Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update
Issue #6, August 2001

Websites of Interest

Aquaculture Information Center — DOC/NOAA
http://www.lib.noaa.gov/docaqua/frontpage.htm

NOAA's aquaculture web site provides a wealth of information, ranging from aquaculture news updates to links to numerous aquaculture-related web sites sponsored by various federal agencies. In addition to these resources, the NOAA site provides links to several websites that contain statistical information on aquaculture. This site also provides public access to various aquaculture-related library indexes. Via the Joint Subcommittee on Aquaculture link (see below), visitors gain access to an extensive resource on governmental agencies that deal with aquaculture issues.

Guide to Federal Aquaculture Programs and Services
http://ag.ansc.purdue.edu/aquanic/jsa/federal_guide/index.htm

This website, sponsored by the Joint Subcommittee on Aquaculture (JSA), operates as a gateway for individuals interested in aquaculture within federal government agencies. The site provides numerous links to aquaculture-related programs and projects of such federal agencies as the USDA, the Fish and Wildlife Service, USGS, FDA, TVA, NSF, EPA, and numerous subdivisions of the U.S. Department of Commerce. The links are separated into individual departmental links as well as subject based groupings, with categories such as: research, Sea Grant contacts, regulatory agencies, and others.

Megalaw.com
http://www.megalaw.com

Megalaw.com is an internet resource that serves both as a gateway to various governmental sites and legislation for all of the United States jurisdictions as well as an archive of important legal information (e.g., Supreme Court decisions). Although Megalaw.com is a privately funded and operated website, it is provided, free of charge, to the general public. At the federal level, Megalaw.com provides .pdf files of all recent Supreme Court decisions. For federal appellate decisions, Megalaw.com facilitates searches through Findlaw.com (dates of coverage vary). At both the federal and state levels, Megalaw.com furnishes links to individual courts' web sites as well as pathfinders for a substantial amount of governmental information (e.g., legislation, agency information, county structures, etc.). Additionally, Megalaw.com contains links to numerous law review websites and legal news resources. Megalaw.com does have limitations. Although the scope of the topics covered is quite broad, the depth of coverage in each area is not extensive. This is largely due to the enormous task of making full text legal resources available on the web free of charge. However, what Megalaw.com lacks in depth it definitely makes up for in scope. This site is an invaluable tool for individuals seeking recent or general information in a broad

array of legal topics. Megalaw.com is a good place to begin your legal research due to its broad coverage of so many legal and governmental topics.

Office of Ocean and Coastal Resource Management
http://www.ocrm.nos.noaa.gov/welcome.html

The OCRM website, hosted by NOAA, presents a wealth of information on the topic of coastal zone management. The site contains relevant law on coastal zone management, downloadable publications from the OCRM, as well as updates on ongoing projects and cooperative efforts with various states. The site is easy to navigate and replete with both the law and the science of coastal zone management, including the topics of aquaculture, wetlands conservation, coastal access, and many others.

Recent Louisiana Legislation

2001 Regular Louisiana Legislative Session

Act 438, House Bill 1606
Oyster Leaseholder Production Information

In the 2001 Regular Legislative Session, R.S. 56:430(A) was repealed in its entirety, and R.S. 56:430.1 was enacted. Act 438, which is relative to oyster leases, states that, beginning in 2003, each leaseholder will be required to submit production information to the Department of Wildlife and Fisheries. This information includes: name of the leaseholder, harvest area grid numbers (the grid to be developed by the Department of Wildlife and Fisheries), amount of marketable oysters removed, amount of seed oysters removed, amount of cultch material placed, and amount of seed oysters placed, including an indication of whether the seed oysters were from a private lease or from the state seed grounds. The information submitted will be available to the Department of Natural Resources strictly for the purposes of conservation, protection, management, enhancement, and restoration of coastal wetlands or barrier islands. However, the information will be held confidential for all other purposes. Any information aggregated for the entire state shall be public record.

