In the
# Supreme Court of the United States

October Term, 1968

No. 35,
Original

UNITED STATES OF AMERICA,
PLAINTIFF,

*v.*

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

## MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

Robert H. Quinn
*Attorney General*
Henry Herrmann
*Special Assistant*
*Attorney General*
Thomas J. Crowley
*Assistant Attorney General*

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OCTOBER TERM, 1968

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ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF,

*v.*

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

## MOTION FOR PRELIMINARY INJUNCTION FOR THE COMMONWEALTH OF MASSACHUSETTS

Defendant, Commonwealth of Massachusetts, moves the Court for a preliminary injunction against the Plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action:

1. Enjoining them from conducting any explorations, by whatever method, for the location or probable location of oil, gas and other mineral resources within that area of the Atlantic Continental Shelf which is claimed by Mas-

sachusetts and which is in issue in the case at bar, to wit, an ~~area: landed Starting it to at a point of the three miles~~ area: ~~landed.~~ Starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the limit of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the limit of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N35°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts.

2. Enjoining them from licensing, permitting, or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

3. Enjoining and ordering them to forthwith suspend, or amend to conform to the provisions of prayer one above, the exploration permit granted to Digicon, Inc., dated May 4, 1972, and designated OCS Permit E2-72, pursuant to the right to suspend or amend specified therein; and to also suspend any further such exploration permits which encompass the activities delineated in prayer one above, which may pos-

sibly exist, and of which the Defendant, Commonwealth of Massachusetts has no knowledge.

4. Enjoining and ordering them to maintain and keep in strict confidentiality any data previously acquired by the Plaintiff by virtue of the activities delineated in prayers one and two above;

on the grounds that

1. Unless enjoined by this Court the Plaintiff, United States of America will comit the acts referred to in prayers numbered one and two above and will refuse to perform the acts referred to in prayers numbered three and four above.

2. Such action and non-feasance by the Plaintiff will result in serious and irreparable harm to the Defendant as more particularly appears in the Affidavits attached hereto;

3. The issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the Plaintiff, but will prevent serious and irreparable harm to the Defendant, Commonwealth of Massahusetts.

And the Defendant, Commonwealth of Massachusetts further moves that in view of the seriousness and urgency of the subject matter of this Motion, the Plaintiff, United States of America, be required to respond hereto within such period of time as the Court may deem meet and proper to enable the Court to consider and rule on this Motion within the present Term of Court.

ROBERT H. QUINN
*Attorney General*
Commonwealth of Massachusetts

June, 1972

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF,

*v.*

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

## DRAFT

### Preliminary Injunction

This cause came on to be heard on defendant Commonwealth of Massachusetts' motion for a preliminary injunction and the Court having considered the motion, the affidavits in support of the motion and the affidavits in opposition thereto, and having considered the pleadings filed by the Plaintiff United States of America in opposition, the Court makes the following

### Findings of Fact

1. The plaintiff United States of America, during the pendency of this action and before same can be heard on its merits

a. Proposes to conduct explorations, through the Geological Survey, for the location or probable location of oil and gas deposists in that portion of the North American Atlantic continental shelf with respect to which both the plaintiff and the defendant, Commonwealth of Massachusetts, claim the exclusive right of exploration and exploitation of the mineral resources of the subsoil; and

b. Has authorized a private exploration company, to wit, Digicon, Inc. of Houston, Texas, to conduct the same type of explorations in the same geographical area referred to in 1(a) above, and said explorations are presently continuing; and

c. Proposes to issue further permits in the future of the general type referred to in 1(b) above.

2. Defendant Commonwealth of Massachusetts contends that the plaintiff's conduct of such explorations as referred to in 1(a) above, and the plaintiff's issuance of permits to private persons as referred to in 1(b) and 1(c) above would be unlawful and contrary to the rights of exclusive exploration asserted by Defendant Commonwealth of Massachusetts in its answer, and further, that the alleged statutory authority which the plaintiff asserts as justification for the acts complained of by the Defendant Commonwealth of Massachusetts in its Motion for a Preliminary Injunction is directly in issue in this action.

