

CALENDAR ITEM

137

A & S: Statewide

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Consider requesting the United States Department of Interior and the United States Department of Justice to agree to jointly petition the United States Supreme Court for entry of a fifth supplemental decree in the case of *United States of America v. California* (1965) 381 U.S. 139, No. 5 Original, to permanently establish an agreed offshore boundary between the United States and California, in the location as jointly agreed to by the Mineral Management Service (now known as Bureau of Ocean Energy Management, Regulation and Enforcement) and the State Lands Commission in 2009, and already in effect for administrative purposes

PARTIES

California State Lands Commission

United States Department of Interior, Bureau of Ocean Energy Management, Regulation and Enforcement

United States Department of Justice

INTRODUCTION

The purpose of this calendar item is to consider requesting the United States Department of Interior and the United States Department of Justice to agree to jointly petition the United States Supreme Court to permanently establish an agreed offshore boundary between the United States and California, in the location as jointly agreed to by the Mineral Management Service ("MMS", now known as Bureau of Ocean Energy Management, Regulation and Enforcement, "BOEMRE") and the State Lands Commission ("Commission") in 2009, and already in effect for administrative purposes. See Exhibit A.

BACKGROUND

In 1793, the Secretary of State, Thomas Jefferson, was the first American to formally put forth the now widely accepted claim that the marginal sea, those first three miles off of a shore, belonged to the adjacent sovereign. (H. Ex. Doc. No. 324, 42d Cong., 2d Sess. (1872) 553-554). As the colonies and states were formed, the difficulties in applying the seemingly straightforward claim became readily apparent with

CALENDAR ITEM NO. **C137** (CONT'D)

divisive disagreements, including over what type of miles were meant. California's foray into this debate is immortalized in the United Supreme Court Case, *United States v. California* (1947) 332 U.S. 19, 804, No. 12 Original, where the Court held that the United States owned, as the sovereign, the marginal sea, not including inland waters, from the ordinary low water mark on the coast to the outer extent of three nautical miles. California, and by extension all other coastal states, therefore owned only the tidelands. The United States owned the submerged lands.

The loss of the case was a serious blow to California. Since the initial Leasing Act of 1921, offshore oil and gas development was a valued source of non-tax revenue for the state. In part, it was the controversy surrounding the issuance of the early leases that led to abolition of the elected office of the Surveyor General, the transfer of those duties to a position within the California Governor's Department of Finance and ultimately, the creation of the California State Lands Commission in 1938. Prior to the formal filing of litigation in 1945, the issue of whether tidelands and submerged lands, including the mineral rights, belonged to California or the United States was addressed in four separate Commission meetings. Between the 1947 *United States v. California* decision and the federal Submerged Lands Act of 1953, the Commission considered actions involving this issue approximately fifty times.

That coastal states now control three nautical miles of lands off their coasts (with the exception of Texas and Louisiana) is a direct result of the passage of the Submerged Lands Act of 1953 ("Submerged Lands Act") by the 83rd United States Congress which served to overturn the 1947 holding of the original *United States v. California*. The genesis of this litigation was the discovery of the West Wilmington oil field in the mid-1930's, located both onshore and in the tidelands of the City of Long Beach, California and is still an active oil field. The City of Long Beach, California and the United States all desired to claim revenue resulting from the production of the oil located in the tidelands. In September 1945, President Truman issued a proclamation whereby he declared that all lands below the ordinary low water mark, and most importantly mineral resources lying below those lands, belonged to the federal government. The following month, the United State Attorney General filed suit against California to claim the seabed lands and the minerals lying underneath. The City of Long Beach and the Commission had already been issuing leases and permits to oil operators. Litigation commenced between the United States and California to determine whether the land and the minerals belonged to California or the United States. The United States Supreme Court, which has original jurisdiction, over these disputes, held that the lands and the mineral located below the ordinary low water mark belonged to the United States. Litigation between the United States and Texas and Louisiana followed shortly.

The coastal states, particularly those that had mineral resources off their coasts, pressured their congressional representatives to pass legislation overturning the

CALENDAR ITEM NO. **C137** (CONT'D)

Supreme Court's decision in *U.S. v California*, as an unwarranted intrusion of federal authority over the states. President Truman vetoed the initial version of the Submerged Lands Act in 1951. Dwight Eisenhower made a campaign promise in 1952 that he would sign such a bill. The 1953 Submerged Lands Act was signed into law within four months of President Eisenhower's becoming President. At the time this issue was a highly charged state versus federal dispute.

