operations in perspective in the aftermath of the massive oil spill in Prince William sound, but I urge you to keep in mind that the spill was a marine transportation accident, apparently caused by gross human error. The record clearly shows that the vast majority of oil spills are related to marine transportation and those types of spills tend to be much larger than other spills.

By way of background, Chevron, along with its partners and other firms in the oil industry, acquired leases in OCS Sale 92 for the North Aleutian Basin in October 1988 after protracted litigation which lasted over two and a half years. OCS Sale 92 was scheduled for January 15, 1986, but legal challenges by the State of Alaska and others delayed the opening of bids until October 11, 1988.

This delay and extensive review of Sale 92 by the U.S. Courts is in actuality only a small part of the delay in the leasing and exploration of the North Aleutian Basin.

The North Aleutian Basin was among the earliest of all OCS sales planned for the Alaska Outer Continental shelf. Plans for leasing in this area were first announced in November of 1974 and the first sale was planned for 1977. Previously planned sales were repeatedly delayed and rescheduled because of concerns expressed by the State of Alaska. During this period of over 10 years leading to the Final Notice of Sale 92 in December 1985, there was extensive consultation between the State of Alaska and the U.S. Department of the Interior. Also, during the period leading to the scheduling of Sale 92, there were voluminous studies and numerous research program undertaken to address the concerns expressed by the State and others opposed to leasing in the area. In fact, there was near total accommodation and compromise by the Department of the Interior to the concerns expressed by the State. The North Aleutian Basin Planning Area, consisting of 32.5 million acres and 5,947 blocks of an average of 5,464 acres each, could have been offered under the area-wide leasing program. Instead, the lease offering was reduced by approximately 83 percent and only 5.6 million acres of the 32.5 million acre Planning Area was offered in Sale 92. Of the 990 blocks representing about 5.6 million acres, only 23 blocks accounting for 121,7545 acres were ultimately leased after all the years of delay, compromise, and litigation.

These 23 leases, shown on the map attached to my statement, represent only about 0.4 percent of the North Aleutian Basin Planning Area. The leases involve 5 prospects in a relatively small, concentrated area ranging from 15 to 58 miles from the nearest part of the Aleutian Peninsula.

Our interpretation of geological and geophysical data leads us to believe that the major area of interest is what we refer to as the Bidarka Prospect which is shown on the attached map. This assessment is reinforced by bidding patterns which show that this prospect received \$69.5 million in high bids of total high bids of about \$95 million for the 5 prospects. Because this single structure is regarded as the key to establishing commercial production in the Sale 92 area, only limited exploratory drilling will be required to evaluate the area.

In fact, we have proposed the drilling of a single initial exploratory well in partnership with the other lessees. This joint venture could reduce initial drilling to one well. If that initial well should result in a discovery or prove encouraging enough to warrant further drilling, the additional exploration could also be undertaken jointly to minimize impact in the area. If the initial well is discouraging, we believe it is unlikely that additional exploratory drilling will occur in the foreseeable future.

This background brings me to several points which I hope your committee will consider before requesting that the opportunity for exploration and possible development in the North Aleutian Basin be suspended or further delayed.

1. The petroleum industry has long operated and produced petroleum in many sensitive marine areas world-wide. These include the North Sea, the Gulf of Mexico, offshore California, and here in the Cook Inlet of Alaska. In all of these areas, petroleum exploration and development have proven to be compatible with thriving commercial and sport fisheries. Here in Alaska, the industry has over twenty-five years of experience in upper Cook Inlet, which demonstrates the compatibility of petroleum development with commercial and sports fisheries.

2. The industry has demonstrated its capacity to conduct exploratory drilling safely in areas of the Bering Sea with similar or more severe environmental conditions. Twenty-one exploratory wells have been drilled in the Bering Sea using semi-submersible rigs of the type suitable for drilling in the North Aleutian Basin; eleven of these wells were drilled in the St. George Basin just west of the Sale 92 area and nine wells were drilled in the remote and hostile Navarin Basin . These totals include one C.O.S.T. well in the St. George Basin and two C.O.S.T. wells in the Navarin Basin. Tens of thousands of wells have been drilled all over the world using jack-up drill rigs, drillships, and semi-submersible drilling vessels with significant benefits to society in terms of energy supply, jobs, and economic security.

3. One deep stratigraphic test well (C.O.S.T. well) has been drilled by ARCO Alaska, Inc., in the North Aleutian Basin on behalf of ARCO and 18 partners. This well was drilled offstructure for geological and geophysical information and

not for discovery of oil and gas. The well was plugged and abandoned on January 14, 1983. The drilling of a deep stratigraphic test well is the same kind of operation involved in drilling for the discovery of oil and gas. This well and the thousands of miles of seismic surveys show that operations can be conducted without harm to the area.

4. The North Aleutian Basin has significant petroleum potential. Furthermore, if petroleum is discovered in sufficient quantities, development will be possible from an economic, technical and environmental standpoint. The North Aleutian Basin is one of Alaska's most promising unexplored areas. In our judgment, the North Aleutian Basin and the Arctic National Wildlife Refuge coastal plain are the most promising areas for the next phase of frontier exploration in Alaska.

5. Before bidding in Sale 92, Chevron and several other companies participated in study of the feasibility of petroleum development in the North Aleutian Basin. If petroleum should be discovered in commercial quantities, our studies demonstrate that transportation would be by buried marine pipeline to a point on the north side of the Alaska Peninsula. Production would then be transported across the Peninsula by pipeline to a terminal on the Pacific side of the Peninsula for tanker movement to market. In other words, tanker transportation would not be required on the waters of Bristol Bay.

I will close my statement with a few comments about Chevron's experience with the Kodiak Island community and its fishermen. When OCS leasing was first proposed for the waters around Kodiak Island in the mid-to-late 1970's, there was a great deal of concern and, in some cases, hostility toward any thought of petroleum exploration and potential development. The community had little experience with exploration and what they had experienced wasn't too good. Seismic survey vessels conducting exploration on the Kodiak shelf and in the Shelikof Strait occasionally destroyed valuable crab fishing gear and our seismic operations were sometimes perceived to impair important fisheries.

As we participated in the pre-sale hearing process which led to CCS Sale 60 in September 29, 1981, we were faced with many questions from the community. We learned from the process. We learned that it was important to work with the local community and see that legitimate concerns and complaints were addressed. Chevron was a leader in forming the Oil/Fisheries Group of Alaska, which became a useful forum for resolving conflicts and communicating industry-to-industry.

Through this organization and our direct efforts with fishermen and community leaders, we were able to resolve conflicts. We educated ourselves about their fisheries. We learned where they fished, how they fished, and most importantly how to avoid damage to their gear. And, if we did inadvertently damage their gear, we made restitution. We took into account the seasonal nature of the fisheries and scheduled our operations accordingly which also helped avoid conflict.

After acquiring a few leases in Sale 60, we proceeded with plans for an exploratory well in Shelikof Strait. After much dialogue and planning with the Kodiak community, we drilled our well. But we worked with the fishermen in planning and conducting the operation. Corridors were established for our support vessels after consultation with fishermen to avoid conflict with commercial fishing and fixed gear. Fishermen were provided with the location of our anchor chains so that fishing gear wouldn't be lost. Communications between our drilling vessel and their fishing boats were established which meant that current weather and sea conditions were widely known.

Although our well did not result in a discovery, it was a success in terms of working with a community which is vitally concerned with protecting its fishing industry.

As I said earlier, we initially faced a great deal of opposition in the Kodiak area, especially from the fishermen. But we met with them, listened to their concerns and really tried to understand their concerns and perspective.