3. The defendant Commonwealth of Massachusetts further contends that the plaintiff's acts referred to in (1) above would cause it to sustain irreparable injury, both in serious damages, and in an amount difficult or impossible to determine, to its exclusive right of exploration, and in usurping the prerogative of the Massachusetts Legislature to proscribe all further explorations in the relevant area, and the Defendant Commonwealth of Massachusetts further contends that sale, publication, or other disposition of

the exploration data already accumulated by the plaintiff by means of the acts referred to in 1(a) and 1(b) above will significantly increase the injury caused to Massachusetts, and the defendant, Commonwealth of Massachusetts, further contends that it is without any adequate remedy at law.

4. Defendant Commonwealth of Massachusetts further contends that the issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the plaintiff.

5. The defendant Commonwealth of Massachusetts further contends that if the Court rules affirmatively on its motion, it should be exempted from the requirement of providing a bond.

6. The granting of a Preliminary Injunction is necessary to preserve the status quo until the merits of the case can be decided.

## Conclusions of Law

1. Defendant Commonwealth of Massachusetts is entitled to a Preliminary Injunction on the terms of, and with the effect of, the ORDER set forth below.

And it is therefore

ORDERED that the plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action be

1. Enjoined from conducting any explorations, by whatever method for the location or probable location of oil, gas and other mineral resources within that area of the Atlantic continental shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, an area: Starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42° 58′30″N., and longitude 70°47′00″W., and continuing along

a line on a bearing of N 86.07°30′ E. to a point of intersection with the limit of the North American Atlantic continental shelf, thence in a general southwesterly direction following the limit of the continental shelf to a point having the coordinate latitude 40°02′00″ N., and longitude 70°34′ 00″ E., thence continuing landward in a general northwesterly direction on a bearing of N 35° W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′ N., and longitude 71°31′ E., thence northeasterly on a bearing N 34° E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′ N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coast line of Massachusetts.

2. Enjoined from licensing, permitting, or otherwise authorizing any non-federal government entity, and any legal and natural person from performing the acts delineated in paragraph one above;

> Provided, however, that nothing contained in the paragraphs one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

3. Enjoined and ordered to forthwith suspend, or amend to conform to the provisions of ~~prayer~~ paragraph one above, the exploration permit granted to Digicon, Inc., dated May 4, 1972, and designated OCS Permit E2-72, pursuant to the right to suspend or amend specified therein; and to also suspend any further such exploration permits which encompass the activities delineated in paragraph one above, which may possibly exist, and of which the Defendant, Commonwealth of Massachusetts has no knowledge.

4. Enjoined and ordered to maintain and keep in strict confidentiality any data previously acquired by the plaintiff by virtue of the activities delineated in paragraphs one and two above.

AFFIDAVIT

My name is Henry Herrmann.

I am a Special Assistant Attorney General of Massachusetts with an office at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts. I am a member of the Massachusetts and the Federal Bar.

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States, by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil or other mineral deposits in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.*

On November 3, 1971, the Attorney General of the Commonwealth of Massachusetts became aware of press reports that the United States Department of the Interior intended to issue off-shore exploration permits for that area off Massachusetts which is in dispute in this lawsuit. On that day, at the request of the Attorney General, I had telephone conversations with both the Honorable Erwin N. Griswold, Solicitor General of the United States, and the Honorable William T. Pecora, Undersecretary of the Interior. I communicated the concern of the Attorney General that the Federal Government would disrupt the status quo during the pendency of this lawsuit and stressed that Massachusetts could not passively acquiesce in any such action, but, rather, would be forced to move this Court for a preliminary injunction. After considerable discussion, I was assured that the press reports were completely erroneous and that the reported federal action would not take place before a final decision in this lawsuit. I was given specific assurances by Dr. Pecora that the *only* action contemplated during the pendency of this lawsuit was an environmental impact study, pursuant to the provisions of the National Environmental Policy Act of 1969, with re-

gard to future continental shelf oil exploration and exploitation. I was told that Dr. Pecora's department was initially contemplating only a compilation and evaluation of scientific and other data presently in its possession; his estimate was that this would take a few months and that a preliminary report would be made public upon its completion. Dr. Pecora told me that, at that time, the Department of the Interior might decide to hold public hearings or elicit public testimony on the contents of the preliminary report. I would like to stress that no mention whatsoever was made by Dr. Pecora of any intent of his department to conduct explorations for oil, or to license private persons to do so, in the area under dispute. I informed Dr. Pecora that Massachusetts would consider even public hearings as an improper assertion of federal jurisdiction during the pendency of this lawsuit.

