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EXXON V. FISCHER: THRESHER SHARKS PROTECT THE COASTAL ZONE

Edward A. Fitzgerald*

The Coastal Zone Management Act of 1972 ("CZMA") is designed to establish a federal-state partnership to manage the coastal zone. It seeks to accomplish this by providing federal funding for the development and administration of state coastal zone management programs. It also grants the coastal states some authority over federal and private activities which affect the coastal zone. The CZMA provides the coastal states with the means to participate in the outer continental shelf ("OCS") development process.

In recent years, executive and judicial action has threatened the federal-state partnership established by the CZMA. The Reagan administration attempted unsuccessfully to terminate the funding for the CZMA. The Supreme Court held that OCS lease sales are

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2 Id. §§ 1454-1455.

3 Id. § 1456.

4 Id. §§ 1456-1456a.

Title 43, Public Lands, defines OCS as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in Section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (1982). Section 1301 of Title 43 defines lands beneath navigable water as " . . . 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 . . . ." 43 U.S.C. § 1301(a)(2) (1982).

It has been estimated that as much as "60% of the Nation's undiscovered oil and gas resources" are contained in the OCS. COMPTROLLER GENERAL, UNITED STATES GENERAL ACCOUNTING OFFICE, ISSUES IN LEASING OFFSHORE LANDS FOR OIL AND GAS DEVELOPMENT 1 (Report to the Congress of the United States, 1981).

5 Fitzgerald, Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion, 5 UCLA J. ENVTL. L. & POL'Y 1, 18-21 (1985).
not subject to consistency review under section 307(c)(1) of the CZMA because they do not directly affect the coastal zone.\textsuperscript{6}

The Exxon corporation in \textit{Exxon Corp. v. Fischer}\textsuperscript{7} challenged state consistency authority under section 307(c)(3)(B) of the CZMA. According to the California district court, section 307(c)(3)(B) of the CZMA requires an applicant for an OCS exploration, development and plan\textsuperscript{8} to certify that the plan is consistent with the coastal zone management program of any affected coastal state.\textsuperscript{9} The certification is submitted to the coastal state which can consent or object to the certification.\textsuperscript{10} An unsuccessful applicant may appeal to the Secretary of Commerce (the "Secretary") who may override the state's objection on the grounds that the activity is consistent with the CZMA or in the interest of national security.\textsuperscript{11}


\textsuperscript{7} No. 84-2362 (D. Cal. Oct. 9, 1985), rev'd, 807 F.2d 842 (9th Cir. 1986).

\textsuperscript{8} Exploration, which takes approximately 60–90 days, involves the use of mobile rigs to explore for commercial quantities of oil and gas. The potential impacts from such activity include the discharge of drill muds and cuttings, interference with fishing activities, emission of air pollutants, impediments to navigation, and accidental oil spills. Development and production entails the establishment of offshore drilling platforms from which production wells can be located. The oil and gas recovered is then shipped by tanker or pipeline to refining facilities. Eichenberg, \textit{The Thresher Shark Case: Another Challenge to State Coastal Management Authority}, 6 TERRITORIAL SEA 1, 2 n.8 (1986).

\textsuperscript{9} Exxon Corp. v. Fischer, No. 84-2362 at 2.

\textsuperscript{10} Id. at 2–3.


After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certification and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.
In *Exxon Corp. v. Fischer*, the courts had to answer two questions pertaining to section 307(c)(3)(B): first, whether the socioeconomic impacts on California's coastal fishing industry resulting from Exxon's OCS exploration activities constituted an effect on land and water uses in the coastal zone? Second, what was the scope of the Secretary's authority in reviewing the appeal of California's objection?\(^\text{12}\)

The federal district court held that socioeconomic impacts on California's coastal fishing industry resulting from Exxon's OCS exploration activities could not support California's objection.\(^\text{13}\) Since the Secretary could not address this issue, an appeal to the Secretary was unnecessary prior to a judicial challenge.\(^\text{14}\) The Ninth Circuit Court of Appeals reversed the district court on the grounds that Exxon could not relitigate in a collateral proceeding having already litigated the issue before the Secretary.\(^\text{15}\) The Ninth Circuit Court, however, did not address expressly the central issues in the case.\(^\text{16}\)

This Article demonstrates that socioeconomic impacts on the coastal fishing industry resulting from OCS exploration constitute effects on land and water uses in the coastal zone that are subject to state consistency review. Furthermore, if a coastal state objects to a consistency certification, in most cases, the unsuccessful applicant must appeal to the Secretary before challenging the state's objection in court.

I. SEAWEED REBELLION

In order to understand the significance of *Exxon Corp. v. Fischer*, it is necessary to review the history of federal-state relations regarding OCS development. OCS development has generated much conflict between the federal and state governments. This conflict, known as the Seaweed Rebellion, has occurred both in the courts and in Congress.\(^\text{17}\)

"The Tidelands Controversy," which began before World War II, was the first major conflict precipitated by offshore petroleum development.\(^\text{18}\) This conflict dealt with whether the federal or state
governments held title to offshore coastal lands. In several cases, the Supreme Court declared that the federal government owned offshore coastal lands. In 1953, Congress enacted the Submerged Lands Act ("SLA") which granted the states title to the land three miles seaward of their coasts. The SLA overturned the Supreme Court's decisions and enabled the coastal states to regulate and derive the benefits from offshore petroleum development.

One month after the enactment of the SLA, Congress passed the Outer Continental Shelf Lands Act ("OCSLA"). The OCSLA granted the federal government jurisdiction over OCS lands beyond the three mile limit established in the SLA. The SLA delegated broad discretionary authority to the Secretary of the Interior to regulate OCS development. By constructing the statute in general terms, Congress intended to create a flexible OCS development process that could adapt to changing conditions.

There was little public scrutiny of OCS operations from 1953 to 1969. Offshore development was limited. The technology for oil and gas development in the deeper OCS waters was still in its infancy. Nevertheless, by the late 1960's new public concerns, such as environmental protection and coastal management, began to emerge. The Santa Barbara oil spill legitimized the concerns of environmental groups and focused national attention on the dangers of offshore petroleum development. Congress responded by enacting new statutes which would affect OCS development: the National Environmental Policy Act, the Marine Sanctuaries Act, the Endangered Species Act, and the Coastal Zone Management Act.

19 Id.
24 43 U.S.C. § 1334 (1982). The OCSLA has since been described as "essentially a carte blanche delegation of authority to the Secretary of Interior." H.R. REP. No. 590, 95th Cong., 1st Sess. 54 (1977) [hereinafter H.R. REP. No. 590].
27 Jones, Understanding the Offshore Oil and Gas Controversy, 17 GONZ. L. REV. 221, 243 n.94 (1982).
At the same time Congress was instructing federal agencies to consider environmental factors in their decision-making process, there was a growing recognition of a domestic energy shortage. In 1971, President Nixon decided to pursue an extensive OCS leasing program. For the first time OCS leasing was scheduled to occur in the undeveloped frontier areas. President Nixon expanded the program’s goals in 1973, and they were expanded again in 1974 following the Arab oil boycott.

Many coastal states, coastal communities, and environmental and fishing industry groups opposed the expanded OCS leasing program. These groups resorted to the courts to halt particular lease sales. The courts were called upon to interpret the new statutory mandates. Meanwhile, Congress sought to reduce state opposition and to expedite OCS development by enacting amendments to the CZMA and to the OCSLA.

Congress enacted the CZMA amendments to deal with the impacts of OCS development on the coastal zone. Congress established the Coastal Energy Impact Program ("CEIP") which provided funds to coastal states and communities to mitigate the adverse impacts of OCS development. Furthermore, Congress added a new section to the consistency provisions that granted the coastal states the right to determine if a federal lessee’s exploration, development and production plans were consistent with the states’ coastal zone management programs.

In 1978, after a difficult four year struggle, Congress enacted amendments to the OCSLA. The OCSLA Amendments divided the

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32 Special Message to the Congress on Energy Resources, 195 PUB. PAPERS 703 (June 4, 1971).
33 Id. at 709.
34 Frontier areas had not yet experienced OCS development. They are further defined in H.R. REP. No. 590, supra note 24, at 126–27.
35 Address to the Nation About Policies To Deal With the Energy Shortages, 323 PUB. PAPERS 916 (Nov. 7, 1973).
36 Special Message to the Congress on the Energy Crisis, 17 PUB. PAPERS 29 (Jan. 23, 1974).
42 Murphy and Belsky, OCS Development: A New Law and a New Beginning, 7 COASTAL ZONE MGMT. J. 297 (1980).
OCS development process into four distinct states: 1) the preparation of a five year leasing schedule;\(^43\) 2) the lease sale;\(^44\) 3) exploration;\(^45\) and 4) development and production.\(^46\) The Amendments required the Secretary of the Interior to follow delineated procedures at each stage of the process.\(^47\) Congress recognized the need to expedite OCS development, but in an environmentally conscious manner that reflected state and local government concerns.

