STATE OWNERSHIP IN THE MARGINAL SEA AROUND THE CHANNEL ISLANDS NATIONAL MONUMENT

Congress enacted the Submerged Lands Act (SLA) of 1953[1] to end growing disagreement over ownership of the mineral-rich lands[2] beneath United States coastal waters.[3] Under the SLA, the states possess ownership rights[4] to the submerged land which extends three miles[5] into the ocean,[6] excepting land occupied by the federal gov-

1. 43 U.S.C. §§ 1301-1315 (1970). *See* Overfelt, *Submerged Lands Act of 1953 — In Retrospect*, 24 U. KAN. CITY L. REV. 208 (1955-56).

2 Comment, *Constitutional Law: Does National Sovereignty Encompass Federal Proprietory Rights on the Marginal Sea*?, 28 U. FLA. L. REV. 231 (1975). Oil is the primary resource in offshore submerged land. In 1953, a Congressional committee considered a geological survey estimate of 15.156 billion barrels to be the total United States offshore oil reserves. H.R. MIN. REP. ON H.R. REP. NO. 4198, 83d Cong., 1st Sess. (1953), *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1464, 1465. Reliable 1968 estimates of potentially recoverable crude oil in the Outer Continental Shelf indicated 165 billion barrels, or about 11 times the 1953 estimates. U.S. DEP'T OF THE INTERIOR, TECH. BULL. NO. 5, THE ROLE OF THE PETROLEUM AND NATURAL GAS FROM THE OUTER SHELF IN THE NATIONAL SUPPLY OF PETROLEUM AND NATURAL GAS 49 (1970).

3. *See* H.R. REP. NO. 1778, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1415, 1420 (chronicles in detail the disagreement).

4. The SLA provides in part:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be . . . vested in . . . the respective States. . . .

43 U.S.C. § 1311(a) (1976). Section 1311(d), however, provides that nothing in the SLA "shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power. . . ." 43 U.S.C. § 1311(d) (1976).

5. "One English, statute, or land mile equals approximately .87 geographical, marine, or nautical miles. The conventional 'three-mile limit' under international law refers to three geographical miles, or approximately 3.45 land miles." United States

ernment under a claim of right.[7] Instead of resolving the ownership controversy, the SLA has ignited a series of disputes between the states and the federal government.[8] In the most recent suit, *United States v. California*,[9] the Supreme Court uncharacteristically expanded state ownership rights by rejecting the federal government's claim of right[10] to an area of submerged land off the California coast.

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v. California, 381 U.S. 139, 148 n.8 (1965). Unless otherwise indicated in this Comment, "mile" refers to a geographic mile.

6. 43 U.S.C. § 1301(b) (1970). This provision allowed Gulf coast states an opportunity to establish historic boundaries that extend up to 10 ½ miles from their shorelines. Only Texas and Florida, however, qualify for this extension. *See* notes 54-59 and accompanying text *infra*.

7. 43 U.S.C. § 1313(a) (1976). The provision states in part that the Act does not apply to "any rights the United States has in lands presently and actually occupied by the United States under claim of right."

8. United States v. Maine, 420 U.S. 515 (1975) (the federal government, rather than the Atlantic coast states, controls the submerged land beyond the three-mile zone); United States v. Louisiana, 394 U.S. 1 (1969) (the boundary line of Texas must be measured from the state's modern, rather than historic, coastline); United States v. Louisiana, 389 U.S. 155 (1967) (artificial jetties can not be considered a part of the shoreline from which to measure the three-mile limit); United States v. California, 381 U.S. 139 (1965) (the court defined inland waters, a term necessary to determine where a state's coastline ends); United States v. Louisiana, 363 U.S. 1 (1960) (Texas, but not Louisiana, Mississippi, or Alabama, qualifies for a boundary extension beyond three miles).

9. 436 U.S. 32 (1978). This case is the most recent stage of ongoing litigation between the United States and the State of California. The first action took place in United States v. California, 332 U.S. 19 (1947). For a discussion of this decision, see notes 35-41 and accompanying text *infra*. The court entered a decree for the 1947 decision in the same year, 332 U.S. 804 (1947). The court rendered a second decision in 1965, 381 U.S. 139, and a supplemental decree to the decision in 1966, 382 U.S. 448. For a discussion of the 1965 decision, see notes 65-69 and accompanying text *infra*. The court entered a second supplemental decree in 1977, 432 U.S. 40, to clarify the boundary lines off the California coast. A third supplemental decree affirmed the Court's decision in the 1978 case. *See* 439 U.S. 30 (1978).

All cases arose under the Supreme Court's original jurisdiction. "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. 3, § 2, cl. 2. In each decree the Supreme Court reserved jurisdiction to enter such further orders as may from time to time be deemed advisable or necessary to give full force and effect to the decree. California initiated the present suit under the 1966 reservation of jurisdiction. The 1966 decree provided in part:

> As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may be unable to agree, either party may apply to the Court at any time for entry of a further supplemental decree.

382 U.S. at 453.

10. *See* notes 76-81 and accompanying text *infra*.