In my letter to Dr. Pecora dated November 8, 1971, I confirmed the substance of our telephone conversation. I received an answer dated November 23, 1971 from David E. Lindgren, Esq., Associate Solicitor, Department of the Interior. Mr. Lindgren informed me that the day after the aforementioned telephone conversation, the Secretary of the Interior issued a press release which clarified what Mr. Lindgren considered the erroneous impressions resulting from news media reports. In the pertinent part of his letter, Mr. Lindgren stated:

> In that press release, the Secretary noted that the issue of sea bed jurisdiction, presently in litigation in *United States* v. *Maine,* No. 35 Original, is a paramount consideration and, consequently, "no leasing procedures — no action toward such procedures, in fact — can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision". It appears that this

statement serves to meet the concerns you expressed in your November 8 letter.

Please be assured that the Department of the Interior will continue to conduct its activities and responsibilities in these offshore areas in full recognition of the rights, interests and claims of the Commonwealth of Massachusetts, and all the other East Coast States, in the pending Supreme Court action.

Dr. Pecora's verbal assurances and the content of Mr. Lindgren's letter dispelled the urgency of the situation as far as the Attorney General of Massachusetts was concerned.

At a meeting on December 14, 1971 in Philadelphia, attended by representatives of the United States and most of the defendant States, including Massachusetts, the matter of federal action *pendente lite* was discussed. In correspondence to confirm the gist of these discussions, the Acting Solicitor of the Department of the Interior sent the following "clarifications" to the Attorney General of Massachusetts:

You have stated that we have agreed not to take any action towards "leasing procedures" nor "hold any hearings with respect to proposed leasehold areas" unless agreements or arrangements were entered into with the adjacent State. The definition of "leasing procedures" is crucial. We believe that it was made clear at the meeting that the "leasing procedures" referred to were "formal pre-leasing procedures", that is, those involving the published call for nominations and subsequent procedures leading to the issuance of Outer Continental Shelf (OCS) leases as provided for in the applicable regulations. Thus, the United States reserves the right to continue information-gathering activities and hold informal hearings for the purposes of obtaining information relevant to possible mineral development of the OCS off the East Coast.

It was my understanding that taken in its context in the above quoted paragraph, "information-gathering activities" could not conceivably refer to physical exploration.

I can therefore not overstate my surprise and concern engendered by an article entitled "East Coast Drilling Speeded" which appeared in the Boston Evening Globe on February 8, 1972. The substance of that article, which I believe to be accurate after having confirmed it with Mr. John Fuerbinger, the reporter for the Boston Evening Globe who had attended a Department of the Interior press conference in Washington, was that stratigraphic drilling for oil in the Georges Bank area would be undertaken by the Interior Department this summer. The purpose of the drilling was said to be "to pinpoint the richest areas for petroleum production if the government should decide to lease them". Mr. Henry L. Berryll, Chief of Marine Research, Geological Survey, was quoted as saying "We're moving as fast as we can".

The Attorney General of Massachusetts again considered seeking a preliminary injunction in this Court. However, subsequent reports reaching this Department indicated that the aforementioned drilling plans had been suspended for the time being for "scientific reasons" and lack of funds. Subsequently, by means of an article entitled "U. S. and Industry Go Fishing for Oil" by Mr. Tom Incantalupo appearing in *Newsday* on May 19, 1972, the Department of the Attorney General became aware of yet another drastic change in the situation. I have confirmed the substance of that article with Mr. Incantalupo, and believe it to be true. It stated that the vessel *Gulf Seal* sailed out of New Bedford, Massachusetts, on May 18, 1972 in order to conduct seismic explorations for oil in the Georges Bank area (which is claimed by Massachusetts in this lawsuit). The *Gulf Seal* is operated by Digicon, Inc., a research firm in Houston, Texas. Digicon was retained for a fee of $750,-

000.00 by a consortium of thirty oil companies headed by Getty Oil. In addition, the article stated that the United States Geological Survey intended to conduct seismic surveys for mineral deposits in an adjacent area, which is also claimed by Massachusetts.

