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BLOCK V. NORTH DAKOTA: WHEN IS A SOVEREIGN NOT A SOVEREIGN?

by John K. Van de Kamp and Jan Stuart Stevens

In the recent case of *Block v. North Dakota*, ____ U.S. ____; 103 S.Ct. 1811; 75 L.Ed. 840 (1983) the United States Supreme Court once again wrestled with the enigmatic concept of federalism; and once again, the sovereign states found themselves a little less sovereign than the federal government. The Court held that the 12-year statute of limitations in the federal Quiet Title Act applied to the claims of sovereign states as well as those of private persons. As a result, a state is precluded from filing quiet title suits against the federal government if it "knew or should have known" of the claim for more than 12 years.

The 12-year statute, incorporated in the Act at the request of the U.S. Department of Justice to forestall a "flood of litigation," received no apparent attention from states at the time the Act was passed in 1972. This inattention was perhaps understandable because under established principles of common law, statutes of one mitigation will not bar the claim of a sovereign. As that same Court observed in absolving the federal government of estoppel:

> The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. *(United States v. California,* 332 U.S. 19, 39-40 (1947)

Application of the statute of limitations to claims of states seems particularly inappropriate in light of the typical facts surrounding such claims. Each state holds the lands under its navigable waters (tide and submerged land and navigable lakes and rivers) in trust for its people by virtue of the federal constitution, not by congressional grace. (*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). The 13 original colonies succeeded to the title of King George in such land (*Martin v. Waddell,* 41 U.S. (16 Pet.) 367 (1842), and under the equal footing doctrine, states admitted later acquired such lands on admission (*Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), and therein lies the rub.

Once quiet title suits became available under the 1972 Act, surprised states found that the federal government not only was asserting the statute as a bar in such suits but that it was contending that hapless states "knew or should have known" of the federal claim when they acceded to such lands on statehood. Thus, Utah was told that it should have known of claims to Utah Lake when it became a state in 1899. California was told that an 1899 federal-state reclamation project on the Yuba River should have put it on notice of federal claims on that date; and North Dakota, in the *Block* case, was charged with notice of the federal claim in 1955. The "Catch-22" in this argument is, of course, that even if a state knew or should have known of a federal claim at that time, a quiet title suit would have been impossible because Congress did not waive sovereign immunity until 1972.

The sovereign nature of lands underlying a state's navigable waters carries with it implications not discussed by the majority in *Block.* As 28 amici states pointed out, most controversies with the federal government over land involve the claims of private persons. In those infrequent but important cases in which a state sues to protect its sovereign title to the bed of a navigable water, the situation is far different. These lands were acquired by states as an incident of their sovereignty. *(Pollard's Lessee v. Hagan, supra,* 44 U.S. 212; *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at p. 370.) Unlike federal lands, they are held in trust for the people within their borders. *(Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892); *Shively v. Bowlby,* 152 U.S. 1. (1893).

Absent from the majority opinion in *Block* is any reference to the states as sovereigns. Rather, the Court states:

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DEADLINE ON DEVELOPMENT: A MINING COMPANY'S SOLUTION

by Fern Shepard

Admiralty Island, southeast Alaska's third largest island, sits 18 air miles southwest of Juneau, Alaska's capital city. In 1973, a small, richly mineralized area was discovered on the northwest corner of the island. The eleven square mile area, called Greens Creek, contains an economically mineable ore deposit of silver, zinc, gold, lead, and copper, all precious minerals imported in large quantities by the United States. Exploration outside the immediate vicinity of the known deposit indicates significant potential for other major ore bodies in the Greens Creek drainage.

In 1978, the Greens Creek Joint Venture was formed to develop the mining claims. Participants in the Joint Venture include Noranda Mining Inc. (the managing partner), Marietta Resources International, Exalas Resources Corporation, Texas Gas Exploration, and Bristol Bay Native Corporation. To date, the Joint Venture has invested more than $9 million for claimstaking, metallurgical test work, environmental studies, geophysical surveying, excavation of a 4,200-foot adit (or tunnel), and 48,000 feet of diamond core drilling.

THE PROBLEM

On December 2, 1980, President Jimmy Carter signed into law the National Interest Lands Conservation Act (16 USC §3101 et seq., hereinafter "ANILCA"). The purpose of ANILCA is "to provide for the designation and conservation of certain public lands in the State of Alaska..." In section 503(b), Admiralty Island was designated a National Monument and thus protected from activities such as mining and timbering. ANILCA allows holders of valid mining claims to begin mining subject to certain restrictions. As Noranda held eight valid mining claims in Greens Creek before ANILCA's passage, activities related to developing these claims could continue. Recognizing the potential of Greens Creek, Congress provided permits authorizing the exploration of unperfected mining claims.

