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The author is indebted to James D. Leary, Jr., Florida State University College of Law, class of 1986, for his guidance in preparing this article.

COMMENT

FEDERAL OFFSHORE LEASING: STATES' CONCERNS FALL ON DEAF EARS

RICHARD GROSSO*

I. INTRODUCTION

A dominant theme of the current administration in Washington is "The New Federalism." This term describes the shifting of powers and responsibilities away from the federal government to the individual states that has taken place during the 1980's. While this course has been vigorously and successfully pushed by President Reagan's administration, the changing roles of the state and federal governments had already been recognized in many areas during the preceding decade. The management of the nation's coastlines is one of those areas.

A statutory scheme of shared responsibilities over the control and protection of this natural resource had been in place as early as 1972. This federal/state partnership would seem like just the sort of program envisioned by the New Federalism. Ironically, during the course of the 1980's the balance of power over the management of the coastal zone has shifted dramatically in favor of the federal government. To be sure, the protection of the resources in the coastal zone is still predominantly a state prerogative. However, the federal government has become the senior partner, reaping most of the benefits that come from having control of the nation's ocean resources while leaving the states to absorb most of the costs.

This article will discuss the balance of power issue as it relates to the nation's coastlines. Of specific concern will be the interplay between the Outer Continental Shelf Lands Act (OCSLA),[1] under which the federal government leases its submerged lands to commercial enterprises, and the Coastal Zone Management Act (CZMA)[2] which attempts to protect the coastal zone surrounding

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1. 43 U.S.C. § 1331 (1985).
2. 16 U.S.C. § 1451 (1985).

the United States. The series of administrative actions and court decisions which have implemented and interpreted those two statutes will be analyzed in order to assess the necessity for legislative changes to make coastal zone management operate as it was originally intended.

II. THE FEDERAL STATUTORY SCHEME

A. *The Outer Continental Shelf Lands Act*

In 1953, Congress passed the Submerged Lands Act (SLA),[3] granting to the states title to all the lands beneath their navigable waters. This title extended seaward either three geographic miles from their coastlines, or to the seaward boundaries as they existed at the time of statehood.[4] Ownership of all lands seaward of that line, including the outer continental shelf, was reserved to the federal government. As a corollary to the SLA, Congress adopted the Outer Continental Shelf Lands Act (OCSLA) of 1953, authorizing the leasing of lands on the outer continental shelf for mineral resource exploration.[5] The Secretary of the Interior is empowered with administering the OCSLA which is unique among federal administrative programs in that it actually generates revenue.[6] Indeed, monies generated by oil and gas development in the OCS constitute the second largest contribution to the United States Treasury after taxes.[7]

The United States has jurisdiction and control over 1.8 million square miles of continental shelf and slope under which vast amounts of energy resources reside.[8] It has been estimated that at least 3.5 billion barrels of oil and 36 trillion cubic feet of gas lie in reserve offshore,[9] leading to predictions that the outer continental shelf could be the "largest domestic source of oil and gas between now and the 1990's."[10] The ability to control such an important natural resource has made the Secretary of Interior a major figure

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3. 43 U.S.C. § 1301 (1985).

4. 43 U.S.C. §§ 1311(a) and 1312 (1985).

5. *Supra* note 1.

6. *See* Note, *Outer Continental Shelf Leasing Policy Prevails Over the California Coastal Commission*, 24 NAT. RESOURCES J. 1133, 1143 (October 1984).

7. Husing, *A Matter of Consistency: A Congressional Perspective of Oil and Gas Development on the Outer Continental Shelf*, 12 COASTAL ZONE MGMT. J. 301, 306 (1984).

8. Jones, *The Legal Framework for Energy Development On the Outer Continental Shelf*, 10 UCLA-ALASKA L. REV. 143, 144 (1981).

9. *Id.*

10. *Id.* at 144-45.

in coastal zone management issues.

The administration of oil and gas lease sales has been delegated to the Bureau of Land Management.[11] Briefly, the program operates in the following manner. The Bureau tentatively selects and schedules for leasing general areas of the outer continental shelf. Data on possible amounts of oil and gas reserves and other environmental resources are then compiled. A call for nominations (bids) is published in the Federal Register thus allowing oil companies to express interest in particular tracts. After receiving the nominations the Bureau tentatively selects individual tracts for leasing, preparing for each tract a Draft Environmental Impact Statement (DEIS).[12] Before a Final Environmental Impact Statement (EIS) can be prepared, the DEIS must be made available for public review and a hearing must be held in the vicinity of the proposed sale.[13] At this stage, express provision is made for the governors of affected coastal states to submit recommendations on the "size, timing, or location of a proposed lease sale."[14] Affected local governments may also submit such comments. The Secretary of the Interior must accept these recommendations if he finds that they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state."[15] Nevertheless, the final choice as to which tracts will be offered for sale and under what conditions, is the Secretary of the Interior's to make. Final notice of the sale is published in the Federal Register.[16] The acquisition of a lease confers on the purchaser the right to conduct "preliminary activities" on the leased tracts. Before actual exploration can proceed, exploration plans must be submitted. Once these plans are approved by the Secretary, another plan, for development, is submitted and subject to comments by the governors of affected states. When this plan is approved development and production can proceed.[17]

Recognizing the risks inherent in offshore oil drilling, Congress has provided in the OCSLA an oil spill liability fund to pay for the removal of any oil spilled as a result of OCS development as well

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11. Note, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLIAMETTE L. REV. 535, 538-39 (1982).

12. *Id.*

13. Jones, *supra* note 8 at 157.

14. 43 U.S.C. § 1345(a) (Supp. III 1976).

15. 43 U.S.C. § 1345(c) (Supp. III 1976).

16. Note, *supra* note 11.

17. 43 U.S.C. §§ 1340(a)-(c), 1351 (Supp. III 1976).

as for any damage caused by such spills. The Offshore Oil Pollution Compensation Fund is administered by the Secretaries of Transportation and the Treasury and financed by a fee of three cents ($.03) per barrel on oil produced on the OCS and through fines, penalties and reimbursements. Owners and operators of vessels and offshore facilities are held to a limited strict liability for oil spills and must also meet financial responsibility requirements.[18] Any United States resident, federal or state agency or political subdivision which has suffered an economic loss relating to removal costs or environmental damage may assert claims. Injuries to property or natural resources and injuries to the use of property or natural resources including loss of profits, are also compensable.[19]

B. The Coastal Zone Management Act

Enacted in 1972, the Coastal Zone Management act (CZMA) was designed "to preserve, protect, develop and where possible to restore or enhance the resources of the Nation's coastal zone"[20] and to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone. . . ."[21] The "encouragement" and "assistance" comes in the form of a two-pronged incentive for states to develop coastal zone management programs.

While participation is strictly voluntary, the benefits appear hard to refuse. First, once a state's plan is approved by the Secretary of Commerce the federal government will pay up to 80 percent of the cost of developing and administering a coastal zone management program.[22] Second, after such approval, federal actions that affect the state's coastal zone must be "consistent" with the state's approved management program plan.[23] Specifically, the consistency requirement applies to five categories of federal activities: (1) those which are conducted or supported by a federal agency and which directly affect the coastal zone; (2) development projects undertaken by a federal agency in the coastal zone; (3) activities of applicants for federal licenses or permits which will affect land or

18. 43 U.S.C. § 1812 (1984).
19. 43 U.S.C. at §§ 1813-14 (1984).
20. 16 U.S.C. § 1452(1) (1985).
21. 16 U.S.C. § 1452(2) (1985).
22. 16 U.S.C. § 1455(a) (1985).
23. 16 U.S.C. § 1456(e)(2) (1985).

water uses in the coastal zone; (4) activities conducted by the holder of a federal lease or permit which will affect land or water uses in the coastal zone; and (5) federal assistance to state and local governments for projects which affect the coastal zone.[24] The degree of consistency required by an activity as well as whether it must affect, directly affect, or be conducted in the coastal zone to trigger the consistency requirement, depends on which of the five categories into which the activity falls.

