

REPORT OF THE COMMITTEE ON PUBLIC LANDS

I. MMS ROYALTY PROGRAM DEVELOPMENTS

A. Gas Contracts Settlements Initiative

The Department of the Interior (DOI), as reported last year,¹ launched an initiative in 1993 to collect royalties on gas contract settlements. The trade associations of federal and Indiana lessees filed suit² challenging the authority of DOI's Minerals Management Service (MMS) to collect royalties on sums received by lessees to settle take-or-pay disputes, to terminate natural gas sales contracts, and to reduce the prices paid under natural gas sales contracts.

In two test cases, DOI issued final orders reaffirming the policy that royalties are due on contract settlements.³ The decision in one of the test cases was appealed and consolidated with the trade association's challenge.⁴ In late 1994, the parties filed cross motions for summary judgment; oral argument on the motions is tentatively scheduled for early spring.

B. Negotiated Rulemaking

Due to changes in gas marketing in recent years, MMS recognized in 1994 that compliance with the agency's 1988 natural gas royalty valuation regulations⁵ had become increasingly problematic.⁶ Those regulations were issued at a time when most natural gas was sold at the wellhead. Today, however, many lessees sell gas at pooling points or other downstream locations, and fewer sales are pursuant to wellhead contracts with dedicated reserves. Because of the complexity of tracing gas sold for the first time at points far removed from the lease, it had become increasingly difficult to pay royalties accurately under the "gross proceeds" standard of the 1988 regulations. To address the problem, MMS initiated a negotiated

1. *Report of the Committee on Public Lands*, 15 ENERGY L.J. 219, 229 (1994).

2. *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-2544 (D.D.C. filed 1993). The complaint was filed in the U.S. District Court for the Northern District of West Virginia, but the case was transferred to the District for the District of Columbia in late 1993. *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-0112-E (N.D. W. Va. Dec. 2, 1993) (Memorandum of Opinion and Order).

3. *Samedan Oil Corp.*, No. MMS-94-0003-IND (U.S. Dep't of Interior Sept. 16, 1994), *appeal filed*, *Samedan Oil Corp. v. Deer*, No. 94CV02123 (D.D.C. filed Oct. 3, 1994); *Shell Offshore Inc.*, No. MMS-91-0087-OCS (U.S. Dept. of Interior Sept. 2, 1994).

4. *Samedan Oil Corp. v. Deer*, No. 94CV02123 (D.D.C. filed 1994); *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-2544 (D.D.C. Nov. 16, 1994) (Order Granting Motion to Consolidate).

5. *Revision of Gas Royalty Valuation Regulations and Related Topics*, 53 Fed. Reg. 1230 (1988) (codified at 30 C.F.R. pts. 202, 206).

6. *Establishment of the Federal Gas Valuation Negotiated Rulemaking Committee*, 59 Fed. Reg. 32,943 (1994) (to be codified at 30 C.F.R. pt. 206).

rulemaking proceeding under the Federal Advisory Committee Act⁷ to investigate, *inter alia*, an alternative valuation procedure and to consider other problems with the existing regulations.

Representatives of MMS, federal lessees, and affected states⁸ met several times to discuss the issue; by the end of 1994, they had tentatively agreed to recommend that, for federal royalty purposes, lessees be allowed to value natural gas production by reference to index prices published in various natural gas trade publications. While all details had not been finalized by year's end, the tentative agreement includes a "true-up" mechanism in the event that the index prices are less than the "gross proceeds" received by lessees who continue to sell gas at the wellhead. If the negotiators agree on a final proposal, then MMS is expected to use the agreement as the basis of a notice of proposed rulemaking in 1995.

C. *Royalty in Kind Program*

Relying on its statutory⁹ and lease rights, MMS announced a pilot program to collect certain Outer Continental Shelf (OCS) gas royalties in kind rather than in value. According to MMS' announcement of the pilot project, the agency will take gas royalties in kind from lessees who volunteer to participate in the program and will sell these royalties to gas marketing companies competitively selected.¹⁰ The project is part of the Administration's National Performance Review.

D. *Statute of Limitations Litigation*

During 1994, MMS scored two victories in Tenth Circuit cases in which lessees had asserted that the general statute of limitations¹¹ barred MMS' efforts to collect royalties. The decisions followed a 1993 Tenth Circuit ruling which was also favorable to MMS.¹² In *Mesa Operating Ltd. Partnership v. United States Department of the Interior (Mesa)*,¹³ the Tenth Circuit summarily disposed of the lessee's claim that MMS was required to bring an action against the lessee or to assert a counterclaim during the course of judicial review of an administrative decision respecting the amount of royalties due from the lessee to pursue a claim for additional royalties. In essence, the Tenth Circuit determined that MMS had, in fact, pursued the claim against Mesa in the timely instituted prior administrative and appel-

7. 5 U.S.C. app. §§ 1-15 (1988).

8. Pursuant to § 35 of the Mineral Lands Leasing Act of 1920 as amended, 30 U.S.C. § 191 (Supp. V 1993), each state except Alaska receives 50% of the royalties collected by DOI for oil and gas produced from federal leases located within its borders. Alaska receives 90% of the royalties attributable to federal leases in Alaska.

9. 43 U.S.C. § 1353 (1988).

10. MMS, U.S. DEP'T OF THE INTERIOR, MMS PILOT PROJECT TO ASSESS MARKETING FEDERAL ROYALTY GAS (June 30, 1994) (News Release).

11. 28 U.S.C. § 2415(a) (1988).

12. *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993).

13. 17 F.3d 1288 (10th Cir. 1994).

late proceedings and that a decision in the lessee's favor would exalt form over substance and operate as a "procedural trap for the unwary."¹⁴

The *Mesa* decision was followed by an order finding that the general statute of limitations has no application to MMS orders seeking monies due under oil and gas leases. According to the court, such orders do not seek "money damages" and thus do not fall within the purview of the statute of limitations.¹⁵

E. Other Royalty Developments

In *Southern Ute Indian Tribe v. Amoco Production Co.*,¹⁶ oil and gas lessees received a favorable decision in a highly contested mineral ownership case. In that dispute, the lessor alleged that coalbed methane belonged to the owners of coal rights, rather than the owners of oil and gas rights. It claimed that the oil and gas lessees had been producing coalbed methane for several years without authority and, therefore, were liable to the rightful owners for the methane illegally produced. After reviewing the oil and gas leases in controversy and the statutes pursuant to which the leases had been issued, the court ruled that coalbed methane had indeed been leased as part of the oil and gas rights.