Acting on information received from Mr. Incantalupo, I confirmed that Digicon was operating under a permit issued by the United States Geological Survey.

Unfortunately, the Department of the Massachusetts Attorney General has had to rely almost entirely on press reports as to the continually changing plans of the Federal Government in this area. Notwithstanding our repeated requests that this Department be kept informed of the Interior Department's plans in this disputed area, specifically as to activities which would relate to the issues in this lawsuit, our requests for timely official information have been consistently ignored.

After first having obtained clearance from the Associate Solicitor of the Interior Department, I called the responsible officials of the Geological Survey on May 25 and 26, 1972, and urgently requested a copy of the Digicon permit. I received one a week later.

On the basis of the information contained in the Digicon permit (the text of which I have annexed hereto as Exhibit 1) and on the basis of my information and belief as to the proposed explorations by the Geological Survey this summer in an area of the continental shelf claimed by Massachusetts, the Attorney General has made a determination that he is obliged to move for a preliminary injunction in this Court in order to protect the interests of Massachusetts *pendente lite.*

For the reasons stated in the affidavits submitted by the Honorable David M. Bartley, Speaker of the Massachusetts House of Representatives, and Mr. Charles J. Strumski, President of the Massachusetts Wildlife Federation, I be-

lieve that serious and irreparable harm will be caused to Massachusetts if the above delineated actions by the United States are not enjoined during the pendency of this lawsuit. I believe, on the legal grounds set forth in Massachusetts' brief in support of this Motion, that serious financial damages, in an amount extremely difficult to ascertain, would be caused by plaintiff's interference with Massachusetts' exclusive right to explore for continental shelf resources in the area which it claims. Furthermore, the action by the plaintiffs will, with finality, usurp the decision-making power of our legislature. I believe that Massachusetts has no remedy at law for the above injury, which it will suffer unless the status quo *pendente lite* is preserved. I further believe that the granting of such an injunction could not cause any undue damage or inconvenience to the plaintiff.

For the convenience of the Court, I am annexing as Exhibit 2 to this Affidavit a geographic sketch prepared by the Geodetic Division, Massachusetts Department of Public Works, at the request of the Department of the Attorney General. This sketch shows the offshore areas referred to in our Motion and in the Affidavit by Sidney Smookler, Esquire, Assistant Attorney General; it shows the continental shelf area claimed by Massachusetts, the area subject to the Digicon permit, and the location of Georges Bank. This sketch is included for convenience of reference and is not intended as an accurate maritime map showing the areas under discussion.

(s) Henry Herrmann
*Special Assistant*
*Attorney General*
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Then before me personally appeared the above named Henry Herrmann and made oath that the above statement is true to the best of his knowledge and belief.

(s) DAVID J. PAYNE
Notary Public

My Commission Expires:
January 14, 1977

EXHIBIT 1

UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON, D.C. 20242

May 4, 1972

Mr. Richard C. Finn
Digicon Incorporated
3701 Kirby Drive — Suite 112
Houston, Texas 77006

Re: OCS Permit E 2-72

Dear Mr. Finn:

Your letter of April 20 requests authorization for Digicon Inc. to conduct a seismic survey in the Georges Bank area in the Atlantic Ocean utilizing pneumatic devices (air guns) for the energy source. The approximate location of an area within which you propose to conduct the operations is shown on the enclosed plat (Enclosure I).

Approval is hereby granted for Digicon Inc. to conduct the proposed operations during the period from May 15 to October 15, 1972, along the 700-Series lines shown on the plat (dated 4-10-72) received with your letter insofar as they lie within the "Outer Continental Shelf" (as defined in Section 2 of the Outer Continental Shelf Lands Act of August 7, 1953), subject to the following conditions:

1. That you send notices or reports to this office at the address shown on the attached sheet (Enclosure II), with copies to the Commander, Eastern Sea Frontier and to appropriate offices of the U.S. Coast Guard and the National Marine Fisheries Service, also shown on Enclosure II, as follows:

(a) To be mailed a few days prior to com-

mencement of operations: Date you expect to commence operations.

