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OUTER CONTINENTAL SHELF LEASING POLICY PREVAILS OVER THE CALIFORNIA COASTAL COMMISSION*

ENVIRONMENTAL LAW—COASTAL ZONE MANAGEMENT ACT—The United States Supreme Court holds that the federal government's sale of outer continental shelf oil and gas leases is not an activity "directly affecting" the state-managed coastal zone within the meaning of the Coastal Zone Management Act and therefore, a consistency review is not required before such sales are made. *Secretary of the Interior v. California*, ___U.S.___, 104 S. Ct. 656 (1984).

In 1981 the State of California challenged the sale of outer continental shelf (OCS) oil and gas leases due to an alleged failure by the Secretary of Interior to conduct the sale within the provisions of the California coastal management plan. The locations chosen for oil and gas leasing, in California's view, would negatively impact the southern sea otter, native to California's coastal zone.[1]

BACKGROUND

The Coastal Zone Management Act of 1972 (CZMA) § 307(c)(1) states:

> Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.[2]

The CZMA defines the coastal zone to include: (1) state (but not federal) lands near the shoreline of coastal states; and (2) the coastal waters extending to the outer limit of the territorial sea.[3] Submerged lands subject to United States jurisdiction lying more than three miles from shore constitute the OCS.[4]

In 1972 Congress enacted the CZMA declaring a national policy to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding gen-

*The author wishes to express his appreciation for the assistance provided by Professor Cheryl Block, Visiting Professor of Law, University of New Mexico.

1. California v. Watt, 520 F. Supp. 1359 (C.D. Ca. 1981).

2. 16 U.S.C. § 1456(c)(1) (1982) (emphasis added).

3. 16 U.S.C. § 1453(1) (1982). This territorial sea extends three geographical miles seaward from the coastline of states bordering the Atlantic or Pacific Oceans. 43 U.S.C. 1301 (1982); United States v. California, 381 U.S. 139 (1965).

4. 43 U.S.C. §§ 1301(a)(1), 1331(a) (1982).

erations."[5] Congress found that "increasing and competing demands upon the lands and waters of our coastal zone . . . have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion."[6]

Using a system based upon economic incentives, the CZMA encouraged coastal states to develop a coastal management plan.[7] The state plan is then approved by the Secretary of Commerce. To be approved, a state plan must adequately consider national interests[8] and the views of the federal agencies principally affected by the plan.[9] Once the plan has been approved, §307(c)(1) of the CZMA requires federal activities directly affecting the coastal zone to be consistent with the state plan to the maximum extent practicable.[10]

The Outer Continental Shelf Lands Act (OCSLA)[11] established federal authority over the OCS. The OCSLA made the subsoil and seabed of the OCS subject to United States jurisdiction, control, and power of disposition.[12] The Secretary of the Interior was to formulate regulations for developing the OCS mineral resources,[13] and the Secretary was given carte blanche authority over the OCS.[14]

In response to growing congressional dissatisfaction with the Department of the Interior's administration of the OCSLA, the Act was amended in 1978 to integrate more cooperation between governmental groups.[15] In the 1978 amendments, Congress declared the policy of the United States to be that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[16] With this policy in mind, the House Ad Hoc Select Committee on the Outer Continental Shelf stated that the OCSLA's basic purpose is to "promote the swift, orderly, and efficient exploitation of our almost untapped domestic oil

5. 16 U.S.C. §1452(a) (1982).
6. *Id.* §1451(c).
7. *Id.* §1454.
8. *Id.* §1455(c)(8).
9. *Id.* §1456(b).
10. *Id.* §1456(c)(1).
11. 43 U.S.C. §§1331–1356 (1982).
12. *Id.* §1332.
13. *Id.* §1334(a)(1).
14. H.R. REP. NO. 95-590, 95th Cong., 1st Sess., 57 (1977).
15. Jones, Mead, & Sorenson, *OCS Land Act Amendments of 1978,* 19 NAT. RES. J. 885 (1979).
16. H.R. REP. NO. 95-590, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1450. The Senate bill was passed in lieu of the House bill after amending its language to contain much of the text of the House bill.

and gas resources in the Outer Continental Shelf."[17] The motivation for this legislation came from a desire to improve lease administration[18] as well as a desire to lessen the United States' dependence on foreign oil which was made painfully clear by the 1973 Arab oil embargo.[19]

The CZMA and OCSLA exist side by side although the former is weighted towards resource conservation while the latter is weighted towards resource development with neither given preeminence over the other.[20] Problems have arisen not only due to policy conflicts but also because these two statutes place control (or offer to place control) over various portions of the two Acts in the Secretary of Interior, the Secretary of Commerce, state governors, and state coastal commissions without giving any one power center the final authority.