Two restrictions on exploration, contained within section 504 of ANICLA, create the controversy in this case. First, exploration of unperfected claims is limited to areas within ¾ mile of a perfected claim, and second, exploration must cease on December 2, 1985, five years from the passage of the Act. After this date, activities are strictly limited to developing perfected claims. Noranda believes it is sitting on a proverbial goldmine, and wants to explore beyond the ¾ mile boundary and beyond the 1985 cutoff date. To accomplish this goal, Noranda has proposed excluding Greens Creek from the Monument.

NORANDA'S PROPOSED SOLUTION

ANILCA section 103(b) gives the Secretary of Agriculture and the Secretary of the Interior authority to make minor boundary adjustments to federal conservation units in Alaska. Federal conservation units include National Parks, National Refuges, Wild and Scenic Rivers, portions of the National Wilderness System, National Forest lands, and National Monuments, such as Admiralty Island.

ANILCA limits the minor boundary adjustment to an increase or decrease in such units of a maximum of 23,000 acres. Noranda has proposed a land exchange using section 103(b) to remove the entire Greens Creek area from the Admiralty Island National Monument. First, the minor boundary adjustment provision would remove the 17,225 acre Greens Creek area from the Monument. Second, the same provision would incorporate into the Monument the 18,174 acre Young Lake area, located outside of but adjacent to the Monument lands.

ENVIRONMENTALISTS' POSITION

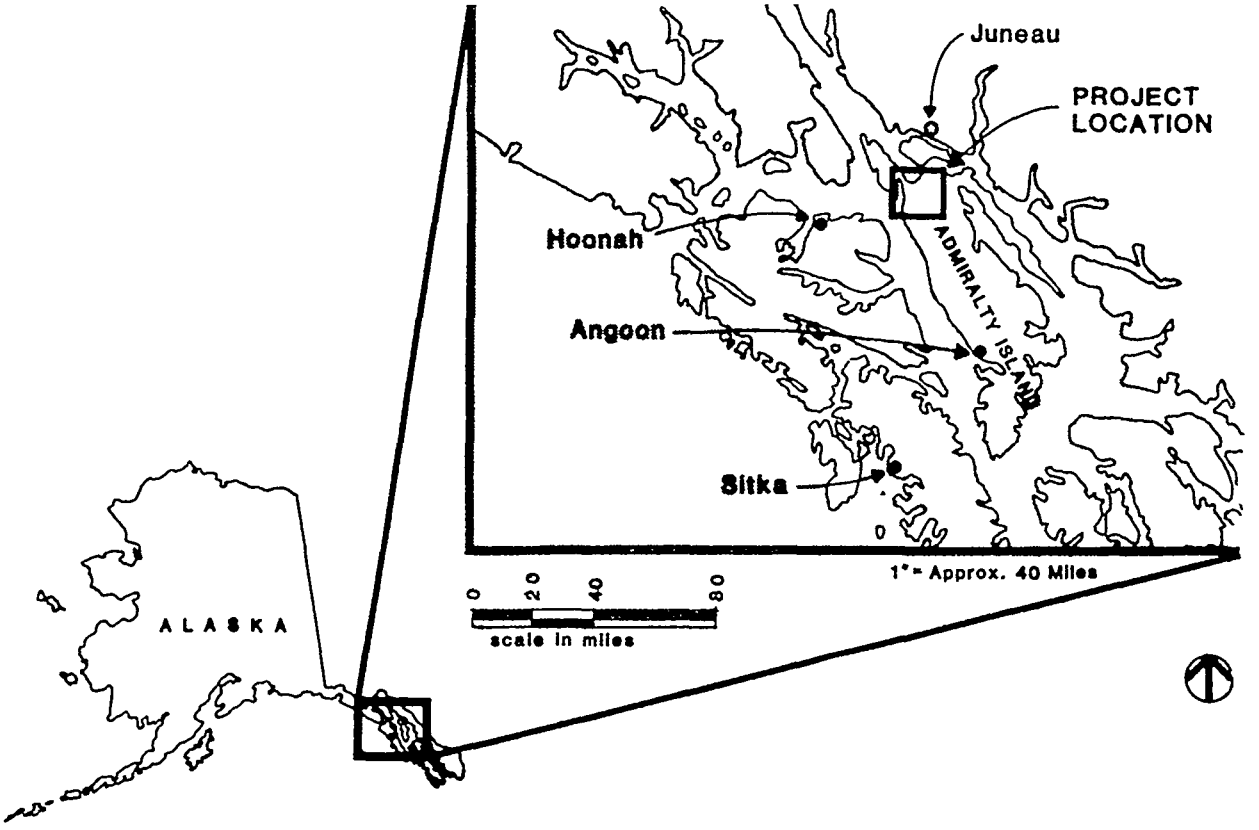
For Alaska's environmental community, Noranda's proposal presents both clear benefits and dangerous possibilities. On the positive side, if the proposal is adopted, the Young Lake area would be protected within the Monument, and the proposed addition would be approximately 950 acres larger than the Greens Creek deletion. Young Lake is a popular recreation area in Southeastern Alaska, and users would likely welcome protection from development, mining, and logging.