The mechanics of consistency determinations also differ depending on the category. When a federal agency is conducting or supporting an activity that directly affects the coastal zone or when the agency itself undertakes a development project in the coastal zone, the agency must notify the state of the action. If the agency determines that its proposed activity will not directly affect the state's coastal zone, it must provide a "negative determination" setting forth the reasons for this conclusion.[25] If the federal agency determines that there will be an effect on the coastal zone, a "consistency determination" accompanied by supporting data which describes the activity and its anticipated effects must be submitted to the state.[26] Department of Commerce regulations require that these determinations be made at the "earliest practicable time in planning, before significant decisions are made," but not until there is "sufficient information to determine reasonably the consistency of the activity with the state's management program."[27] In the event that a state disagrees with a federal determination that an activity either has only a minimal effect on the coastal zone or that an activity is consistent with the state's program and this disagreement cannot be resolved privately, the Act provides for mediation by the Secretary of Commerce. However, the federal decision, subject to limited judicial review, is final.[28]

When applying for federal permits to conduct specific activities, the applicant, not the federal agency involved, must certify that the activity is consistent with the state's plan.[29] The state must notify the federal agency involved of its concurrence with or objection to the applicant's certificate "[a]t the earliest practicable

24. 16 U.S.C. § 1456 (1985).
25. 15 C.F.R. § 930.35(d) (1986).
26. 15 C.F.R. § 930.39(a) (1986).
27. 15 C.F.R. § 930.34(b) (1986).
28. 16 U.S.C. § 1456(h) (1985).
29. 16 U.S.C. § 1456(c)(3) (1985).

time."[30] Failure by the state to give such notice within six months of receiving the certificate will result in a conclusively presumed concurrence.[31] Timely stated objections, however, are not conclusive. The applicant may appeal to the Secretary of Commerce or the Secretary may review the decision on his own initiative.[32] If the Secretary finds, after receiving comments from the state and the federal agency, that the activity is consistent with the CZMA's objectives, or is otherwise necessary in the interest of national security, the state's objection may be overridden and the application approved.[33]

Finally, with respect to projects involving federal assistance to state and local governments, the consistency determination is made by the state or local government.[34] A state's determination of inconsistency will block the project unless the Secretary of Interior rules, either upon the petition of the applicant for the funds or the Secretary's own initiative, that the project is consistent with the purpose of the CZMA or is necessary in the interest of national security.[35]

It is approval of a state's coastal management plan by the Secretary of Commerce that triggers the availability of federal funding and the requirements of the consistency doctrine. The CZMA sets out the requirements which must be met before approval is given. First, state plans must include nine specified elements which essentially involve the definition of key terms, an identification and inventory of the lands in the coastal zone, a land use plan for these lands, and the mechanics of the state's implementation of the plan.[36]

In addition to the substantive requirements, the CZMA also contains certain procedural mandates. These include provisions for coordination with local, area-wide, and interstate plans and agencies,[37] and require that the plan have been subject to public hearings and approval by the governor.[38] Also the CZMA requires that the proper organization be in place to administer the coastal zone management plan, including the designation of a lead agency

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. 16 U.S.C. § 1456(d) (1985).
35. *Id.*
36. 16 U.S.C. § 1454 (1985).
37. 16 U.S.C. § 1455 (1985).
38. *Id.*

to receive and administer the federal grants.[39] A final, and very important set of requirements, ensures that state programs will reflect and accommodate national needs and interests. State plans must give "adequate consideration of the national interest" in the planning for and siting of energy and other facilities.[40] Also before approving a state plan, the Secretary of Commerce must find that relevant federal agencies have been given "the opportunity for full participation" in the development of the plan.[41]

Federal consistency with, and financial assistance for, implementing a state's plan are not the only benefits of federal approval. States with approved plans are also eligible to receive federal grants and loans to assist them in financing public facilities and services and meeting the environmental consequences attributable to activities affecting the coastal zone.[42] Under the Coastal Energy Impact Program,[43] states and local governments are given assistance in meeting demands placed on them by the presence of coastal energy activity. This assistance can take the form of anything from revenues to help retire bonded indebtedness resulting from the provision of onshore public facilities[44] to financial relief for states that have incurred or will incur any "unavoidable loss of a valuable environmental or recreational resource" due to coastal energy activity.[45]

III. THE ISSUES

The statutory scheme just described appears to be comprehensive and highly integrated. Congress obviously intended for oil and gas exploration to take place on the outer continental shelf without damaging the coastal zones of affected states. Decisions with potential impacts on the coastal zone were to be made through cooperation between the federal and state governments. Envisioned was a "partnership" which would afford the states "*substantial involvement*"[46] in matters over which the federal government had jurisdiction, but which were expected to have an impact, both environmentally and economically, on the states. Unfortunately,

39. 16 U.S.C. § 1455(c) (1985).
40. 16 U.S.C. § 1455(c)(8) (1985).
41. 16 U.S.C. § 1455(c)(1) (1985).
42. 16 U.S.C. § 1456(a) (1985).
43. 16 U.S.C. § 1456(a) (1985).
44. 16 U.S.C. § 1456(a)(1)(e) (1985).
45. 16 U.S.C. § 1456(a)(1)(G) (1985).
46. Note, *Federal Consistency Under the CZMA*, 7 U. HAWAII L. REV. 135-37 (1985).

increasing demands for offshore energy exploration have put great strains on this statutory scheme, revealing its inherent shortcomings. What has emerged is not so much the partnership envisioned by Congress, but rather a clash of two federal statutes with conflicting goals. The OCSLA, designed to foster offshore development, and the CZMA, adopted to protect the coastal environment, were intended to carry equal weight; however, no adequate mechanism for resolving the tie was provided. As a result, the interplay of these two acts offers more chances for resistance than for cooperation.[47] The federal government's superior position has naturally tended to tip the scales in favor of the OCSLA's goals. Moreover, the federal/state cooperation envisioned by the CZMA has failed to materialize. In adopting and amending the act, Congress left major questions to be answered by administrative actions and judicial decisions. The resolution of these issues, at least from the state's point of view, has been largely unsatisfactory.[48]

The remainder of this article will examine two important issues which have emerged concerning offshore energy development and its effects on the coastal zone. First, the United States Supreme Court's decision in *Secretary of the Interior v. California*[49] holding that the sale of oil and gas leases by the federal government is not subject to the consistency requirement will be critically analyzed. Second, a recent federal court decision in *Exxon v. Fischer*[50] holding that a state may not base a finding of inconsistency on economic considerations will be discussed. Finally, some changes to the law which would effectively reverse these decisions, will be proposed.

A. Secretary of the Interior v. California: Do Lease Sales Directly Affect the Coastal Zone?

1. The Opinion of the Supreme Court.

On January 11, 1984, the Supreme Court, in a 5-4 decision, ruled

47. Comment, *Cooperative Federalism for the Coastal Zone and the Outer Continental Shelf: A Legislative Proposal*, 1983 B.Y.U. L. REV. 123, 143 (1983).

48. *See generally* Note, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLIAMETTE L. REV. 535 (1982); Note, *Federal "Consistency" Under the Coastal Zone Management Act - A Promise Broken by Secretary of the Interior v.California*, 15 ENVTL L. 153 (1984).

49. 464 U.S. 312 (1984).

50. Exxon v. Fischer, United States District Court, Central District of California, No. 84-2362 PAR, Memorandum of Decision and Order (October 9, 1985).

that consistency review under the CZMA was not required when the Department of the Interior sold oil and gas leases on the outer continental shelf off the coast of California.[51] While the Court's opinion, written by Justice O'Connor, answered with a resounding "no" to the question of whether oil and gas lease sales were subject to consistency review, its reasoning is somewhat cryptic, offering "at least two distinct rationales"[52] for this conclusion.

The opinion attempts to decide whether Congress, in inacting the CZMA had contemplated the effects of granting offshore oil leases. The question presented was whether the sale of leases is an activity which directly affects the coastal zone under the section of the CZMA requiring federally conducted or supported activities to be consistent to the maximum extent practicable with approved state plans.[53] Finding the express language of the CZMA of little help in answering this question and confronted with the parties' contrary definitions of "directly affecting,"[54] O'Connor focused on the legislative history of the CZMA.

When the House and Senate first passed their respective versions of the CZMA, both bills required consistency only for federal activities "in the coastal zone." The House-Senate Conference Committee amended this to read "directly affecting the coastal zone."[55] This change was approved by both chambers without any discussion.[56]

Recognizing that "at first sight" this change appeared to be an expansion of the CZMA's scope,[57] O'Connor found available "a much more plausible explanation."[58] The original House and Senate versions of the CZMA contained different definitions of the coastal zone. The Senate defined it to exclude lands under federal jurisdiction.[59] However, the House's definition included lands under federal jurisdiction, thus subjecting activities on these lands to consistency review.[60] According to O'Connor both bills excluded

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51. 464 U.S. at 315.

52. Florida Comments on the Draft Federal Consistency Study 3 (Vol. 1)(1985)(hereinafter referred to as Florida Comments).

53. 464 U.S. at 315.

54. *Id.* at 321.