The Department of the Interior conducts OCS lease sales.[21] Various sections of the OCSLA require the Secretary to conduct environmental studies,[22] consider recommendations concerning size, time, or location,[23] consider suggestions from federal agencies and affected state and local governments,[24] and provide for state concurrence during development and production.[25] The CZMA specifically requires a consistency review with the state plans approved by the Secretary of Commerce before an exploration, development, or production plan in the OCS can be approved by the Secretary of the Interior.[26] No such specificity exists as to oil and gas lease sales and pre-lease activities in the OCS.

CASE HISTORY

In November 1977, the Department of the Interior (Interior) began preparation for outer continental shelf oil and gas Lease Sale No. 53. Interior requested the petroleum industry to designate specific tracts located off California's coast on which it was interested in bidding if a sale were held.[27] Interior asked federal, state and local governments, universities, environmental organizations, research institutions, and the public to identify any tracts that should be excluded or leased under particular restrictions.[28] In October 1978, Interior announced the tentative selection

17. *Id.* at 1460.
18. *Id.*
19. *Id.*
20. Comment, *Coastal Zone Federalism*, 1983 B.Y.U.L. REV. 123, 138.
21. 43 U.S.C. § 1344 (1982).
22. *Id.* § 1346.
23. *Id.* § 1345(a).
24. 43 U.S.C. § 1344(c) (1982).
25. *Id.* § 1351.
26. 16 U.S.C. § 1456(c)(3)(B) (1982).
27. California v. Watt, 638 F.2d 1253, 1258 (9th Cir. 1982).
28. *Id.*

of 243 tracts located on the outer continental shelf (OCS) in five different basins off the California coast,[29] including 115 tracts situated in the Santa Maria Basin.[30]

In July 1980, the California Coastal Commission[31] informed Interior that Lease Sale No. 53 had been determined to be an activity "directly affecting" the California coastal zone and as such the sale should be "consistent" to the "maximum extent practicable" with the state coastal zone management program.[32] Interior responded that the sale would not directly affect the coastal zone.[33]

In response to this determination, the Commission repeated its belief that a consistency review was required and adopted a resolution that the deletion of 29 tracts in the northern Santa Maria Basin was necessary for Lease Sale No. 53 to be consistent with the state plan.[34] The Commission's main concern was that possible OCS oil spills could threaten the southern sea otter, whose range is within 12 miles of challenged tracts.[35] On December 24, 1980, California Governor Brown, responding to Interior's notice of sale, recommended the deletion of 32 northern tracts.[36] Interior rejected the state's demands, reiterating that no consistency review was required because the lease sale did not engage Coastal Zone Management Act (CZMA) § 307(c)(1). On April 27, 1981, Interior issued a final notice of sale.[37]

California then sought an injunction in federal district court against the lease sale.[38] The court granted a preliminary injunction preventing the Interior Department from accepting or rejecting bids or issuing leases on

29. *Id.*

30. 104 S. Ct. at 659. Tracts in this particular basin, which extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south, became the subject of this litigation. 683 F.2d at 1258. A draft Environmental Impact Statement (EIS) was issued by Interior in April 1980, followed by a final EIS in September 1980. 104 S. Ct. at 659. The EIS analyzed the enviornmental impacts in the five basins included in Lease Sale No. 53. It was based on an estimate of 404 million barrels of oil for the Santa Maria Basin. This estimate was later revised to 794 million barrels. 683 F.2d at 1258. These figures are used to estimate the amount of production from an oil and gas field and thus its potential environmental impact. *See generally* Massachusetts v. Andrus, 594 F.2d 872, 873–74 (1st Cir. 1979). A Secretary Issued Document, an internal aid to the Secretary of Interior for making lease sale decisions, concluded a supplementary EIS was not needed even though the revised estimate had nearly doubled. 683 F.2d at 1258.

