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Inside...

The Historic Development of Seaward Boundaries: Implications for Louisiana

by Charles G. Clayton

Burgeoning coastal zone population growth in all coastal nations is dramatically stressing the carrying capacity of the world's coastal regions and adjacent seas and increasing competition for control of natural resources.

Historically, nations have argued whether the sea should be an entirely "open sea" free to all nations or whether parts of the sea adjacent to nations should be "closed sea", i.e. under the sovereignity and/or jurisdiction of a coastal nation, with boundary lines drawn between the seaward limits of the "closed sea" and the beginning of the open sea.

Those nations advocating the notion of "closed sea" areas have historically been concerned with control of navigation access or the exclusive right to exploit resources therein. In the last 50 years, this argument has been largely driven by offshore oil and gas finds around the globe.

Drawing lines delimiting the extent of "closed sea" areas has been the subject of three international conventions over the past 50 years. Domestically, drawing these lines has been a subject of federal-state tensions, leading to much domestic litigation and legislation.

The United Nations Convention on the Law of the Sea III adopted the 1982 Law of the Sea Treaty which reflects current international concensus on where the "closed sea" boundaries end and the "open sea" begins. This article discusses the historic development of these lines, with a focus of the significance of this for Louisiana.

I. The Historical Development of Ocean Boundaries

A. International

The modern territorial sea constitutes an extension of a coastal nation's sovereignty to a narrow belt of ocean adjacent to a particular coastline. The coastal nation exercises exclusive jurisdiction within this narrow band of ocean just as it does on the adjacent land.

The historic development of the territorial sea as reflection of international custom is best illustrated by the conflicting historic notions of the terms "open sea" and "closed sea." The advocates of an "open sea" considered the world's oceans to be accessible to all for almost any purpose. Conversely, some maritime powers promoted the "closed sea," concept in which large areas of the ocean were considered under the control of a particular nation. Spain and Portugal made the most extreme assertions of a "closed sea," when they attempted to divide the New World between them in 1493. The result was that the two nations claimed control over most of the known oceans of the time. England asserted an "open sea" policy in response to Spanish and Portuguese claims, and as an ideological justification for flexing its naval might.

Smaller trading nations such as the Duchy of Venice on the Adriatic Sea were more pragmatic. Venice claimed closed sea jurisdiction over nearby regional seas to facilitate its trade, and also maintained an open sea policy beyond this region. This pragmatic approach of a combined claim for the open sea and a closed, territorial sea are the foundation of modern customary practice for maritime delimitations.[1]

Scholarly attention to this issue can be focused on the "closed or open sea debate" after a Dutchman, Hugo Grotius, wrote an article, Mare Liberum (free or open sea) in 1609, which later was included in his seminal work De Jure Praedae (On the Law of Booty). Grotius maintained that the ocean was inherently inexhaustible and could be used by everyone. He argued that it would defy the very nature of the ocean to make it the property of any one nation. Grotius made an important proviso for limited national sovereignty over a respective nation's adjacent bays, straits, passes and other similar bodies of water, but argued that this should not serve to impede free pas-

sage of other nation's vessels within these areas. Those nations seeking to limit the power of Spain and Portugal to assert broad claims of closed seas over vast areas seized upon this idea. Grotius framed the debate as to how far a nation could extend its jurisdiction from its shoreline, a controversy that still rages.[2]

B. Madisonian-American Federalism and the Development of Boundaries in the United States' Coastal Zone

In 1793, the United States of America found itself involved in this controversy as England and France engaged in armed conflict, since the two nations were its primary trading partners. The United States decided to adopt a three-mile limit for its territorial sea, based on international principles of neutrality, in an attempt to maintain its trade with the warring nations. This was in response to Britain and France's practice of boarding American ships to confiscate "contraband" bound for either nation as the ships left the immediate safety of their harbors. The Secretary of State, Thomas Jefferson, drafted the three-mile neutrality proclamation to both France and England informing them that neither was to engage in hostile acts within the territorial waters of the United States. Congress also addressed the problem of this widening conflict by enacting the Neutrality Act of 1794.[3] The act prohibited hostile action by foreign nations within three miles (one marine league) of the United States coastline and extended the jurisdiction of federal courts for legal complaints related to the capture of ships within the territorial sea. The Act also allowed the United States to capture foreign ships, with just cause, within its newly established three mile territorial sea.[4]

The United States Supreme Court upheld the three-mile territorial sea claim in Church v. Hubbart.[5] Chief Justice Marshall held that the absolute sovereignty of a nation was "within the range of its cannon," which was approximately one marine league or three miles. Additionally, Marshall noted that a nation's "special jurisdiction" did not stop at three miles, and that the United States could exercise its sovereign jurisdiction beyond three miles to twelve miles offshore for the purpose of enforcing its customs law. This was a response to the need to control "revenue cutters," ships attempting to circumvent United States customs taxes by remaining offshore and loading and unloading cargo via smaller vessels. Many other nations made similar claims of extra-jurisdictional rights in the name of trade.[6]

For most of our nation's history, management and ownership of the seabed off our coastline was assumed to function harmoniously within our federal system. The seabed beneath the United States' three mile territorial sea was accepted as owned by the individual coastal states for their citizens, while the federal government controlled the waters above this seabed area through exercise of the Commerce Clause of the United States Constitution. This understanding was first challenged in Martin v. Waddell,[7] in which the Supreme Court held that Waddell's exclusive claim of ownership of an oyster bed in a bay off the coast of New Jersey, based on a letter-patent granted by Charles II to the Duke of York and ultimately conveyed to Waddell, was without merit. The Court determined that the seabed was owned by the state of New Jersey in the public trust for its citizens.

> "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British Crown, when the title is held by a single individual, in trust for a whole nation."[8]

Martin established that the American Revolution made each state sovereign over its territory, including the seabed of any adjacent "arms of the sea" and the three-mile territorial sea off its coastline, subject to the jurisdictional supremacy of the federal government under the United States Constitution. The decision in Pollard's Lessee v. Hagan,[9] reaffirmed this general proposition by holding that once a territory became a state the United States government could not confer any proprietary right to the shores or seabed of the navigable waterways within the exclusive jurisdiction of the respective states to any party. The Court concluded that the "shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States...," but were reserved for the states under the Tenth Amendment. Additionally, the new states of the union were held to "have the same rights, sovereignty, and jurisdiction over this subject as the original states."[10] The Court held also that the plaintiff's claim to the property, subject to tidal overflow in Mobile, Alabama, based on a patent granted to them by an act of Congress, was without effect and the property was owned by the state of Alabama.[11]

The States' exercise of exclusive jurisdiction over the seabed of the adjacent three mile territorial sea continued, and no serious challenges were made to this belief until after World War II. As the federal government realized the incredible value and vast natural resources located on the continental shelf within the territorial sea and beyond, it sought to regulate and promote the development of oil and gas resources. The impetus for modern legal developments concerning control of the continental shelf was the potential vast national economic and strategic reward of oil and gas offshore exploration and development. The historic Truman Proclamation was a result of this as President Truman announced on September 28, 1945 that "the Government of the United States regards the natural resources of the subsoil and the sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."[12]

The proclamation regarded the continental shelf as an "exten-

sion of the land mass of the coastal nation" that was appurtenant (part and parcel) to it, and said that this assertion was merely a natural and logical step. Truman said that this sudden extension of the territorial jurisdiction of the United States by 50,000,000 square miles did not affect the "character of the high seas."[13] The jurisdictional annexation of such a vast amount of ocean by a nation victorious in World War II had a huge impact on international and national affairs, and was accomplished by a stroke of President Truman's pen. This assertion of rights was based on the "geological unity" of the continental shelf, and unilaterally bound the United States. However, it was calculated to effect a change in international law by establishing a precedent that other nations could emulate. The initial result was chaos as emerging nations made wild territorial sea claims even beyond those of the United States. As a result of the Truman Proclamation, the United Nations has engaged in a 50 year attempt to establish jurisdictional order on the high seas.[14]

Bolstered by the international success of the Truman Proclamation, the United States Attorney General announced a judicial challenge to California's exclusive right to regulate the leasing of oil and gas sites within the territorial sea off its coastline. Congress responded to this by passing House Joint Resolution 225 to "quiet" (to render secure) the respective States' title to submerged lands within the three-mile territorial sea, by circumventing the federal government's judicial effort legislatively. President Truman immediately responded with a veto of the legislation because he anticipated a favorable Supreme Court decision.[15]

The result was the Attorney General's lawsuit, United States v. California.[16] The Supreme Court held that "the Federal Government rather than the state has paramount rights in and power over that (3 mile) belt."[17] The Court also concluded that these "paramount rights" included the right to control the vast natural resources in and under the seabed of the three-mile territorial sea and reaffirmed this holding in the companion cases of United States v. Louisiana,[18] and United States v. Texas,[19] by determining that the United States government owned the submerged land and natural resources within the territorial sea off Louisiana and Texas.

