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UNITED STATES v. ALASKA:
SECTION 10 PERMITS, THE TERRITORIAL SEA,
AND FEDERALISM

*Jeffrey W. Peters**

I. INTRODUCTION

*United States v. Alaska*¹ represents the latest clash between the federal government and coastal states for control of valuable resources located in the submerged lands of the territorial sea. In its decision, the Supreme Court considered the conflict between a coastal state's right to jurisdiction over coastal areas under the Submerged Lands Act² (SLA) and the federal government's power to regulate the construction of new structures on the shoreline under the Commerce Clause of the Constitution. History rang true in this latest chapter of the ongoing dispute.

Under international law, a nation may extend its sovereignty twelve miles from its shoreline.³ International law also allows a nation to consider non-natural structures as a part of its "coastline" and move its seaward limit as if the coastline followed the contour of the structure.⁴ The city of Nome, Alaska, recently constructed a causeway that extended into Norton Sound approximately twenty-seven hundred feet. The United States conditioned construction on Alaska's promise that the causeway would not affect the location of the boundary marking the federal/state three-mile limit; the line of demarcation between federal and Alaskan submerged lands would continue to be measured from Alaska's natural coastline in the vicinity of the causeway. To achieve this end the

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1. 112 S. Ct. 1606 (1992).

2. 43 U.S.C. §§ 1301-1356 (1988).

3. See Art. 3, United Nations, THE LAW OF THE SEA, Official Text of the U.N. Convention on the Law of the Sea With Annexes and Index, U.N. Sales No. E.83.V.5 (1983).

4. *Id.* Art. 11.

Army Corps of Engineers (Corps), acting for the United States, required Alaska to abandon all claims to the submerged lands that would result if the three mile federal/state boundary were to be measured from the end of the causeway before issuing the necessary federal construction permit.

The Supreme Court upheld the Corps' actions in conditioning the issuance of the construction permit. The Supreme Court agreed with the United States that the River and Harbors Appropriation Act of 1899⁵ (RHA) accorded the federal government nearly unlimited discretion to grant or deny section 10 permits, and it upheld the Corps' requirement that Alaska waive territorial claims created by the SLA. The Court ignored Alaska's invitation to examine the question of whether Corps' regulations could override the congressional mandate of the SLA. In Alaska's view the Department of the Army implemented administrative regulations in a manner that took land granted by Congress. The Court, however, decided the case on the basis of administrative law; examining only the question of whether the Corps' regulations, which included review of the effect of the project on the federal/state boundary as a part of the permitting process, were proper. The Court's decision validated the Corps' regulations, holding that the Corps could require a waiver of rights granted by the SLA as a condition to granting a section 10 permit. This decision, in effect, allows the federal government to hold property rights to resource-rich submerged lands as ransom for permission to construct a public causeway.

II. BACKGROUND OF THE CASE

Nome, Alaska, applied to the Corps for a permit to construct a new port facility in 1982. Plans called for this facility to extend into Norton Sound. The Corps issued a public notice and invited comments in accordance with the Army's public interest review procedures.⁶ The Corps, in consultation with the United States Department of the Interior, concluded that the proposed Nome facility would extend Alaska's legal coastline seaward of its present location to the detriment of the offshore property interests of the United States.

The Department of the Interior recommended that the Corps condition approval of the permit application upon Alaska's executing an agreement or a quit claim deed preserving the original federal/state

5. 33 U.S.C. § 403 (1988).

6. See 33 C.F.R. § 325.3 (1993).

boundary. Alaska conditionally agreed that if the Corps approved construction of the facility, its legal coastline would not be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. However, Alaska reserved the right to void the waiver of rights if a court determined that the Corps lacked legal authority to require such a disclaimer before issuing the permit.⁷

Alaska's disclaimer satisfied the objections of the Department of Justice and the Department of the Interior to the issuance of the permit and the Corps issued a statement of findings supporting the issuance of the permit pursuant to the Department of the Army's public interest review criteria. The Corps issued a validated permit on July 25, 1984. The City of Nome, Alaska, subsequently constructed the port facility, which included a causeway that extended approximately 2700 feet into Norton Sound.

In 1988 the federal government solicited comments and nominations for a proposed lease sale for hard-rock minerals, including gold, in the Norton Sound area.⁸ Alaska, taking the position that the proposed sale involved submerged lands subject to the Nome Port Facility project disclaimer, submitted comments disputing the federal government's claim to the submerged lands more than three miles from the natural shoreline but less than three miles from the low-water line of the Nome causeway. Although the Nome causeway measured only 85 feet in width and 2700 feet in length, it placed approximately 730 acres of submerged lands in dispute. Alaska subsequently provided notice of its intention to file suit challenging the Corps' authority to require a waiver of rights to the

7. The Alaska Department of Natural Resources conditional disclaimer stated in pertinent part:

Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

Joint Stipulation 3, 30a. *U.S. v. Alaska*, 112 S.Ct. 1606 (1992). Paragraph 4 provided that the disclaimer "becomes ineffective and without force and effect" if a court determines that "the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." Joint Stipulation 4, 30a-31a.

8. 53 Fed. Reg. 8134 (1988).

submerged lands and seeking to quiet title to the disputed belt of submerged land in Norton Sound.

The United States requested, and was granted leave by the Supreme Court of the United States, to commence an original jurisdiction action against Alaska to quiet title to the disputed lands before Alaska filed suit. The Minerals Management Service published a final leasing notice soliciting bids, and the United States and Alaska agreed that any revenues from leasing of the disputed acreage should be placed in escrow for payment to the United States or Alaska depending upon the outcome of the action.⁹ Both parties stipulated to the facts of the case and the Supreme Court reviewed the controversy strictly as a question of law.

The fundamental question presented by *United States v. Alaska* was whether a state's legal coastline for measuring its three nautical mile boundary is measured from the low-water mark of an artificial structure that extends into the sea or from the low-water mark of the natural coastline.¹⁰ Despite the significant backdrop of federal/state boundary cases and interpretations of the SLA that bear on this question, the Supreme Court analyzed the controversy primarily as a question of administrative law. Justice White interpreted the issue of the case to be whether the Corps possessed sufficient authority under section 10 of the RHA¹¹ to condition the Nome Port Facility federal permit on a waiver of rights to submerged lands granted to Alaska by the SLA. The Court concluded that the Corps had sufficient authority to condition a section 10 permit on a waiver of property rights to lands in the territorial sea and held the waiver valid and binding upon the State of Alaska.

A. *The Arguments*

The United States relied primarily upon two cases, *United States v. California*¹² (*California II*) and *United States ex rel. Greathouse v. Dern*.¹³ Both cases suggest that the federal government holds unfettered

9. The bidding process closed and no bids were received. However, the action continued because both parties agreed that a live controversy remained because the continued disagreement as to the location of the federal-state boundary would affect the prospect of future lease sales in the area. *United States v. Alaska*, 112 S. Ct. at 1610 n.4.

10. *Id.* at 1609.

11. 33 U.S.C. § 403 (1988).

12. 381 U.S. 139 (1965) (*California II*).

13. 289 U.S. 352 (1933).

discretion to withhold permits for coastal construction even when the disallowance purposely denies title to submerged lands to which the States would otherwise be entitled under the SLA. Alaska interpreted *California II* differently. It argued that *California II* established a single coastline for the administration of the SLA and for the conduct of international relations, and, therefore, that the Corps overstepped its authority when it required Alaska to waive legitimate rights created by the SLA. Alaska maintained that the Corps' discretion to issue the federal permit did not include authority to waive rights granted by Congress. The Court, however, sided with the federal government and reviewed the case as a question of whether the federal government may require states to abandon territorial claims when considering permits for coastal structures.¹⁴

The United States successfully argued that the RHA placed responsibility to approve the construction of any coastal structure that could possibly affect navigation that Congress itself had not approved with the Secretary of the Army (Secretary).¹⁵ The Secretary, however, was required to consider the recommendation of the Corps. The federal government maintained that the broad language of the RHA flatly prohibited the construction of any obstruction in a navigable waterway that Congress had not authorized nor had been authorized by the Secretary.¹⁶ The United States asserted that since the statute lacked

14. Justice White stated the sole question presented was "whether the Secretary of the Army may decline to issue a permit to build an artificial addition to the coastline unless Alaska agrees that the construction will be deemed not to alter the location of the federal-state boundary." *United States v. Alaska*, 112 S. Ct. at 1611.

15. The broad language of § 10 of the RHA provides in pertinent part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any ... structures in any ... water of the United States ... except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge ... unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1988).