55. *Id.* at 322.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 323.

submerged lands on the OCS from this definition.[61] The amendment was "a simple compromise."[62] In exchange for adoption of the Senate's narrow definition of coastal zone, it was agreed that activities on federal lands not "in," but nevertheless "directly affecting," the zone would be subject to the consistency requirements.[63] Support for this conclusion is found in an admittedly "cryptic" [64] conference report which stated that the use of such federal lands affecting a state's coastal zone would be subject to the consistency requirement.[65] The Court next concluded that while OCS activities other than oil and gas leasing might be covered by the consistency doctrine, Congress "expressly intended to remove the control of OCS resources from CZMA's scope."[66] O'Connor found support in numerous examples of Congress's "insist[ance] that no part of CZMA was to reach beyond the [state's] three mile territorial limit."[67] A fair reading of this part of the Court's opinion is that oil and gas leases are not subject to the consistency requirement because they apply to an activity which occurs outside of the coastal zone. However, O'Connor's opinion offers another possible rationale for the Court's holding — the interplay of the provisions of the CZMA and the OCSLA.

Section 307 of the CZMA contains the consistency requirement. Justice O'Connor explained its provisions:

> Section 307(c) contains three coordinated parts. Paragraph (1) re-

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 324.
67. *Id.* First, the court cited repeated statements during congressional floor debates to the effect that the CZMA did not cover the OCS or that the federal government was retaining its jurisdiction beyond the three mile limit. Second, and most importantly to the Court, Congress had "debated and firmly rejected at least four proposals to extend parts of CZMA to reach OCS activities". While passing the CZMA in 1972 the Conference Committee had rejected language that would have required the Secretary of the Interior to develop a federal management program for the contiguous zone of the United States. The Committee stated that this language "would create potential conflicts with legislation already in existence concerning continental shelf resources". The Conference Committee also rejected a provision that would have required the Secretary of Commerce to extend coastal zone marine sanctuaries established by the states into the OCS region. In addition, two other attempts to extend the CZMA's reach beyond the coastal zone were rejected by the Senate. Justice O'Connor relegated to a footnote statements explicitly stating that oil and gas lease sales were subject to consistency review. In light of the "systematic rejections" of every attempt to extend the CZMA's reach, the opinion concluded that "the 1972 Congress did not intend [the consistency requirement] to reach OCS lease sales." *Id.* at 324-30.

> fers to activities "conduct[ed] or support[ed]" by a federal agency. Paragraph (2) covers "development projects" undertake[n] by a federal agency. Paragraph (3) deals with activities by private parties authorized by a federal agency's issuance of licenses and permits. The first two paragraphs thus reach activities in which the federal agency is itself the principal actor, the third reaches the federally approved activities of third parties. Plainly, Interior's OCS lease sales fall in the third category. Section 307(c)(1) should therefore be irrelevant to OCS lease sales, if only because drilling for oil or gas on the OCS is neither "conduct[ed]" nor "support[ed]" by a federal agency. Section 307(c)(3), not section 307(c)(1), is the more pertinent provision.[68]

O'Connor rejected California's suggestion that section 307(c)(3) applies only to private applicants, while section 307(c)(1) applies to federal agencies, finding it "squarely contradicted by abundant legislative history and the language of section 307(c)(3) itself."[69] Furthermore, she concluded that section 307(c)(3) "definitely does *not* require consistency of OCS lease sales."[70] That section applies to the issuance of a license or permit and makes no mention of lease sales.[71] The opinion noted that this omission was specifically preserved in 1976 when the House rejected proposals to add the word "lease" to section 307(c)(3).[72] Conceding that "the distinction between a sale of a 'lease' and the issuance of a permit to 'explore', 'produce', or 'develop' oil or gas seems excessively fine," Justice O'Connor stated that "it is a distinction that Congress has codified with great care."[73]

To clarify this distinction Justice O'Connor turned to an examination of the OCSLA. She found that the Act contained "four distinct statutory stages to developing an offshore oil well,"[74] explaining them in detail.

The first stage is the Department of Interior's formulation of a five-year leasing program. During the preparation of this program the OCSLA requires that the comments and requests of interested federal agencies and the governors of affected states must be re-

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68. *Id.* at 332-33.
69. *Id.* at 333.
70. *Id.*
71. *Id.* at 334.
72. *Id.*
73. *Id.* at 335-36.
74. *Id.* at 337.

sponded to in writing.[75] The Court found "no suggestion that CZMA section 307(c)(1) consistency requirements operate here."[76]

The second stage — the focus of the issue before the Court — involves the sale of leases. During this process the governor of any affected state, as well as any affected local government, has an opportunity to make recommendations regarding the proposed sales. O'Connor noted Interior's duty to accept these recommendations if they strike a reasonable balance between national and local interests, as well as its final authority to proceed with the sale.[77] O'Connor was quick to point out that lease purchasers acquire the right only to conduct preliminary activities on the OCS and nothing more.[78] Thus, there was nothing to indicate that lease sales "directly affect" the coastal zone. A lease conferred "no right to proceed with full exploration, development, or production" that might trigger CZMA section 307(c)(3)(B); the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted."[79] The specific references to consistency O'Conner found lacking in the first two stages of OCS development are contained in those provisions relating to the latter stages.

The third stage of the process is the approval of exploration plans. The OCSLA explicitly states that such plans must contain a certificate stating that they are consistent with applicable state management plans.[80] In the same fashion, the approval of a plan for exploration and development, the fourth stage, is specifically contingent upon a finding of consistency.[81]

Justice O'Connor placed much emphasis on the pains taken by Congress to separate the various decisions involved in the process. From her reading of the intricate provisions of both the CZMA and OCSLA she concluded that "[t]he first two stages [developing a leasing plan and selling leases] are not subject to consistency review; instead, input from state governors and local governments is solicited by the Secretary of Interior."[82] Congress, it is suggested,

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75. *Id.*
76. *Id.* at 338.
77. *Id.*
78. *Id.* at 339.
79. *Id.*
80. 43 U.S.C. § 1340(c)(2) (Supp. III 1976).
81. 43 U.S.C. § 1351(d) (Supp. III 1976).
82. 464 U.S. at 340-41.

specifically exempted the sale of leases from consistency review.

The majority opinion concludes by offering a third possible ground for its ruling that lease sales do not "directly affect" the coastal zone. As Justice O'Connor wrote: "even if OCS lease sales are viewed as involving an OCS activity 'conduct[ed]' or 'support[ed]' by a federal agency, lease sales can no longer aptly be characterized as 'directly affecting' the coastal zone."[83] This followed from her earlier observation that lease purchasers only acquired rights to conduct preliminary activities. Full scale exploration and development require further approval which might be denied upon a finding of inconsistency.[84] Justice O'Connor was unpersuaded by the argument that a lease sale was a crucial first step, generating momentum that makes approval of subsequent steps inevitable.[85] She noted the counter-argument that not enough information is known at the sale stage on which to base a consistency determination.[86] Nevertheless, she felt that the policy choice had already been made by Congress. While "[c]ollaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts. . . Congress did not intend section 307(c)(1) to mandate consistency review at the lease sale stage."[87]

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, authored a lengthy and scathing dissent to the majority opinion. Stevens, saw little need for the Court having to engage in any analysis at all. To Stevens, the issue could be, and indeed had been, settled by answering the factual question of whether lease sales directly affected the coastal zone under the plain meaning of the CZMA.[88] Justice Stevens wrote:

> The Court reaches a contrary conclusion, however, based on either or both of these two theories: (1) section 307(c)(1) only applies to federal activities that take place within the coastal zone itself or in a federal enclave within the zone — it is wholly inapplicable to federal activities on the outer continental shelf no matter how seriously they may affect the coastal zone; (2) even if the sale of oil leases by the Secretary of the Interior would have been covered by section 307(c)(1) when the CZMA was enacted in

83. *Id* at 342.
84. *Id.*
85. *Id.* at 342.
86. *Id.*
87. *Id.* at 343.
88. Secretary of the Interior v. California, 464 U.S. 312, 344 (1984) (Stevens, J., dissenting).