> In direct reaction to these decisions, Congress passed the Submerged Lands Act of 1953[20] which returned ownership of the seabed and natural resources within the three-mile territorial sea to the States, legislatively overturning the decision in United States v. California. The Act specifically mandates that:
>
> (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the 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 the applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective State in which the land is located, and the respective grantees, lessees, or successors in interest thereof;[21]

Congress also passed companion legislation to the Submerged Lands Act, the Outer Continental Shelf Lands Act of 1953[22], which partially reaffirmed the Truman Proclamation by establishing federal control of the continental shelf beyond the three-mile territorial sea to the outer edge of the Shelf. The Act extended the jurisdiction of the United States over the submerged lands that constitute the Outer Continental Shelf (OCS), and authorized the Secretary of the Interior to lease the land for the economic exploitation of the natural resources. It enables the United States to exert jurisdiction over submerged lands beyond three miles for the purpose of regulating the exploitation of the resources located there. This is not an extension of national sovereignty over the high seas that cover this area, but is a "special purpose" jurisdiction analogous to the limited right to inspect "revenue cutters" beyond the traditional territorial sea for the purpose of customs, consistent with historic United States practice. The "special purpose" jurisdiction is explained in Section 3(a) of the Act: "It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act."[23]

After the passage of the Submerged Lands Act, a controversy arose among the five coastal states of the Gulf of Mexico and the United States government concerning the extent of these States' territorial jurisdiction beyond the traditional three mile limit, based on historical claims. The Submerged Lands Act had a provision, §1312, that stated: "Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary **beyond** three geographical miles..." Because of the vast oil and gas reserves that had just been discovered in the Gulf of Mexico, the five coastal states filed suit in federal court to assert their respective historical claims to a broader territorial sea limit was supposedly allowed under the Submerged Lands Act.[24]

The result was a lawsuit that merged the States' claims into one action, United States v. States of Louisiana, Texas, Mississippi, Alabama, and Florida.[25] Louisiana, Mississippi, and Alabama's claims were dismissed because the Court found that the Congressional acts admitting them as states made no mention of any coastal boundaries beyond the traditional three mile territorial sea limit. However, the state of Texas which was an independent republic before its admission, had a constitution that stated its boundaries extended to "three leagues" or nine miles beyond its shores and Congress previously agreed to accept the constitution of the state of Texas upon its admission to the union. Florida's claim

was similar as its constitution included boundary references of "three leagues from the mainland" that Congress approved during Florida's readmission to the union after the Civil War, but it applied only to the Gulf of Mexico. The result was that Florida and Texas were determined to have a nine-mile territorial sea and thus able to benefit greatly from additional oil and gas revenue, while the rest of the states were restricted to the traditional three mile limit.[26]

C. The Development of the Modern International Law of the Sea

In response to the diversity of international claims of territorial sea widths, the United Nations first convened a Conference on the Law of the Sea (UNCLOS I) in 1958. This produced the 1958 Geneva Law of the Sea Convention, but delegates could not agree on a uniform width for the territorial sea. UNCLOS II was convened in 1960 to determine a uniform territorial sea limit but also failed to resolve the problem. UNCLOS III first convened in 1970 in recognition of the overwhelming need to develop a comprehensive body of oceanic law that would finally codify centuries of conflicting international maritime law which had been developed by custom. This task was completed twelve years later in 1982. The Reagan administration found the treaty unacceptable to the United States because of its deep-seabed mining provisions. However, it did succeed in codifying uniform ranges of territorial zones with varying degrees of jurisdiction.[27]

The United Nations Law of the Sea treaty established uniform ranges for the territorial sea and the degree of sovereignty that the respective nations may exercise within them. The "territorial sea" was recognized as extending twelve miles from the shoreline, and coastal nations were empowered to exercise exclusive sovereignty over the air, sea, and seabed. A "contiguous zone" extending for an additional 12 miles to the 24 mile mark, to accommodate the nation's customs, immigration, fiscal, and pollution control concerns. The "exclusive economic zone" (EEZ) reaches out 200 nautical miles from the shoreline, and within it, a nation can exercise jurisdiction for the exploitation over the living and non-living resources in the water and the seabed.[28]

Currently, 159 nations have signed the 1982 Law of the Sea accord, but the United States is not among their number. On July 29, 1994, however, the United States signed the "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," which substantially reforms the deep-seabed mining provisions of the 1982 Convention which the United States found highly objectionable. After this successful amendment, President Clinton submitted the 1982 Convention to the Senate for ratification but the Senate has yet to act. Presently, 76 nations have ratified or acceded to the convention including our allies Germany, Italy, Greece, and Australia. The convention has entered into legal force through a self-executing provision for those nations that ratified or acceded to the treaty prior or subsequent to November 16, 1994.[29]

The result of this treaty is that many nations have adopted these uniform sea delimitations. The United States has adopted specific provisions of the 1982 Law of the Sea treaty in a piecemeal manner. President Reagan on March 10, 1983 issued an Executive Proclamation declaring the extension of the United States' special jurisdiction to an "Exclusive Economic Zone" within a territorial sea out to a distance of 200 miles. The proclamation stated that the United States would "assert certain sovereign rights over natural resources and related jurisdiction" which encompass national control over living and mineral resources.[30] On December 27, 1988, President Reagan issued an Executive Proclamation increasing the United States territorial sea from 3 to 12 nautical miles for the purposes of international law. This proclamation effectively adopted the "territorial sea" provision of the 1982 Law of the Sea Treaty by extending exclusive national sovereignty over the air, sea, and seabed. However, the President attempted to limit the domestic effect of this proclamation by including a provision stating:

> Nothing in this Proclamation:
>
> (a) extends or otherwise alters existing Federal or State law or jurisdiction, rights, legal interests, or obligations therefrom.[31]

This was designed in part to limit the domestic effect of such a territorial sea extension by preventing the application of the Submerged Lands Act to it, because the United States government could lose billions of dollars in revenue from what would be former OCS leases.[32]

The 1983 EEZ proclamation did not have this limiting provision. The proclamation effectively granted the States limited conservation and environmental jurisdiction over this vast area if it concurred with federal objectives of relevant Congressional fishery and environmental legislation. The limiting provision of the 1988 proclamation serves to drastically restrict the effective management of a particular State's coastal zone as it terminates the State's exclusive jurisdiction at three miles. A nine-mile extension of jurisdiction would allow a State to establish a comprehensive ocean policy, and more effectively address its particular needs so that it can protect these fragile and unique resources. The preservation of the natural, commercial, ecological, and aesthetic resources of our nation's coastal zone is a vital national interest, and the respective States could collectively protect this diversified and complex interest if the Law of the Sea Treaty is adopted without limitations. The current three mile limit on the States' exclusive jurisdiction simply is not a large enough area to effectively implement a comprehensive and effective Ocean Policy Plan on the individualized state ecosystem strata.[33]

II. The Historical Development of Louisiana's Seaward Boundaries

A. Prior to 1972

Because of its unique history and abundant natural resources,

Louisiana has been involved in several boundary disputes with the federal government and adjoining states. The primary source and basis of resolution of these disputes have been the early territorial treaties that established our nation. The genesis of Louisiana's current disputes over its territorial boundaries originated in 1762, when France, at war with England, persuaded Spain to join the conflict on its side. In the peace treaty, Spain lost its territories of Cuba and Florida to England. As recompense to Spain, France ceded part of the Louisiana Territory in the Treaty of Paris in 1763. The Treaty held that Spain's new territory included an undefined area west of the Mississippi River and specifically included the Isle of Orleans on the east side of the river. In 1800, Napoleon forced Spain to retrocede its portion of the Louisiana Territory to France. Subsequently on April 30, 1803, the celebrated Louisiana Purchase was perfected with the United States. This Territory was never clearly defined when France originally claimed it nor when it was finally sold to the United States.[34]

The United States Congress passed an Act on February 20, 1811 enabling the Territory of Orleans to adopt a constitution and establish a government in order to be admitted to as a state of the Union. Included in the act was a boundary description that stipulated Louisiana's seaward boundary to, "... all islands within three leagues of the coast."[35] This description, approved by Congress, was incorporated into the 1812 constitution of Louisiana. These boundaries were not contested until Congress passed the Submerged Lands Act of 1953, which limited Louisiana's sovereignty to three nautical miles instead of the "three leagues" or nine miles it originally claimed. While this final description seems to be relatively clear, it has been the source of much litigation with the federal government and the state of Texas primarily concerning offshore oil leases.[36]

As the United States experienced postwar economic growth, its demands for natural resources grew at an exponential rate. In the 1930's, there were discoveries of vast oil and natural gas reserves along the Continental Shelf of the Gulf of Mexico off the shores of Louisiana and Texas. This discovery prompted President Truman to issue Executive Proclamation No. 2667[37] declaring that the United States exercised exclusive right of the subsoil and seabed to the extent of the Continental Shelf off the coast of the United States within and beyond the three-mile territorial sea. This concern was proven to be well founded, as the first offshore well out of sight of land was drilled via a mobile platform twelve miles off Louisiana's coast in 1947. The state of Louisiana raised the question, "how far does Louisiana's boundary actually extend into the marginal sea.?" Relying on its original 1812 State Constitution and the Supreme Court decision in Pollard's Lessees v. Hogan,[38] Louisiana took the position that it held rights of sovereignty over the submerged lands of the marginal sea out to a distance "...within three leagues of the coast..."[39]