Federal-state conflicts continued after the enactment of the OCSLA Amendments. Two of the most controversial battles of the Seaweed Rebellion involved the establishment of Interior's five year OCS leasing program under section 18 of the OCSLA\(^48\) and the consistency review of OCS lease sales under section 307(c)(1) of the Coastal Zone Management Act.\(^49\)

While this litigation was underway, President Reagan came to office seeking to reduce the federal deficit. To help accomplish this, Reagan decided to accelerate and expand OCS leasing, while attempting to terminate the funding for many ocean and coastal programs.\(^50\)

The Reagan administration targeted the programs established under the CZMA for elimination.\(^51\) The administration asserted that the CZMA had achieved its goals and the states, being aware of the benefits of sound coastal zone management, would continue to fund their programs.\(^52\) Furthermore, the Reagan administration slated the Coastal Energy Impact Program for termination because the anticipated boom/bust cycle associated with OCS development had not occurred.\(^53\)

The Reagan administration also proposed to eliminate the funding for the following programs: 1) the National Sea Grant, which Congress enacted in 1966 to develop a network of universities dedicated

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\(^44\) Id. § 1345.
\(^45\) Id. § 1340.
\(^46\) Id. § 1351.
\(^47\) Id. §§ 1340, 1344, 1345, 1351.
\(^49\) See Fitzgerald, supra note 6.
\(^51\) Fitzgerald, supra note 5, at 18.
\(^52\) Id. at 18–19.
\(^53\) Id. at 19.
to marine education and research;54 2) the Commercial Fisheries Research and Development Act, which Congress established in 1964 to provide grants for research and the development of commercial fisheries;55 and 3) the Anadromous Fish Conservation Act, which Congress enacted in 1965 to conserve, develop, and enhance the nation's anadromous fishery resources.56 The administration contended that the goals of the programs had been realized and that state and private industry, as the beneficiaries, should fund their own programs.57

The Reagan administration engendered much hostility from coastal states by pursuing an aggressive OCS leasing program while attempting to terminate the funding for vital ocean and coastal programs.58 In order to maintain the funding of these ocean and coastal programs and to minimize coastal state opposition to OCS leasing, Congress considered various bills that would provide for the sharing of OCS revenues with the coastal states.59 After a five year struggle, in the face of intense Reagan administration opposition, Congress rejected OCS revenue sharing in 1986.60 Nevertheless, Congress reauthorized the CZMA,61 maintained the funding for the aforementioned programs,62 and established moratoria on OCS leasing in certain environmentally sensitive areas.63

While Congress debated OCS revenue sharing, another OCS revenue sharing battle was underway in the courts. Texas and the Department of the Interior disagreed over what constituted a "fair and equitable" disposition of revenues derived from common pools under section 8(g) of the OCSLA.64 A federal district court determined that the "fair and equitable" standard should be interpreted broadly to include recovery for bonus enhancement65 and a share of the revenues generated from all section 8(g) leasing.66

57 Fitzgerald, supra note 5, at 20.
58 Id. at 21.
59 Id.
60 Id. at 21-29.
62 Fitzgerald, supra note 5, at 21, 46-47.
63 Id. at 11-13.
64 43 U.S.C. § 1337(g) (1982).
65 Bonus enhancement refers to the amounts by which bids for OCS tracts are increased as a result of prior state offshore leasing.
Congress decided that a legislative solution to this issue was required. Congress amended section 8(g) to allow coastal states to share in all of the revenues derived from leasing in the 8(g) zone, not just those generated from common pools. These funds will allow the coastal states to deal with the adverse economic and environmental impacts resulting from OCS development.

*Exxon Corp. v. Fischer* was another battle in the Seaweed Rebellion that focused on OCS development and the consistency provisions of the CZMA. In an earlier battle, the Supreme Court held that OCS lease sales did not directly affect the coastal zone, and thus were not subject to federal consistency review under section 307(c)(1). In *Exxon Corp. v. Fisher*, the scope of coastal state authority under section 307(c)(3)(B) was contested.

II. BACKGROUND

A. Facts

In early 1983, Exxon, as the designated operator of a quadrant in the Santa Barbara Channel, submitted an exploration plan and environmental report to the Department of Interior's Minerals Management Service, seeking approval for three exploratory wells (A, B, C). Several days later, Exxon gave similar information and a certification of consistency to the California Coastal Commission as required under the CZMA.

In July 1983, the Commission objected to Exxon's consistency certification. The Commission asserted that Exxon's plan failed to comply with the enforceable policy requirements of the California Coastal Act which provides for the protection of marine resources and commercial fishing activities in the coastal zone. Specifically,

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67 The 8(g) zone is the area extending 3 miles seaward from state coastal zones. 43 U.S.C. § 1337(g) (1982).
69 No. 84-2362 (D. Cal. Oct. 9, 1985), *rev'd*, 807 F.2d 842 (9th Cir. 1986).
71 *Id.* at 5-6.
72 *Id.* at 5-6.
73 *Id.* at 6.
74 *Id.*
75 *Id.* at 7-8. Sections 30001(c), 30230, 30231, 30234, 30250, 30255, 30260 and 30703 of the California Public Resources Code require the Commission to protect both the commercial fishing industry, and the land associated with it, from the reasonably mitigable individual and
Exxon's exploration activities would interfere with thresher shark fishing, if exploration occurred during the fishing season from May to December.\textsuperscript{76} In response to Exxon's appeal, the Secretary conducted negotiations that led to an agreement between the parties.\textsuperscript{77} The Commission approved the drilling of well A which Exxon would complete before the thresher shark fishing season began on May 1.\textsuperscript{78} The Commission also agreed to reconsider Exxon's exploration plans for wells B and C.\textsuperscript{79}

In February 1984, the Commission again objected to Exxon's consistency certification for wells B and C.\textsuperscript{80} This precluded any federal agency from issuing any permits for development.\textsuperscript{81} Again, Exxon appealed to the Secretary who could override the state's objection if he found that the activity was consistent with the CZMA or in the interest of national security.\textsuperscript{82}

### B. Secretary of Commerce's Decision

Department of Commerce regulations required the Secretary to consider four factors in determining if an activity was consistent with the objectives of the CZMA.\textsuperscript{83} First, the Secretary had to determine if the activity furthered the national objectives or purposes set out in the CZMA.\textsuperscript{84} Since OCS development was within the purposes of the CZMA, this requirement was satisfied.\textsuperscript{85}

cumulative effects of any oil and gas developments which adversely affect them or threaten to displace them from the portions of the California coast they now occupy. Cal. Pub. Res. Code §§ 30001(c), 30230, 30231, 30234, 30250, 30255, 30260 and 30703 (West 1986).

\textsuperscript{76} Exxon Corp. v. Fischer, No. 84-2362 at 7. Fishermen complained that drilling would interfere with the harvesting of the thresher sharks. The fishermen utilize a fishing technique known as drift gill netting which requires the fishermen to drift with the current pulling nets as long as 6000 feet. While fishing, the ships are not under power. They can not, therefore, maneuver and are vulnerable to drilling rigs and their anchoring systems. Moreover, the thresher shark fishing season is limited to May through December. Drift gill netting is prohibited during the other months because it would endanger whale migration. Id.

\textsuperscript{77} See id. at 8.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 8–10.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 10–11.

\textsuperscript{83} 15 C.F.R. § 930.121 (1987).

\textsuperscript{84} 15 C.F.R. § 930.121(a) (1987).

\textsuperscript{85} Decision and Findings of the Secretary of Commerce in the Consistency Appeal of Exxon Company, U.S.A. to an Objection from the California Coastal Commission 6 (Nov. 14, 1984) [hereinafter Secretary's Findings].
Second, the Secretary had to determine if the activity's impact on the natural resources of the coastal zone was less than the activity's contribution to the national interest.\textsuperscript{86} The Commission asserted that since Exxon's exploration would harm the thresher shark fishery, the commercial coastal fishing industry would suffer.\textsuperscript{87} This would violate the California Coastal Act which requires the protection and upgrading of commercial fishing facilities such as hoists, ice houses, processing plants, and pier uses.\textsuperscript{88}

Exxon argued that the effects on the thresher shark fishery were commercial, thus did not affect land and water uses in the coastal zone.\textsuperscript{89} According to Exxon, the protection of OCS fishing activities from conflicts with other OCS users did not constitute the proper basis for a consistency objection because it was only a perceived economic impact.\textsuperscript{90} Furthermore, the Secretary of the Interior was to resolve OCS conflicts, not the Secretary of Commerce.\textsuperscript{91}

The Secretary determined that, although Exxon's activity affected the land and water uses of the coastal zone, such impacts were not substantial.\textsuperscript{92} The impacts were outweighed by the national interest in the projected 35 million barrels of oil and 272 billion cubic feet of gas.\textsuperscript{93}

Third, the Secretary, as required,\textsuperscript{94} determined that Exxon's exploration plan did not violate the Clean Air Act\textsuperscript{95} or the Federal Water Pollution Control Act.\textsuperscript{96}

Finally, the Secretary had to find that no reasonable alternatives were available.\textsuperscript{97} This required the Secretary to balance the costs and benefits of various alternatives.\textsuperscript{98} The Secretary found that, even though the economic impacts on the coastal zone were limited, all adverse impacts could be avoided if drilling was restricted to the off-season.\textsuperscript{99} The Secretary also determined that the record did not support Exxon's contention that they would incur exorbitant costs.