Other than the negotiated rulemaking proceeding discussed above, there was little in the way of MMS royalty rulemaking activity during 1994. In July, however, MMS issued a final rule¹⁷ establishing procedures for obtaining refunds and credits for overpayments on OCS leases. In the preamble to the rule, MMS asserted that, except for a new \$500 assessment prescribed for each unauthorized credit adjustment,¹⁸ the rule "codifies the Department's current interpretation and application of section 10 [of the Outer Continental Shelf Lands Act of 1953¹⁹]."²⁰ MMS' assertion is only partially correct: MMS declined to follow certain decisions of the Interior Board of Land Appeals respecting the treatment of advance rental payments when leases are later subject to suspensions.²¹ Nevertheless, the new regulations provide a detailed road map for lessees seeking to obtain refunds or credits for overpayments on OCS leases.

14. *Id.* at 1292.

15. *Phillips Petroleum Co. v. Johnson*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994) (order granting petition for rehearing and denying suggestion for rehearing *en banc*), *modifying* 22 F.3d 616 (1994).

16. 863 F. Supp. 1389 (D. Colo. 1994).

17. *Offsets, Recoupments and Refunds of Excess Payments of Royalties, Rentals, Bonuses, or other Amounts Under Federal Offshore Mineral Leases*, 59 Fed. Reg. 38,359 (1994) (to be codified at 30 C.F.R. §§ 230.451 to .461).

18. *See* 30 C.F.R. § 230.458(b) (1994).

19. 43 U.S.C. § 1339 (1988).

20. 59 Fed. Reg. 38,359, at 38,360.

21. *See id.* at 38,362.

II. BLM ONSHORE OIL AND GAS PERFORMANCE REVIEW

Pursuant to the Administration's "National Performance Review" initiative, the Bureau of Land Management (BLM) established a team of BLM representatives in December 1993 to conduct a performance review of the BLM's Onshore Oil and Gas Program.²² Following a collaborative scoping effort by the team and representatives of the MMS, the Bureau of Indian Affairs, the Department of Energy (DOE), and the United States Forest Service (USFS), the BLM identified issues to be addressed in Phase II—the implementation stage—of the review process.²³ Identification of those issues resulted in the creation of seven teams to review and analyze the following: (i) regulatory review—eliminate duplication and non-productive paperwork; (ii) regulatory incentives—design financial and conservation incentives; (iii) bonding—examine unfunded liability issues; (iv) National Environmental Policy Act (NEPA)—examine the NEPA planning process; (v) Native American issues—New Mexico National Review Performance Laboratory; (vi) lease sale efficiencies to Wyoming Process Review Team; and, (vii) outreach and interagency coordination to the BLM California Process Review Team.²⁴ The teams were charged with five objectives: eliminate unnecessary internal regulations, set customer service standards, serve the public, instill collaborative leadership, and improve BLM efficiency.²⁵

The formal charters that were created for each team in September 1994 indicate that each team was to include, as *ad hoc* members, representatives from a broad variety of public and private entities, including United States Forest Service (USFS), the Department of Energy (DOE), oil and gas associations, and other special interest groups.²⁶ In addition, the charters provided greater specificity regarding the key objectives associated with the review process.²⁷ These objectives addressed diverse issues of immediate concern to the energy industry. For example, the Wyoming Process Review Team, created to streamline and improve the oil and gas leasing process on both BLM and USFS lands, was directed to focus on such areas as oil and gas lease stipulations, lease rental rates, maximum lease sizes, and the one-year waiting period for the filing of non-competitive oil and gas pre-sale lease offers.²⁸ Similarly, the bonding/unfunded liability team was directed to review the level of bonding needed to ensure proper plugging and abandonment of wells and the reclamation of abandoned sites, and to develop improved procedures relating to federal debt collection actions and the administration of outstanding obligations owed to the

22. DIRECTOR, BLM, DIRECTOR OF BLM INSTRUCTION MEMORANDUM NO. 94 214 (June 13, 1994).

23. *Id.* at 1-2.

24. *Id.* at 2.

25. *See id.*; BLM, BLM ONSHORE OIL AND GAS NATIONAL PERFORMANCE REVIEW, WEEKLY BRIEFING NO. 1 (Aug. 1, 1994).

26. *See National Performance Review, in BLM CHARTERS.*

27. *Id.*

28. *National Performance Review, Wyoming Laboratory (Lease Sale Efficiencies), in BLM CHARTER; see source cited supra note 5.*

federal lessor at the termination of a lease.²⁹ Other charters simply reiterated the general issues identified in the Director's Instruction Memorandum.³⁰

Phase II of the review process, commenced in August 1994, significantly altered certain aspects of the BLM Onshore Oil and Gas Performance Review. In particular, for reasons associated with budgetary constraints and staffing difficulties, the lease sales efficiency review was postponed.³¹ Additionally, implementation of the review process apparently caused interaction between the BLM and other state and federal agencies, and private organizations with respect to public lands issues relating to oil and gas exploration and development. An example is a DOE proposal that the two agencies enter into a Memorandum of Understanding (MOU) for the purpose of enhancing inter-agency efforts on public lands energy issues.³² Less formally, the BLM has met with organizations such as the Interstate Oil and Gas Commerce Commission, the Rocky Mountain Oil and Gas Association, and the California Conservation Committee.³³ According to the BLM Director's Instruction Memorandum, the new regulations and reports to be proposed and generated as a result of the project are expected to be delivered to the Secretary of DOI in April and June of 1996.³⁴

III. DEVELOPMENTS AFFECTING THE OUTER CONTINENTAL SHELF

New developments relating to OCS leasing are important for those planning to explore in the OCS and for those currently producing from the OCS. The MMS is promulgating a new five-year leasing plan and is implementing heightened financial responsibility requirements not only for producers and explorers, but also for anyone or any entity conducting "operations" on "offshore facilities." In addition, related judicial decisions potentially impact OCS dispute procedures and federal or agency jurisdiction.

A. *Financial Responsibility Requirements Under the Oil Pollution Act*

In the wake of the Exxon Valdez disaster, the Oil Pollution Act of 1990 (OPA)³⁵ was enacted to help ensure that potential polluters can pay

29. *National Performance Review, Bonding/Unfunded Liability Issue Resolution Team, in BLM CHARTER* (July 28, 1994); see source cited *supra* note 5.