Act 439, House Bill 1795
Projected Impact Areas/Coastal Restoration

In the 2001 Regular Legislative Session, R.S. 56:428.1(A) was amended and reenacted. Act 439, which is relative to oyster leases, states that areas determined to be located within the projected impact area of a coastal restoration project included within a public program officially proposed by the appropriate local, state, or federal agency (formerly a project funded pursuant to the state's annual Coastal Wetlands Conservation and Restoration Plan) may be renewed by the secretary for not less than one year nor more than fourteen years. This legislation focuses only on leases, which expired on December 31, 1996 or at any time thereafter. In addition, each year the Department of Natural Resources shall present the projected impact areas and recommendations relative to affected leases to the Oyster Task Force by the fifteenth of August. Furthermore, September thirteenth will be the date that final lease recommendations to the Department of Wildlife and Fisheries and the Oyster Task Force are due. The Oyster Task Force may request review by the House and Senate Committees on Natural Resources of the final recommendations presented by the DNR, otherwise it shall be interpreted as an acceptance of the final recommendations. A request from the Oyster Task Force may be for review of all final recommendations or specific individual recommendations. If a timely request for review has been submitted, the committees shall meet to review the recommendations. The committees may vote to approve or disapprove the impact area and lease recommendations, or to suggest changes. Failure to conduct a hearing will be interpreted as approval of that recommendation. The Department of Natural Resources shall present to the Oyster Task Force and the Department of Wildlife and Fisheries a revised final recommendation which reflects the action taken by the legislative committees.

Act No. 466, Senate Bill No. 965
Ground Water Resources Management Commission

During the 2000-2001 regular session of the Louisiana Legislature, Senators Hoyt, McPherson, and Theunissen introduced Senate Bill No. 965 to create the Ground Water Resources Management Commission and to impose a statewide groundwater resource management program. The bill passed unanimously in the House and with only three nays in the Senate. The governor gave his signature of approval and it became effective as Act No. 466 on June 18, 2001.

The Act is all new law, and is made up of four sections. The first section creates R.S. 36:4 (V), which provides for the Ground Water Management Commission (GWMC) to be established as a division of the governor's office. Section two creates R.S. 38:3099 et seq., which calls for the development of a state groundwater management program which is to take into account the needs of all the citizens of Louisiana. Section three gives the GWMC the authority to appoint representatives of water users as advisors to the commission, and requires the commission to consult these advisors before making any decisions that have local impact. The fourth section creates a Groundwater Management Task Force made up of forty-nine persons representing a plethora of interests including government officials, farmers, water associations, industry and conservationists.

The Act specifies who the fifteen members of the GWMC will be. The membership includes, but is not limited to, secretaries of certain state agencies, the governor or his designee, a governor-appointed geologist or an engineer who is an expert in groundwater resources, and members recommended by various water districts.

The commission is charged with a number of responsibilities regarding groundwater management. The commission shall determine the "critical ground water areas of the state's aquifers." (R.S. 38:3099.3 (D). Critical areas, as defined in the Act, are those areas that are being maintained in a way that if not remedied will have an adverse affect on the aquifer. Boundaries of the critical areas will be proposed, and after holding meetings in the parishes located within the critical areas, the commission will set the final boundaries. Rules will be enacted regarding preservation and use of water in the critical areas, with highest priority going to human consumption and public health and safety. In addition, the commission shall enact an emergency plan for instances where natural or man-made phenomena cause depletion of groundwater.

The Act requires any well drilled that is not a replacement well or for domestic use to be pre-registered with the commissioner of conservation as of July 1, 2001. It also requires the commission to promulgate rules for the permitting process for drilling new wells in the critical areas.

The commission, though established, will be short-lived. The Act calls for the commission to cease existence on July 3, 2003, at which time the commissioner of conservation will take over all the functions of the commission.