\textsuperscript{86} 15 C.F.R. § 930.121(b) (1987).
\textsuperscript{87} Secretary's Findings, supra note 85, at 8–11.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 8–11.
\textsuperscript{94} See 15 C.F.R. § 930.121(c) (1987); Secretary's Findings, supra note 85, at 12–13.
\textsuperscript{95} 42 U.S.C. §§ 7401 et seq. (1982).
\textsuperscript{96} 33 U.S.C. §§ 1251 et seq. (1982).
\textsuperscript{97} Secretary's Findings, supra note 85, at 13–15.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
from restricted drilling.\textsuperscript{100} Evidence showed that Exxon drilled well A in January and February and neither California nor the fishing industry raised objections.\textsuperscript{101} Since the thresher shark fishing season was about to end, Exxon could comply with the drilling restrictions easily.\textsuperscript{102} Other companies, such as Sun Oil, Chevron, Getty, and Arco, have accommodated such restrictions, demonstrating that the restrictions were not unreasonable.\textsuperscript{103} Consequently, Exxon did not show that its exploration activities were consistent with the purposes of the CZMA.\textsuperscript{104}

The Secretary could also override the state’s objection in the interest of national security.\textsuperscript{105} Exxon argued that OCS drilling would further national security because the increased production of oil and gas would reduce U.S. dependence on imported oil.\textsuperscript{106} The Secretary, disagreeing with Exxon, determined that the small amount of oil and gas, if present, would not have a significant impact on national security.\textsuperscript{107} Furthermore, the decision did not prohibit all drilling, only that occurring during the thresher shark fishing season.\textsuperscript{108} Consequently, Exxon’s argument did not warrant a secretarial override on national security grounds.\textsuperscript{109}

\section*{C. Federal District Court Decision}

Prior to the Secretary’s decision, Exxon filed suit challenging the Commission’s objection.\textsuperscript{110} The court, however, did not decide the case until after the Secretary rendered his decision.

The court, examining the procedural issues, held that prudential considerations, such as the appeal to the Secretary of Commerce and the possible interference with federal-state affairs, would not prohibit judicial review.\textsuperscript{111} The federal court had jurisdiction because the California coastal management program was federal law for the purposes of consistency review.\textsuperscript{112} Furthermore, since the Secretary

\begin{itemize}
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} See 15 C.F.R. § 930.122 (1987).
\item \textsuperscript{106} Secretary's Findings, supra note 85, at 15-16.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id. at 17.
\item \textsuperscript{110} Exxon Corp. v. Fischer, No. 84-2362.
\item \textsuperscript{111} Id. at 18–19.
\item \textsuperscript{112} Id. at 19.
\end{itemize}
in his override consideration must assume the correctness of the state's decision, the court's failure to examine the scope of the Commission's authority would grant the Commission a veto to which it was not entitled under the statute. 113

The court found that the doctrine of exhaustion of administrative remedies was inapplicable. 114 Exxon could challenge the Secretary's decision, but this was not required. 115 If the court was to review the Secretary's decision, it would have to determine if the decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 116 None of these was crucial to the case. This case presented a purely legal question, whether the Commission was acting within the scope of its statutory authority. Once the Commission made its decision, judicial review could occur. 117

The court determined that the Secretary's decision did not have preclusive effect under the doctrines of res judicata or collateral estoppel. 118 The Secretary was not acting in a judicial capacity, nor did he address the issues before the court. 119 The Secretary did not consider whether the Commission acted within the scope of its authority, the statutory language, or the legislative history of the CZMA. 120 Consequently, the Secretary's decision did not constitute an adjudication of the legal issues in the case. 121

Turning to the substantive issues presented, the court held that coastal state authority was limited to activities that occurred in the coastal zone. 122 Since thresher shark fishing occurred on the OCS, the state had no authority over such activity. 123 If the state was allowed to extend its authority beyond the coastal zone, its authority would intrude on federal lands. 124 In addition, the court held that an exercise of such authority would be contrary to the Supreme Court's decision limiting state authority to the geographical confines of the coastal zone. 125
The court emphasized that affected land uses under section 307(c)(3)(B) must occur in or on the shorelands of the coastal zone and emphasized only conventional notions of land use planning, such as inventory of lands of particular interest or guidelines on the priority uses of certain facilities. Nothing in the statute suggests that the coastal state could utilize consistency authority to protect the economic interests of a particular industry. Furthermore, the Coastal Energy Impact Program, which provided funds to the coastal states to plan for the economic effects of OCS development and for infrastructure development, did not expand the scope of state consistency authority.

D. Ninth Circuit Court’s Decision

The Ninth Circuit Court disagreed with the district court’s appraisal of the Secretary’s decision. The circuit court raised three questions in its evaluation of the Secretary’s decision: 1) did the Secretary act in a judicial capacity?; 2) were the issues presented to the district court litigated before the Secretary?; and 3) was the resolution of the issues critical to the Secretary’s decision?

First, the court determined that the Secretary acted in a judicial capacity. Even though the Secretary acted as policymaker, balancing costs and benefits and soliciting comments from nonparties, Exxon received a full hearing with the opportunity to present and rebut evidence. Exxon took this opportunity to introduce thresher shark statistics in the area, which the Secretary utilized in his final decision. Furthermore, the question the Secretary decided was a legal issue, not a policy determination.

Second, the Ninth Circuit held that the parties had litigated the central issue of the case before the Secretary. The Secretary found that Exxon’s activities affected land and water uses in the coastal zone. Although these effects were insignificant, Exxon nevertheless could avoid all adverse impacts if its exploration was limited to

126 Id.
128 Exxon Corp. v. Fischer, No. 84-2362 at 46–18.
129 Exxon Corp. v. Fischer, 807 F.2d 842, 845–66 (9th Cir. 1986).
130 Id. at 846.
131 Id.
132 Id.
133 Id.
134 Id.
the drilling window. This determination necessitated a finding that
the Commission's objection was valid under the CZMA and that the
interests asserted were protected under the statute. Otherwise,
there was nothing to which the Secretary could have legitimately
subordinated Exxon's interests.

Finally, the circuit court did not decide if Exxon was required to
submit its objection to the Secretary before challenging the Com­
misson's objection in the court. The court held that since Exxon
had litigated the issue before the Secretary, Exxon could not reliti­
gate the issue in a collateral proceeding. Exxon's proper recourse
was to challenge the Secretary's decision.

III. ISSUE 1: SOCIOECONOMIC IMPACTS

The first issue that the courts had to address was whether the
socioeconomic impacts on the coastal zone resulting from OCS ex­
ploration constituted an effect on land and water uses in the coastal
zone that was subject to state consistency review under section
307(c)(3)(B). An examination of the statute's legislative history, Na­
tional Oceanic and Atmospheric Administration (NOAA) regulations,
Coastal Energy Impact Program, and several court cases indicate
that the answer to this question is "yes."

A. Legislative History

Congress recognized that the coastal zone possesses a "variety of
natural, commercial, recreational, ecological, industrial, and est­
hetic resources of immediate and potential value to the present and
future well-being of our Nation." Increasing and competing de­
mands, "occasioned by population growth and economic develop­
ment," were damaging the coastal zone. Consequently, Congress
had to develop an institutional structure to manage the demands on
the coastal zone.

Congress decided that the key to effective coastal zone manage­
ment was to encourage the coastal states to exercise their regulatory
authority over the coastal zone. Coastal states were urged to develop coastal zone management programs which balanced economic development and the protection of natural resources. A coastal zone management program had to consider "ecological, cultural, historic, and esthetic values," as well as the needs for economic development.

To accomplish this goal, Congress provided the funds for the development and implementation of state programs. As a further incentive, federal and private actions that affected the coastal zone had to be consistent with state programs. A review of the legislative history of the consistency provisions of the CZMA, particularly the relationship between sections 307(c)(1) and (c)(3)(B), demonstrates that Congress intended the socioeconomic effects on land and water uses in the coastal zone resulting from OCS exploration to be subject to consistency review under section 307(c)(3)(B).