As noted above, the Supreme Court jurisprudentially approved the Truman Proclamation in United States v. California,[40] and its subsequent reaffirmations in United States v. Louisiana[41], and United States v. Texas[42] in 1950, which declared that the Federal government rather than the states had "paramount rights" over the Continental Shelf, and this necessarily included the right of control over the natural resources located there. Additionally, the Supreme Court in United States v. Louisiana et al.,[43] held that Louisiana, Mississippi, and Alabama had no "historical" boundaries and their marginal sea boundaries were to be limited to three nautical miles, while Texas and Florida's "historical" boundaries were determined to be at a length of three marine leagues, or nine miles. The Court further held that Louisiana's irregular ambulatory coastline was to be determined by the provisions under the Geneva Convention on the Territorial Sea and Contiguous Zone.[44]

Therefore, it was necessary to apply the definitional provisions of the Geneva Treaty to Louisiana's irregular, ambulatory coastline. In an opinion handed down on March 3, 1969,[45] the Court set basic guidelines and appointed a Special Master to hear evidence and fix a coastal boundary for the state. The Special Master's findings were submitted to the Court and subsequently approved in an opinion rendered in 1975.[46] The Court issued a decree that fixed the coastline of Louisiana by utilizing coordinates from which the state's territorial sea of three miles was measured, but also declared portions of the coastline ambulatory.[47] In 1981,[48] the Court applied the decree of 1975 to the Submerged Lands Act to determine the extent of Louisiana's rights to the seabed. This negated the judicial interpretation that Louisiana's coastline being ambulatory in nature, and subject to great change because of accretion and erosion could never be permanently set. On April 7, 1986, Congress amended OCS to fix the coordinates of the coastal baseline boundary of Louisiana as per the 1975 decree. Consequently, Louisiana's seaward boundary and coastal baseline are set in law as permanent without regard to the eroding forces of nature and man.[49]

A significant boundary dispute arose between Louisiana and Texas in 1969, as a result of lucrative oil and gas offshore leases, concerning the marginal sea adjacent to their coastlines at the mouth of the Sabine River. Texas filed an original action[50] to have the Supreme Court establish a seaward boundary line between the states to the 30• north latitude, and Louisiana was successful in having the case moved to a Special Master to hear evidence, who determined that the jetties constructed at the mouth of the Sabine River by Louisiana had the effect of extending the mouth of the river into the Gulf, and that the extension of the boundary should be based on the center line of the channel of the Sabine River itself.[51] All parties agreed that the lateral seaward boundary is determined by the "equidistant principle" as stipulated in the 1958 Geneva convention on the Territorial Sea and the Contiguous Zone.[52] The Supreme Court adopted the Special Master's report and held that the Special Master had correctly applied the Geneva Treaty, which mandates that the median line be measured with reference to the manmade jetties.[53] This determina-

tion gave Louisiana approximately 9,000 acres in the marginal sea. Louisiana was able to lease 3,500 acres of this area for about $53,000,000 in 1979.[54]

In the early 1900's, heated boundary conflicts between Louisiana and Mississippi oyster fishermen arose in Lake Borgne, the Mississippi Sound, and the adjacent waters in the Gulf, even armed conflict was threatened.[55] Louisiana filed an action in the Supreme Court in 1906 to resolve this title dispute.[56] The Court determined that Louisiana's state constitutional description of the disputed boundary took precedence since Louisiana was admitted into the Union in 1812, while Mississippi was not admitted until five years later. Therefore, the seaward boundary was determined to follow,

> "...the channel of that river (Pearl River) to Lake Borgne, Pearl River flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound into the open Gulf of Mexico, through among other outlets South Pass separating Cat Island and Isle de Pitre."[57]

B. Subsequent to the Coastal Zone Management Act of 1972 (CZMA)[59]

The Court recognized the boundary, but it again came under attack when a dispute over revenue sharing of oil and gas revenues resulted from a 1976 amendment to the CZMA. Congress passed the Coastal Energy Impact Fund (CEIP) which allowed revenue sharing of oil and gas royalties from federal lands in the Gulf of Mexico adjacent to the respective states' coastlines.[58] An Administrator was appointed by the Court to determine exactly how to extend Louisiana and Mississippi's respective lateral boundaries into federal waters. After extensive hearings throughout 1979, the Administrator held that the Mississippi - Louisiana boundary as determined by the Court in 1906[60] would stand for purposes of CEIP. This boundary was projected out into the Gulf, and followed the principle of equidistance as stipulated in the Geneva Convention[61] just as in the Texas boundary cases. While this ruling reaffirmed the sanctity of the 1906 boundary between the two states, CZMA was amended again in 1979 to eliminate the CEIP. The ruling stands as the present recognized boundary.[62]

1. Establishing Louisiana's Coastal Zone Boundary

The CZMA encouraged the coastal states to develop programs, with federal oversight, for managing the resources of their respective coastal zones. In 1974, Louisiana began to receive federal matching funds to develop a Coastal Zone Management Program (CZMP) and a Louisiana Coastal Resources Program (LCRP) for the state. The development of a state CZMP required it to determine the boundaries of the coastal zone, in order to define the jurisdiction of the program. The CZMA included criteria for the boundary determination including the coastal waters and shorelines and extending as far inland as necessary to control activities that have a direct and significant impact on the coastal waters.[63]

The boundary criteria and guidance for the CZMA were put to the test due to Louisiana's unique geography, e.g., the vast wetlands, flood plains, and estuaries which serve to make boundary demarcation difficult. Coastal Zone Management boundaries are based on legal and governmental determinations, and physical characteristics since the coastal zone does not neatly follow legislative and jurisprudential boundary distinctions. Coastal Zone Management is designed to manage valuable coastal resources effectively. Boundaries of a state's program should primarily be established with biological and geographic considerations in mind to facilitate this purpose.[64]

The lateral and seaward boundaries of Louisiana's coastal zone are considered to be "coextensive" with the state's political boundaries and these have been previously discussed. The most significant boundary to be established for the purposes of the CZMA is the inland boundary within which activities have a direct and significant impact on the effective management of the coastal zone. Several criteria may be used for an effective determination of those inland areas included within the coastal management zone: state and federal regulatory boundaries; topographic characteristics, such as geology and vegetation; point location criteria, such as the degree of salinity in the water; and the ranges of selected fish, mammals, birds, and reptiles.[65]

The inland boundary may be determined by four possible legal or governmental criteria: the "navigable waters of the United States," the 100-year flood elevation line, the storm surge reference line, and requirements of Federal Acts and the Louisiana and United States Constitutions.[66] The "navigable waters of the United States" is inadequate to appropriately delimit a jurisdictional boundary for the ambulatory coastal zone of Louisiana.[67]

The 100-year Flood Elevation Line, as established pursuant to the National Flood Insurance Act of 1968, requires communities to adopt and enforce adequate flood control and land use measures in order to qualify for federal flood insurance. This boundary is an effective means of determining those areas in Louisiana which may have a direct effect on the management of the coastal zone by showing where the traditional flood plain of Louisiana lies.[68]

The State and Federal Constitutions require that all regulations should not deprive citizens of life, liberty, or happiness without Due Process of law. The boundaries of the coastal zone cannot be sufficiently clear if drawn solely on "legal/governmental" criteria to a degree of specificity that would satisfy the individual landowners and municipalities of the state. However, when personal rights serve to hinder an important public interest, a state may adopt regulations that are "narrowly tailored" to serve a "legitimate state purpose," such as land use restrictions that aid in the preservation of Louisiana's rapidly disappearing coastal zone. Criteria based on clearly articulated biological and geographic characteristics of the land must be used to put everyone on notice of the jurisdiction of the LCRP. This would allow landowners within the coastal zone to make more effective use of their property and provide a regulatory scheme for the proper utilization of

land within well defined limits.[69]

The topography and indigenous wildlife of Louisiana have proven to be an effective criteria for determining the inland boundaries necessary for the effective management of the coastal zone than any other delineation. The line of contact between the Pleistocene Terraces and more recent marsh, swamp, and flood plain deposits are the principal factor that separates coastal from non-coastal features and wetlands from non-wetlands in Louisiana. The Pleistocene Terraces are geological formations that consist of uplifted, weathered deposits produced more than thousands of years by natural processes that are currently active in the coastal zone. The break in the slope of the land occurs at this contact and proceeds in a generally east-west direction across the state between river basins and north-south along the corridors between the river basins. These deposits form 5 and 25 foot contour lines that are highly irregular, but visible from aerial photography and radar maps and easily delineate the coastal zone.[70]