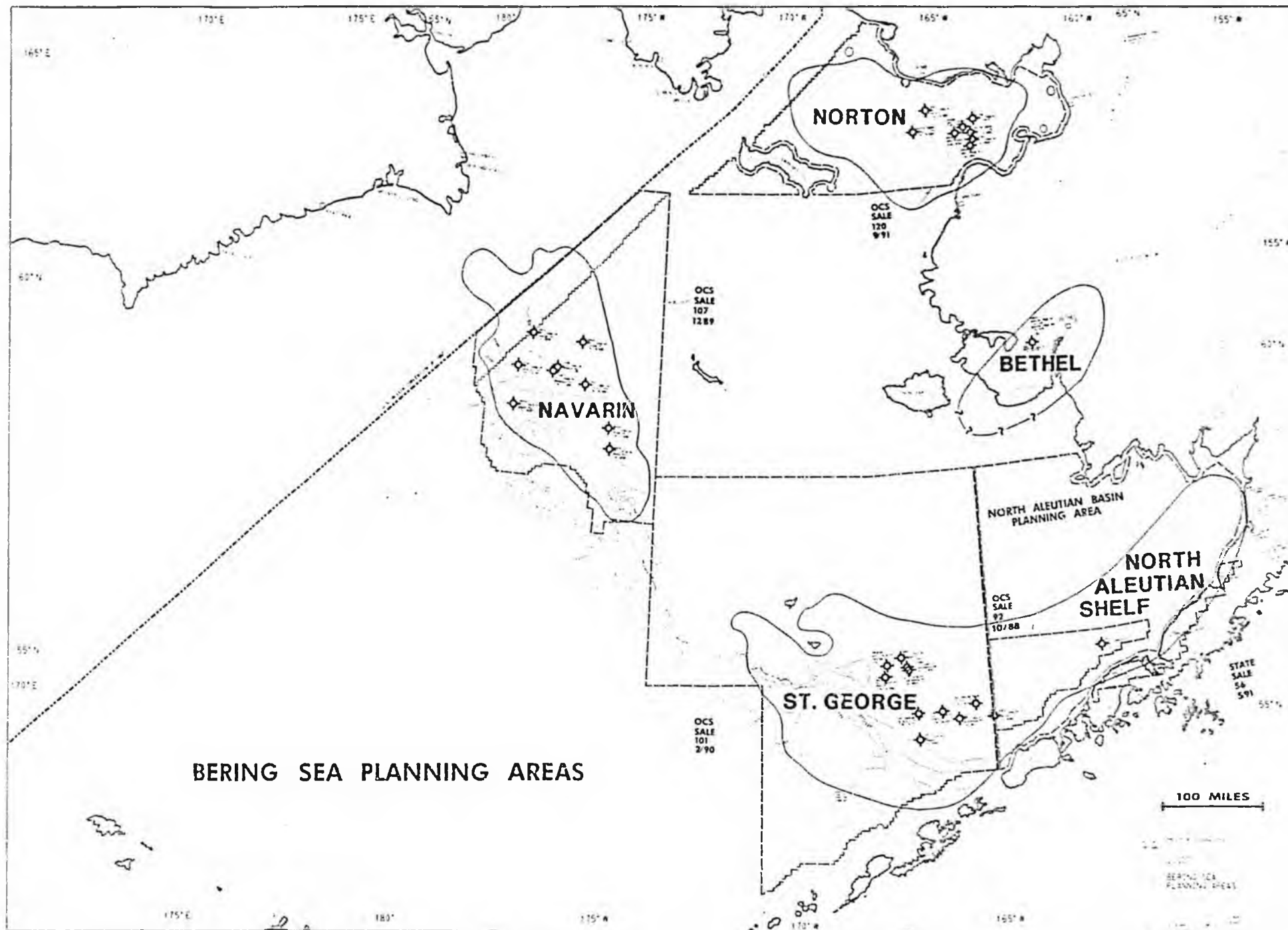
It took some time and a lot of talking, but eventually, we found a way for both groups to work together. We developed an understanding that set general operating guidelines for us and for them. We even developed a unique manual that explains the technology and operations of both groups.

We are committed to working with communities in the Bristol Bay region just as we did in Kodiak. We have had some initial communications in the Bristol Bay region concerning our plans in the

Sale 92 area and intend to work with fishermen and community leaders to see that petroleum exploration in the North Aleutian Basin is conducted in a responsible manner.

I respectfully ask that you do not pass Senate Committee Substitute for HJR No. 32. If our efforts are successful in finding new reserves, the Bristol Bay region and the State will have an improved economy and the nation will benefit from increased domestic sources of energy.

Thank you. I'll be happy to respond to your questions.



N. ALEUTIAN SHELF, Alaska
O.C.S. SALE 92 RESULTS
OCTOBER 11, 1988

NO 3-7 NO 3-8

NO 3-8 NO 4-7

NO
3-7
NN
3-1

NO
4-7
NN
4-1

NN
3-1

NN 3-2

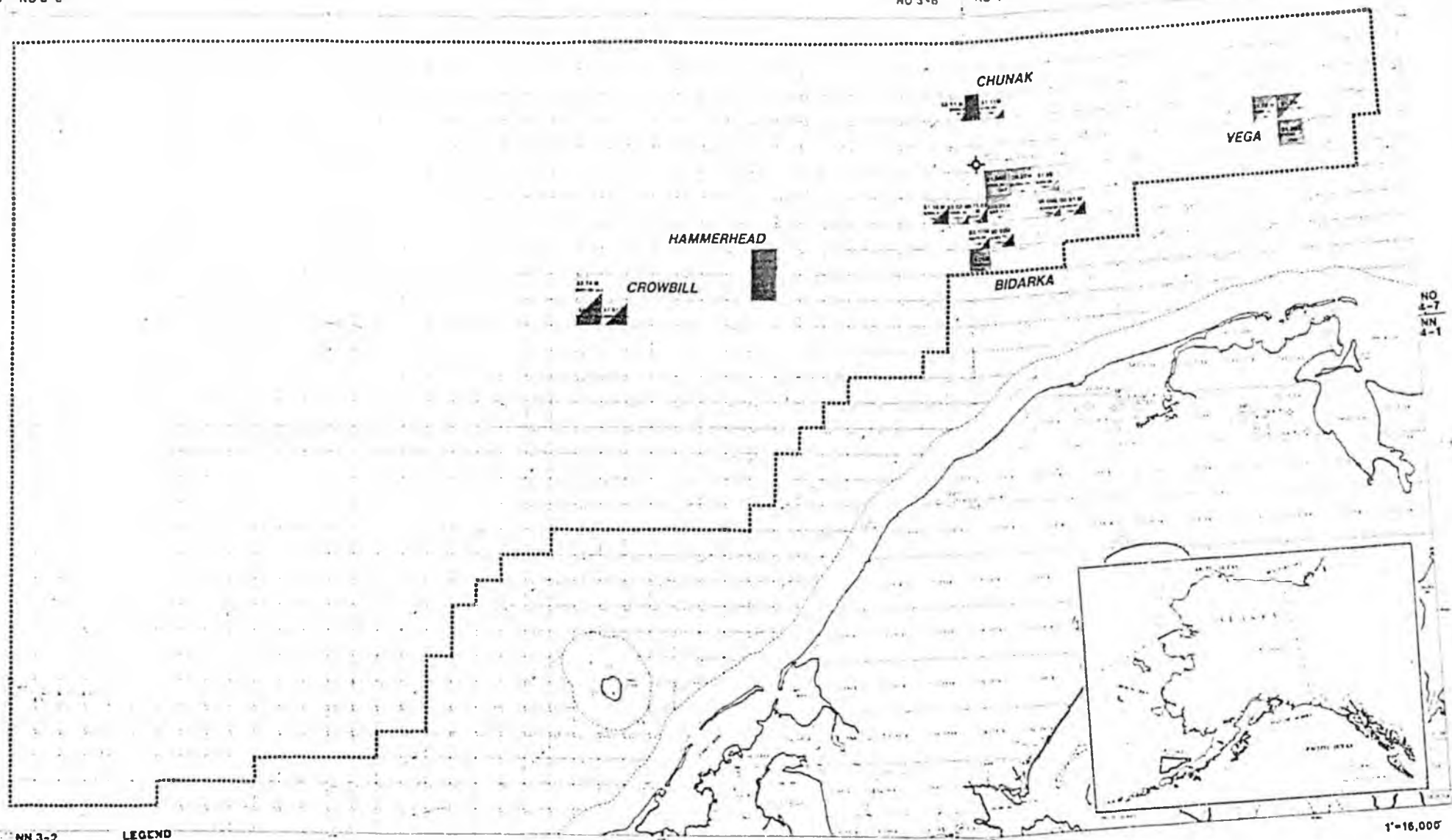
LEGEND

- AMOCO
- CHEVRON
- CONOCO
- MOBIL
- MURPHY-ODECO
- PENNZOIL
- SHELL
- UNOCAL

NN 3-2 NN 4-1

1"=16,000'

NOTE: Lease interests reflect all assignments made immediately after sale.