1. 1971

A Senate bill, considered in 1971, contained the first consistency provisions. Section 313(b) of the bill stated that, "all Federal agencies conducting or supporting activities in the coastal zone . . . shall administer their programs consistent with approved State management programs." The Senate report explaining this section stated that,

any lands and waters under Federal jurisdiction and control, within or adjacent to the coastal or estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with the lands and waters within the coastal zone and estuarine zone, should be administered consistent with approved state management programs.

Section 313(c) provided that "applicants for federal licenses and/or permits to conduct any new activity affecting land and water uses in the coastal zone" required state certification before the granting

142 Id. § 1451(i).
143 See id. § 1452(2).
144 Id.
145 Id. §§ 1454(a), 1455(a) [emphasis added].
146 Id. § 1456(c).
148 Id.
of the license or permit.150 The Secretary of Commerce could over­ride the state’s decision if the federal activity was consistent with the purposes of the Act or necessary for national security.151 State review was limited to Federal licenses and permits occurring in the coastal zone.152 The functional interrelationship test applied to section 313(b), not to section 313(c).153

2. 1972

The Senate renewed its consideration of the CZMA in 1972. The consistency language in the Senate bill pertaining to federally sup­ported or conducted activity in the coastal zone remained the same.154 Consequently, the Senate continued to apply the functional interre­lationship test to federal activities on the OCS.

The language pertaining to state consistency review of federally issued licenses and permits changed.155 There was no longer any reference to “affecting land and water uses in the coastal zone.”156 Section 314(b)(3) provided that “any applicant for a Federal license or permit to conduct any new activity in the coastal zone shall provide in the license or permit a certification that the proposed activity complies with the state’s approved management pro­gram.”157

There were also several attempts on the Senate floor to extend provisions of the CZMA beyond the coastal zone. Senator Hale Boggs attempted unsuccessfully to add an amendment which would have granted coastal state governors a veto over the issuance of any OCS lease which affected the coastal zone.158 Furthermore, the Sen­ate added a provision bill requiring the National Academy of Science to undertake a full investigation of the hazards of the OCS drilling.159

The House also enacted a version of the CZMA in 1972.160 The consistency language for federally conducted or supported activities

151 Id.
152 Id.
153 Id.
155 Id. § 314(b)(3).
156 Id.
157 Id.
159 Fitzgerald, supra note 6, at 453.
in the coastal zone was the same as the Senate bill. Consequently, the functional interrelationship test was applicable.

The language pertaining to state review of consistency certifications was different than the Senate version. The House bill stated that "any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone" shall provide a consistency certification. The House report limited this section to activities occurring in the coastal zone.

The House attempted to extend the scope of the CZMA beyond the coastal zone. Section 312 of the House bill allowed the coastal states to establish estuarine sanctuaries which the Secretary could extend onto the OCS. In addition, section 313 allowed the Secretary of Commerce, in coordination with the Secretary of Interior, to develop a multi-purpose management plan for OCS areas adjacent to the coastal zone within 12 miles from shore.

The conference committee rejected several of the provisions in the House and Senate bills that extended specifically the CZMA beyond the coastal zone. First, the provision in the Senate bill to have the National Academy of Science study the environmental hazards of OCS development was deleted because it was "non-germane" to the CZMA. Second, section 312 of the House bill was removed because "the need for such a provision appears rather remote." Finally, section 313 of the House bill was rejected because "the provisions related thereto did not prescribe sufficient standards or criteria and would create potential conflicts with legislation already in existence concerning OCS resources."

Nevertheless, Congress was able to accomplish the goal of these deleted sections, which was to harmonize OCS activities with state coastal zone management programs, by its substitution of "directly affecting" for "in" the coastal zone in section 307(c)(1). The substitution required that Federal activities directly affecting the coastal zone be certified as consistent with state coastal zone management programs. Since nothing in the conference committee re-

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161 Id. § 307(c)(3).
163 H.R. 14146, 92d Cong., 2d Sess. § 312 (1972); Fitzgerald, supra note 6, at 452.
164 H.R. 14146, 92d Cong., 2d Sess. § 313 (1972); Fitzgerald, supra note 6, at 451–52.
165 Secretary of the Interior v. California, 464 U.S. at 330 n.14 (quoting the remarks of Congressman Downing, 118 Cong. Rec. 35547 (1972)).
167 Id. at 15.
168 Fitzgerald, supra note 6, at 455.
port limited the scope of section 307(c)(1) or contradicted the 1971 Senate report, one could assume that the functional interrelationship test continued to be applied to 307(c)(1). As a result, Federal activities that had a direct impact on or were functionally related with the coastal zone, whether occurring inside or outside the coastal zone, were subject to consistency review under section 307(c)(1).

The final language for section 307(c)(3), pertaining to state consistency review of federally issued licenses or permits, followed the House version. It stated that "any applicant for a required Federal license or permit to conduct an activity affecting land and water uses in the coastal zone shall certify that the activity is consistent with the state's program." The conference committee report, explaining the scope of state authority under section 307(c)(3) stated that,

Federal agencies involved in any activity directly affecting the State coastal zone . . . must make certain that their activities are to the maximum extent practicable consistent with approved state management programs. In addition, similar consideration of State management programs must be given in the process of issuing Federal licenses or permits for activities affecting State coastal zones.

Consequently, the functional interrelationship test which underlied section 307(c)(1) was also applicable to section 307(c)(3).

3. 1976

In 1976, Congress amended the CZMA in order to deal with the impacts of OCS energy development. The CZMA amendments established the Coastal Energy Impact Program, and added section 307(c)(3)(B). Congress designed these new sections to reduce coastal state opposition and thus expedite OCS development.

The original version of the House amendments to the CZMA in 1976 added "lease" to section 307(c)(3). The inclusion of leasing clarified the scope of section 307(c)(3) and put to rest any doubts concerning consistency review of OCS lease sales. The House report stated that, "the Committee believes that it would break faith with

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173 Id. § 1456(a).
174 See supra note 11 for text of section 307(c)(3)(B).
the states not to state plainly its clear intent to include major federal actions as OCS leasing under the 'federal consistency' section.\textsuperscript{177}

Leasing, however, was deleted from section 307(c)(3) on the House floor. The deletion occurred, not because of opposition to the concept, but to give Congress more time to consider the issue during the conference committee deliberations.\textsuperscript{178}

The Senate bill also added "lease" to section 307(c)(3).\textsuperscript{179} This cleared up any ambiguity concerning the applicability of consistency provisions to OCS lease sales. The Senate report stated that, "if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply."\textsuperscript{180}

The conference committee deleted "lease" from section 307(c)(3), which was renumbered as section 307(c)(3)(A).\textsuperscript{181} The committee added a new section 307(c)(3)(B) extending the consistency requirements to the basic steps in the OCS development process—exploration, development and production.\textsuperscript{182} An applicant submitting an exploration or development and production plan to Interior was required to certify that "any exploration, development and production described in such plan and affecting any land use or water use in the coastal zone of such state . . . complies with such state's approved management program . . . ."\textsuperscript{183} The coastal state had to approve the plan or no further activity could occur unless the Secretary of Commerce overruled the state's objection.\textsuperscript{184}

This new section consolidated the approval process for Federal licenses and permits. Once Interior and the coastal state approved a plan, all required licenses and permits were presumed to be in conformity with the state's coastal zone management program.\textsuperscript{185}

There was no need for consistency review of individual licenses or

\textsuperscript{178} Representative DuPont, sponsor of the amendment, stated:
By striking it in the House bill and leaving it in the bill that has already passed the Senate we will be giving ourselves a little bit of flexibility in the conference to either adopt the language as the Senate put it or adopt some other language we feel would be more beneficial and at the same time protect the rights of the States.
So the purpose of this amendment is not to get rid of the word 'lease' but to allow us time to work on the problem a little bit longer.
\textsuperscript{122} CONG. REC. 6128 (1976).
\textsuperscript{179} S. 586, 94th Cong., 1st Sess. § 307(c)(3) (1975).
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.} § 1456(c)(3)(B).
\textsuperscript{184} \textit{Id.} § 1456(c)(3)(A).
permits. This presumption expedited the OCS development process.\textsuperscript{186}

Section 307(c)(3)(B) utilized the “affecting land and water uses” language which was derived from the 1972 CZMA. Consequently, if OCS exploration has a functional interrelationship from an economic, social, or geographic standpoint with the coastal zone, such economic effects are subject to consistency review under section 307(c)(3)(B).