30. See generally source cited *supra* note 5.

31. BLM, BLM ONSHORE OIL AND GAS PERFORMANCE REVIEW, WEEKLY BRIEFING No. 8 (Oct. 3, 1994).

32. BLM, BLM ONSHORE OIL AND GAS PERFORMANCE REVIEW, WEEKLY BRIEFING No. 9 (Oct. 13, 1994). The California Department of Oil, Gas, and Geothermal Resources also has negotiated a MOU with the BLM. See BLM, BLM ONSHORE OIL AND GAS PERFORMANCE REVIEW, WEEKLY BRIEFING No. 8 (Oct. 3, 1994).

33. See BLM, BLM ONSHORE OIL AND GAS PERFORMANCE REVIEW, WEEKLY BRIEFING NOS. 1-9 (1994).

34. See DIRECTOR, BLM, DIRECTOR OF BLM INSTRUCTION MEMORANDUM No. 94 214 (June 13, 1994); *National Performance Review, in BLM CHARTERS*.

35. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified at 33 U.S.C. §§ 2701-2761 (Supp. V. 1993)).

to clean up the pollution they cause. It increased the financial responsibility required of operators of offshore facilities. MMS is charged to implement these requirements. Under the Outer Continental Shelf Lands Act (OCSLA)³⁶ 1978 Amendments, the required level of responsibility was \$35 million. With the implementation of section 1016 of the OPA, however, OCS operators must demonstrate \$150 million of financial responsibility.³⁷

The MMS published an Advance Notice of Proposed Rulemaking (ANPR) on August 25, 1993. The ANPR received approximately 1,900 comments raising issues regarding jurisdiction, pollution risk and exceptions, and exclusions.³⁸ In addition to the issues raised by the Draft Report, the National Petroleum Council (NPC) prepared a report at the request of the Secretary of the DOE. Based on these comments and reports, the Draft Report asks three questions and prescribes six components for the financial responsibility regulations. The questions are: (i) the scope of the facilities covered by the MMS regulations; (ii) whether evidence of \$150 million in financial responsibility should be demonstrated for each offshore facility, regardless of the relative pollution risk it poses; and, (iii) whether an exemption from OPA's financial responsibility requirements should be established for certain offshore facilities.

The prescribed components of financial responsibility are: (i) criteria for determining whether a particular facility falls into the OPA "offshore facility" category; (ii) procedures for identifying the party who is financially responsible for a particular offshore facility; (iii) methods that a responsible party may use to demonstrate financial responsibility; (iv) processes for issuing certificates of financial responsibility; (v) mechanisms for interfacing with States that have financial responsibility programs; and, (vi) procedures for taking enforcement actions against parties that do not comply with the financial responsibility requirements.

1. Facilities Covered by the MMS Regulations

Critical terms in interpreting the scope of the facilities covered by the MMS implementing regulations are "oil" and "offshore facility."³⁹ Under the OPA, the definition of an offshore facility is *much* broader than that

36. 43 U.S.C. § 1815 (1988).

37. 33 U.S.C. § 2716 (Supp. V 1993).

38. MMS, 1994 DRAFT REPORT ON THE ISSUES OF OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES (Oct. 31, 1994); *see also* MMS, POTENTIAL ECONOMIC IMPACTS OF RULEMAKING (Nov. 1, 1994) (Draft on Economic Impacts).

39. The OPA defines "oil" as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil . . .," 33 U.S.C. § 2701(23) (Supp. V 1993), and "facility" as "any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes." *Id.* § 2701(9). The OPA defines "offshore facility" as "any facility of any kind located in, on, or under any of the navigable waters of the United States, and, any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel." *Id.* § 2701(22).

traditionally associated with operations on the OCS. The result is that an OPA offshore facility may be located in state coastal waters or wetlands, and facilities may include fuel oil storage facilities and conceivably even fuel oil tanker trucks that cross a bridge spanning a stream.⁴⁰

In its Draft on Economic Impacts, the MMS assumes that jurisdiction includes the OCS, as well as state coastal waters, and inland navigable waters, including wetlands. The resulting financial impact of that assumption is an estimated increase in the average annual insurance premium (further assuming that insurance is available) from approximately \$12,000 per well under the OCSLA Amendments of 1978 to approximately \$48,000 per well under the OPA.

OPA requirements would apply not only to traditional OCS activities, but also to facilities not directly involved in the oil and gas industry. Examples cited in the Draft on Economic Impacts include a stripper oil well in the Appalachia Region producing one to two barrels of oil per day, with a pipeline that crosses navigable waters, dock-side marinas on rivers and lakes, farmers, bush pilots in Alaska, and Alaskan native communities.⁴¹ In addition to new categories of facilities that would be included in the Financial Responsibility Regulations under the OPA, the heightened requirements would ostensibly apply for each offshore facility regardless of whether such facilities are owned by a single operator. Many of the comments generated in response to the ANPR suggest that the \$150 million level be applied as a *maximum* with varying lower levels of financial responsibility to be imposed for less risky operations or facilities or for operations in less environmentally sensitive areas.

The Texas Railroad Commission (TRC) estimates that 4,800 of 12,000 operators in Texas have facilities that are in or on navigable water. The TRC assumes an annual insurance premium of one percent (1.0%), or \$1.5 million, on a policy face value of \$150 million. The annual cost therefore to those 4,800 operators is \$7.2 billion. According to the Draft on Economic Impact, imposing the heightened financial responsibility requirements will likely result in premature abandonment of facilities in the OCS, in State coastal waters, and in many inland waters. For example, Louisiana projects annual revenue losses of \$642 million attributable to failures of large portions of market sectors in State waters.

2. Whether Evidence of \$150 Million in Financial Responsibility Should Be Demonstrated for Each Offshore Facility Regardless of Relative Pollution Risk.

The OPA requires evidence of \$150 million in financial responsibility for *each* offshore facility regardless of the number of wells located on the facility or the size of the facility in relation to oil production. This level of responsibility, as previously discussed, may exceed the requirements neces-

40. MMS, 1994 DRAFT REPORT ON THE ISSUES OF OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES 3 (Oct. 31, 1994).

41. MMS, POTENTIAL ECONOMIC IMPACTS OF RULEMAKING 3 (Nov. 1, 1994) (Draft on Economic Impacts).

sary to insure accountability for oil spills. For example, the MMS estimated that the costs in 1992 dollars of clean-up and damages from spills over 1,000 barrels on the Gulf of Mexico OCS between 1971 and 1991 did not exceed the prior OCSLA level of \$35 million in any case. Commentators suggest that the MMS set financial responsibility requirements in proportion to the severity of oil pollution risk posed by the facility. Such a "sliding scale" would require operators of multi-well facilities to demonstrate a higher level of financial responsibility than operators of single stripper well facilities or of low-volume facilities.