STATUS OF STATE'S EFFORT TO DELAY
LEASING OF THE BRISTOL BAY AREA
March 16, 1989

I. ADMINISTRATIVE

1. An issue paper describing the State's position with regard to oil and gas leasing in the Bristol Bay region was delivered to Bush transition team. (Attachment I 1,2)
2. Governor's letter to President Bush requesting the addition of Alaska's Bristol Bay area to the OCS Task Force review called for in President Bush's budget speech. (Attachment I 1,2)
3. Subject of one-on-one conversation between Governor Cowper and Secretary Lujan during their March meeting.

II. LEGISLATIVE

1. Governor's letter to Chairman Yates of House Interior Appropriations Committee requesting deletion of funding for Bristol Bay development. (Attachment II 1)
2. The State's Washington Office has conveyed the State's position to House Interior Appropriations committee members over the past three weeks. Chairman Yates has communicated his support of the Governor's position.
3. The State's contacts with Representative Miller has resulted in budget report draft requiring Presidential Task Force to include Bristol Bay in its scope of review. (Attachment II 3)
4. Testimony before House Interior Appropriations by Natural Resources Defense Council stated that Section 19 of Outer Continental Shelf Lands Act does not provide adequate deference to views of governors of coastal states. (Attachment II 4)

III. JUDICIAL

1. The State recently appealed the Ninth Circuit Court of Appeals decision and sought rehearing. The Ninth Circuit Court has just advised the State of its decision against the rehearing plea. The Governor has stated his intention to appeal to the Supreme Court.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 27, 1989

The Honorable George Bush
The President
The White House
Washington, DC 20500

Mr. President:

Thank you for the opportunity last week, on your stopover in Anchorage, to speak with you on some issues of concern to Alaska. As you know, we are very encouraged with your stance to promote the opening of the Arctic National Wildlife Refuge (ANWR) to responsible oil and gas leasing. The coastal plain of ANWR offers a prospect of substantial oil and gas recovery under adaptable environmental conditions.

On a related issue, I was heartened by your announcement that you have directed Secretary of the Interior Manuel Lujan to set up a task force to examine the environmental impact of proposed outer continental shelf (OCS) lease sales in three areas off the coasts of California and Florida. As you know, Alaska, too, has been seeking to postpone oil and gas exploration in the OCS, off Bristol Bay, an area we believe to be of far greater value for its fish and wildlife than for its hydrocarbon potential.

It is our understanding that your administration is in the process of focusing and shaping the task force's scope of review, and is evaluating whether it will limit the task force's attention to the three geographic areas highlighted in your speech. Since the group has been expanded to include the Environmental Protection Agency and possibly the National Oceanic and Atmospheric Administration, and since questions of both environmental and ocean resources impacts are at the heart of our concern for Bristol Bay, we respectfully request that consideration of the impacts of exploration in the area of Lease Sale 92, the Northern Aleutian Basin, be added to the scope of the review team.

In making this request we are aware that Bristol Bay is distinguishable from the other three OCS areas in that a lease sale already has occurred. Nevertheless, we believe the economic and biological reasons for postponing exploration, while we answer remaining questions, are as compelling as anywhere else in the country. As further elaboration on the risks at stake in Bristol Bay, I have

Mr. President

- 2 -

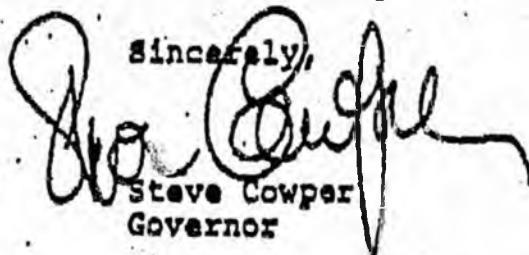
February 27, 1989

enclosed a copy of an issue paper which was provided to your transition team in January..

Alaska remains responsive to the nation's need to decrease its dependence on foreign oil, as evidenced by our efforts to open the coastal plain of ANWR, and fully supports the prudent and orderly development of the state's outer continental shelf in an environmentally acceptable manner. In Bristol Bay, however, we look for your consideration of deferring exploration in order to protect its exceptional commercial, subsistence, and esthetic fish and wildlife values.

Thank you for your consideration of this important matter.

Sincerely,



Steve Cowper
Governor

Enclosure

cc/enc: Richard G. Darman, Office of Management and Budget
James D. Watkins, Department of Energy
Manuel Lujan, Jr., Department of the Interior
Robert A. Mosbacher, Department of Commerce
William K. Reilly, Environmental Protection Agency
The Honorable Ted Stevens
The Honorable Frank Murkowski
The Honorable Don Young
Philip M. Smith, National Academy of Sciences

BRISTOL BAY OIL AND GAS LEASE SALE**ISSUE:**

Should the Department of the Interior postpone exploration and development of Oil and Gas Leases in Bristol Bay (Sale 92)?

SUMMARY OF STATE POSITION:

The State of Alaska supports delay of oil and gas exploration in Bristol Bay because of the low hydrocarbon potential and extremely high fish and wildlife values.

BACKGROUND:

With the exception of Sale 92, the State of Alaska has strongly supported the federal OCS leasing program off Alaska. In 1985, the Governor of Alaska recommended to the Secretary of the Interior under Section 19 of the Outer Continental Shelf Lands Act (OCSLA) that Sale 92 be postponed for ten years. The Secretary rejected this recommendation and conducted the lease sale. The courts enjoined the Secretary from opening the bids received from the sale. In November, 1988, the Ninth Circuit Court of Appeals lifted the injunction. The Secretary of the Interior opened and awarded the bids soon thereafter. Exploration on some tracts could begin in 1989. The state is appealing this decision to the U.S. Supreme Court.

DISCUSSION OF STATE POSITION:

The State of Alaska supports a postponement of exploration and development in this area because of 1) the region's unequalled fish and wildlife values, 2) its low oil and gas potential, and 3) the reasonable expectation that risks will be significantly reduced by deferring activities.

Fish and Wildlife Values

- The fisheries of the sale area are among the most productive in the world according to the sale 92 EIS. First wholesale value can exceed one billion dollars annually and employs 10,000 people.
- According to the National Marine Fisheries Service, Alaska Region, the area is the single most important region of the U.S. Outer Continental Shelf for the conservation of marine mammals and endangered species and the protection and management of fishery resources.

Oil and Gas Benefits

- o The Department of the Interior estimates that the potential economic benefits of the North Aleutian Basin hydrocarbon resources are among the lowest of all the nation's OCS planning areas.
- o In 1985, the Department of the Interior ranked it 14 out of the nation's 18 OCS planning areas in terms of the estimated net economic value of recoverable hydrocarbon resources.

Risks of Exploration and Development

- o 52- 57% probability that one or more spills exceeding 1,000 barrels of oil will occur over the productive life of the leases, according to Sale 92 EIS.
- o EIS projects major effects to the red king crab population, as well as less serious impacts to tanner crab, salmon, herring, and groundfish. We estimate the discounted gross economic loss based on the first wholesale values to be approximately 563.6 million dollars.
- o The Department of the Interior has found that mechanical recovery of spilled oil at sea becomes ineffective between sea states three and four. In the Sale 92 area, sea states of three or greater occur from 68 to 94 percent of the time.