The Act directs the GWMC, Task Force, commissioner of conservation, and any advisory bodies to submit the plan for groundwater management to designated Senate and House committees. The Act lists the mandatory components of the plan; such as a review of the state's groundwater resources, the estimated usage of those resources, potential alternatives, surface water resources, educational and conservation programs, and a determination of the state entity structure that will manage the water resources of Louisiana. The Act calls for the plan to be proposed to the legislative oversight committees before January 2003 and any proposed statutes must be ready for legislative review during the 2003 session.

Update on Federal Coastal Zone Management Act Reauthorization

In May 2001, the House Resources Subcommittee on Fisheries, Wildlife and Oceans heard testimony regarding a H.R. 897, a bill to reauthorize the Coastal Zone Management Act (CZMA) introduced by

Representative Jim Saxton (R-NJ) in March 2001. The proposed bill does not call for any major changes to the CZMA. The changes mostly concern allocation of grant money and minor changes to existing programs.

However, it does ask for states to match funds for the coastal zone enhancement program.

Originally enacted in 1972, the CZMA authorizes and grants funding to coastal states to develop coastal management programs, which must be approved by the National Oceanic and Atmospheric Administration. It also established the National Estuarine Reserve System that provides funding to the states to maintain their own estuarine reserve systems. Two aspects of the CZMA and the proposed revision that have sparked the most debate are the provisions on offshore energy production and nonpoint source pollution.

The current CZMA gives the states authority to review federal activities and the issuance of federal permits and private permits that affect that state's coastal zone. This includes the states' authority to review the Department of Interior's granting of permits for offshore oil and gas drilling for consistency with the states' coastal management programs. While almost all federal activities are approved, some states are more stringent with their requirements and have found the permits to be inconsistent. Craig Wyman, testifying on behalf on several industrial groups, called for the bill to make some changes regarding offshore drilling. He requested cutting back the states' ability to demand that certain information to be included in the consistency determination, and specifying the scope of the states' authority regarding review of private permits.

Participation in the coastal management programs is voluntary, yet thirty-three of thirty-five coastal states have such programs. The current CZMA requires states to have a nonpoint source program in order to receive federal funding, yet does not mandate how much of those funds are to be applied to the nonpoint source programs. The proposed bill will require that states spend thirty-five percent or ten million, whichever is less, on nonpoint source programs. Jacqueline Savitz, executive director of Coast Alliance, asked that the bill toughen enforcement of nonpoint source violations.

Recent Case Law of Interest

United States Supreme Court rules in *Palazzolo v. Rhode Island*

At the end of the 2000-2001 term, the United States Supreme Court ruled on a regulatory takings case discussing key issues regarding government liability to a landowner resulting from imposed regulations on his property. The Fifth Amendment to the United States Constitution contains what is commonly referred to as the "Takings Clause." It states that "private property may not be taken for public use without just compensation." The petitioner brought suit against Rhode Island alleging the State's restrictions on his property constituted a taking, and sought compensation. Palazzolo v. Rhode Island, 533 U.S. 2448 (2001). While the Supreme Court ultimately denied compensation, it made two important findings. First, it found that acquiring title after regulations are in place does not bar a landowner from bringing a takings claim. Second, the court found that deprivation of use of a substantial portion of the property is not deprivation of all economically beneficial use.

Facts of case:

The property in question is mostly undeveloped "salt marsh subject to tidal flooding" located on the Atlantic coast in Westerly, Rhode Island. Palazzolo at p. 2451. Petitioner, Anthony Palazzolo, and others formed the corporation Shore Gardens, Inc. in 1959 to facilitate the purchase of the property. After the corporation bought the property, the petitioner became the sole shareholder of Shore Gardens, Inc., and pursued commercial development of the property. From 1962 through 1966, petitioner submitted three

applications to the Rhode Island Division of Harbors and Rivers to acquire a permit to fill the area. All of the applications were denied.

In 1971, the Rhode Island legislature authorized the formation of the Rhode Island Coastal Resources Management Council (CRMC). The CRMC was given the authority to enact laws for coastal protection. The CRMC labeled salt marshes, like the property in dispute, as coastal wetlands and restricted development of these wetlands. In 1978, Shore Gardens, Inc. lost its corporate charter, and by operation of law, title to the property devolved to petitioner.