3. Whether an Exemption from OPA's Financial Responsibility Requirement Should Be Established for Certain Offshore Facilities

Formerly, under OCSLA, financial responsibility was required for an OCS facility only if it was used to explore for, produce, or process oil, or if it handled more than 1,000 barrels of oil at any one time.⁴² The comments to the ANPR suggest that a *de minimis* threshold be established. It would be based on an oil volume that varies depending on the sensitivity of the location of the facility and the pollution prevention measures applied. The NPC report suggests that a *de minimis* volume might range from 250 bbl to 1,000 bbl depending upon the severity of environmental impact that might result if oil discharge occurred. The Marine Operators Association of America (MOAA), in response to the ANPR, estimates there are 6,000 potentially affected marinas operating in fifty states unless otherwise excluded under the OPA. The MOAA estimates costs of compliance will range from \$150,000 to \$450,000 per year per facility, which would force many marinas to close their fuel docks.

Interior has requested a formal legal opinion evaluating the three above-discussed issues.⁴³

B. Draft Report of New Five-Year Offshore Leasing Program

The Minerals Management Service (MMS) recently solicited comments from affected parties for use in drafting its new five-year leasing program, scheduled to take effect in July 1997.⁴⁴ The MMS has targeted spring of 1995 for release of the first draft of the plan. Formation of the plan is controversial in at least two respects: its support of offshore leasing, and its contention that the MMS receives fair market value for OCS leases. The oil and gas industry points to Sale 147 of March 1994, in which bids for 357 tracts in the Central Gulf of Mexico totaled \$277 million. In that sale, Anadarko Petroleum Corporation offered \$40 million, or \$8,008.90 per acre for a single block.⁴⁵

42. 43 U.S.C. § 1815 (1988), *repealed by* OPA tit. II, § 2004, 104 Stat. 484, 507 (1990).

43. Patrick Crowe, 'Slow Ball' Approach to Spill Insurance, OIL & GAS J., Nov. 7, 1994, at 42.

44. 59 Fed. Reg. 59,328 (1994).

45. *Public has Interest in Oil, Gas Activity*, OIL & GAS J., Apr. 18, 1994, at 21. MMS, TALKING POINTS FOR NOVEMBER, 1994, OCS POLICY COMMITTEE MEETING 3 (1994).

The MMS five-year plan is expected to be formulated in several stages taking two-to-three years to complete. According to an MMS "talking paper," key program steps include: (i) solicitation of comments and suggestions (45-day comment period); (ii) draft proposed program (60-day comment period); (iii) proposed program and draft Environmental Impact Statement (EIS) (90-day comment period); (iv) proposed final program (60-day Congressional notification period); and, (v) program approval. Each of these steps would require publication in the Federal Register soliciting suggestions for developing the program and scoping comments for the draft EIS.

MMS' intent is "to develop the new five-year OCS program based on sound science, open and informative communication, and meaningful consultation."⁴⁶ Among MMS concerns to be addressed in the new plan are low oil prices, maturation of the Central and Western Gulf of Mexico basin, capital flight overseas, technological innovation, and increased interest in sub-salt accumulations. As a result of these concerns, the MMS is reviewing its leasing policies and evaluating alternatives to determine whether beneficial changes can be made.⁴⁷ According to the MMS, the goal is "to find ways to offer more flexible and more attractive terms to industry while maintaining at least the same level of revenue receipts as would be obtained under current conditions."⁴⁸

In addition to Sale 147, four other sales (141, 142, 143 and 150) identified in the 1992-1997 five-year program have been completed. Sale 150 in the Western Gulf, held August 17, 1994, produced bids totaling \$60,399,786 with 57 companies participating. A total of 266 bids on 210 tracts were received for areas located offshore of Louisiana and Texas. Additional scheduled sales include Sale 152 in the Central Gulf and Sale 155 in the Western Gulf with the final EIS consistency determination scheduled for December 1994; Sale 157 in the Central Gulf and Sale 161 in the Western Gulf with the draft EIS and proposed notice scheduled for Spring 1994; Sale 166 in the Central Gulf proposed for early 1997; and, Sale 151 in the Eastern Gulf proposed for late 1995.

In addition to Gulf of Mexico sales, several Alaskan sales have been proposed. These include Cook Inlet Sale 149 proposed for early 1996; the Beaufort Sea Sale 144 proposed for late 1996; the Chukchi Sea Sale 148 proposed for mid-1997; the Gulf of Alaska/Yakutat Sale 158 proposed for 1996; and, the St. George Basin Sale 153 scheduled for late 1996. A moratorium has been placed on Atlantic Sale 164.

C. Legislative Developments Affecting the OCS

The 103rd Congress enacted House Bill 3678 on October 31, 1994. House Bill 3678 streamlined the process for obtaining access to OCS sand,

46. MMS, TALKING POINTS FOR NOVEMBER, 1994, OCS POLICY COMMITTEE MEETING 3 (1994).

47. MMS, MINERALS MANAGEMENT SERVICE OUTER CONTINENTAL SHELF ACTIVITIES UPDATE, APRIL 1994-OCTOBER 1994, at 25 (1994) (Activities Update).

48. *Id.*

gravel, and shell resources. This amendment to OCSLA expands the Secretary of the Interior's authority for conveying rights to Federal OCS sand, gravel, and shell resources from, or in association with, certain types of public works projects.

House Bill 3678's technical amendment to OCSLA clarifies that the DOI and the MMS have full responsibility for OCS sand and gravel mineral resources. Pursuant to section 8(k) of OCSLA, the MMS is responsible for administering DOI's role in activities associated with OCS leasing, exploration, development, production, and royalty management of mineral resources. Before the amendment, the Secretary was limited to conveying OCS minerals rights through a competitive leasing process. The amendment would require federal agencies (such as the Corps of Engineers) to enter into Memoranda of Agreement with the DOI for the use of OCS mineral resources. The legislation will give states, local governments, and federal agencies a streamlined process for obtaining federal marine sand and gravel for beach nourishment, coastal restoration, and wetlands creation.