Deferral will Reduce Risks

- o Deferral will enable important environmental information to be obtained.
- o Deferral will allow improvements in open-ocean oilspill cleanup capabilities.
- o Deferral will allow the industry to obtain additional operating experience in other less sensitive areas of the Bering Sea.

February 6, 1989

The Honorable Sidney R. Yates
Chairman
House Subcommittee on Interior and
Related Agencies
308 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I am writing to request your assistance in imposing a deferral on oil and gas exploration in Bristol Bay (the Sale 92 area). The Secretary of the Interior awarded these leases in the Fall of 1988. A deferral similar to the one which your committee crafted last year for the lease sale off Florida would allow time for needed research to be completed.

As you know, the State of Alaska has consistently opposed the development of oil and gas in this area. This is the only area in the five year plan where the State has opposed development. We recommend postponing exploration and development in Bristol Bay because of 1) the region's unequalled fish and wildlife values, 2) its low oil and gas potential, and 3) the reasonable expectation that risks will be significantly reduced by deferring activities.

The fisheries of the sale area are among the most productive in the world according to the Environmental Impact Statement prepared by the Department of the Interior. The first wholesale value of the commercial fisheries can exceed one billion dollars annually, and the fishery employs 10,000 people, either directly or indirectly. According to the National Marine Fisheries Service, Alaska Region, the area is the single most important region of the U.S. Outer Continental Shelf for the conservation of marine mammals and endangered species and the protection and management of fishery resources.

In contrast, the Department of the Interior estimates that the potential economic benefits of the area's hydrocarbon resources are among the lowest of all the nation's OCS planning areas. In 1985, the Department of the Interior ranked it 14 out of the nation's 18 OCS planning areas in

terms of the estimated net economic value of recoverable hydrocarbon resources.

With regard to the risks of development in the area, the EIS estimated that there was a greater than 50% probability that one or more spills exceeding 1,000 barrels of oil would occur over the productive life of the leases. Further, the EIS projected major effects to the red king crab population, as well as less serious impacts to tanner crab, salmon, herring, and groundfish. The State estimates the discounted gross economic loss based on first wholesale values to be approximately 563.6 million dollars. The Department of the Interior has found that mechanical recovery of spilled oil at sea becomes ineffective between sea states three and four. In the sale area, sea states of three or greater occur over 68 percent of the time.

The State supports deferral of exploration and development because it will reduce the above risks. Deferral will enable important environmental information to be obtained, allow improvements in open-ocean oilspill cleanup capabilities, and permit the industry to obtain additional operating experience in other less sensitive areas of the Bering Sea.

In the past, we have been reluctant to use the appropriation process to further this objective. We believed that the safeguards provided in Section 19 of the Outer Continental Shelf Lands Act (OCSLA) provided the governors of coastal states with a meaningful opportunity to protect important state interests in the federal leasing process. The recent decision by the Ninth Circuit Court of Appeals which upheld the Secretary's decision to lease in Bristol Bay greatly diminishes the consultative role of coastal state governors intended by the Congress and forces us to return to the legislative process for relief.

This committee has provided leadership in the area of balancing the national interests in energy security and the protection of highly valued marine resources and areas. Last year, the Congress, following the lead of this committee, imposed a moratorium on the exploration of leases which had been granted off the coast of Florida. The Congress was concerned by the number of questions which remained unanswered regarding the impact of development on other resources.

The State of Alaska encourages the committee to adopt an approach for Bristol Bay which is similar to that taken last year for Florida. In Bristol Bay, like the Florida Keys, the research conducted in preparation for the sale has left

February 6, 1989

several critical questions unanswered. These include: 1) the effects of seismic energy sources on salmon fisheries, 2) the patterns and timing of salmon migration through Bristol Bay and the North Aleutian Basin, 3) the distribution and abundance of forage fish in and adjacent to the North Aleutian Basin, 4) migratory behavior of egg-bearing female king crab along the north shore of the Alaska Peninsula, 5) the importance and location of juvenile king crab protective rearing habitats in the North Aleutian Basin, 6) the effects of oiled sediment on settling and recruitment of food organisms important to juvenile king crab, 7) effects of oil contamination on gray whales, 8) the importance of the North Aleutian Shelf as a feeding area for gray whales, 9) the effects of oil contamination on eelgrass beds along the northern shoreline of the Alaska Peninsula, and 10) an analysis of oil spill response capabilities.

The enclosed analysis by the Alaska Department of Fish and Game provides a further discussion of the importance of understanding these phenomena prior to proceeding with exploration and development in Bristol Bay.

Thank you for your consideration of this request. I am hopeful that together we can adopt an approach to the lease sale in Bristol Bay which will protect its exceptional commercial, subsistence, and esthetic fish and wildlife values.

Sincerely,

S/S Steve Cowper

Steve Cowper
Governor

Enclosure

Identical Letter sent to all members of the Subcommittee

cc: Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young

bcc: Attorney General Grace Schaible
Commissioner Lennie Gorsuch
Commissioner Don Collinsworth
Commissioner Kelso
Bob Grogan
Denby Lloyd
Dem Cowles
Kate Graham, UFA
Henry Mitchell, BSFA
Lisa Speer, NRDC

ANALYSIS OF INFORMATION NEEDS IN THE NORTHERN ALEUTIAN BASIN

PART 1

Information needs that have not been addressed as of January 1989:

1. Effects of seismic energy sources on salmon fisheries. 1
2. Seaward migration patterns and timing of Pacific salmon through Bristol Bay and the North Aleutian Basin. 2
3. Distribution and abundance of forage fish in and adjacent to the North Aleutian Basin. 3
4. Migratory behavior of egg-bearing female king crab along the north shore of the Alaska Peninsula. 1
5. Importance and location of juvenile king crab protective rearing habitats in the North Aleutian Basin. 4
6. Effects of oiled sediment on settling and recruitment of food organisms important to juvenile king crab. 1
7. Effects of oil contamination on gray whales. 1
8. Importance of the North Aleutian Shelf as a feeding area for Gray whales. 1
9. Effects of oil contamination on eelgrass beds along the northern shoreline of the Alaska Peninsula. 1
10. Analysis of oil spill response capabilities. 1

1 To our knowledge, no studies addressing this question are underway and no future studies have been funded.

2 Studies that may address this question are currently underway. However, a minimum of three more years of study will be necessary before this question is adequately resolved.

3 Some studies directed at herring use of the Port Moller vicinity are planned for summer 1989. However no studies directed at capelin or sandlance are underway and no future studies have been funded.

4 Previous studies have suggested that rocky, cobble habitat is crucial to juvenile king crab survival. However, no studies have been directed toward identifying the locations of these habitats in the North Aleutian Basin.

PART 2

Discussion of selected information needs

1. MIGRATORY BEHAVIOR OF EGG-BEARING FEMALE KING CRAB ALONG THE NORTH SHORE OF THE ALASKA PENINSULA

Justification: Insufficient information is currently available on the onshore-offshore migration pattern of egg-bearing red king crab in the North Aleutian Basin (NAB). In the Kodiak region, female king crab exhibit an annual onshore-offshore migration pattern (Powell and Nickerson 1965, NPFMC 1980). Due to limited winter surveys, this behavior is not documented for the NAB. McMurray et al. (1984) questioned whether females undergo an onshore-offshore migration, and suggested that remaining in warmer nearshore waters would enhance egg development.

Whether or not gravid females exhibit an onshore-offshore migration is important to the Sale 92 decision process because it affects the potential for increased hydrocarbon exposure to developing eggs and therefore affects the risk assessment. If studies indicate that females do not migrate to deeper offshore areas, the information would provide justification for additional protection to nearshore areas through adoption an alternative lease sale configuration or mitigation measures.

