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## Treating Offshore Submerged Lands as Public Lands: A Historical Perspective

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## **Treating Offshore Submerged Lands as Public Lands: A Historical Perspective**

**By Robin Kundis Craig\***

### **ABSTRACT**

When President Harry Truman proclaimed federal control over the United States' continental shelf in 1945, he did so primarily to secure the energy resources—oil and gas—embedded in those submerged lands. Nevertheless, the mineral wealth of the continental shelf spurred two critical legal battles over their control and disposition: first, whether the federal government had any interest in the first three miles of continental shelf; and second, if so, whether the federal government had authority to regulate the continental shelf under traditional federal public land laws, such as the Minerals Leasing Act. Congress's reactions to federal courts' resolutions of these questions, embodied in 1953 in the Submerged Lands Act and the Outer Continental Shelf Lands Act, continue to provide the foundations for state and federal management of the nation's continental shelf and its energy resources.

Nevertheless, the Outer Continental Shelf's status as federal public lands remains ambiguous. This Article takes a historical approach to assessing that issue, reviewing the traditional definition of federal "public lands" and the historical context of the public lands issues that arose for the Outer Continental Shelf. It concludes that the Outer Continental Shelf, from a natural resources perspective, qualifies as the newest of the federal public lands, but it also acknowledges that—unlike for many other public lands—federal statutes repeatedly and consistently exclude the states from gaining ownership of those submerged lands.

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I. INTRODUCTION .....	52
II. THE IMPORT OF “PUBLIC LANDS” STATUS.....	55
III. THE HISTORICAL BACKGROUND OF THE CONTINENTAL SHELF CONTROVERSIES .....	57
A. Jurisdiction over the First Three Miles of Ocean, Including Its Submerged Lands .....	58
B. Federal Authority Under Federal Public Land Laws to Lease Offshore Submerged Lands for Oil and Gas Development.....	62
IV. THE PASSAGE OF THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF LANDS ACT.....	68
A. The Submerged Lands Act of 1953 .....	69
B. The House of Representatives’ Federal Leasing Provisions Intended for the Submerged Lands Act .....	75
C. Outer Continental Shelf Lands Act (OCSLA) .....	76
V. LATER CONGRESSIONAL PRONOUNCEMENTS ON THE OUTER CONTINENTAL SHELF.....	79
A. Alaska Native Claims Settlement Act (ANCSA) of 1971 .....	81
B. Federal Land Policy and Management Act of 1976 (FLPMA) .....	83
C. Alaska National Interest Lands Conservation Act (ANILCA) of 1980 .....	84
D. Abandoned Shipwreck Act of 1987.....	87
VI. CONCLUSION .....	89

## I. INTRODUCTION

The United States controls vast areas of offshore territory—indeed, including the sea around the nation’s island territories, the United States’ offshore interests are larger than its terrestrial interests.<sup>1</sup> The resources of these offshore areas are similarly vast and rich, from the fishery resources of the United States’ 200-nautical-mile wide Exclusive Economic Zone (EEZ)<sup>2</sup> to the oil (petroleum) and natural gas resources lying beneath its continental shelf.<sup>3</sup> Indeed, in 1953, as the United States was first asserting

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1. U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century* iii, 30-31 (2004) [hereinafter 2004 USCOP Report].

2. *Id.* at 274-75.

3. *Id.* at 352, 353.

clear regulatory authority over the Outer Continental Shelf, Warren Christopher noted that “[t]he mineral resources and food potential of this area have been said to make its acquisition more important to the nation than the Louisiana Purchase.”<sup>4</sup>

The United States has asserted control over its outer continental shelf since at least 1945, when President Harry Truman issued a presidential proclamation to that effect.<sup>5</sup> Without question, the mineral energy resources beneath the continental shelf have always been a substantial motivating force for the United States to assert control over those offshore submerged lands.<sup>6</sup> Indeed, it is not an exaggeration to view the U.S. law of the continental shelf as the law of offshore oil and gas development, as this Article should make clear. That law evolved once in the 1930s through 1950s to accommodate and clarify the rules regarding offshore oil and gas development, from regulatory jurisdiction to royalty arrangements to leasing requirements. More recently, the law of the continental shelf has been evolving again to acknowledge the other potential energy resources offshore, such as offshore wind farms, thermal exchange, and wave and current energy.<sup>7</sup> This most recent evolution in offshore energy law, however, builds off the first, rendering the 1930s to 1950s a particularly interesting three decades for assessing the legal status of the continental shelf.

That status, it turns out, became and continues to be highly contextual, particularly with regard to the status of the continental shelf as “public lands.” As Bob Armstrong, then Assistant Secretary for Land and Minerals, U.S. Department of the Interior, noted in 1997:

While many people do not think of the submerged lands of our nation's outer continental shelf as public lands, the United States has jurisdiction over the nearly 2 billion acres of the seabed and subsoil of our submerged lands. Congress, in 1978, declared that those lands were “a vital national resource reserve held by the Federal government for the public, which should be made available for

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4. Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 23 (Dec. 1953).

5. Pres. Procl. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

6. See Part II, *infra*, and accompanying notes.

7. 2004 USCOP Report, *supra* n. 1, at 364-68.

expeditious and orderly development, subject to environmental safeguards....” 43 U.S.C. § 1332. In 1996, the United States received over \$3.5 billion in leasing and royalty revenue from oil and gas and other minerals from these offshore public lands.<sup>8</sup>

Congress and the Supreme Court have largely resolved the basic issues of which government—the relevant coastal state or the federal government—has jurisdiction to regulate offshore activities in specific locations. Nevertheless, the status of the federally-controlled portions of the continental shelf (generally referred to as the Outer Continental Shelf, or OCS) remains variable. The federal OCS includes the submerged lands subject to U.S. control more than three miles out to sea in most places, or three marine leagues off the Gulf of Mexico coasts of Texas and Florida.<sup>9</sup>

This Article examines the contextualized status of the continental shelf as “public lands” and potential import of that status from a historical perspective. It begins in Part I with a quick examination of what the federal public lands are and why “public lands” status matters. Part II then examines the two significant controversies that arose with respect to the continental shelf beginning in the 1930s and continuing until Congress enacted both the Submerged Lands Act<sup>10</sup> and the Outer Continental Shelf Lands Act<sup>11</sup> in 1953. The first issue was who owned and/or controlled the first three miles of ocean—the states or the federal government? Assuming that the federal government had some authority over at least some parts of the continental shelf, the second issue was whether the federal government had authority, pursuant to its terrestrial public lands mineral statutes, to lease areas of the continental shelf for oil and gas development.

Parts III and IV then turn to Congress’s responses to this litigation. Part III examines the legislative history of both the Submerged Lands Act and the Outer Continental Shelf Lands Act for evidence of how Congress was thinking about the continental shelf, especially the OCS, in relation to other mineral- and energy-producing federal public lands. Part IV, in turn, examines OCS-relevant federal law since 1953, in statutes as

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8. Bob Armstrong, *Our Federal Public Lands*, 12 Nat. Resources & Env. 3, 4 (Summer 1997).

9. 2004 USCOP Report, *supra* n. 1, at 70-71.

10. 43 U.S.C. §§ 1301-1315 (2006).

11. *Id.* at §§ 1331-1356a.

diverse as the Alaska Native Claims Settlement Act of 1971,<sup>12</sup> the Federal Lands Policy Management Act of 1976,<sup>13</sup> the Abandoned Shipwreck Act of 1987,<sup>14</sup> and the Alaska Native Claims Settlement Act. The Article concludes that the continental shelf's—and even just the OCS's—legal status as public lands depends significantly on the exact context and the exact legal question that is being asked. In the context of offshore oil and gas exploration and development, however, the OCS should be viewed as public lands, even though Congress has made no provision for conveying title to those lands into private ownership.

## II. THE IMPORT OF “PUBLIC LANDS” STATUS

The status of any submerged lands, and especially the OCS, as federal public lands is not particularly intuitive. Nor has the subject been the focus of extensive general litigation. There are several good reasons for this gap. First, under the federal Equal Footing Doctrine and principles of state title, *states* took title to the submerged beds and banks of navigable fresh waters and all tidally influenced coastal waters as they became states.<sup>15</sup> As a result, these two very important sets of submerged lands are not *federal* lands<sup>16</sup>—although they may constitute, under the relevant state's land, public lands of the *state*.<sup>17</sup> Second, the submerged lands beneath non-navigable fresh waters generally belong to the private riparian landowners adjacent to the water body.<sup>18</sup> As a result, these

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12. *Id.* at §§ 1601-1629h (2006).

13. *Id.* at §§ 1701-1782 (2006).

14. *Id.* at §§ 2101-2106 (2006).

15. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227-28 (2012) (citations omitted).

16. Indeed, the U.S. Supreme Court has occasionally described these submerged lands as “pre-reserved” to the states and hence as subject to the rule that federal public lands do not include lands reserved for a specific purpose. *See Scott v. Carew*, 196 U.S. 100, 111-12 (1905) (citing *Shively v. Bowlby*, 152 U.S. 1, 38 (1894); *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894)).

17. *See e.g., Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 212-13 (N.C. App. 2010) (including navigable waters as state public lands); *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1109-13 (Fla. 2008) (describing in detail the nature of the coastal public lands below the mean high water line). *But see Totemoff v. State*, 905 P.2d 954, 962-68 (Alaska 1995) (holding that, in general, navigable waters and the lands under them are *not* public lands).