The petitioner renewed his plans to develop the property in 1983. He submitted an application to the CRMC for a permit to fill the marsh area. The permit was denied because of vagueness, conflict with the Coastal Resources Management Plan (CRMP), and a finding that the plans would affect the wetlands. At this point, petitioner hired an attorney to help him with another application that was submitted in 1985. This application requested a permit to build a private beach club, which would require filling 11 of the 18 acres of wetlands. The CRMP requires that in order to fill that property, the landowner must meet the conditions for a special exception. It is within CRMC's discretion to grant a special exception if it concludes the landowner's proposal serves a "compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." CRMP §130A (1). The CRMC found that petitioner's proposal did not meet the conditions of a special exception and denied his permit.

State Court Decision and Appeal:

Petitioner sought review of CRMC's denial in Rhode Island state court alleging violation of state administrative law. The denial was affirmed. Petitioner then brought a claim in Rhode Island Superior Court asserting that the entirety of his property had been taken without compensation in violation of the Fifth and Fourteenth Amendments. He petitioned for $3,150,000 in damages. This amount was derived from an appraisal of the property as a seventy-four lot residential area. The Superior Court denied petitioner any recovery.

Supreme Court of Rhode Island:

The Supreme Court of Rhode Island affirmed on four grounds. First, petitioner's takings claim was not ripe for judicial review. (Ripeness is a procedural requirement derived from Article III of the Constitution, which states that federal courts can only hear "cases" or "controversies". Courts have interpreted this to mean that the matter before them must be an actual claim or dispute.) For a takings claim to be ripe the agency must have reached a final decision on how much of the land can be developed. The Rhode Island courts found that CRMC had not reached a final decision regarding how much of the property could be filled. It said that petitioner should have submitted further applications seeking permission to fill less of the property than previously requested. Second, petitioner acquired ownership of the property after the CRMP regulations were in place, therefore, he could not challenge the regulations. Third, that all economically beneficial use had not been taken because an upland portion of the property was valued at $200,000. Finally, that petitioner could not recover under a Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978) analysis because his ownership occurred after regulations, hence, he had no "reasonable investment-backed expectations that were affected by the regulation". Palazzolo, p. 2452. The United States Supreme Court granted certiorari.

United States Supreme Court:

The Supreme Court found that the case was ripe for judicial review, and that petitioner did have a right to challenge the regulations even though his ownership was subsequent to their enactment. However, the court agreed with Rhode Island that petitioner had not been deprived of all economic use of the property. The Court remanded for a determination on whether the petitioner could obtain relief under a Penn Central claim.

On the issue of ripeness the U.S. Supreme Court said that the agency determination was final, because there was no evidence to support a finding that the CRMC would have ever approved an application to fill any portion of the wetlands. Therefore, the U.S. Supreme Court found petitioner's case ripe for review.

The Rhode Island courts' finding that petitioner could not bring a takings claim because his ownership postdated the regulations was founded on the principles of state property law and notice: The State gives property rights, so it may also place restrictions on them. Furthermore, petitioner should have been aware of the restrictions; accordingly, he could not have had any expectations of developing the property. If he had no expectations, he suffered no injury. The U.S. Supreme Court rejected this reasoning, finding many problems with having such a rigid rule. First, it would relieve the states from the burden of having to litigate any regulations of private property regardless of the burden imposed on the landowner. Second, the rule does not consider takings claims that outlive the current owner; a successor would not be able to continue the litigation. Last, it would disregard instances where the takings claim has not yet ripened prior to transfer of title, so that the former landowner had no opportunity to bring the claim. Consequently, the U.S. Supreme Court refused to adopt a blanket preclusion to takings claims brought by landowners whose ownership postdated the regulations.