A 1938 Presidential Proclamation[11] designated two islands[12] off the California coast as the Channel Islands National Monument.[13] The Proclamation's purpose was to preserve unusual fossil formations and other objects of geologic interest located on the islands.[14] The discovery of rare and endangered marine life[15] prompted a second Presidential Proclamation in 1949[16] which expanded the Monument

11. Presidential Proclamation No. 2281, 3 Fed. Reg. 827 (1938). Franklin Roosevelt "reserved from all forms of appropriation under the public-land laws" most of the land on two islands, Santa Barbara and Anacapa. He set aside portions of the islands for continued lighthouse purposes. The area reserved for the national monument is about 538 acres on Anacapa Island and about 581 acres on Santa Barbara Island. *Id.*

Federal title to the islands can be traced to the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). Mexico ceded to the United States the islands lying off the coast of California, along with the adjacent mainland. When the United States admitted California to the Union in 1850, the federal government retained control over the islands. *See* An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850). *See generally* Bowman, *The Question of Sovereignty over California's Off-Shore Islands*, 31 PAC. HIST. REV. 291 (1962) (Bowman discusses whether the federal government does hold the lawful title to the islands).

12. The islands, Santa Barbara and Anacapa, are located about 15 miles off the California coast, just south of Los Angeles. NAT'L GEOGRAPHIC ATLAS OF THE WORLD 38 (1975). The three-mile limit still applies to these islands, however, because the Supreme Court held in the 1965 *California* case that California owns the waters and submerged land within three miles of each of the many islands off the coast. 381 U.S. at 177.

13. The Antiquities Act of 1906 authorizes the President to reserve lands "owned and controlled by the Government of the United States" for use as national monuments. 16 U.S.C. § 431 (1976). The Act provides in part:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. § 431 (1976).

14. The Proclamation states that the islands contain "fossils of Pleistocene elephants and ancient trees, and furnish noteworthy examples of ancient volcanism, deposition, and active sea erosion, and have situated thereon various other objects of geological and scientific interest." Presidential Proclamation No. 2281, 3 Fed. Reg. 827 (1938).

15. The surrounding waters contain endangered sea otters, sea elephants, and fur seals. Memorandum from Victor Cahalene, Representative of the National Park Wildlife Service, to Ben Thompson, Fish and Wildlife Service (Jan. 30, 1941).

16. Presidential Proclamation No. 2825, 3 C.F.R. 17 (Supp. 1949). President Harry Truman proclaimed that "the areas within one nautical mile of Anacapa and Santa Barbara Island . . . are withdrawn from all forms of appropriation under the

to include the waters and submerged land within one mile of the islands.[17] The *California* case arose after the United States interfered with California's efforts to lease to commercial fishermen the rights to harvest kelp[18] found abundantly within the one-mile area.[19] The federal government invoked its long-standing policy of denying potentially harmful intruders, especially kelp fishermen, access to the area.[20] The United States argued that under the 1949 Proclamation it

public-land laws and added to and reserved as a part of the Channel Islands National Monument." *Id.* The parties in the 1978 *California* decision devoted a considerable portion of their briefs to a discussion of what the President intended when he used the word "areas" in the Proclamation. Rather than resolve this controversy, the Supreme Court assumed that even if "areas" included the submerged land, California still owns the one-mile belts. 436 U.S. at 37.

17. Although the Antiquities Act only refers to "lands," the Supreme Court recognizes that it now authorizes the President to reserve waters located on or over any federally owned land. 436 U.S. at 36 n.9. *See* Cappaert v. United States, 426 U.S. 128 (1975) (the Antiquities Act authorizes the President to reserve an underground pool since that pool and its inhabitants are "objects of historic and scientific interest" within the meaning of the Act); United States v. Oregon, 295 U.S. 1 (1934) (an Executive Order setting aside a non-navigable lake on public domain as a bird sanctuary was within the President's authority).

As early as 1941, the federal government emphasized the need to enlarge the monument. Early drafts of the Proclamation acknowledged an intent to protect the waters' marine life. The federal government deleted such references, however, when George T. Washington, the Assistant Attorney General, expressed doubts about whether the Antiquities Act permitted the establishment or the enlargement of a national monument to protect plant and marine life. Letter from George T. Washington to the Attorney General (Jan. 28, 1949).

18. Kelp refers to a mass or growth of large brown seaweeds. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1236 (14th ed. 1966). Giant kelp known as Macrocystis grow in the waters along portions of the California coast. Fishermen harvest them for various substances, including algin, a chemical used for several commercial purposes. 436 U.S. at 35 n.8. *See* Zahl, *Algae: The Life-Givers*, 145 NAT'L GEOGRAPHIC 361 (1974); North, *Giant Kelp, Sequoias of the Sea*, 142 NAT'L GEOGRAPHIC 251 (1972).

19. The original drafters of the SLA noted that in 1945 commercial fishermen harvested 37,542 tons of kelp under state leases. H.R. REP. No. 1778, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1415, 1435. The Department of Agriculture remarked in 1911 that "the giant kelp beds of the Pacific coast are . . . a national asset of first importance." S. DOC. No. 190, 62d Cong., 2d Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1415, 1435.

20. In 1950, the acting regional director for the National Parks Service, whose duties included supervision of the islands, noted the potential problem with kelp fishermen. Letter from C. Persons, acting regional director, to Superintendent, Sequoia and Kings Canyon (July 20, 1950). The acting director remarked that "the kelp beds are essential for wildlife protection and should not be disturbed." *Id.* Since then, other officials of the National Parks Service have made similar remarks. Joint Appendix at 78-82, United States v. California, 436 U.S. 32 (1978).

should control the one-mile belts.[21] Rejecting this position, the Court concluded that since the disputed area fell within the SLA's three-mile zone,[22] Congress intended that California own the waters and submerged land.[23]

The SLA is the outgrowth of early cases[24] where the Supreme

21. 436 U.S. at 39-40.