31. This commission was established to bring California into accord with the provisions of the Coastal Zone Management Act. *See* 16 U.S.C. §§ 1454, 1455, 1455a, 1456 (1982). *See also infra* text accompanying notes 7–9.

32. 104 S. Ct. at 659.

33. *Id.*

34. 683 F.2d at 1259.

35. 104 S. Ct. at 660.

36. 683 F.2d at 1259.

37. 104 S. Ct. at 660 *citing* 46 Fed. Reg. 23674 (1981).

38. 520 F. Supp. 1359. Apparently, this was the first legal action to require Interior to perform consistency reviews for OCS lease sales.

the disputed tracts.[39] The court then entered summary judgment for respondents in this action[40] based upon violations of CZMA § 307(c)(1).[41] The Ninth Circuit Court of Appeals affirmed as to the requirement for a consistency determination for Lease Sale No. 53.[42]

HOLDING

The Supreme Court, in a 5–4 decision, held that the sale of oil and gas leases on the OCS is not an activity "directly affecting" the coastal zone; therefore, no consistency review is required.[43] Justice O'Connor, writing for the majority, reasoned that Congress did not intend the CZMA to apply to the OCS[44] and that the subsequent consistency review requirements of the exploration, production, and development phases of OCS oil and gas leasing provide the necessary protection for the coastal zone.[45]

LEGISLATIVE HISTORY[46]

Both the majority and the dissent turned to that reliable barometer of congressional intent: legislative history. The original versions of § 307(c)(1),

39. 683 F.2d at 1259.

40. Respondents included the State of California, the Natural Resources Defense Council Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Petitioners, defendants below, included the Secretary of the Interior, the Department of the Interior, and the Bureau of Land Management. Western Oil and Gas Association (a regional trade association) and twelve of its members intervened as defendants. Several local government entities in California intervened as plaintiffs. 104 S. Ct. a5 660, note 3. The Ninth Circuit found that the environmental groups and local governments had standing to sue under CZMA § 307(c)(1), a decision disagreed with by petitioners. 683 F.2d at 1269–71. The Supreme Court found that, since the State of California "clearly does have standing," they need not address the standing of the other respondents. 104 S. Ct. at 660, note 3.

41. 104 S. Ct. at 660.

42. 683 F.2d at 1267.

43. 104 S. Ct. at 672.

44. *Id.* at 666.

45. *Id.* at 671.

46. As urged by the parties, Justice O'Connor begins the majority decision by discussing the plain meaning of the term "directly affecting." Interior contended that the term meant "having a direct identifiable impact on the coastal zone," Brief for Federal Petitioners, p. 20, while the respondents contended it means "initiating a series of events of coastal management consequences." Brief for Respondent State of California, p. 10. Finding that the CZMA nowhere defines or explains which federal activities should be viewed as directly affecting the coastal zone, and that the two parties' definitions were both plausible, Justice O'Connor stated that the plain meaning cannot be determined. 104 S. Ct. at 661.

Justice Stevens' dissent, however, found that the words in § 307(c)(1), whatever they mean, clearly apply to activities that take place outside, as well as inside, the coastal zone. 104 S. Ct. 673. Focusing on the affect portion of the phrase, Justice Stevens saw the entire phrase as an enlargement of the coverage of § 307(c)(1) and that the coastal zone can be affected by federal activity within or without of the coastal zone. *Id.* at 674. "[I]t is hard to see how the Court can hold, as it does, that federal activities in the OCS can never fall within the statute because they are outside the outer boundaries of the coastal zone." *Id.*

in both the House and Senate bills, required consistency determinations only for federal activities "in" the coastal zone.[47] The House-Senate Conference Committee replaced "in" with "directly affecting."[48] From this point of agreement the two opinions diverge.