The Marine Mammal Protection Act was reauthorized. It redefined the "incidental take" process to permit incidental take authorization via permits for up to one year.⁴⁹

Notwithstanding the legislation discussed above, the 103rd Congress was primarily noteworthy for environmental bills that died. Proposals to provide royalty relief to deepwater leases in the Gulf of Mexico died when the reform to the Mining Law of 1872 failed in conference. Failure to pass Clean Water Act reauthorization legislation also ended legislative attempts to formally authorize a Gulf of Mexico Program. Further, failure to act on NOAA reauthorization legislation also marked the demise of attempts to expand the boundaries of the Flower Garden Banks National marine Sanctuary.

1. Rulemaking

In December 1993, the MMS submitted a Safety and Pollution Prevention Rulemaking for negotiated rulemaking. The first step in this process involved convening a group of interested parties to solicit views on the current program and to participate in a negotiated rulemaking. Seventeen representatives from the manufacturing industry, the oil and gas industry, the certifying organizations, and an independent laboratory have been involved. Should the MMS proceed with negotiated rulemaking, an advisory committee consisting of representatives of interested parties would define the scope of issues and negotiations.

The MMS published a Notice of Proposed Rulemaking to reduce or to prevent the unintentional release of hydrocarbons on platforms during

49. Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 4(a)(5)(D), 108 Stat. 532, 533 (1994) (amending 16 U.S.C. § 1371(a)(5)(D)) (enacted on Apr. 30, 1994).

emergency situations.⁵⁰ MMS' proposals include: requiring operators to protect horizontal sections of pipeline risers from damage by falling objects; requiring operators to install shut-down valves on new or modified pipelines departing from a platform; and, providing the Regional Supervisor the authority to require the submission and approval of written pipeline repair plans.

2. MMS Programmatic Developments

Progress on the Environmental Studies Program Information System (ESPIS) continued throughout 1994. In response to the public and industry need for improved access to Environmental Studies Program data, information on ESPIS will be available via Internet or other remote-station access. ESPIS should be fully operational in 1995.

D. Court Decisions Pertaining to the OCS

The U.S. Court of Appeals for the Fifth Circuit in *Phillips Petroleum Co. v. Johnson (Phillips)*,⁵¹ held that the new criteria for valuing natural gas liquid products (NGLP) established in an unpublished MMS internal agency paper (the Procedure Paper) was a substantive rule constituting a rulemaking within the meaning of the Administrative Procedure Act (APA).⁵² The APA requires that an agency provide notice of a proposed rule in the Federal Register and afford an opportunity for interested persons to present their views.⁵³ The Procedure Paper promulgated by the MMS established the spot-market price that would be accepted for royalty determination purposes. This valuation conflicted with the governing regulation requiring consideration of a range of various types of prices. Based on the Procedure Paper, the MMS required ARCO to recalculate its royalties for the period 1983 to 1989. The *Phillips* court disagreed with the MMS position that the Procedure Paper is an interpretive rule, interpreting and applying section 206.150 of volume 30 of the Code of Federal Regulations. The *Phillips* court pointed out that the Procedure Paper is not a mere clarification in that it defines no ambiguous term and gives no officer's opinion about the meaning of the statute or regulations.⁵⁴ The court further disagreed with the MMS characterization of the Procedure Paper as a "general statement of MMS policy." In so holding, the court enunciated the test to be applied in considering a rule that may arguably fall under the exemptions for procedural rules: "[W]hen a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided."⁵⁵

50. Safety Requirements Governing Production Platforms and Pipelines, 59 Fed. Reg. 25,377 (1994) (to be codified at 30 C.F.R. pt. 250) (proposed May 16, 1994).

51. 22 F.3d 616 (5th Cir. 1994).

52. 5 U.S.C. § 551(5) (1988); see 22 F.3d at 619.

53. 5 U.S.C. § 553(b), (c) (1988).

54. 22 F.3d at 619-20.

55. *Id.* at 620 (quoting *Brown Express Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979)).

According to this interpretation, the change in evaluation technique "dramatically affects the royalty values of all oil and gas leases."⁵⁶ It thus required publication in the Federal Register.

In *EP Operating Ltd. Partnership v. Placid Oil Co.*,⁵⁷ the Fifth Circuit Court of Appeals reversed a lower court and held that federal courts possess jurisdiction over a dispute arising from property located on the Outer Continental Shelf (OCS). The dispute arose out of the plaintiff's attempt to recover value from two depreciating assets on the OCS, both federally created offshore pipeline rights-of-way on which the plaintiff and its co-owners constructed an oil pipeline, a natural gas pipeline, an offshore platform, and related processing facilities.⁵⁸ In 1990 the wells serviced by the facilities were shut down, causing the offshore facilities to lay dormant.⁵⁹ EP could not reach a voluntary agreement with the co-owners and lienholders to dispose of its offshore facilities and so brought suit seeking partition by licitation. EP filed in federal district court with subject matter jurisdiction premised on the OCSLA. The defendants contested federal subject matter jurisdiction, arguing that there were no "operations" on the OCS, and thus section 1349 of the OCSLA was not applicable. The district court dismissed for lack of subject matter jurisdiction. The Fifth Circuit Court of Appeals reversed:

[T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. . . .⁶⁰

The Fifth Circuit recognized that the term "operation" is not defined in the OCSLA. However, citing to *Amoco Production Co. v. Sea Robin Pipeline Co.*,⁶¹ the court maintained that the term "operation" contemplated both physical acts on the OCS and contemplated the cessation of those acts.⁶² Finding that substantial acts had been undertaken on the OCS by the parties and that "there undoubtedly will be acts taken on the OCS in the future,"⁶³ the court found federal jurisdiction. In dicta, the court noted that even if there had been nothing more than removal of offshore facilities, federal subject matter jurisdiction would still have been proper.

The court rejected appellees' argument in the lower court that the nature of a partition suit defeated federal subject matter jurisdiction. Interpreting the OCSLA jurisdictional grant broadly, the court noted that "the statute provides that there is jurisdiction for cases or controversies 'arising out of, or in connection with' any 'operation' conducted on the OCS for the

56. *Id.* at 621.

57. 26 F.3d 563 (5th Cir. 1994).

58. 26 F.3d at 565.

59. *Id.*

60. *Id.* at 566-67 (citing 43 U.S.C. § 1349(b)(1) (1988)).

61. 844 F.2d 1202 (5th Cir. 1988).

62. 26 F.3d at 567.