22. *See* note 12 *supra*.

23. 436 U.S. at 41.

24. The first case was Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842) (after the Revolution, the people of each state became themselves sovereign, thereby possessing the absolute right to all their navigable waters and soils under the waters). The most notable case, however, is Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The Court held that title to Alabama's tidelands belonged to Alabama. The Court decided that the federal government held the title to the land in public trust until the territory gained statehood. A state entering the Union retained most of the sovereign rights it possessed before entering the Union, including title to the tidelands. *Id.* at 229.

In several other cases, the Supreme Court followed the general holding of *Pollard's Lessee*. *See, e.g.*, United States v. Utah, 283 U.S. 64 (1931) (title to the beds of navigable rivers passed to Utah when it entered the Union); Appleby v. City of New York, 271 U.S. 364 (1926) (after the Revolution, the Crown's proprietary rights in tidewaters vested in the original states); Oklahoma v. Texas, 258 U.S. 574 (1922) (upon creation of a state, ownership of beds of navigable streams within the state passes from the United States to that state); Port of Seattle v. Oregon & Washington R.R., 255 U.S. 56 (1921) (the navigable waters in the State of Washington and the lands under them passed to Washington when it joined the Union); The Abby Dodge, 223 U.S. 166 (1912) (Congress has no control over sponges growing on land beneath tidewaters within a state's jurisdiction); United States v. Mission Rock Co., 189 U.S. 391 (1903) (California, when admitted to the Union, received full ownership rights to the soils under its navigable tidewaters); Mobile Transp. Co. v. Mobile, 187 U.S. 479 (1903) (the court reaffirmed that Alabama, when admitted to the Union, became entitled to the soil under the navigable waters below the high-water mark); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349 (1897) (the rights of a riparian owner of land situated on the Mississippi River are to be measured by the rules and decisions of the court located within that state); Shively v. Bowlby, 152 U.S. 1 (1893) (the original 13 states possess the ownership rights to tidewaters previously held by England); Illinois Cent. R.R., v. Illinois, 146 U.S. 387 (1892) (it is settled law that the state owns the submerged land within the limits of that state); Hardin v. Jordan, 140 U.S. 371 (1891) (the extent of a state's prerogative over its submerged land depends on the laws of that state); Manchester v. Massachusetts, 139 U.S. 240 (1891) (a state may define the boundaries of its submerged land within the generally recognized territorial limits of that state); McCready v. Virginia, 94 U.S. 391 (1876) (each state owns the beds of all tidewaters within its jurisdiction); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) (California has absolute property rights in and sovereignty over all soils under tidewaters within the state's limits); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867) (when the Revolution took place, the people of each state became themselves sovereign, thereby holding the absolute right to all their navigable waters and soils under them); Smith v. Maryland, 59 U.S.

Court has held that the original thirteen states own their navigable inland waters[25] and submerged land. All states, including California, now enjoy similar rights.[26] None of these early decisions[27] involved disputes over ownership rights to the marginal sea (the area within three miles of the coastline).[28] Nevertheless, legal commentators noted that the cases supported a widespread belief that state ownership extended three miles into the ocean.[29] Not until 1937[30] did the

(18 How.) 71 (1855) (the soil below the low-water mark in the Chesapeake Bay, within the boundaries of Maryland, belongs to Maryland); Den v. Jersey Co., 56 U.S. (15 How.) 426 (1853) (the soil under the public navigable waters of East New Jersey belongs to that state); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850) (Congress cannot grant the lands under Alabama's navigable rivers to anyone, since Alabama retains sovereignty over the area).

25. Inland waters are those over which a state may exercise sovereignty as if the waters were part of the land mass, such as rivers and bays. Taylor, *The Settlement Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication?* 11 HARV. INT'L L.J. 358, 359 (1970).

26. The equal-footing doctrine allows states, besides the original 13, to join the Union with all the rights and privileges enjoyed by the original states. Equality among the original states was first recognized in the Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, passed by the Congress of the Confederation, 1787, readopted by 1st Cong., 1st Sess., 1 Stat. 51 (1789). The equal-footing statute extending these rights to California is An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850).

See Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) (upon admission of California into the Union under the equal-footing doctrine, sovereignty over all soils under tidewaters within the state's boundaries passed to California). *See also* Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935) (the federal government reserved the soils under tidelands within the original states for those respective states. New states admitted to the Union receive the same type of sovereignty to the lands within their borders as the original 13 states enjoyed); United States v. Oregon, 295 U.S. 1 (1935) (when a state joins the Union, the United States' title to lands underlying navigable waters within the state passes to that state). *See generally* Comment, *Equal Footing and the Marginal Sea*, 19 U. KAN. CITY L. REV. 66 (1951).

27. *See* S. MIN. REP. NO. 133, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1534, 1619 (remarks of Phillip B. Perlman, then Solicitor General of the United States) (the holding of *Pollard's Lessee* does not apply to submerged land in the marginal sea).

28. The three-mile zone often is referred to as the marginal or the territorial sea. *See* 29 U. CIN. L. REV. 510, 511 n.8 (1960).