Justice O'Connor first admitted to believing this change to be an "expansion in the scope of § 307(c)(1)" which is surprising, unexplained, and subsequently unnoticed.[49] But, Justice O'Connor found an explanation in that the Senate and House versions of the CZMA defined the coastal zone differently. While the Senate bill excluded federal lands within the coastal zone, the House bill included them.[50] Both bills excluded submerged OCS lands from their definitions of the coastal zone.[51] In light of this conflict, the majority determined that the change in § 307(c)(1) was a compromise for adopting the Senate's definition of the coastal zone.[52] The majority buttressed this theory using language from the Conference Report:

> Though cryptic, the Conference Report's reference to the change in § 307(c)(1) fully supports this explanation. "The Conferees . . . adopted the Senate language . . . which made it clear that federal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provision of section 307(c) would apply."[53]

Justice O'Connor found further support for her conclusion by the fact that two sections of the House bill that would have extended parts of the CZMA to the OCS were deleted by the Conference bill.[54]

Justice Stevens reviewed the same history and reached the result that the CZMA was intended to apply to the OCS if activities there affected

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After this preliminary skirmish over words, the majority opinion and the dissent closely parallel each other in approach if not result. This section, and the two that follow, will contrast their treatment of the major arguments, focusing on how Justice Stevens refutes the majority opinion.

47. S. 3507, 92d Cong., 2d Sess., 118 CONG. REC. 14190 (1972); H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26502 (1972).

48. H.R. CONF. REP. No. 92-1544, 92d Cong., 2d Sess., *reprinted in* 19722 U.S. CODE CONG. & AD. NEWS 4822, 4824.

49. 104 S. Ct. at 661. The majority failed to explain its surprise or how it felt congressional legislation can go unnoticed.

50. S. 3507, 92d Cong., 2d Sess., 118 CONG. REC. 14188 (1972); H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26501 (1972).

51. *Id.*

52. 104 S. Ct. at 674. If the majority's view is correct, then only federal activities occurring within the three mile state coastal zone, but also within exempt federal areas, require a consistency determination.

53. 104 S. Ct. at 662 *quoting from* H.R. CONF. REP. NO. 92-1544, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776, 4822. While the majority cited the Conference Report's reference to the change as a change in § 307(c)(1), it must be noted that this quotation comes from the explanation of the change in § 304 (definitions) not in § 307.

54. H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26503 (1972).

the coastal zone.[55] Rather than focus on the definitional discussion of the majority opinion, Justice Stevens argued that the purpose of the CZMA is to prevent adverse effects on the coastal zone.[56] The House extended the coverage of the CZMA to include shorelands impacting on the coastal zone.[57] The zone was not extended beyond the territorial sea because the House required the Secretary of Commerce to develop a management program for activities on the OCS consistent with the management programs of the adjacent states.[58] Further, the House recognized that the CZMA would affect actions on the OCS by defeating an attempt to delete the requirement for mandatory federal sanctuaries adjacent to state sanctuaries.[59] If adopted in this form, the CZMA would have required federal sanctuaries on the OCS.

Justice Stevens also found reference to waters outside the zone in the 1971 Senate version of the CZMA. The 1972 Senate Report stated that the CZMA was derived from a bill favorably reported the previous year.[60] The report on the previous bill construed the following language to extend the consistency obligation to federal activities in waters outside the coastal zone:[61]

> [A]ny lands or waters under Federal jurisdiction and control, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands or waters within the territorial sea, should be administered consistent with approved State management programs except in cases of overriding national interest as determined by the President.[62]

Since the 1972 bill used identical language, with nothing in the 1972 report indicating the consistency requirement should be construed differently from the 1971 language, Justice Stevens found the 1972 version placed a consistency obligation upon federal activities in the OCS.[63]

In similar style to Justice O'Connor, Justice Stevens found the Conference Report's change in language evidenced a congressional compromise. The deletion of §312 (mandatory federal sanctuaries) and §313

55. 104 S. Ct. at 674.

56. *Id. citing* S. 3507, 92d Cong., 2d Sess., 118 CONG. REC. 14188 (1972) (language concerning "impact on coastal waters"); H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26501 (1972) (similar language).

57. H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26501 (1972).

58. 104 S. Ct. at 675 *citing* H.R. 14146, 92d Cong., 2d Sess., 118 CONG. REC. 26503 (1972).

59. 118 CONG. REC. 26495–96 (1972).

