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WATER LOG

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SEA GRANT STUDENT ASSISTANTS

The University of Mississippi Sea Grant Legal program conducts a number of projects to assist in developing an understanding and appreciation of issues of ocean and coastal law and policy. The Legal Program holds legal workshops, develops course materials for marine educators, works with state and federal agencies and publishes studies on marine issues. These projects are all worthwhile in their own right, but perhaps the most important benefit provided by Sea Grant support of the Legal Program is the opportunity for young law students to explore marine-related issues and to receive training in the practical application of ocean and coastal law.

Sea Grant support also enables the Director of the Legal Program to offer marine law and policy courses to upper level law students. During the past semester, fifteen second and third year law students were enrolled in Law of the Coastal Zone, a seminar focusing on legal issues and problems unique to coastal areas. Each student produced a paper on a particular coastal law issue and participated in class discussion and study of other students' papers. Several papers have been selected for inclusion in the first in a series of "Occasional Papers" to be published by the Legal Program. The papers were selected for their substantive and innovative contributions to discussions on coastal law and policy.

Edited versions of four student papers are presented in this issue of the Water Log. The papers have been substantially edited and footnotes and references have been omitted to save space. Complete texts of any or all of the "Occasional Papers" are available upon request. The ideas and positions expressed in each paper are the author's.

Many former Sea Grant student assistants have moved from the University of Mississippi School of Law to responsible positions with state and federal agencies, industry and academia. The training and experience received by these young lawyers would not have been possible without Sea Grant support. This is another example of how Sea Grant is helping to improve use and management of ocean and coastal resources.

LITTORAL RIGHTS—By: Stanton J. Fountain, Jr.

INTRODUCTION

For many people, the ownership of waterfront property has become an integral cog in their pursuit of the "American Dream". Once such a person has accumulated the necessary wealth, he will buy such a piece of property and, as a result of this purchase, become the unwitting possessor of certain rights. He will not remain unknowledgable for long, however, because he will soon discover that these rights are as essential to his enjoyment of his waterfront property as was the accumulating of wealth which facilitated the purchase.

The term "riparian rights" is one which is often encountered in any discussion of coastal zone property rights. This term is used to denote the rights which accrue to the upland owner by merit of the fact that his land is adjacent to water. This is, however, a misnomer. The correct term to be used in this context is "littoral rights". In Mississippi the two types are distinguished by the ebb and flow of the tides. By applying the Mississippi definition, it can be said that "littoral rights" are those which accrue by virtue of the fact that land is adjacent to a body of tidal water. "Riparian rights" accrue to lands which border upon "fresh", or non-tidal, waters. Generally speaking, if one's property is bounded by water, or marshland in which the tide ebbs and flows, then he can be termed a "littoral owner", entitled to littoral rights.

When the question is whether a particular piece of property has littoral rights, the inquiry cannot end with the nature of the water. Even though littoral rights might have at one time attached, it is quite possible that a previous owner has conveyed them away. The possibility that these rights are capable of being separated from the property should always be kept in mind by anyone who is examining the title to littoral property.

In Mississippi littoral landowners have both common-law and statutory littoral rights. Those by statute are aquaculture and construction rights. The rights which have existed at common law deal predominately with the extremely important right of continued access to the water. At least one court has defined this right as "access to the navigable part of the stream". To protect this right, two devices arose: the right to accretions and the right to wharf out. This article will focus on Mississippi's statutory littoral rights.

STATUTORY SCHEME

Mississippi's statutory enumeration of certain littoral rights is probably best described as imprecise:

> §14-15-9. Rights of riparian owners on Gulf Coast defined.
>
> The sole right of planting and gathering oysters and erecting bathhouses and other structures in front of any land bordering on the Gulf of Mexico or Mississippi Sound or waters tributary thereto belongs to the riparian owner and extends not more than seven hundred fifty (750) yards from the shore, measuring from the average low water mark, but where the distance from shore to shore is less than fifteen hundred (1500) yards, the owners of either shore may plant and gather to a line equidistant between the two (2) shores, but no person shall plant in any natural channel so as to interfere with navigation, and such riparian rights shall not include any reef or natural oyster bed and does not extend beyond any channel. Stakes of such frail materials as will not injure any watercraft may be set up to designate the bounds of the plantation, but navigation shall not be impeded thereby. Any oysters planted by such riparian owner are the private property of such riparian owner, subject to the right of the commission to adopt reasonable rules and regulations as to the planting and gathering of such oysters. All bathhouses, piers, wharfs, docks and pavilions, or other structures owned by riparian owner are likewise the private property of such owner, who shall be entitled to the exclusive use, occupancy and possession thereof, and may abate any private or public nuisance committed by any person or persons in the area of his riparian ownership and may, for such purposes, resort to any remedial action authorized by law. The governing authorities of any municipality and the board of supervisors of any county are authorized to adopt reasonable rules and regulations to protect riparian owners in the enjoyment of their riparian rights, and for such purposes may regulate the use of beaches, landings, and riparian areas abutting or fronting on roads, streets or highways.

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As to the type of lands, this section applies to "any land bordering on the Gulf of Mexico, or Mississippi Sound or waters tributary thereto". A literal interpretation of the term "tributary" would result in the inclusion of lands along the Mississippi and Pearl Rivers. In light of Mississippi's case law the term which should have been used here is "tidal waters of the state".

If a landowner owns land which is entitled to littoral rights, his rights extend "not more than 750 yards from the shore, measuring from the average low water mark." This leaves open to question whether or not his rights *do* extend 750 yds. If the distance from shore to shore is less than 1500 yds., the owner on either shore will have the right to "*plant and gather* [referring to oyster rights] to a line equidistant between the two shores." Since structure rights are not mentioned, this provision is susceptible to several interpretations:

(1) In instances where the shores are not more than 1500 yards apart, the owners have no structure rights, or

(2) The owners have structure rights but they are not restricted by the line equidistant, or

(3) The legislature intended that structure rights exist subject to the line equidistant, but it just forgot to say so.