18. *See e.g. Mesenbrink v. Hosterman*, 210 P.2d 515, 519-20 (Idaho 2009) (describing the devolution of title to the submerged lands of nonnavigable water bodies from the federal government to private riparian landowners); *Orr v. Mortvedt*,

submerged lands are usually not in any kind of public ownership, obviating the public lands issue. Finally, the offshore continental shelf, and especially the OCS, did not become significantly important economically—and hence legally—until the mid-1930s, with increasing importance after World War II.<sup>19</sup> As a result, many of the 19th- and 20th-century court decisions, federal statutes, and Executive Branch actions regarding federal public lands simply did not consider the submerged lands beneath the oceans.

Complicating the issue even further is the fact that “public lands” has different meanings in different contexts. For example, as a matter of federal common law, as George Coggins and Robert Glicksman have emphasized, “[t]he meaning of the term ‘public lands’ has varied greatly . . . . In common parlance, the term simply means all lands owned by the United States.”<sup>20</sup> To the extent that the federal courts settled on a specific common-law definition, however, they indicated that federal public lands are federally owned lands that are available—albeit often through federal regulation—for general public use and for acquisition of private property rights. Thus, for example, the Supreme Court has emphasized that federal public lands cannot include lands reserved by Congress or the Executive for specific purposes, such as tribal reservations or national parks.<sup>21</sup> Instead, it has suggested that federal public lands must be “unqualifiedly subject to sale and disposition”<sup>22</sup> or “subject to sale or other disposal under general laws.”<sup>23</sup>

Traditionally, this definition has also delineated the import of “public lands” status. Unlike other kinds of federal lands, such as reserved lands, federal agencies could readily give private citizens (or, in some cases, the states) some interest—title or “other disposal”—in the federal

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735 N.W.2d 610, 616 (Iowa 2007) (“The navigable or nonnavigable status of a watercourse generally determines whether the bed of a watercourse is owned by the state or by private parties.”).

19. *United States v. California*, 332 U.S. 19, 37-39 (1947).

20. George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* vol. 1, § 1.13 (2d ed., West 2012).

21. *Federal Power Commission v. Oregon*, 349 U.S. 435, 448 (1955) (holding that the Warm Springs Indian Reservation and other reserved federal lands are not “public lands”); *United States v. O’Donnell*, 303 U.S. 501, 510 (1938); *United States v. Minnesota*, 270 U.S. 181, 206 (1926); *Scott v. Carew*, 196 U.S. 100, 111-12 (1905); *Missouri, Kansas & Topeka Ry. Co. v. Roberts*, 152 U.S. 114, 118-19 (1894); *Wilcox v. Jackson ex dem. McConnel*, 38 U.S. 498, 513 (1839).

22. *O’Donnell*, 303 U.S. at 510.

23. *Newhall v. Sanger*, 92 U.S. 761, 763 (1875).

public lands. Such interests, historically, have ranged from title patents in formerly federal lands<sup>24</sup> to timber sales<sup>25</sup> to mineral leases.<sup>26</sup> Viewed from this perspective, offshore submerged lands, and especially the OCS, should qualify as at least a form of federal public lands, especially in light of Coggins' and Glicksman's recognition that the evolution of the law governing federal lands has rendered "the common law definitions [of 'public lands'] obsolete."<sup>27</sup> Instead, the status of the OCS is best evaluated through the rich history and thick lens of the statutes that now govern its use and management. That history, as Part II will explore, begins with the rather sudden desire in the 1920s through 1940s to develop the energy resources that lay buried off the United States' coasts, especially in the Gulf of Mexico and off California.

### III. THE HISTORICAL BACKGROUND OF THE CONTINENTAL SHELF CONTROVERSIES

Immediately before and especially after World War II, all facets of U.S. society viewed development of the United States' offshore petroleum, and to a lesser extent natural gas, resources as being critical to both our national security and our economic well-being.<sup>28</sup> The oil business was also, of course, incredibly lucrative. Beginning in the mid-1930s in particular, this new interest in offshore oil and gas drove two significant legal controversies, one pitting coastal states against the federal government for control over continental shelf energy development and one questioning the federal government's actual authority under existing public lands statutes to regulate offshore oil and gas development. Both of these controversies helped to shape the status of offshore submerged lands as "public lands."

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24. The federal government has issued land patents under a variety of federal statutes. These include: Coal Lands Act of 1909, 30 U.S.C. § 81 (2006); Coal Lands Act of 1910, 30 U.S.C. §§ 83-85 (2006); Homestead Act, 43 U.S.C. §§ 325-329 (2006); Indian Homestead Act, 43 U.S.C. § 190 (2006); Mineral Lands Act, 30 U.S.C. § 22 (2006); Stock Raising Homestead Act, 43 U.S.C. § 299 (2006); and Swamp Lands Act, 43 U.S.C. §§ 982-984 (2006), among others.

25. 16 U.S.C. § 472a (2006).

26. Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-195 (2006); Materials Act of 1947, 30 U.S.C. § 611 (2006).

27. Coggins & Glicksman, *supra* n. 18, at § 1.13.

28. See discussions *infra*.

A. *Jurisdiction over the First Three Miles of Ocean, Including Its Submerged Lands*

Beginning in the 1930s, the revenues to be made from the leasing of offshore lands for oil development sparked a series of long and bitter legal battles between coastal states—notably, California, Louisiana, Florida, and Texas<sup>29</sup>—and the federal government for control over offshore oil and gas development. Many of these controversies were sparked around 1937, when oil prospectors and their attorneys applied to the U.S. Department of the Interior for permission to explore for and develop offshore oil and gas resources under the federal Mineral Leasing Act, insisting that the federal government, not states, had the legal authority to regulate oil and gas prospecting, even in the first three miles of ocean.<sup>30</sup>

As a legal matter, reasonable minds differed over which government owned and/or controlled the first three miles of ocean.<sup>31</sup> As a practical matter, however, those who emphasized the federal government's pervasive *laissez-faire* attitude toward the oceans—except where its interests in national security, national defense, international relations, or national commerce were directly concerned, which was a relatively rare event during the 19th-century United States' overall isolationist approach to the world—probably had the better of the argument.<sup>32</sup> Coastal states

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29. See generally, e.g., *United States v. Texas*, 339 U.S. 707 (1950) (holding that the United States controlled oil deposits off the coast of Texas); *United States v. Louisiana*, 339 U.S. 699 (1950) (holding that the United States controlled oil deposits off the coast of Louisiana).

30. See discussion *infra* Part II.B.

31. See *supra* note 29 and the cases cited therein.

32. As the House of Representatives emphasized, for example:

Many attorneys general have approved, over a period of 100 years, as required by law, the title to the submerged coastal lands granted to the United States by the States. The War and Navy Departments have treated these lands as owned by the States since the Departments originated most of the requests for State grants of such lands to the United States. In some 30 opinions, from 1900 to 1937, the Department of the Interior ruled that ownership of the soil in the 3-mile belt was in the respective States.

H.R. Rpt. 83-215 (March 27, 1953) (reprinted in 1953 U.S.C.C.A.N. 1385, 1427). See also *id.* at 1428 (quoting from these opinions). Moreover, “[a]s late as 1933, the then Secretary of the Interior, Harold L. Ickes, in refusing to grant a Federal oil ease on lands under the Pacific Ocean within the boundaries of California, recognized: ‘Title

had exercised fairly plenary authority in regulating offshore coastal activities such as fishing, sand and gravel mining, and, as oil and gas became increasingly important, offshore oil and gas leasing, with little to no interference from the federal government until the 1930s. Moreover, the formal federal law descriptions of many coastal states' boundaries, especially on the Pacific coast and along the Gulf of Mexico, seemed to confirm state jurisdiction over a band of coastal waters and the corresponding continental shelf.<sup>33</sup>

Nevertheless, the battle over which government controlled the continental shelf was hard fought in all three branches of the federal government. In general, the majority of Congress sided with the states, while the Executive, especially under President Truman, strongly asserted the federal government's rights, aided by minority support in Congress. Thus, for example, "[i]n 1938 and 1939 the Congress failed to enact legislation asserting ownership of submerged lands in the Federal Government, and in 1946 the Congress confirmed States' ownership of such lands by enactment of House Joint Resolution 225, which was vetoed by President Truman."<sup>34</sup>

It was the U.S. Supreme Court, however, that gave the first decisive answer to the question of which government controlled the ocean.

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to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State." *Id.* at 1417.

33. As the House of Representatives summarized in 1953:

In 1850 Congress approved the constitutional boundaries of California upon its admission to the Union. Its boundaries were specifically described as extending 3 miles into the Pacific Ocean. In 1859 Congress admitted Oregon into the Union with its constitutional boundaries specifically defined as being 1 marine league from its coast line. In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico. Texas' boundary was fixed 3 marine leagues into the Gulf of Mexico at the time it was admitted to the Union in 1845 by the annexation agreement. In 1889 Congress approved the Constitution of the State of Washington, which defined its boundary as extending 1 marine league into the ocean and which specifically asserted its ownership to the beds of all navigable waters within the territorial jurisdiction of the State.

*Id.* at 1428.