63. *Id.*

development of the mineral resources.”⁶⁴ The court concluded that a suit to determine ownership of the offshore facilities is sufficiently connected with the operation of those offshore facilities to come within federal jurisdiction. As noted by the court, this body of substantive law identified in section 1333 was intended “ ‘to govern the full range of potential legal problems that might arise in connection with operations on the Outer Continental Shelf’ ”⁶⁵

The final test enunciated by the court for federal subject matter jurisdiction based on the OCSLA was that jurisdiction would be conferred over any dispute that alters the progress of production activities on the OCS and thus threatens to impair the total recovery of federally-owned minerals or of any dispute that arises out of or in connection with such operation.⁶⁶

IV. ENVIRONMENTAL AND CONSERVATION INITIATIVES AFFECTING PUBLIC LANDS

A. *National Biological Survey/Endangered Species Act*

Although the 103rd Congress failed to pass enabling legislation regarding the creation of the National Biological Survey (NBS) prior to the close of the second session in October 1994, the Clinton administration has proceeded independently to identify and implement the mission of the NBS.⁶⁷ The NBS first came into being in the fall of 1993 when the Secretary of Interior issued Order 3173, which established the NBS under the supervision of the Assistant Secretary for Fish and Wildlife and Parks.⁶⁸ Under Order 3173, the NBS’ mission is “to gather, analyze, and disseminate the biological information necessary for the sound stewardship of our nation’s natural resources and to foster understanding of biological systems and the benefits they provide to society.”⁶⁹

The NBS is created pursuant to Reorganization Plan Number 3 of 1950.⁷⁰ On May 2, 1994, the Solicitor of the Department of Interior issued his Memorandum Opinion in which it was concluded that, under Reorganization Plan Number 3 and other federal statutes, the creation of the NBS “constituted a proper exercise of the Secretary’s authority.”⁷¹ Under Reorganization Plan Number 3 the Secretary of Interior was vested with complete authority over every bureau and operating unit within the DOI.⁷² Similarly, under the broad reorganization authority granted by Reorganiza-

64. *Id.* at 569 (quoting 43 U.S.C. § 1349(b)(1) (1988)) (emphasis in original).

65. *Id.* (quoting *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985)).

66. *Id.* at 570.

67. H.R. 1845, 103d Cong., 1st Sess. (1993), which was passed by the House in 1993 and which provided for NBS enabling legislation, died with the close of the 103rd Congress.

68. DOI, U.S. DEPARTMENT OF INTERIOR ORDER NO. 3173 (Sept. 29, 1993).

69. *Id.* at 1.

70. *Id.*; see 5 U.S.C. app. §§ 1-5 (1988).

71. DOI, U.S. DEPARTMENT OF INTERIOR SOLICITOR MEMORANDUM M-36980, at 1 (May 2, 1994).

72. See *id.* at 5.

tion Plan Number 3 the Secretary may, and with substantial frequency has, withdrawn those delegations and reassigned the pertinent authority.⁷³ Order 3173 transferred to the NBS the “[f]unctions necessary to perform the mission of the NBS” from a variety of agencies under the Secretary’s supervision, including certain functions previously performed by the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining Reclamation and Enforcement, the U.S. Geological Survey, and the Bureau of Reclamation.⁷⁴ The NBS will (1) conduct research to support biological resource management; (2) inventory, monitor, and report trends relating to the nation’s biotic resources; and, (3) develop the capability to transfer information it acquires to other parties interested in the “care, use, and conservation of the [n]ation’s resources.”⁷⁵

The NBS has begun to enter into data-sharing agreements with a variety of public and private entities such as the Nature Conservancy, Champion International Paper Company, and the State of California, and it intends to encourage similar agreements with other entities.⁷⁶ As of June 30, 1994, three bureaus of the DOI—the National Park Service, U.S. Geological Survey, and Bureau of Indian Affairs—had signed memoranda of understanding with the NBS for biological research projects.⁷⁷

The NBS’ mission is interrelated with the Endangered Species Act (ESA),⁷⁸ both because of the DOI’s dominant role in administering the ESA⁷⁹ and because of the ESA’s focus on biological organisms and their habitat. It is therefore significant to the NBS that the 103rd Congress did not pass ESA reauthorization legislation. The diverse ESA reauthorization bills that failed to pass the 103rd Congress nonetheless provide some insight into what generally can be expected in the ESA reauthorization debate before the 104th Congress. Most of the bills proposing ESA reform included heightened consideration of economic concerns.⁸⁰ Similarly, many of the more prominent proposals focused on efforts to impose lesser

73. *See id.* app. A.

74. DOI, U.S. DEPARTMENT OF INTERIOR ORDER NO. 3173, at 1 (Sept. 29, 1993).

75. *Id.*

76. *See* NBS, NBS FACT SHEET (Oct. 20, 1994); NBS, THE TWENTY MOST FREQUENTLY ASKED QUESTIONS ABOUT NBS, at 3 (Oct. 20, 1994).

77. DOI, DEPARTMENT OF INTERIOR NEWS RELEASE, INT. REG. #404884 (June 30, 1994).

78. 16 U.S.C. §§ 1531-1544 (1988).

79. *Id.* Under the ESA, the Secretary of Interior is primarily responsible for decisions regarding the listing and delisting of all non-marine species that are threatened or endangered, and for ensuring that federal actions are designed to promote the recovery of the listed species. *Id.*

80. *See, e.g.*, H.R. 2043, 103d Cong., 1st Sess. (1993) (Studds-Dingell bill); H.R. 1490, 103d Cong., 1st Sess. (1993) (Tauzin-Fields bill); H.R. 1992, 103d Cong., 1st Sess. (1993) (Smith bill); S. 921, 103d Cong., 1st Sess. (1993) (Baucus bill).

obligations on private property interests,⁸¹ or included a greater emphasis on sociological factors.⁸²

B. Wilderness Designations/Wilderness Study Areas

The 103rd Congress failed to enact a broad variety of bills relating to proposed wilderness designations under the Wilderness Act. Wilderness bills in such western states as Idaho,⁸³ Montana,⁸⁴ and Colorado⁸⁵ all died with the close of the second session. Only after a successful cloture vote against a vigorous filibuster, the California Desert Protection Act of 1994⁸⁶ was enacted on the final day of the 103rd Congress.