60. S. REP. NO. 92-753, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776, 4782.

61. 104 S. Ct. at 676.

62. S. REP. NO. 92-526, 92d Cong., 1st Sess. 20 (1971).

63. 104 S. Ct. at 676.

(Secretary of Commerce management plan for the OCS consistent with state plan) from the Conference bill indicated, to Justice Stevens, that those provisions were left out because § 307(c)(1) had been expanded in scope to protect the coastal zone from federal OCS activity.[64] The explanation of this compromise comes from the conferees themselves: "[A]s to Federal agencies involved in *any* activities directly affecting the state coastal zone and any Federal participation in development projects in the coastal zone, *the Federal agency must make certain that their activities are to the maximum extent practicable consistent* with approved state management programs."[65]

Justice O'Connor found a compromise leading to her determination that the OCS was not included in the provisions of the CZMA by focusing on the definitions of what should be included in the coastal zone. Justice Stevens, taking a more functional approach, found a compromise extending the scope of § 307(c)(1) to protect the coastal zone from *effects* occurring in the OCS. Neither interpretation is absolutely compelled by the legislative history cited; "[I]nquiries into congressional motives or purposes are a hazardous matter."[66]

THE CONSISTENCY REVIEW REQUIREMENT § 307(c)(1)

Justice O'Connor looked to § 307(c) as three coordinated parts. She found that paragraphs (1) and (2) deal with activities of federal agencies while paragraph (3) reaches the activities of third parties approved by federal agencies.[67] Justice O'Connor then stated that paragraph (3) is the appropriate paragraph covering OCS leasing.[68] How this conclusion followed goes unexplained. Whether it meant that pre-lease sale activities by Interior, such as deciding on tract size, time of sale, and which tracts to offer, are not viewed as activities or that these acts are but incidental to the purchase of the leases by the third parties, is unclear.

Justice O'Connor's cataloging of lease sales into § 307(c)(3), which contains no mention of consistency reviews in connection with the sale of a lease but requires such a review for the issuance of licenses and permits, relieves OCS lease sales of any § 307(c)(1) requirements.[69] Further, when this section was amended in 1976, instead of adding "lease," Congress added a second subparagraph, § 307(c)(3)(B), requiring con-

64. *Id.*

65. 104 S. Ct. at 677 *citing* H.R. CONF. REP. NO. 92-1544, 92d Cong., 2d Sess. 14, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822, 4824 (emphasis by Justice Stevens).

66. United States v. O'Brien, 391 U.S. 367, 383 (1968).

67. 104 S. Ct. at 667.

68. *Id.*

69. H.R. CONF. REP. NO. 92-1544, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822, 4824.

sistency reviews for exploration, production, or development of oil and gas in the OCS.[70]

Justice Stevens used this provision to fashion a compelling argument that OCS leasing was already covered by § 307(c)(1) and the amendments of 1976 merely added to the provision.[71] The 1976 legislation created a program of federal financial aid to coastal areas to help states deal with the impact of OCS leasing because Congress recognized that OCS leasing could dramatically affect the coastal zone environmentally, socially, and economically.[72] Though explicit reference to OCS leasing was deleted by the Conference Committee, the reason, according to Justice Stevens' view, was to supplement the requirement by applying consistency to other stages of the process as well.[73]

> The Senate bill required that each Federal lease (for example offshore oil and gas leases) had to be submitted to each state with an approved coastal zone management program for a determination by that state as to whether or not the lease was consistent with its program. The conference substitute *further elaborates* on this provision and specifically applies the consistency requirement to the basic steps in the OCS leasing process. . . .[74]

Justice Stevens made a strong argument that, rather than denying consistency reviews for OCS leasing, the 1976 amendments to the CZMA extended that requirement throughout the entire spectrum of OCS oil and gas activities. Justice O'Connor did not account for the Conference Report's wording but merely pointed out that the word "lease" was left out, so OCS lease sales should be excluded.[75]

OUTER CONTINENTAL SHELF LANDS ACT AND THE CZMA

Justice O'Connor stated that "at least since 1978 the sale of a lease has been a distinct stage of the OCS administrative process. . . ."[76] In 1978, the OCSLA was amended to require that oil and gas leases provide that exploration and development be conducted only in accordance with a subsequent plan[77] which requires consistency review under CZMA § 307(c)(3)(B). Congress had taken these steps to separate the various