34. *Id.*

On June 23, 1947, in *United States v. California*,<sup>35</sup> it found in favor of the federal government.<sup>36</sup>

Like all of the litigation between states and the federal government that raised this issue, *United States v. California* was a fight over which sovereign was entitled to the revenues from oil and gas leasing and production in the first three miles of the ocean.<sup>37</sup> The United States claimed title to the submerged lands of this zone in fee simple.<sup>38</sup> Against California's assertions of ownership and control over these submerged lands based on California's congressionally ratified constitution and the Equal Footing Doctrine,<sup>39</sup> the Supreme Court emphasized the federal government's role both in defending the entire nation and in negotiating international relations with the rest of the world.<sup>40</sup> It then framed the issue for resolution as not being about legal title but rather "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered may be exploited."<sup>41</sup>

The Court rested its decision in the federal government's favor on four major grounds. First, "[a]t the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders."<sup>42</sup> As a result, the original 13 colonies-cum-states did not inherit a three-mile zone of ocean from England, giving California no claim to such a zone under the Equal Footing Doctrine.<sup>43</sup> Instead, the federal government established the nation's claims to this three-mile zone significantly later in the nation's history.<sup>44</sup>

Second, "[n]ot only has acquisition, as it were, of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty."<sup>45</sup>

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35. 332 U.S. 19 (1947).

36. *Id.* at 40-41.

37. *Id.* at 22-23.

38. *Id.* at 22.

39. *Id.* at 23.

40. *Id.* at 29.

41. *California*, 332 U.S. at 29.

42. *Id.* at 32.

43. *Id.*

44. *Id.* at 33-34.

45. *Id.* at 34.

Control over this belt of ocean, the Court concluded, was subject to the traditional international law rule of freedom of the seas.<sup>46</sup> As a result, national control could be secured only through international negotiation and perhaps treaty, actions that were clearly the federal government's prerogative.<sup>47</sup> Indeed, the Court pointed out, "[t]he very oil about which the state and nation here contend might well become the subject of international dispute and settlement."<sup>48</sup>

Third, the Supreme Court determined that its prior case law governing the ownership of submerged lands beneath the internal navigable waters, under which title usually goes to the states, did not apply at sea.<sup>49</sup> According to the Court, none of these prior cases squarely decided the issue of which government controls the first three miles of ocean, which had become an issue only with the recent advent of offshore oil and gas development.<sup>50</sup>

Finally, California had argued that, even if the federal government originally had title to the first three miles of continental shelf, that government had lost title to California as a result of prescription, federal acquiescence, estoppel, laches, and/or *res judicata*.<sup>51</sup> In fact, the Court concluded, *neither* California nor the federal government had shown much interest in the three-mile belt until recently, when oil became important.<sup>52</sup> In any case, California could not assert equitable doctrines against the United States, "which holds its interests here as elsewhere in trust for all the people [and] is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property . . . ."<sup>53</sup>

Thus, the federal government won the case. The Supreme Court concluded that "we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."<sup>54</sup> However, as

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46. *Id.* at 34-35.  
 47. *California*, 332 U.S. at 35.  
 48. *Id.*  
 49. *Id.* at 36-39.  
 50. *Id.* at 37-39.  
 51. *Id.* at 24.  
 52. *Id.* at 39.  
 53. *California*, 332 U.S. at 40.  
 54. *Id.* at 38-39.

this statement indicates, the Court did not clearly settle *legal title* to the continental shelf in the United States. Instead, it emphasized only that “national rights are paramount in waters lying to the seaward in the three-mile belt”<sup>55</sup> and that “the nation has paramount rights in and power over this ocean belt . . . .”<sup>56</sup>

Nevertheless, at the very end of *United States v. California*, the Supreme Court did appear to acknowledge that the continental shelf was federal property. Specifically, it noted, against California’s fears of complete exclusion from continental shelf resources, that it would not “assume that Congress, which has constitutional control *over Government property*, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission.”<sup>57</sup>

As a result, while *United States v. California* left the federal government with clear authority and jurisdiction to regulate oil and gas development in all of the United States’ continental shelf, the exact status of those submerged lands was ambiguous. Litigation over the federal government’s leasing authority, if anything, only underscored that ambiguity, leaving much resolution to Congress.

*B. Federal Authority Under Federal Public Land Laws to Lease Offshore Submerged Lands for Oil and Gas Development*

The issue of who had title to the continental shelf and control over offshore oil and gas deposits was important beginning in the 1930s because Congress had already enacted statutes that appeared to regulate offshore oil and gas development—if the continental shelf constituted federal public lands. In particular, the federal Mineral Leasing Act of

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55. *Id.* at 36.

56. *Id.* at 40. *See also Submerged Lands Act a Valid Exercise of Congressional Power*, 102 U. Pa. L. Rev. 804, 808 (April 1954) (concluding that the Supreme Court in later litigation “would have performed a service if it had clearly defined the rights and relationship of both state and federal governments in the areas included in the [Submerged Lands] Act. The uncertainties remaining due to the summary nature of the opinion are an invitation to litigation, or even attempts at new legislation, which might act to delay and impede the exploitation of resources vital to the economy and defense of the nation.”).

57. *California*, 332 U.S. at 40. (emphasis added).

1920<sup>58</sup> governs disposition of mineral rights by the federal government for:

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves . . . .<sup>59</sup>

Therefore, if the federal government owned the nation's offshore oil and gas deposits, the Act would seem to apply.

Individuals seeking to prospect for offshore oil certainly believed that this statute governed and repeatedly applied to the U.S. Department of the Interior for the requisite permits and leases. For example, in 1937 Robert E. Lee Jones applied to the Department of the Interior, through its Los Angeles Land Office, for oil and gas leases off the coast of California.<sup>60</sup> The Department denied his application on the grounds that it lacked jurisdiction over those offshore tracts, and, after appealing to the Secretary of the Interior, Jordan sued in the U.S. District Court for the District of Columbia to compel the Department to issue the leases.<sup>61</sup> The district court ducked the merits of the case, noting the ongoing litigation over which government controlled the continental shelf but concluding that, regardless, it lacked authority to compel the Secretary of the Interior to engage in so discretionary an action as issuing mineral leases.<sup>62</sup>

Similarly, in 1934 Deryl L. Mayhew applied to the Department for a permit to prospect for oil on approximately 1,600 acres of submerged lands off the coast of California.<sup>63</sup> Again, the Secretary of the Interior

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58. 30 U.S.C. §§ 181-195 (2006).

59. *Id.* at § 181.

60. *United States ex rel. Jordan v. Ickes*, 55 F. Supp. 875, 875 (D.D.C. 1943).

61. *Id.*

62. *Id.* at 875-76.

63. *Mayhew v. Krug*, 98 F. Supp. 338, 338 (D.D.C. 1951).

denied the permit on the grounds that California, not the United States, controlled the lands at issue.<sup>64</sup> Despite the fact that it was deciding the case in 1951, four years *after* the Supreme Court's decision in *United States v. California*, the D.C. District Court held the case in abeyance in light of the Supreme Court's decision to retain jurisdiction over *United States v. California* to resolve further issues.<sup>65</sup> However, it also noted that the Secretary of the Interior, on behalf of the United States, was arguing in defense that the Mineral Leasing Act "does not apply to land lying beneath the marginal sea because such is not public land."<sup>66</sup>

Indeed, even after *United States v. California*, the U.S. Department of the Interior continued to reject applications for leases under the Mineral Lands Leasing Act for offshore submerged lands. The legal basis of these rejections was the Solicitor of the Department of the Interior's August 1947 opinion that the continental shelf was not "public lands" and hence that the Mineral Leasing Act did not apply to offshore oil and gas development.<sup>67</sup> For example, in 1939, Alma Swart applied under the Act for a lease of 640 acres of submerged lands off the coast of southern California from which the City of Long Beach, pursuant to California law, was already pumping oil under a trust relationship with the state; Earl Sinclair and Lauren Cherry applied for an adjacent 640-acre tract.<sup>68</sup> Despite *United States v. California*, the Secretary of the Interior denied the applications in 1948.<sup>69</sup>

The U.S. Court of Appeals for the D.C. Circuit upheld the Department of the Interior's interpretation in *Justheim v. McKay*<sup>70</sup> in 1956—notably, after Congress enacted the Submerged Lands Act and Outer Continental Shelf Lands Act in 1953, as discussed in the next part. Plaintiffs in the case were numerous persons who had applied to the Department of the Interior for oil and gas leases for submerged lands off the coast of California, within the three-mile belt, all of which applications

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64. *Id.* at 338-39.

65. *Id.* at 340.

66. *Id.*

67. *Justheim v. McKay*, 123 F. Supp. 560, 561 (D.D.C. 1954) (citing Opinion No. M-34985, Solicitor of the Department of the Interior (Aug. 8, 1947)).

68. *Gabrielson v. City of Long Beach*, 56 Cal.2d 224, 230, 363 P.2d 883, 887 (Cal. 1961).