Number three above seems to be the most logical choice, but even if this is the legislature's intent, there is still a problem which exists in its application; the line equidistant could cut-off the owners access to navigable water. Likewise, he wouldn't have any water in which to have oyster rights, either. One possible formula which would avoid this would be to provide that the line run to the thread of the stream. But this, too, would work its own inequity. In this instance, both owners have equal access to navigable water, but one owner would have littoral rights in a larger area of marsh. With the growth of aquaculture, marsh areas will probably be used for raising shrimp or crabs. The owner of the larger area of marsh has a distinct advantage in aquaculture if the thread of the stream is used.

Whether the extent of his rights are measured by the 750 yards or a line equidistant standard, an owner is subject to two conditions: (1) "No person shall plant in any natural channel so as to interfere with navigation, (2) and such riparian *rights* shall not include any reef or natural oyster bed and *does* not extend beyond any channel." (emphasis added) The first condition seems straight forward: you can't plant oysters in a *natural* channel if it will interfere with navigation. Does this include the planting of oysters if their harvest will interfere with navigation?

The second condition is almost ludicrous. First, we are addressing "rights". Does this mean "planting and gathering " or oyster and structure? For simplicity's sake, let's assume that they mean planting and gathering. This being the case, we know that the rights of gathering and planting do not include any "reef or natural oyster bed." What this appears to mean is that the owner does not have the sole rights to any oysters which he does not plant himself. The problem with this is that the act defines the terms "natural reefs" and "tonging reefs"; it does not, however, define "reef or natural oyster bed". Note that the riparian owner might still have other rights in such oysters because he is a member of the public. The second half of the second condition is the coup de grace: "such rights . . . does [sic] not extend beyond any channel." This presents both legal *and* grammatical affronts. Which rights do not extend? Does this refer to both oyster and structure rights or to both planting and gathering as indicated by the plural "rights", or does it refer only to the right to oyster as indicated by the use of the singular construction "does"? The next two sentences provide a respite as they can easily be said to apply only to oyster rights. According to these, oyster beds may be marked with stakes if navigation is not impeded, and all oysters planted by the owner are his private property but are subject to reasonable regulation by the BMR.

As to structure rights, the statute provides that they, too, are private property. The owner is entitled to exclusive use and possession of his structures. It is under this provision that landowners along Highway 90's beach claim the right to place gates on their piers and exclude the public. In protection of his riparian ownership, the landowner can abate any private nuisance or "resort to any remedial action authorized by law." Finally, local governing authorities are empowered to adopt rules and regulations which protect the landowner.

HYPOTHETICAL SITUATIONS

As our final consideration, let's turn to two hypothetical situations which demonstrate the complexity of issues presented by the ownership of littoral rights. First, however, it must be noted that *Giles v. City of Biloxi* has been interpreted as holding either directly or by necessary inference that the owner of uplands bordering tidewater may not extend his lands by artifically reclaiming the state owned bottoms.

This being the law, it is possible for a littoral owner to cut-off his own access by reclaiming submerged lands. In such an event, the reclaimed lands should belong to the state. This has interesting and far reaching ramifications when applied to two instances of Gulf Coast construction. One of these, the bulkhead is an almost ubiquitous structure in coastal areas; the other is a specific structure—The Broadwater Beach Marina.

Almost every waterfront property owner who can afford one has a bulkhead because they stabilize his boundary. In many instances, they are used to expand property by reclaiming land behind them. Because their construction often encroaches upon wetlands, some adherence to the Mississippi Wetlands Law is required. The question as to this reclaimed land is ownership. If a permit was not obtained, or compliance satisfied through some other means, the owner is clearly in contravention of the Wetlands Law and subject to its sanctions; additionally, *Giles* would hold that the landowner did not own the reclaimed land. The artificial accretion in this situation is a result of the owner's act and not the act of a stranger, nor is it a natural occurrence. It would seem, however, that where the Wetlands law is complied with that the harshness of the *Giles* rule deserves some mitigation, owing to the fact that the state has approved the owner's actions.

The Broadwater Marina is a structure whose ownership is inextricably bound in the interplay between the public trust doctrine and the concept of littoral rights. The final determination of its ownership will turn on how it is classified. Is it a "structure" or is it reclaimed land? According to Mississippi Law, the littoral owner has the "sole right of . . . erecting bathhouses and other structures in front of any land bordering on [tidal water]." Among the structures mentioned in the statute are piers, wharfs, docks and pavilions. If the Broadwater Marina is classified as a structure then it will remain the property of the Broadwater Hotel. The problem with classifying it as such is that the Broadwater Marina is not a collection of pilings and planks; the Broadwater Marina appears to be solid reclaimed earth—it even has grass growing on it in places. Certainly, this is not what the legislature had in mind when it enacted §49-15-9. This reclaimed land rests solidly upon public trust land. *Giles* informs us that a landowner *cannot* extend his property through his own action. The state of Mississippi might hold title to the marina.

ESTOPPEL

If the state should assert title in either of the above hypotheticals, the aggrieved owner would argue that the state was estopped by its actions. It is difficult to supply an exact definition for the equitable doctrine of estoppel. Couched according to the above facts, an estoppel would preclude the state from asserting its title to the reclaimed lands because it had indicated by its past actions (the granting permits or collecting taxes) that title was in someone other than itself. Where the state has collected taxes, this argument is very compelling. By assessing and collecting taxes, the state represents that title to the assessed land is in the person assessed. The argument is not so persuasive where the states action was the granting of a permit, but surely the state should not be able to give its permission to reclaim the land and then turn around and claim as its own. The state's silence during the process of permitting should operate to estop the state.

Even though equity would seem to demand an estoppel in such a case, it may not. The general rule is that "the doctrine of estoppel will not be applied against the state in its governmental, public, or sovereign capacity, unless its application is necessary to prevent fraud or manifest injustice."