Methodology: Conventional winter field surveys along the North Aleutian Shelf and inner Bristol Bay would be necessary to document the nearshore distribution of egg-bearing female king crab.

Timing: Currently depressed NAB king crab populations may restrict the acquisition of data necessary for proper analysis. Consequently, two or more winter field surveys may be required.

Cost: Estimated cost for this study is 100,000 to 150,000 dollars.

2. IMPORTANCE OF THE NORTH ALEUTIAN SHELF AS A MIGRATORY FEEDING AREA FOR GRAY WHALES

Justification: The relative importance of the North Aleutian Shelf to the overall eastern Pacific gray whale population is currently unknown. Although small numbers of gray whales have been reported feeding in nearby waters during migration and while on the breeding grounds (Sund 1975, Darling 1977, Wellington and Anderson 1978, Norris et al. 1982, and Brueggemann et al. 1987), the majority are not known to begin feeding intensively until they reach the northern Bering Sea (Rice and Wolman 1971, Zimushko and Ivashin 1980, Lowry et al. 1982). However, Gill and Hall

(1983) reported that once gray whales moved into nearshore and estuarine waters along the north side of the Alaska Peninsula, many of them began feeding. During three spring aerial surveys, 50-80 percent of the whales seen within 1 kilometer (km) of shore between Unimak Pass and Naknek were trailing mud plumes or were on their sides characterizing feeding behavior (Gill and Hall 1983). This observation is important because it indicates that a significant percentage of the eastern Pacific gray whale population may utilize coastal areas along the North Aleutian Shelf for "migratory" feeding.

The significance of such "migratory" feeding areas is currently unknown. Gill and Hall (1983) suggested that the use of such feeding areas might be a requisite for survival, due to several prior months of near fasting and the energy demands resulting from a long migration. Consequently, additional studies are needed to provide accurate estimates of: 1) the number of gray whales that utilize this area as feeding habitat; 2) the length of time that feeding occurs in the area; and 3) the principle prey species. If information is obtained that shows the North Aleutian Shelf nearshore area is of critical importance to gray whales, it should significantly influence the reasoned choice between alternatives through supporting selection of an alternative lease sale configuration or the adoption of mitigating measures restricting activities in the nearshore area during the spring migration period.

Methodology: The MMS should consult with the NMFS on designing conventional field studies to address this information need. This study should also be coordinated with the on-going OCSEAP endangered whale monitoring study.

Timing: A minimum of two years of field surveys would be required.

Cost: The study cost is not anticipated to exceed 400,000 dollars.

3. EFFECTS OF OIL CONTAMINATION ON EELGRASS BEDS ALONG THE NORTHERN SHORELINE OF THE ALASKA PENINSULA

Justification: Oil contamination of eelgrass beds is likely if an oilspill reaches the northern shoreline of the Alaska Peninsula. Contamination may reduce productivity of these plants, cause outright mortality, and alter substrates so that recolonization by plants may be hindered. If the growth of these plants is affected, or the plant surfaces are contaminated, the implications could be severe. For instance, the world populations of black brant and emperor geese rely on Bristol Bay eelgrass beds, particularly those found in Izembek Lagoon, as a primary food source prior to their strenuous fall migration. It is also suspected that the eelgrass beds are utilized by herring stocks for spawning substrates.

In order to adequately evaluate the risks to this critically important habitat, and the species dependent upon eelgrass beds, it is essential that there be a better understanding of the potential effects of oil contamination on these plants and their substrates. The final EIS did not adequately address the issue on how long impacts might persist or how the long-term disruption to eelgrass beds might affect waterfowl. However, it did state that East Coast eelgrass beds affected by disease required over 30 years to recover. This suggests that very significant long-term impacts might result from oil contamination. If the proposed studies found this to be true, the information would provide strong justification to support an alternative lease sale configuration or mitigation measures which would lower the risk of oil contamination to these important habitats.

Methodology: In situ field studies should be conducted utilizing various types of hydrocarbon contaminants at varying concentrations.

Timing: The study schedule should be flexible to ensure that long-term impacts are adequately documented. It is anticipated that monitoring will be required for at least three to five years.

Cost: Estimated study costs are not projected to exceed 500,000 dollars.

4. ANALYSIS OF OIL SPILL RESPONSE CAPABILITIES

Justification: To date, an analysis of oilspill response capabilities in the Bering Sea has not been conducted. Considerable information is available that could be utilized in this analysis. This information includes: 1) Coast Guard oilspill logs and response capability evaluations for major oilspill events in U.S. waters; 2) reports on international oilspill events and subsequent cleanup efforts; 3) oilspill response exercises conducted by the Coast Guard and the oil industry; 4) manufacturer equipment specifications; 5) oilspill behavior reports; 6) industry oilspill contingency plans; and 7) meteorological and oceanographic studies of the NAB. The analysis should not only focus on equipment capabilities, but also on the capability to deploy equipment and to logistically support cleanup operations.

The study results could 1) allow the MMS to include an oilspill response capability judgement into their analyses of impacts in Environmental Impact Statements; 2) provide a basis for evaluating the effectiveness of current mitigative measures such as oilspill contingency plans; 3) justify development or adoption of different mitigation measures to reduce oilspill risks; or 4) support adoption of alternative lease sale configurations

Methodology: The study should provide the following information: 1) describe equipment, personnel, and logistical capabilities currently available or anticipated by industry; 2) develop several oilspill scenarios and analyze industry's response capabilities under each scenario; and 3) develop a set of standards for evaluating oilspill contingency plans.

Timing: The study could be completed in one year.

Cost: Estimated study costs could range from 15,000 to 25,000 dollars.

Literature cited.

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SEC. ____ . No funds provided in this title may be expended by the Department of the Interior for the approval or permitting of any drilling or other exploration activity, on lands within the North Aleutian Basin planning area of the Department of the Interior, and identified by the Department of the Interior as the following blocks: 579, 634, 635, 679, 711, 712, 713, 754, 755, 757, 758, 798, 799, and 842.

Fiscal Year 1990 Budget Requests

**Bureau of Reclamation
Water Resources Division, U.S. Geological Survey
Federal Power Marketing Administrations
Minerals Management Service (OCS Leasing Program)
Bureau of Land Management (Alaska)**

VIEWS AND ESTIMATES REPORT

**RECOMMENDATIONS OF THE
SUBCOMMITTEE ON WATER, POWER AND
OFFSHORE ENERGY RESOURCES**

February 27, 1989

MINERALS MANAGEMENT SERVICE -- OCS PROGRAMS

OCS ESCROW RELEASE

The Administration's budget projects \$1.0 billion in FY 1990 revenues from an OCS escrow account release. This anticipates a favorable Supreme Court decision in 1990 concerning title to the submerged lands immediately offshore ANWR, thus permitting the release of the Federal share of the Section 7 escrow funds, including interest.

The Subcommittee notes that there is no firm basis for assuming that the Supreme Court will decide the Alaska submerged lands issue in FY 1990. This complex case, United States v. Alaska, No. 84 Original, has been pending since 1979 and the matter remains delegated to a Special Master appointed by the court.

In addition, while the Subcommittee in no way intends to prejudice the Federal government's position in this case, we question whether the Administration's anticipation of a "favorable" decision can be properly accounted for as \$1 billion in Federal revenues. For example, a recent CRS analysis casts doubt upon such reliance:

"This position of the United States [in United States v. Alaska] has become increasingly tenuous as a result of the holding and the reasoning of the Supreme Court in Utah v. United States, June 8, 1987...."


OCS Lease Sales

President Bush's budget supplement defers three scheduled OCS lease sales, thus removing \$457 million in anticipated FY 1990 revenues. The President directed that a joint Interior, Department of Energy, and National Academy of Sciences task force be established to review and resolve environmental concerns over adverse impacts of sales in the "three environmentally sensitive areas." Specifically, Lease Sale 91 off Northern California is "indefinitely postponed" (\$126 million); Lease Sale 95 off Southern California is "delayed pending review" (\$321 million); and, Lease Sale 116 off the Gulf Coast of Florida is "indefinitely postponed" (\$10 million).