69. *Id.*

70. 229 F.2d 29 (D.C. Cir. 1956).

the Secretary of the Interior had denied in 1948.<sup>71</sup> When the plaintiffs sued the Secretary in federal court, “[t]he District Court concluded that the Mineral Lands Leasing Act applied only to public lands and that public lands do not include lands beneath the marginal seas.”<sup>72</sup> The D.C. Circuit adopted the district court’s reasoning almost without comment and affirmed.<sup>73</sup>

The district court emphasized the Solicitor for the Department of the Interior’s opinion “that the Mineral Leasing Act did not authorize the issuance of oil and gas leases on submerged coastal areas below low tide off the shores of the United States.”<sup>74</sup> As the district court recounted,

The opinion of the Solicitor was based on the following grounds (1) the Mineral Leasing Act is a statute for the disposition of public lands, but lands located below the high water mark, are not now and never have been considered public lands of the United States, (2) lands affected by the Act are to be surveyed and described by legal subdivisions of the public land surveys and these surveys have not heretofore extended beyond the high tide line, (3) since there had been no judicial determination that these lands belonged to the United States at the time of passage of the Act nor at the time of the amendatory Act of August 8, 1946, it could not be assumed that Congress intended to subject these lands to the provisions of the Act.<sup>75</sup>

The public lands argument turned first on what Congress meant by “public domain” in the Mineral Leasing Act of 1920, and the district court concluded that the term meant “public lands.”<sup>76</sup> The district court then noted that:

Public lands have been generally defined as those lands of the United States which are subject to sale or other

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71. *Id.* at 29-30.

72. *Id.* at 30.

73. *Id.* at 30-31.

74. *Justheim*, 123 F. Supp. at 561-62 (citing Opinion No. M-34985, Solicitor of the Department of the Interior (Aug. 8, 1947)).

75. *Id.* at 561-62.

76. *Id.* at 562 (citing *Barker v. Harvey*, 181 U.S. 481, 490 (1901)).

disposal under general laws. Not all lands of the United States are classified as public lands. Lands to which rights have attached and become vested through full compliance with an applicable land law are no longer part of the mass of public lands, nor are lands which have been reserved or appropriated for some lawful public purpose, i.e., National Parks, Military and naval reservation, etc.<sup>77</sup>

To support this traditional view of the public laws, the district court traced the history of federal mining laws and bills that existed before 1920, emphasizing that “[t]here are found in the legislative histories of all these bills expressions that the bills are intended to apply to minerals located in public lands or those minerals reserved when the public lands were patented to individuals.”<sup>78</sup> Similarly, during the consideration of the bill that became the Mineral Leasing Act of 1920, “there were several statements which reflect the fact that Congress intended it to apply only to the public land minerals. In the House Report on the bill it was made unmistakably clear that this was the intention of the bill.”<sup>79</sup> Absent from the district court’s consideration was the fact that Congress had no real reason to think about the continental shelf in these discussions; instead, the federal public lands would continue to be what the federal public lands always had been: terrestrial.

Finally, relying to a great degree on the battle between the federal government and the state governments over title to and control over the continental shelf in the first three miles of ocean, the court concluded that these submerged lands could *not* be public lands:

Although there had been no judicial determination of this question, it appears that these lands were never considered public lands of the United States. As defined above public lands are those lands of the United States which are subject to sale or other disposal under general laws. The areas involved in this action were never held open for sale

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77. *Id.* at 562-63 (citing *Newhall v. Sanger*, 92 U.S. 761, 763 (1875); *Bardon v. Northern Pacific R.R. Co.*, 145 U.S. 535, 538 (1892); *Payne v. Central Pacific Ry. Co.*, 255 U.S. 228, 237 (1921); *Leavenworth, Lawrence & Galveston R.R. Co. v. United States*, 92 U.S. 733, 745 (1875); *United States v. Minnesota*, 270 U.S. 181, 206 (1926); *Scott v. Carew*, 196 U.S. 100, 114 (1905)).

78. *Id.* at 564.

79. *Id.*

or other disposal. Furthermore, the public land surveys were never extended beyond the high tide line and it has been held that unsurveyed lands are not public lands of the United States. Rather than being considered public lands of the United States it appears that for many years these areas were believed to be the property of the adjacent state. This belief resulted from a series of cases which raised questions as to whether lands covered by inland waters and tidelands were public lands. In holding that tidelands were not public lands, the Court used such strong language that it was believed all submerged lands within the territorial jurisdiction of a State were State property, regardless of whether they were tidelands, lands covered by inland waters or marginal sea lands.<sup>80</sup>

In other words, the continental shelf could not be federal public lands because everyone had always believed that it belonged to the states. While *United States v. California* “established the interest of the Federal Government in these lands,” it “did not hold that they were subject to lease under the Mineral Leasing Act.”<sup>81</sup> (Of course, the Mineral Leasing Act issue was not before the Court.) The district court also emphasized that the Supreme Court had not clearly established the federal government as the owner in fee of the offshore submerged lands, underscoring the point that these lands could not be public lands.<sup>82</sup> Finally, “[a]lthough Congress had on several occasions extended the applicability of the Mineral Leasing Act to lands which were not within the scope of the original act, it has not taken any action specifically to include submerged coastal lands within the provisions of the act.”<sup>83</sup>

In the wake of *United States v. California*, therefore, the judiciary and the Executive were in agreement that the United States’ newly acquired coastal submerged lands were not “public lands,” especially not with regard to the Mineral Leasing Act. However, as the district court in *Justheim* acknowledged, Congress can add territory to the federal public lands; to hold otherwise would be to limit forever the federal public lands to the territory that the United States owned at some particular point in

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80. *Justheim*, 123 F. Supp. at 565.

81. *Id.* at 566.

82. *Id.* at 567.

83. *Id.* at 568.

history. Moreover, the continental shelf of the United States could (and arguably still can) properly be considered a new territorial acquisition: President Truman's Proclamation extended the United States' claim to its continental shelf under the high seas in 1945;<sup>84</sup> the Supreme Court decided *United States v. California* in 1947; and the international law governing coastal jurisdiction continued to evolve through the 1982 United Nations Convention on the Law of the Sea, which recognized coastal nations' claims to at least 200 miles of continental shelf as a matter of treaty,<sup>85</sup> and which the United States (a non-party) claims represents customary international law.<sup>86</sup>

As a result, the district court's and D.C. Circuit's decisions in *Justheim* and the Solicitor of the Department of the Interior's 1947 opinion on the Mineral Leasing Act are best viewed as temporal rather than absolute judgments regarding the continental shelf's status as federal public lands, particularly with regard to the OCS more than three miles out to sea—that is, that these were opinions that offshore submerged lands were not federal public lands *yet*. Therefore, the continental shelf's status must be evaluated in light of the legislation that Congress enacted in 1953 in response to *United States v. California* and the Mineral Lands Leasing Act litigation. It is to those statutes that this Article now turns.

#### IV. THE PASSAGE OF THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF LANDS ACT

While the federal courts provided the first round of resolutions to both the jurisdictional and the federal leasing authority questions for the continental shelf, Congress soon responded with two pieces of legislation intended to “fix” those judicial conclusions. It passed both statutes—the Submerged Lands Act and the Outer Continental Shelf Lands Act—in 1953, and the legislative history supporting their enactment provides interesting historical insights into Congress' view of the continental shelf as public lands.

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84. Pres. Procl. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

85. United Nations Convention on the Law of the Sea arts. 76-85 (Dec. 10, 1982) 1833 U.N.T.S. 397.

86. *E.g.* Pub. L. No. 104-43, § 401(1), 109 Stat. 389 (Aug. 27, 1994) (characterizing the prior U.N. Convention on the Law of the Sea as incorporating the customary international law right of passage); National Policy for the Oceans, Our Coasts, and the Great Lakes, 74 Fed. Reg. 28591-28592 (June 12, 2009).

A. *The Submerged Lands Act of 1953*

In the wake of the U.S. Supreme Court’s decision in *United States v. California*,<sup>87</sup> Congress decided to “correct”<sup>88</sup> the Court’s holding by “returning”<sup>89</sup> the first three miles of ocean submerged lands to the coastal states.<sup>90</sup> It accomplished this goal through the Submerged Lands Act of 1953.<sup>91</sup> As enacted, the Submerged Lands Act declares the national 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, and they are, subject to the provisions hereof, recognized,

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87. 332 U.S. 19 (1947).

88. See H.R. Rpt. 83-215 (March 27, 1953) (reprinted in 1953 U.S.C.A.N. 1385, 1419-25) (questioning the wisdom of the Supreme Court’s decision and describing all of the problems that it created as justifying congressional legislation).

89. See *id.* at 1417-19 (emphasizing that “[t]hroughout our Nation’s history the States have been in possession of and exercising all the rights and attributes of ownership in the lands and resources beneath the navigable waters within their boundaries,” cataloging Congress’s attempts to preserve this ownership against the Executive Branch, and characterizing the Supreme Court’s decision in *United States v. California* as “establish[ing] the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be.”).

90. See *id.* at 1385 (noting that the purpose of the legislation was to “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, and to provide for the use and control of said lands and resources and the resources of the outer Continental Shelf”); see also *id.* at 1388-89 (summarizing Title II of the proposed legislation as “declar[ing] that it is in the public interest that title and ownership of lands beneath navigable waters within the boundaries of the respective States and of the natural resources therein be in the respective States. It provides in addition to but also distinct from title and ownership that the rights and power to administer, lease, control, develop, and use such lands and resources under applicable State laws and in accordance with the terms of the bill.”)