That the state was estopped from asserting title to land because it had been collecting taxes on such land was asserted in the case of *International Paper Co. v. Mississippi State Highway Department*. In fact, "[T]he payment of taxes [was] the dominant evidentiary element of ownership or possession." Because alienation of public trust land is a breach of the public trust doctrine, the court held that the patent issued by the state was invalid. To counter this, the landowner argued "that assessment and collection of taxes on these lands by the state for a period in excess of half a century, together with its failure to file suit to set aside the patent,

should in equity estop the state from contending its patents to be invalid." Though the court did not record any of the bases of its reasoning, it had no problem in finding that this argument was "unavailing".

One possible solution to this problem would be a legislative grant of title. This type of grant was approved by the Mississippi Supreme Court in the case of *Treuting v. Bridge and Park Commission of Biloxi*. The court approved the grant to a public corporation despite the fact that the corporation could sell the property to private individuals for private purposes. This was acceptable because "the legislature was justified in authorizing sale of these lands, when filled in and developed, to private individuals as an incident to the overall public interest and purpose in accommodating an expanding population, commerce, tourism and recreation." This would seem to allow such a grant to Broadwater but certain distinctions should not be overlooked. Since the *Treuting* doctrine is an exception to the general rule that public trust land cannot be sold "by a trustee to anyone for a private purpose," it would be necessary that the private owner of land fit the exception of accommodating the public interest through private ownership. In the bulkhead hypothetical, this might be rather difficult to do.

The above hypotheticals indeed present a very puzzling quandry. It would seem that equity would estop the state, but *International Paper* casts serious doubt on this. Finally, the legislature might act but it should be very careful to enunciate the ways in which the public will benefit, lest the Supreme Court strike it down as it has other such grants.

This, then, is a brief consideration of certain aspects of littoral rights. It is an area of the law which is rife with confusion and inconsistency, but it is still a very intriguing area of the law and will play an important role in the development of Mississippi's Coastal Zone.

MISSISSIPPI'S POLICY RE: OIL & GAS LEASING IN THE MISSISSIPPI SOUND

By: Mark W. Johnson

INTRODUCTION

One has only to look at the power of OPEC and the price of gasoline today to recognize the importance of oil and gas production in today's society. A wealth of these important resources has been discovered in the Gulf of Mexico, and this has created a problem of wealth. The question is, who gets the royalties and other benefits from the leasing of these submerged lands? The questions addressed in this paper are how much of these lands does Mississippi own (specifically submerged lands in the Mississippi Sound), and how does the state lease them?

MISSISSIPPI'S OWNERSHIP OF SUBMERGED LANDS IN THE GULF

The extent of state ownership in the Gulf of Mexico was addressed by the U.S. Supreme Court in *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida*. In that case, the Court adjudicated the United States' claim to the submerged lands lying more than three geographical miles seaward from the coast of each state. All five of the aforementioned states claimed rights in such lands extending to three marine leagues (nine geographical miles), the maximum possibly owned by any Gulf state. The claims of Texas and Florida were upheld, basically for historic reasons. None of the other three states were able to assert as strong a claim and consequently their boundaries were not extended. This case did, however, create a foolish situation in the Mississippi Sound. If the Sound is considered "inland waters," then there is no problem. If not, then the three-mile boundary after the *United States v. States of Louisiana, etc., supra*, will leave "pockets" of federal waters in the Sound, with most of the Sound belonging to Mississippi. The State of Mississippi is presently seeking a supplemental decree to define the Sound as inland waters, and thus wholly within the territory of the state. So the question of the extent of Mississippi's ownership of the submerged lands in the Sound is still a viable issue.

Even though there is still some dispute over ownership of parts of the Sound, ownership has been determined for a sufficient area that the question of what the state will do with this land squarely presents itself. The state plans to lease the area for oil and gas exploration and production, but how? The remainder of this treatise will discuss the present system as well as a new system that is in draft form at this time.

Leasing in the Mississippi Sound

The Mississippi Commission on Natural Resources is given the authority to lease state lands for minerals. The actual leasing is handled through the Mineral Lease Division, Bureau of Geology, Department of Natural Resources. Any person, association or company that wishes to lease state-owned lands for minerals must propose to the Mineral Lease Division, that bids be offered. This proposal must contain a legal description of the land through reference to a plat of the Sound that was prepared under the authority of the Mineral Lease Commission. If it is determined that the lands proposed will be offered for mineral leasing, an advertisement that sealed bids will be received, containing the date and time that the bids will be received as well as the location of the property, will be published. The successful bidder, or, if none of the bids are accepted, the party requesting that the property be advertised, will have to pay the newspaper for the advertising.

The Commission then opens the bids and either accepts the best bid or rejects all of them. The best bid is either determined by the bonus amount and the royalty consideration of at least 1/5, or by the bonus amount with the royalty being fixed. Once a bid is accepted, the state draws up a lease and submits it to the prospective lessee. The primary term of the lease is usually five years.

Before a lease can be granted for submerged lands off Mississippi's coast, the potential lessor must seek approval of various other state and federal agencies. The U.S. Corps of Engineers requires that an Environmental Assessment Statement (EAS) be sent to it along with the application for lease. The Corps then determines whether an EIS will be required or if further environmental study, short of the EIS, is needed. If the Corps approves the lease and environmental statement, it issues a §404 permit in compliance with the Federal Water Pollution Control Act and forwards the paperwork to the Mississippi's Bureau of Marine Resources (BMR) and Bureau of Pollution Control (BPC). The BPC is responsible for issuing an NPDES permit and a certificate of water quality in connection with the proposed leasing for oil and gas development. An NPDES permit is required when anyone proposes to discharge wastes into the waters of the state pursuant to the FWPCA.

The BMR is responsible for issuing a permit for pre-leasing geophysical work and is also ultimately responsible for determining whether the proposed lease is consistent with the Mississippi Coastal Program (MCP). The purposes of MCP are to "provide for reasonable industrial expansion in the area, [to] conserve the resources of the coastal area, [to] consider the national interest involved in planning for and in the siting of facilities in the coastal area, and [to] encourage the preservation of natural scenic qualities in the coastal area." BMR can refuse to allow the project to proceed if it is inconsistent with the state management program.