Second, the proposal provides some protection to the Greens Creek area itself. Currently, Noranda is working under the December 2, 1985 deadline for exploration. Almost 440 lode claims and 138 millsite claims were staked in Greens Creek. Eight core claims have been declared valid. The remaining 149 unperfected claims within the ¾ mile radius will be lost if not declared valid by the deadline. Due to the time pressure, Noranda has been forced to explore the extent of its claim by what it describes as "a large number of very deep holes." For both Noranda and environmentalists, this is the least preferable method of exploration.

The most efficient method would be to follow the orebody by underground exploration because the deposit is narrow and deeply situated. It is, in fact, impossible to fully delineate the entire deposit from the surface. Underground exploration is preferred by Noranda as it is the most cost effective and efficient method. Further, if the ability to perfect the additional claims is lost, the continuity between Noranda's valid claims and its unperfected claims would be lost. As presently projected, four gaps between claim blocks would exist, making development of the claims difficult, inefficient and environmentally unsound. Underground development is also preferred by environmentalists because it results in the least surface disturbance of the area. Yet underground exploration is time-consuming. If Greens Creek is removed from the Monument, the exploration deadline would be lifted and Noranda could utilize underground exploration.

The above reasons present a strong argument to support removal of the exploration areas from the Monument by a boundary adjustment. Yet despite these benefits, environmentalists are opposing the proposed land exchange for two reasons. First, removing Greens Creek from the Monument significantly decreases its overall protection from development. Second, the use of section 103(b) in the proposed manner would establish an environmentally unsound precedent.

One of the purposes for creating a National Monument is to preserve and protect rare scenic areas. Keeping Greens Creek in the Admiralty Island National Monument means retaining three crucial protection measures for the area that would be lost under Noranda's proposal. First, as mentioned earlier, Noranda's exploration and ultimate mine development would be limited to a ¾ mile ring around claims perfected by December 2, 1985. If the Greens Creek drainage is deleted from the Monument, the entire area is opened for claiming, exploring, and developing with no time constraints. Adverse im-



pacts from increasing the mineable area include the necessity of a more extensive road system, additional adits, and a longer mine life with attendant tailings disposal problems.

Second, while in the Monument, Greens Creek is expressly protected from timber harvest. If the proposed removal is adopted, the entire area would be considered by the Forest Service under the Tongass Land Management Plan for a range of multiple uses, including clearcut logging. Finally, under the current plan for development of the Greens Creek mine, all roads within the Monument must be reclaimed to as near a pre-project condition as possible when mining ends. Once the area is removed from the Monument, no guarantee of reclamation exists. An existing road in a non-Monument area is an open invitation for a timber harvest in Southeast Alaska.

By far, however, the most serious threat created by Noranda's proposal is the precedent it would establish if adopted. If Greens Creek is stripped of Monument status via the boundary adjustment provision, then all Alaska's lands currently protected by ANILCA are put in jeopardy. The Secretary of Agriculture, by using this administrative provision, could undo much of Congress' work in creating the conservation units. Scenic lands that environmentalists fought to have included under ANILCA's protections would be threatened with the prospect of being swapped with lands without special status and then developed. Clearly, Greens Creek would not be the last use of section 103(b) to remove an area from a National Monument or other conservation unit.

In December, 1983, the United States Forest Service issued its draft environmental impact statement, supporting Noranda's proposal as the preferred alternative for relieving the mining company of the time constraints on exploration imposed by ANILCA. The Sierra Club Legal Defense Fund (SCLDF), on behalf of every environmental organization in Alaska, questioned the legality of invoking section 103(b) to remove Greens Creek from the Monument. SCLDF put forth three major arguments in opposing the land exchange.

First, if ANILCA is to be internally consistent, section 103(b) cannot be used to remove an area from a National Monument that was specifically included in section 503(b). Second, section 103 is entitled "MAPS", and the Congressional intent for section 103(b), the minor boundary adjustment provision, was that it be used to correct clerical and typographical errors in the Act and to conform the descriptive boundaries to natural features. The logical inference is that adjustments were intended to be made only for technical improvements in boundaries. The statutory language in no way indicates that a substantive boundary change, such as removing an area specifically included in a Monument, is a legal or intended use of section 103(b). During the Congressional debate on ANILCA, Representative Morris Udall (D-AZ) stated that "[section 103(b)] deletions must consist solely of lands not essential for the purposes for which the unit was established, and must be held to a minimum." (126 Cong. Rec. H10543 (daily ed. Nov. 12, 1980).