91. Pub. L. No. 83-31, 67 Stat. 29 (May 22, 1953) (codified at 43 U.S.C. §§ 1301-1315 (2006)).

confirmed, established, and vested in and assigned to the respective States . . . .<sup>92</sup>

The Act released all of the federal government's title and claim to the first three miles of offshore submerged lands,<sup>93</sup> with the exceptions of the federal government's authority and right to regulate such waters for navigation, flood control, and power<sup>94</sup> and of the submerged lands to which the federal government had already acquired or reserved title.<sup>95</sup> In addition, the United States retained:

all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others . . . .<sup>96</sup>

Because the Submerged Lands Act gave control to the *states*, it largely avoided the “public lands” quandary. Instead, the Act works on “lands beneath navigable waters,” which it defined to be:

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as

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92. 43 U.S.C. § 1311(a) (2006). For a contemporary history of the Submerged Lands Act, see generally Aaron L. Shalowitz, *Boundary Problems Raised by the Submerged Lands Act*, 54 Colum. L. Rev. 1021 (1954).

93. *Id.* at § 1311(b).

94. *Id.* at § 1311(d).

95. *Id.* at § 1313.

96. *Id.* at § 1314(a).

heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters . . . .<sup>97</sup>

After the Submerged Lands Act, therefore, “lands beneath navigable waters”—including offshore submerged lands out to (for most states<sup>98</sup>) three miles—thus belong to the coastal states. In contrast, the United States claimed for itself “the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters,”<sup>99</sup> effectively confirming the Supreme Court’s *United States v. California* opinion for the OCS.

While the Submerged Lands Act preserves all rights acquired in submerged lands pursuant to other laws, it also disclaims that it constitutes or incorporates any interpretation that any other federal laws apply.<sup>100</sup> In other words, the Act expressly leaves open the question of whether the submerged lands of the OCS should be considered “public lands” for other federal law purposes.

Undoubtedly, members of Congress sincerely believed that the U.S. Supreme Court had simply gotten the law wrong and states should be entitled to control the first three miles of continental shelf and coastal waters, subject to some specific reservations of federal authority and

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97. *Id.* at § 1301(a).

98. 43 U.S.C. § 1312 (2006) (allowing states to press more extensive claims to offshore submerged lands based on historic ownership or control). Only Florida and Texas succeeded, in the Gulf of Mexico. JOSEPH J. KALO *ET AL.*, COASTAL AND OCEAN LAW: CASES AND MATERIALS 422 (3rd ed. 2007).

99. *Id.* at § 1302.

100. *Id.* at § 1315.

title.<sup>101</sup> Nevertheless, one of the key motivations for the Submerged Lands Act was to ensure the rapid and steady development of offshore petroleum by ending much of the litigation. For example, the House of Representatives' committee report on the new legislation waxed quite poetic about the "almost interminable debate over the disposition of these submerged lands" and the resulting "acute and vital necessity of the immediate enactment of legislation to promote the exploration and development of the petroleum deposits known to be located in these areas."<sup>102</sup> It further emphasized "[t]he strategic importance of oil to our economy and our defense efforts," which "demand immediate action to alleviate a growing menace to our national welfare."<sup>103</sup> Continuing litigation over control of these submerged lands, however, brought offshore petroleum development to a virtual standstill, particularly in the Gulf of Mexico.<sup>104</sup> Similarly, the Senate's report on the legislation emphasized the great wealth lying beneath the continental shelf and its importance to national defense.<sup>105</sup>

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101. See H.R. Rpt. 83-215, *supra* n. 86, at 1429-32 (describing the equities of granting these submerged lands to the states).

102. *Id.* at 1386.

103. *Id.*

104. *Id.* ("Since the court decisions in the cases involving the States of California, Louisiana, and Texas, new development of the vast potentialities located in these lands has been brought almost to a complete standstill, particularly in the Gulf of Mexico. The litigation which was the primary cause of these stoppages threatens to further retard any progress. Therefore, the committee feels that permanent legislation covering all phases of this litigation must be enacted."). See also *id.* at 1396 (stating, in an appendix report generated from prior attempts at similar legislation, that "[t]his controversy, originating in 1938, has been before the Seventy-fifth, Seventy-sixth, Seventy-ninth, Eightieth, Eighty-first, and Eighty-second Congresses. The longer it continues, the more vexatious and confused it becomes. Interminable litigation has arisen between the States and the Federal Government, between applicants for leases under the Federal Mineral Leasing Act and the Departments of Justice and Interior, and between the States and their lessees. Much-needed improvements on these lands and the development of strategic natural resources within them have been seriously retarded."); *id.* at 1397 (describing how litigation that began in 1950 had brought oil and gas development in the Gulf of Mexico to a "standstill").

105. Sen. Rpt. 83-133 (Mar. 27, 1953) (reprinted in 1953 U.S.C.C.A.N. 1471, 1534) ("Great wealth lies beneath the waters off the shores of our Nation. The oil supply is the richest of the treasures that have been so far discovered. It is one of the richest discoveries of natural wealth in the history of the United States. In addition, vast reserves of natural gas, sulfur, and other resources, some discovered only recently, bring the total value of the known resources in this rich submerged area to many billions of dollars. The oil supply alone is one of the keys to the defense of

Beyond the need to end the conflicts was also the fact that the states were better positioned at the time to promote offshore petroleum development. As the House of Representatives explained in its report on the legislation that became the Submerged Lands Act, “[y]ears have been spent by the States in working out legislation, rules, and regulations, and details of procedure and practices governing the geophysical work, leasing methods and drilling problems involved in this new and hazardous type of oil exploration. . . . The States have established and maintain departments, technical staffs, and experienced personnel to handle these matters and supervise these activities.”<sup>106</sup> In contrast, “[i]f the submerged lands are transferred from State to Federal control, the Federal Government will have to begin from scratch. . . . The ownership of the submerged lands off the coasts of Texas and Louisiana and other coastal States will have to be determined by litigation. . . . At present there is not even a law under which the Federal Government could operate these lands.”<sup>107</sup> As a result, “[t]he committee believes that failure to continue existing State control will result in delaying for an indefinite time the intensive development now under way on these lands and that any delay is, in the words of Secretary Forrestal, ‘contrary to the best interest of the United States from the viewpoint of national security.’”<sup>108</sup> Finally,

No evidence was presented to show that the Federal Government could do a better job in administering the submerged lands than the States are doing. The evidence is overwhelming that State control is not only adequate but is desirable. Geological, engineering, and physical conditions in oil production vary greatly not only from State to State, but also from field to field within a State. Different practices and procedures have been established to fit the peculiar local needs.<sup>109</sup>

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our country and of the entire free world. Planes, tanks, and ships—all of these major instruments of modern warfare—are useful only if there is enough oil to keep them in motion.”).

106. H.R. Rpt. 83-215, *supra* n. 86, at 1433.

107. *Id.*

108. *Id.*

109. *Id.*

The House committee report on the Submerged Lands Act legislation also suggests that the House considered submerged lands—at least those owned by the federal government—to be public lands. First, the proposed legislation specifically exempted from transfer to the states submerged lands that the United States owned as part of the public lands,<sup>110</sup> indicating that the OCS was both federal and a form of public lands. Second, part of the House's defense of giving states control over the first three miles of offshore submerged lands also evidenced its view that the OCS constituted public lands just like government-owned terrestrial lands. Specifically, the House committee looked to evidence from oil and gas production from these more traditional public lands to argue that states should be left in control of the offshore submerged lands:

In the five *public land* States producing oil and gas, the Federal Government owns approximately 36 1/2 percent of the acreage but produces only about 13 percent of the oil and gas produced in these States. The 1946 total production from these lands was approximately 62,000,000 barrels, while the production from State and privately owned lands in the same States was in excess of 380,000,000 barrels. Thus, it will be seen that in these five '*public land*' States, where Federal- and State-owned lands are in direct competition with each other, development has been much faster and production has been much greater under State regulation than under Federal control. The total annual production of oil from the vast federally owned domain in 1946 was less than 12 days' production of the Nation. It must be conceded that the Federal Government has made a pitiful showing with respect to the development of *public lands* for oil and gas purposes.<sup>111</sup>

Thus, at least as far as energy development was concerned, the House committee viewed the continental shelf as being equivalent to terrestrial public lands, whether state- or federal-owned. Moreover, in its opinion, the return of the first three miles to the states would create both state-owned public lands and federal public lands off the nation's coasts that

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110. *Id.* at 1388.

111. *Id.* at 1434.

were capable of mineral development, just as mineral development occurred on both state and federal terrestrial public lands.

*B. The House of Representatives' Federal Leasing Provisions Intended for the Submerged Lands Act*

In its version of the Submerged Lands Act, the House of Representatives would have addressed federal offshore oil and gas leasing more than three miles out to sea (proposed Title III). The Senate eventually struck these provisions from the legislation that became the Submerged Lands Act—although such leasing became the core focus of the companion Outer Continental Shelf Lands Act, discussed below. Nevertheless, the House's report on these provisions provides some insight into the status of the Outer Continental Shelf as public lands.

The House bill would have addressed oil and gas leasing because the House was concerned that failure to assert decisive control over the OCS would prejudice the United States' interests and relationships in the international sphere.<sup>112</sup> Moreover, the House recognized that the parts of the continental shelf given to states were a relatively small part of the total continental shelf that the United States had already claimed through President Truman's 1945 Proclamation<sup>113</sup>: “[t]hat part of the shelf which lies within historic State boundaries, or 3 miles in most cases, is estimated to contain about 27,000 square miles or less than 10 percent of the total area of the shelf . . . .”<sup>114</sup>

Notably, therefore, the federal government controlled more than 90 percent of the potentially developable—for oil and gas—continental shelf off the coast of the United States, the OCS. However, as the House committee report further noted, “no law now exists whereby the Federal Government can lease those submerged lands, the development and operation of which are vital to our national economy and security.”<sup>115</sup> It was Congress's duty to act so that all that petroleum could be developed.<sup>116</sup> States, in contrast, could regulate their offshore submerged lands through their respective police powers.<sup>117</sup>

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112. *Id.* at 1386.