16. Sections 7 and 10 of the 1890 Rivers and Harbors Appropriation Act of Sept. 19, 1890 preceded § 10 of the 1899 Act. The original § 10 prohibited creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters within the jurisdiction of the United States. Section 7 made it unlawful to build any

criteria to guide the Secretary, it gave him unlimited discretion to grant or deny a permit for construction of a structure that obstructs a navigable waterway. It contended that the Corps could conduct a "public interest review" to determine whether to issue a section 10 permit and that the final decision to issue a permit was discretionary. Because section 10 of the RHA does not specify those factors the Secretary should consider before issuing a permit, it was reasonable for the Secretary to consider all factors relevant to the public interest in order to ensure a sound and fully informed exercise of his discretion. The Secretary may properly consider, as part of his public interest review, the effects of a coastal structure on the limits of the territorial sea because, the federal government argued, a structure that alters the coast line may substantially alter the Nation's international and federal/state boundaries, affecting the United States' vital national interests in the outer continental shelf. The United States concluded that section 10 of the RHA conferred broad authority on the Secretary to regulate placement of structures in coastal waters. Given that the federal government could have simply denied the Nome causeway permit, it could also condition the permit on any ground that advanced the public interest.

Alaska argued that the RHA did not give the federal government the right to condition a permit on a state's abandonment of territorial claims created by Congress in the SLA. It asserted that the RHA is primarily concerned with ensuring safety of navigation, and, therefore, if the Nome causeway would not obstruct navigation, then a section 10 permit ought to issue as a matter of right. Moreover, Alaska maintained that the Corps' regulations governing the issuance of the section 10 permits under the RHA granted the Secretary too much discretion.

Alaska also asserted that allowing the federal government to force coastal states to waive SLA rights to submerged lands placed the United States in the enviable position of "having its cake and eating it too." The Nome causeway extended the United States' territorial sea and exclusive economic zone against the claims of other nations under international law. Alaska contended that in light of the causeway's effect on the international boundary, it would be unfair for the federal government to deny the benefit of that extra area given that the State was responsible for constructing the new coastal feature. Alaska contended that there is a strong presumption for a "single coast-line" to be used both for

wharf, pier, or structure of any kind outside established harbor-lines without permission from the Secretary of War. *United States v. Alaska*, 112 S. Ct. at 1611.

international law purposes and for federal/state boundary questions, and, further, that *California II*¹⁷ required a "single coast-line" approach.

B. The Decision

The Court began by analyzing the language of section 10 of the RHA, the decisions interpreting it, and the longstanding practices of the Corps in fulfilling Congress' mandate. They measured these factors against the landmark administrative law case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁸ The Court, relying on *United States ex rel. Greathouse v. Dern*¹⁹ and *United States v. Pennsylvania Industrial Chemical Corp.*,²⁰ found that the Secretary's "authority [was] not confined solely to considerations of navigation in deciding whether to issue" a section 10 permit.²¹ After establishing the broad scope of the RHA, the Court then examined whether the regulations enacted by the Department of the Army governing the Corps' review of permit applications violated the discretion afforded by section 10. The Court found that the Corps' review process did not overstep the discretion afforded the Secretary and did not usurp Alaska's sovereignty over submerged lands within three miles of its coastline granted by the SLA.²² The Corps' determination of "whether an artificial addition to the coastline will increase a State's control over submerged lands to the detriment of the United States' legitimate interest" was held to be "a reasonable exercise of agency authority."²³ The Court distinguished its statements in *California II* that artificial additions to the coastline expanded seaward sovereignty under international law, noting that in that case "the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from

17. 381 U.S. 139 (1965).

18. 467 U.S. 837 (1984) (*Chevron*). *Chevron* holds that when reviewing an agency's construction of a statute, the reviewing court first determines "whether Congress had directly spoken to the precise question at issue." *Id.* at 842-843. Should the statute be silent or ambiguous on the direct question presented, then the reviewing court must decide whether the "agency's answer is based on a permissible construction of the statute." *Id.*

19. 289 U.S. 352 (1933).

20. 411 U.S. 655 (1973).

21. *United States v. Alaska*, 112 S. Ct. at 1612.

22. *Id.* at 1615.

23. *Id.* at 1616.

encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties."²⁴

The Court next considered Alaska's argument that allowing the Secretary to establish one boundary for international purposes and one boundary for domestic purposes under the guise of a public interest review conflicted with *California II*. Justice White, explaining *California II*, wrote that the decision "did not specify a 'goal' of achieving a 'single' coastline," but that the purpose of the decision was to "give the SLA a 'definiteness and stability.'"²⁵ The decision noted that boundary stability is achieved when the Secretary decides whether a state must disclaim its rights to submerged lands resulting from artificial structures. Uncertainty and indefiniteness end when the State disclaims sovereignty over the submerged lands and the three-mile boundary remains constant.²⁶ Justice White concluded that, in light of the above analysis, the Secretary could consider a project's effects on the federal/state boundary as a part of the section 10 permit review process.

The Court then turned to Alaska's argument that even if the RHA authorized the Corps' regulations, the Secretary's actions were inconsistent with those regulations. The decision states that "the regulations indicate[d] that the Corps may include in its evaluation the 'effects of the proposed work on the outer continental rights of the United States.'"²⁷ The Court found that it is "untenable to maintain that the legitimate property interests of the United States fall outside the relevant criteria for a decision that requires the Secretary to determine whether the issuance of a permit would affect the 'public interest.'"²⁸ Justice White concluded that it would be inconsistent with Congressional intent to hold that the Corps could legitimately prohibit the construction of the Nome port facility, but deny it the authority to seek the less drastic alternative of conditioning the permit on Alaska's disclaiming the rights to the submerged lands.²⁹

24. *Id.* at 1616 (quoting *California II*, 381 U.S. 139, 176, and n.50 (1965)).

25. *Id.* at 1617.

26. *Id.*

27. *Id.* at 1618 (quoting 33 C.F.R. § 320.4(f) (1993)).

28. *Id.*

29. Alaska also argued that the Army Corps of Engineers regulations conflict with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which held that a coastal commission could not condition the granting of a construction permit on the landowner's granting of a public access permit across private land. Alaska looked to language of

Justice White's opinion concludes with an analysis of Alaska's argument that the Army's failure to formalize its authority to condition waivers of sovereignty in the permit issuance procedures violated administrative procedure. The Court dealt with this argument quickly, noting that the United States averred that such disclaimers had been requested on a case-by-case basis since 1970. The Court found that the Corps' administrative actions in requiring the disclaimer before issuing the permit were "neither arbitrary nor capricious" and approved the Corps' procedures.³⁰

III. THE TRADITION BEHIND THE CONTROVERSY

The issue of ownership of offshore submerged lands first went before the Supreme Court in 1842. In over thirty decisions between 1842 and 1935, the Court held that title to submerged lands under navigable waters belonged to the coastal states.³¹ More recently, title to offshore submerged lands has been a source of contention between the federal government and the coastal states. The federal government did not seek to assert control over these lands until the discovery of offshore oil and gas. Competition for control of the valuable resources found in near shore areas has fueled the controversy, with the possibility of substantial profit from the sale of mineral leases sparking federal interest. In the past fifty years, the federal government has generally prevailed in these contests. The battle for control over these lands has been centered on three issues: ownership of title to the offshore submerged lands, definition of the federal/state boundary, and definition of the baseline from which to measure the offshore federal/state boundary.

Nollan stating that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out' plan of extortion." *Id.* at 837. Justice White considered this argument in a footnote, stating that *Nollan* "has no applicability in a situation" where the Court is called upon to evaluate the statutory authority underlying an agency's action. He went even further to dismiss any influence of *Nollan*, stating that "[e]ven were the *Nollan* situation analogous to that presented here, we note that Alaska would gain no benefit because the purpose behind imposing a condition for issuance of the permit—to protect federal rights to submerged lands—is the same as that for denying the permit." *United States v. Alaska*, 112 S. Ct. at 1618 n.12 (quoting *Nollan v. California Coastal Commission*, 483 U.S. at 837 (1987)).

30. *Id.* at 1619.

31. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209, 212-213 (1989).

*A. Does Title to Offshore Land Lie With
the Federal Government or the States?*

The Roosevelt Administration commenced the battle for title to offshore submerged lands when it promoted federal legislation declaring that the federal government held title to submerged lands beyond the low water mark.³² World War II suspended the controversy for a time, but after the war Congress began to consider legislation that surrendered federal claims to offshore lands and granted coastal states title to submerged lands within their historic boundaries.³³ The Executive Branch re-entered the controversy with a Presidential Proclamation³⁴ by President Truman that declared United States' jurisdiction over natural resources of the subsoil and seabed of the continental shelf beneath the high seas.³⁵ Executive Order 9033, which implemented the Proclamation, stated, however, that the Proclamation did not affect the federal/state controversy as it related "to the ownership and control of the subsoil and seabed of the continental shelf within or outside of the 3-mile limit."³⁶

Some coastal states took advantage of President Truman's failure to address the intragovernmental ownership issue by exercising control of the submerged lands of the territorial sea themselves. In particular, California began leasing submerged lands within the three-mile limit for petroleum exploration. President Truman resorted to litigation in the Supreme Court when he recognized that Congress would side with

32. In 1938, the Independent Exploration Company sought a contract from the Department of Interior authorizing petroleum exploration in waters beyond the three-mile limit. This request brought the question of rights to submerged lands beyond the territorial limit to the attention of President Roosevelt. President Roosevelt suggested that the Secretary issue an Executive Order to handle the problem. See Kenneth W. Swenson, Note, *A Stitch in Time: The Continental Shelf, Environmental Ethics and Federalism*, 60 S. CAL. L. REV. 851, 858 n.36 (1987).