President Bush's action is an acknowledgement of the flaws in the Reagan budget's assumption that "no legislative moratoria" would be imposed on controversial OCS lease sales. Congressional

² Pamela Haldwin, "Legal issues Related to Ownership of the Submerged Lands Within and off the Coast of the Arctic National Wildlife Refuge," August 10, 1987, p. 19, CRS # 87-673 A

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concern about the Reagan Administration's accelerated leasing of environmentally sensitive OCS areas is such that, even before the President's deferral, it was extremely unlikely that these three sales would have been held as scheduled.

While the Subcommittee is pleased with the President's proposal, we would recommend the Administration consider the following actions:

1. Representation on the Task Force should be broadened to, at a minimum, include the Environmental Protection Agency.

2. No funds should be expended on any pre-lease sale activities in FY 1990 or prior to the Task Force report, Presidential review and Congressional reaction.

3. The scope of the Task Force review should be expanded to include scrutiny of other no less controversial sales such as #119 off Central California, #92 off Bristol Bay, Alaska, #132 off Washington - Oregon, and others.

4. The Department, and the Task Force, should give greater emphasis to increasing Federal revenues and reducing the deficit by improved royalty collection and management on existing Federal leases.

² The Subcommittee notes the establishment of an Advisory Committee under the auspices of the Committee's Ranking Republican, Mr. Young, to resolve fisheries and resource conflicts involved in lease sale #92 should the lease sale proceed.

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Mr. Chairman and Members of the Committee:

My name is Lisa Spear. I am Senior Staff Scientist with the Natural Resources Defense Council (NRDC). My testimony is on behalf of NRDC, the American Littoral Society, American Oceans Campaign, Clean Ocean Action, Florida Public Interest Research Group, Friends of the Earth, Greenpeace, the North Carolina Coastal Federation, the Oceanic Society, Sierra Club and Trustees for Alaska (hereinafter, "environmental coalition"). We welcome the opportunity to testify today on the Department of the Interior's Outer Continental Shelf (OCS) Oil and Gas Leasing Program.

I. INTRODUCTION

As this Committee is well aware, the OCS program during the Reagan years was the subject of extraordinary conflict and controversy. From 1981 to 1988, eleven coastal states -- Louisiana, Texas, Alaska, New York, New Jersey, Maryland, Virginia, California, Massachusetts, Washington and Oregon -- filed suit against the OCS program or individual lease sales. In addition, Congress has been forced to intervene to protect highly sensitive offshore areas from the Department's leasing plans each year since 1982. Mounting public concern over the program is reflected by the turnout of hundreds and even thousands of people at recent hearings on OCS leasing off California, Florida and North Carolina. The introduction last month of legislation that would block leasing off the New Jersey coast indicates that Congressional concern over DOI's approach is spreading.

Campaign statements made by President Bush lead to hope that the new Administration will pursue a more moderate course with the OCS Program. However, the Administration's intentions are not yet clear. While we have every expectation that the new Secretary will move to reduce conflict by removing highly sensitive and controversial areas from the OCS program, there are no assurances he will do so in the absence of Congressional encouragement. A one-year delay imposed by this Committee on OCS activities in sensitive areas would provide an important incentive for the Department to overhaul the program quickly, so that the nation can move forward with a more reasonable and balanced program of OCS development. We therefore ask the Committee to consider:

- 1) a one-year delay in leasing off California in those areas previously subject to Congressional leasing restrictions;
- 2) extending the current prohibition on OCS activities in Georges Bank off the New England coast through Fiscal Year 1990;
- 3) extending the ban on leasing and exploration south of 26° north latitude in the Eastern Gulf of Mexico for three years;
- 4) requiring the Department to prepare an EIS prior to approving exploration off the North Carolina coast as requested by Governor Martin;
- 5) a one-year delay on leasing within 50 miles of the coast, around canyon head tracts, in the shelf break zone and north of 40°15' north latitude in the mid-Atlantic; and

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6) a one-year delay on exploration in Bristol Bay, Alaska.

On behalf of the groups I represent, I would like to thank this Committee for its many years of hard work to resolve the difficult and troubling issues surrounding the OCS program. It has been only through this Committee's actions that a modicum of reason and balance were imposed on the program during the Reagan years. From Cape Cod to Cape Mendocino, from Bristol Bay to Florida Bay, this Committee has defended the right of states, local governments and ordinary citizens to have a say in leasing decisions that will profoundly affect their coasts and their lives. On behalf of all those people, we thank you.

II. ENERGY SECURITY

The Interior Department and the oil industry cite the nation's escalating reliance on foreign oil as evidence of the need to drill sensitive areas of the OCS. While rising imports are undeniably a concern, developing hydrocarbons in the areas listed above will not contribute appreciably to the nation's long-term energy security.

For one thing, the Interior Department projects that the oil and gas located offshore Southern and Northern California, all of the North and Mid-Atlantic states, Bristol Bay and the Florida Keys ~~together~~ amount to roughly 735 million barrels of oil equivalent. This represents enough oil and gas to fuel the nation for less than 40 days. These areas are thus clearly not the answer to the nation's long-term energy future. Indeed, the "drain America first" approach advocated by the industry is likely to enhance the nation's reliance on foreign oil over the long term.

Second, the Department's arguments about the need to open sensitive OCS areas on energy security grounds are unconvincing when considered in the context of other federal actions that have increased the nation's dependence on imports. For example, at the same time the Interior Department was pressing Congress to lift the moratorium on drilling off certain areas of California, the Transportation Department was rolling back fuel economy standards for automobiles. These rollbacks will cause roughly 210 million barrels of oil -- almost 30% of the oil the Department thinks underlies the areas listed above -- to be burned needlessly. Other examples of government policies that undermine national energy security include the Administration's deep cuts in funding for energy conservation and alternative energy research. The Administration cannot seriously expect the public to accept oil drilling in national treasures, like the Florida Keys while simultaneously advocating a 70% reduction in DOE's energy conservation programs, as the Administration's FY'90 budget proposes.

Pursuing conservation measures could help substantially reduce reliance on oil imports and the need to drill sensitive areas of the OCS for oil and gas. For example:

* An increase to 40 miles per gallon (mpg) fleet average for cars and 30 mpg for trucks by the year 2008 production models would save roughly 20

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Tracts Within 50 Miles of the Coast: In recognition of the importance of nearshore areas, the states of Connecticut, New Jersey, and Virginia have all recommended a 50 mile buffer zone be imposed in the mid-Atlantic in which no leasing takes place.²¹ North Carolina has additionally recommended that all tracts within the 200 meter isobath be deleted. The Department has deferred this area from further consideration in a previous area identification for this region (Lease Sale 111, which was cancelled due to lack of industry interest).

Submarine Canyon Tracts: As noted above, submarine canyons in the mid-Atlantic are known to be highly productive and important to commercial species of fish as well as seabirds and other species. The States of Rhode Island, Connecticut, New York, New Jersey, and the National Oceanic and Atmospheric Administration, have all requested that all canyon head and associated blocks be deleted from Sale 121.²²

The Shelf Break Zone: Canyon head deferrals will not provide protection for inter-canyon blocks in the shelf break zone. A report by the Center for Coastal and Environmental Studies at Rutgers University²³ identified the shelf break zone as a particularly sensitive ecotone due to rugged topography and exposed substrate that are associated with increased biological productivity. The state of New Jersey has requested that this zone be deferred from past lease sales because of the unusual productivity that is thought to characterize the shelf break area.

All Tracts North of 40°15' North Latitude: The State of New York has repeatedly voiced its opposition to leasing any tracts north of 40°15' north latitude due to the high population density of the Long Island area and the heavy recreational use of its shores and the importance of its recreational and commercial fisheries.