113. Pres. Procl. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

114. H.R. Rpt. 83-215, *supra* n. 86, at 1390.

115. *Id.* at 1391.

116. *Id.*

117. *Id.* at 1391, 1406-07.

One of the telling aspects of the House's proposed legislation, at least so far as the status of the offshore submerged lands as federal public lands is concerned, is that the House from the beginning lodged authority for offshore oil and gas leasing with the Secretary of the Interior.<sup>118</sup> As was discussed in Part II, much of the litigation that precipitated the need for the Submerged Lands Act and the Outer Continental Shelf Lands Act arose from private parties trying to lease offshore submerged lands for mineral development pursuant to the federal Mineral Leasing Act, which is also administered by the Department of the Interior. The Department of the Interior was deemed the *de facto* regulatory authority for offshore oil and gas development, despite the paucity of explicit legal authority to engage in such leasing, on the basis of its authority to allow mineral development on the terrestrial federal public lands. Indeed, in its proposals, the House would have made nine sections of the federal Mineral Leasing Act directly applicable to the continental shelf.<sup>119</sup> It also turned to that Act for precedent on how to divide royalties from mineral development on the continental shelf with states.<sup>120</sup>

In describing earlier bills on the same subject, the House equated the continental shelf to new territory acquired under international law doctrines of discovery or conquest. The House's proposed legislation would have brought "the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery."<sup>121</sup> Building on this Article's suggestion at the end of Part II, the House thus arguably viewed the OCS as *new* federal public lands that had to be incorporated into existing public land law.

### C. Outer Continental Shelf Lands Act (OCSLA)

Despite the House of Representatives' impulse to address both continental shelf jurisdiction and OCS oil and gas leasing, exploration, and development in one statute, Congress as a whole chose to address the latter activities separately, about three months after it enacted the Submerged Lands Act, in the Outer Continental Shelf Lands Act

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118. *Id.* at 1391-93.

119. *Id.* at 1404.

120. H.R. Rpt. 83-215 at 1413-14.

121. *Id.* at 1407.

(“OCSLA”).<sup>122</sup> The OCSLA also made clear that the OCS is under U.S. jurisdiction and that federal and, to some extent, state laws apply to oil and gas operations on those submerged lands.<sup>123</sup>

The OCSLA is very much a companion statute to the Submerged Lands Act. For example, the OCSLA defines the “outer continental shelf” to which it applies by reference to the Submerged Lands Act. The “outer continental shelf” is “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title [the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”<sup>124</sup> The OCSLA also borrows heavily from federal public lands statutes governing terrestrial mineral and energy development, suggesting strongly that Congress viewed the Outer Continental Shelf as a form of federal public lands, at least so far as developing these resources was concerned. For example, the OCSLA defines the “minerals” to which it applies with reference to the federal public land statutes. In OCSLA’s current form, “minerals” means “oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from ‘public lands’ as defined in section 1702 of this title.”<sup>125</sup> This cross-reference to federal public land law explicitly excludes the OCS from federal public lands managed by the Bureau of Land Management (“BLM”),<sup>126</sup> creating a perfect parallelism of regulatory regimes for federal lands: the OCSLA governs the OCS while other statutes govern federal terrestrial lands, but the regimes are otherwise parallel regulatory schemes for assigning mineral interests in federal lands.

That parallelism is more evident in the original OCSLA than is evident in the amended version today. As originally enacted, the OCSLA made clear that it was a mineral leasing statute and that it was superseding similar statutes for terrestrial public lands. The OCSLA originally focused

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122. Act of August 7, 1953, ch. 345, 67 Stat. 462 (Aug. 7, 1953) (codified at 43 U.S.C. §§ 1331-1356a (2006)). For a contemporary account of the OCSLA’s passage and import, see generally Christopher, *supra* n. 4.

123. 43 U.S.C. § 1333 (2006).

124. *Id.* at § 1331(a).

125. *Id.* at § 1331(q). The cross-reference now references the definition of Bureau of Lands Management (“BLM”) public lands in the Federal Lands Management & Policy Act (“FLPMA”), discussed in more detail in Part IV, *infra*. See 43 U.S.C. § 1702(a) (2006) (defining “public lands”).

126. *Id.* at § 1702(a).

on “mineral leases,” which it defined to be “any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals . . . .”<sup>127</sup> Similarly, Congress extended the federal Constitution and federal statutes to the Outer Continental Shelf “to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.”<sup>128</sup> As Warren Christopher noted in a contemporaneous article on the Act, “[t]he provision that federal laws apply to the outer Shelf as if it were ‘an area of exclusive Federal jurisdiction located within a state’ solved the drafting problem in connection with federal laws which might be interpreted as being limited in their application to continental United States.”<sup>129</sup>

The OCS, therefore, was just like terrestrial federal public lands, except that the OCSLA governed mineral leasing there. Notably, the OCSLA is and has been codified into Title 43 of the United States Code, which is entitled “Public Lands.” In addition, Congress’ declaration of policies in amendments to the OCSLA confirm that Congress thought of the OCS as public lands. In the OCSLA, Congress established a U.S. policy that “the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in” the Act.<sup>130</sup> Moreover, “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs . . . .”<sup>131</sup> Congress also has emphasized that the purpose of the OCSLA was to provide a method for distributing OCS lands for development—albeit by leases, not by deed.<sup>132</sup>

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127. Pub. L. No. 83-212, § 2(c), 67 Stat. 462, 462 (Aug. 7, 1953).

128. *Id.* at § 4(a)(1), 67 Stat. at 462.

129. Christopher, *supra* n. 4, at 42.

130. 43 U.S.C. §§ 1332(1) (2006).

131. *Id.* at § 1332(3).

132. *See id.* §§ 1334 (putting the Secretary of the Interior in charge of the leasing regime and regulations for it and specifying when leases can be cancelled); 1335 (providing for validation of leases that existed before the OCSLA’s enactment, especially leases procured under state law); 1337 (describing the bidding system); 1338 (designating how revenues should be disposed of); 1340 (describing exploration plan requirements); 1344 (outlining the federal leasing program).

Moreover, as is true under the general common law of federal public lands, Congress exempted from the OCSLA leasing process portions of the OCS already reserved to other purposes—“any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.”<sup>133</sup> The OCSLA also explicitly reserves the President’s authority to withdraw unleased OCS lands from disposition under the Act.<sup>134</sup> The OCSLA, in other words, treats the OCS as new federal public lands, subject to further congressional reservation, Presidential withdrawal, and disposition through leases by the Secretary of the Interior.

#### V. LATER CONGRESSIONAL PRONOUNCEMENTS ON THE OUTER CONTINENTAL SHELF

While the Submerged Lands Act and the OCSLA remain the two primary federal statutes governing offshore submerged lands, Congress has since enacted several other statutes that also bear on the status of these lands as federal public lands. These statutes emphasize that the question “are offshore submerged lands or the Outer Continental Shelf public lands?” has no acontextual, *a priori* answer. Instead, the only relevant question is whether these lands qualify as federal public lands *for a particular purpose or use*.

Congress has continued to describe the nation’s OCS as public lands, especially with respect to energy development and production. For example, in connection with the 1978 amendments to the Outer Continental Shelf Lands Act, the House of Representatives’ committee report on the legislation repeatedly referred to the outer continental shelf as public lands.<sup>135</sup> Similarly, in reports on legislation replacing the Minerals Management Service in the wake of the *BP/Deepwater Horizon*

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133. *Id.* at § 1337(p)(10). *See also id.* at § 1340(h) (“The Secretary shall not issue a lease or permit for, or otherwise allow, exploration, development, or production activities within fifteen miles of the boundaries of the Phillip Burton Wilderness . . . unless the State of California issues a lease or permit for, or otherwise allows, exploration, development, or production activities on lands beneath navigable waters . . . of such State which are adjacent to such Wilderness.”).

134. *Id.* at § 1341(a).

135. H.R. Rpt. 95-372 (Aug. 29, 1977) (reprinted in 1978 U.S.C.C.A.N. 1450, 1485, 1646-47). *See also* H.R. Rpt. 108-811 (Jan. 3, 2005) (available at 2005 WL 147925) (referring to “an inventory of estimated undiscovered oil and gas resources beneath public lands (including the outer continental shelf)” and hence considering the outer continental shelf to be public lands).

oil spill in 2010, the Senate committee report noted that there is federal revenue from “both offshore and onshore mineral development on public lands.”<sup>136</sup> Most recently, in 2012, the House of Representatives’ committee report on the proposed Energy Security and Transportation Jobs Act clearly included the federally controlled OCS as part of the federal public lands.<sup>137</sup>

Congress has also defined the OCS as federal public lands in other contexts. For example, the Engle Act explicitly includes the OCS as “public lands” that the federal government can withdraw or reserve for national defense purposes.<sup>138</sup> Similarly, in 1964, Congress explicitly included the OCS as part of the “public lands” subject to the Public Land Law Review Commission’s review process.<sup>139</sup>

Even in the context of the OCSLA, however, there is room for debate on the exact status of the OCS—particularly when control of its resources is at stake. In response to a 1985 proposal to move jurisdiction over the OCSLA in the House of Representatives from the Interior Committee to the Merchant Marine Committee, for example, the Merchant Marine Committee argued strongly that the outer continental shelf did *not* constitute traditional federal public lands.<sup>140</sup> According to this argument, “[t]he term ‘public lands’ enjoys two centuries of well-established meaning as it has been used by the U.S. Congress and interpreted by the Supreme Court. Two fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability

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136. Sen. Rpt. 111-236 (July 28, 2010) (available at 2010 WL 2977946, at \*14).