70. H.R. CONF. REP. NO. 94-1298, 94th Cong., 2d Sess., 122 CONG. REC. 20458 (1976).
71. 104 S. Ct. at 683.
72. *See* S. REP. NO. 94-277 (1975); H.R. REP. NO. 94-878 (1976).
73. 104 S. Ct. at 684–85.
74. H.R. CONF. REP. NO. 94-1298, 94th Cong., 2d Sess., 122 CONG. REC. 20458 (1976) (emphasis added).
75. 104 S. Ct. at 668.
76. *Id.* at 669. The four stages are: (1) preparation of a leasing program; (2) lease sales; (3) exploration; and (4) development and production. *Id.* at 669–70.
77. 43 U.S.C. § 1351(b) (1982).

decisions concerning OCS oil and gas and to forestall premature litigation regarding adverse environmental effects that would flow only from OCS exploration and production.[78] This attractive argument is supplemented by the fact that since 1978, according to Justice O'Connor, the sale of a lease grants the lessee the right to conduct only very limited "preliminary activities" on the OCS.[79] Since any effects on the coastal zone due to rights acquired from an OCS lease purchase are so limited, they cannot be termed direct.[80]

Justice Stevens attacked this with some vigor. The addition of consistency review requirements in other steps of OCS development, in Justice Stevens' view, does not operate to relieve Interior from a similar review of OCS lease sales. It only leads to a factual question of whether the sale "directly affects" the coastal zone, which in this case has been answered in the affirmative by the district court.

The House Report,[81] on the OSCLA, stated:

> The Committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976, . . . certain OCS activities *including lease sales* must comply with consistency requirements . . . Except for specific changes . . . nothing in this Act is intended to amend, modify, or repeal any provision of the Coastal Zone Management Act.[82]

Justice Stevens also attacked Justice O'Connor's belief that no direct effects occur due to a lease sale, citing the district court's description of the effects of the pre-leasing decisions.[83] "Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which leases would be subject" explained the Ninth Circuit while reviewing the lower court's findings.[84] Justice Stevens agreed.[85] "Development is the expected consequence of leasing; if it were not, purchasers would never commit millions of dollars to the acquisition of leases."[86] Justice Stevens realized that to determine that OCS leasing does not directly affect the coastal zone is basically denying each coastal state the federally-granted right to require important

78. 104 S. Ct. at 671 and note 22.
79. *Id.* at 672.
80. *Id.*
81. Although the Senate bill was adopted, it incorporated much of the House bill. H.R. CONF. REP. NO. 95-1474, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1674.
82. 104 S. Ct. 686 *citing* H.R. REP. NO. 95-590, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1559 note 52 (emphasis by Justice Stevens).
83. 520 F. Supp. at 1380–82.
84. 683 F.2d at 1260.
85. 104 S. Ct. at 682.
86. *Id.*

factual and policy decisions, made by Interior before lease sales, be consistent with their state coastal management plan.

ANALYSIS/IMPACT

Justice O'Connor's and Justice Stevens' opinions are more significant for the considerations not mentioned than for those discussed. While judicial effort is always needed to ascertain the correct congressional intent for conflicting statutes, important issues lurk in the background of this dispute over Congress' meaning.

A curious situation first appears when reviewing the record below on the issue of whether the CZMA was to apply to OCS lease sales. In its opinion, the Ninth Circuit stated, and the State of California emphasized in its brief to the Supreme Court, that "it is conceded on appeal that §307(c)(1) does apply at the lease sale stage."[87] Possibly Justice O'Connor's argument that the CZMA does not apply to the OCS may have been devised to allow the majority to maintain federal preeminence on the OCS without determining if OCS lease sales directly affected the state's coastal zone.

The federal preeminence issue gains importance when one realizes the peculiar position the Department of the Interior plays in the federal scheme. The Interior Department is unique as the only federal agency able to produce large revenues for the federal treasury without taxation.[88] Thus the Secretary of the Interior has considerable power in the Reagan Administration, an administration committed to balancing the budget and reducing taxes.[89] The maintenance of the preeminent position of complete federal control of an important revenue source is one important result of this decision.