(b) To be mailed at the end of successive periods of operations not exceeding two weeks each: Report stating the approximate number of days operations were conducted and the approximate number of miles of line run subsequent to each preceding report, and your estimate of the time which will be required to complete the survey.

(c) To be mailed upon completion of operations: Report stating the date on which the operations were completed.

(d) All such notices or reports must contain a reference to "U.S. Geological Survey OCS Permit E 2-72".

2. That upon completion or suspension of the operations, you furnish this office with two copies of a large scale plat showing the lines or portions of lines completed.

3. That you report to this office immediately any difficulty encountered with other users of the sea.

4. That, when requested by this office, offshore quarters and offshore transportation be provided for a representative of the Geological Survey or for such other Federal personnel designated by me to permit inspection or observation of the operations at any time.

5. That this permit may be amended, suspended, or revoked at any time should circumstances develop which would warrant such action.

6. That no operations shall be conducted under this permit after October 15, 1972, unless an extension of time is granted.

7. That as to any area covered by this permit in which the water depth exceeds 200 meters, the fol-

lowing shall be applicable: In accordance with the policy statement of the President dated May 23, 1970, exploration permits issued pursuant to Section 11 of the Outer Continental Shelf Lands Act of 1953 pertaining to areas of the seabed beyond the depth of 200 meters are subject to the provisions of any future treaty, regarding the exploration and exploitation of the natural resources of these areas, to which the United States is a party. Accordingly, this permit is subject to the policy conditions incorporated in that statement.

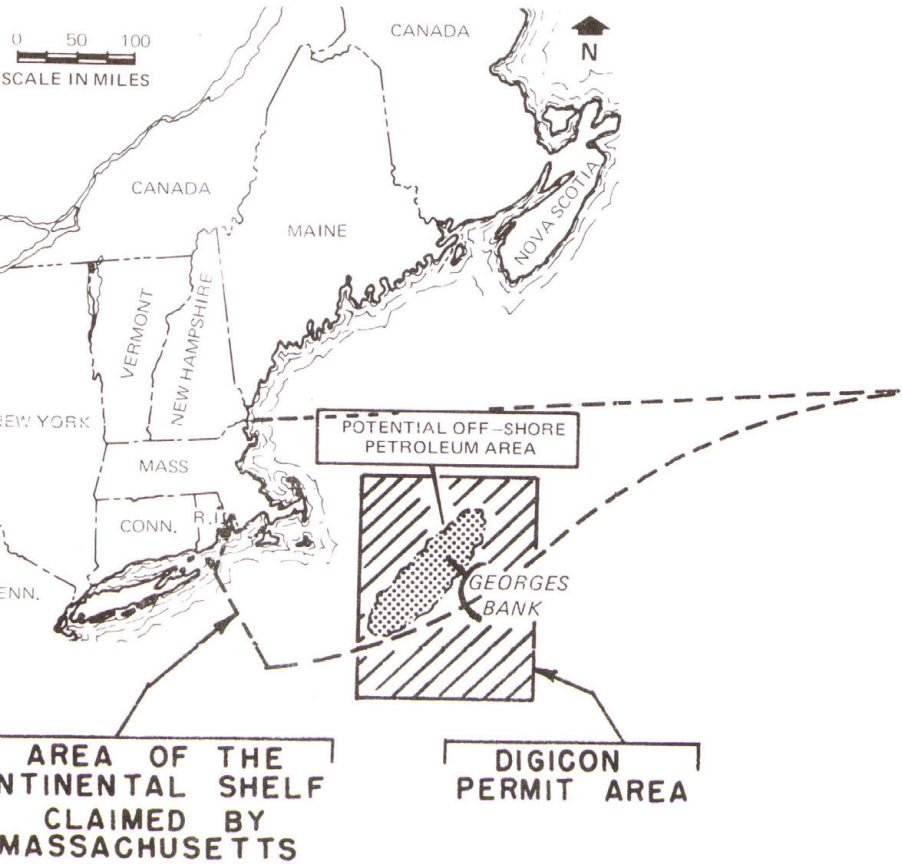
Copies of this letter and your letter of April 20 are being furnished to the parties shown on Enclosure II.