In order to receive compensation in a regulatory takings case, the regulations must have been so restrictive as to deprive the landowner of all economically beneficial use. In all hearings prior to reaching the U.S. Supreme Court, the petitioner argued his case as though his property was undivided. As a result, the lower courts found that petitioner had not been denied all economic use of his property because the upland portion, valued at $200,000, could be developed. On hearing before the U.S. Supreme Court, the petitioner tried to assert, for the first time, that the upland portion and the wetlands portion should be considered as separate parcels. The petitioner argued the permit denial is a taking of one hundred percent of his *wetlands*, thus, he should be entitled to compensation for the wetlands portion of his property. The U.S. Supreme Court, agreeing with the Rhode Island Supreme Court, found that the upland portion retained a value of $200,000. The U.S. Supreme Court found this was not a trifling amount, and ruled that petitioner had not been deprived of all economically beneficial use, therefore, was not due compensation from the government.

In Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978), the U.S. Supreme Court held that land use restrictions that amounted to less than deprivation of all economically beneficial use could still be a taking, depending on the circumstances. Some of the relevant factors to be considered are the nature of the government action, the degree to which the landowner's reasonable investment-backed expectations have been infringed upon, the economic effect on the landowner resulting from the regulation, and whether the landowner has received compensation in any way. The Rhode Island courts dismissed petitioner's Penn Central claim on the sole finding that his ownership subsequent to regulations precluded him from having any reasonable investment-backed expectations. The Rhode Island courts failed to explore any of the other factors. The U.S. Supreme Court found that acquiring ownership after the regulations were imposed was not an absolute bar to recovery under Penn Central, and remanded to the Rhode Island Supreme Court for a determination of all of the factors.

While the U.S. Supreme Court reached a majority decision, there were two concurring opinions, two dissenting opinions, and one justice who concurred in part and dissented in part. Justice O' Connor concurred to express her view that the reasonable expectations of petitioner is only one factor of many that should be considered under a Penn Central analysis. Moreover, the regulations on the property at the time petitioner took ownership is only one, yet important, factor that contributes to the reasonableness of those expectations. Justice Scalia concurred to opine that the fact that the regulation was in place prior to petitioner's ownership should not factor in to the determination of whether or not the regulation was a taking. Justice Ginsberg dissented to contest the majority finding that petitioner's claim was ripe for judicial review because the "extent of permitted development" is unknown, and stated she would have affirmed the Rhode Island Supreme Court. Palazzolo, p. 2477. Justice Breyer dissented

agreeing with Ginsberg in full. He added that in a takings claim ripe for review, he would agree with Justice O'Connor that timing of regulation enactment in relation to acquisition of ownership is important in determining the reasonable expectations of the landowner. Finally, Justice Stevens concurred with

majority on its decision that the claim was ripe, but dissented on grounds that petitioner does not have standing to assert this claim because the takings claim arose, if at all, prior to petitioner's ownership. Therefore, since his ownership post-dated regulations, he is precluded from asserting the takings claim.

Effort to Save Fish Forces United States Fish and Wildlife Service and National Marine Fisheries Service to Pick up Tab for Reduction of Resident Water Supply

A recent decision of the United States Court of Federal Claims declared restrictions of water rights granted by contract a physical taking under the Fifth Amendment, and required the federal government to compensate county water districts in southern California for the reduction to their water supply. Tulare Lake Basin Water Storage District, et al. V. United States, 2001 WL 474295 (2001).

In an effort to protect two endangered species of fish, the delta smelt and the winter-run chinook salmon, the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMSF) found it necessary to restrict the amounts of water pumped from the Sacramento-San Joaquin Delta. As a result of these restrictions, several county water districts receiving their water from the Delta were deprived of a portion of the water previously entitled to them by contract.

The authority of the USFWS and NMFS ("agencies") to restrict the water flow in order to protect the fish is granted by the Endangered Species Act of 1973, and this authority was not disputed. The nature of the dispute was who should bear the cost of reallocating the water in order to save the fish. The water districts wanted the agencies to pay, but the agencies claimed it was not responsible to the plaintiffs. Determining that the agencies must compensate the water districts, the court made the following findings: First, the water districts' rights to the water are property rights rather than contract rights. Second, there was a taking of property requiring compensation. Finally, the plaintiffs are the owners of the water entitling them to receive the compensation.