> 1972, amendments to an entirely different statute adopted in 1978 mean that the leases cannot directly affect the coastal zone notwithstanding the fact that those amendments merely imposed additional obligations on private lessees and did not purport to cut back any obligation previously imposed on federal agencies.[89]

The dissent found the first theory refuted by the plain language, legislative history, and basic purpose of the CZMA as well as the findings of the district court.[90] The second theory was thought to be similarly "overwhelmed by a series of unambiguous legislative pronouncements that consistently belie the Court's interpretation of the intent of Congress."[91]

In attacking the first theory, Justice Stevens first saw no distinction in the plain language of the CZMA between "activities that take place outside the coastal zone and those that occur within the zone. It is the effect of the activities rather than their location that is relevant."[92] Further, the dissent took a view of the 1972 Conference Committee's substitution of "directly affecting" for "in" contrary to that taken by the majority opinion. The House version of the original CZMA, he wrote, had "clearly recognized that activities outside the coastal zone could have a critical impact upon the coastal zone,"[93] in that it permitted states to establish marine sanctuaries in the OCS and that it required the federal government to establish sanctuaries in areas adjacent to state sanctuaries.[94] According to Justice Stevens, the House agreed to drop these requirements, as well as the inclusion of federal lands in the definition of "coastal zone," in exchange for the switch from "in" to "directly" affecting."[95] The result, he continued, was that federal activities which directly affected the coastal zone, whether occurring inside or outside of it, became subject to consistency review under section 307(c)(1).[96]

The dissent also found a report on the 1971 Senate version of the CZMA to be highly persuasive. That report construed the con-

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89. *Id.* at 344-45.
90. *Id.* at 345.
91. *Id.*
92. *Id.*
93. *Id.* at 349.
94. *Id.* at 350.
95. *Id.* at 348. *See also* Fitzgerald, *Secretary of the Interior v. California: Should Continental Shelf Lease Sales Be Subject to Consistency Review?*, 12 B.C. ENVTL AFF. L. REV. 425, 448 (1985).
96. 464 U.S. at 348.

sistency requirement broadly:

> [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 and waters within the territorial sea, should be administered consistent with approved state management programs. . . .[97]

This interpretation should be followed, said Stevens, since it was construing language identical to that contained in the 1972 version of the CZMA which eventually was adopted. Nothing in the 1972 version had indicated that a different construction was intended.[98] To bolster this conclusion, the dissent quoted the following language from the Conference Committee Report explaining the language compromise:

> [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 agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs.* In addition, similar consideration of state management programs must be given in the process of issuing Federal licenses or permits for activities affecting State coastal zones. The Conferees also adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields, including submerged lands.[99]

Stevens also relied on the underlying purposes of the CZMA. He found that the congressional findings contained in the CZMA "surely indicate a congressional preference for long-range planning and for close cooperation between federal and state agencies in conducting or supporting activities that directly affect the coastal zone."[100] The dissent went on to explain how the majority's holding was "squarely at odds with this purpose:"[101]

> The sale of OCS leases involves the expenditure of millions of

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97. *Id.* at 352. (quoting S. Rep No. 92-526, p. 20 (1971)).

98. *Id.*

99. *Id.* at 353 (quoting H.R. Conf. rep. No. 92-1544, p. 14 (1972), U. S. Code Cong. & Admin. News 1972, p. 4824) (emphasis supplied by Court).

100. *Id.* at 357.

101. *Id.*

> dollars. If exploration and development of the leased tracts cannot be squared with the requirements of the CZMA, it would be in everyone's interest to determine that as early as possible. On the other hand, if exploration and development of the tracts would be consistent with the state management plan, a pre-leasing consistency determination would provide assurances to prospective purchasers and hence enhance the value of the tracts to the Federal Government and, concomitantly, the public. Advance planning can only minimize the risk of either loss or inconsistency that may ultimately confront all interested parties. It is directly contrary to the legislative scheme not to make a consistency determination at the earliest possible point. It is especially incongruous since the Court agrees that all federal activity "in" the coastal zone is subject to consistency review. If activity in the OCS directly affects the zone — if it is in fact the functional equivalent of activity "in" the zone — it is inconceivable that Congress would have wanted it to be treated any differently.
> The *only* Federal activity that ever occurs with respect to OCS oil and gas development is the decision to lease; all other activities in the process are conducted by lessees and not the Federal Government. If the leasing decision is not subject to consistency requirements, then the intent of Congress to apply consistency review to federal OCS activities would be defeated and this part of the statute rendered nugatory.[102]

Stevens quoted with approval language from the opinions of the lower courts in this case to support his position that activity outside of the coastal zone can be the functional equivalent of an activity in the zone. He felt that the selection of lease tracts and lease terms were decisions "of major importance to the coastal zone".[103] Borrowing from the district court's opinion, Stevens went on to describe some of the most important effects on the coastal zone.[104]

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102. *Id.* at 357-59 (footnote omitted).

103. *Id.* at 360.

104. *Id.* at 360-61.

The "Notice of Oil and Gas Lease Sale No. 53(Partial Offering)," as published in the Federal Register, announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulation result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required; the Department of Interior, as lessor, specifically reserves the right to regulate the placement of "any pipeline used for transporting production to shore." Lessees must agree, pursuant to No. 1, to preserve and protect biological resources discovered during the conduct of operations in the area.

The Secretarial Issue Document ("SID"), prepared in October 1980 by the Department of

The court of appeals, noted Stevens, had agreed with these findings, along with the conclusion that decisions at the lease sale stage established the basic scope of subsequent development. The court had found that critical decisions regarding the size and location of the tracts, the timing of the sale, and other conditions of the lease were made early on in the process. These decisions in turn would "at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction."[105]

> Under these circumstances Lease Sale 53 established the first link in the chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis. . . .[106]

That lease sales set in motion this "chain of events" was evident, in Justice Stevens' view, by the fact that oil companies spend millions of dollars to acquire leases. He concluded that "[w]hen the intended and most probable consequence of a federal activity is oil and gas production that will dramatically affect the adjacent coastal zone, that activity is one "directly affecting' the coastal zone within the meaning of section 307(C)(1)."[107]

Stevens also disagreed sharply with Justice O'Connor's view of the effect of legislative developments subsequent to the CZMA's adoption in 1972. To Stevens, the 1976 amendment to the CZMA, establishing the Coastal Energy Impact Program, demonstrated

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Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of an oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%. Both the SID and the EIS [Environmental Impact Statement] contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 sills are expected during the project conducted in the Santa Maria subarea. According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

* * *

Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreational sportfishing, navigation, cultural resources, and socio-economic factors.

105. *Id.* at 362.

106. *Id.* (quoting 683 F.2d 1253, 1260 (9th Cir. 1982)).

107. *Id.* at 364.

congressional recognition "that OCS leasing could dramatically affect the adjacent coastal zone, not only environmentally but socially and economically."[108]

Stevens also took a different view of Congress' rejection in 1976 of an amendment which would have added the word "lease" to the CZMA's consistency provisions. The Senate and House reports on those amendments were read as containing restatements of 1972 congressional intent. The Senate Report had stated that the consistency requirement applies to activities in or out of the coastal zone which may affect that area." This report specifically referred to OCS leases:

> One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State's coastal zones, including Federal authorization for non-Federal activity, but under the act as it presently exists, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply.[109]

The House Report was in agreement, stating that the change would "make explicit . . . that federal leasing is an activity already covered by section 307 of the Act".[110]

> To argue otherwise would be to maintain that a federal permit for a wastewater discharge, for example, must be certified by the applicant to be in compliance with a state program, the state being given an opportunity to approve or disapprove of the proposal, while a federal lease for an Outer Continental Shelf tract does not have to so certify. Given the obvious impacts on offshore petroleum resources, it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of "federal consistency."[111]

While the conference committee deleted the word "lease" from the final bill, Stevens was persuaded that the reason "was not disagreement with the concept of applying section 307 to OCS leasing, but rather to supplement that requirement by applying consis-

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108. *Id.* at 365.
109. *Id.* at 366 (quoting S. Rep. No. 94-277, pp. 36-37 (1975)) (emphasis in original).
110. *Id.* at 367 (quoting H.R. Rep. No. 94-878, p. 52 (1976)).
111. *Id.*

tency to other stages in the process as well."[112] The "widespread agreement" by Congress in 1976 that leasing was already subject to consistency review indicated to Justice Stevens that Congress simply saw no need for the amendment. All that was left to do was to require consistency review at later stages in the process.[113] This reading of the legislative history was bolstered by the fact that the proposal before Congress was to add the word lease to the section of the CZMA dealing with the consistency obligations of lessees.[114] The consistency obligation at the lease sale stage is on the federal government.

The dissent also disagreed with the majority's finding that the 1978 amendments to the OCSLA, by requiring approval for exploration and development in the OCS, implicitly removed leasing from the consistency review requirements. Stevens saw the issue as having been settled by a savings clause in the House Report on those amendments which "made it clear that the consistency obligation of the CZMA would continue to apply to OCS leasing decisions."[115]

The reauthorization of the CZMA in 1980 also supported the dissenting opinion. Both the Senate and House Reports stated that the 1976 amendments had left intact the requirement that leasing be subject to consistency review. Consider, for example, the House Report:

> [The 1976 amendments] did not alter Federal Agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases.[116]

The Senate Report agreed with this conclusion, stating that as the Department of the Interior conducts its lease sale activities it

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112. *Id.* at 368.

113. *Id.* at 368-69.

114. *Id.* at 372.

115. *Id.* at 371.