Sincerely yours,

(s) H. A. DuPont
*Regional Oil and*
*Gas Supervisor*
*Eastern Region*

Enclosures

EXHIBIT NO. 2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SCALE IN MILES
CANADA
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CANADA
MAINE
NOVA SCOTIA
VERMONT
NEW HAMPSHIRE
EW YORK
MASS
CONN.
R.I.
ENN.
POTENTIAL OFF-SHORE PETROLEUM AREA
GEORGES BANK
AREA OF THE NTINENTAL SHELF CLAIMED BY MASSACHUSETTS
DIGICON PERMIT AREA

# AFFIDAVIT

My name is Sidney Smookler.

I am an Assistant Attorney General of the Commonwealth of Massachusetts. I am a member of the Massachusetts and the Federal Bar, and am also a Registered Professional Engineer and a Registered Massachusetts Land Court Examiner.

My office is at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts.

I am submitting this affidavit in support of the Motion for a preliminary injunction being filed by Massachusetts in the case of *United States* v. *The State of Maine, et al, No. 35 Original.*

I have read the aforementioned Motion for a Preliminary Injunction. I prepared the Description in the Motion of that area of the North American Atlantic continental shelf which is claimed by Massachusetts and is in issue in the case at bar, according to the best of my professional experience, and judgment. I believe the aforesaid description to be the most accurate and proper one that I could construct on the basis of the available applicable legal data and geographical methodology. I was assisted in the task by experts from the Geodetic Division, Massachusetts Department of Public Works.

This description is the best possible delimitation of this area under the circumstances and I do not intend to represent to the Court that the legal principles and geographical methods employed are necessarily conclusive.

I have in my possession a photostatic copy of a permit issued by the United States Geological Survey to Digicon, Inc. of Houston, Texas. This permit authorizes Digicon to conduct a "seismic survey" in the "Georges Bank area" in the Atlantic Ocean. The off-shore area to which this exploration permit applies is shown on a roughly drawn

plat marked as permit enclosure I, and encompasses a rectangle whose perimeter is located approximately between latitude 40° N to 42° 13′ N and longitude 69° E to 66° E.

I have made a professional determination that a substantial portion of the Digicon permit area is within the area encompassed by the description in the Motion. Furthermore, the proposed Digicon explorations in the Georges Bank area would place them well within a geographical area which would certainly appertain to Massachusetts if the latter prevailed in this case, and which would not be affected by issues of the delimitation of off-shore lateral boundaries with Massachusetts' neighboring states.

(s) SIDNEY SMOOKLER
*Assistant Attorney General*
Commonwealth of Massachusetts

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 7th day of June, 1972 before me personally appeared Sidney Smookler to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) DAVID J. PAYNE
Notary Public

My Commission expires:
January 14, 1977

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## AFFIDAVIT

My name is David M. Bartley.

I am the Speaker of the Massachusetts House of Representatives, and have my office at the State House, Boston, Massachusetts.

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.*

In the event that Massachusetts were to prevail in this lawsuit, it would clearly be within the prerogative of the Massachusetts Legislature to make the fundamental decision whether it would be in the best interests of the citizens of this Commonwealth to permit any exploration for, and any exploitation of, the oil and gas deposits which may be present in the area of the Continental Shelf to which Massachusetts makes claim.

In my opinion, the conduct of explorations in this area by the Federal Government and or its licensees, which will accumulate data not presently available as to the location or probable location of oil and gas deposits in this disputed area, would usurp the decision of our legislature as to whether further exploration should be undertaken at all. It is my considered opinion as the Speaker of the Massachusetts House of Representatives, therefore, that further exploration by the Federal Government, or its licensees, before a final decision in this lawsuit, would create a serious and irreparable harm to the interest of this Commonwealth. Our legislature will have an important and complex decision to make on this conservation issue if the Commonwealth prevails in this action. It is my belief that the

legislative decision-making process would be disrupted by the premature accumulation of this oil and gas exploration data.