In summary, removing Greens Creek from the Monument would strip the area of the mining restrictions and logging proscription in direct conflict with the Monument's stated purpose of protection. In addition, interpreting section 103(b) to authorize the boundary change proposal ignores the express statutory language and adopts an interpretation inconsistent with another section of ANILCA and its legislative history.

THE FUTURE

Noranda's boundary adjustment proposal presents serious legal and environmental problems. The U.S. Forest Service's final environmental impact statement on the proposal was expected to be issued this last spring. If Noranda's proposal remains the preferred alternative, Alaska's environmentalists are expected to initiate litigation. However, the environmentalists recognize the economic and environmental advantages of relieving Noranda of its exploration deadline problems. As a result, discussions have begun between the interested parties to draft a legislative solution. These negotiations present the hope for resolution, while lawsuits and the December 2, 1985 deadline remain on the horizon.

GORDA RIDGE

by Adam Rosen and Anne Stausboll

INTRODUCTION

In the spring of 1983 the U.S. Department of Interior announced its intention to hold a lease sale of 70,000 square miles of sea floor off the northern Pacific coast for mineral prospecting. This area, known as the Gorda Ridge, is a vast undersea canyon about 150 miles from shore thought to contain polymetallic sulfides (PMS), a source of important minerals. Many groups, including environmentalists, biologists, fishing groups, the mining industry, and local governments have criticized Interior's plan. These groups claim that the lease sale is premature because there has been insufficient research on the impacts of deep sea mining on the Gorda Ridge area and its potential for containing PMS. Also, Interior has not demonstrated an urgent need for the minerals, and the necessary mining technology is not yet developed. Finally, critics claim that Interior does not have the legal authority to conduct the lease sale.

This article will focus on the issue of jurisdiction over the mining of PMS in the Gorda Ridge area. Does Interior have jurisdiction? If not, does the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce have jurisdiction? If Congress has not delegated authority over deep sea mining of PMS to any particular agency, what policies should be considered in making such a delegation?

THE GORDA RIDGE STORY

Gorda Ridge, which extends from Cape Mendocino, California to Newport, Oregon, is one of three areas in the world where hydrothermal vents, a unique geological phenomenon, are found. In each of these areas, shifting plate tectonics cause fractures in the ocean floor. Cold seawater seeps down these fractures and is heated by volcanic magma. The heated water is trapped beneath layers of rock, allowing sulfur and metallic elements to mix with the water. After being expelled by great pressure, this water mixes with the cold and highly pressurized water of the ocean floor. The metals and sulfur then crystallize, forming the components of PMS. This process also creates water hotsprings, or "hydrothermal vents". The springs are known as "black smokers" because of the cloud-like plumes of dark minerals exuding from the ocean floor.

The black smoker phenomenon has been found in the rift zones of the Guaymas Basin off the Mexican coast near the Galapagos Islands, and on the Juan de Fuca Ridge near Washington state. In both areas PMS have been found in the immediate vicinity of the black smokers. PMS can be a major source of minerals, including copper, zinc, silver, and gold. In the Galapagos Islands PMS also yielded trace amounts of manganese, aluminum, cobalt, magnesium, mercury, and lead.

Interior is interested in Gorda Ridge and its potential for PMS because of the Reagan Administration's general concern over America's increasing "mineral vulnerability". Some of the minerals found in the Guaymas Basin and Juan de Fuca Ridge are important "strategic minerals" used in defense and industry. As one example of the need for PMS, Interior has pointed out that 90% of our cobalt, which is vital to the manufacture of jet engines, comes from politically unstable Southern Africa.

In response to this concern for "national security", on March 10, 1983, President Reagan issued a Proclamation declaring an "exclusive economic zone" (EEZ). The Proclamation gives the U.S. sovereign rights over the exploration, management, exploitation, and conservation of marine resources within 200 nautical miles of the border of the territorial sea, to the extent permitted by international law. (48 Fed. Reg. 10605) (A Proclamation is a formal declaration by the President to make a governmental matter generally known.)