33. *Id.*; see also William K. Metcalfe, *The Tidelands Controversy*, 4 SYRACUSE L. REV. 39 at 51-64 (1953).

34. This proclamation is identified as "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 Comp.) nullified by 43 U.S.C. §§ 1331-1356 (1988).

35. Fitzgerald, *supra* note 31.

36. The Truman Proclamation provided notice of the change in United States policy in regard to its territorial sea to other nations. The proclamation asserted ownership of the continental shelf by the United States, but it did not address the important issue of state versus federal ownership of the area. Proclamation No. 2667, *supra* note 34.

coastal states.³⁷ Congressional action to return control of offshore submerged lands to the states indicated to President Truman that he should not expect Congressional help to place these areas under federal control. The United States filed suit against California in 1947.³⁸

The United States challenged California's exerted control over submerged lands located within three miles of its coastline. It sought to enjoin California from leasing the disputed submerged lands and to compel accounting of all proceeds from any executed leases. The suit asked the Supreme Court to decide whether the federal government or a coastal state held a superior right to take, or authorize the taking of, the oil and gas found under offshore submerged lands. The United States asserted that it owned in fee simple, or possessed paramount rights in and powers over the lands, minerals and other things of value underlying the Pacific Ocean lying seaward of the low water mark on California's coast and outside the inland waters of the state.³⁹ California answered the complaint, asserting ownership of the belt of submerged lands extending three miles from the low water mark based on the original boundaries established in California's Constitution. California also asserted that the equal footing clause of the Enabling Act that admitted California into the Union granted it the same historical rights possessed by the original states over their offshore lands.⁴⁰

The Court rejected the equal footing argument, holding that the original states never held title to offshore lands beyond the low water mark.⁴¹ When the original states declared independence from England, there was no claim to, nor international recognition of, a three-mile territorial sea.⁴² The federal government established the territorial sea at a later date for international purposes.⁴³ The Court did recognize state ownership of submerged lands lying under inland bodies of water under

37. Fitzgerald, *supra* note 31, at 213-214.

38. United States v. California, 332 U.S. 19 (1947) (*California I*).

39. *Id.*

40. *Id.*

41. *Id.*

42. This Article uses the term territorial sea to refer to that three-mile belt of water normally claimed by the coastal states. The general use of the term infers no specific points of measurement of the boundary.

43. *California I*, 332 U.S. at 33 n.16.

the rationale of *Pollard's Lessee v. Hagan*,⁴⁴ but it refused to transfer similar control of the lands beneath the territorial sea to the coastal states. The court looked to the international aspect of the territorial sea and found that the federal government's interest in national defense, commerce, and international affairs called for paramount rights and control over this area to rest with the federal government.⁴⁵ The Court stated:

if this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three mile belt.⁴⁶

The federal government won the first round, but *California I*⁴⁷ did not mark the end of state challenges to attempts to exercise control over the minerals found in the submerged lands of the territorial sea. In 1950, the Supreme Court faced the question of federal versus state ownership of submerged lands off the coast of Louisiana and Texas. These states, ignoring the Supreme Court's pronouncement in *California I*, continued their activities on the submerged lands found off their coasts. The federal government brought the controversy into the Gulf of Mexico with two concurrent cases against Louisiana and Texas, *United States v. Louisiana*⁴⁸ and *United States v. Texas*⁴⁹ respectively. Once again, control of mineral leases provided the catalyst for litigation. Louisiana asserted that it retained ownership of submerged lands within three miles of its shore in the Gulf of Mexico, arguing that it owned this area because since admission into the Union it had "exercised continuous,

44. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Under the Pollard Doctrine a state has a qualified ownership of lands under navigable inland waters such as rivers, harbors and tidelands down to the low water mark. See e.g., *Manchester v. Massachusetts*, 139 U.S. 240 (1890); *Louisiana v. Mississippi*, 202 U.S. 1 (1905); *The Abby Dodge*, 223 U.S. 166 (1912). See also *United States v. Mission Rock Co.*, 189 U.S. 391 (1903); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

45. *California I*, 332 U.S. at 35-36.

46. *Id.* at 36.

47. 332 U.S. 19 (1947).

48. 339 U.S. 699, 702 (1950) (*Louisiana I*).

49. 339 U.S. 707, 711 (1950).

undisturbed and unchallenged sovereignty and possession over the property in question."⁵⁰ The Court, following *California I*, dismissed the State's claims.⁵¹

Texas distinguished its argument by asserting that as an independent nation the Republic of Texas had enjoyed open, adverse, and exclusive possession of and had exercised jurisdiction over the area in controversy and that the United States' annexation of Texas preserved these rights.⁵² Texas, as an independent republic, exercised sovereignty over a three marine league territorial sea, exercising both *dominium*⁵³ and *imperium*⁵⁴ over this area.⁵⁵ Texas claimed that when it entered the Union, it surrendered only its *imperium*, not its *dominium*, over its offshore lands.⁵⁶ Furthermore, Texas alleged that Congress recognized Texas' territorial claim to offshore lands in the resolution of annexation.⁵⁷ Despite these arguments, in *United States v. Texas*, the Court rendered a decision similar to *Louisiana I* which applied *California I* and found against Texas.

The Court offered a novel interpretation of the equal footing clause.⁵⁸ It found that even though the Republic of Texas may have enjoyed

50. *Louisiana I*, 339 U.S. at 702.

51. *Id.* at 705.

52. *United States v. Texas*, 339 U.S. at 711.

53. In the civil and old English law, *dominium* means ownership; property in the largest sense, including both the right of property and the right of possession or use. BLACK'S LAW DICTIONARY 456 (5th ed. 1979).

54. *Imperium* means the right to command, which includes the right to employ the force of the state to enforce the laws. This is one of the principal attributes of the power of the executive. BLACK'S LAW DICTIONARY 754 (5th ed. 1979).

55. Texas was an independent republic for nine years between 1836 and 1845.

56. Texas argued that in its unique, pre-annexation status as a sovereign republic it exercised both *dominium* and *imperium* over the land, minerals and other products of the submerged lands under the territorial sea within three miles of its shoreline. In *California I* the Court found that California, like the original 13 States never held *dominium* over that area. *United States v. Texas*, 339 U.S. at 712-713.

57. *Id.* at 710-714.

58. The Court ruled that because upon admission of a state into the Union, title to submerged inland lands traditionally passed to the state as an incident of the transfer of local sovereignty to the state, in the converse situation presented by Texas' annexation, any implied or special limitation of any of the paramount powers of the United States would be negated. In effect, Texas relinquished some of its sovereignty when it joined the Union in order to gain an equal footing with other states and the United States succeeded Texas in ownership of submerged lands. *United States v. Texas*, 339 U.S. at 717-718.

paramount rights over its territorial sea, the state of Texas had relinquished this control to the federal government. The Court acknowledged Texas' assertion of *imperium* and *dominium* over its offshore lands as a sovereign nation, but found that when Texas became a state it relinquished authority over its offshore lands to the federal government due to the overriding concerns for national defense and international affairs. This decision broadened the scope of *California I* as it held, in effect, that regardless of past status, Texas, like other coastal states, did not hold title to submerged lands in the territorial sea because of overriding international considerations.⁵⁹

Even after Supreme Court decisions and an effective presidential veto that seemed to solidly vest control of the submerged lands of the territorial sea with the federal government, the controversy remained alive. While the Supreme Court judicially solidified federal control of the submerged lands of the territorial sea, Congress worked to counter the judicial decisions. In 1946 and 1951, Congress legislatively granted title to these areas to the coastal states, but President Truman vetoed both bills.⁶⁰ The issue of ownership of offshore submerged lands became an issue in the 1952 elections. Republicans favored granting title to the coastal states, while northern and southern Democrats split on the issue.⁶¹ The combination of President Eisenhower's victory and Republican control of Congress provided the proper environment for the enactment of the Submerged Lands Act in 1953.⁶² This Act legislatively overruled *California I*, *Louisiana I*, and *United States v. Texas*, and it gave the coastal states their first victory in the struggle for control of the submerged lands of the territorial sea.

The SLA granted coastal states title to the submerged lands of the territorial sea and the rights to the natural resources contained therein, and relinquished federal claims to such lands.⁶³ It bestowed an unconditional grant to offshore lands within three miles of the coastal states' coastlines.⁶⁴ Under the SLA the federal government retained the

59. *Id.* at 718-720.

60. Fitzgerald, *supra* note 31, at 218.

61. *Id.*

62. *Id.*

63. 43 U.S.C. § 1311 (1988).