Finally, the paperwork is sent to the Mineral Lease Division for the actual lease. While this is the final step in the leasing procedure, actual drilling cannot begin until a permit is obtained from the state Oil and Gas Board to maintain, operate and construct facilities for exploration, production, or transportation of oil or gas in navigable waters. The fee for this permit is $500. However, the right to construct, operate and maintain such facilities on submerged lands is subject to the paramount right of the U.S. to control commerce and navigation and the public's right to free use of the waters.

Draft Regulations for Offshore Oil & Gas Leasing

The State of Mississippi is now in the process of promulgating rules and regulations for geophysical operations on and leasing for the production of minerals on state-owned lands. This codification is presently in draft form, but is scheduled to go into effect in 1982. The purpose of the new rules is to bring a more orderly system to the process of development and leasing on all state-owned lands.

Under the new rules, a person wishing to

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lease state-owned lands may initiate the request. Additionally, the Commission may call for nominations for leasing, or advertise any land under its jurisdiction for lease. The maximum area for which the calls for leasing may cover is 2,880 acres. The application must state the acreage in the area and be accompanied by a plat depicting the land.

Rule 6 provides for the payment of advertising costs. There are important differences in this rule as opposed to the former procedure. First, there is a prepayment to DML for the cost of publication. Then, if no bids are received, or all are rejected and the applicant did not submit a bid, the prepayment is forfeited. If the applicant submits a bid and all are rejected, then the prepayment is refunded. If the prepayment is forfeited, the applicant is still responsible for any amount by which the expenses exceed the prepayment. The major difference, aside from the prepayment, between the new and old procedure in this respect is one of payment by an unsuccessful bidder/applicant. Under the old system, the applicant must pay for advertising if no bids are accepted, but under the new rules the pre-payment is refunded. This may seem more equitable to bidders, but it is only shifting the burden of payment to the State in this situation.

Calls for nominations for leasing must be published for at least 60 days in the newspaper in the county in which the property is located, in one Jackson newspaper, and in the *Southeastern Oil Review*. All advertisements for leasing must be published at least once a week for three weeks next preceding the date set for the opening of the bids. The Commission may decide to publish an advertisement for more than thirty days, but in that case will publish a Notice of Intent to Advertise State Lands for Leasing before the 30-day notice period begins. The notice is to contain an identification of the land, tell when and where additional information concerning the land or leasing procedure may be obtained, and give the approximate date set for the opening of the sealed bids.

Rule 9B lists the information which must be contained in the advertisements for leasing. A legally sufficient description of the property, along with the time and place: where additional information may be obtained, where bids will be received, and where bids will be publicly opened must be included. The advertisement shall also contain the items subject to bid. Unlike the present system, under which the lease bonus is the only item actually bid on, the new plan makes the lease bonus, delay rental, lease royalty, and shut-in royalty, if any, subject to bidding. The advertisement shall also contain any conditions or limitations required of the lessee that are known to the Commission, the form of the lease, and (catchall) "(any) other information deemed by the Commission to be necessary or appropriate."

Sealed bids may be submitted on any or all of the tracts advertised, but not for only part of a tract. The bids must specify the full consideration offered, along with a bond, bank draft, or cashier's or certified check for 5% of the amount of the bid. Bids are opened publicly. Rule 20 states that the most advantageous bid will be accepted, but does not provide any guidelines as to what is considered most advantageous. Before a lease is executed, the lessee must tender full payment of the advertising. The standard accepted royalty for a bid is 1/5. A minimum delay rental of $2 per acre is specified, but the Commission may prescribe an escalating delay rental. The maximum primary lease term remains at five years. The Commission is required to state in the advertisement whether a shut-in royalty will be included in the lease and whether or not it will be a biddable item. The lessee must record the lease immediately after execution and delivery by the Commission.

CONCLUSION

It should be remembered that these Rules are still only in draft form. A public meeting was held at the Biloxi Community Center in Biloxi, Mississippi, at seven o'clock (7:00 P.M.), on November 12, 1981. The hearing lasted thirteen minutes. There were no comments and no questions, so the hearing was opened and closed after a brief period of time. This does not mean that no suggestions have been set forth, however. According to Mr. James Palmer, the Mississippi Attorney General's office has received comments from interested parties through the mail. He told this writer that there probably will be some changes in the Rules before they are to become official Rules.

Mr. Palmer also said that there are other aspects to leasing and production that will be initiated and are not covered in the Draft Rules. Leasing form is one example. While much of the form of the lease is prescribed in the Rules, there is no formal approved lease form as yet. The State proposes to have a definite, formal approved lease form soon. This will be a big step toward putting Rules 21-25 into practice. Seismographic work is not covered at all in these rules. Regulations are proposed to be promulgated soon which will govern all aspects of seismic work, especially in the Sound.

I think that these new Rules and Regulations may prove to be very beneficial. The procedure now used is far from being as definite and certain as the new Rules. I have no doubt that the new Rules will be a vast improvement over the present system.

In closing, one final aspect should be mentioned: permitting. This fearsome mass of agencies and permits will not be changed by these Rules. The pro's and con's of "one-stop permitting" are myriad, so not everyone concerned would be happy with either system. "One-stop permitting" is a possibility, however, as specific authority for it in the coastal area is in 1972 Miss. Code Ann. §57-15-6. Not only is it authorized by this Code section, the Code states that it *shall* be done. No time is given in which it "shall" be done, though, so it may never happen.

AN OVERVIEW OF OFFSHORE OIL AND GAS LEASING IN MISSISSIPPI, ALABAMA, LOUISIANA AND FEDERAL WATERS—By: Glen C. Warren, Jr.*

***Mr. Warren's information on leasing in the Mississippi Sound has been deleted to avoid duplication with Mr. Johnson's paper.**

INTRODUCTION

The purpose of this paper is to discuss oil and gas leasing in the Gulf of Mexico by agencies of the States of Mississippi, Alabama and Louisiana. The discussion will include an examination of the Submerged Lands Act, the Outer Continental Shelf Lands Acts, the current status of the federal-state boundary controversy, and state and federal leasing authorities and procedures.