The boundaries between non-wetland and wetland soils, are represented by "transitional soils" that have been plotted on charts of southern Louisiana on U.S. Natural Resources Conservation Service parish soil survey maps. A comparison of these maps with the contour lines of the Pleistocene Terraces display a close correlation. This same correlation was also found in the distribution of wetland and non-wetland vegetation as determined from NASA high altitude photographic imagery. It is reasonable that the deposits formed along the contours of the Pleistocene Terraces delineate the types of soil and vegetation that grow there and serve as a clear line of demarcation between wetlands and non-wetlands. The 100 year flood and tidal inundation levels as depicted by alluvium areas as clearly seen from aerial photography simply do not reach the contour levels of the Pleistocene Terraces with a consistent degree of certainty to serve as an effective inland boundary criteria. Maps of soil, vegetation, and geologic formations used in conjunction with one another serve as a highly accurate delineation of the outer rim of the Louisiana coastal zone.[71]

The degree of salinity in the water is a key factor of the inland intrusion of certain coastal biological organisms and could aid in the further defining more accurate inland regulatory coastal boundaries. The distribution of brackish water clams (*Rangia cuneata*) serve to define the furthest extent of marine biological influence and inland intrusion. Several types of crabs and marine fish that live in fresh water depend on the marine environment for the early stages of their development, and these fresh waters have a direct impact on the coastal zone and should be included within the administrative jurisdiction of the CZMP of Louisiana. Additionally, certain reptiles and mammals have a distinct preference for non-wetland habitats and their existence may be plotted on maps to effectively display the inland limits of Louisiana's coastal zone. The reptiles and mammals that live exclusively outside or inside a wetland habitat may serve as a most effective means of delineating the administrative inland boundary of the coastal zone when used in conjunction with other biological and physical characteristics of the topography of Louisiana. These characteristics serve to "narrowly tailor" and provide a reasonable basis for the effective administration of the coastal zone and easily dovetail with legal/governmental criteria. This would satisfy the paramount need in Louisiana for fixed determination of the jurisdictional limits of administration over a well defined coastal zone. This would simultaneously serve to provide for effective administration of Louisiana's coastal zone and give the landowners within this area adequate notice of what activities are permitted on their environmentally sensitive property.[72]

2. The Use of "Federal Consistency" to extend Louisiana's Regulatory Power

Congress passed the CZMA in 1972[73] to address the deterioration of marine estuaries and the resources of coastal areas in general. The Act creates a uniquely cooperative management scheme between federal and state governments to address local and national interests in preservation and development of the coastal zone.[74] Congress hoped to provide an effective mechanism to resolve the increasingly bitter disputes between competing interests of those who wished to further develop the coastal zone, and those who wished to preserve the aesthetics of the region for future generations.[75]

The most important provision of the CZMA for the purpose of extending a state's sovereignty is section 307, which requires federal agencies to be *consistent* with the federally approved state CZMP management programs. States with approved programs are given the authority, first, to review four classes of federal activities inside or outside of a state's coastal zone that may directly affect the coastal zone and second, require that federal activities be consistent (in three classes) or consistent to the maximum extent practicable (for the other class, direct federal activities) with the state's approved coastal management program. Section 307 serves as an incentive for a state to adopt a federally approved CZMP because it enables a state to extend its CZM regulatory authority beyond the three-mile limit. This is accomplished by forcing a federal agency or applicant for a federal license or permit to provide a written statement detailing why the particular federal action is consistent with the state's CZMP. If the federal agency proceeds with the action despite a state's objection, that state may petition the Secretary of Commerce for mediation. Alternatively, the state may bring suit in a federal court seeking injunctive relief without having to first pursue the mediation process.[76]

The most controversial issue surrounding CZMA consistency determinations has been defining the scope of federal activities that are covered. The CZMA stated originally that "each federal agency conducting or supporting activities *directly affecting* the coastal zone will conduct or support those activities in a manner which is, to the *maximum extent practicable*, consistent with approved state management programs."[77] Federal cases broadly interpreted this provision to apply to federal activities that affected the

coastal zone whether within or outside its physical limits.[78]

The Supreme Court limited the scope of consistency review in 1984, in its decision, Secretary of the Interior v. California.[79] The Court in a 5 to 4 decision restricted consistency determinations to those federal activities within the actual geographic area of the coastal zone, determining that "section 307(c)(1)'s '*directly affecting*' language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone."[80] This excluded consistency review any federally conducted or sponsored activity outside the coastal zone, primarily OCS lease sales, from consistency review. The "directly affecting" of section 307(c)(1) was narrowed further by the Court as it found no causal relationship between federally sponsored OCS oil and gas development and exploration and the potential corresponding effects to the coastal zone.[81]

Congress overruled this decision by the Supreme Court, which was influenced by the oil and gas industry, by enacting the Coastal Zone Management Act Reauthorization Amendments of 1990.[82] The amendments changed the language of the statute to read "each Federal agency activity *within or outside the coastal zone that affects* any land or water use or natural resource of the coastal zone shall be carried out in a manner that is consistent *to the maximum extent practicable* with the enforceable policies of approved State management programs."[83] This amendment broadens the scope of consistency determinations to include those federal activities that "directly affect" the coastal zone instead of limiting the applicability solely on the basis of a federal activities' geographic location. Presently, whenever a federal agency proposes or conducts any activity in or outside the a state's coastal zone, it must follow the federal consistency requirements.[84]

3. The Requirements for a Consistency Determination in Louisiana

Louisiana passed the State and Local Coastal Resources Management Act (SLCRMA) in 1978,[85] which led to the development of the Louisiana Coastal Resources Program (LCRP), approved by the Secretary of Commerce in 1980. SLCRMA created a state administrative agency for coastal zone management in accordance with the CZMA, the Coastal Management Division (CMD) of the Department of Natural Resources. CMD is responsible for compliance with and exercise of the LRCP,[86] including responsibility for conducting consistency determinations. Through CMD's consistency determinations, Louisiana has potential "veto power" of federal activities or any activity that requires a federal permit or license. Unfortunately, Louisiana has had limited degrees of success in utilizing the full scope of its power under the Act.[87]

The Louisiana Coastal Resources Program's (LCRP) consistency requirements mandate that an applicant for a required Federal license or permit that may have an effect on the land, water, or resources of the Louisiana coastal zone must ensure that the activity is consistent with the LCRP. Consistency determinations ordinarily must include, according to federal or state requirements, a vicinity map and a detailed description and plats of the proposed activities including any dredging or filling, structures or facilities, and means of access. If available, a copy of the National Environmental Policy Act (NEPA)[88] documentation must be included, such as Environmental Impact Statements or Environmental Assessments. The plan must follow NOAA Consistency Regulations 15 C.F.R. 930.76 before it may be approved and granted a Consistency Certification.[89]

If the Federal permit or license meets all CMD guidelines and requirements, the public notice period begins at the date of publication, in the appropriate official parish journal and lasts 15 calendar days. The review and public comment period starts the day CMD receives the application and also lasts 15 calendar days. The earliest the plan may be released is the later of the two dates. DNR decisions regarding Federal licenses and permits and OCS plans are due within three months of receipt of the Consistency request. These time frames assume that all necessary information concerning the project have been made available for review.[90]

3. Louisiana's Limited Attempts to Exercise its Consistency Power

Louisiana is the dominant producer of oil and gas from the Federal OCS adjacent to its coast and is currently yielding about 70% of the Federal revenues collected, which are at about 2 billion dollars a year. Louisiana bears over 40% of direct damage to its coastal zone as the result of this unabated development. The Federal government scheduled an OCS lease sale for the Gulf of Mexico (Lease Sale No. 135), in which 23.5 million acres of the Gulf was offered for oil and gas exploration and development. It had been determined that oil and gas lease activity in the Gulf at the OCS had contributed to significant adverse impacts to the environment, economy, and social structure of south Louisiana.[91]

In Louisiana v. Lujan,[92] the state sought a preliminary injunction against the Department of Interior's plans to conduct Lease Sale No. 135. The state disagreed with the Department of Interior's consistency determination and contended that this activity was inconsistent with the LCRP. Additionally, Louisiana alleged that the Environmental Impact Statement (EIS) prepared was inadequate as it made no alternative proposals and downplayed the significant impacts the lease sale would have on the surrounding environment. The court determined that the plaintiff could not carry its heavy burden of showing a high likelihood of success on the merits, because could not prove that the agency's consistency determination was "arbitrary or capricious" or otherwise in violation of the law. The court held that under the CZMA, the state must carry the burden of proof of a lack of consistency, and the federal agency is not required to prove that its actions are consistent upon the motion of the plaintiff state. The court applied the "arbitrary and capricious" standard of the federal Administrative Procedure Act[93] which forces the state to justify its own consistency decision. The state must meet a high burden of proof, and its administrative "veto

power is thereby emasculated."[94]

The court's decision seems directly contradictory to the intent of the CZMA as it was originally passed. The result is a blatant usurpation of state sovereignty granted by the CZMA in the name of oil and gas revenue, indicative of the prevailing short-sighted approach to coastal zone management in the Gulf of Mexico. This is representative of the limited vision of many of our nation's politicians who maintain a monolithic viewpoint that the development of the offshore oil and gas industry and preservation of the coastal zone are goals that are inherently at odds. In fact, oil and gas revenue may be used by Louisiana to ensure that our coastal resources are protected as the industry expands. Offshore oil rigs provide valuable artificial marine habitats and can provide an impetus for the state and concerned citizens to work together at a comprehensive goal of the maintenance of Louisiana's economy and coastal zone.