> The committee is aware that under the Coastal Zone Management Act of 1972, . . . certain OCS activities including lease sales and approval of development and production plans must comply with "consistency" requirements as to coastal management plans approved by the Secretary of Commerce. Except for specific change made by Titles IV and V of the 1977 amendments, nothing in this act is intended to amend, modify, or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures for consistency once a State has an approved Coastal Zone Management Plan.

Id. (quoting H.R. Rep. No. 95-590, p.153, n.52 (1977), U.S. Code Cong. & Admin. News 1978, p.1559, n.52).

116. *Id.* at 373.

"sets in motion a series of events which have consequences in the coastal zone."[117]

2. Analysis

The Supreme Court's decision in *Secretary of Interior v. California* has received much criticism, on both legal and policy grounds, by members of Congress, state management program directors, environmentalists and commentators. From the perspective of those with an interest in states' efforts to protect their coastal zones, the decision can only aggravate what had already been viewed as a lack of good faith cooperation by federal agencies in dealing with the states.[118] The case can easily be viewed as a clear signal to Washington that leasing schedules and sales will be allowed to proceed more swiftly in the future, with resistance from the states reduced to a minimum. In short, the decision may bring increased oil and gas production and with it the attendant risks to the environment.

The decision has also been assailed from a strictly legal perspective. It has been lamented that the majority opinion written by Justice O'Connor is unclear as to the rationale and even the precise holding of the Court, thereby raising more questions than it answered.

As noted earlier, Justice O'Connor's opinion lends itself to a number of differing interpretations. According to at least one commentator, the Court held that "only federal activity conducted within the geographical confines of the coastal zone can 'directly affect' the coastal zone within the meaning of the CZMA."[119] Others, however, have stated that the opinion "did not preclude review of federal activities other than oil and gas lease sales on the Outer Continental Shelf."[120]

Both of these interpretations find support in the court's opinion. Part II of the opinion is based entirely on legislative history and concludes that Congress meant for the states to have no consistency jurisdiction over activities without their seaward boundaries. Part IV, on the other hand, relies on an examination of the statutory framework involved to find that Congress made a conscious

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117. *Id.* at 375 (quoting S. REP. No. 96-783, p.11 (1980).

118. Letter from Bob Graham, Governor of Florida, to Dr. Anthony J. Calio, Administrator, National Oceanic and Atmospheric Administration, p.2 (Aug. 28, 1985) (hereinafter referred to as Graham letter).

119. *See* Fitzgerald, *supra* note 95, at 447.

120. *See* Graham letter, *supra* note 118.

choice to exclude leasing activities from consistency review due to the presence of environmental safeguards which applied to later stages of the process. Thus, it is difficult to determine which rationale persuaded the four concurring justices. In any event the decision is flawed.

In drafting the CZMA, Congress left many key terms, including "directly affecting" undefined. The parties in the California case, of course, had their own ideas of what it meant. The Department of Interior felt that the term meant "having a direct, identifiable impact on the coastal zone."[121] A lease sale would not fit this definition. The lack of specific information regarding actual drilling and the need for subsequent approval of plans would mean that the impact of leasing is at this point indirect and generalized. By contrast, California defined "directly affecting" as "initiating a series of events of coastal management consequence."[122] Viewed in this manner, lease sales, being the crucial first step in a process which has probable and intended impacts on the coastal zone, would fit the definition.

Since the CZMA itself offered the Court little guidance, O'Connor felt compelled to examine the act's legislative history. This course was misguided at best. First of all, as Stevens points out, the plain language of the CZMA should have controlled. "Directly affecting" under any reasonable interpretation, is much broader a phrase than "in." The presence of this term in the CZMA should have precluded any reading of the Act that excluded all activity not conducted "in" the coastal zone from consistency review. In any event O'Connor should have stayed within the four corners of the act she was construing. Certainly the legislative findings contained in the CZMA, and the balance of its provisions, would have been more instructive than obscure samplings of legislative history.

Compounding this error was the fact that the legislative history was especially vague in this case. Both sides were able to cite convincing quotations from both committee reports and floor debates. For example, Senator Hollings, one of the CZMA's chief sponsors, was quoted by both parties in support of their positions. It was simply inappropriate to rely on these pronouncements as the basis for a decision in this case.

When engaging in statutory construction courts usually look to

121. 464 U.S. at 321.
122. *Id.*

the interpretations provided by the agency charged with administering the law in question. Such interpretations, though not controlling, are given great deference by the courts due to the agency's expertise in the area. The National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce is the federal agency charged with administering the CZMA.[123] In 1977 the Department of Interior objected to NOAH's intention to adopt a regulation applying the consistency requirement to federal OCS leasing.[124] In 1979 this dispute was submitted to the Department of Justice which ruled that Interior's pre-leasing activities were subject to consistency review.[125] Thus, up until May, 1981, NOAA's interpretation of the CZMA, concurred in by the Justice Department, had been that consistency review applied to OCS leasing because leasing "sets in motion actions which will invariably affect coastal resources".[126] In May, 1981, shortly after the first complaint was filed in *Secretary of Interior v. California*, NOAA proposed a new regulation which completely reversed this longstanding interpretation. According to this proposal an activity directly affected the coastal zone only "if the federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or . . . initiates a chain of events reasonably certain to result in such alteration, without further required agency approval."[127] These proposed regulations were challenged both in the courts and in Congress. California sued in federal district court, alleging that the regulations were contrary to the CZMA's intent.[128] Concurrent resolutions were introduced in Congress to exercise a legislative veto of the proposal.[129] Senator Hollings, introducing the Senate version, said that the new definitions would "fly in the face of the intent of the law and the legislative history governing the proper interpretation of the provisions."[130] The negative reaction caused NOAA to withdraw the regulations[131] and at this writing the term "directly affecting" is not defined in

123. 16 U.S.C. § 1463 (1985).

124. Note, *Federal "Consistency" Under the Coastal Zone Management Act — A Promise Broken by Secretary of the Interior vs. California*, 15 ENVTL L. 153, 174 (1984).

125. *Id.*

126. *Id.*

127. 46 Fed. Reg. 26, 658-59 (1981).

128. Yi, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL L. REV. 159, 173 (1982).

129. *Id.* at 179.

130. *Id.*

131. *Id.* at 175.

the Code of Federal Regulations.[132]

O'Connor relegated a discussion of NOAA's interpretation of "directly affecting" to a footnote. She was unpersuaded that NOAA had interpreted the consistency requirement broadly for many years, changing its stance only after the issue had been brought before a federal court. While one might have concluded that NOAA's long standing interpretation should have been given great weight since it changed only under circumstances that suggested the imposition of political pressure from above, O'Connor concluded that "the Agency has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter".[133]

The majority opinion also ignored numerous post-enactment legislative statements that revealed a belief that the CZMA, as adopted, required lease sales to be consistent with state management plans.[134] In the face of these explicit statements, the Court instead relied on a negative inference — that Congress had never added the word "lease" to the CZMA's consistency provisions. However, with regard to Congress' rejection in 1980 of four proposals extending the consistency requirements to OCS activities, one commentator noted "[t]hese four proposals . . . were not rejected because of congressional opposition to extending the CZMA's requirements to OCS activities. In fact, they were deleted because of their own inherent defects."[135] One of those inherent defects was that it made little sense to insert the word "lease" into section 1456 of the CZMA, which sets out the consistency obligations of applicants for federal licenses and permits. That section applies when these applicants are seeking permission "to conduct an activity" pursuant to an already acquired lease. The consistency obligation at the lease sale stage falls on a federal agency. When the Department of Interior conducts its pre-lease and lease sale activities, it is most certainly "conducting or supporting activities directly affecting the coastal zone" under section 1456(c)(1) of the CZMA. At no time did Congress ever reject the addition of the word "lease" to this section. It simply did not think such a change necessary.

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132. *Id.* at 172, n.115. On the other hand, the August 1985 amendments to the Federal Consistency regulation specifically identifed oil and gas leases as not directly affecting the coastal zone and therefore not subject to consistency review. *See* 15 C.F.R. § 930.33(c) (1986).

133. 464 U.S. at 320, n.6.

134. *See supra* notes 107-115 and accompanying text.