64. Gulf states could assert a claim of three marine leagues from their coastlines. 43 U.S.C. §§ 1302, 1312 (1988).

right to regulate offshore activities for the purposes of navigation, national defense, international affairs, and commerce.⁶⁵

Surprisingly, challenge to the SLA came from two coastal states.⁶⁶ Alabama and Rhode Island possess only minimal ocean frontage when compared to other coastal states and, as a result, the SLA decreased their rights to the territorial sea. Taking the position that the territorial sea should be shared equally by all coastal states, which would increase their rights in relations to the other coastal states, they argued "that the resources under the marginal sea did not, under *United States v. Texas*, *Louisiana I*, and *California I*, constitute property either of the United States or of any state."⁶⁷ They alleged that Congress could not divest paramount rights since those rights were aspects of sovereignty. Furthermore, they urged the Court to find that the SLA violated the equal footing clause because "the rights [were] held in trust for all the states as a federal responsibility and to cede them to individual states would take away the 'equal footing' among states by extending state power into the domain of national responsibility."⁶⁸

The Supreme Court denied Alabama's and Rhode Island's motions to file complaints challenging the constitutionality of the SLA. The Court held that its prior decisions recognized the paramount rights of the United States in offshore submerged lands, and that these paramount rights were equivalent to a property right.⁶⁹ The Court found that congressional power over public lands was entrusted to Congress without limitation. Congress could deal with these lands as could a private owner: the Court could not interfere with Congress' actions with regard

65. 43 U.S.C. § 1314 (1988). Although the federal government granted the coastal states title to the submerged lands of the territorial sea, it expressly reserved for itself rights to submerged lands seaward of the territorial waters. Congress passed the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1988), soon after it passed the SLA. This Act granted jurisdiction over submerged lands seaward of the boundaries established in the SLA to the federal government, and rested broad discretionary authority to regulate oil and gas development on the Outer Continental Shelf (OCS) with the Department of the Interior. 43 U.S.C. §§ 1331-1356 (1988); see also Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953).

66. *Alabama v. Texas*, 347 U.S. 272 (1954).

67. *Id.* at 274 (Reed, J., concurring).

68. *Id.* citing *United States v. Texas*, 339 U.S. at 719, and *Coyle v. Oklahoma*, 221 U.S. 559 (1910).

69. *Id.*

to the public lands.⁷⁰ Justice Reed stated in his concurrence that relinquishment of property rights to submerged lands did not interfere with United States' sovereign interests and Congress could grant property to some coastal states without awarding the same amount to all coastal states.⁷¹ Although the Court never heard the suit presented by Alabama and Rhode Island, this decision represented a fundamental change in the Court's consideration of ownership of submerged lands. The Court abandoned the international perspective of *California I*⁷² and its progeny and termed the controversy over title to the submerged lands of the territorial sea a domestic dispute over Congressional disposition of United States property.

*Alabama v. Texas*⁷³ ended the controversy over possession of title to submerged lands in the territorial sea.⁷⁴ This case recognized the SLA

70. *Id.*

71. *Id.* at 274-276.

72. 332 U.S. 19 (1947).

73. 347 U.S. 272 (1954).

74. A later case, *United States v. Maine*, 420 U.S. 515 (1975), involved claims by the original Atlantic seaboard states to offshore lands in the Atlantic Ocean. In 1968, the State of Maine leased 3.3 million acres located eighty-eight miles offshore for energy exploration. The United States brought suit against Maine, and the other twelve Atlantic states, challenging their claims to offshore lands beyond the three-mile territorial sea. The suit was originally filed against 13 states bordering the Atlantic Ocean—ME, NH, MA, RI, NY, NJ, DE, MD, VA, NC, SC, GA, and FL. Connecticut was not made a party to the suit because it borders Long Island Sound, which is considered inland water rather than open sea. *Id.* at 517 n.1. The states challenged the previous seaward boundary cases, asserting that, as grantees of the crown of England, they possessed exclusive rights of dominion and control over the seabed underlying the Atlantic from the coastline to the limits of United States jurisdiction. *Id.* at 518.

The Supreme Court, following the rationale of *California I*, denied the Atlantic states' claims. *Id.*; see *California I*, 332 U.S. at 38-39. The Court found that the original colonies never held title to offshore lands beyond the low water mark, and that the federal government created the first claim of title to such lands when it established the three-mile territorial sea. *United States v. Maine*, 420 U.S. at 520, 523-524. The federal government's sovereign interests provided the basis for its paramount rights in these offshore lands, including the energy resources located therein. The Court held that the SLA merely relinquished the federal claims to offshore lands three miles from the Atlantic States' coastlines, and refused to reconsider the rationale of the earlier cases. *Id.* at 523-526.

The Court severed Florida's Atlantic boundary claim from *United State v. Maine* because Florida's claim rested on different grounds. 420 U.S. at 517-518 n.3 (1975). Florida asserted that its 1868 Constitution established its Atlantic boundary, and that Congress accepted this boundary when it accepted the Florida Constitution. Affirming

as controlling the ownership question. The SLA firmly placed control over these areas with the coastal states. This decision, however, is also important for the change in direction taken by the Court. The Court abandoned its previous rationale of viewing the issue as a matter of international concerns in favor of viewing it as a domestic dispute between the federal government and the states. Previous decisions turned in favor of the United States because of concerns over national defense, commerce, and international affairs. The removal of these issues from consideration and the recognition of Congressional discretion clearly favored the coastal states and ended the dispute over ownership of the title to the submerged lands of the territorial sea.

B. Locating the Federal/State Offshore Boundary

Defining the offshore federal/state boundary was nearly as important as the question of title. In 1956, both the United States and Louisiana attempted to lease the same tracts of submerged lands. The dispute arose because Louisiana measured its boundary at three marine leagues and the federal government measured the boundary at three miles. The United States challenged Louisiana's claim of ownership, and the Supreme Court enjoined all leasing in the disputed area.⁷⁵ Continuing the action, the Supreme Court granted leave to the other Gulf states to join the suit.⁷⁶

the Special Master's Report which held that prior to the SLA, the federal government possessed paramount rights over submerged offshore lands, the Supreme Court held that the SLA established Florida's only claim to offshore Atlantic lands. *See United States v. Florida*, 425 U.S. 791, 792 (1975).

Florida claimed that the Straits of Florida and the Florida Keys were in the Gulf of Mexico, not in the Atlantic Ocean. The Supreme Court rejected this claim and limited Florida's claim to three miles, not three leagues. *Id.* at 792-793. The Court, continuing *Louisiana II*, 363 U.S. 1 (1960), also established Florida's boundary in the Gulf of Mexico. The Court affirmed the Special Master's Report that invoked *United States v. Louisiana*, 389 U.S. 155 (1967) (*Louisiana III*) and *United States v. Louisiana*, 394 U.S. 1 (1969) (*Louisiana IV*), and held that Florida's Gulf coastline must be measured from its 1868 coastline if accretion occurred, or from its present coastline if erosion occurred. *United States v. Florida*, 425 U.S. at 792-793. Florida also asserted that Florida Bay satisfied the definition of a historic bay for the purpose of measuring its three league grant in the Gulf. The Court upheld the Special Master's Report that found that Florida did not meet the criteria for establishing an historic bay. *Id.*

75. *United States v. Louisiana*, 351 U.S. 978 (1956) (per curiam).

76. *United States v. Louisiana*, 354 U.S. 515 (1957). The Supreme Court granted Alabama, Florida, Mississippi and Texas leave to join the suit.

In the resulting action with the combined Gulf states, the United States argued that a state boundary cannot be greater than the national boundary, and since the national boundary was never greater than three miles from shore, no state boundary could extend beyond three miles from shore.⁷⁷ The states countered with a segmented argument that the SLA *ipso facto* made a three league grant to all Gulf states, or at least established the boundary of Texas and Florida at three leagues. Alternatively, the states argued for boundaries established prior to admission to the Union and that the national boundary at the time of admission was irrelevant because the SLA demonstrated Congressional intent for the coastal states to receive title to their historical territories. And finally, if the national boundary were deemed relevant, then the boundary should be established at three leagues because it had always been three leagues in the Gulf of Mexico.⁷⁸

The Court interpreted the sole question presented in *Louisiana II* to be "only the geographic extent to which the statute [SLA] ceded to the States the Federal rights established" in previous decisions.⁷⁹ The Court, following the rationale of *Alabama v. Texas*,⁸⁰ characterized the controversy as a "wholly domestic concern within the power of Congress to resolve,"⁸¹ and concluded that Congress could recognize different boundaries for different circumstances. It determined that Gulf states could claim ownership of submerged lands within three marine leagues of their coastlines if they met both prongs of a two-part test: (1) state boundaries had to exceed three miles upon admission into the Union and be legally effective under the *Pollard* doctrine,⁸² and (2) Congress had to approve the boundaries.⁸³

The Court found that Texas claimed a three league boundary as an independent republic and that its annexation resolution confirmed that boundary. These actions entitled Texas to a three league boundary for domestic purposes.⁸⁴ Florida was also entitled to a three league boundary in the Gulf because its constitution defined such a boundary and Congress accepted the Florida Constitution when it readmitted

77. 363 U.S. 1, 11-12 (1960) (*Louisiana II*).

78. *Id.* at 12.

79. *Id.* at 7.

80. 347 U.S. 272 (1954).

81. *Louisiana II*, 363 U.S. 1, 31 (1960).

82. *See supra* note 44.

83. *Louisiana II*, 363 U.S. at 27, 33-36.

84. *Id.* at 36-65.