JURISDICTION

The consistent policy of the federal government since the fuel crisis of the early 1950's has been to expedite the exploration and development of oil and gas from the Outer Continental Shelf (OCS). In order to institute that policy, Congress passed the Submerged Lands Act (43 U.S.C. §§1301-15 (1964)) and the Outer Continental Shelf Lands Act (43 U.S.C. §§1331 et seq. (1953) as amended). The Submerged Lands Act, passed on May 22, 1953, divided title to offshore submerged lands between the coastal states and the federal government. This Act was followed a few months later by passage of the Outer Continental Shelf Lands Act which established federal administration of the submerged lands of the continental shelf with emphasis on mineral leasing and development.

The purpose of the Submerged Lands Act was to return to the coastal states a portion of the seabed and the natural resources thereof underlying the marginal sea, title to which the Supreme Court had in several previous decisions ruled as vesting in the United States. Section 1312 of the Act provides that the seaward boundary of each original coastal state is confirmed "as a line three geographical miles distant from its coastline," and any state admitted subsequent to the formation of the Union may similarly extend its seaward boundary. However, states whose seaward boundary extended beyond three geographical miles at the time of their entry can extend its seaward boundary to nine nautical miles. Texas and Florida are the only two states which have qualified for the more expansive grant.

The Act does not specify exactly how the three miles of marginal sea is to be measured. It does indicate that the seaward boundary of the state is to be measured from the "coast line" of each state. Section 1301(c) of the Act defines "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking

the seaward limit of inland waters." Unfortunately, the term "inland waters" is not defined in the Act. It was therefore left to the courts to determine the meaning of this ambiguous phrase which has given rise to federal-state offshore boundary disputes.

The decision of the United States Supreme Court in 1965, in *United States v. California*, has great significance for the states of Mississippi, Alabama, and Louisiana, in the determination of their respective coastlines. The Court decided that the Submerged Lands Act would be interpreted in the light of the International Convention on the Territorial Sea and the Contiguous Zone and that definitions of "inland waters" as contained in such convention are adopted for purposes of the Submerged Lands Act.

Under the Submerged Lands Act the United States retains all its rights to regulate and control the lands and navigable waters granted to the states for the constitutional purposes of commerce, navigation, national defense, and international affairs. Also, the United States, in time of war or for national defense purposes, reserves the prior right to purchase all or a portion of the natural resources of such lands, or to acquire and use said lands by paying just compensation to the states.

Section 1302 of the Act reserves to the United States the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands granted to the states and confirms to the United States jurisdiction and control over such resources. The OCS Lands Act affirms the above reservation in the Submerged Lands Act by declaring that the subsoil and seabed of the Outer Continental Shelf belong to the United States and are subject to the jurisdiction, control, and power of disposition of the federal government. The term "Outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters quitclaimed to the coastal states under the Submerged Lands Act.

STATE LEASING AUTHORITIES

In Alabama, the Commissioner (hereinafter referred to as Commissioner) of Conservation and Natural Resources is authorized to lease state owned lands, including submerged lands in the Gulf, for the exploration, development, and production of oil, gas and other minerals. Its counterpart in Louisiana is the State Mineral Board, composed of the Governor, the Secretary of the Department of Natural Resources and nine members appointed by the Governor. If the Governor serves as ex officio chairman, in the case of a tie his vote determines the issue. Both the Alabama Commissioner and the Louisiana Mineral Board have the power to, and have, issued regulations for offshore oil and gas leasing. The Louisiana regulations are more comprehensive than the Alabama regulations, but neither is as detailed as the federal regulations.

The Alabama Commissioner is authorized to lease "upon such terms as he may approve." There is a restriction on the size of the tracts that may be leased: "[N]o tract of land containing more than five thousand two hundred (5,200) acres shall be leased or advertised for lease." The Supreme Court of Alabama has held that the Commissioner, in appraising the respective values of royalty proposals contained in bids for oil and gas leases, is authorized to use his best judgment; and that the consideration for a sale of oil and gas leases on state lands to the highest bidder is threefold: (1) the bonus, which is the amount of cash presently paid; (2) the annual rental; and (3) the royalty, each of which forms an integral part of the consideration or price of the rights sold.

The lease form currently in use in Alabama is the Alabama Department of Conservation and Natural Resources standard oil and gas lease form, revised February, 1981. The lease provides for a primary term of five years and annual rental of five dollars per acre. According to the Department's February 18, 1981 Invitation for Bids applicable to the March 31, 1981 Sale, "no bid will be considered for acceptance unless it offers a cash bonus in the amount of one hundred dollars ($100) or more per acre or fraction thereof and royalty of twenty-five percent (25%) or more."

The Louisiana statutes establish certain minimum requirements which limit the State Mineral Board in accepting bids. The maximum area that may be included in a single lease is 5,000 acres. The Mineral Board has the authority to accept the bid most advantageous to the state, and may lease upon whatever terms it considers proper. The statute fixes the minimum royalty at 1/8 on oil and gas. The statutes do not require that a cash bonus be included in a bid or a lease. Where a lease provides for delay rental, the annual rental shall not be for less than one-half the cash bonus. The statutes do not fix a primary period for the lease; however, the policy of the Board has been to grant leases for a term of five years on offshore leases.

Alabama and Louisiana have similar statutorily prescribed bidding procedures. Both provide for leases to be granted upon the basis of competitive bidding. The sealed bids are to be publicly opened at designated places. Alabama limits the acreage in each lease to 5,200 acres, whereas Louisiana allows only 5,000 acres. Both state agencies must publish advertisements of the bids in state and local newspapers. In Alabama the publication must occur at least 25 days before the final date for submitting bids. In Louisiana, the publication must occur not more than 60 days prior to the date of the opening bids. The Louisiana Mineral Board may also cause notices to be sent to those whom it thinks will be interested in submitting bids. The bids may be for the whole or any particularly described portion of the land advertised.