Louisiana's unsuccessful attempt to limit an OCS lease sale was by far its most ambitious effort at utilizing the full scope of its consistency review power to extend its regulatory jurisdiction beyond its political boundaries. However, Louisiana has had some limited success with consistency review of federal projects directly inside its coastal zone. The Army Corps of Engineers applied for a federal permit to dredge the Mississippi River-Gulf Outlet (MR-GO) in order to permit "deep-draft" vessels a greater ease of navigation. The Corps' federal rules call for it to dispose of dredge spoil in the "least costly manner," while DNR's LCRP calls for dredge spoil to be used only for "beneficial uses." DNR refused to issue a Certificate of Consistency unless the dredge spoil was deposited in the north bank of the channel, and not on the south bank as the Corps wished. The Corps relented and worked hard to fund the project so as to meet the request of north bank spoil desposition.[95]

III. North Carolina, an example of a Successful Assertion of Extra-Jurisdictional Consistency Review

While Louisiana has met with limited success in exercising its full power of consistency determination, other states have had more success based on more focused efforts and political will, and because of a lack of a politically dominant oil and gas industry. North Carolina objected to Mobil Oil Company's Program of Exploration (POE) on a OCS lease site 39 miles off its coastline on November 19, 1990. Specifically, the state contended that Mobil provided insufficient "site-specific" information to make a consistency determination on the impacts on North Carolina's coastal zone arising from Mobil's proposed exploration activity. Additionally, the lease site's close proximity to a unique fishery known as "the point" made such exploration activities of great concern to North Carolina's coastal zone. The state's consistency objection precluded the Federal agency from issuing Mobil a drilling permit under Section 307(c)(3)(B) of the CZMA. In accordance with the same provision of the CZMA, Mobil filed an appeal with the Secretary of Commerce for mediation of the state's objection to Mobil's consistency certification.[96]

The Secretary found that there was inadequate information to determine whether the benefits to the national interest in Mobil's proposed POE outweigh the proposed activity's adverse effects on the state's coastal resources. He also determined that there was no reasonable alternative available to Mobil to make its proposed POE comply with the state's CZMP. Additionally, he held that one exploratory natural gas well had no significant impact on the nation's national security interest if the proposed POE is not allowed to go forward as proposed. Based on these conclusions, the Secretary refused to overturn North Carolina's consistency objection.[97]

IV. Effective Concurrent State & Federal Jurisdiction: Magnuson Fishery Conservation and Management Act

The Magnuson Fishery Conservation and Management Act of 1976[98] (MFCMA) declares its primary principle is "to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination."[99] This fundamental principle of state and federal jurisdictional cooperation coupled with the Executive Proclamation of 1983[100] recognizing an EEZ of 200 miles, has served to extend a states' limited regulatory power over its fisheries beyond the territorial sea. This spirit of cooperation is necessitated by the fact that stocks of fish may range through several ocean jurisdictional boundaries, and regulations must be promulgated by many separate jurisdictions, but they must have the common goal of preservation. Currently a state's territorial sea extends to three nautical miles,[101] while for fisheries management purposes, federal jurisdiction extends an additional 197 miles into the EEZ.[102]

The MFCMA claims not to effect a state's jurisdiction over its fisheries within its boundaries,[103] and actually may extend a states' jurisdiction beyond its territorial sea boundaries.[104] However, the Act allows for Federal preemption of state regulations in certain instances within in its own territorial waters.[105] Such preemption will take place only if such action or inaction by the state in its territorial waters "substantially and adversely affects" an approved Federal Fisheries Management Plan that concerns species that exist primarily in the EEZ. The courts have determined that state laws that further the purposes of the MFCMA and do not conflict with federal regulations may be enforced by the respective states in the EEZ and federally controlled territorial sea.[106]

The case of Alaska v. F/V Barnoff[107] held that state regulation of fisheries outside its territorial seas were valid in the absence of any federal regulation. The Alaska court held the MFCMA carried no implicit preemption, and that to find preemption in the absence of federal regulation would defeat the purpose of the Act and leave the Fishery Conservation Zone (FCZ) entirely without regulation and unduly endanger the entire fishery. The court refused to find preemption where such an action would deplete the very resource that the MFCMA was designed to protect.[108] The court

further expanded this concept in its decision Alaska v. Painter[109] by holding that state regulations for crab fisheries that extended beyond the state's territorial sea were not preempted by federal regulation of crab fisheries unless such regulations conflicted. The court cited the Supremacy Clause in its determination that federal law preempts any state regulation that may conflict with federal regulations. This determination upholds the principle of concurrent jurisdiction for the benefit of the nation's fisheries as a whole as they are inherently transient in nature.[110]

In the case of Alliance Against IFQs v. Brown, Secretary of Commerce,[111] the court addressed a challenge by fisherman in Alaska to the Secretary of Commerce's sablefish and halibut fishery management plan. The court granted summary judgment in favor of the government and dismissed the claim. The court held that according to the MFCMA its power was limited to a determination of whether the Secretary was "arbitrary and capricious" in his promulgation of regulations, and it may not substitute its judgment of what it may deem as a better regulatory scheme. Additionally, the court stipulated that the fisherman could not individually assert a challenge to the imposition of federal regulations without holding a preemption hearing as required by MFCMA § 306, as only the state of Alaska could seek such judicial relief for interference with its state sovereignty. This case has solidified the view that the Secretary of Commerce's fishery management plan is subject only to challenge by an affected state, and then is subject to a stringent "arbitrary and capricious" standard. This reaffirms federal dominance of fishery management to the detriment of state interests within its territorial sea and beyond to the edge of the EEZ. This developing policy endangers the spirit of harmonious concurrent jurisdiction of the nation's fisheries as the MFCMA provides.[112]

V. State Ocean Policy Plans: the Most Effective Management Vehicles for the Territorial Seas and Beyond

Currently, over 90% of the 4,000 mineral mining structures offshore of the United States coastal waters are located off the Louisiana coast. Louisiana's commercial fishing industry ranks second in poundage and second in overall value in the United States. These facts coupled with the corresponding heavy shipping traffic to several of the busiest ports in the world according to gross tonnage, will serve to intensify Louisiana's current problems of coastal erosion and coastal zone pollution unless some comprehensive ocean governance strategy is undertaken. Louisiana's typical response to coastal zone crises has been an after the fact ad hoc approach with no long range plan. In order to preserve our valuable natural resources for future generations, Louisiana must adopt a well reasoned comprehensive Ocean Policy Plan that includes all relevant factors in the coastal zone and does not focus solely on oil and gas concerns.[113]

A comprehensive Ocean Policy Plan for the state of Louisiana must necessarily address the interrelated issues of: marine fisheries, oil and gas and other mineral development operations, regulation of state owned lands and waters, marine pollution, maintenance of ocean commerce and navigation, tourism and recreation, and education and research of the coastal zone itself. A reactionary piecemeal approach to problems that arise out of these areas of concern is ineffective and serves to increase the degeneration the coastal zone. Additionally, a truly effective Ocean Policy Plan must be implemented within the framework of an expanded territorial sea of 12 miles, in accordance with the Law of the Sea Treaty, instead of the unnecessarily restrictive current three mile limit. An Ocean Policy Study being developed by the Sea Grant Legal Program (SGLP) for Louisiana recommends that an Executive Assistant for Ocean and Coastal Activities be added to the Governor's staff. Secondly, the creation of a standing Ocean Policy and Planning Council with members that represent backgrounds in science, policy, law, and economics selected from the state's universities, agencies, and industry. The Council should be responsible for the development of a Louisiana Ocean Policy that reflects a long term revisionary plan of action that comprehensively addresses the interrelated interests and issues of the coastal zone.[114]

Several states have pursued a more aggressive effort to adopt an Ocean Policy Plan with varying degrees of success. Scientists and policy makers in the field of ocean governance cite Oregon's Ocean Policy initiatives as the best representation of a well defined program with comprehensive planning and funding adequately supported by legislation. The end result was the adoption of two separate plans, the *Oregon Resources Management Plan* (1990) and the *Territorial Sea Plan* (1994), both of which were subsequently approved by the U.S. Department of Commerce as a part of Oregon's CZMP. These plans establish resource zones, use criteria, and implementation processes unique to the respective geographical areas covered by each plan.[115] The Territorial Sea Plan focuses on a management framework for the state's marginal sea and focuses primarily on coastal concerns, while the Oregon Ocean Resources Management Plan asserts managerial interests to the edge of the OCS. Oregon's comprehensive approach of addressing ocean and territorial sea issues is the only Ocean Policy Plan developed to a level of sophistication that can effectively implement enforceable state policies on a consistent basis.[116]