Florida into the Union in 1868.⁸⁵ The Court rejected the boundary claims of Alabama, Louisiana, and Mississippi, but acknowledged their title to offshore islands beyond the United States territorial limit.⁸⁶ Although not all states won their claims, the location of the federal/state boundary in the territorial sea was clearly found to be within the discretion of Congress.

Controversy over the location of the federal/state offshore boundary reinforced the rationale of *Alabama v. Texas*. The Court abandoned its focus on international concerns to view the controversy as a domestic boundary dispute. *Louisiana II* indicated that the states were making headway in favor of federalism in the territorial sea. However, in future cases the Court returned to the international law perspective which favored the federal government.

*C. Defining the Baseline from Which to Measure
the Offshore Federal/State Boundary*

Although Supreme Court involvement in the dispute over ownership of submerged lands dated to World War II, the term "boundary" remained undefined until 1988. Under the SLA, a state measured its three-mile seaward boundary from the "coastline."⁸⁷ The "coastline" generally follows the "line of ordinary low water,"⁸⁸ and waters inside the "coastline" are inland waters. In Congressional deliberations during consideration of the SLA, it became clear that agreement on a definition of "inland waters" was likely to impede passage of the legislation because no agreement could be readily reached concerning where to draw the "coastline" across bays and rivers.⁸⁹ When Congress finally enacted the SLA it neither accepted nor rejected any rule or formula for addressing the problem, and left the definition of "inland waters" to the judiciary.⁹⁰ Congress granted control of submerged lands beneath the

85. *United States v. Florida*, 363 U.S. 121, 121-129 (1960).

86. *Id.*

87. Florida and Texas have historic boundaries in the Gulf of Mexico extending three marine leagues (nine geographic miles) from their coastlines. *See Louisiana II*, 363 U.S. 1 (1960). Florida, on its Atlantic Ocean side, has a statutory three-mile seaward boundary.

88. *See* 43 U.S.C. 1301(c) (1989).

89. *See California II*, 381 U.S. 139, 152 (1965).

90. *See id.* at 150-152, 157, 164.

territorial sea to the coastal states with the SLA, but it failed to define the key term necessary to exercising these newly created rights.

The need for a precise manner to determine the exact location of the federal/state boundary set the stage for *California II*.⁹¹ California claimed its coastline began at the end of the inland waters identified as "those waters which the State considered to be inland at the time it entered the Union."⁹² The United States challenged California's claim, alleging that California's coastline should be set at three miles beyond the baseline established in *California I*.⁹³ The controversy centered upon defining the term "inland waters" because Congress neglected to do so in the SLA.⁹⁴ This decision reinvoked the international law and policy considerations of *California I*⁹⁵ as the Court turned to international law to define "inland waters."

The Supreme Court decided that because the SLA contained no definition for inland waters, Congress intended the term to be defined by the courts.⁹⁶ The Court looked to the 1958 Convention on the Territorial Sea and Contiguous Zone (Convention)⁹⁷ to define the SLA's "inland waters."⁹⁸ The United States ratified the Convention in 1964. This established the method for delineating seaward territorial boundaries of the signatory countries. Under this convention, a country's territorial sea boundary is measured from a "baseline" that, like the SLA's "coastline," generally follows the line of ordinary low water. The Convention also recognized the ambulatory nature of a country's territorial sea, and

91. The SLA halted the California line of proceedings. Because of the depth of water off California's shores, the current technology allowed for drilling only close to shore and the Court did not take action on the Special Master's Report, allowing the California controversy to lie dormant. By 1963, technology made deep water drilling economically feasible and the United States filed an amended complaint reviving the controversy. *Id.* at 148-149 (1965).

92. *Id.* at 149.

93. The Court established the low water mark as the baseline in *California I*. *Id.* at 149-150.

94. The original version of the bill defined inland waters as "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." However, Congress deleted this definition from the final version of the bill that became the Submerged Lands Act. *Id.* at 150-152.

95. 332 U.S. 19 (1947).

96. *California II*, 381 U.S. at 150-161.

97. Geneva Conventions of 1958, Convention on the Territorial Sea and the Contiguous Zone [Convention], April 29, 1958, 15 U.S.T. 1607, T.I.A.S. No. 5639.

98. *California II*, 381 U.S. at 161-167.

established that the boundary may be modified by natural changes in and artificial accretion to the coastline.⁹⁹ The Court adopted the Convention's definition for the SLA with the goal of establishing "a single coastline for both the administration of the SLA and the conduct of our future international relations."¹⁰⁰ It supported California's position and recognized juridical bays and historic bays as inland waters,¹⁰¹ but denied the use of straight baselines to establish California's inland waters,¹⁰²

99. See Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, pt. 1, art. 8, 15 U.S.T. 1607, T.I.A.S. 5639. The Supreme Court has held that the ambulatory nature of boundaries as allowed by the Convention applies equally to the delineation of State seaward boundaries. See *California II*, 381 U.S. at 177; *United States v. California*, 432 U.S. 40, 41 (1977) (Second Supplemental Decree). *Louisiana III*, 389 U.S. at 158; and *United States v. California*, 447 U.S. 1 (1980) (*California III*).

100. *California II*, 381 U.S. at 165.

101. Article 7 of the Convention states:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of the bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Convention, quoted in *California II*, 381 U.S. at 169 n.36.

102. *Id.* at 167-169.

even though the Convention established inland waters with straight baselines drawn from the mainland around offshore islands.¹⁰³

After *California II*, Louisiana and Texas attempted to apply the Convention to their ongoing disputes over the territorial sea in the Gulf of Mexico.¹⁰⁴ In *Louisiana III*, a continuation of *Louisiana II*,¹⁰⁵ Texas invoked an article of the Convention which included artificial structures as part of the shoreline,¹⁰⁶ and claimed that its three-marine-league boundary should be measured from the offshore jetties that were constructed after its 1845 admission into the Union.¹⁰⁷ The United States argued that the boundary should be measured from the annexation coastline.¹⁰⁸

The Supreme Court held that Texas' three-marine-league boundary should be measured from the Texas coastline "as it existed" in 1845; however, if Texas claimed a three-mile boundary, then the jetties would

103. Article 4 of the Convention provides:

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Convention, quoted in *California II*, 381 U.S. at 167-168 n.34.

104. *United States v. Louisiana*, 389 U.S. 155 (1967) (*Louisiana III*).

105. 363 U.S. 1 (1960).

106. *Louisiana III*, 389 U.S. at 158. Article 8 of the Convention states, "For the purpose of delimiting the territorial seas, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." *Id.*

107. *Id.* at 157.

108. *Id.*

establish its coastline.¹⁰⁹ The Court, distinguishing the unconditional three-mile grant and historical grant provisions of the SLA, stated that the three-mile grant of *California II*¹¹⁰ was not tied to a specific boundary at a specific date, but the three-league grant was specifically tied to Texas's entry into the Union.¹¹¹ It determined that using the Convention to define the Texas coastline would grant Texas title to offshore land that Congress never intended. The Court retreated from the international law rationale of *California II* and refused to allow Texas to combine international law and federal law to "carve out the largest possible area for itself."¹¹²

In *Louisiana III*, the Supreme Court held that Texas's three-league seaward boundary must be measured from its coastline as it existed in 1845.¹¹³ In *Louisiana IV*, the Court established from what point on the Texas shoreline the boundary should be measured.¹¹⁴ The United States argued for the boundary to be measured from the modern coastline. Texas argued that the 1845 coastline should be used because erosion and accretion unfairly decreased the three league boundary.¹¹⁵ The Court, returning to an international law source, adopted the Convention's principle of an ambulatory coastline, and determined that Texas' three marine league boundary should be measured from the present coastline.¹¹⁶ This directly conflicted with *Louisiana III* which required the 1845 coastline be used in such measurements.¹¹⁷ Consequently, if there was any accretion to the Texas coast since 1845, the three league boundary was measured from the 1845 coastline. If there was any erosion, the boundary was measured from the modern coastline as defined by the Convention.¹¹⁸ The Court acknowledged the paradox

109. *Id.* at 160.

110. *See* 381 U.S. at 155.

111. *Louisiana III*, 389 U.S. at 183-184.

112. *Id.*

113. *Id.* at 160.

114. *Louisiana IV*, 394 U.S. 1 (1969).

115. *Id.* at 3-4. Erosion had claimed between 17,000-35,000 acres along the Texas coast. Much of the present coastline of Texas is inland from its 1845 coastline. *Id.* at 4 n.4.

116. *Id.* at 4-5.

117. 389 U.S. at 161.

118. *Louisiana IV*, 394 U.S. at 5-6.

created by its decision, but attributed the inequity to the SLA and left Texas to turn to Congress for relief.¹¹⁹

Boundary problems persisted in the Gulf of Mexico even after *Louisiana IV*, with the previous decisions only compounding the ataxia.¹²⁰ In *Louisiana V*, Louisiana asserted that its boundary should be measured from the Inland Water Line, fixed by the Coast Guard pursuant to an 1895 federal statute.¹²¹ The United States challenged Louisiana's claims, arguing that the definition of "inland waters" found in the Convention should determine the baseline.