In Alabama, leases "shall be awarded to the highest responsible bidder making the most advantageous offer to the state, and the Commissioner must either accept the most advantageous offer or reject all bids within five (5) days from the date said bids were opened. The Louisiana State Mineral Board has the authority to accept the bid most advantageous to the state subject to minimum statutory requirements. The Board may also reject any and all bids, or may lease a lesser quantity of property than advertised and withdraw the rest. Any person who desires to lease certain Louisiana state lands may initiate the leasing process by filing an application with the Secretary of the Department of Natural Resources and enclosing a check for three hundred dollars ($300).

FEDERAL LEASING AUTHORITY

The Outer Continental Shelf Lands Act authorizes the Secretary of the Interior to lease the submerged lands of the Outer Continental Shelf (seaward of state boundaries) for mineral production. Regulations for administration of the Act may be found in Title 43, Parts 3300 et seq. of the Code of Federal Regulations. The regulations provide for the preparation of an index to OCS information by the Director of the Bureau of Land Management (BLM) in conjunction with the Director of the U.S. Geological Survey. The index, which lists all relevant actual or proposed programs, plans, reports, environmental impact statements, nominations information, environmental study reports and lease sale information, is sent to all affected states and, upon request, to any affected local government. The regulations also require the Secretary to prepare a proposed 5 year leasing program, taking into consideration suggestions and relevant information from Governors of affected states, local government, industry, other federal agencies and the public. In addition, consideration must be given to the coastal zone management programs of an affected coastal state. The leasing itself is under the control of the Director of the BLM, while day-to-day operations of the lease are under the jurisdiction of the U.S. Geological Survey.

An important difference between federal and state leasing is the qualification of bidders. Federal statute authorizes the Secretary to award leases only to the highest responsible qualified bidder. Eligible bidders must be citizens of the U.S. over 21 years of age or associations of such citizens, states and their political subdivisions, private, public or municipal corporations. Since various bidding systems may be utilized, the notice of lease sale must identify which system is being used and why. Bidding is by sealed bids and must be accompanied with a bid deposit of 1/5 the amount of the cash bonus. Leases are awarded to the highest responsible qualified bidder following a public opening and recording of bids. However, any and all bids may be rejected regardless of the amount offered. If the highest bid is not accepted within 60 days after the date on which the bids are opened, all bids for that lease are considered rejected. Written notice of acceptance or rejection is transmitted to those bidders whose deposits have been held. The successful bidder is required to pay the first year's rental, the balance of the bonus bid, and file the required bond no later than the fifteenth day after receipt of the lease for execution.

Federal regulations provide a specific procedure for tentative tract selection. The Director of BLM, in consultation with the Director of the U.S. Geological Survey may recommend to the Secretary tracts for further environmental analysis and consideration for leasing whether

(continued)

the tracts have been nominated or not. In making a recommendation, the Director is required to consider all available environmental information, multiple-use conflicts, resource potential, industry interest and other relevant information. Comments received from states, local governments and other interested parties in response to calls for nominations must also be considered.

After the tracts have been tentatively selected, the Director must evaluate fully the potential effect of leasing on the human, marine, and coastal environments, and develop measures to mitigate adverse impacts. The Director may hold public hearings on the environmental analysis but is required to inform the public as soon as possible of tract additions or deletions that occur after the tentative selection of tracts. Additionally, an environmental impact statement (EIS) must be prepared by the Department of Interior before the notice of lease sale is published.

All oil and gas leases issued by the Secretary are limited to a compact area not to exceed 5,760 acres, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit. Leases are generally for a primary term of five years and as long thereafter as oil and gas may be produced from the area in paying quantities, or drilling or reworking operations as approved by the Secretary are conducted thereon. The lease must require the payment of the amount or value determined by one of the bidding systems set forth in the Act. An annual rental is due and payable, in advance, at the rate specified in the lease, on the first day of each lease year prior to the discovery of oil and gas. In most instances, the royalty rate is specified in the lease. Pursuant to §1334 of the Act, a lease must provide for suspension or cancellation during the initial lease term. All leases are conditioned upon due dilignece requirements and the approval of the development and production plans. Finally, the successful bidder must, prior to the issuance of the lease, furnish a $50,000 corporate surety bond conditioned on compliance with all the terms and conditions of the lease.

TREASURE SALVORS I, II, III. EXERCISES IN THE LAW OF FINDERS-KEEPERS
By: Robert W. Polk

INTRODUCTION

On September 4, 1622, the "Nuestra Senora de Atocha" was part of a fleet of 28 ships known as the Tierra Firme Flota. The Flotella had left Havana and set sail for Cadiz, Spain, laden with gold bullion and other riches of the New World to be used to help finance the Thirty Years War. Eight of the ships of the fleet, including the "Atocha", were sunk in a hurricane off the lower Florida Keys. The "Atocha" was carrying 160 gold bullion pieces, 900 silver ingots, over 250,000 silver coins, 600 copper planks, 350 chests of indigo, and 25 tons of tobacco. In 1978 the treasure was valued at $250 million.

Over three centuries after the "Atocha" sunk, a historian working for Treasure Salvors, Inc. and Armada Research Corp. uncovered documentary evidence that a search for the "Atocha" which had begun in the mid 1960's was directed toward the wrong set of Keys. Despite this new information, and over 300 years of technological advances, it was another year before any remains of the "Atocha" were found. Salvage efforts by Treasure Salvors, Inc. were begun after a series of contracts were entered into with the State of Florida allowing Treasure Slavors to conduct their underwater salvage operations. These contracts were entered into on the belief that the "Atocha" was resting on lands owned by Florida. However, in 1975, in *U.S. v. Florida*, the U.S. Supreme Court affirmed the report of a special master which rejected Florida's ownership claims to lands which included those upon which the "Atocha" rested. The legal quarrels over ownership of the treasures of the "Atocha" began with this decision.