We ask that the Committee consider imposing a one-year delay on leasing these areas. We note that Congressman Pallone and Courter from New Jersey have both supported a delay in Lease Sale 121 altogether. Congressman Pallone has introduced a bill to delay the sale (H.R. 121).

F. Bristol Bay

We would like to bring to this Committee's attention a recent court decision that will, if allowed to stand, seriously undermine the right of states to meaningfully participate in federal leasing decisions. This court decision arose out of litigation over Sale 92 in Bristol Bay, Alaska.

Bristol Bay supports one of the largest commercial fisheries in the world. The Bristol Bay salmon fishery alone is valued in excess of \$250 million annually and employs an estimated 10,000 people. The Bay also encompasses one of the world's great bird migration crossroads and supports at least 20 species of marine mammals, including eight species of endangered whale. The Department estimated that there is a greater than 50% chance that one or more major spills would occur over the life of the field. The Department predicted "major" to "moderate" impacts to marine and coastal

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birds, the red king crab fishery and to several species of marine mammals from Lease Sale 92. The National Marine Fisheries Service has concluded that a major spill occurring during peak gray whale migration or when right whales are present would be likely to jeopardize the continued existence of these species.

In December of 1985, 10 national and Alaskan conservation organizations, 6 Alaskan villages and Native Alaskan organizations, and the State of Alaska on behalf of itself and a number of fishing groups filed suit to block Sale 92, then scheduled for January 15, 1986. Six states (Washington, Oregon, Hawaii, California, Massachusetts and Texas) filed amicus briefs on the side of the State of Alaska.

Unfortunately, in January of last year, the district court ruled against the State, saying that no deference is due to a governor's recommendation under Section 15 of OCSLA. This decision was upheld by the Ninth Circuit last fall. If allowed to stand, the decision will mean that states could have virtually no say in federal leasing decisions. In response, the State of Alaska recently filed a petition for re-hearing en banc in the Ninth Circuit.

In the event the Ninth Circuit rules against the State, we ask that this Committee impose a one-year delay on exploration in the Bay. This request, which has also been made by the State of Alaska, is based on critical information gaps that must be filled before informed decisions can be made on whether and how to proceed with any drilling in Bristol Bay. These data gaps include:

- * the effects of seismic activities on salmon;
- * the effects of oil contamination on grey whales;
- * the importance of the North Aleutian shelf as habitat for grey whales;
- * the effects of oil contamination on eel grass beds along the northern shoreline of the Alaska Peninsula; and
- * an analysis of oil spill response capabilities.

Until these data gaps are filled responsible decisions on proceeding in Bristol Bay cannot be made.

The district court's decision in the Sale 92 case illustrates the failure of OCSLA to adequately ensure that states have the right to participate meaningfully in OCS leasing decisions. If the states are to be excluded from such decisions, the controversy over OCS leasing -- and the pressure for leasing moratoriums -- will continue to grow.

Thank you for the opportunity to testify.



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AEL ISSUE PAPER FOR HJR 32: RELATING TO OIL AND GAS DRILLING ON THE NORTH ALEUTIAN BASIN OUTER CONTINENTAL SHELF

The Alaska Environmental Lobby strongly supports HJR 32 due to the national and international significance of Bristol Bay and the North Aleutian Basin for fish and wildlife resources and the insignificance of the area for oil and gas production as evidenced by the following:

The first wholesale value of the fishery, employing 10,000 people, may exceed one billion dollars annually. These areas support the world's largest sockeye salmon fishery, a world class herring fishery, and major components of the king and tanner crab and groundfish resources.

The benefits of area hydrocarbon resources are among the lowest of all the OCS planning areas. In 1985, the Department of the Interior ranked it 14th out of the Nation's 18 OCS planning areas in terms of the net economic value of recoverable hydrocarbon resources.

According to the National Marine Fisheries Service, the Basin is the single most important region of the U. S. Outer Continental Shelf for the conservation of marine mammals, endangered species, and protection and management of fisheries resources. Over one million marine mammals, including the entire world population of northern fur seals and Pacific grey whales, inhabit or migrate through the area. The world's population of black brant and emperor geese stage in the area in the fall; 45-100 million salmon annually migrate through the area.

Potential risks to these fish and wildlife populations are extremely high. Oil spill cleanup technologies are unproven and ineffective, as the social, economic, and environmental disaster of the Exxon Valdez oil spill clearly demonstrates.

--According to the Sale 92 EIS, there is a 52-57% probability that one or more spills exceeding 1000 barrels of oil will occur over the productive life of the leases.

--The Governor's risk analysis estimates a discounted gross economic loss based on first wholesale values to be approximately 563.6 million dollars. The EIS projects major effects to red king crab and impacts to tanner crab, salmon, herring, and groundfish.

--The Department of the Interior has found that mechanical recovery of spilled oil at sea becomes ineffective between sea states 3 and 4, which occur 68-94% of the time in Sale 92 area.

The AEL recognizes that leasing, at this time, is not a wise resource management decision considering the significance of the resources at risk and our unproven ability to protect them. The validity of our concerns has been born out by the recent Exxon Valdez oil spill disaster, where the oil industry has shown its near-complete inability to operate safely and to respond to an oil spill. We do not want to see the same tragic loss of wildlife, habitat, and the fishing industry in the North Aleutian Basin, as we are now seeing in Prince William Sound.

The Lobby believes that national energy needs can be effectively met through energy conservation measures alleviating the need to drill in sensitive areas.

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • JUNEAU GROUP, SIERRA CLUB • SITKA GROUP, SIERRA CLUB
 KNIK GROUP, SIERRA CLUB • DENALI GROUP, SIERRA CLUB • ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY
 DENALI CITY AUDUBON SOCIETY • ALASKA FRIENDS OF THE EARTH • JUNEAU AUDUBON SOCIETY • KAC (Karene Brown) CONSERVATION SOCIETY
 KENAI PENINSULA AUDUBON SOCIETY • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • ALASKA WILDLIFE ALLIANCE
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FOR IMMEDIATE RELEASE
March 1, 1989
No. 89-40

COWPER ASKS BUSH FOR BRISTOL BAY OIL DEVELOPMENT DELAY

WASHINGTON, D.C.--Gov. Steve Cowper has asked President George Bush to delay oil exploration in Bristol Bay, at least long enough to study the environmental impacts of an oil spill in the fisheries-rich area.

The Governor this week asked Bush to include Bristol Bay with three upcoming oil lease sales off Florida and California in a federal review of the environmental effects of off-shore oil development.

". . . Since questions of both environmental and ocean resources impacts are at the heart of our concern for Bristol Bay, we respectfully request that consideration of the impacts of exploration in the area of Lease Sale 92, the Northern Aleutian Basin, be added to the scope of the review team," Cowper told Bush in a Monday letter.

"In making this request we are aware that Bristol Bay is distinguishable from the other three OCS areas in that a lease sale already has occurred," Cowper said. "Nevertheless, we believe the economic and biological reasons for postponing exploration, while we answer remaining questions, are as compelling as anywhere else in the country."

-MORE-

At issue is Bush's pledge during a Feb. 9 address to the nation to halt the California and Florida sales. The President appointed a review team to study the sales composed of the National Academy of Sciences, the Office and Management and Budget, the Environmental Protection Agency and the departments of Interior and Energy.

At Cowper's request, a U.S. House budget bill now making its way through Congress includes language to include Bristol Bay in the review. Cowper also is asking Congress not to appropriate money for Bristol Bay exploration this year.

Cowper told the President the risks of a spill in Bristol Bay outweigh the benefits of the relatively small amount of oil believed present there. The yearly value of the Bristol Bay fishery exceeds \$1 billion and employs 10,000 people.

The federal Department of Interior has determined the probability of a spill there of at least 1,000 barrels over the life of development at 52-57 percent. At the same time, Bristol Bay ranks 14 of 18 outer continental shelf leasing areas in terms of net economic value.

Cowper joined with his two immediate predecessors in opposing oil development in Bristol Bay, which is the only such sale opposed by the Cowper administration.