29. *See* Hanna, *The Submerged Land Cases*, 3 BAYLOR L. REV. 201, 209 (1951); Metcalfe, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYRACUSE L. REV. 39, 41 (1952-1953). In 1953, a Congressional report on the submerged lands controversy concluded in part that between 1842 and 1935 more than 30 Supreme Court decisions announced the principle that the states owned the soils under all navigable waters, regardless of whether the waters were inland. H.R. REP. NO. 1778, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1415, 1438. While many scholars held this belief, there was evidence to support

United States first contest state ownership of the marginal sea. The discovery of enormous deposits of oil, minerals, and other natural resources aroused the government's economic interest in preventing foreign exploitation.[31] President Harry Truman issued two Proclamations[32] calling for exclusive United States control over the waters and submerged land extending to the outer edge of the Continental Shelf.[33] Despite such federal claims, the states maintained that they

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the government's position. Secretary of State Thomas Jefferson, in a note to the British Ambassador to the United States, advanced the first official American claim for a three-mile zone. Letter from Thomas Jefferson to the British Ambassador (1793), H R. EXEC. DOC. No. 324, 42d Cong., 2d Sess. 553, 553-554 (1872).

30. Senator Nye introduced Senate Bill 2164, which called for United States control over the marginal sea. S. 2164, 75th Cong., 1st Sess., *Hearings before the House Comm. on the Judiciary on S.J. Res. 208*, 75th Cong., 3d Sess. 5 (1938). The federal government, while recognizing state ownership of tidelands and lands beneath navigable waters, claimed title to submerged lands lying seaward of the coastline. *Id.*

31 The discovery of oil in the submerged land beneath the Santa Barbara Channel occured in 1894. Unsophisticated drilling techniques, however, prevented the extraction of any oil until the 1920's. Metcalfe, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYRACUSE L. REV. 39 (1952-1953). *See Hearings before Subcomm. 4 of the Comm. on the Judiciary on H.J. Res.* 181, 76th Cong., 1st Sess. 50 (1939).

32 Presidential Proclamation No. 2668, 3 C.F.R. 68 (1943-1948 Compilation); Exec Order No. 9634, 3 C.F.R. 437 (1943-1948 Compilation) accompanied this Proclamation; Presidential Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 Compilation); Exec Order No. 9633, 3 C.F.R. 437 (1943-1948 Compilation) accompanied this Proclamation. Proclamation No. 2667 asserted United States' jurisdiction and control over the natural resources in the Continental Shelf contiguous to the United States. It sought to conserve the shelf resources, to protect the United States from foreign exploitation of the resources, and to promote domestic development among United States industries in offshore mining. The Executive Order accompanying the Proclamation stated that the President was not attempting to affect "the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the Continental Shelf within or outside the three-mile limit." Exec. Order No. 9633. Proclamation No. 2668 announced the United States' right to establish conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. These zones were areas where fishing had been or would be maintained in large scale. *See* Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976)

33 The Continental Shelf refers to those slightly submerged portions of the continents that surround all the continental areas of the earth. The outer edge of the shelf ends when the slope of the sea floor increases sharply. An abrupt drop in depth usually occurs when the water reaches 100 fathoms (600 feet). The total area of the Continental Shelf off the United States, excluding Alaska and Hawaii, is about 290,000 square miles. H.R. REP. No. 215, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1385, 1390.

possessed ownership rights to the marginal sea.[34]

In 1947, the conflict culminated in *United States v. California*,[35] the first in a series of disputes between the federal government and the State of California.[36] For the first time, the Supreme Court addressed the issue of whether the marginal sea belonged to the individual states or to the United States.[37] The dispute arose because California had authorized through leases the extraction in the marginal sea of petroleum, gas, and other mineral deposits.[38] Objecting to this offshore program, the United States brought suit.[39] The Court

34. The conflicting claims caused those favoring and those opposing state ownership to introduce several bills in Congress, but none of them became law. During the 79th Congress (1945-46), legislators brought 19 joint resolutions, all favoring state ownership, before Congress. These proposals granted to the states a three-mile zone of submerged land off their coastlines. The government did retain, however, ownership in those lands it had acquired previously by purchase, condemnation, and donation. One bill passed the House, H.R.J. 225, 79th Cong., 2d Sess. (1946), but was vetoed by President Harry Truman. 92 CONG. REC. 10660 (1946). The House failed to override his veto. 92 CONG. REC. 10745 (1946). Between 1937 and 1939, legislators proposed a large number of bills that attempted to declare the lands seaward of the low water mark to be part of the United States' public domain. *See* Metcalfe, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYRACUSE L. REV. 39, 41 (1952-53).

35. 332 U.S. 19 (1947). For a general background of the disputes leading up to this decision, see Note, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 YALE L.J. 356 (1947).

36. *See* note 9 *supra*.

37. 332 U.S. at 23.

38. California received large sums in rents and royalties for these leases. 332 U.S. at 23. The court noted that the discovery of oil off the coast prompted the state to pass laws authorizing California residents to prospect for oil and gas on blocks off its coast. *Id.* at 38.

39. The United States obviously desired control over these valuable resources. The federal government also argued that federal dominion was necessary to protect the country against dangers to security and tranquility of its citizens, and that the United States has a responsibility to handle diplomatic relations. 332 U.S. at 29. These arguments greatly resemble the concern expressed by President Franklin Roosevelt in his two 1945 Proclamations.