Three weeks after Reagan issued the Proclamation, Interior announced its intention to prepare a draft environmental impact statement (DEIS) for an October 1984 lease sale of mining rights to the Gorda Ridge. Soon afterwards, it issued the DEIS. Interior's plan shocked the mining industry, local governments, and environmentalists for several reasons:

(1) Whether Interior has the legal authority to lease the Gorda Ridge is unclear;

(2) Sufficient research to ascertain whether PMS will actually be found in the area has not been done;

(3) Interior's decision is premature because the needed technology has not yet been developed, and there is a surplus of these minerals on the world market;

(4) The Gorda Ridge may contain extremely rare geological and biological communities valuable for research on evolution and energy production;

(5) NOAA is currently in its third year of a five-year mapping program at the Gorda Ridge, and any development plans should wait for completion of the program, since maps will be needed to search for the minerals;

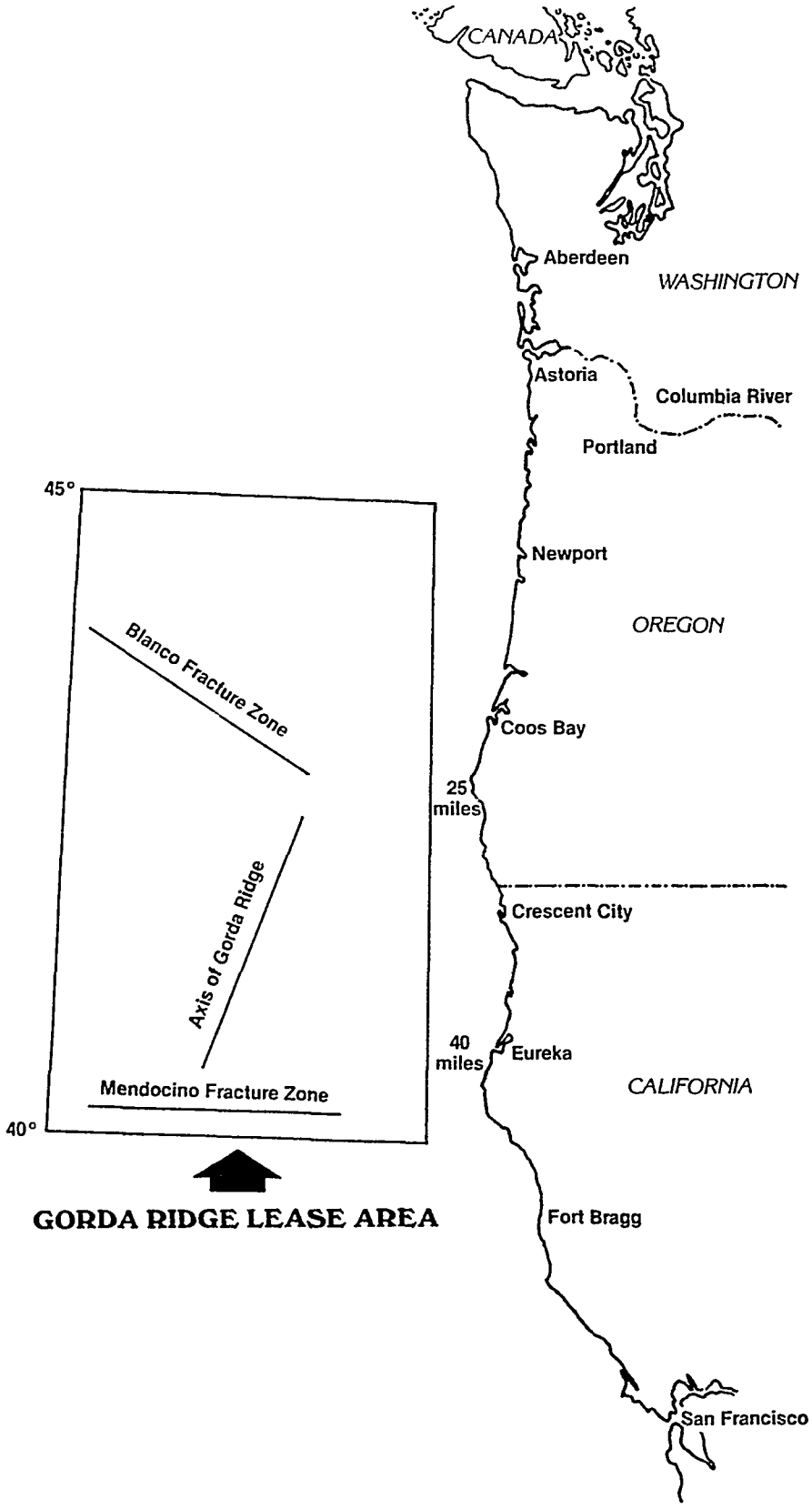
(6) The proposed mining would produce "slurry", a highly toxic mixture of rock, minerals, and seabed, which would be pumped up from the seafloor and transported to coastal ports. No technology exists to clean up affected water in case of an accident;

(7) Interior estimates that nine metric tons of waste per day will be dumped into surface waters from each mining operation. The impact on these waters and wetlands is unknown and the DEIS proposes no comprehensive treatment or cleanup plan.