The Supreme Court found that Congress intended the 1895 statute to divide federal/state jurisdiction for the purpose of navigation, and that Congress designed the SLA to distinguish federal/state claims of ownership but did not intend to define "inland waters" in the 1895 statute.¹²² The Court held that under the SLA the seaward limit of Louisiana's coastline is to be defined in accordance with the Convention.¹²³ The Court referred the question to a Special Master, who was to consider Louisiana's claim to historic waters "as if it were being made by the national sovereign and opposed by another nation."¹²⁴ Once again the Court demonstrated its propensity towards viewing territorial sea issues from an international law perspective, with the associated emphasis upon national considerations.

Defining the baseline from which to measure the offshore federal/state boundary remains confusing even after these decisions. However, these cases show that the Court favors resolution of claims of ownership of submerged lands of the territorial sea from an international perspective, which implicitly favors the Federal Government's claims. This approach seemingly conflicts with the principles developed in *Alabama v. Texas*¹²⁵ and *Louisiana II*¹²⁶ which characterized this issue as a domestic dispute between the federal government and the states.

119. *Id.* at 6.

120. *United States v. Louisiana*, 394 U.S. 17 (1969) (*Louisiana V*).

121. *Id.* at 18-19. Louisiana also claimed several historic bays as inland waters. *Id.* at 74-78.

122. *Id.* at 19.

123. *Id.* at 17-35.

124. *Id.* at 77.

125. 347 U.S. 272 (1954).

126. 363 U.S. 1 (1960).

IV. UNITED STATES V. ALASKA

A. The Administrative Law Perspective

The Court treated *United States v. Alaska*¹²⁷ as presenting only a question of administrative law.¹²⁸ However, this case did not solely pose an administrative law question. The import of this case goes beyond the legality of the regulations followed by the Corps in its administration of the permitting process. As was previously discussed, title to submerged lands in the territorial sea clearly rests with the coastal states as provided in the SLA. However, locating the offshore federal/state boundary is not so clear-cut. This case asked the Court to recognize a single boundary for domestic and international purposes, but the Court declined to do so. Administrative law provided an answer, but it allowed the Court to ignore the opportunity to unify and simplify the previous decisions bearing on the issue.

In its administrative law analysis, the Court correctly began with the language of the statute which granted the Corps authority over the permitting process. When a court reviews an agency's construction of a statute, the court must first inquire "whether Congress has directly spoken to the precise question at issue."¹²⁹ If the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹³⁰ The language of section 10 of the RHA,¹³¹ flatly prohibiting "the creation of *any* obstruction" to navigation not approved by Congress nor recommended by the Secretary, is quite broad.¹³² Section 10 does not confine the Secretary to considering only those factors that bear upon the navigable capacity of the waters involved. Nor does section 10 condition the right to obtain a permit for construction or fill in covered waters such that the Secretary may deny a permit only upon finding an adverse impact on navigation or the presence of other specified factors. Additionally, statutory antecedents to the RHA provide no insight into Congressional intent for the statute. Thus, under

127. 112 S. Ct. 1606 (1992).

128. See *supra* note 14.

129. *Chevron*, 467 U.S. at 842 (1984).

130. *Id.* at 843.

131. 33 U.S.C. § 403 (1988).

132. *United States v. Alaska*, 112 S. Ct. at 1611 (quoting 33 U.S.C. § 403).

Chevron, the initial question in determining the legality of the Secretary's actions is whether the Secretary's use of a "public interest review," as required by Army regulations,¹³³ "is based on a permissible construction of the statute."¹³⁴

Construction of the RHA has been the focus of few court battles, and there have been relatively few occasions to decide whether the language of the statute should be construed broadly or narrowly.¹³⁵ Analysis of judicial interpretations of other sections of the RHA facilitates determining the permissibility of the Secretary's broad construction of section 10. Section 13 of the RHA,¹³⁶ which was enacted contemporaneously with section 10, provided that the Secretary "may permit" the discharge of "refuse" whenever "in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby."¹³⁷ *United States v. Pennsylvania Industrial Chemical Corp.*¹³⁸ asked whether section 13 required the Secretary to allow such discharges when they failed to affect navigation. The Court, interpreting the language of section 13 broadly, held that even when the Corps concedes that a certain deposit will not cause injury to an anchorage or navigation, "the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—i.e., it provides that the Secretary 'may permit' the deposit."¹³⁹ In *United States v. Alaska* the Court correctly concluded

133. 33 C.F.R. 320.4(f) (1993).

134. *Chevron*, 467 U.S. at 843.

135. See, e.g., *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 353-355, 358-359, (1933) (Petitioners sought permission from the Secretary to build a wharf on the Potomac River. The Secretary refused to authorize construction solely on the ground that it would be inimical to the establishment of the proposed George Washington Parkway. The Court noted that the duty of the Secretary under the statute is not plain and certain, since the words forbidding all structures in any navigable water, except as recommended by the Army Corps of Engineers and approved by the Secretary of War, are only permissive, not mandatory, and there is no plain implication of a duty on the part of the Secretary to authorize a structure that infringes the rights or obstructs the public policy of the United States as owner and sovereign of the river bed); *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960) (concluding that "[t]he philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342, that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading either of § 13 or of § 10" of the 1899 Act); *New Jersey v. New York*, 283 U.S. 336 (1931); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

136. 33 U.S.C. § 407 (1988).

137. *Id.*

138. 411 U.S. 655 (1973).

139. *Id.* at 662.

that as section 10 provides no criteria to be considered before granting the permit, the Secretary may apply full discretion in the approval of a section 10 permit request.

Under *Chevron*, if the language of a statute does not address the question presented the court looks to the reasonableness of the agency's interpretation.¹⁴⁰ The courts must defer to the agency's interpretation if it is reasonable, even though the court may prefer a different interpretation.¹⁴¹ In 1968, the Corps regulations pertaining to navigable waters were revised to include consideration of "the effects of permitted activities on the public interest including effects upon water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation" as a part of the permit review process.¹⁴² A year later, Congress passed the National Environmental Policy Act of 1969,¹⁴³ requiring federal agencies to consider ecological factors when their activities may significantly affect the environment. The House Committee on Government Operations concluded in 1970 that the Corps was not interpreting its section 10 authority broadly enough.¹⁴⁴ The Committee commended the Corps because the revised regulations demonstrated that it recognized "its broader responsibilities" pursuant to section 10, but also instructed the Corps to increase emphasis on how projects would affect *all aspects of the public interest*, including conservation of natural resources, fish and wildlife, air and water quality, aesthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway.¹⁴⁵ This Congressional endorsement supported the conclusion that the Corps regulations, if anything, did not go far enough in considering public interest issues, and that Congress desired the Corps to consider a full range of factors in the permitting process.

The Secretary's public interest review regulations expressly provided for consideration of a wide variety of factors.¹⁴⁶ The *Alaska* case arises

140. *Chevron*, 467 U.S. at 837.

141. *Id.* at 843-844.

142. 33 C.F.R. 320.4 (1993).

143. 42 U.S.C. §§ 4331-4347 (1989).

144. *See*, H.R. REP. NO. 917, 91st Cong., 2d Sess., at 5-6 (1970).

145. *Id.* (emphasis added).

146. *See* 33 C.F.R. § 320.4(b) (wetlands); 33 C.F.R. § 320.4(c) (fish and wildlife) (1993); 33 C.F.R. § 320.4(d) (water quality) (1992); 33 C.F.R. § 320.4(e) (historic, cultural, scenic, and recreational values) (1993); 33 C.F.R. § 320.4(g) (property ownership) (1993); 33 C.F.R. § 320.4(h) (coastal zones) (1993); 33 C.F.R. § 320.4(i) (marine sanctuaries) (1993); 33 C.F.R. § 320.4(j) (other federal, state, or local

from the consideration of one particular factor—the effects of the proposed construction on the "limits of the territorial sea."¹⁴⁷ The Corps regulations satisfied *Chevron*, but the broad language of the statute did not speak to the precise question of what criteria the Corps must review in the permitting process. The Supreme Court's review of this case as a strictly administrative law question limited its analysis. As a question of administrative law, the Court could inquire only into whether the statute spoke to the precise issue presented. Upon finding that it did not, the Court could consider only whether the agency interpretation was reasonable, without regard for the appropriateness of the action. Looking to the judicial, legislative, and administrative history of the regulations there can be little doubt that the Corps regulations represented a reasonable construction of the Congressional authority granted by the RHA, and therefore, the Court concluded correctly that the Corps validly requested a waiver prior to approving Nome's section 10 permit.

The tenets of administrative law tied the Court's hands in *United States v. Alaska* once the Court chose to rely on administrative law to resolve the case. However, the history of the controversy surrounding the federal/state boundary in the territorial sea suggests that the Federal Government would have won this suit even if it were not for the favorable administrative law posture of the case. This case ultimately falls in line with *California I*¹⁴⁸ and its progeny which seem to guarantee that the Federal Government always prevails when it comes to valuable offshore resources.