135. Fitzgerald, *supra* note 95 at 451.

For this same reason, the 1978 amendments to the OCSLA cannot support O'Connor's opinion. She seems to suggest that even if lease sales had been subject to consistency review in the past, the 1978 amendments, which made clear that the sale of a lease was a distinct step in the process and placed additional burdens on private lessees, somehow repealed by implication the consistency requirement as applied to leases.[136] This conclusion cannot be reconciled with the text of those amendments which stated that "[e]xcept as otherwise expressly provided in this act, nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972. . . ."[137] Furthermore, to read the 1978 OCSLA amendments as to weaken the state's role in leasing decisions completely ignores the purpose of those amendments. Congress had felt the need to cure the "carte blanche" power that had been given to the Secretary of the Interior.[138] Dissatisfaction with the Secretary's lack of cooperation with the states under the then existing law,[139] and the hope that increased state participation would decrease lawsuits[140] provided the motivation for the 1978 amendments. "The policy rationales and the legislative history, as well as the language of the statute, clearly demonstrate that the 1978 amendments do not exempt OCS lease sales from the consistency requirements of the CZMA."[141]

One final point about the majority's discussion of legislative intent deserves mention. The concern over the environmental hazards associated with offshore drilling which culminated in the adoption of the CZMA in 1978 was triggered by an incident that had occurred three years earlier. On January 28, 1969, there was an oil well "blow-out" on a drilling project in the Santa Barbara Channel, off the coast of California. This disaster, which occurred on OCS lands outside of California's coastal zone boundary, had a devastating effect on a large portion of that state's shoreline.[142] This event focused national attention on the need to consider the possible impacts of OCS drilling on state's coastal zones. Unfortu-

136. 464 U.S. at 336.
137. 43 U.S.C. § 1866(a) (Supp. V 1976).
138. Note, *supra* note 11, at 549 (quoting H.R. REP. No. 590, 95th Cong.)
139. Jones, *supra* note 8, at 179.
140. Note, *supra* note 11, at 549.
141. Yi, *supra* note 128, at 179.
142. Note, *The Seaweed Rebellion Revisited: Continuing State-Federal Conflict*, 20 WILLIAMETTE L. REV. 83, 84 (1984).

nately, the majority in *Secretary of the Interior*, in its efforts to place an overly strict and literal interpretation on the CZMA, failed to take this important impetus for the act's passage into account.

In holding that the need for a federal lessee to gain approval for exploration and drilling subsequent to acquiring the lease made consistency review at the sale stage unnecessary, the Court grossly undervalued the significance of the Interior Department's pre-lease activities. This process, outlined in Part 2 of this article, involves the most fundamental decisions concerning where, when, and how drilling for oil and gas will proceed. It is only at this stage of the process, where development parameters are being set,[143] that "coastal zone managers can perform a holistic analysis of effects."[144] A case-by-case analysis of development on particular tracts, by contrast, cannot assess the cumulative effects of exploration. Unfortunately, it is this approach that state coastal zone managers are left with after *Secretary of the Interior v. California*.

The significance of the pre-lease decision-making process and hence the need for consistency review at this stage is clearly evident from the following passage in the trial court's opinion:

> Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage, which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the sale and the stipulations to which the leases are subject. Each of these are key [OCS] planning decisions. The selection of tracts to be let determines where the lessee can explore and produce oil and gas. The decision to offer or delete various tracts also determines which estuaries, reefs, wetlands, beaches, or barrier islands are exposed to the risk of oil spills and which are not. The particular stipulations imposed on the lessors, along with the designated location of the tracts, influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction. Stipulations included in the lease determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts. In addition, decisions made during the preleasing stage establish the timing of OCS develop-

143. Husing, *supra* note 7, at 305.
144. *Id.*

> ment and production. Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development.[145]

This chain of events culminates in some significant impacts upon state and local governments. "These effects can take the form of damaging a flourishing tourist industry, damaging the physical environment, over-stimulating of the economy, or a rapid depletion of nonrenewable resources."[146]

Of course, the environmental impacts are the most dramatic. Aside from the possibility of oil spills, considered to be the most catastrophic effect, other damages associated with the drilling for and transportation of oil include air pollution from hydrocarbon omissions generated by the loading of barges or tankers with oil;[147] aesthetic harm; noise pollution;[148] and increased population in fragile coastal areas.[149]

It is the economic burdens, however, that are more certain. For the most part these burdens fall upon local governments. Offshore exploration requires large-scale onshore development such as pipeline landfalls, harbor supply bases, refineries and deepwater ports.[150] There are other attendant pressures. Increased labor and staffing requirements of energy related facilities increases population in coastal areas.[151] Tourist-based economies may suffer from environmental or aesthetic damage to coastal and marine resources.[152] The threat of all these impacts will also cause state and local governments to incur increased costs for regulation of these OCS effects.[153] Consistency review at the lease sale stage would allow state and local officials to better anticipate and plan for these effects. Coastal zone management plans can be effectively implemented only if this is done.

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145. State of California By and Through Brown v. Watt, 520 F. Supp. 1359, 1371 (C.D. Cal. 1981) *reversed*, 140 S. Ct 656 (1984).

146. A Report on Oil and Gas Leasing in Florida Offshore Waters at 11 (undated).

147. Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent with State Coastal Zone Management Programs?*, 14 U.C.D. L. REV. 105, 113 (1980).

148. Comment, *Prospects for Increased State and Local Control Over OCS Leasing: The Timing of the Environmental Impact Statement*, 21 SAN DIEGO L. REV. 699, 714 (1984).

149. Linsley, *Federal Consistency and OCS Oil and Gas Leasing: The Application of the "Directly Affecting" Test to Pre-Lease Sale Activities*, 9 B.C. ENVTL AFF. L. REV. 431, 477 (1981).

150. *Id.* at 477.

151. *Id.*

152. *Id.*

153. Note, *supra* note 124, at 154.

Early consistency review would be beneficial to everyone involved in the process. If there are going to be consistency problems, it would be best to put the industry on notice at an early point in time. "They could then determine if bidding on certain tracts would be worthwhile."[154] Once the lease has been acquired and preliminary activities have begun, a finding of inconsistency for a particular tract could result in cancellation of the lease and the loss of millions of dollars worth of preliminary work.[155] Alternatively, political and economic pressures could force the state to withdraw its consistency objection and "allow development to proceed even though the balance favored not developing oil and gas in that particular area."[156] Neither scenario is desirable. In short, "[d]elays hurt everyone; resources won't be developed and conservation measures won't be established."[157]

Consistency review at the lease sale stage would not grant the states, as some have argued,[158] too much power. In the first place, the plans that consistency findings are based on have been written so as to accommodate the needs and concerns of federal agencies as well as the national interest in energy facility siting. Consistency objections cannot be based solely on arbitrary, parochial concerns. Second, the CZMA in no way grants the states any veto power. Disagreements are settled by the Department of Commerce, a federal agency. If any bias is present in the statutory scheme, it is the national interest that will benefit.

Recent political developments also call for a greater state role at an earlier stage of the process. First, federal funding under the CZMA has been cut in recent years.[159] Most states have indicated that if cuts are too drastic they will not be able to assume the financial burdens of administering coastal zone management plans.[160] In other words, the consistency requirement is the only real incentive left for state participation in the CZMA. Second, at the same time it has cut funding for protection of the coastal zone, the administration has stepped up the rate and size of federal lease sales for OCS mineral exploration.[161] This means that at the very

154. Fitzgerald, *supra* note 95, at 468.
155. Yi, *supra* note 128, at 182.
156. *Id.*
157. Comment, note 47, at 125.
158. 17 COASTAL ZONE MGMT., No. 4, at 4 (Jan. 30, 1986).
159. Note, *supra* note 46, at 137.
160. Husing, *supra* note 7, at 304.
161. Note, *supra* note 46, at 137.

time when the environmental risks are increasing, the ability of the states to react is being diminished.

The *Secretary of the Interior v. California* decision "relegates the states to being mere advisors, rather than cooperative partners, during the crucial early planning stages of the process. This frustrates the policy and purpose of the CZMA."[162] Corrective legislation has been urged upon and introduced in Congress.[163] This decision may be a misinterpretation of the CZMA, but it is one that is likely to obtain until Congress itself corrects it.

B. *Exxon v. Fischer:*[164] *Are Economic Considerations Relevant To Consistency Review?*

1. Case History

In January of 1983 the Exxon Corporation acquired rights to explore for oil on an OCS tract located in the Santa Barbara Channel approximately seven miles off the coast of California.[165] The California Coastal Commission objected to the consistency certification, finding that the proposal was contrary to certain statutory provisions relating to the protection of marine resources and commercial fishing in the coastal zone.[166] Specifically, the Commission concluded that the plan was inconsistent with state statutes relating to: maintenance of marine resources; special protection for areas of special biologic or economic significance; and maintenance of the biological productivity and quality of coastal waters.[167] The basis for this conclusion was the Commission's finding that the drilling would interfere with the commercial harvest of thresher sharks. Local fisherman had testified that harvesting the sharks required them to "drift with the current pulling nets as much as 6,000 feet in length."[168] As the Court described the technique, "[b]ecause the ships are not under power while fishing, they are not maneuverable and are vulnerable to obstructions such as drilling rigs and their anchoring system."[169] Since the thresher shark fishing season is

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162. Fitzgerald, *supra* note 95, at 426.