Given these problems, why has Interior planned a lease sale at this early date? In its DEIS Interior claims that although the U.S. currently has an adequate domestic supply of PMS, the onshore supply of these minerals might run out by the year 2000. Others disagree, claiming that worldwide deposits are enough to last until 2020; that additional deposits may be found in the northern Rocky Mountains, southeastern Arizona, Western Canada, and Africa; and that none of the figures cited by Interior include recycling as a source of supply. (California Coastal Commision, internal memorandum from Michael L. Fischer, Executive Director, March 2, 1984.)

Critics argue that Interior may be acting prematurely to set a precedent giving jurisdiction over deep sea mining in general. Interior has already discussed an accelerated leasing program involving all areas of the EEZ, off both the east and west coasts of the U.S. and throughout the Pacific Basin. Areas are targeted for mineral leasing at a rate of one major region every six months over the next two-and-one-half years. Opponents argue that not only is Interior acting too quickly, but that it might not have the authority to act at all. They suggest that NOAA is the appropriate agency to handle deep sea mineral leasing.

Under the relevant statutes, it is unclear which federal agency has authority over deep sea mining at the Gorda Ridge. On one hand, Interior controls the leasing of oil and gas mining on the outer continental shelf (OCS) under the Outer Continental Shelf Lands Act (OCSLA). 43 U.S.C. §1337 (8)(k). Interior contends that the Gorda Ridge is on the OCS and therefore that it has the authority to lease



this area. Whether the Gorda Ridge is in fact on the OCS is debatable. On the other hand, NOAA has jurisdiction over the mining of manganese nodules on the deep seabed under the Deep Seabed Hard Minerals Resources Act (DSHMRA). 30 U.S.C. §1403 (6). While NOAA clearly has more experience administering mining activities in the deep seabed, the term "hard minerals" as defined in the DSHMRA does not appear to include PMS.

INTERIOR'S ARGUMENT

Interior's claim of authority over deep sea mining at the Gorda Ridge is based on the OCSLA; ultimately, its argument hinges on the definition of "outer continental shelf." Originally, the continental shelf was defined as an 18 mile area measured seaward from the coast. But treaties and statutes have extended the shelf hundreds of miles further.

The OCSLA provides Interior with jurisdiction over the exploitation, development, and conservation of certain natural resources on the OCS. 43 U.S.C. §1337 (8)(k). These resources are oil and gas, as well as any mineral "authorized by an act of Congress to be produced from 'public lands.' " 43 U.S.C. §1331 (q). Interior claims that PMS are "minerals" under this definition. (Letter from Interior, Office of the Secretary, to House Committee on Merchant Marine and Fisheries, September 26, 1983.) However, there is no authorizing act of Congress and Interior has not provided any support for its position. There is no explicit congressional delegation of jurisdiction over mining PMS or any other mineral on the deep seabed, except for manganese nodules, which are under NOAA's exclusive jurisdiction. (National Advisory Committee on Oceans and Atmosphere, *Marine Minerals: An Alternative Mineral Supply,* July 1983, page 34.) Interior does not argue that it has express jurisdiction over PMS mining generally; it contends that under its interpretation of the OCSLA, it has jurisdiction over mining on the OCS (including PMS) and that the Gorda Ridge lies on the OCS.

The OCSLA itself gives only a vague definition of the OCS:

> [A]ll submerged lands lying seaward and outside of the area of lands beneath the 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 ("Lands beneath the navigable waters" generally means submerged lands within three miles of the coast.)

Interior relies on two other documents — the Geneva Convention and Reagan's

1983 Proclamation of an Exclusive Economic Zone — for its argument that the Gorda Ridge lies on the OCS.

The Geneva Convention defines the OCS as:

> [T]he seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 200 meters, or beyond that limit, to where the depth of the superadjacent waters *admits of the exploitation of the natural resources of the said areas* . . . (Emphasis added.)

At least one federal court has held that as between the Geneva Convention and the OCSLA, the Convention controls the definition of the OCS. *U.S. v. Ray,* 432 F.2d 16, 23 (5th Cir. 1970). Interior asserts that the Geneva Convention's definition of OCS defines its jurisdiction over minerals on the OCS. Since current technology permits exploitation of virtually the entire ocean, the Convention's definition of the OCS would give Interior a limitless claim of authority over the ocean.

Interior further bolsters its position by citing the EEZ Proclamation which asserted U.S. jurisdiction over the 200 nautical miles adjacent to territorial waters. Since the OCSLA defines the OCS as the submerged lands subject to U.S. jurisdiction, combining the OCSLA with EEZ gives Interior jurisdiction over the 200 mile area.

In summary, Interior claims jurisdiction over the virtually limitless area defined by the Convention, and alternatively, over the 200 mile EEZ. Under either interpretation, the Gorda Ridge lies on the OCS since it is within the 200 nautical mile zone and "admits of exploitation."