B. The Three Nautical Mile Federal/State Boundary

1. What The Submerged Lands Act Grants Coastal States

Congress has not exercised its authority to prevent coastal states from unilaterally extending their coastline or seaward boundaries through either the Rivers and Harbors Act, the Clean Water Act or the Ocean

requirements) (1993); 33 C.F.R. § 320.4(k) (safety of impoundment structures) (1993); 33 C.F.R. § 320.4(l) (floodplain management) (1993); 33 C.F.R. § 320.4(m) (water supply and conservation) (1993); 33 C.F.R. § 320.4(n) (energy conservation and development) (1993); 33 C.F.R. § 320.4(o) (navigation) (1993); 33 C.F.R. § 320.4(p) (environmental benefits) (1993); 33 C.F.R. § 320.4(q) (economics) (1993); 33 C.F.R. § 320.4(r) (mitigation) (1993).

147. 33 C.F.R. § 320.4(f) (1993).

148. 332 U.S. 19 (1947).

Dumping Act. Congress has spoken on this subject only in the Submerged Lands Act (SLA) which expressly grants States "title to, and ownership of" the submerged lands three geographic miles from the coastline, while expressly reserving to the federal government certain paramount rights of commerce, navigation, national defense, and international affairs.¹⁴⁹ Federal/state seaward boundary disputes are to be addressed by the Secretary of the Interior, not the Army.¹⁵⁰

The SLA grants States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States."¹⁵¹ The Act generally defines the "seaward boundary" of each State "as a line three geographical miles distant from its coastline."¹⁵² It defines the "coastline" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."¹⁵³ Congress clearly recognized that the coastline would be constantly modified and changed by human actions when it passed the SLA. "Apart from the resources which may be taken from submerged lands, the States have other interests in the use of such lands. Many piers, docks, wharves, jetties, sea walls, pipe lines, sewage-disposal systems, acres of reclaimed land and filled-in beaches, etc. have been established, and many more will be established on these lands."¹⁵⁴ Congress was also aware that natural changes constantly reformed the coastline.¹⁵⁵ The Supreme Court has recognized that problems may arise due to the ambulatory nature of a State's coastline, from either natural or artificial causes. But, as the Court has noted, "if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing which would obstruct resolution of the problems through appropriate legislation or agreement between the parties."¹⁵⁶ The word "agreement" implies negotiation; however, the Corps simply gave Nome a "take-it-or-leave-it" proposition. The Corps told Alaska either to waive rights created by the SLA, or forgo the permit and the causeway. This

149. See 43 U.S.C. §§ 1312, 1314 (1988).

150. See 43 U.S.C. 1336 (1988).

151. 43 U.S.C. § 1311(a) (1988).

152. 43 U.S.C. § 1312 (1988).

153. 43 U.S.C. § 1301(c) (1988).

154. H. REP. NO. 1778, 80th Cong., 2d Sess. 2 (1948), *reprinted in* 1953 U.S.C.C.A.N. 1415, 1436.

155. *Id.* at 1424.

156. *Louisiana IV*, 394 U.S. 11, 34 (1969).

approach is not negotiating an agreement, it is holding the permit hostage until the "disclaimer-of-rights" is executed.

The SLA is silent as to whether artificial modifications of the coastline change the seaward boundary of a state. However, under the Supreme Court's interpretations of the SLA, the three-mile seaward boundary must be measured from the baseline drawn along points on the low tide line of the state's coast. This baseline, according to the Court, is drawn along the mean low tide line of the coastline as it has been changed and modified by both natural and man-made forces.¹⁵⁷ This construction recognizes the desirability of a "single coastline for both the administration of the SLA and the conduct of our future international relations."¹⁵⁸

The line of cases clearly stands for the proposition that the Nome facility extended Alaska's coastline under the law. The fact that the Corps requested the waiver manifests this point. The Court did not dispute this conclusion when it discussed Alaska's SLA argument. The Court instead looked back to section 10 of the RHA, and reiterated its argument that section 10 allows the Corps complete authority to grant the permit, and, therefore, grants discretion to condition the permit, even when the condition represents a departure from case law.

The Court's reliance upon administrative law to approve the Corps' actions in denying the permit in the face of case law is the major inconsistency in the opinion. After concluding that *California II* establishes that non-natural structures extend the coastline, the Court stated:

The Secretary is making no effort to alter the existing rights of a State to sovereignty over submerged lands within three miles of the coastline. The SLA makes this guarantee and nothing in the Corps' practice, as exercised in this case, alters this right. What the Corps is doing, and what we find a reasonable exercise of agency authority, is to determine whether an artificial addition to the coastline will increase the State's control over sub-

157. *California II*, 381 U.S. 139, 177 (1965) ("when a State extends its land domain by pushing back the sea ... its sovereignty should extend to the new land, as was generally thought to be the case prior to the 1947 California opinion"); *Louisiana III*, 389 U.S. 155, 158 (1967) ("it is clear that in the case of the three-mile unconditional grant artificial jetties are a part of the coastline for measurement purposes"). See also *United States v. California*, 432 U.S. 40, 41-42 (1977).

158. *California II*, 381 U.S. at 165; *Louisiana IV*, 394 U.S. 11, 34 (1969).

merged lands to the detriment of the United States' legitimate interests.¹⁵⁹

This clearly runs contrary to *California II*. In the previous line of cases, the Court examined whether the law calls for the measurement of a coastal state's coastline to include extensions caused by non-natural structures. Instead of looking at the legal change a non-natural structure causes to the measurement of a states coastline, the Court considered only whether the Army's permitting process satisfied administrative requirements. Such an approach ignores whether the Corps can change the law as established by the SLA and judicial precedent. This error flaws the Court's analysis because it disregards the true issue of whether the law calls for a pier to affect the coastline. The Court lost sight of the core issue of the case when it based its analysis upon which party had the most rights to a band of submerged land three miles out to sea. That consideration became the final justification for the decision to elude the *California II* holding and the core issue presented. The court concluded:

Were we to accept Alaska's position, the Federal Government's interests in submerged lands outside the State's zone of control would conceivably become hostage to state plans to add artificial additions to its coastline. And if Alaska's reading of the applicable law were followed to its logical extreme, the United States would be powerless to protect its interests in submerged lands if a State were to build an artificial addition to the coastline for the sole purpose of gaining sovereignty over submerged lands within the United States' zone, so long as the project did not affect navigability or cause pollution.¹⁶⁰

The Court's justification of its reasoning misses the mark. It is based upon the assumption that the issue of the case was only control of valuable property rights instead of whether United States domestic boundaries should follow international convention and include the length of a pier in the measurement of ocean boundaries. As this rule will apply to all offshore areas, and some areas do not contain valuable resources, the Court wrongly considered interests in offshore resources as a part of its decision. Under international law, the United States loses

159. United States v. Alaska, 112 S. Ct. at 1613-1616.

160. *Id.* at 1616.

nothing if the state boundary is extended in relation to non-natural structures, but gains territory if it is not extended. The Court claims that to extend Alaska's coastline would be to hold the United States hostage, but this substantially overstates the reality of the situation presented in *United States v. Alaska*. The converse is true; the conditional permit holds the state hostage while giving additional territory to the federal government.

a. Paramount Powers

The SLA reserves to the federal government "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs."¹⁶¹ But the Corps' requirement that a state waive its statutory rights because of the impact of a coastal project on the location of a state's seaward boundary does not further any of these paramount powers. That a state's seaward boundary is changed by an artificial modification of the coastline in no way leads to any infringement, interference, diminishment or prohibition of any of the federal government's reserved, paramount powers.

The location of a state's invisible seaward boundary neither obstructs navigation nor interferes with interstate or foreign commerce. Causing a delay in the construction of a port, however, would interfere with the furtherance of interstate and foreign commerce. No real-world problem burdening modern shipping and navigation can be seen to arise due to the placement of a state's invisible seaward boundary a few hundred feet in one direction or another. The location of a state's seaward boundary has no relation to national security or defense. "This ownership in [a state] would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the Nation."¹⁶² Nor could the shifting of a state's seaward boundary a few hundred feet possibly interfere with international affairs. Indeed, on the outer continental shelf, the United States possesses full jurisdiction, control, and power of disposition to the exclusion of any foreign power.¹⁶³

161. 43 U.S.C. § 1314(a) (1988).

162. *California I*, 332 U.S. at 42-43 (1947) (Reed, J. dissenting).

163. See 43 U.S.C. §§ 1331-1356 (1988).

b. The Army Corps of Engineers' Authority

The Rivers and Harbors Act¹⁶⁴ provides the Corps' permitting authority in the nation's navigable waters. Congressional authority to enact the Act stems from Congressional jurisdiction over navigation through "the provisions of interstate commerce, or within the admiralty and maritime jurisdiction."¹⁶⁵ Congress passed the RHA to assure that the Nation's navigable waters would be free and clear of obstructions to navigation, in order to increase and enhance interstate and foreign commerce. The principal purpose of the Act is to assure that construction projects do not impede navigation.¹⁶⁶ As the Court has stated:

Under section 10 of the River and Harbor Act ... the Corps has traditionally protected navigation by regulating the building of structures (piers, docks, etc.) within navigable waters as well as dredge and fill activities in such waters.... Starting in 1968, the Army Corps began to use its authority under the River and Harbor Act to regulate activities within navigable waters which, while not necessarily obstructing navigation, would cause pollution.¹⁶⁷

Nowhere does the Act imply that property rights to submerged lands or the location of the federal/state boundary are issues to be considered as a part of the permit process.