Ocean governance efforts that focus on a rigid, uniform approach may not be the most effective course of action because of the great biodiversity found in the Unites States' coastal zones. Regional approaches take into account important distinctions in regional circumstances, interests, and policy needs, and do not become overly specialized to the detriment of the larger coastal area. They may be more suitable for adoption, implementation, and especially effective enforcement. The vast differences in state coastlines and resources affect how the citizens and governments of those areas view these resources and how they ideally would like to manage them. These concerns would especially be true in a re-

source rich area such as the Gulf of Mexico, where the coastal states are blessed with vast oil and gas reserves and abundant fisheries. The current patchwork of varying state regulations coupled with inadequate federal regulations call for the development of a comprehensive Regional Ocean Policy Plan. Such a plan could address important issues of concern such as gill nets and oil and gas development on the OCS. The Plan could effectively fill the regulatory lapses and gaps that currently plague this region and could best preserve and manage the resources as a whole.[117]

This paper established the historical process of defining the geographic and political boundaries of the ocean, from a Louisiana perspective. Additionally, it has addressed the delimitation of the regulatory boundaries of the coastal zone. The conflict that arises from the concurrent and overlapping jurisdiction of the state and federal governments and their disparate interests is well chronicled.[118] The principal aim of a regulatory structure must be the conservation and preservation of Louisiana's coastal resources. This goal can be achieved only through effective cooperation of the federal and state governments through shared knowledge in a system of seamless concurrent jurisdiction within a comprehensive national Ocean Policy Plan. Such a plan must have as its principal goal the preservation and reasonable exploitation of the coastal zones and United States territorial sea's resources.

A comprehensive national Ocean Policy Plan must effectively mirror the constitutional principles of Federalism through which the states and federal governments' often disparate interests are allowed to coexist and flourish. The interests and needs of the several states and federal government are as diverse and varied as the United States coastal zone itself. A Ocean Policy Plan must address these concerns but at the same time allow enough regulatory freedom for the several states and ecosystems to adopt specific management principles for themselves. Additionally, an effective means of dispute resolution must be implemented. Productive cooperation between the many levels of government under the umbrella of one comprehensive regulatory scheme is the only way to preserve our nation's coastal zones and territorial seas. The slow progress of piecemeal promulgation of federal legislative and regulatory schemes cannot keep pace with the continuing stresses of the fragile environment of the coastal zones and territorial seas. We must not allow these irreplaceable resources to wither on the vine because of ineffective regulatory administration and a lack of political resolve to force the disparate interest groups to negotiate and compromise in order to adopt a national, multi-tiered Ocean Policy Plan.

Endnotes

1 T.W. Fulton, The Sovereignty of the Sea, at 3,4 (1911, reprinted 1976).

2 Fulton, supra at 338 - 344., Gerald J. Mangone, Marine Policy for America, at 25, 26 (1977).

3 The Neutrality Act, 1 Stat. 381, § 6 (1794).

4 Phillip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, at 50 (1927).

5 2 Cranch (U.S.) 187 (1804).

6 Church v. Hubbart, 2 Cranch (U.S.) 187, 199 and, 235-238.

7 41 U.S. (16 Pet.) 367 (1842).

8 Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410-411 (1842)

9 44 U.S. (3 How.) 212 (1845).

10 Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845)

11 Id.

12 Executive Proclamation No. 2667, 59 Stat. 884 (1945)., Although the proclamation did not define the continental shelf, an accompanying press release described it as "submerged lands contiguous to the continent" and covered by "no more than 100 fathoms" or 600 feet of water.

13 Id.

14 Amy deGeneres Berret., UNCLOS III: Pollution Control in the Exclusive Economic Zone, 55 Louisiana Law Review 1165, 1174-1176 (1995).

15 House Joint Resolution 225., 92 Congressional Record, 10660 (1946).

16 332 U.S. 19 (1947).

17 United States v. California, 332 U.S. 19, 38

18 339 U.S. 699 (1950).

19 339 U.S. 707 (1950).

20 43 U.S.C. § 1301, et seq.

21 43 U.S.C. § 1311 (1953).

22 43 U.S.C. § 1331, et seq. (1982).

23. Id.

24 Fred Whitrock., Louisiana's 'Nine-Mile' Territorial Sea, 54 Louisiana Coastal Law 1, 5 (Jan. 1986).

25 363 U.S. 1 (1960).

26 United States v. Louisiana et al., 363 U.S. 1, at 36-64, 123.

27 UNCLOS III., 21 International Legal Materials 1245 (1982).

28 UNCLOS III, articles 1-33, and 55-75., at 21 International Legal Materials 1271-1276 (1982).

29 George V. Galdorisi, "A Chance to Codify the Law of the Sea," The San Diego Union- Tribune., October 27, 1995.

30 Exec. Proc. No. 5030., 43 Fed. Reg. 10605 (March 10, 1983).

31 Exec. Proc. No. 5928, 54 Fed. Reg. 777 (1989).

32 Richard K. Littleton., The Territorial Sea: Prospects for the United States, at 15-17., Mississippi-Alabama Sea Grant Consortium., MAGSP-84-021, (1984).

33 Id., 40-44.

34 Oliver P. Stockwell., The Boundaries of the State of Louisiana, 42 Louisiana Law Review 1045 - 1048 (1982).

35 Act of February 20, 1811, ch. 21, 2 Stat. 641.

36 Id.

37 See text at note 12, supra.

38 See text at note 9, supra.

39 Aaron L. Shalowitz, Shore and Sea Boundaries, Vol. I., at 182 - 189., U.S. Department of Commerce: Coast and Geodetic Survey, (1962).

40 See text at note 16, supra.

41 See text at note 17, supra.

42 Id.

43 See text at note 25, supra.

44 516 U.N.T.S. 205 U.S.T. 1606, T.I.A.S. No. 5639. The Geneva Treaty stipulates the drawing of legal coastal baselines according to its definitions of bays, low-tide elevations, and harbor works such as jetties. These definitions set a baseline for which sovereign jurisdiction may extend outward into the sea, and it is important to remember that this jurisdictional limit is not set on the actual natural coastline as it stands. This is because these definitions serve to set a fixed line so as to overcome the ambulatory nature of Louisiana's coastline.

45 United States v. Louisiana, 394 U.S. 11 (1969).

46 United States v. Louisiana, 420 U.S. 529 (1975).

47 United States v. Louisiana, 422 U.S. 13 (1975).

48 United States v. Louisiana, 101 S.Ct. 2605 (1981)

49 As amended Apr. 7, 1986, Pub.L. 99-272, Title VIII, § 8805, 100 Stat. 151.

43:1301. Definitions

(b) "...except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court **shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;**" (emphasis added)

50 Texas v. Louisiana, 410 U.S. 702, 712 (1973).

51 Report of the Special Master in the Supreme Court of the United States, October Term 1974, No. 36, Original, Texas v. Louisiana, (Robert Van Pelt, Senior U.S. District Judge, Special Master).

52 15 U.S.T. (pt.2) 1606, T.I.A.S. No. 5639.

53 Texas v. Louisiana, 426 U.S. 465, 470 (1976).

54 Stockwell., 42 Louisiana Law Review 1043, 1057.

55 Stockwell., 42 Louisiana Law Review 1043, 1071.

56 Louisiana v. Mississippi, 202 U.S. 1 (1906).

57 Id. at 48.

58 Section 308 of the Coastal Zone Management Act of 1972, as amended (CZMA), established the Coastal Energy Impact Program (CEIP) 16 U.S.C. § 1456a (1972), Pub.L. 89-454, § 308, *as added* Pub.L. 94-370, § 7, 90 Stat. 1019 (1976).

59 16 U.S.C.A. §1451 et seq.

60 Louisiana v. Mississippi, 202 U.S. 1 (1906).

61 See text at note 52, supra.

62. ...and amended Sept. 18, 1978, Pub.L. 95-372, Title V, §§ 501, 503(a)-(d), 92 Stat. 690, 692, 693; Oct. 17, 1980, Pub.L. 96-464, § 6047, 100 Stat. 128.

63 Rodney D. Adams, Barney B. Barrett, Marc J. Hershman, William G. McIntire, Kai D. Midboe., A Rationale for Determining Louisiana's Coastal Zone, 1, Sea Grant Publication No. LSU-T-75-006, (Nov. 1975)., and supplement.

64 Id.

65 Id.

66 Coastal Zone Management Act, Section 304(a), 16 U.S.C. 1453(a).

67 Adams, A Rationale for Determining Louisiana's Coastal Zone, at 7.

68 Id. at 8.

69 Id. at 9.

70 Id.

71 Id. at 10.

72 Id. at 11.

73 See text at note 62, supra.

74 Congress declared that in the Act that its inherent policy was "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1) (1990).

75 Martin J. LaLonde., Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act, 92 Michigan Law Review 438, 439-440 (Nov. 1993).

76 LaLonde., 92 Michigan Law Review 438, 439., See 16 U.S.C. § 1456(h) (1988)., and 15 C.F.R § 930.116 (1991)., respectively.

77 16 U.S.C. § 1456(c)(1) (1990) (emphasis added).