163. 16 ELR 10038, N55 (Feb. 1986).

164. Exxon v. Fischer, United States District Court, Central District of California, No. 84-2362 PAR, Memorandum of Decision and Order (October 9, 1985) [hereinafter referred to as *Exxon* Order].

165. *Id.* at 5.

166. *Id.* at 6.

167. *Id.* at 7.

168. *Id.*

169. *Id.*

limited to the period of May to December, this technique is prohibited during other months because it would endanger whale migration. The Commission stated that it would find the exploration plan consistent if drilling were limited to those months when thresher shark harvesting is prohibited.[170]

The Commission also found that the plan was inconsistent with a state law concerning the location and expansion of coastal-dependent industrial facilities because of the effect on the shore-based industries dependent on commercial fishing.[171] It was noted that other thresher shark fisheries had been closed because of exploratory drilling and the Commission found that closing another fishing ground "would be unfair to the commercial fishermen and would significantly and adversely impact a portion of this coastal dependent industry."[172]

Exxon appealed to the Secretary of Commerce and filed suit in federal district court. However, after mediation Exxon agreed to complete drilling for one of the wells during the suggested "drilling window" of January to May.[173] Exxon refused to make this same concession with regard to the remaining two wells although it did agree to some other mitigating measures. The Commission, citing adverse affects to the thresher shark industry and the commercial fishing industry in general, refused to withdraw its objection.

Exxon appealed this decision to the Secretary of Commerce who found Exxon had not satisfied the grounds necessary for the Secretary to overrule California's objection. The Secretary found that since the "drilling window" alternative was reasonable in light of the competing interests and the proposed drilling was not necessary to national security, the proposed exploration could not be permitted.[174]

2. The District Court's Decision.

The matter was before the court on cross-motions for summary judgment. California's motion, based on arguments of exhaustion of administrative remedies, abstention, collateral estoppel, and ripeness, was denied. Exxon's motion raised the substantive issue before the Court, specifically whether the Commission had the au-

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170. *Id.* at 7-8.
171. *Id.* at 8.
172. *Id.*
173. *Id.*
174. *Id.* at 11.

thority, under the CZMA, to object to a consistency certification solely in order to protect the economic interests of California fishermen.[175]

Judge Pamela Ann Rymer answered the question in the negative, holding the effects to marine resources located outside of the coastal zone cannot be the basis for a consistency objection. The Court first took notice of the plain language of the CZMA. Section 1456(c)(3)(B) of the act requires federal applicants to provide a certification of consistency when a plan for exploration or development will affect "any land or water use in the coastal zone."[176] "Land use" is defined as "activities which are conducted in, or on the shorelands within the coastal zone. . . ."[177] "Water use" means "activities which are conducted in or on water."[178] From this the Court concluded that "affected land and water uses must occur in the coastal zone."[179]

Congressional expressions of policy within the CZMA were also read as limiting the state's jurisdiction. Congress had found that the coastal zone and various resources "therein" were vulnerable to man's destructiveness.[180] Consequently, the Act sought to "encourage the states to exercise their full authority over the lands and waters in the coastal zone . . . ."[181] The Court found no statements of intent to give states any authority over areas outside of their coastal zones.[182] To the contrary, the declaration of policy set forth in the Act consistently refers to state responsibility "in the coastal zone."

The thresher shark fishery in question was located outside of California's coastal zone. Since any effects on the fishery would not affect a land or water use in the coastal zone the Court concluded that the Commission could not base a consistency determination on these effects.[183] To do so "would extend the Commission's authority into waters which are the exclusive province of the federal government."[184] Justice Rymer cited *Secretary of the Interior* as authority for her finding that the CZMA was not meant to reach

175. *Id.* at 3.
176. 16 U.S.C. §§ 1453(10), 1456 (c)(3)(B) (1985).
177. 16 U.S.C. § 1453(10) (1985).
178. 16 U.S.C. § 1453 (18) (1985).
179. Exxon Order, *supra* note 164, at 34.
180. 16 U.S.C. § 1451 (d) (1985).
181. 16 U.S.C. § 1451(i) (1985).
182. Exxon Order, *supra* note 164, at 36.
183. *Id.*
184. *Id.*

beyond the state's territorial waters.[185]

The Court did not base its decision solely on its finding that the effects which concerned the Commission occurred outside of the coastal zone. It also held that economic considerations were not relevant to consistency review, reasoning that an adverse impact on the fishing industry would not affect a "land use" in the coastal zone.[186] Judge Rymer felt that while the CZMA's definition of land use was "not self explanatory, the inclusion of 'activities' in the definition as well as the literal meaning of 'use' appear to represent a concept less intangible than purely economic interests."[187] Thus, the phrase was limited, she wrote, only to "physical utilization of the land. . . ."[188] This conclusion was buttressed by the statutorily prescribed elements of state management plans which include land inventories and what in essence are zoning plans. This indicated to the Court that only competing physical interests, not economic ones, were meant to be the focus of the CZMA.[189]

Legislative findings contained in the CZMA were also relevant to this issue. The opinion noted that the Act encourages the states to consider "ecological, cultural, historic, and aesthetic values"[190] as they drew up their management plans. "Notably absent" from the expression of concern over the competing interests in the coastal zone was "any indication that the states could use the consistency review process for the protection of economic interests of a single industry."[191] The Court cited Congressional Reports[192] and statements by members of Congress[193] indicating that only competing demands on the land are to be considered by the states.

Finally, Judge Rymer was persuaded by the existence of the Coastal Energy Impact Program (CEIP), which provides funds to state and local governments to mitigate the effects of energy development.[194] The Court disagreed with California's assertion that the program evinced congressional concern over the adverse economic effects of OCS energy development and was thus an expansion of the consistency review procedure. The legislative history of the

185. *Id.* at 38.
186. *Id.* at 39.
187. *Id.*
188. *Id.* at 40.
189. *Id.*
190. *Id.* at 41.
191. *Id.* at 42.
192. *Id.* at 45.
193. *Id.* at 45, 46.
194. *Id.* at 48.

program did not suggest to the Court that it was to be integrated with the CZMA.[195] "Instead," wrote Judge Rymer, "it appears that the CEIP was intended to strengthen the state's ability to plan for the economic effects of rapid energy development and to provide funds for the construction of the infrastructure needed to handle growth."[196] While agreeing that Congress was concerned about the economic ramifications of energy development, Judge Rymer concluded that the remedy provided was the CEIP, not the CZMA. The Court's order, dated October 9, 1985, granted Exxon's motion for summary judgment.[197]

3. Analysis.

It is estimated that by the year 2000, 75% of Americans will live within 50 miles of the coast.[198] No doubt a substantial number of these people will depend on coastal activities for their livelihood. According to the district court's opinion in *Exxon v. Fischer* these interests cannot be protected by the states under the CZMA unless natural resources within the coastal zone are being affected. The economic effects are felt within the coastal zone, but they are not the type of effects thought to be protected by the act. While it is not clear whether this conclusion is supported by the terms of the CZMA, it is certainly at war with the spirit of that act.

Adoption of the CZMA by Congress reflects a recognition of the unfairness of allowing the federal government to reap all of the benefits of an activity — OCS leasing — while the states bear the burdens. Whether physical, or economic, the impacts of OCS energy activity can be devastating.[199] Under the *Exxon* Court's interpretation of the CZMA if a federal activity could affect a natural resource located in a state's coastal zone and thereby detrimentally impact local commercial activity, consistency review is required. If on the other hand, the affected resource is located outside of the coastal zone, no such review is required, even when the impact on the local economy is the same. To those local communities that rely on marine resources for their economic health, this is a distinction without a difference.