137. H.R. Rpt. 112-384 (Feb. 9, 2012) (available at 2012 WL 419823, at \*\*11-12). See also Joseph P. Tomain, *Smart Energy Path: How Willie Nelson Saved the Planet*, 36 Cumb. L. Rev. 417, 453 (2005-2006) (including the Outer Continental Shelf as public lands for purposes of energy development); Kate M. Joyce, *U.S. Energy Policy Since September 2001*, 15 Fordham Envtl. L. Rev. 31, 56 (2004) (noting that “public lands” for purposes of the National Energy Plan “include the Outer Continental Shelf on the east and west coasts, Alaska’s Bristol Bay and most of the eastern Gulf of Mexico off the coast of Florida.”).

138. 43 U.S.C. § 155(1) (2006).

139. Act of Sept. 19, 1964, Pub. L. No. 88-606, § 10, 78 Stat. 982, 985 (1964). For a discussion of this review process, see Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act After the Legislative Veto Decisions*, 36 Hastings L.J. 1, 69-70 (Sept. 1984).

140. H.R. Rpt. 99-300 (Oct. 3, 1985) (reprinted in 1986 U.S.C.C.A.N. 756, 1084, 1098).

to sell or otherwise dispose of it.”<sup>141</sup> The United States, according to this argument, had neither title to the OCS nor the authority to dispose of its submerged lands; instead, “[e]xcept for the resources related claims of jurisdiction over the fisheries and mineral deposits of the OCS, the area is international and beyond U.S. control, as recently reiterated by the President’s Exclusive Economic Zone Proclamation.”<sup>142</sup>

This Part examines four other federal statutes under which the status of the Outer Continental Shelf as federal public lands became relevant but the statute either explicitly defined “public lands” to *not* include the Outer Continental Shelf or was deemed through interpretation not to extend to those offshore submerged lands. Collectively, what these statutes suggest most strongly is that the OCS and its resources are conclusively *not* subject to state acquisition and control.

A. *Alaska Native Claims Settlement Act (ANCSA) of 1971*

Unlike was the case for many Native American groups in the continental United States, the federal government never entered into treaties with the various groups of Native Alaskans, leaving their lands claims unresolved. In 1971, Congress enacted the Alaska Native Claim Settlement Act (“ANCSA”)<sup>143</sup> after concluding that “there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims . . . .”<sup>144</sup>

Much of ANCSA operates to designate which lands in Alaska belong to Native Alaskan groups and villages, which belong to the State of Alaska, and which belong to the federal government. From the point of view of Native Alaskans, the primary impact of ANCSA was to extinguish these groups’ claims to aboriginal title to lands: “[a]ll prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the

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141. *Id.*

142. *Id.* at 1084-85. Jurisdiction over the OCSLA in the House of Representatives now belongs to the Natural Resources Committee and the Subcommittee on Energy and Mineral Resources. House Committee on Natural Resources, *Subcommittee on Energy and Mineral Resources* (<http://naturalresources.house.gov/subcommittees/subcommittee/?SubcommitteeID=5062> (as viewed Dec. 27, 2012)).

143. Pub. L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971) (codified at 43 U.S.C. §§ 1601-1629h (2006)).

144. 43 U.S.C. § 1601(a) (2006).

Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.”<sup>145</sup> For these purposes, moreover, ANCSA defines “public lands” to be:

all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969 . . . .<sup>146</sup>

ANCSA’s extinguishment of Native claims also clearly applies to submerged lands, including offshore submerged lands. Specifically, by operation of the statute, “[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, *including submerged land underneath all water areas, both inland and offshore*, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”<sup>147</sup> As the federal government began to regulate both fishing above and oil and gas development on the Outer Continental Shelf off of Alaska, the question became whether this provision extended to the Outer Continental Shelf or only to Alaska’s three-mile belt of offshore submerged lands.

Given the history of public lands disposition in Alaska, the U.S. Supreme Court indicated that ANCSA does not extend to the Outer Continental Shelf. As the Court explained in 1987:

In the Statehood Act, Congress provided that the State of Alaska could select over 100 million acres from the vacant and unreserved “public lands of the United States in Alaska” within 25 years of its admission. Statehood Act § 6(b), 72 Stat. 340. Similarly, in ANCSA, Congress allowed Native Alaskans to select approximately 40 million acres of “Federal lands and interests therein

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145. *Id.* at § 1603(a).

146. *Id.* at § 1602(e).

147. *Id.* at § 1603(b).

located in Alaska,” with the exception of federal installations and land selections of the State of Alaska under the Statehood Act. 43 U.S.C. §§ 1602(e), 1610(a), 1611. We agree with the Secretary that “[i]t is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS—‘a vital national resource reserve held by the [government] for the public’ (43 U.S.C. 1332(3)).” Brief for Petitioners in No. 85-1406, p. 33. Clearly, the purpose of these provisions was to apportion the land within the boundaries of the State of Alaska.<sup>148</sup>

ANCSA, or at least the Supreme Court’s interpretation of it, as prompted by the Secretary of the Interior, would thus seem to suggest that the OCS is not part of the “normal” federal public lands. However, it is important to emphasize that the Court was giving strong interpretive weight to the phrase “in Alaska” and that it concluded that federal public lands “located in Alaska” by definition could not include the OCS because Alaska had no claim whatsoever to those submerged lands.<sup>149</sup> In context, therefore, the Supreme Court’s analysis essentially declares that the OCS can in no way become *state* land, rather than that it can never be considered federal public lands.

#### B. Federal Land Policy and Management Act of 1976 (FLPMA)

Congress enacted the Federal Land Policy and Management Act (FLPMA)<sup>150</sup> in 1976 to provide for comprehensive planning for and management of certain federal public lands. It announced in FLPMA national policies to generally keep those lands in federal ownership, to engage in federal land use planning for those lands, and to recognize the national need for promoting various uses of those lands.<sup>151</sup> However, the statute narrowly defines “public lands” to mean “any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land

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148. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 552 (1987) [hereinafter *Gambell III*].

149. *Id.* at 547-49.

150. 43 U.S.C. §§ 1701-1787 (2006).

151. *Id.* at § 1701(a).

Management, without regard to how the United States acquired ownership . . . .”<sup>152</sup>

Thus, the federal “public lands” subject to FLPMA’s planning and management requirements are limited to lands managed by the federal BLM, and FLPMA itself also operates as the BLM’s organic act. Congress went further, however, and also explicitly exempted “lands located on the Outer Continental Shelf” from the Act’s scope.<sup>153</sup> Thus, OCS lands are clearly *not* “public lands” for FLPMA purposes.

With regard to this definition, the House Conference Report on FLPMA notes only that “[t]he conferees retained the traditional use of the term ‘public lands’ (hereinafter referred to as BLM lands) in referring to the bulk of the lands administered by BLM.”<sup>154</sup> That report thus suggested that the OCS was not part of those “traditional” public lands.

Nevertheless, Congress’ perceived need to explicitly exempt the OCS from FLPMA also cuts another way. If the OCS were clearly *not* part of the federal public lands, no such exemption would be necessary. The explicit exemption of the OCS from FLPMA therefore suggests that Congress otherwise considers those offshore submerged lands to be a part of contemporary federal public lands.

### C. *Alaska National Interest Lands Conservation Act (ANILCA) of 1980*

Congress enacted the Alaska National Interest Lands Conservation Act (“ANILCA”)<sup>155</sup> in 1980 with three purposes: (1) to preserve and protect “certain lands and waters in the State of Alaska that contain significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values;” (2) “to preserve and protect “unrivaled scenic and geological values associated with natural landscapes,” wildlife habitat, and Alaskan ecosystems; and (3) “to provide the opportunity for rural residents [in Alaska] engaged in a subsistence water of life to continue to do so.”<sup>156</sup> However, ANILCA also raised considerable questions for Native Alaskans regarding whether it applied to the OCS.

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152. *Id.* at § 1702(e).

153. *Id.* at § 1702(e)(1).

154. H.R. Conf. Rpt. 94-1724 at 57 (Sept. 29, 1976) (reprinted in 1976 U.S.C.C.A.N. 6227, 6229).

155. 16 U.S.C. §§ 3101-3233 (2006).

156. *Id.* at § 3101(a), (b), (c).