California argued that its original constitution, adopted in 1849 before the state was admitted to the Union, included within its state boundaries the water area extending three English miles into the ocean. *Id. See* CAL. CONST. art. 12, § 1. Since the United States admitted California into the Union on an equal footing with other states, 9 Stat. 452 (1850), California argued its ownership followed from *Martin* and *Pollard's Lessee*. The court rejected this position, particularly the application of *Pollard's Lessee* and *Martin*. 332 U.S. at 32-33.

California claimed three English miles; the United States claimed three marine (3.45 English) miles. The court held that the United States possessed paramount rights in the area extending three marine miles from the coastline. *Id.* at 39.

held that the federal government possessed "paramount rights in and full dominion and power over" the submerged land within three miles of the California coastline.[40] The majority opinion emphasized that the international importance of the area dictated federal control.[41] The Court subsequently expanded its newly created paramount rights doctrine in *United States v. Louisiana*[42] and *United States v. Texas*[43] by rejecting state-proclaimed boundaries which extended beyond the marginal sea. The Court concluded that the federal government's paramount rights applied to all submerged land seaward of a state's coastline.[44]

The SLA, passed six years later, overturned the 1947 *California* decision[45] by granting coastal states ownership rights to the marginal

40. 332 U.S. 804, 805 (1947) (the first decree). The court held in part:

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean seaward of the ordinary low water mark on the coast of California and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title interest thereof or property interest therein.

Id. at 805. The Court did not state that title to the disputed area vested in the United States. However, then Attorney General Clark expressed in 1953 the view that paramount rights and full dominion signified a title interest potentially greater than a fee simple. H.R. REP. NO. 1778, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1415, 1419-20.

41. 332 U.S. at 35. The Court stated that "[t]he very oil about which the state and nation contend here might become the subject of international dispute and settlement." *Id.*

42. 339 U.S. 699 (1950). Louisiana argued that under a state statute it owned the water extending 27 miles beyond the coastline. *Id.* at 701. Applying the 1947 *California* reasoning, the Court held that since the United States owns the marginal sea, the ocean beyond the marginal sea, which is an equally important international concern, must also be within the national dominion. *Id.* at 704.

43. 339 U.S. 707 (1950). Texas argued that under Texas law its boundary extended nine miles from the coastline. Texas had an unusual claim to an extended boundary because the state entered the Union not as a former territory of the United States, but as an independent nation. The Court held that "as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States." *Id.* at 718.

44. 339 U.S. at 720.

45. The 1947 *California* decision upset many legislators. The states had exercised dominion over submerged lands for nearly 150 years. Thus, they felt that equitable principles called for Congress to give to the states what they traditionally were thought to have: ownership rights to the marginal sea. 99 CONG. REC. 4361 (1953) (remarks of Sen. Hollard). The stated purpose of the SLA, however, shows that Congress did not ignore the federal government's interests. The purpose was in part

sea.[46] Congress allowed Gulf coast states an opportunity to establish historic boundaries[47] extending up to three leagues[48] from their coastlines. The United States, however, retains control over the Continental Shelf.[49] The Act specifically states that it does not apply to areas in the marginal sea occupied by the federal government under a claim of right or a title interest.[50]

Since passage of the SLA, no court has expressly considered the "claim of right" provision. Numerous decisions since 1953, though, show that the Supreme Court, interpreting related provisions of the

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to confirm and establish the titles of the states to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of state boundaries.

Submerged Lands Act, Pub. L. No. 31, ch. 65, § 1, 67 Stat. 29 (1953).

46. 43 U.S.C. § 1311(a) (1976). Many legislators strongly expressed a desire to quickly pass the SLA. They worried that the United States would need oil for the Korean War. Since state ownership of offshore oil wells already was established, legislators thought it would be more expeditious to maintain state control. H.R. REP. No. 215, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1385, 1386. Legislators did not act in undue haste, however. Congress examined 40 bills on submerged lands, 6,000 pages of testimony and exhibits in at least 14 formal hearings before passing the SLA. H.R. REP. No. 215, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1385, 1385.

47. An historic boundary is the boundary of any Gulf coast state as such boundary existed when the state joined the Union. 43 U.S.C. § 1301(a)(2) (1976). *See* notes 52-59 and accompanying text *infra*.

48. Three leagues equals about nine marine, nautical or geographic miles, or approximately 10½ land, statute, or English miles. 363 U.S. at 9 n.6 (1960).

49. 43 U.S.C. § 1332(a) (1976). Sections 1331-1343 of the Outer Continental Shelf Lands Act relates to submerged land in the outer Continental Shelf. President Harry Truman's 1945 Proclamation No. 2667 foreshadowed enactment of §§ 1331-1343. While the Proclamation referred only to control over the "national resources" of the Continental Shelf contiguous to the United States, Presidential Proclamation No. 2667, 3 C.F.R. 67, 67 (1943-1948 Compilation), the SLA refers to the entirety of the subsoil and the seabed. 43 U.S.C. § 1332(a) (1976). Congress decided that the United States may lease the outer Continental Shelf to private enterprise for the extraction of oil, gas, and other valuable mineral deposits. 43 U.S.C. §§ 1334-1337 (1976). *See generally* Stone, *Some Aspects of Jurisdiction over Natural Resources under the Ocean Floor*, 3 NAT. RESOURCES LAW. 155 (1970).