In California, the State Water Resources Control Board has ultimate authority to regulate the distribution of state waters. This is accomplished by granting permits to the Bureau of Reclamation (BOR) and the Department of Water Resources (DWR) which then enters into contractual agreements with county water districts to supply the districts with a specified allotment of water each year. The permits issued to BOR and DWR provide that the state will not be held responsible for water shortages due to drought or other causes beyond its control. As a result of the decision by the NMFS to restrict the amount of water pumped from the Delta, the BOR and DWR were unable to supply the amount of water promised to the county water districts by contract from 1992 to 1994.

The Fifth Amendment to the United States Constitution states that "private property may not be taken for public use without just compensation." Therefore, the agencies' action must entail a taking of *property.* The agencies argued that the rights were merely contract rights, not property rights. If the rights are contractual in nature, the agencies do not have to give compensation. The court found the contracts for water use conferred a superior property interest on the plaintiffs because the contracts provide the districts with "exclusive rights to prescribed quantities of water." Tulare at 4.

Once the court has determined the rights are property rights, it must decide if the limitation on the water use was a taking. A physical taking is when the government physically invades the property or usurps the owner's possession of the property. If the taking is physical, the government must pay the owner for the loss of property. A regulatory taking is found when regulation of property restricts the way in which the owner may use his property to such an extent that it amounts to a taking. However, no compensation is required unless the regulations result in a deprivation of all economic viability or productive use of the property. In such case, compensation is required.

The plaintiffs argued that since the contracts provided for a specified amount of water to be distributed to their systems, the reduction by the agencies in the amount of water available dispossessed them of the total value of their property interest. The agencies argued that the limitation constituted a regulatory taking because only a fraction of the property interest was lost and that amount was insignificant. The

court considered whether or not the intrusion was "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." The court found that "in the context of water rights, a mere restriction on use, --- the hallmark of a regulatory action--- completely eviscerates the right itself because plaintiffs' sole entitlement is to the use of the water." Tulare at 4.

Regardless of the fact that the contracts conferred property interest and that a physical taking occurred, the agencies would not have to compensate the water districts unless they were found to be the actual owners of the water taken. The agencies contended that the water districts did not have ownership of the water because they were only promised to receive the water that was made available to DWR. Since DWR was not supplied with the water, the plaintiffs had no claim to it. Central to this argument is the clause in the contracts that stated DWR would not be responsible for reductions in the water supply due to drought or other events over which DWR has no control. The court fully recognized this clause, but points out that the clause only exempts DWR from liability, not the agencies. The court rejected the agencies' arguments, and found that the water districts in fact owned the water.

A final attempt by the agencies to escape liability was to raise common law claims that plaintiffs' contract rights to the water were in violation of the public trust doctrine, doctrine of reasonable use, and California nuisance law. The court admitted the plaintiffs were subject to these doctrines, but decided they were not in violation of them.

In conclusion, the court found that it is well within the agencies' authority to reserve water for the smelt and salmon, however, it would have to do so at its own expense.

Federal District Court Judge Halts Drilling On California's Outer Continental Shelf

Justice Wilken of the Northern District of California found that the United States Department of Interior could not extend the lease terms of certain oil and gas leases on California's Outer Continental Shelf (OCS), unless the state of California determined that the drilling activities would be consistent with the California Coastal Management Plan.

Under the authority of the Outer Continental Shelf Lands Act (OCSLA), the Department of the Interior may issue leases for oil and gas production on the OCS. The leases have an initial term of five to ten years, and may be extended after the initial term provided there is oil and gas produced in sufficient amounts and the drilling and well reworking operations are authorized. There are four steps to the leasing process. First, schedules of proposed lease sales are developed. Second, the leases are sold. Third, the lessee must submit a proposed exploration plan to the Regional Supervisor of the MMS, who must consult with the governor of the state affected, the National Oceanic and Atmospheric Administration, and the Office of Ocean and Coastal Resource Management. Last, the lessee must submit a development and production plan, and a certification that each activity is consistent with the state's coastal management program. The MMS also has authority to grant suspensions of the terms of the leases. In effect, the suspension acts as an extension because it suspends the running of the initial term.