ANILCA defines “land” to “mean lands, waters, and interests therein,”<sup>157</sup> suggesting that submerged lands might be included. “Federal land,” in turn, is “lands the title to which is in the United States after December 2, 1980.”<sup>158</sup> Finally, the Act defines “public lands” to be:

land situated in Alaska which, after December 2, 1980, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.<sup>159</sup>

ANILCA thus suggested that the federal interests in the OCS off the coast of Alaska rendered those submerged lands not only “Federal lands” but also “public lands,” at least for purposes of the Act. The issue came to a head when several Native Alaskan Villages claimed aboriginal rights to subsistence hunt and fish on the OCS and sought to enjoin oil and gas leasing there under ANILCA on the ground that such energy development activities would interfere with the Natives’ hunting and fishing rights.<sup>160</sup> The district court held both that the Villages held no such aboriginal rights and that ANILCA did not apply on the Outer Continental Shelf.<sup>161</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the conclusion regarding aboriginal rights but reversed regarding

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157. *Id.* at § 3102(1).

158. *Id.* at § 3102(2).

159. *Id.* at § 3102(3).

160. *Gambell III*, 480 U.S. at 535.

161. *Id.* at 535-36.

ANILCA, finding that it *did* apply to the OCS.<sup>162</sup> The Ninth Circuit gave two primary reasons for its decision. First, logically and according to legislative history, the geographic scope of ANILCA should be the same as the geographic scope of ANCSA, which the Ninth Circuit concluded extended to the OCS<sup>163</sup> (a conclusion, as discussed above, that the Supreme Court later undermined). Second, and more importantly, Congress enacted ANILCA's subsistence provisions in order to benefit the Native Alaskans, and under Supreme Court precedent, its scope should be interpreted generously and to the benefit of the tribes.<sup>164</sup>

The U.S. Supreme Court reversed, concluding that, by statutory definition, ANILCA "public lands" could not include the OCS.<sup>165</sup> The Court emphasized that under ANILCA's definition, quoted above, "public lands" are "lands *in Alaska*," and that the phrase "in Alaska"

has a precise geographic/political meaning. The boundaries of the State of Alaska can be delineated with exactitude. The State of Alaska was "admitted into the Union on an equal footing with the other States," and its boundaries were defined as "all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Alaska Statehood Act (Statehood Act) §§ 1, 2, 72 Stat. 339. The Submerged Lands Act of 1953, 67 Stat. 29, as amended, 43 U.S.C. § 1301 et seq. (1982 ed. and Supp. III), was made applicable to the State. Statehood Act § 6(m), 72 Stat. 343. Under § 4 of the Submerged Lands Act, 43 U.S.C. § 1312, the seaward boundary of a coastal State extends to a line three miles from its coastline. At that line, the OCS commences. OCSLA § 2(a), 43 U.S.C. § 1331(a). By definition, the OCS is not situated in the State of Alaska.<sup>166</sup>

Moreover, against arguments (and the Ninth Circuit's finding) that Congress had not intended to be so precise, the Supreme Court "reject[ed]

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162. *Id.* at 536.

163. *People of Gambell v. Clark*, 746 F.2d 572, 575, 579-80 (9th Cir. 1984).

164. *Id.* at 581.

165. *Gambell III*, 480 U.S. at 546-48.

166. *Id.* at 547.

the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA as ‘Federal lands’ ‘situated in Alaska.’ Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning.”<sup>167</sup>

As a result of the Supreme Court’s decision, the OCS off Alaska does not qualify as “public lands” for ANILCA purposes.<sup>168</sup> Nevertheless, the Supreme Court reached that decision based on ANILCA’s particular definition of “public lands”—not on the basis of traditional public land law—and again emphasized that the OCS does not belong to the states. As a result, it is difficult to conclude that either ANILCA or the Supreme Court’s interpretation of it resolves for all contexts the OCS’s federal public lands status.

#### D. Abandoned Shipwreck Act of 1987

Offshore submerged lands are the sites of more resources of interest than just oil and gas, including shipwrecks. Traditionally, recovery of shipwrecks was governed by the federal admiralty or maritime law of salvage,<sup>169</sup> but the Submerged Lands Act’s assignment of the first three miles of offshore submerged lands to the coastal states created issues regarding state claims to shipwrecks on that part of the continental shelf.<sup>170</sup> To resolve at least some of those issues, Congress enacted the Abandoned Shipwreck Act of 1987 in 1988.<sup>171</sup>

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167. *Id.* at 548.

168. For a discussion of the further implications of the Supreme Court’s decision, see Joan M. Nockels, Student Author, *Katie John v. United States: Redefining Federal Public Lands in Alaska*, 26 *Envtl. L.* 693 (1996).

169. *See generally, e.g., The Blackwall*, 77 U.S. 1 (1869) (assessing rights to salvage a British ship that caught fire in San Francisco Bay); *The “Sabine,”* 101 U.S. 384 (1879) (assessing salvage rights to a steamer that suffered distress on the Ouachita River on its way to New Orleans).

170. *E.g. Marx v. Government of Guam*, 866 F.2d 294, 300 (9th Cir. 1989) (holding that Congress’s extension of the Submerged Lands Act to Guam, especially in light of the Abandoned Shipwreck Act, gave Guam a colorable claim to shipwrecks in its territorial waters).

171. Pub. L. No. 100-298, 102 Stat. 432 (April 28, 1988) (codified at 43 U.S.C. §§ 2101-2106 (2006)).

Like the Submerged Lands Act, the Abandoned Shipwreck Act operates to increase state control over resources on the first three miles of continental shelf. Congress found that “States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands,” which included “certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.”<sup>172</sup> Under the somewhat convoluted operative provisions of the Act, Congress first proclaimed that the United States holds title to “any abandoned shipwreck that is—(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.”<sup>173</sup> The Act then transfers title to such shipwrecks “to the State in or on whose submerged lands the shipwreck is located.”<sup>174</sup> However, “[a]ny abandoned shipwreck *in or on the public lands of the United States* is the property of the United States Government.”<sup>175</sup>

As a result, both “submerged lands” and “public lands” are relevant to the proper disposition of abandoned shipwrecks under the Abandoned Shipwreck Act. “Submerged lands” for the Act’s purposes are the offshore submerged lands given to coastal states under the Submerged Lands Act and similar lands controlled by Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, as defined through other federal statutes.<sup>176</sup> “Public lands,” in contrast, are defined with reference to the Archaeological Resource Protection Act of 1979.<sup>177</sup> The definition of “public lands” in that Act serves mainly to qualify certain reserved federal lands as “public lands” for purposes of protecting archaeological resources. Thus:

The term “public lands” means—

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172. *Id.* at § 2101.  
173. *Id.* at § 2105(a).  
174. *Id.* at § 2105(c).  
175. *Id.* at § 2105(d).  
176. *Id.* at § 2102(f).  
177. Pub. L. No. 100-298 at § 2102(c) (referencing 16 U.S.C. §§ 470aa-470ll).

(A) lands which are owned and administered by the United States as part of—

- (i) the national park system,
- (ii) the national wildlife refuge system, or
- (iii) the national forest system; and

(B) all other lands the fee title to which is held by the United States, *other than lands on the Outer Continental Shelf* and lands which are under the jurisdiction of the Smithsonian Institution.<sup>178</sup>

As under FLPMA, Congress explicitly removed the OCS from the relevant definition of “public lands,” exempting the OCS from the operation of both the Archaeological Resource Protection Act and the Abandoned Shipwreck Act. The latter exemption makes sense because, under the terms of the Submerged Lands Act, the states have no claim to shipwrecks in the federally controlled OCS. As a result, the only shipwrecks for which the Abandoned Shipwreck Act needed to preserve federal title were those on or in federally controlled submerged lands within the first three miles of shore or Florida’s and Texas’s extended areas of control in the Gulf of Mexico.

In contrast, the exemption of the OCS from the Archaeological Resource Protection Act, like the exemption in FLPMA, reflects a more traditional view of federal public lands. Nevertheless, the use of an explicit exemption also indicates that Congress continued to feel compelled clarify when the OCS needed to be removed from the operation of particular federal public land laws. Thus, that Act, like FLPMA, suggests that Congress continues to believe that the OCS would otherwise be considered part of the contemporary federal public lands.

## VI. CONCLUSION

From one perspective, under contemporary federal public land law, the status of any particular federal lands as “public lands” has become entirely a matter of specific statutory definition: lands reserved for

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178. 16 U.S.C. § 470bb(3) (2006) (emphasis added).

national parks and other purposes are federal “public lands” for purposes of the Archaeological Resource Protection Act but not for purposes of FLPMA. Like any other federal land, the OCS’s status as “public lands” depends on the exact regulatory context at issue.

Nevertheless, the public lands debate over the OCS also demonstrates that there is something special about these submerged lands. First, the continental shelf is a relatively new acquisition, not contemplated as part of the traditional federal public lands and often still irrelevant to traditional public lands management concerns such as public access and recreation. Second, the OCS is decidedly federal, placed and kept beyond the states’ control and jurisdiction except as allowed under the Submerged Lands Act. Finally, fee simple title to the OCS is a fuzzier issue than it is for the federal government’s terrestrial lands, leading many to conclude that this region can never be considered federal public lands.

Nevertheless, in the context of natural resource—and especially energy—development, Congress views the OCS as federal public lands on which private mineral development is to be encouraged. While oil spills and environmental concerns have tempered the offshore oil rush since 1953, Congress has never fundamentally changed the idea embedded in the OCSLA that the federal government holds the OCS primarily for disposal to private development of petroleum, natural gas, and other minerals. As such, the OCS comprises federal lands for which, at least until reservation or withdrawal, the United States can dispose of private property interests, rendering the OCS meaningfully indistinguishable from any other federal public lands.