While the passage of the Submerged Lands Act answered the question of ownership of the submerged lands, it did not address the corollary question of the location of the offshore boundary of that three-mile limit. Over the next ten years, the Commission dealt with reconciling the actions the state had taken with nearshore oil and gas revenue, as a result of the 1947 case with the Submerged Lands Act, eleven times.

In 1963, the federal Department of Interior exercised its authority under the Outer Continental Shelf Lands Act of 1953, the corollary legislation to the Submerged Lands Act, to open up the federal waters outside the three mile limit for development of offshore oil and gas leases. That decision led to the filing of litigation by the United States to have the United States Supreme Court define how to calculate the three mile limit. The need to locate the boundary was predicated on the need to know what area could be leased and how to split the revenue received therefrom. The case, *United States v. California* (1965) 381 U.S. 139 No. 5 Original, defined what was an "in-land water" as used in the Submerged Lands Act for purposes of calculating the boundary and that the method for calculating the boundary was to be the 24-mile closing rule together with the semicircle test from the 1961 international Treaty of Convention of the Territorial Sea and the Contiguous Zone.

Between 1966 and 1981, the United States Supreme Court issued a total of four supplemental decrees to *United States v. California*, No. 5 Original, in an effort to provide guidance in determining California's offshore boundary. During that same period, the Commission itself considered actions involving this matter approximately seventy times. In 1966, the first of the supplemental decrees, the Supreme Court further defined a few terms and explicitly retained jurisdiction over the matter in order "to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises." *United States v. California* (1966) 382 U.S. 448, 453. Jurisdiction was also retained in the subsequent supplemental decrees. In 1969 and again in 1975, California enacted legislation that explicitly stated that fixing or altering the shoreline boundary would have no effect on the federal-state offshore boundary. See Cal. Pub. Res. Code §§ 6301.7, 6340. The 1969 legislation was necessary so that the federal government would allow the necessary dredging and filling of navigable waters of the state to facilitate the construction of Highway 101 in Ventura and Los Angeles Counties. The Commission

CALENDAR ITEM NO. C137 (CONT'D)

has waived claims of changes to the boundary pursuant to Cal. Pub. Res. Code § 6301.7 on several occasions.

In 2010, in the wake of massive oil spill from the April 20, 2010 explosion of the Deepwater Horizon platform in the Gulf of Mexico, the federal government by Executive Order No. 3299, issued May 19, 2010, dissolved the MMS. The new agency, Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE"), remains an agency within the Department of Interior. It has taken over some of the duties previously held by MMS, including mapping and surveying. As such, BOEMRE has the authority on behalf of the federal government to negotiate the boundary.

COOPERATIVE FEDERAL-STATE EFFORT

The first formal attempt to jointly determine the location of the offshore boundary was in 1955, whereby the Secretary of the Interior, Wesley A. D'Ewart, wrote a letter to the Governor of California, Goodwin J. Knight, requesting that an agreement be negotiated that would locate the offshore boundary.

Attempts to calculate the boundary resulted in litigation six times, with the United States Supreme Court providing additional guidance and fixing a few boundary points. Starting in the mid-1980's, after the most recent supplemental decree was entered by the United States Supreme Court, the MMS' Mapping and Boundary Branch worked with the Commission's Boundary Unit to resolve all the remaining boundary positions. By 1998, the staff at both agencies had reached an agreement on the location of the roughly 3,600 baseline points, which are divided into seventeen broad geographic areas and used to protract offshore intersection points. When plotted, these offshore intersection points delineate the offshore boundary between the United States and California. Through Minute Item #20 at the November 2000 Commission meeting, the Commission authorized the Executive Officer to, on behalf of California, accept and sign these block diagrams. As part of the final review process, MMS staff noticed an error in California's favor on a few baseline points that required the creation of a few new maps. Once signed, the block diagrams serve, for administrative purposes related to the Outer Continental Shelf Lands Act, as the official boundary the United States and California. In March 2009, the final three block diagrams were signed and are known formally as the Supplemental Official OCS Block Diagrams. See Exhibit B for an example.

JUDICIALLY ESTABLISHING AND FIXING THE OFFSHORE BOUNDARY

The Commission has the legal authority to negotiate and enter into agreements with the federal government related to the Outer Continental Shelf Act and it is the agency that represents the state on all sovereign land issues, specifically including those matters involving the federal government. Cal. Pub. Res. Code §§ 6210, 6301, 6301.5. However, there is no mechanism, other than by an issuance of a supplement decree by the United States Supreme Court, which can establish and permanently fix the true legal offshore boundary between the United States and California. The

CALENDAR ITEM NO. C137 (CONT'D)

appropriate remedy is to formally fix the offshore boundary between the United States and California by asking the United States Supreme Court to do so in a final supplemental decree.