The conflict between different levels of government and even different federal agencies often results in areas where divergent policies intersect.[90] While the resolution of such conflicts has often been the task of the Supreme Court, this decision offers little help to those enmeshed in the struggle over management and development of the OCS and adjacent coastal areas.

The importance of this conflict is seen by comparing Lease Sale No. 53 with a previously litigated conflict over OCS leasing off the east coast of the United States.[91] In discussing a final Environmental Impact State-

87. 683 F.2d at 1260; Brief for Respondent State of California at 25.

88. Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, 1114–15 (1976).

89. Comment, *Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLAMETTE L. J. 535, 558 (1982).

90. Hoaglund, *Federal Ocean Resource Management*, 3 VA. J. NAT. RES. L. 32 (1983).

91. Maine v. Andrus, 594 F.2d 872 (1st Cir. 1979).

ment for an OCS lease sale with estimated oil reserves approximately two-thirds of the Santa Maria Basin, the court reported that "at least one large oil spill attributable to human error is projected during the development and production phases . . . and . . . one large spill is also predicted during the transportation of oil."[92] Justice O'Connor felt the reviews required for the later stages of OCS oil and gas production will adequately protect each state's interest in light of these predicted consequences.

Thus even an extreme optimist can envision at least one major spill which will endanger the southern sea otter off the California coast. Yet Justice O'Connor, who relies on the protections of later stages of OCS development, does not offer one instance where environmental concerns have ever stopped oil and gas operations. Once operations commence there may be little anyone can do to halt the momentum of the oil and gas producers. The southern sea otter is inextricably trapped between the developmental policies of Interior and this Court's decision that those early developmental decisions do not affect the coastal zone.

Another unexplored issue is the relationship of the National Environmental Protection Act (NEPA) to each state's coastal zone management program.[93] Neither justice dealt with the apparent inconsistency between the NEPA requirements for an EIS due to OCS leasing and Justice O'Connor's determination that such a lease sale does not directly affect the coastal zone. An EIS is required for "major federal action significantly affecting the quality of the human environment."[94] For a federal activity to significantly affect the quality of the human environment so as to require an EIS without directly affecting the coastal zone is logically inconsistent. Perhaps Justice O'Connor's focus on whether the CZMA can apply to *any* activity on the OCS is the result of this conflict. By finding that the CZMA does not contemplate affects originating in the OCS, Justice O'Connor could reach the result she desired without being faced with this obvious discrepancy.

CONCLUSION

The Court's decision in *Secretary of the Interior v. California* excludes the coastal states from significant decisions that impact their coastal waters.[95] State officials consider this a misinterpretation of congressional intent and say they will seek to make the law explicitly cover the leasing process.[96] Once a lease has been granted, they contend, a state is in a weak position

92. *Id.* at 876.
93. 42 U.S.C. §§ 4321–4370 (1982).
94. *Id.* § 4332(c).
95. 683 F.2d at 1260; 520 F. Supp. at 1380–82.
96. N.Y. Times, Sep. 16, 1984, at 29, col. 4–5.

to challenge development terms.[97] An alternative to this ongoing governmental conflict is legislative action to establish an effective conflict resolution mechanism.[98] An ad hoc panel composed of one representative from the state coastal agency, the governor's office, the Department of the Interior, the Department of Commerce, and the petroleum industry could form a bargaining group.[99] Any deadlocks by this panel would be sent directly to the President for resolution. This panel could provide the flexibility and diverse inputs needed to make appropriate decisions balancing development with conservation.

This decision will force state coastal managers to deal with federally established leasing decisions and policies *after* the process has already begun. Also, this abdication of power to Interior will defeat the congressional preference for long range planning and close cooperation between federal and state agencies.[100] Absent some legislative action to mediate these recurring conflicts, coastal zone managers will be forced to function under the upper hand given to Interior by the majority. This tip of the balance of power towards resource development deals a losing hand to those concerned with resource conservation and protection.

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97. *Id.* at 29, col. 5.
98. Comment, *Coastal Zone Federalism*, 1983 B.Y.U.L. REV. 123, 145.
99. *Id.*
100. 104 S. Ct. at 679.