The Governor praised Bush's support for development of the Arctic National Wildlife Refuge and said Alaska "fully supports the prudent and orderly development of the state's outer continental shelf in an environmentally acceptable manner.

"In Bristol Bay however, we look for your consideration of deferring exploration in order to protect its exceptional commercial, subsistence and esthetic fish and wildlife values," Cowper said.

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 27, 1989

The Honorable George Bush
The President
The White House
Washington, DC 20500

Mr. President:

Thank you for the opportunity last week, on your stopover in Anchorage, to speak with you on some issues of concern to Alaska. As you know, we are very encouraged with your stance to promote the opening of the Arctic National Wildlife Refuge (ANWR) to responsible oil and gas leasing. The coastal plain of ANWR offers a prospect of substantial oil and gas recovery under adaptable environmental conditions.

On a related issue, I was heartened by your announcement that you have directed Secretary of the Interior Manuel Lujan to set up a task force to examine the environmental impact of proposed outer continental shelf (OCS) lease sales in three areas off the coasts of California and Florida. As you know, Alaska, too, has been seeking to postpone oil and gas exploration in the OCS, off Bristol Bay, an area we believe to be of far greater value for its fish and wildlife than for its hydrocarbon potential.

It is our understanding that your administration is in the process of focusing and shaping the task force's scope of review, and is evaluating whether it will limit the task force's attention to the three geographic areas highlighted in your speech. Since the group has been expanded to include the Environmental Protection Agency and possibly the National Oceanic and Atmospheric Administration, and since questions of both environmental and ocean resources impacts are at the heart of our concern for Bristol Bay, we respectfully request that consideration of the impacts of exploration in the area of Lease Sale 92, the Northern Aleutian Basin, be added to the scope of the review team.

In making this request we are aware that Bristol Bay is distinguishable from the other three OCS areas in that a lease sale already has occurred. Nevertheless, we believe the economic and biological reasons for postponing exploration, while we answer remaining questions, are as compelling as anywhere else in the country. As further elaboration on the risks at stake in Bristol Bay, I have

Mr. President

- 2 -

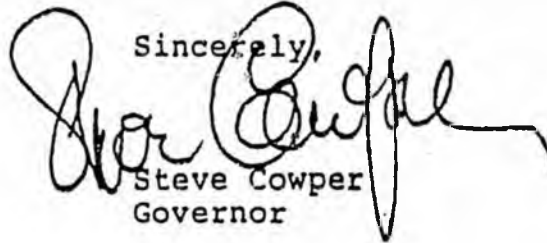
February 27, 1989

enclosed a copy of an issue paper which was provided to your transition team in January.

Alaska remains responsive to the nation's need to decrease its dependence on foreign oil, as evidenced by our efforts to open the coastal plain of ANWR, and fully supports the prudent and orderly development of the state's outer continental shelf in an environmentally acceptable manner. In Bristol Bay, however, we look for your consideration of deferring exploration in order to protect its exceptional commercial, subsistence, and esthetic fish and wildlife values.

Thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Cowper", written in a cursive style.

Steve Cowper
Governor

Enclosure

cc/enc: Richard G. Darman, Office of Management and Budget
James D. Watkins, Department of Energy
Manuel Lujan, Jr., Department of the Interior
Robert A. Mosbacher, Department of Commerce
William K. Reilly, Environmental Protection Agency
The Honorable Ted Stevens
The Honorable Frank Murkowski
The Honorable Don Young
Philip M. Smith, National Academy of Sciences

BRISTOL BAY OIL AND GAS LEASE SALE

ISSUE:

Should the Department of the Interior postpone exploration and development of Oil and Gas Leases in Bristol Bay (Sale 92)?

SUMMARY OF STATE POSITION:

The State of Alaska supports delay of oil and gas exploration in Bristol Bay because of the low hydrocarbon potential and extremely high fish and wildlife values.

BACKGROUND:

With the exception of Sale 92, the State of Alaska has strongly supported the federal OCS leasing program off Alaska. In 1985, the Governor of Alaska recommended to the Secretary of the Interior under Section 19 of the Outer Continental Shelf Lands Act (OCSLA) that Sale 92 be postponed for ten years. The Secretary rejected this recommendation and conducted the lease sale. The courts enjoined the Secretary from opening the bids received from the sale. In November, 1988, the Ninth Circuit Court of Appeals lifted the injunction. The Secretary of the Interior opened and awarded the bids soon thereafter. Exploration on some tracts could begin in 1989. The State is appealing this decision to the Supreme Court.

DISCUSSION OF STATE POSITION:

The State of Alaska supports a postponement of exploration and development in this area because of the 1) the region's unequalled fish and wildlife values, 2) its low oil and gas potential, and 3) the reasonable expectation that risks will be significantly reduced by deferring activities.

Fish and Wildlife Values

- ° The fisheries of the sale area are among the most productive in the world according to the Sale 92 EIS. First wholesale value can exceed one billion dollars annually and employs 10,000 people.
- ° According to the National Marine Fisheries Service, Alaska Region the area is the single most important region of the U.S. Outer Continental Shelf for the conservation of marine mammals and endangered species and protection and management of fishery resources.

Oil and Gas Benefits

- ° The Department of the Interior estimates that the potential economic benefits of the North Aleutain Basin hydrocarbon resources are among the lowest of all the Nation's OCS planning areas.
- ° In 1985, the Department of the Interior ranked it 14 out of the Nation's 18 OCS planning areas in terms of the net economic value of recoverable hydrocarbon resources.

Risks of Exploration and Development

- ° 52- 57% probability that one or more spills exceeding 1,000 barrels of oil will occur over the productive life of the leases, according to Sale 92 EIS.
- ° EIS projects major effects to the red king crab population as well as less serious impacts to tanner crab, salmon, herring and groundfish. We estimate the discounted gross economic loss based on first wholesale values to be approximately 563.6 million dollars.
- ° The Department of the Interior has found that mechanical recovery of spilled oil at sea becomes ineffective between sea states three and four. In the Sale 92 area, sea states of three or greater occur from 68 to 94 percent of the time.

Deferral will Reduce Risks

- ° Deferral will enable important environmental information to be obtained.
- ° Deferral will allow improvements in open-ocean oilspill cleanup capabilities.
- ° Deferral will allow the industry to obtain additional operating experience in other less sensitive areas of the Bering Sea.

ANALYSIS OF INFORMATION NEEDS IN THE NORTHERN ALEUTIAN BASIN

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PART 1

Information needs that have not been addressed as of January 1989:

1. Effects of seismic energy sources on salmon fisheries. 1
2. Seaward migration patterns and timing of Pacific salmon through Bristol Bay and the North Aleutian Basin. 2
3. Distribution and abundance of forage fish in and adjacent to the North Aleutian Basin. 3
4. Migratory behavior of egg-bearing female king crab along the north shore of the Alaska Peninsula. 1
5. Importance and location of juvenile king crab protective rearing habitats in the North Aleutian Basin. 4
6. Effects of oiled sediment on settling and recruitment of food organisms important to juvenile king crab. 1
7. Effects of oil contamination on gray whales. 1
8. Importance of the North Aleutian Shelf as a feeding area for Gray whales. 1
9. Effects of oil contamination on eelgrass beds along the northern shoreline of the Alaska Peninsula. 1
10. Analysis of oil spill response capabilities. 1

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- 1 To our knowledge, no studies addressing this question are underway and no future studies have been funded.
 - 2 Studies that may address this question are currently underway. However, a minimum of three more years of study will be necessary before this question is adequately resolved.
 - 3 Some studies directed at herring use of the Port Moller vicinity are planned for summer 1989. However no studies directed at capelin or sandlance are underway and no future studies have been funded.
 - 4 Previous studies have suggested that rocky, cobble habitat is crucial to juvenile king crab survival. However, no studies have been directed toward identifying the locations of these habitats in the North Aleutian Basin.