4. 1980

In 1980, Congress reauthorized the CZMA.\textsuperscript{187} Congress maintained the funding for the CZMA because state programs had not yet become sufficiently institutionalized.\textsuperscript{188} Congress recognized that:

New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, and OCS are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters.\textsuperscript{189}

Furthermore, Congress required the coastal states to meet new national objectives in the development and implementation of their coastal zone management programs, such as:

[P]riority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists.\textsuperscript{190}

Both the House and Senate reports made reference to the consistency provisions. The House concluded that the consistency requirements required no change.\textsuperscript{191} The only uncertainty was over the threshold test for “directly affecting,” which would be invoked for activities having “a functional interrelationship from an economic,
geographic or social standpoint with a State coastal program's land or water use policies."  

The House report specifically recognized that "the acceleration of OCS activity will have a profound impact on the coastal zone ...." Consequently, the "rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act," and the recognition that such balancing would be increasingly difficult in the future, warranted the reauthorization of the CZMA.

The Senate concurred with the House. The Senate report stated that intergovernmental coordination begins as soon as "Interior sets in motion a series of events which have consequences in the coastal zone" and "must continue during the crucial exploration, development, and production stages."

Both the House and Senate reports were concerned with the "directly affecting" test of 307(c)(1) which is more rigorous than the "affecting land and water uses" test of section 307(c)(3)(B). Since Congress recognized that the functional interrelationship test applied to section 307(c)(1), the test continued to apply to section 307(c)(3)(B). Consequently, the socioeconomic effects on land and water uses in the coastal zone are subject to state consistency review under section 307(c)(3)(B).

B. National Oceanic and Atmospheric Administration (NOAA) Regulations

The courts defer generally to agency regulations, if the regulations "implement the congressional mandate in some reasonable manner." An examination of NOAA regulations demonstrates that socioeconomic impacts constitute effects on land and water use in the coastal zone that are subject to consistency review under section 307(c)(3)(B).

The first consistency regulations proposed by NOAA in 1976 held that the "causal" terms of the Act would be adopted. NOAA made no attempt to define the meaning of "directly affecting" or "affecting

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192 Id.
193 Id. at 33.
194 Id.
196 California v. Watt, 683 F.2d 1253, 1263 (9th Cir. 1982).
land and water uses.” These terms would speak for themselves and NOAA would address any differences on a case by case basis.

In 1977, NOAA issued proposed regulations stating that the “directly affecting” and “affecting land and water uses” language described the impact of an action on the coastal zone which triggered federal agency or applicant responsibility to notify the coastal states of proposed action. Consistency would be determined later. The coastal zone program must delineate any activity that is to be subject to consistency review.

The section 307(c)(3)(B) regulation was related to the section 307(c)(1) regulation. Section 307(c)(1) defined the direct effects “in terms of the significance of the effects upon the coastal resources.” Significant effects were “primary, secondary, and cumulative impacts, and actions which may have both beneficial and detrimental effects,” even if on balance these actions will be beneficial.

The “affecting land and water uses” language in section 307(c)(3)(B) was attributed the same meaning as section 307(c)(1). To distinguish section 307(c)(3)(B) from section 307(c)(1), NOAA permitted the states the option of employing a more expansive definition of “significant effect” to include a broad range of resources, social and economic effects that the management program considered to be significant. NOAA noted that a coastal state’s broad definition of land and water uses would increase the state’s ability to review proposed applicant activities. Consequently, the scope of section 307(c)(3)(B) was broader than section 307(c)(1) and included social and economic effects.

The petroleum industry was critical of the broad authority granted to the states. It felt that the states would utilize their authority to frustrate OCS development. NOAA, disagreeing, asserted that the CZMA presumed a cooperative federal-state effort to develop

198 Id.
199 Id.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 Id. at 43,601, 43,604.
207 Id. at 43,601.
208 Id. at 43,593.
209 Id.
OCS resources in a timely manner, while protecting coastal resources and industries. NOAA assumed that the state would not abuse their consistency authority which was limited by their coastal zone programs. Coastal Energy Impact Program funds would encourage state cooperation. In addition, the Secretary would oversee the state's exercise of state consistency authority.

In the final regulations in 1978, NOAA established a uniform standard for all of the consistency provisions of section 307. If an activity "significantly affected" the coastal zone, the consistency provisions were activated. NOAA noted that although the statutory language was not uniform, the legislative history indicated that Congress did not intend to create separate requirements for each subsection of 307. The statutory terms were interchangeable.

NOAA intended that the "significantly affecting" language be broadly defined. Industry commentators recommended that NOAA limit the definition to significant effects on "land and water uses" in the coastal zone. NOAA rejected this, stating that the legislative history was replete with statements indicating that Congress was generally concerned about all federal activities that were capable of significantly affecting the coastal zone. Furthermore, NOAA's utilization of the "significantly affecting" language, which was derived from the proposed 1977 regulations, indicated that socioeconomic impacts were subject to consistency review.

In 1979, the Department of Justice, in the context of a dispute over lease sale 48 off California, issued an opinion concerning the applicability of section 307(c)(1) to OCS pre-lease activities. Justice ruled that OCS pre-lease activities were subject generally to consistency review, if such activities did, in fact, directly affect the coastal

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210 Id.
211 Id.
212 Id.
213 Id.
215 Id. at 10,511.
216 Id.
217 Id.
218 Id.
219 Id.
220 Id.
221 Whether the pre-leasing activities of the Secretary of the Interior relating to the Outer Continental Shelf are subject to the Consistency Requirements of § 307(c)(1) of the Coastal Zone Management Act (April 1979) [hereinafter Justice Advisory Opinion].
zone. Furthermore, Justice rejected NOAA's substitution of the "significantly affecting" test for all of the threshold tests in section 307. Justice determined that Congress had intended to apply different threshold tests for different activities subject to consistency review under section 307.

NOAA revised its regulations in response to Justice's opinion. NOAA recognized that even though the legislative history was quite general, certain parameters on the threshold tests could be discerned. The 1972 conference committee report held that once the impact threshold was crossed, activities occurring inside and outside the coastal zone were subject to consistency review. Other congressional reports required consistency review for activities having "significant" effects on coastal resources or a "functional interrelationship from an economic, social, or geographic standpoint with the coastal zone."

NOAA decided that the regulations would not define "affecting the coastal zone." NOAA asserted that Congress granted the affected parties some "discretion to work out the details of their novel intergovernmental coordination efforts." Consistency review allowed the coastal states to review and comment upon proposed activities, thus assisting the states in planning for and managing the impacts of proposed development. Given these benefits, NOAA encouraged all of the affected parties "to liberally construe the threshold tests in favor of the inclusion of federal activities subject to consistency review."

The 1979 revision of the regulations did not limit, but broadened, the scope of state consistency authority under section 307(c)(3)(B) to effects which significantly affected the coastal zone. Significant effects included socioeconomic impacts. Justice implied that this was too narrow because Congress intended different threshold determinations. The plain language of section 307(c)(3)(B)—"affecting land and water uses"—is broader in scope than "significantly affecting."

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222 Id.
223 Id.
224 Id.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
Even though the current regulations do not define "the land and water uses in the coastal zone," the evolution of the regulations demonstrates that the socioeconomic impacts on land and water uses in the coastal zone are subject to state consistency review under section 307(c)(3)(B).

C. Coastal Energy Impact Program (CEIP)

Congress was aware of the adverse impacts of OCS development on the coastal zone and the need to provide coastal states with funds to deal with such impacts. An initial proposal included a general OCS revenue sharing program. Congress did not proceed in this direction. Instead, Congress granted coastal states funds through the CEIP to study and plan for the impacts, including the socioeconomic effects, of OCS development.

In the Senate version of the 1976 CZMA Amendments, CEIP funds were designed to help the coastal states study the impacts of OCS development. The states were to receive loans from CEIP to deal with temporary impacts and grants to deal with long-term harm. The Senate report stated that:

In either case, the impacts in question must be the result of a Federal license, lease or permit for exploration, development or production of energy resources . . . . The impacts must occur within the State's coastal zone, although the activities causing the impacts may be outside the coastal zone, on either land or water.