Critics argue that Interior's position contravenes established principles of domestic and international law. They claim that Interior's definition of the OCS is incorrect, and that the OCS does not include the Gorda Ridge. In other words, even if Interior has jurisdiction over the mining of PMS (a proposition for which there is no authority), it does not have jurisdiction over the geographic area of the Gorda Ridge.

The EEZ Proclamation itself states that it "does not change existing United States policies concerning the continental shelf." The Proclamation was a new claim of sovereign rights over an "economic" zone; it did not alter existing U.S policies. Significantly, Reagan's statement in support of the Proclamation explained that it would "provide United States jurisdiction for mineral resources out to 200 nautical miles *that are not on the continental shelf.*" (Emphasis added) (Ocean Policy Statement by the President, March 10, 1983). This language indicates that the EEZ Proclamation did not change, but rather confirmed, the existing legal definition of the continental shelf. (Note, H.R. 2061, currently before the U.S. House of Representatives, would provide Congressional approval of the Proclamation.)

Interior's critics buttress their claim that the Gorda Ridge is not located on the OCS by reference to the Geneva Convention definition of the OCS. (Center for Law and Social Policy letter to William Clark, Secretary, Department of the Interior, Appendix A, December 8, 1983, pp. A10-A12.) The Convention states that the continental shelf includes the "seabed and subsoil of the submarine areas *adjacent* to the coast." (Emphasis added.) The International Court of Justice has noted that in this context, "adjacent" requires not only proximity, but *natural prolongation* of the land mass under water. North Sea Continental Shelf, 1969 I.C.J. 1, 31-34, 41-43. The Center for Law and Social Policy goes on to argue that the Gorda Ridge is not part of the "natural prolongation" of the U.S continental shelf. (See also Nelson G. Wolfe, "What's the Rush?", *Oceans,* Vol. 16, No.1, 1984, p. 63; California Coastal Commission memo, *supra,* p. 8.) [Note, in making this argument the Center did not differentiate between "adjacent" and "superadjacent", as done in the Geneva Convention definition (above).]

In conclusion, Interior might lack jurisdiction not only over PMS mining, but over the Gorda Ridge area as well. Interior's assertion of jurisdiction has received much criticism, to which it has not responded. To further confuse the issue, Interior's opponents claim that if any agency has jurisdiction over the lease sale of PMS on the deep seabed, that agency is NOAA of the Department of Commerce.

ARGUMENTS IN FAVOR OF NOAA

First, Interior's critics argue that its definition of OCS leads to a nonsensical result and should therefore be disregarded. As explained below, combining Interior's interpretation of OCS with the statutory language granting NOAA jurisdiction over the deep seabed leads to the absurd conclusion that NOAA does not have jurisdiction over any part of the seabed.

The Deep Seabed Hard Minerals Resources Act (DSHMRA) provides NOAA with the authority to issue exploratory licenses and develop regulations for commercial mining of manganese nodules on the "deep seabed" 30 U.S.C. §1403. The DSHMRA defines "deep seabed" as the " seabed and subsoil thereof...lying seaward and outside (A) the Continental Shelf of any foreign nation; and (B) any area of natural resource jurisdiction of any foreign nation ..." 30 U.S.C. §1403(4) et seq. This Act's definition of the continental shelf is basically the same as that in the Geneva Convention.

According to the Geneva Convention's definition, NOAA has jurisdiction over the "seabed lying *seaward and outside* the area where the waters "admit of the exploitation of the natural resources." This is the same definition upon which Interior relies for its jurisdiction. This definition provides Interior with jurisdiction over a limitless area (see above), and NOAA is left with jurisdiction over the area of the seabed where the resources are not yet exploitable. This obviously could not have been Congress' intention.

On the other hand, if we use the EEZ Proclamation to define the area beyond which NOAA has jurisdiction, NOAA has jurisdiction only *beyond* the 200 nautical mile limit. But as discussed above, the EEZ Proclamation does not appear to have been intended as a new definition of the OCS.

Perhaps agency authorization should not be based on grants of jurisdiction over expansive, vaguely defined areas such as "continental shelf" or "exploitable waters". Rather, it may be preferable to use grants of jurisdiction over specific natural resources to determine which agency has expertise in a particular area.

Although the DSHMRA does not explicitly give NOAA responsibility for PMS, environmental organizations argue that NOAA should logically be assigned responsibility for PMS because manganese nodules and PMS exhibit similar characteristics and both ores must be mined on the deep ocean floor. Due to its role in mining manganese nodules, NOAA has already developed expertise in this area and may be the more appropriate agency to handle the lease sale of the Gorda Ridge. (Center for Law and Social Policy, Letter to Minerals Management Service, Department of Interior, May 26, 1983.)

Those who support this position recognize the lack of clear statutory authority for NOAA's jurisdiction over PMS at the Gorda Ridge, and emphasize policy concerns.