50. 43 U.S.C. § 1313(a) (1976). Congress excepted from operation of the SLA lands to which the United States held lawful title, including lands acquired by eminent domain proceedings, purchase, cession, and gift; and lands retained by or ceded to the United States when the state entered the Union. Congress also excepted from operation of the SLA "any rights the United States has in lands presently and actually occupied by the United States under claim of right." *Id.*

Act, has subtly returned to the United States some of the rights initially thought to be surrendered.[51] In *United States v. Louisiana*,[52] and *United States v. Florida*,[53] for example, the Gulf coast states argued that their historic boundaries extended three leagues into the ocean. The Supreme Court held that only Texas[54] and Florida[55] qualify for a three-league boundary in the Gulf of Mexico. In *United States v. Maine*,[56] the Atlantic coast states argued that their ownership rights extended beyond the marginal sea.[57] The Supreme Court reaffirmed explicit language in the SLA[58] by holding that the federal

51. *See* notes 52-69 and accompanying text *infra*.

52. 363 U.S. 1 (1960). The United States sued Louisiana, Texas, Mississippi, Alabama, and Florida. The federal government claimed that it was entitled to full dominion and power over the lands, minerals, and other natural resources in the Gulf of Mexico between the three-mile boundary line and the outer edge of the Continental Shelf. The Court noted that the Act preserved the right of a Gulf coast state to prove historic boundaries beyond three miles. To satisfy the Act's requirements, however, the Court held that a state must prove it would have been entitled to the submerged land under the doctrine of *Pollard's Lessee* as Congress conceived that doctrine before the 1947 *California* decision. Mere existence of such a boundary prior to the State's admission to the Union is insufficient. *Id.* at 24-36.

53. 363 U.S. 121 (1960). Originally five state actions were consolidated in 363 U.S. 1. The Supreme Court, however, reported the Florida decision separately.

54. 363 U.S. at 64. Texas successfully established its historic boundary by showing that as an independent nation prior to statehood, Texas' boundary extended three leagues into the Gulf of Mexico. *Id.* at 36. Louisiana, Mississippi, and Alabama could not maintain similar claims. Consequently, the Court held that these three states could not extend their boundaries beyond three miles. *Id.* at 79-82. *See generally*, Charney, *Judicial Deference in the Submerged Lands Cases*, 7 VAND. J. TRANSNAT'L L. 383 (1973-74); Lewis, *A Capsulte History of the Present Status of the Tidelands Controversy*, 3 NAT. RESOURCES LAW. 620 (1970).

55. 363 U.S. at 129. Florida showed that its Constitution of 1868, approved by Congress when Florida was readmitted to representation in Congress after the Civil War, established a three-league boundary. *Id.* at 123.

56. 420 U.S. 515 (1975). The United States filed a complaint in 1969 against 13 states. Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. Connecticut was not made a defendant, probably because the state borders on Long Island Sound, which is not part of the marginal sea. *Id.* at 516-17.

57. *Id.* at 517. Each of the states, excepting Florida, claimed for itself, "as successor in title to certain guarantees of the Crown of England, . . . the exclusive right of dominion and control over" all the submerged land extending to the outer edge of the Continental Shelf. *Id.* at 518. The states argued that they "acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States." *Id.* at 519. *See generally* 5 GA. J. INT'L & COMP. L. 580 (1975).

58. 43 U.S.C. § 1332(a) (1976). *See* note 45 *supra*.

government controls all submerged land between the three-mile boundary line and the outer edge of the Continental Shelf.[59]

In the 1967 *United States v. Louisiana* case,[60] the Supreme Court decided that artificial jetties could not be considered a part of the shoreline from which to measure the three-mile limit.[61] The opinion, in effect, moved the state boundary line toward the mainland. In the 1969 *United States v. Louisiana*,[62] the Court held that the Texas boundary line extends three leagues from the state's modern, rather than historic, coastline.[63] As the coastline continues to erode, the boundary line presumably moves landward,[64] thus benefiting the federal government.

In the 1965 *United States v. California* case,[65] California asserted that all waters and submerged land between its mainland and off-

59. 420 U.S. at 528. The Supreme Court relied on the 1947 *California* decision, as well as the SLA, to support its conclusion that the United States has sovereign rights over the seabed and subsoil underlying the ocean more than three miles from a state's coastline. This holding has tremendous economic implications. The Court noted that the outer Continental Shelf yielded from 1953 to 1974 more than 3 billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million tons of sulfur, and 4 million tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the outer Continental Shelf. *Id.* at 527. *See generally* 28 U. FLA. L. REV. 231 (1975).

60. 389 U.S. 155 (1967). The issue was whether Texas could measure its three-league boundary from the outer edge of artificial jetties—permanent harbor works—or whether the boundary should be measured from the state's natural coastline as it existed when Texas entered the Union in 1845.