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231 For some activities covered by these terms see 15 C.F.R. §§ 930.53(b), 930.58(a), 930.77(b)(3) (1987).
Examples of land and water uses and coastal zone activities are stated in 16 U.S.C. § 1451(c) and (f) which include industrial and commercial activities, mining, transportation and navigation, waste disposal, and fishing.
232 H.R. Rep. No. 878, 94th Cong., 2d Sess. 31 (1976). This report contains a statement from the National Governors' Conference which reads,

The Governors believe that any OCS program will have substantial financial impact on affected states . . . . Adequate federal funds should be made available now to States to enable them to stay ahead of the program and plan for onshore impact. Once the program commences provisions should be made for federal assistance such as the application of federal royalty revenues to affected coastal and adjacent states in compensation for any net adverse budgetary impacts and for the costs of fulfilling state responsibilities in the regulation of off and onshore development.
235 Report No. 277, supra note 233, at 22.
236 Id.
237 Id.
The Senate committee was concerned that CEIP expenditures would be harmonious with the CZMA. Consequently, the states had to demonstrate adverse impacts; be engaged in comprehensive coastal zone management; and spend the funds in a manner consistent with the purposes of the CZMA.\textsuperscript{238}

The House was also aware of the harm that OCS development posed to state coastal zones. The House committee noted that disenchanted coastal states had threatened law suits and restrictive permitting controls because their views had not been accorded the proper weight.\textsuperscript{239} Coastal states were not opposed to OCS development, but wanted to be involved in the process from the beginning and share in the profits of such activity.\textsuperscript{240} Consequently, the House passed the CEIP in order to decrease state hostility and thus expedite OCS development.\textsuperscript{241}

The CEIP was included in the CZMA Amendments of 1976.\textsuperscript{242} The CEIP provided coastal states with funds “for study of and planning for, consequences relating to new or expanded energy facilities in, or which significantly affect, the coastal zone.”\textsuperscript{243} Such consequences were “any economic, coastal, or environmental consequence which has occurred, is occurring, or is likely to occur in the coastal zone from the siting, construction, expansion, or operation of new or expanded facilities.”\textsuperscript{244} This demonstrated congressional concern with the socioeconomic impacts of OCS development.

NOAA regulations manifested a similar concern. The regulations defined “significantly affecting” as “likely to cause population changes in the coastal zone” or “likely to change employment patterns in the coastal zone, including fishing and tourism.”\textsuperscript{245} Since population and economic changes generated by OCS development triggered CEIP grants, clearly NOAA assumed that policies concerning social and economic impacts were within the scope of the CZMA.

The CEIP also provided the funding to comply with section 305(b)(8) of CZMA which requires state coastal zone management

\textsuperscript{238} \textit{Id.} at 33.
\textsuperscript{239} Report No. 878, \textit{supra} note 233, at 28–29.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.}
\textsuperscript{243} \textit{Id.} § 1456a(a)(1)(B).
\textsuperscript{244} H.R. REP. No. 1298, 94th Cong., 2d Sess. 34 (1976) (emphasis added) [hereinafter Report No. 1298].
\textsuperscript{245} 15 C.F.R. § 931.114 (1987).
programs to include policies to anticipate and manage the impacts of energy projects that significantly affect the coastal zone. The legislative history of section 305(b)(8) demonstrated congressional concern with the socioeconomic impacts of energy facilities that significantly affect the coastal zone.

The Senate report required a planning process for energy facilities in the coastal zone which affect the coastal zone. The House report restricted the planning process to energy facilities in the coastal zone, but socioeconomic and environmental impacts were to be considered. The conference committee compromise provided for “a planning process for energy facilities likely to be located in, or which may significantly affect the coastal zone, including impact management.” Impact management included the socioeconomic and environmental impacts specified in the House bill. Since OCS development significantly affects the coastal zone, the states are required to provide a planning process in their coastal zone management programs that considers the socioeconomic impacts of OCS development.

The purpose of the CEIP was to improve coastal zone management planning by providing funds to the states to develop policies that were harmonious with the CZMA. These include land and water use policies to anticipate and manage social and economic impacts of OCS development. Since Congress would grant CEIP funds only to further CZMA policies, provisions in the state's coastal zone management program that provide for the management of social and economic impacts are by definition within the scope of the CZMA. Consequently, the coastal states can base their consistency objections on the socioeconomic impacts of OCS development on land and water uses in the coastal zone.

D. Court Decisions

Several courts have addressed a similar issue in a different context, whether socioeconomic impacts of OCS lease sales directly

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246 16 U.S.C. § 1454(b)(8) (1982) which requires coastal zone management programs to include, “A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.”
247 Report No. 277, supra note 233, at 33.
249 Report No. 1298, supra note 244 at 29.
250 Id.
251 Id.
affect the coastal zone under section 307(c)(1).252 In 1981, a federal
district court in California held that OCS lease sales directly affected
the coastal zone, thus were subject to consistency review under
section 307(c)(1).253 The Ninth Circuit Court of Appeals affirmed this
decision.254 Both courts recognized the socioeconomic effects of OCS
leasing on the coastal zone.

Following these cases, a federal district court in New Jersey
determined that the socioeconomic impacts of OCS leasing alone did
not constitute direct effects under section 307(c)(1).255 A federal
district court in Massachusetts, disagreeing with the New Jersey
court, held that socioeconomic impacts were direct effects on the
coastal zone subject to consistency review under section 307(c)(1).256

The Supreme Court put the issue to rest with its narrow inter‐
pretation of "directly affecting" in Secretary of Interior v. Califor‐
nia.257 The Court held that OCS lease sales did not directly affect
the coastal zone under section 307(c)(1) and thus federal consistency
certification was not necessary.258

The Supreme Court was concerned with whether OCS leasing was
subject to consistency review under section 307(c)(1).259 The Court
did not examine the scope of state consistency authority under sec‐
tion 307(c)(3)(B). The Court did, however, note that the state pos‐
sessed broad authority at the later stages of the OCS development
process.260 Consequently, socioeconomic impacts on land and water
uses in the coastal zone remained subject to state consistency review
under section 307(c)(3)(B).

1. Kean v. Watt

New Jersey, in its suit opposing an offer by the United States to
lease tracts of the OCS area off its coast, alleged that the socioeco‐

252 16 U.S.C. § 1456(c)(1) states that "[e]ach Federal agency conducting or supporting activ‐
ities directly affecting the coastal zone shall conduct or support those activities in such a
manner which is, to the maximum extent practicable, consistent with approved state
management programs."


254 California v. Watt, 683 F.2d 1253 (9th Cir. 1982).

255 Kean v. Watt, No. 82-2420 (D.N.J. Sept. 7, 1982), vacated as moot, No. 82-5679 (3d Cir.
1984).

grounds, 716 F.2d 946 (1st Cir. 1983).


258 Id.

259 Id.

260 Id.
nomic effects on the fishing industry resulting from OCS development of the tracts directly affected the coastal zone and thus required a consistency determination by Interior.261 New Jersey argued that the harm to the nonmigratory tilefish which live exclusively on the OCS and to other fish and crustaceans which live in the same area would significantly affect commercial and recreational fishing.262 New Jersey requested that Interior delete some tracts, and impose a biological resource stipulation on other tracts.263

Interior alleged that none of the possible effects of the OCS lease sales directly affected the coastal zone.264 Furthermore, federal OCS activities that only have socioeconomic impacts on the coastal zone were not subject to consistency review.265 Section 307(c)(1) limited consistency review to federal activities having a direct physical impact on the natural resources of the coastal zone.266

The federal district court held that the proposed lease sale, not its socioeconomic impacts, was subject to consistency review under section 307(c)(1).267 State coastal zone management authority did not extend to activities occurring on the OCS.268 The CZMA protected only the physical resources of the coastal zone, not the economic health of coastal industries.269 Adverse economic impacts on coastal industries were not subject to consistency review unless the effects arose from an interference with the natural resources of the coastal zone.270 If the court accepted New Jersey’s arguments, all federal activities would be subject to consistency review.271

2. Conservation Law Foundation v. Watt

Lease sale 52 involved the sale of tracts on Georges Bank, one of the world’s richest fishing grounds.272 Massachusetts requested the deletion of 98 of the 540 proposed tracts, the extension of the Bio-

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261 See Kean v. Watt, No. 82-2420 at 15.
262 Id. at 13–14.
263 Id. at 13.
264 Id. at 10.
265 Federal Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 21–32, Kean v. Watt, No. 82-2420.
266 Id.
267 See Kean v. Watt, No. 82-2420, at 37–44.
268 See id. at 40–41.
269 Id.
270 Id.
271 Id. at 42.
logical Task Force to all of Georges Bank, and a stipulation that notified fishing vessels of the location of pipelines. When the Final Notice of Sale was released, Interior had deleted 41 of the requested 98 tracts, extended the scope of the Biological Task Force, but did not include the requested stipulation. Massachusetts brought suit challenging the sale on various grounds.

Massachusetts alleged that lease sale 52 was not consistent to the maximum extent practicable with the Massachusetts coastal zone management program. The 98 tracts had to be deleted because an oil spill on these tracts would endanger the fishing industry. Massachusetts asserted that the socioeconomic impacts on the coastal fishing industry constituted a direct effect under section 307(c)(1). Furthermore, Interior's consistency determination was deficient because it did not articulate adequately why lease sale 52 was consistent with the Massachusetts coastal zone management program.