TREASURE SALVORS I

Four months after the Supreme Court's decision in *U.S. v. Florida*, Treasure Salvors, Inc. and Armada Research Corp., finders of the "Atocha", brought a salvage action in federal court in the Southern District of Florida for possession and confirmation of title against all persons as to an unidentified, wrecked and abandoned vessel, thought to be the "Atocha". The United States answered and counter-claimed, seeking title to the vessel under the Antiquities Act (16 U.S.C. §§432, 433 (1974)), the Abandoned Property Act (40 U.S.C. §310 (1969)), and the Outer Continental Shelf Lands Act (43 U.S.C. §§1332 et seq. (1964)). In this action, dubbed *Treasure Salvors I*, the parties agreed that the site of the wreck was on the continental shelf but outside the territorial waters of the United States.

Treasure Salvors, basing their claims on general principles of maritime and international law, asserted that when a vessel has been abandoned, the finder in possession becomes the new owner of the vessel. Since abandonment constitutes a repudiation of ownership, and a party taking possession under salvage operations may be considered a finder, they argued that Treasure Salvors, having begun a salvage service as to the "Atocha", was entitled to sole possession of the ship. The United States, on the other hand, claimed that objects of antiquity recovered by persons subject to the jurisdiction of the U.S. are taken in the name of the sovereign, thus belonging to the country as a whole, not to the finders alone. This is the concept of sovereign prerogative, a common law rule that the King of England had a right to the objects recovered from the sea by his subjects. The United States, in effect, was arguing that through the Antiquities Act and Abandoned Property Act, the Legislature had incorporated the doctrine of sovereign prerogative to situations such as that in *Atocha I*. They further asserted that the Outer Continental Shelf Lands Act effectively brought the *Atocha* case within the jurisdiction of the Abandoned Property Act and Antiquities Act even though the ship was outside U.S. territorial waters.

The federal district court, in its opinion, said that the issue was "whether the statutes which the United States based its claim upon were applicable to the salvage of a shipwreck discovered on the continental shelf outside the territorial waters of the U.S." The court, in its analysis of the government's claim under the Abandoned Property Act, following an earlier decision, *Russell v. Forty Bales of Cotton*, held that the Abandoned Property Act applied only to property which was abandoned as a result of the Civil War, and therefore not applicable to the "Atocha". It further held that the Antiquities Act applied only to objects of antiquity located on lands owned or controlled by the U.S.; therefore, the "Atocha's" presence outside the territorial waters of the U.S. precluded the United States' claim of ownership. The Outer Continental Shelf Lands Act, the court stated, did not cure the jurisdictional flaws of the Antiquties Act and Abandoned Property Act because it "merely asserts jurisdiction over the minerals in and under the continental shelf". Further support for this decision was found by the court in the Geneva Convention on the Continental Shelf which recognizes the sovereign rights of nations over the continental shelf only for the purpose of exploring it and exploiting its natural resources, and not for recovering objects such as shipwrecks and their cargoes. The fact that the U.S. has the right to restrict the activities of its citizens and corporations even though they may be conducted extraterritorily was not sufficient to vest ownership of the "Atocha" in the U.S. The court then held that exclusive possession and title to the "Atocha" should be "rightfully conferred upon the finder of the res derilictae," Treasure Salvors, Inc.

On appeal, the Fifth Circuit Court of Appeals affirmed the lower court's decision that the United States did not have jurisdiction over the salvage operations of the "Atocha". However, it did not approve that portion of the decision which gave Treasure Salvors, Inc. exclusive title to and sole possession of the vessel and cargo as to other possible claimants who were not parties to the lawsuit. The court conceded that there is some dispute as to whether abandoning property divests the owner of title. The court noted, however, that courts "have rejected the theory that title can never be lost and have applied the law of finds." Under the law of finds, title vests in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intent to become its owner."

TREASURE SALVORS II

As was mentioned before, the legal troubles of the finders of the "Atocha" began with the decision of *U.S. v. Florida*. The contracts which Treasure Salvors and Florida had entered into had caused Treasure Salvors to give the Florida Division of Archives several artifacts which they

now wanted back. Accordingly, the district court, after *Treasure Salvors I*, issued a warrant for arrest of the articles. The Division of Archives obtained an emergency stay of the warrant from the Fifth Circuit Court of Appeals. Treasure Salvors responded with a motion to have the Division of Archives show cause as to why the artifacts should not be kept in the possession of Treasure Salvors, Inc. The Division of Archives, forced to turn the articles over to the court, challenged the jurisdiction of the court and also claimed the artifacts for various reasons.

The Division of Archives' challenge of the court's jurisdiction was based on the modifications which the Fifth Circuit attached to the holding in *Treasure Salvors I*. The modification was that "we do not approve that portion of its order which may be construed as holding that plaintiffs have exclusive title to, and the right to immediate possession of the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation." The Division of Archives argued that since it was not a party or privy to *Treasure Salvors I*, it was not bound by the previous litigation and therefore the court's ancillary warrant of arrest was invalid. After looking at the record of *Treasure Salvors I*, the district court concluded that the Division of Archives was bound by the judgment in *Treasure Salvors I*. It reached this decision because the Division of Archives had notice of the previous suit and could have intervened to protect its interest under Rule 24 of the Federal Rules of Procedure. Since the Department of Archives purposely did not intervene, deciding instead to rely upon the United States to protect its claim, it thereby repudiated the contracts and was bound by the judgment of the court.

The district court went a step further and found that the statute upon which the Division of Archives relied to coerce Treasure Salvors, Inc. to contract with the State of Florida in order to carry on the salvage of the "Atocha" was unconstitutional. The court reasoned "that the contract is invalid because the states cannot constitutionally alter general admiralty and maritime jurisdiction and congressional acts." The Constitution extends the judicial power of the U.S. to all cases of admiralty and maritime jurisdiction, and since this jurisdiction is exclusive, the power to legislate on those subjects is vested exclusively in the national rather than state legislature. The court concluded that "the insistence of the state that a finder of a wrecked and abandoned vessel not only does not get title but that it has the right or authority to prohibit salvage or if granted, to regulate salvage is in direct conflict with substantive maritime law."