Under the CZMA, when the repercussions of a federal activity,

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195. *Id.*
196. *Id.*
197. *Id.*
198. Yi, *supra* note 128, at 176.
199. *See* notes 146-153 and accompanying text.

including the activity of a federal lessee, will be felt, in any form, within the coastal zone of a state, that activity should be conducted in conformity with the state's coastal management plan. The House Merchant Marine and Fisheries Committee said as much in a 1980 report. That report stated that the consistency requirement applies "when a federal agency initiates a series of events of coastal management consequence" without regard to whether those consequences are economic, geographic, or social.[200] Similarly, the Senate Report on the 1971 version of the CZMA interpreted the consistency requirement as extending to "any federal activity having a functional interrelationship from an economic, social, or geographical standpoint" with the coastal zone.[201]

Judge Rymer found that the economic interests of state and local governments were adequately protected by the Coastal Energy Impact Program. Her reasoning is reminiscent of that of the Supreme Courts in holding that the necessity for consistency review at subsequent stages of the process obviated the need for such review at the lease sale stage. In both instances a federal court elevated form over substance, failing to view a statutory scheme as an integrated whole. With the CZMA, OCSLA, and CEIP, Congress set up a highly coordinated process whereby the national interests in energy development and the social welfare interests of the states could coexist. It was obviously thought that when a decision concerning both of these interests was to be made, the balancing of these interests, including consideration of all relevant factors, would be done at the same time. The upshot of the *Exxon* opinion is that instead of anticipating and mitigating the economic effects that federal activities will have on states at the earliest stages of the development process, the federal government can allow those effects to occur haphazardly as long as it attempts to compensate for them later. Doesn't it make infinitely more sense to consider in advance the economic effects of OCS activity so that they can be controlled? Certainly, such preventative actions would require less federal dollars than paying for unplanned, unforeseen effects.

It is folly to rely on the CEIP to protect the economic interests of states. This program can only be effective, and even at that to a limited extent, if it enjoys a high level of federal funding. This is a situation not likely to occur throughout the balance of the current administration.

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200. Yi, *supra* note 128, at 176.
201. S. REP. No. 92-526, p.20 (1971).

If Congress meant to allow the economic interests of local coastal-dependent industries to be the basis for a state's consistency objections, it did not explicitly say so. Considering the manner in which the federal courts have filled the gaps in the CZMA, this was a particularly egregious omission.

IV. CONCLUSION

Shortly after the Court's decision in *Secretary of the Interior* was announced, legislation was introduced in both Houses of Congress to reverse it. The House and Senate bills both defined "directly affecting" as "produc[ing] identifiable physical, biological, social or economic consequences in the coastal zone or . . . initiat[ing] a chain of events likely to result in any of such consequences."[202] The Senate Commerce Committee amended the Senate bill to say that the only effects of federally conducted or supported activities which would trigger the consistency requirement would be those "to the natural resources or land or water uses in the coastal zone."[203] The Committee Report on this amendment stated that it was intended to remedy *Kean v. Watt*,[204] a 1982 federal district court case to the same effect as the *Exxon* trial court decision. Presumably, under this change, economic, social, or cultural effects standing alone could not trigger consistency review. "However, should federal OCS activity cause a physical impact on ocean resources which in turn affected a coastal industry, such as commercial fishing, the federal activity would be subject to consistency review."[205] This interpretation would be in direct conflict with the *Exxon* holding. However, the 98th Congress took no further action on either bill.[206]

Congress has at various times enacted moratoria on lease sales for certain areas of the country. Over the past four years, sites off the New England and California coasts as well as Florida's Gulf Coast, have been the subject of such moratoria.[207] These moratoria, however, have been of limited duration. To this date, no permanent legislative changes have been made to either the OCSLA or the CZMA that would reverse either *Secretary of the Interior* or *Exxon*.

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202. *See* S. 2384, 98th Cong., 2d Sess. (1984); H.R. 4589, 98th Cong., 2d Sess. (1984).
203. *Fitzgerald*, *supra* note 95, at 470.
204. 13 E.L.R. 20618 (D.N.J. 1982).
205. Fitzgerald, *supra* note 95, at 471.
206. 4 MLC 069 (98th Cong., Jan. 1986).
207. *Id.*

Numerous commentators have suggested legislative changes which would "restore the balance between state and federal interests in OCS activities".[208] One of those proposals is revenue sharing, under which the federal government would allot a small share of the revenues collected from OCS leasing to the coastal states.[209] This would accomplish little. At best it could potentially balance out the cuts to CZMA funding made by the current administration. Moreover to the extent that it would tend to give coastal states an economic incentive to support the selling of OCS leases it would be both counter to the intentions of Congress and unwise. The OCSLA and CZMA were designed to give environmental and economic concerns equal weight in decisions of coastal significance. Given the economic pressures being put on state and local governments by federal budget cuts this proposal would undoubtedly weaken the CZMA's impact on important decisions of this nature.

Some have suggested the use of a mediator possibly less biased than the Secretary of Commerce. This idea calls for an ad hoc panel made up of one representative each from the state coastal agency, the governor's office, the Department of the Interior, the Department of Commerce, and the petroleum industry to form a bargaining group to resolve conflicts arising under the CZMA.[210] This would be ineffective as well. While it would at least give the state's concerns some say in the mediation process, state officials would always make up a minority of the group. There would be scant improvement on the present balance of power, given the stubborn attitude of most federal agencies in this area. More importantly, such a change would affect neither the types of decisions reviewed nor the grounds upon which these decisions could be objected to. If a state can neither object to the OCS lease sale nor use economic grounds as the basis for a consistency objection, there is no need for any dispute resolution mechanism.

Congress should amend the law to specifically state that lease sales are required to undergo consistency review. Nothing short of such an amendment will be enough to convince federal courts to adopt such a conclusion. While earlier cases gave a "broad, pro-state reading to the CZMA,"[211] of late the federal judiciary, led by the Supreme Court, has given the narrowest interpretation possible to every word of the Act if has construed. For the same reason,

208. Yi, *supra* note 128, at 180.
209. Comment, *supra* note 47, at 145.
210. Note, *supra* note 6, at 1145.
211. Note, *supra* note 46, at 141.

states should be given specific authority to object to consistency findings on economic grounds, at least where a coastal dependent economy is damaged.

The *Secretary of the Interior* and *Exxon* trial court decisions, and others like them have "seriously undermined [the] balanced and cooperative system which congress and coastal states have worked so hard to maintain."[212] Indeed the joint OCSLA and CZMA scheme, which specifically governs OCS oil exploration, has been weakened to the point that a general policy statute, the National Environmental Policy Act, probably offers more protection to states' coastal zones.[213] The substantial role in OCS decisions that states were promised has turned out to be a bit part. Moreover, the purpose of long-range planning and coordination has been defeated. As one commentator has written, it is "hard to believe that Congress intended the planning relationship to arise only at the time when the activity literally affected the coastal zone."[214]

Congress should act now to insure that states will play at least an equal part in OCS decisions. "Whether increased air or water pollution, aesthetic and visual pollution, harm to marine life, or disruption of local economies, the importance of potential impacts is too great to exclude the participation of the coastal states."[215]

POSTSCRIPT

On January 7, 1987, the Ninth Circuit Court of Appeals reversed Judge Rymer's judgment in *Exxon v. Fischer*,[216] holding that the doctrine of res judicata should have prevented the district court from ever hearing the case. According to the Ninth Circuit, by dismissing Exxon's appeal of the California Coastal Commission's consistency objection, the Secretary of Commerce had, at least impliedly, determined that the state's objection was valid. Since Exxon had not appealed the Secretary's decision, it was barred from bringing a collateral attack on that finding. The court did not discuss the merits of the case stating in a footnote that "[w]e do not reach Exxon's contention that the Commission was really engaging in a form of economic protectionism not permitted by the

212. 17 COASTAL ZONE MGMT. No. 4, at 1 (Jan. 30, 1986).

213. Comment, *supra* note 148, at 712, 713.

214. Lindsley, *supra* note 149, at 477.

215. Berger and Saurenman, *The Role of Coastal States in Outer Continental Shelf Oil and Gas Leasing: A Litigation Perspective*, 3 VA. J. NAT. RESOURCES L. 35, 67 (1983).

216. Exxon Corp. v. Fischer, No. 85-6572 (Ninth Circuit Court of Appeals), (January 7, 1987), (to be reported at 807 F2d 842).

CZMA."[217]

A petition for rehearing was filed in this case on January 21, 1987. If given the chance, Exxon will no doubt reassert its position that the Secretary of Commerce never squarely faced the question of the validity of California's consistency objection, focusing instead on the question of the consistency of Exxon's plan with the state's coastal management plan. It has been reported that the Justice Department will intervene on Exxon's behalf, supporting the motion for rehearing.[218]

It would be premature to hail this latest decision as a victory for coastal zone management planners. Exxon is correct in asserting that the Secretary of Commerce did not address the question subsequently litigated at the trial court level in *Exxon v. Fischer*.[219] If the Secretary had, all indications are that he would have agreed with Judge Rymer. In addition to intervening on behalf of Exxon in this case the Department of Commerce recently intervened on behalf of a coal company which had brought a commerce clause challenge to Delaware's coastal management plan.[220] In light of the technical grounds upon which the *Exxon* district court opinion was reversed, and the administration's apparent decision to advocate a limited state role in the implementation of the CZMA, the debate has only just begun.

217. *Id.*
218. 18 COASTAL ZONE MGMT., No. 2, at 5 (Jan. 15, 1987).
219. *See* note 216.
220. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986).