Interior asserted that Massachusetts' definition of "directly affecting" was contrary to the Kean decision. Socioeconomic impacts were not subject to consistency review which was only required for activities having a direct physical impact on the natural resources of the coastal zone. Furthermore, the consistency determination submitted by Interior demonstrated consistency to the maximum extent practicable with the Massachusetts coastal zone management program.

The Court, disagreeing with the Kean decision, found that lease sale 52 did directly affect the coastal zone. The Court determined that the CZMA was concerned with socioeconomic development. The legislative history of the CZMA supported a broad definition of

273 The Georges Bank Biological Task Force was established as a result of the Interior-NOAA compromise which resulted in the withdrawal of Georges Bank from consideration as a marine sanctuary. 44 Fed. Reg. 62,553 (1979).
275 Id. at 566–67, 574–78.
276 Id. at 574.
279 Id.
280 Id.
281 Id.
283 Id.
directly affecting that included socioeconomic impacts. In addition, the Court held that Interior's consistency determination was inadequate because Interior had not explained sufficiently why lease sale 52 was consistent with the Massachusetts coastal zone management program.


In this case the courts dealt with the issue of whether OCS lease sales directly affected the coastal zone under section 307(c)(1). The federal district court and the Ninth Circuit Court determined that lease sale 53, off the coast of California, directly affected the coastal zone and was thus subject to consistency review under section 307(c)(1). Both courts accepted that socioeconomic impacts of OCS leasing constituted direct effects on the coastal zone. The Supreme Court, however, held that OCS lease sales did not directly affect the coastal zone, and thus were not subject to consistency review under section 307(c)(1).

The federal district court found that OCS lease sales directly affected the state's coastal zone. Among the direct effects were socioeconomic impacts. The district court stated that the Secretarial Issues Document and the Environmental Impact Statement list a multitude of "impacts arising out of operations in the leasing area such as impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries . . . , and socio-economic factors." The Ninth Circuit Court, upholding the district court's decision, stated that the "direct effects . . . on California's coastal zone are detailed by the district court."

Judge Mazzone stated that the CZMA "recognizes that a wide range of uses and concerns comes within the purview of the Act," such as "ecological, cultural, historic, and esthetic values as well as . . . economic development." Judge Mazzone noted that in the legislative history "example after example of socioeconomic effects of oil and gas exploration were discussed, evidencing a clear Congressional intent to lessen such impacts through coordinated planning between states and the Federal government." Id.

See id. at 578.


520 F. Supp. at 1380; 683 F.2d at 1260.


Id. at 343.

520 F. Supp. at 1380.

See id. at 1380–81.

Id. at 1381.

California v. Watt, 683 F.2d at 1260.
The Supreme Court, however, held that OCS lease sales did not directly affect state coastal zones.\textsuperscript{295} The Court determined that the legislative history indicated that section 307(c)(1) was limited to the geographical confines of the coastal zone.\textsuperscript{296} Furthermore, the careful separation of OCS leasing from subsequent exploration in the Outer Continental Shelf Lands Act demonstrated that OCS leasing did not directly affect the coastal zone.\textsuperscript{297} The lease sale had no physical impacts on the coastal zone.\textsuperscript{298} It only granted the lessee priority position in the submission of subsequent exploration, development and production plans.\textsuperscript{299}

The Court's decision was incorrect. The decision was contrary to legislative history, NOAA regulations, and the Outer Continental Shelf Lands Act.\textsuperscript{300} The Court did not adopt the causal meaning of "directly affecting." The Court limited the direct effects of federally conducted or supported activity to the geographical confines of the coastal zone.\textsuperscript{301} The "affecting" language in 307(c)(3)(B), however, describes the causal relationship between federally permitted activity and land and water uses in the coastal zone, not the geographical location of the activity.\textsuperscript{302} Consequently, the Court's reasoning cannot be applied to limit state consistency authority under section 307(c)(3)(B).\textsuperscript{303}

Furthermore, the Court only determined that a particular activity, OCS leasing, was not subject to consistency review under section 307(c)(1). It did not address specifically the issue of the scope of state consistency authority. The Court did, however, remark that, "[s]tates with approved CZMA plans retain considerable authority to veto inconsistent exploration or development and production plans put forward in those later stages."\textsuperscript{304}

IV. ISSUE 2: SECRETARIAL OVERRIDE

The second major issue in\textit{ Exxon Corp. v. Fischer} was procedural, addressing the Secretary of Commerce's role regarding the override

\textsuperscript{296} Id. at 321-25.
\textsuperscript{297} Id. at 335-44.
\textsuperscript{298} See id. at 338-39.
\textsuperscript{299} Id. at 339.
\textsuperscript{300} Fitzgerald, supra note 6, at 451.
\textsuperscript{301} Secretary of the Interior v. California, 464 U.S. at 321-35.
\textsuperscript{303} Id.
\textsuperscript{304} Secretary of the Interior v. California, 464 U.S. 312, 341 (1983).
of state objections under section 307(c)(3)(B). The issue posed two questions. First, was a decision on appeal from the Secretary a prerequisite for judicial review of the Commission's objection? The district court held that since the Secretary could not address the substantive issue—whether socioeconomic impacts on land and water uses in the coastal zone resulting from OCS exploration were subject to state consistency review—an appeal to the Secretary was not necessary. The Ninth Circuit did not answer the question. An appeal to the Secretary was required in this case. The appeal process is inherent in the structure of the consistency provisions and required by the doctrine of exhaustion of administrative remedies.

The second question was whether the Secretary, in his consideration of Exxon's appeal, decided the substantive issue in the case. The district court held that he did not, but the Ninth Circuit Court determined that he had. The Secretary decided the substantive issue in his consideration of adverse impacts and reasonable alternatives. Consequently, subsequent judicial review of the issue was barred under the doctrines of res judicata and collateral estoppel.

A. Exhaustion of Administrative Remedies

Kenneth Culp Davis points out that the doctrine of administrative remedies involves judicial discretion because of its inherent tensions. Invocation of the doctrine is encouraged when there are such factors,

as need for factual development, importance of reflecting agency's expertise or policy preferences in the final result, probability that the agency will satisfactorily resolve the controversy without judicial review, protection of agency processes from impairment by avoidable interruption, conservation of judicial energy by avoiding piecemeal or interlocutory review, and providing the agency opportunity to correct its own errors.
Resort to the doctrine is discouraged when there are such factors,
as irreparable injury to a party from pursuing the administrative
remedy, clear absence of agency jurisdiction, clear illegality of
the agency's position, a dispositive question of law peculiarly
within judicial competence, the futility of exhaustion, and ex­
pense and awkwardness of the administrative proceeding as com­
pared within expensive and efficient judicial disposition of the
controversy.316

The district court held that the doctrine did not apply in this case
because the Secretary could not reach the issue of coastal zone
effects.317 Once the California Commission objected to Exxon's ex­
ploration plan, all that remained was a legal question. At that point,
Exxon had the right to challenge the Commission's exercise of its
consistency authority.318

The district court was incorrect. The doctrine of exhaustion of
administrative remedies applied in this case for several reasons.
First, Congress designed the appeals process to carry out the
purposes of CZMA. Congress set out certain goals and allocated
power to realize these goals. Section 307(c)(3)(B) granted coastal
states the right to determine if a lessee's exploration, development
and production plans were consistent with a state's coastal zone
management program. Only the Secretary could override the state's
objection. Since the statute defined this process as the means to
realize the goals of the CZMA, premature judicial review would
interfere with the intent of Congress.

Second, a decision by the Secretary could resolve the conflict
without the need for judicial review. Under NOAA regulations,
California's objection was presumed to be correct. The Secretary
could only override the objection if he found the activity to be in
conformity with the CZMA or necessary for national security.319
NOAA deliberately kept the Secretary's override authority narrow.

In the first proposed regulations in 1977, Congress defined the
Secretary's override authority narrowly.320 The Secretary could only
override a state's objection if he found the activity was in conformity
with the CZMA or in the interest of national security.321 Otherwise,

316 Id. at 414–15.
317 Exxon Corp. v. Fischer, No. 84-2362, at 26–29.
318 Id.
321 Id.
the state's objection prevailed.\textsuperscript{322} Under the proposed regulations, the Office of Coastal Zone Management in NOAA would review a state's implementation of its coastal zone management program, including consistency determinations.\textsuperscript{323}

There was much criticism concerning the Secretary's override authority in the proposed regulations.\textsuperscript{324} The oil and gas industry complained that the Secretary's authority was too narrow and did not provide sufficient discretion.\textsuperscript{325} The coastal states argued that the Secretary's override authority was too broad.\textsuperscript{326}

In the final regulations issued in 1978, NOAA refused to change its position.\textsuperscript{327} The correctness of a state's consistency objection could not be the basis of the Secretary's override.\textsuperscript{328} The Secretary was not empowered to determine if a coastal state correctly determined that an activity was consistent with its coastal zone management program.\textsuperscript{329} The correctness of the state's decision was assumed.\textsuperscript{330} Congress intended the Secretary's case by case determination for the review of inconsistent actions that warranted federal approval based on overriding national concern.\textsuperscript{331} Challengers could bring any other objections to the Office of Coastal Zone Management or to the courts.\textsuperscript{332} The Secretary could only "provide a variance when justified by overriding national concerns."\textsuperscript{333}

Once the Commission objected, Exxon was required to appeal to the Secretary of Commerce. Exxon could only judicially challenge the Commission's decision at this point if the secretarial appellate process would not address the basis of the challenge.\textsuperscript{334} The Secretary addressed the issue raised by Exxon's objection, however, in his consideration of adverse impacts and reasonable alternatives. Consequently, judicial review of the Commission's decision should not have occurred until after the Secretary's decision. Furthermore, Exxon should not have brought suit against the Commission, but against the Secretary.