164. 33 U.S.C. §§ 401, 403 (1988).

165. *United States v. Banister Realty Co.*, 155 F. 583, 595 (1907).

166. *See, e.g.* *Wyandotte Co. v. United States*, 389 U.S. 191, 201 (1967); *Wisconsin v. Illinois*, 278 U.S. 367 (1929); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F.Supp. 1304 (S.D. Tex. 1971), *aff'd*, 463 F.2d 120 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972); *U.S. v. Ohio Barge Line, Inc.*, 458 F.Supp. 1086, 1091 (W.D. Pa. 1978), *vacated on other grounds* 607 F.2d 624 (3d Cir. 1979); *Minnehaha Creek Watershed Dist. v. Hoffman*, 449 F. Supp. 876 (1978), *aff'd in part, rev'd in part*, *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (1979); *United States v. Sexton Cover Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976) ("Promoting and protecting navigation was the dominant theme of this chapter ..."); *United States v. Logan & Craig Charter Service, Inc.*, 676 F.2d 1216, 1217 (8th Cir. 1982) (Section 10 of the Rivers and Harbors Act "was enacted to prevent private parties from obstructing navigable waters...").

167. *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1158 (1st Cir. 1987).

The foundation of the Court's decision in *United States v. Alaska* is its broad reading of section 10 of the RHA. Such a reading of this Act allowed the Court's final conclusion that the Corps may consider property rights to submerged lands and the location of the federal/state boundary before granting a permit. The Court first read the "broad" language of the statute to "flatly prohibit[] the creation of any obstruction 'to navigable capacity that Congress itself has not authorized and it bans construction of any structure in any water of the United States except on plans recommended by the Chief of Engineers and authorized by the Secretary.'"¹⁶⁸ It next examined how section 10 has been interpreted through the years, concluding that although the statute was originally interpreted relatively narrowly, it is now construed in such a manner to afford the Corps a great deal of discretion.¹⁶⁹ This established the foundation for the conclusion that the governing regulatory language found in 33 C.F.R. section 320.4 is not an overly broad interpretation of the powers delegated to the Corps in section 10 of the RHA.

The regulatory language requires the Corps to consider the effect on the limits of the territorial sea as a part of the permitting process. The Court's broad interpretation of the language found in the RHA allows it to uphold this provision even though there is no statutory requirement for such considerations in the permitting process. The Court's decision to interpret the language broadly allows it to ignore the Act's silence on this issue and grant the Corps complete discretion. The grant of discretion to the Corps forms the cornerstone of the Court's argument in favor of the federal government.

However, fundamental principles of administrative law suggest that the Court should not have found that the Act granted the Corps such complete discretion. The Administrative Procedure Act¹⁷⁰ and case law require that agency action be consistent with underlying authorities. In *ETSI Pipeline Project v. Missouri*, for example, the Court found that a federal agency "is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law," and set aside the Secretary of the Interior's actions, finding

168. *United States v. Alaska*, 112 S. Ct. at 1612 (quoting 33 U.S.C. § 403 (1988)).

169. *Id.* at 1613 ("The Committee emphasized that the Corps should instruct its district engineers . . . to increase their emphasis on how the work will affect *all aspects of the public interest*, including not only navigation but also conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway.") *Id.*

170. 5 U.S.C.A. §§ 553(b)(2), 706(2)(C) (West 1977).

them beyond his statutory authority.¹⁷¹ The Corps is subject to this same rule.¹⁷² Accordingly, the Corps' regulations should be limited to those considerations found in the enabling legislation. Consideration of requests for permits should be limited to the stated purposes and policies of the RHA. Under the Act, those purposes and policies relate to navigation and pollution, not property rights.

The Court's conclusion in *United States v. Alaska* palliates the Corps' usurpation of authority reserved to the Congress. No statute includes consideration of the effect on property rights to submerged lands in the territorial sea or the federal/state boundary as necessary to determining whether a party may build a structure in the navigable waters. In accordance with the RHA, the Clean Water Act, and the Ocean Dumping Act, the Corps may deny a permit for the construction of a harbor facility if it is determined that the construction or facility would result in an obstruction to navigation, endanger human health or welfare, the marine environment, or economic potential. None of these statutes, however, grant the Corps authority to deny such a permit because of the effect that a construction project may have on the location of a state's seaward three-mile boundary. Taken together, these three statutes embody Congress's clear intention of maintaining the Nation's waterways free from obstruction, and doing so in a manner that does not unreasonably diminish the quality of the navigable waters, endanger human health, safety or welfare, or harm the coastal or marine environment. Neither jointly nor separately do these three statutes delegate the authority to the Corps to deny or condition a permit for a coastal project because of the effect such a project may have on the location of a state's seaward boundary. The RHA never included consideration of property rights in submerged lands, and, therefore, neither should the Corps' regulations.

2. State Title and Ownership under the Submerged Lands Act and the "Public Interest"

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the

171. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988).

172. *See, e.g., Pacific Northwest Bell Telephone Co. v. United States*, 549 F.2d 1313, 1317 (9th Cir. 1977), *cert. denied*, 434 U.S. 820 (1978).

natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby ... recognized, confirmed established, and vested in ... the respective States.¹⁷³

Congress so "determined and declared" in 1953 when it passed the SLA. The *United States v. Alaska* decision, however, allows the Corps to consider whether state title and ownership of the submerged lands out to three miles from its coastline, as modified by any natural or artificial causes, is in the "public interest." In accordance with these regulations, the Secretary conducts a "public interest review" of the project before issuing a permit for the placement of dredge or fill material into the navigable waters of the United States.¹⁷⁴ One of the factors of this "public interest review" is "whether the coast line or base line might be altered."¹⁷⁵ As Congress has determined and declared that title to the submerged lands found in the territorial sea vesting in the states is in the "public interest," the Court should not rule so as to allow the Corps to reconsider this policy.

The Court considered the public interest review as further support for its broad reading of section 10 of the RHA. The public interest review, however, should have favored Alaska when one considers the totality of the circumstances. The Court implies that there is a general public interest in the resources of the submerged lands. However, vesting title to these areas to the states is equally in the public interest. Also, it is in the public interest to have one "baseline" for measuring maritime jurisdictional boundaries. This decision creates jurisdictional ambiguity between the federal government and Alaska. Another factor that should be considered in the public interest review is that this decision grants the federal government something for nothing. The federal government enjoys an extension of its seaward boundary into previously international waters while at the same time requiring the state to waive its right to the counterbalancing windfall. The state is responsible for the extension and, therefore, it should be entitled to the benefit under a fair review of the public interest. Weighing the competing

173. Submerged Lands Act, 43 U.S.C. § 1311(a) (1988).

174. See Corps of Engineers, Dept. of the Army, General Regulatory Policies, 33 C.F.R. § 320.4(a) (1993).

175. *Id.* § 320.4(f).

public interest tips the scales in the favor of Alaska, and against the Court's decision.

V. CONCLUSION

The Supreme Court should have found in *United States v. Alaska* that the Corps lacks authority to withhold a permit for the construction of a coastal project until the state has waived its statutory rights under the SLA. The three statutes upon which the Army Corps based its authority to impose such a condition: the 1899 Rivers and Harbors Appropriations Act, the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act, do not provide the basis to deny a permit based on a coastal project's effect on the location of a state's seaward boundary.

Congress set forth an orderly process for determining the boundary between a state's submerged lands and federal outer continental shelf in the SLA. Congress recognized that disputes may arise between the states and the federal government "as to whether or not lands are" state-owned submerged lands, or federally-managed, outer continental shelf lands.¹⁷⁶ To resolve such disputes, Congress included within the SLA a specific provision delegating to the Secretary of the Interior the authority to negotiate a remedy for such disputes with the states.¹⁷⁷ Since only Congress has the power to establish state boundaries,¹⁷⁸ the Corps' actions held no independent validity, and unlawfully infringed upon this congressional delegation of authority to the Secretary of the Interior. Although the Congress expressly reserved certain paramount federal powers associated with commerce, navigation, national defense and international affairs,¹⁷⁹ the requirement that a state waive its statutory rights under the SLA has no rational relationship to the exercise of any of these powers. The Court needed to look no further than the SLA to determine the impropriety of the Corps' actions.

The Corps overstepped its authority by declining to approve the City of Nome's causeway construction permit until Alaska waived its rights to submerged lands granted by the SLA. The Supreme Court has held that natural shifts in the coastline and artificial coastline construction,

176. See 43 U.S.C. § 1336 (1988).

177. *Id.*

178. *Louisiana II*, 363 U.S. at 35.

179. See 43 U.S.C. § 1314 (1988).

such as the Nome causeway, alter the coastal boundaries for purposes of the SLA. To allow the Corps discretion to condition construction permits based upon the effect on the federal/state boundary disregards the clear intended purpose of the act and violates the Administrative Procedure Act. The Army Corps of Engineers has no right to change the law. In light of the decision in *United States v. Alaska* one must conclude that federal interests indeed prevail in the territorial sea.