The court then turned to the final arguments in support of the Division of Archives' claim to the treasures of the "Atocha". The Division of Archives argued that the Eleventh Amendment and the concept of sovereign immunity acted as a bar to the proceedings. The Court found that "since the Division of Archives chose to assert such a claim on the merits, it necessarily waived the Eleventh Amendment as to its claim." Since the court had already found that Florida did not have title to the property and had no rights to the salvaged articles under the contracts, "there is no Eleventh Amendment bar to the mere arrest of articles of salvage." The court described the Eleventh Amendment as a "shield" to protect the State rather than a "sword" to violate due process.

The majority opinion of the Fifth Circuit Court of Appeals affirmed the lower court's alternative holding that the suit to determine title to the salvaged artifacts was not barred by the Eleventh Amendment and that Florida's claim of ownership was without merit. However, it declined to either affirm or reverse the district court's innovative analysis regarding the effect of the *Treasure Salvors I* judgment on the State of Florida even though it was not a party or privy to the suit.

TREASURE SALVORS III

After its success in court against the United States and Florida, Treasure Salvors, Inc. once again devoted its full attention to the remaining salvage work to be done in the "Atocha". During the search and salvage operation, two other vessels appeared within the area described as the "Atocha" wreck site and began to conduct salvage operations there. As a result, Treasure Salvors, Inc. filed a motion for a temporary restraining order against the vessels and their masters, claiming interference with Treasure Salvors', Inc. right to possession and salvage of the "Atocha". The district court granted the motion and later issued a preliminary injunction. The defendants appealed the preliminary injunction decision, challenging the district court's jurisdiction to hear the dispute. Treasure Salvors then challenged the appealability of the preliminary injunction. The Fifth Circuit allowed the appeal, reasoning that after the unification of the admiralty rules with the federal civil rules in 1966, the authority of admiralty courts to issue injunctions and the appeals courts to hear the appeals of such orders was no longer left in doubt.

The court then analyzed the defendants' argument that because the "Atocha" was not within the territorial jurisdiction of the district court, then the court was without authority to issue the injunction. It rejected the defendants' jurisdiction argument, finding that the court had properly perfected personal jurisdiction over the parties and that jurisdiction over the subject matter of the controversy was proper pursuant to 28 U.S.C. 1333 which grants federal courts jurisdiction over all admiralty maritime claims. And since the law of salvage and finds falls within this category, the court had the jurisdictional power to settle the dispute.

The Fifth Circuit then turned its attention to the propriety of the granting of the preliminary injunction. The Fifth Circuit focused its analysis upon the four prerequisites for such an injunction. These are:

1. a substantial likelihood that the movant will eventually prevail on the merits;
2. a showing that the movant will suffer irreparable injury unless the injunction issues;
3. proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the party or parties opposed; and
4. a showing that the injunction, if issued, would not be adverse to the public interest.

The district court had found for Treasure Salvors on all four of these prerequisites, reasoning that "title to the Atocha" had already been adjudicated by this Court, "possession and control of the 'Atocha's' remains would be impossible to monitor," the defendants were "free to conduct salvage operations anywhere in the ocean other than the area claimed by Treasure Salvors," and "the archaeological recovery methods being employed by Treasure Salvors have greatly benefitted the American public."

The appeals court as noted before, modified the injunction so as to expire within 90 days because "given the exceptional nature of this injunction, and the burdens it places on the defendants, we think that the merits of this dispute should be resolved as quickly as possible." The court remanded the case and admonished the district court to "make a fresh and complete record concerning Treasure Salvors' claim to exclude the defendants from this fifty square mile area in light of the basic principles of the maritime law of salvage and finds and such extensions or modifications of those principles as are consistent with the basic policies behind them and required by the extraordinary facts of this case." The appeals court then proceeded to outline how the district court should analyze the facts under the law and the basic principles to be followed. "Persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference by others," and "in determining property rights in lost or abandoned objects, some equitable considerations come into play in determining the legal protection afforded a finder."

CONCLUSION

There have been no more reported decisions as to what shape the rights of the finders of the "Atocha" took after *Treasure Salvors III* was remanded to the district court. According to John Morse, presently Dean of Florida State Law School and Counsel for Treasure Salvors, Inc., the district court issued an injunction barring the defendants from the "Atocha" wreck site for a three year period. As of November 24, 1982, this decision was on appeal. Meanwhile, salvage operations for the remaining 44 tons of gold are continuing.

Treasure Salvors II is currently pending before the U.S. Supreme Court with Florida continuing to maintain that the Eleventh Amendment was a bar to the suit. The Fifth Circuit's holding that the statute which the contracts between Treasure Salvors, Inc. and Florida were based upon is unconstitutional has started a new round of lawsuits. Mr. Morse said that at last count there were fourteen separate lawsuits pending between Treasure Salvors, Inc. and Florida involving other wrecked ships because of the salvage contracts which Florida law demands, including one over the "Margarita", a sister ship of the "Atocha" lost in the same hurricane.

WATER LOG

This newsletter is a quarterly publication reporting on the activities of the Mississippi-Alabama Sea Grant Consortium and on issues and events affecting the Mississippi-Alabama coastal area. The purpose of the newsletter is to increase public awareness of coastal problems and issues.

If you would like to receive future issues of the *Water Log* free of charge, please send your name and address to: Sea Grant Legal Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the Water Log.

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NOTES

The Mississippi Sea Grant Legal Program is pleased to welcome a new staff attorney, Ms. Casey Jarman. Ms. Jarman, a recent graduate of the University of Mississippi School of Law, served for two years as a Sea Grant student assistant. After graduation, she worked with the Mississippi Mineral Resources Legal Program. We are confident that her experience and enthusiasm will prove to be valuable assets to our program and to the people we serve.

The battle of the budget is not yet complete, but it appears that the National Sea Grant Program will escape relatively unscathed. The continuing resolution signed by the President in December, 1981, includes a total NOAA budget of $864.8 million in fiscal year 1982. The resolution provided fiscal year 1982 funding for Sea Grant at $35 million.

The next issue of the Water Log will focus on marine pollution.

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