78 LaLonde., 92 Michigan Law Review 438, 440-442. See California v. Watt, 520 F.Supp. 1359, 1368-13682 (C.D. Cal. 1981), *modified*, 683 F.2d 1253 (9th Cir. 1982).

79 464 U.S. 312 (1984). The case involved a state challenge to an OCS

lease sale for oil and gas exploration and development.

80 464 U.S. 312, at 330., (1984).

81 464 U.S. 312, at 331-343., and LaLonde., 92 Michigan Law Review 438, 441-443.

82. Coastal Zone Act Reauthorization Amendments of 1990, Pub.L. No. 101-508, 104 Stat. 1388-299 to 1388-319 (codified at 16 U.S.C. §§ 1451-1464 (Supp. III 1991)).

83 16 U.S.C. § 1456(c)(1)(A) (Supp. III 19911) (emphasis added).

84 LaLonde., 92 Michigan Law Review 438, 442-444.

85 1978 La. Acts No. 361, § 1. See also La. R.S. 49:214.21-214.40 (Supp. 1990).

86 16 U.S.C. §§ 1451-1464 (1989), as amended by the Reauthorization Amendments of 1990, §§ 6201-6216. See also 15 C.F.R. part 930 (1990).

87 J. Christopher Martin., The Use of the CZMA Consistency Provisions to Preserve and Restore the Coastal Zone in Louisiana, 51 Louisiana Law Review 1087, 1090-1092., (1991).

88 National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370 (1988 & Supp. 1990)).

89 Louisiana Administrative Code, § 719.

90 Id.

91 D.F. Boesch., N.N. Rabalais., C.S. Milan., C.B. Henry., J.C. Means., R.P. Gambrell., and E.B. Overton., Impacts of Outer Continental Shelf Related Activities on Sensitive Coastal Habitats, at 3., Vol II., OCS Produced Waters. Draft Final Report to the Marine Management Service. Louisiana Universities Marine Consortium, Chauvin.

92 777 F.Supp. 486 (E.D. La. 1991).

93 Pub.L. No. 89-554, 80 Stat. 392 (codified at 5 U.S.C. §§ 551-559, 701-706 (1988)).

94 LaLonde., 92 Michigan Law Review 438, 456-458.

95 The Times-Picayune., "Corps Project Not 'Smothering' State's Wetlands," May 16, 1994., pg. B6.

96 Ronald H. Brown., U.S. Secretary of Commerce., "Decision and Findings in the Plan of Exploration Consistency Appeal of Mobil Oil Exploration and Producing Southeast, Inc. From an Objection by the State of North Carolina," p. iii-v, September 2, 1994.

97 Id., at vi.

98 16 U.S.C. § 1801 et seq. (1988).

99 16 U.S.C. § 1851(a)(3).

100 See text at note 30, supra.

101. Submerged Lands Act, 42 U.S.C. § 1312 (1988). The states of Florida and Texas are the exceptions to this rule as their "traditional boundaries" of three marine leagues or nine miles extend into the Gulf of Mexico. United States v. Louisiana et al., 363 U.S. 1.

102 Jeffery A. Ballweber, Richard Hildreth., Fishery Management Implications of the U.S. Territorial Sea Extension, Proceedings of Coastal Zone '91.

103 16 U.S.C. § 1856(a)(1).

104 16 U.S.C. § 1856(a)(2): A States' jurisdiction extends:

"to any pocket of waters that is adjacent to the state and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party."

105 16 U.S.C. § 1856(b).

106 Ballweber, Hildreth., Fishery Management Implications of the U.S. Territorial Sea Extension, Coastal Zone 1991.

107 677 P.2d 1245 (1984).

108 677 P.2d 1245, 1251.

109 695 P.2d 241(1985).

110 John Winn., Alaska v. F/V Barnoff: State Regulation Beyond the Territorial Sea After the Magnuson Act, 13 Environmental Affairs 281, 285-289. (1986).

111 84 F.3d 343 (1996).

112 84 F.3d 343, 350-352.

113 Mike Wascom, Co-Coordinator, Louisiana Sea Grant Legal Program, Personal Communication, August16, 1996.

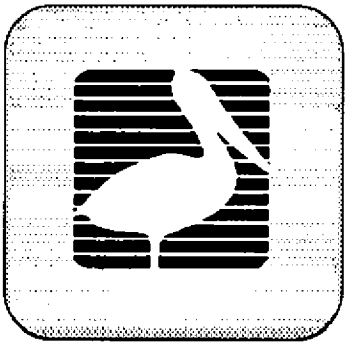
114 Id..

115 Hout, "Oregon Policy Development in the State of Oregon," *Coastal Management*, 18(3): 255-266, 1990.

116 Marc J. Hershman, "Ocean Management Policy Development in Subnational Units of Government: Examples from the United States," p.11-16., *Ocean and Coastal Management Journal* (forthcoming) 1996.

117 Biliana Cicin-Sain, "National and Regional Perspectives on Ocean Governance," p. 11-21., a paper presented at the Pacific Coast Ocean Management Workshop, September 10, 1995.

118 Id.



Summary of Recent Louisiana Legislation

By Catherine D. Susman

1996 FIRST EXTRAORDINARY SESSION OF THE LOUISIANA LEGISLATURE

WILDLIFE AND FISHERIES

RESOLUTIONS

H.R. 3 (Odinet)
Directs the secretary of the Department of Wildlife and Fisheries to issue a special permit to enable the Louisiana Seafood Management Council to conduct a "Day on the Bay" program in order to educate legislators about commercial seafood harvesting techniques.

H.R. 8 (Facheux)
Urges the Louisiana Wildlife and Fisheries Commission to impose a limit of five hundred thousand pounds on both the recreational and commercial taking of southern flounder, proportioned between commercial and recreational fishermen consistent with 1995 biological data. Furthermore, urges that if the above limit is not enforced that a complete ban be effected thereby precluding the taking of southern flounder by both commercial and recreational fishermen.

H.C.R. 5 (Odinet)
Urges the Louisiana Wildlife and Fisheries Commission and the Department of Wildlife and Fisheries to extend the season for taking oysters on all presently opened oyster grounds from April 2, 1996 to April 30, 1996. It is also urged that the Louisiana Wildlife and Fisheries Commission to schedule a meeting prior to April 2, 1996, for the purpose of extending the season.

H.C.R. 27 (Rousselle)
To urge and request the House Committe on Natural Resources and the Senate Committee on Natural Resources to meet and function as a joint committee and to schedule hearings for the purpose of eliciting information and testimony from representatives and agents of the Louisiana Department of Wildlife and Fisheries, and others, including the general public, with respect to the law enforcement activities conducted by the Department of Wildlife and Fisheries.

ENVIRONMENTAL QUALITY

Act 36 (H.B. 115 Theunissen)
Provides for the jurisdiction, powers, duties, oversight rules, and related matters of the House Committee on the Environment (HCE). Specifically it amends various provisions of the Louisiana Environmental Quality Act, R.S. 30:2001 et seq to provide that reports, agreements, notices, and proposed rules are to be submitted to the HCE instead of the House Committee on Natural Resources (HNRC); Provides that jurisdiction and authority with regard to oversight and approval of agency actions be with the HCE instead of the HNRC; provides for the adoption, amendment, or repeal of standards and regulations pursuant to the Hazardous Waste Control Law as provided by the Administrative Procedure Act while removing certain specific procedures; requires the Louisiana oil spill coordinator to submit for approval any proposed rules, plans, guidelines, or regulations to the HCE in addition to the Senate Committee on Environmental Quality (SCEQ), House and Senate Natural Resources Committees and retains the rules for review in accordance with the Administrative Procedure Act; recognizes the need for twelve-month legislative oversight capacity, which will be achieved during the legislative sessions by the HCE and SCEQ instead of the House and Senate Natural Resources Committees and provides that the environmental committees of the House and Senate will serve on the Joint Legislative Committee on Environmental Quality instead of the natural resource committees of the House and Senate; requires that the Department of Environmental Quality submit its proposed rules to the HCE instead of the HNRC.(Amends R.S. 30:90, 201(D), 2058, 2106, 2117, 2180, 2226, 2331, 2413, 2418, & 2457; R.S. 40:2355; R.S. 49:953 & 968)

Act 41 (H.B. 173 Windhorst)
to provide for appeals of certain administrative and enforcement actions, such as orders and rulings of hearing officers, to the Nineteenth Judicial District Court instead of the First Circuit Court of Appeal. Review of final judgments, interlocutory order, or rulings of the Nineteenth Judicial District Court may be appealed to the First Circuit Court of Appeal. In addition, the act prohibits a bond requirement for appeals to the Nineteenth Judicial District Court. (Note: This act makes some of the same amendments as Acts 1995, No. 947 previously made) (Amends R.S. 30:2050.18, 2050.21, and 2050.22)

Act 86 (H.B. 200 Windhorst)
Provides that with regard to judicial review of actions by Department of Environmental Quality hearings officers' in refusing to certify an interlocutory order or decision. The court may decide the issue if it determines that the hearing officer's refusal to certify the interlocutory order or ruling is not supported by a preponderance of the evidence. This changes the old standard that required the court to find the hearing officer's decision was manifestly erroneous before deciding the issue. (Amends R.S. 30:2050.18(A)(3))