61. *Id.* at 161. The Court decided the SLA provided two types of grants to the states. The first was an unconditional grant allowing each coastal state to extend its boundaries three geographic miles into the ocean. The second was a conditional grant allowing any Gulf coast state to extend its boundaries up to three leagues if the state could prove its historic boundaries extended that far. Since Texas has an historic boundary extending three leagues, the Court concluded, measurement of that boundary must be made from the state's historic coastline as it existed when Texas entered the Union. The artificial jetties were not part of the boundary when Texas entered the Union; thus, they cannot be considered part of the coastline. *Id.* at 157-160. *See generally* Stone, *Some Aspects of Jurisdiction over Natural Resources under the Ocean Floor*, 3 NAT. RESOURCES LAW. 155 (1970).

62. 394 U.S. 1 (1969) (Texas coastline case).

63. *Id.* at 5. Despite the holding in the 1967 *Louisiana* case that artificial jetties were not a part of the coastline, the Court decided that under the SLA, Texas' coastline must be measured from its modern, ambulatory coastline. *Id.* This holding greatly favors the United States because the historic boundaries of Texas extended farther into the ocean than the present boundaries do.

64. *Id.* at 6 n.7.

65. 381 U.S. 139 (1965). Before 1963, the depth of the Pacific Ocean made it impossible to drill for oil beyond three miles from the mainland. Improved drilling

shore islands[66] fall within California's control.[67] The Supreme Court decided California owns one strip three miles wide around each island and one strip extending three miles from the coastline of its mainland.[68] All intervening submerged land, constituting the majority of the disputed area, belongs to the United States.[69]

The Supreme Court in the 1978 *United States v. California* decision[70] inexplicably abandoned the pattern set in these recent cases of either directly[71] or indirectly[72] interpreting the SLA in favor of the United States.[73] The Court stated that the SLA's purpose was to return to the states ownership of the marginal sea.[74] Since the one-mile

techniques in the early 1960's, however, revitalized interest in the exact location of the state/federal boundary line. *Id.* at 139.

66. Some of these islands are as far as 50 miles from California's coastline. For a pictorial illustration of the islands and areas claimed by each party, see 381 U.S. at 213 app.

67. *Id.* at 149. California argued that the SLA uses the term "inland waters" to mean those waters the state historically considered to be inland when it entered the Union. In California's case, that would be all the waters between the outer islands and the mainland. *Id.*

68. The Court noted that "[s]ince the Act does not define the term [inland waters], we look to the legislative history." *Id.* at 149. The Court decided legislative history revealed that Congress intended for the Court to define the term. *Id.* at 150. The Court adopted the 24-mile closing line and semicircle test outlined in an international Convention. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 519 U.N.T.S. 205. Congress approved the Convention in 1960, 106 CONG. REC. 11196 (1960), and the President ratified it in 1961, 44 DEP'T STATE BULL. 609 (1961). The Convention went into effect in 1964 when the requisite number of nations (22) ratified it. *See generally* Ereli, *The Submerged Lands Act and the Geneva Convention on the Territorial Sea and the Contiguous Zone*, 41 TUL. L. REV. 555 (1966-67).

69. *Id.* This decision was a major victory for the United States since most of the disputed area remained within the United States' control. *See* Charney, *Judicial Deference in the Submerged Lands Cases*, 7 VAND. J. TRANSNAT'L L. 383 (1973-74).

70. 436 U.S. 32 (1978).

71. *See* notes 52-64 and accompanying text *supra*. In each of these cases, the Supreme Court looked to the SLA itself to find an answer.

72. *See* notes 65-69 and accompanying text *supra*. In the 1965 *California* case, the Supreme Court had to look outside the SLA since the Act does not define inland waters. Hence, the Court's holding in the case only indirectly interpreted the "inland waters" language in the SLA.

73. This pattern actually started in the 1947 *California* case when the Court decided that the United States controls the three-mile marginal sea off the California coast. The trend continued in the 1950 *Louisiana* and *Texas* cases. *See* notes 42-44 *supra*.

74. 436 U.S. at 37.

belts clearly are in the marginal sea,[75] they are the property of California. The federal government asserted that the Act does not apply to "any rights the United States has in lands presently and actually occupied by the United States under claim of right."[76] The United States maintained that it obtained a claim of right to the disputed area when President Harry Truman used the paramount rights doctrine to enlarge the Monument in 1949.[77]

The Supreme Court rejected the federal government's position[78] by citing legislative history[79] to show that the claim of right cannot be based solely on the paramount rights doctrine. If such a claim were possible, the federal government could claim a right to the entire marginal sea, thereby nullifying the purpose of the SLA.[80] Finding no other basis to support the United States' claim,[81] the Court held for California.

The Supreme Court failed to properly construe the claim of right clause. Congress enacted the clause to enable the federal government to preserve all of its installations and acquisitions in the marginal sea.[82] An installation refers to any specific area used by the government for a specific purpose.[83] The Channel Islands National Monu-

75. *See* note 12 *supra.*

76. 436 U.S. at 38. Senator Cordon noted in debates over the SLA that the claim of right "leaves the question of whether it is a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it." *Hearings before the Senate Comm. on Interior and Insular Affairs on S.J. Res. 13, S. 294, S. 107, S. 107 Amend., and S.J. Res. 18*, 82d Cong., 1st Sess. 1322 (1953) [hereinafter cited as *1953 Hearings*]. The claim is simply left for eventual adjudication. *Id.*

77. 436 U.S. at 40.

78. *Id.* at 41.

79. Congress pointed out that the "exceptions spelled out [§ 1313] do not in anywise include any claim resting solely on the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. REP. No. 133, 83d Cong., 1st Sess. 20 (1953).