\textsuperscript{322} Id.
\textsuperscript{323} Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id.
\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id.
Third, the postponement of judicial review would prevent the fragmentation and maintain the integrity of the appellate process. 335 This would reinforce state authority which was part of the inducement to encourage coastal states to participate in the coastal zone management program. 336

Finally, delaying judicial review until after the Secretary’s decision would preserve judicial resources. A judicial challenge of the state’s objection at this intermediate point in an ongoing administrative process would not preclude another judicial challenge of the Secretary’s decision on appeal.

The courts should have held that judicial review of the Commission’s objection must await the Secretary’s decision on appeal. The Secretary would address the substantive issue presented. Furthermore, the Commission’s objection was an intermediate step in an ongoing process. The final step, as defined by Congress, was appeal to the Secretary. To allow premature judicial review would frustrate the congressional scheme which was designed to establish a federal-state partnership. 337

B. Res Judicata and Collateral Estoppel

Since the Secretary addressed the substantive question on appeal, Exxon was precluded from challenging the Commission’s decision under the doctrines of res judicata and collateral estoppel. The doctrine of res judicata holds that “a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.” 338 Under the principle of collateral estoppel once an issue is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. 339 The principles underlying these doctrines are,

that a party who once had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle—that one who has actually litigated an issue should not be allowed to relitigate it—underlies the rule of issue preclusion. 340

335 See generally Exxon Corp. v. Fischer, No. 84-2362 at 24.
337 For another application of this reasoning see Judge Conti’s decision in Exxon Corp. v. Fischer, No. C-83-3911-SC, slip op. at 8–12 (N.D. Cal. July 27, 1984).
340 DAVIS, supra note 314 § 21.1 at 48.
Both of these doctrines apply to the administrative forum. The Supreme Court has stated that,

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce [the decision].

The district court determined that neither doctrine applied to the Secretary's decision in this case. The Secretary was not acting in a judicial capacity. The Secretary did not examine the statutory language or legislative history of the CZMA, thus he did not address the issue before the court.

The Ninth Circuit Court, overturning the district court decision, found that the Secretary was acting in a judicial capacity. Exxon was given a full opportunity to submit evidence and participate in the decision. The Secretary addressed the substantive issue in the case. The Secretary considered the effects on land and water uses in the coastal zone of Exxon's exploration and determined them not to be substantial. Nevertheless, restricting Exxon's exploration activities to the prescribed drilling window could preclude any adverse impacts. The Secretary's cost/benefit analysis was crucial to his decision. If the Secretary did not consider socioeconomic impacts, there was nothing to which Exxon's interests could be subordinated.

The Ninth Circuit Court was correct in its determination that the doctrines of res judicata and collateral estoppel applied in this case. Kenneth Culp Davis points out that the invocation of the doctrines concerning administrative decisions depends on the same factors as in the courts, such as "identity of claims and issues, identity of parties, final decisions on the merits, collateral attack, [and] jurisdiction." Res judicata is applicable particularly when the admin-

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341 Id. (quoting United States v. Utah Construction Co., 384 U.S. 394, 421–22 (1966)).
342 Id. at 26–28.
343 Id. at 28.
344 Exxon Corp. v. Fischer, No. 84-2362 at 29.
345 Exxon Corp. v. Fischer, 807 F.2d at 846.
346 See id. at 844–85.
347 Id. at 846.
348 Id.
349 Id.
350 DAVIS, supra note 178, § 21.2, at 50.
istrative agency acts in the same manner as a court. Such similarity extends both to questions of fact and law.

Following Exxon's original appeal in this issue, a public hearing took place in Santa Barbara on November 8, 1983. Various federal agencies and the parties involved provided extensive commentary. On March 9, 1984, Exxon filed its appeal with the Secretary. Commerce published a public notice of the appeal in the Federal Register and in a local Santa Barbara newspaper. The Secretary considered all of the comments received in the past and present appeal in his analysis of the legal and factual issues presented.

All of the requirements identified by Davis were present in the Secretary's decision. In the decision were identity of the issues and parties, a final decision on the merits by the Secretary, and the possibility of collateral attack on the courts of the Secretary's decision. Furthermore, the Secretary clearly had jurisdiction over the issue. Since the Secretary considered the socioeconomic impacts on land and water uses in the coastal zone resulting from Exxon's exploration, a fact Exxon admitted, Exxon was precluded from challenging the Commission's objection under the doctrines of res judicata and collateral estoppel.

Exxon's proper recourse would have been to challenge the Secretary's decision under section 706 of the Administrative Procedures Act. In such a case, the court would have to review the Secretary's decision to determine if it was arbitrary, not in accordance with the law, contrary to constitutional limits, in excess of his jurisdiction, procedurally incorrect, or unsupported by substantial evidence.
V. CONCLUSION

OCS development has generated an ongoing conflict between the federal and state governments known as the Seaweed Rebellion. The extent of coastal state authority over OCS development under the consistency provisions of the CZMA has been the focus of several federal-state court battles in the rebellion. In *Secretary of Interior v. California*, the Supreme Court held that OCS lease sales did not directly affect the coastal zone, and thus federal consistency certification was not required under section 307(c)(1). In *Exxon v. Fischer*, the scope of state consistency authority under section 307(c)(3)(B) was contested. The courts faced two questions. First, were the effects on the land and water uses in the coastal zone resulting from Exxon's interference with thresher shark fishing on the OCS subject to state consistency review under section 307(c)(3)(B)? Second, what was the Secretary of Commerce's role regarding the override of state objections?

The socioeconomic impacts on California's coastal fishing industry resulting from Exxon's interference with thresher shark fishing constituted effects on land and water uses in the coastal zone that were subject to state consistency review. This was demonstrated in the legislative history, NOAA regulations, Coastal Energy Impact Program, and planning requirements of section 305(b)(8) of the CZMA. Furthermore, several federal district courts determined that the socioeconomic impacts of OCS lease sales were direct effects on the coastal zone that were subject to consistency review under section 307(c)(1). Even though the Supreme Court held that OCS lease sales did not directly affect the coastal zone, the Court's decision did not affect the scope of state consistency authority under section 307(c)(3)(B). In fact, the Court recognized that coastal states could "veto inconsistent exploration or development and production plans put forward in those latter stages."

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360 *Id.* at 312.
361 Exxon Corp. v. Fischer, No. 84-2362; Exxon Corp. v. Fischer, 807 F.2d 842 (9th Cir. 1987).
363 Secretary of the Interior v. California, 464 U.S. at 312.
Section 307(c)(3)(B) establishes a process by which the Secretary of Commerce can override a state’s objection if he finds that the activity is consistent with the purposes of the CZMA or in the interest of national security. The structure and purposes of the CZMA indicate that Congress intended the appeal to the Secretary to be an important component in the operation of the consistency provisions. In most instances, appeal to the Secretary should be a prerequisite to a judicial challenge. An unsuccessful applicant can only bypass the appeals process if the Secretary will not address the basis of the appeal. This reasoning comports with the doctrine of exhaustion of administrative remedies and NOAA regulations.

Exxon was required to appeal California’s objection to the Secretary because Congress had empowered the Secretary to resolve the issue. The Secretary’s consideration of socioeconomic impacts in his evaluation of adverse impacts and reasonable alternatives precluded further judicial review of the Commission’s decision under the doctrines of res judicata and collateral estoppel. Exxon’s proper recourse was to challenge the Secretary’s decision.

The CZMA is designed to generate communication, cooperation, coordination, and consultation between the federal and state governments. Any attempt to diminish state consistency authority will incite further battles in the Seaweed Rebellion which will frustrate OCS development. To establish the effective federal-state partnership envisioned by the CZMA, it is necessary to enhance, not diminish, state consistency authority.

364 For an excellent overview of the Secretary’s role in the consistency process see Eichenberg and Archer, supra note 302.