> (T)he development of a cohesive and coherent oceans policy militates against fragmentation of jurisdiction over polymetallics mining. Authority over the development of a polymetallics industry should not depend upon whether the deposit lies on or off the continental shelf. Rather, deep ocean mining of hard minerals, including both polymetallics and manganese nodules, should be treated as one industry requiring a general development policy, with administrative, research, and regulatory responsibility directed by one lead agency. (Center for Law and Social Policy, letter to MMS, *supra,* pp. 14-15.)

Those who favor NOAA as the agency to control mining at Gorda Ridge emphasize the expertise NOAA has acquired through its regulation of manganese nodule mining and its responsibility for developing an overall oceans policy. Additionally, they point to the fact that NOAA is currently in its third year of a five year mapping program, the Gorda Juan de Fuca Seabed Mapping Project. This project involves mapping the tectonics of the rift and determining the structure of the area. Although it will not provide information about the existence of PMS at the Ridge, it will provide the maps necessary to search for the minerals. These three factors indicate that NOAA may be the more appropriate agency to handle PMS mining at Gorda Ridge, as well as mining for hard minerals in other submarine areas.

CONCLUSION

The determination of which agency has jurisdiction over leasing of PMS and other nonenergy-related minerals in the deep seabed may have serious implications for the 70,000 square mile expanse of Gorda Ridge, as well as for other ocean areas.

Because NOAA has more experience in mineral management, many feel it would be a mistake to allow Interior to take over deep sea mining research and exploitation at the Gorda Ridge. The question remains, however, how the choice of appropriate agency will be made. Interior has already given notice of its intent to conduct a lease sale on the Gorda Ridge; can such an important issue be decided unilaterally?

The public response to Interior's plan has been overwhelmingly negative. At the two public hearings on the issue, those in attendance were unanimously opposed to the proposed lease sale.

The State of Oregon has established a task force in conjunction with Interior to review the environmental and economic feasibility of the lease sale. (California will probably join in this effort.) After doing a six to nine month study, the task force may recommend reducing the total acreage for sale (exluding certain areas for enviromental reasons), or abandonment of the entire project. This will probably delay the project for at least one year past the original October 1984 lease sale date.

California Governor George Deukmejian recently signed into law a bill asking President Reagan and Interior to delay the Gorda Ridge lease sale until NOAA's mapping program is finished. (State Resolution, Chapter 12, signed into law February 24, 1984). The California Coastal Commission supports this approach; further, they argue that Congress should review the issue and legislate affirmatively on the matter.

Lawsuits could also delay the lease sale and perhaps ultimately resolve the jurisdictional issue. Possible plaintiffs include the Attorney General of California and various environmental groups, who would argue that Interior lacks jurisdiction to proceed with the lease sale.

In summary, the jurisdictional issue could be resolved by Congressional action giving jurisdiction to one federal agency. Alternatively, the newly created task force could decide to go ahead with the project without clear authorization from Congress, or to wait for the five year NOAA program to be completed. Finally, the whole issue could die out or be battled out in the courts. Given the long term implications of a project of this kind, Congress should take the lead in settling the jurisdiction question rather than allowing it to be decided by inter-agency turf wars.

In any event, the Gorda Ridge issue exemplifies the larger problem of the usurpation of power by the executive branch of government where Congressional authorization to act would normally be required. Other examples of this are the unilateral presidential commitments of military troops in Vietnam and Grenada. For the system of checks and balances to function, government officials and agencies must play by the rules which govern them; without these rules, the use of power goes unmonitored and is subject to abuse.

BLOCK V. NORTH DAKOTA

(continued from page 1)

> The States of the Union, like all other entitites, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress. *(Id.,* 75 L.Ed. at p.849) (Emphasis added)

Finally, the Court observed that even though the United States may obtain a dismissal on statute of limitations grounds, the title dispute would remain unresolved. In such cases, Justice White observed:

> Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on its merits. *(Id.,* 75 L.Ed at pp. 856-857)

Thus, notwithstanding the decision of two lower federal courts that the little Missouri River was navigable, North Dakota was precluded from obtaining any determination of this question on the merits.

The Court's conclusion, contrary to the states' widespread assumptions and to a number of district court decisions, raises a dilemma for the orderly regulation and development of lands. If, as Justice White observed, underlying title disputes remain unresolved, the states' only alternative will be to provoke the federal government into suing by demanding rents and royalties from federal lessees and generally conducting acts inconsistent with federal ownership. Surely Congress never intended for the states to resort to such inefficient means to protect their sovereign lands.

Editor's note: Rep. Howard Berman (D-CA) has introduced legislation to exempt the states from the 12-year statute of limitations in the Federal Quiet Title Act. Thus far the bill, H.R. 3917, has made little progress in the 98th Congress.

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