80. 436 U.S. at 41. Senator Long stated at the hearings that "I am a little bit afraid of that last clause [referring to the claim of right clause] myself, just on the theory that the clause might be susceptible of interpretation that would complete [*sic*] negate this entire bill." *1953 Hearings*, *supra* note 76.

81. 436 U.S. at 41.

82. The clause was added at the suggestion of the Attorney General whose purpose was to guarantee "that all installations and acquisitions of the federal government within such area [three-mile zone] belong to it." *1953 Hearings*, *supra* note 76, at 935 (letter from Attorney General Brownell).

83. *Id.* at 1322. Senator Cordon stated that occupancy under a claim of right was

ment is a designated area[84] established by the federal government to preserve marine life and fossil formations.[85] The Monument is a federal installation which should entitle the United States to a claim of right.

Before 1949, the federal government held a general claim to the disputed waters under the paramount rights doctrine. The 1949 Presidential Proclamation changed the government's general claim into a specific claim. While the SLA extinguished general claims,[86] Congress intended to keep alive any specific claims the United States might have in the marginal sea.[87]

Legislative history clearly shows, as the Court pointed out, that a claim based solely on the paramount rights doctrine is inadequate.[88] The Court holds, however, that a claim of right, no matter how specific, is inadequate if it originated under the paramount rights doctrine.[89] Nothing in the legislative history supports this conclusion.[90] It is doubtful the federal government retains any specific claims today that were not originally general claims.[91] Consequently, the Supreme Court's interpretation of the SLA renders the claim of right clause virtually meaningless.

The 1978 *California* holding raises a serious question about the preservation of underwater life around the two disputed islands.[92]

"some sort of actual either continuous possession or possession in such a way as to indicate that the individual claims some special right there different from a vast unoccupied area." *See* 99 CONG. REC. 2619 (1953).

84 *See* note 16 *supra.*

85. *See* notes 14-17 *supra.*

86 *See* note 79 *supra.*

87. 99 CONG. REC. 2619 (1953) (remarks of Sen. Cordon).

88 *See* note 79 *supra.*

89 436 U.S. at 41. Although this is not the narrow holding of the case, the dissent points out that it is, in effect, the logical implication to be drawn from the Court's analysis. *Id.* at 47.

90 *See* 99 CONG. REC. 2619 (1953) (remarks of Sen. Holland).

91 Before the federal government could establish a specific interest and occupancy in an area, it most likely would have had a general interest in that area. *See 1953 Hearings*, *supra* note 76, at 1321 (remarks of Senators Kuchel and Cordon).

92. Federal regulations applicable to the monument prohibited tampering with "any underwater growth or formation" and did not allow any person to "dig in the bottom, or in any other way injure or impair the natural beauty of the underwater scene." 36 C.F.R. § 7.84 (1977). The regulations also prohibited tampering with wrecks and regulate fishing. Since these are federal regulations, however, they only apply as long as the federal government has jurisdiction over the area. The Supreme Court holding removed this jurisdiction.

Evidence suggests that removal of the kelp will seriously jeopardize the continued well-being of this marine sanctuary.[93] The Court should have eliminated the potential problem by recognizing the government's specific claim to the area.

The Court's holding also threatens the extraordinary marine life[94] found around the Dry Tortugas Islands, located off Key West, Florida. A 1935 Presidential Proclamation,[95] designed to protect the marine life,[96] designated these islands and the waters immediately around them as the Fort Jefferson National Monument. The Supreme Court recently declared that the waters around the islands are part of Florida's marginal sea.[97] Consequently, the 1978 *California* case strongly suggests that the federal government, if challenged in court, will have to relinquish control over the waters around the Fort Jefferson National Monument.

Few areas in the marginal sea are like the Fort Jefferson National Monument or the Channel Islands National Monument.[98] Therefore, a holding for the United States would not have circumvented the SLA's primary purpose of returning ownership rights in the marginal sea to the states. Rather, it would have followed the Act's claim of right clause. The Court's decision does not satisfy the purpose of either the 1949 Presidential Proclamation or the SLA's claim of right

93. Letter from C. Persons, Acting Regional Director of the National Park Service, to the Superintendent, Sequoia and Kings Canyon National Parks, whose jurisdiction included the Monument, stressed that "there is a general agreement here [at the Monument] that the kelp beds are essential for wildlife protection and should not be disturbed." (July 20, 1950).

94. The waters contain several varieties of turtles, fish, and fossil formations. Letter from J.A. King, Secretary of the Interior, to President Harry Truman (July 2, 1948).

95. Presidential Proclamation No. 2112, 49 Stat. 3430 (1935).

96. When President Truman was considering expanding the Channel Islands National Monument, a letter from the Secretary of the Interior advised the President that "similar protection was given to the extraordinary marine life in the immediate vicinity of the Dry Tortugas group of islands." Letter from J.A. King, Secretary of the Interior, to President Harry Truman (July 2, 1948). Also, the National Park Service promulgated regulations restricting fishing activity in the waters around the Monument. 4 Fed. Reg. 4958 (1939).

97. United States v. Florida, 420 U.S. 531 (1975), *decree entered*, 425 U.S. 791 (1976).

98. *See* 16 U.S.C. § 431 (1976).

provision. A holding for the United States would have supported both these purposes.

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