Permanently fixing the offshore boundary will provide both certainty as to its location and make that location readily available to all that have an interest, including federal and state agencies and members of the general public. Fixing the offshore boundary would put an end to an issue that has resulted in two major United States Supreme Court decisions plus five supplemental decrees, one major piece of federal legislation, state legislation, untold numbers of resources by federal and state staff including those at the federal Solicitor's Office and the federal and state Attorney General's Offices, in addition to those other issues already mentioned.

That the state has ownership of the land out to the three-mile limit is the result of federal legislation, the Submerged Lands Act, granting the area to California. Although it would seem highly unlikely that the United States Congress would or could revoke the portion of the Submerged Lands Act granting the three miles to states, having a judicially confirmed boundary line protects California from that possibility and provides an additional layer of protection for California's ownership of its offshore lands.

There is precedent for this both in the prior supplemental decrees in *United States v. California* where certain points were fixed and in the cases of other states like Texas, Mississippi and Alaska where by supplemental decrees in the 1990's and 2000's, the United States Supreme Court fixed at least portions of those states offshore boundaries. See *United States of America v. State of Louisiana et al. (Texas Boundary Case)* No. 9 Original, 525 U.S. 1; *United States of America v. State of Alaska* No. 84 Original, 530 U.S. 1021; *State of Mississippi v. United States* No. 113 Original, 498 U.S. 16.

Finally, this will not affect the California-Oregon boundary or the boundary with private property owners. As shown on Exhibit B, offshore intersections 6, 10 and 11 reflect points plotted on Block Number 7130 entered into with the State of Oregon in 2001, and the Commission in 2009, and do not reflect the actual boundary between California and Oregon. Further, as the offshore boundary is calculated from the ordinary *low* water mark, fixing it will have no effect on the location of the state's landward boundary or any upland property, which are based on the ordinary *high* water mark, unless fixed by adjudication or by agreement.

RECOMMENDATION

Due to the hard work and extensive resources by both federal and state staff, there is no longer a disagreement as to the location of the offshore boundary between the United States and California. As such, it is appropriate to have a joint request for entry by the United States Supreme Court of a supplemental decree that would

CALENDAR ITEM NO. **C137** (CONT'D)

permanently fix the offshore boundary. Commission staff therefore recommends that the Commission authorize staff, in conjunction with the California's Attorney General's Office, to take all appropriate and necessary steps to permanently fix the offshore boundary between the United States and California.

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (Title 14, California Code of Regulations, section 15061), staff has determined that this activity is exempt from the requirements of CEQA as a statutorily exempt project. The project is exempt because it involves settlement of title and boundary problems.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c)(3) and 15378.

STATUTORY AND OTHER REFERENCES:

- A. Public Resources Code: 6000, et seq.
- B. Cal. Code of Regs.: Title 2, Div. 3; Title 14, Div. 6.

EXHIBITS:

- A. Location and Site Map of the Offshore Boundary
- B. Example of a OCS Block Diagram

IT IS RECOMMENDED THAT THE COMMISSION:

1. Find that the activity is exempt from the requirements of CEQA pursuant to 14 California Code of Regulations 15061 as a statutorily exempt project pursuant to Public Resources Code Section 21080.11, Settlement of Title and Boundary Problems.
2. Authorize and direct staff, on behalf of the Commission, to request the United States Department of Interior and the United States Department of Justice to agree to jointly petition the United States Supreme Court for entry of a fifth supplemental decree in the case of *United States of America v. California* (1965) 381 U.S. 139, No. 5 Original, to permanently establish an agreed offshore boundary between the United States and California, in the location as jointly agreed to by the Mineral Management Service (now known as Bureau of Ocean Energy Management, Regulation and Enforcement) and the State Lands Commission in 2009, and already in effect for administrative purposes
3. Authorize and direct the staff of the State Lands Commission and the Attorney General to take all necessary and appropriate action on behalf of the California State Lands Commission, including litigation, the execution, acknowledgement,

CALENDAR ITEM NO. **C137** (CONT'D)

acceptance and recordation of all documents as may be necessary or convenient to permanently fix of the offshore boundary between the United States and California.