The Desert Protection Act designates sixty-nine wilderness areas to be administered by the Bureau of Land Management (BLM); in total, the BLM wilderness areas comprise approximately 3.5 million acres.⁸⁷ Additionally, the Act creates two new national parks,⁸⁸ and a new wilderness preserve,⁸⁹ all of which also contain wilderness designations. The Act further provides for additional potential designations of wilderness areas through the identification of study areas⁹⁰ and potential wilderness areas,⁹¹ and by specifically permitting the acquisition of private land by voluntary agreement.⁹² A variety of historical uses of the wilderness lands to be administered by the BLM will continue to be permissible. For example, the Act authorizes the BLM to continue to manage certain of the lands for livestock grazing⁹³ and fish and wildlife habitat improvement and maintenance.⁹⁴ Similarly, the State's authority to regulate hunting and fishing on the BLM lands is not affected.⁹⁵ The provisions of the Act establishing Death Valley National Park, Joshua Tree National Park, and the Mojave National Preserve also expressly recognize that previously existing private rights, such as utility rights-of-way owned by the Metropolitan Water District⁹⁶ and Southern California Gas Company⁹⁷ will not be impaired.

81. See, e.g., H.R. 1490, 103d Cong., 1st Sess. (1993) (Tauzin-Fields bill); S. 1521, 103d Cong., 1st Sess. (1993) (Shelby bill).

82. See, e.g., H.R. 1992, 103d Cong., 1st Sess. (1993) (Smith bill, which includes as an ESA listing consideration "indirect costs to . . . public service"); H.R. 2207, 103d Cong., 1st Sess. (1993) (Brewster bill, which would require a "hunting impact statement").

83. H.R. 3732, 103d Cong., 2d Sess. (1994).

84. S. 2125, 103d Cong., 2d Sess. (1994); S. 2137, 103d Cong., 2d Sess. (1994).

85. H.R. 4333, 103d Cong., 2d Sess. (1994).

86. Pub. L. No. 103-433, 108 Stat. 4471 (1994).

87. *Id.* § 102, 108 Stat. at 4472-80.

88. *Id.* tit. III, 108 Stat. at 4485-87 (Death Valley National Park); *id.* tit. IV, 108 Stat. at 4487-89 (Joshua Tree National Park).

89. *Id.* tit. V, 108 Stat. at 4489-95 (Mojave National Preserve).

90. Pub. L. No. 103-433, § 105, 108 Stat. 4471, 4483 (1994).

91. *Id.* § 601(b), 108 Stat. at 4496.

92. *Id.* § 516, 108 Stat. at 4494-95.

93. *Id.* § 103(c), 108 Stat. at 4481.

94. *Id.* § 103(f), 108 Stat. at 4482.

95. Pub. L. No. 103-433, § 103(e), 108 Stat. 4471, 4484 (1994).

96. *Id.* § 406, 108 Stat. at 4488-89.

97. *Id.* § 511(b), 108 Stat. at 4493.

In certain respects, however, the precise scope and application of the Act remains unclear. It provides for the reservation of federal water rights "sufficient to fulfill the purposes of this Act," but leaves for subsequent determination the quantification of that reserved right.⁹⁸ While the right to traditional Native American uses of the pertinent lands is generally preserved,⁹⁹ the Act is not specific regarding what those uses are and how they will be accommodated. It requires the Secretary of DOI to file maps and legal descriptions identifying the lands covered, or withdrawn, by the Act, and provides that those maps shall have the same legal effect as if they had been specifically included in the Act, but does not specify how those maps shall be derived except by general reference to other maps that are only generally identified in the Act.¹⁰⁰

Of particular interest to the energy industry is the fact that, for a period of twenty years, the Act withdraws "from all forms of appropriation under the public land laws (including the mining laws and the mineral leasing laws)" the China Lake Naval Weapons Center, which comprises approximately 1.1 million acres of land in Inyo, Kern, and San Bernardino Counties, California.¹⁰¹ As a result, private activities on the China Lake lands, such as geothermal leasing and development and related power activities, may only be permitted by the Secretary of DOI with the concurrence of the Secretary of the Navy.¹⁰² At the expiration of the twenty-year withdrawal period, or upon an earlier relinquishment by the Navy, those contracts then in effect relating to the development of geothermal resources at China Lake will remain valid and subsisting; further, they may be replaced with a standard geothermal lease with the consent of the Secretary of the Navy.¹⁰³ An additional two hundred twenty-seven thousand acres, comprising the Chocolate Mountain Gunnery Range located in Imperial County, California are also withdrawn by the Act for a period of twenty years.¹⁰⁴ Because of the intended use of those lands for naval gunnery and bombing practice, the withdrawal of the Chocolate Mountain area also will include an absolute prohibition on geothermal leasing and development.¹⁰⁵

C. *Environmental Developments in the Courts*

In three recent opinions, the Federal Courts of Appeal for the Ninth and Tenth Circuits addressed federal agencies' authority to regulate private access over federal lands. In *United States v. Jenks*,¹⁰⁶ the Tenth Circuit

98. *Id.* § 706, 108 Stat. at 4498. The priority of the reserved water rights is to be determined by reference to the date of the enactment of the Act. *Id.*

99. *Id.* § 705, 108 Stat. at 4498.

100. Pub. L. No. 103-433, §§ 103(b), 304, 602, 804, 108 Stat. 4471, 4481, 4486, 4496-97, 4502-03 (1994).

101. *Id.* § 803(a), 108 Stat. at 4502.

102. *Id.* § 805, 108 Stat. at 4503-05.

103. *Id.* § 805(g)(7), 108 Stat. at 4505.

104. *Id.* § 803(b), 108 Stat. at 4502.

105. Pub. L. No. 103-433, § 803(b), 108 Stat. 4471, 4502 (1994).

106. 22 F.3d 1513 (10th Cir. 1994).

reaffirmed that the USFS is authorized under the Alaska National Interest Lands Conservation Act of 1980 (ANICLA)¹⁰⁷ to institute a permit process to regulate private access to inholdings.¹⁰⁸ Specifically, *Jenks* considered whether the USFS could enjoin a private landowner from using Forest Service lands to access a private inholding without first obtaining a USFS permit.¹⁰⁹ USFS had discontinued its prior practice of allowing the private landowner free use of access roads through Forest Service lands, and instead required the landowner to apply for a special use permit pursuant to regulations promulgated under ANICLA.¹¹⁰ When the landowner refused to apply for the use permit on the grounds that the proposed permit was inconsistent with his patent, common law, and statutory easement rights, the USFS sought, and obtained, an injunction prohibiting the landowner from using the access roads without proper USFS authorization.¹¹¹ In reviewing the underlying facts and the USFS permitting procedure, the court first determined that the procedures constituted "a reasonable method of implementing ANICLA's statutory mandate to provide access to inholders while assisting the Forest Service in the management and preservation of forest lands," and that the permit procedures were not inconsistent with the landowner's alleged patent and common law rights.¹¹² While the court thus upheld the permitting procedure, it did not conclude that a permit could be required in every instance by the USFS under ANICLA. Rather, the court noted that a permit for road use may not be required under ANICLA when the landowner can demonstrate, in the course of the permitting process, that he holds common law or patent rights of access.¹¹³