Between 1968 and 1984, forty leases were executed by the MMS for OCS drilling off the California coast. Each lease had an initial term of five years. However, the MMS has granted the lessees' requests for suspensions of the primary terms up until 1999. In 1999, the lessees requested another suspension. California elected officials petitioned the Department of Interior to delay a decision on the suspensions until the California Coastal Commission (CCC) could make a determination, regarding its authority under the Coastal Zone Management Act (CZMA), to examine the lease suspensions for consistency with the CCMP.

The CZMA requires specific federal agency and private activities conducted under authority of a federal license or permit and that affect the coastal zone to be consistent with the state's coastal management program. A federal agency conducting such an activity must submit a consistency determination to the applicable state agency before that agency will approve the federal activity. It was under this authority that the CCC demanded that the MMS delay suspension of the leases so that the CCC could review the

suspensions for consistency with the CCMP, and that the MMS could not issue the suspensions until the state of California agreed with the submitted consistency plan.

The MMS granted the suspensions of thirty-six of the forty leases for periods of nineteen to forty-five months, and required the lessees to conduct "milestone" activities. The activities were drilling a well, presenting a description of the proposed project, and submitting exploration and development and production plans.

It was not disputed that the sale of a lease for OCS drilling is a federal activity under the CZMA that requires a consistency determination to be submitted to the state. The court agreed with plaintiffs' contention that a suspension of a lease should be analogized to the sale of a lease and given the same treatment under the CZMA. The court found that the suspension of a lease is a federal activity affecting the coastal zone as described by the CZMA. The court supported its finding by emphasizing that the suspensions can substantially lengthen the lease terms and this could have the same affect as the sale of a lease. Second, the court pointed out that the MMS required the lessees to engage in "milestone" activities that have a direct affect on the coastal zone.

The defendants argued that requiring the lessees to submit revised exploration and development plans for the milestone activities would negate the need to review the suspensions for consistency. The court rejected this argument for two reasons. First, Congress made clear that sales of leases were to be reviewed for consistency with state programs in the 1990 amendment to the CZMA. The leases in question were sold prior to the revision; therefore, a consistency determination was not done at the time of sale. The court felt that the lack of initial compliance bolstered the need for a consistency determination at the time of suspension. Secondly, if not reviewed at the suspension stage, there would be no guaranty that the revised plans would be subject to consistency requirements because the MMS decides whether or not the revised plans are analyzed for consistency.

Plaintiffs also claimed that the MMS is required under the National Environmental Policy Act (NEPA) to submit an Environmental Impact Statement (EIS) or an Environmental Assessment (EA). An agency may choose not to conduct an EIS if the EA reveals that the activity will not have a significant impact on the environment. In such a case, the agency must give an explanation for its conclusion. The agency may create categorical exclusions from EIS requirements. If it has established categorical exclusions, it must provide for extraordinary circumstances for which the exception will not apply (an exception to the exception). The MMS categorically excluded suspensions of leases. The plaintiffs claim that MMS erroneously relied on the categorical exclusion and that the suspensions were an extraordinary circumstance for which an EIS or EA must be done.

The court found that the MMS should have submitted an explanation of its reliance on the categorical exception and why it felt that the extraordinary circumstance exception did not apply. The court found that the plaintiffs made a "sufficient showing" that the suspensions do meet the extraordinary circumstances exception, but did not order the MMS to conduct an EA or EIS at this time.

The court granted the plaintiffs' motion for summary judgement and ordered the MMS to set aside the approved suspensions and grant temporary ones until the MMS provided the state of California with a consistency determination. The court also ordered the MMS to submit its reasons for relying on the categorical exclusion from an EIS before granting the lease suspensions.