COASTAL RESOURCES AND PUBLIC LANDS

Act 55 (H.B. 181 Robichaux et al)
Provides that landowners of land contiguous to and abutting navigable waters, bays, arms of the sea, the Gulf of Mexico, and navigable lakes shall have a right to reclaim land lost through erosion, compaction, subsidence, or sea level rise; provides that the plans for reclamation be submitted to the governing authority of the parish, DOTD, DWF, the office of mineral resources, and the state land office for review and comment not less than 60 days prior to issuance of the permit, this provision removes the requirement that the governing authority must approve the plans; provides that DNR may enter into agreements with a owners of land contiguous to and abutting navigable waterbottoms belonging to the state who have a right to reclaim such land. These agreements may establish a perpetual or limited, transferrable right of ownership to all subsurface mineral rights to the existing coastline at the time of the agreement and this transfer may be conditioned upon waiver of their reclamation rights;

provides such agreements grant to the state the surface rights to contiguous lands in connection with wetlands conservation and restoration projects with the landowner having necessary surface use of ceded lands for mineral development purposes; provides secretary must first submit the agreement to the House and Senate committees on natural resources, after publishing the agreement as provided in the Louisiana Administrative Procedure Act; defines "emergent lands" as land having an elevation sufficient to support emergent vegetation and in the case of a barrier island such vegetation on its landward side; requires DNR to adopt the regulations allowing reclamation of land not more than 180 days from the effective date of this act; changes present law by requiring that determinations regarding whether an activity would unreasonably hinder navigability of any waters of the state or impose undue or unreasonable restraints on state rights only be made by either the DNR or the attorney general; an aggrieved party to seek relief in the 19th Judicial District Court. (Amends R.S. 41:1702)

Act 75 (H.B. 47 Bruneau, Walsworth, Quezaire)
Provides additional limitations on the liability of a landowner, for any injury to person or property, to include any lands owned, leased, or managed as a public park by the state or any of its political subdivisions and which is used for recreational purposes. For the purposes of the limitation of liability "land" does not include buildings, structures, machinery, equipment, whether or not attached to the land and does not apply to playground equipment which is defective. (Amends R.S. 9:2795(E))

RESOLUTIONS

H.C.R. 27 (Faucheaux, et al)
To urge and request the Department of Natural Reousrces and the Governor's Office of Coastal Activities to become more active in educating the citizens of Louisiana about coastal erosion and what they can to to help reduce the amount of wetlands lost each year due to coastal erosion.

H.C.R. 45 (Hebert)
The legislature of Louisiana expresses its support for the implementation of coastal restoration projects, particularly the Oaks/Avery Canal Hydrologic Restoration Project.

S.C.R. 37 (Romero)
Urges the secretary of the Department of Culture, Recreation and Tourism, to transfer, due to nonuse, certain undeveloped lands in the Lake Fausse State Park, along with ingress and egress to such lands, back to the registrar of the state land office.

PORTS, HARBORS, AND WATERWAYS

Act 13 (S.B. 133 Robichaux)
Authorizes the Lafourche Basin Levee District to use public funds for general drainage work not incidental to the construction and maintenance of levees. (Amends R.S. 38:325 & 334)

Act 82 (H.B. 121 Triche et al)
Authorizes the board of commissioners of the Bayou Lafourche Freshwater District to implement measures to abate the water hyacinths within the water bodies of the parishes of Ascension, Assumption, and Lafourche. (Amends Act 113 of 1950 Reg Session of the Louisiana Legislature)

MISCELLANEOUS

Act 89 (H.B. 223 Theriot, Dupre)
Defines the territorial jurisdiction of the North Lafourche Conservation, Levee and Drainage District and to repeal that district's shared jurisdiction for flood protection. Also provides shared jurisdiction for flood protection between the South Lafourche Levee District and the Lafourche Basin Levee District. (Repeals R.S. 38:291(F)(1)(c)) (Amends R.S. 38:291(F)(1)(d) and (T))

H.C.R. 41 (Daniel)

Urges and requests the House Committee on Natural Resources and the Senate Committee on Natural Resources to meet and function as a joint committee to study the Department of Natural Resources, the Department of Wildlife and Fisheries, and the Governor's office on Coastal Activities to determine the feasibility of consolidating the departments and the office under a single department and to report its findings to the legislature prior to the 1997 Regular Session.

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WILDLIFE AND FISHERIES

Act 24 (H.B. 94 Ackal)
Regarding applications for sales and use tax exemption certificates for commercial fisherman, authorizes that in lieu of a notarized statement, a certificate of exemption may be obtained by executing a signed statement before an authorized employee of the Department of Revenue and Taxation if the Louisiana commercial fisherman is acting in his own behalf, with sufficient personal identification and documentation.(Amends R.S. 47:305.20(B))

RESOLUTIONS

H.C.R. 6 (Odinet)
Provides for the continuation of the Louisiana Oyster Task Force to study and propose solutions to the problems of water quality and management requirements of molluscan shellfish propagating areas, and coordination of efforts to increase production, salability, and marketability of molluscan shellfish. Also, provides that the task force seek and receive help from universities within the state. Finally, increases the members of the task force from 12 to 16.

H.C.R. 116 (Gautreaux)
Urges and requests the Louisiana Wildlife and Fisheries Commission to maintain the current size limit of eleven inches on the commercial possession of channel catfish.

ENVIRONMENTAL QUALITY

RESOLUTIONS

S.C.R. 10 (Landry et al)
Express the Louisiana Legislature's objection to the authorization of the pending permit for the solid waste disposal pits on the Mississippi River, and further requests that the U.S. Army Corps of Engineers extend the comment period for the pending permit until the legislature can consider the effects of such pits and express its view on the placement of waste disposal pits on any river batture in the state.

H.C.R. 74 (Murray, Holden and Rousselle)
Creates a study commission to review the effects of global climate change on coastal wetlands, examine the mitigation options listed in the Intergovernmental Panel on Climate Change report, and make rec-

ommendations on the most prudent course of action in order to protect the health and welfare of the citizens and environmental assets of Louisiana. The commission should also examine whether an energy policy stressing carbon dioxide reduction (natural gas usage, energy efficiency, and renewable energy) could enhance the economic development of Louisiana. The commission shall submit a written report of its findings and any specific proposals to the legislature prior to the 1997 Regular Session. Nineteen members from various organizations shall compose the commission. The chairmen of the House and Senate Natural Resources Committees shall serve as acting co-chairmen. The commission shall cease to exist on March 31, 1997.

COASTAL RESOURCES AND PUBLIC LANDS

RESOLUTIONS

H.R. 12 (Faucheux)
Urges and requests the Department of Transportation and Development to transfer certain property, namely Parcel 4-2-1-D, to the St. John the Baptist Parish Council for public services and/or council related uses, and if the property ever ceases to be used for public purpose it shall revert back to the Department.

H.R. 31 (Faucheux)
Urges and requests the Department of Transportation and Development to transfer certain property to the St. James Parish Council for public use as a maintentance facility for the Parish Department of Operations, and if the property ever ceases to be used for a public purpose it shall revert back to the Department.

H.R. 56 (Faucheux)
Urges and requests the Department of Transportation and Development to transfer certain properties, namely Parcels 4-1-A-1, 4-2-2-A, and 4-2-1-B, to the St. John the Baptist Parish Council for public services and/or council related uses, and if the properties ever cease to be used for public purpose they shall revert back to the Department.

H.C.R. 11 (Alexander)
To memoralize the United States Congress to take such actions as are necessary to extend the coastal boundary in Louisiana from three miles to ten miles.

H.C.R. 43 (Durand)
To memoralize the United States Congress to take such actions as are necessary and to urge and request the Mississippi River Commission to allow continuation of the two percent diversion of the Mississippi River flow into the Atchafalaya, and to further increase the river water diversion by an additional three percent during appropriate mid-level stages of the Mississippi River system when such action would not increase the risk of either direct of backwater flooding to allow access to the Atchafalaya Basin for commercial and recreational fishing without causing flooding on Morgan City or surrounding communities or increasing saltwater encroachment in the lower Mississippi River.

H.C.R. 69 (Hebert)
Urges and requests the secretary of the Department of Culture, Recreation and Tourism transfer the management and use of the surface of certain undeveloped lands located within Fausse Pointe State Park to the division of administra

Editor's Note: In the last issue of the Louisiana Coastal Law (#68; Limited Entry: Is Louisiana Ready?) we omitted an important reference for those interested in limited entry issues. It is "Decidion Guide to Individual Quota (IQ) Management of Fisheries" written by Dr. Kenneth J. Roberts, Specialist, of the Louisiana Cooperative Extension Service and the Louisiana Sea Grant College Program. It is available from the Louisiana Sea Grant College Program and on the Internet at our World Wide Web Site, whose address is listed below.

For other legal coastal resource information as well as back issues of the LCL, visit our home page at

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