In *Adams v. United States*,¹¹⁴ the Ninth Circuit also considered the scope of regulatory authority under ANICLA as it concerns private access rights over public lands, and considered whether the private landowner owned access rights pursuant to Revised Statute 2477 (R.S. 2477).¹¹⁵ Affirming a lower court decision, the court disposed of the landowner's claim to an easement under R.S. 2477. According to the court, the only road on the pertinent lands that could have qualified under R.S. 2477 "is no longer in the same location." The only other existing roads post-dated the time at which the pertinent lands lost their open character and therefore were no longer available for use as a R.S. 2477 access route.¹¹⁶ In contrast to *Jenks*, however, the *Adams* court found that ANICLA provided the

107. 16 U.S.C. §§ 3101-3233 (1988). Despite its name, ANICLA applies to all national Forest System lands, and not only those lands located in Alaska. See *Montana Wilderness Ass'n v. United States Forest Serv.*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

108. 22 F.3d at 1518.

109. *Id.* at 1516-17.

110. *Id.*

111. *Id.* at 1518-19.

112. *Id.* at 1518.

113. 22 F.3d at 1519.

114. 3 F.3d 1254 (9th Cir. 1993).

115. *Id.* at 1255. R.S. 2477 was codified at 43 U.S.C. § 932 (1970), and was repealed by the Federal Land Policy Management Act, 43 U.S.C. §§ 1701, 1769(a) (1988).

116. 3 F.3d at 1258.

landowner with a statutory right to an access route over public lands to his inholding.¹¹⁷ In this regard, the court further held that under common law principles, as well as under ANICLA and the Federal Land Policy and Management Act (FLPMA),¹¹⁸ the USFS maintained the authority to regulate and manage the landowner's access rights.¹¹⁹ The court referenced both a prior federal court decision that even common law and patent rights of access over public lands could be regulated by the federal government,¹²⁰ and the underlying federal district court decision in *Jenks* (which was later partially reversed by the Tenth Circuit) in which the district court also concluded that the federal government can regulate "preexisting easements" over federal lands pursuant to ANICLA and the FLPMA.¹²¹

A second decision of the Ninth Circuit issued in November of 1993 also considered the issue of when R.S. 2477 access rights come into existence and whether they, and common law easement rights, may be regulated by the federal government in *Shultz v. Department of Army*.¹²² The plaintiff in *Shultz* claimed common law and R.S. 2477 access rights over lands located in Alaska that eventually were both acquired from private individuals, and withdrawn from public use, by the Department of the Army.¹²³ Because of the harsh Alaskan environment, the landowner never established a particular route over the access lands and, instead, shifted the route as required by the exigencies of weather, means of travel, and geographic conditions.¹²⁴ As a consequence, and as was true in *Adams*, the landowner could not establish the present existence of a specific access route that had been in use prior to the time the land was withdrawn by the Army.¹²⁵ Basing its decision largely on Alaskan common law and "the fact that conditions in Alaska present unique questions," the court held that the showing of a definite route is not required in order to establish a public right-of-way under either Alaskan common law or R.S. 2477; only the termini of the right-of-way must be fixed.¹²⁶ In further explaining the nature of the route that would be required to establish a R.S. 2477 right-of-way, the court observed that an "otherwise qualifying trail" is all that might be required, and that "[a]s long as it is clear that [the private landowner] traveled overland, how he did it is immaterial."¹²⁷

As a result of the recent decision by the Court of Appeals for the D.C. Circuit in *Sweet Home Chapter v. Babbit*,¹²⁸ there is a split in authority

117. *Id.* at 1259.

118. 43 U.S.C. §§ 1701-1784 (1988).

119. 3 F.3d at 1260.

120. *Id.* at 1259 (citing *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979)) ("[R]ights of access cannot be taken under the [FLPMA] . . .").

121. *Id.* at 1259.

122. 10 F.3d 649 (9th Cir. 1993).

123. *Id.* at 653.

124. *Id.* at 654-56.

125. *Id.*

126. 10 F.3d at 655.

127. *Id.* at 657, 658 n.11.

128. 17 F.3d 1463 (D.C. Cir. 1994).

regarding whether the Endangered Species Act (ESA) term “harm,” which appears in the ESA section regarding illegal takings of endangered species by private parties,¹²⁹ encompasses significant habitat modifications that result in an injury to an endangered species. In 1988 the Ninth Circuit addressed the same issue when it upheld a Fish and Wildlife Service (FWS) regulation that defined “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹³⁰ The Ninth Circuit based its decision on the “plain language” of the ESA and the general purpose of the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”¹³¹ In contrast, in a split decision on rehearing that reversed the court’s original opinion, the *Sweet Home* court held that the ESA term “harm” should be interpreted narrowly to mean only “the perpetrator’s direct application of force against the animal.” Based on that narrow interpretation, it held the FWS exceeded its delegated authority when it expanded the meaning of the statute.¹³² In arriving at this decision, the court relied heavily on legislative history that, in the court’s opinion, indicated that Congress ultimately decided that private parties would not be burdened with the statutory duty to protect endangered species habitat located on private property.¹³³

In a vigorous dissent to the *Sweet Home* decision on rehearing, Chief Judge Mikva argued that under a traditional two-step *Chevron*¹³⁴ analysis the interpretation of “harm” by FWS was supported both by the underlying legislative history of the ESA and by amendments passed subsequent to the promulgation of the FWS regulation.¹³⁵

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129. 16 U.S.C. §§ 1531, 1538(a)(1)(B) (1988).

130. *Palila v. Hawaii Dep’t of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988) (citation omitted).

131. *Id.* at 1108 (citation omitted).

132. 17 F.3d at 1464.

133. *Id.* at 1465-70.

134. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). Under *Chevron*, a judicial review of an agency’s construction of a statute should be limited to two questions: (1) whether, in the event Congressional intent is clear, the agency gave effect to that intent; and, (2) whether, in the event the statute is ambiguous with regard to the pertinent issue, the agency’s interpretation is based on a permissible construction of the statute. *Id.* at 842-43.

135. 17 F.3d at 1476-77.