Furthermore, I have been advised by The Honorable Robert H. Quinn, Attorney General of Massachusetts, that the exclusive right to explore for oil and gas is an important property right. That right is claimed by Massachusetts with respect to the off-shore area in controversy. The usurpation by the Federal Government, during the pendency of this lawsuit, of this exclusive property right claimed by Massachusetts, would therefore cause substantial financial damage to the interests of the Commonwealth, in an amount very difficult to determine now or after the outcome of this lawsuit. Disruption by the Federal Government of the status quo would, therefore, in the event Massachusetts ultimately prevails, also create an irreparable harm to the property interests of this Commonwealth as well as cause an irreparable harm to the orderly conduct of the legislative decision-making process and its implementation, as I have indicated above.

(s) David M. Bartley
Speaker, House of Representatives
Commonwealth of Massachusetts

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Commonwealth of Massachusetts

Suffolk, ss:

On this fifth day of June, 1972 before me personally appeared David M. Bartley to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) Albert Peter O'Neil
*Notary Public*

My Commission Expires:
May 3, 1974

# AFFIDAVIT

My name is Charles J. Strumski.

I am the President of The Massachusetts Wildlife Federation, with headquarters at 201 Prospect Street, Norwood, Massachusetts. This organization, which has as its primary purpose the conservation of the wildlife and natural resources of the Commonwealth of Massachusetts, is affiliated with the National Wildlife Federation.

In furtherance of our purpose, we have consistently opposed exploration for oil in the Continental Shelf off our coast, and the granting of exploitation leases for the off-shore area.

I am submitting this affidavit in support of the Motion being submitted to the Supreme Court of the United States by the Attorney General of Massachusetts, which seeks to enjoin any exploration for oil in the disputed area of the Continental Shelf off the coast of Massachusetts, by any federal agency or private party, until such time as a decision is rendered in the case of *United States* v. *The State of Maine, et al.* It is my considered opinion, based upon my experience in formulating conservation policy and furthering its implementation in Massachusetts, that in the event the Commonwealth of Massachusetts were to prevail in the aforementioned litigation, a prior increase of data available as to the amount, nature, and precise location of the off-shore natural resources in question, without the prior consent of the Massachusetts Legislature, would cause a serious and irreparable injury to the interests of the Commonwealth.

I am basing my opinion on the fact that, in the event that Massachusetts were to prevail in this lawsuit, it would then be the prerogative of the Massachusetts Legislature to make the determination whether there should be any drilling for oil on the continental shelf controlled by Massachusetts, or whether there should be a moratorium or

permanent ban on such activities. In the event that Massachusetts were to determine that, under the present state of technology, the exploration for, and exploitation of, such submarine oil deposits (if any), would pose too grave a threat to the marine life and overall coastal environment of our state, the consistent and effective implementation of such a legislative purpose would be hampered by the unnecessary prior accumulation of off-shore oil exploration data. If a conservationist approach is taken by our Commonwealth to this complex problem, it would definitely be desirable to minimize the available information on the precise location of any off-shore oil. The availability of such data, prior to a legislative decision, would undoubtedly generate substantial social, economic and political pressures to immediately exploit the resources whose location is known, rather than to explore for alternate sources elsewhere in our nation, in such areas where the proper political decision-making body has determined that such exploration should occur.

(s) CHARLES J. STRUMSKI
President, Massachusetts
Wildlife Federation

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS:

On this second day of June, 1972 before me personally appeared Charles J. Strumski to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) DAVID J. PAYNE
*Notary*

My Commission Expires:
Jan. 14, 1977

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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ORIGINAL

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STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA AND FLORIDA.

## Statement

This action was brought by the Plaintiff United States of America against the thirteen Atlantic coastal states, including the Defendant Commonwealth of Massachusetts, in order to establish, as against the defendants, that the United States has the exclusive right to explore and exploit the natural resources of the North American Atlantic continental shelf more than three miles seaward from the coast line. The complaint generally alleged that the United States had these rights prior to the enactment, in 1953,

of the Submerged Lands Act. [67 Stat. 29, 43 U.S.C. 1301-1315.]

The complaint further alleged that this Act gave the defendants the ownership of the seabed within their boundaries to a maximum of three miles seaward from the low water mark, but that the United States, by virtue of the Submerged Lands Act retained jurisdiction over the remainder of the continental shelf. Also alleged in the complaint is that the defendants claim rights to this remainder of the continental shelf which are adverse to the plaintiff. The United States prayed for a declaration of its exclusive rights to the area in question as described above.

The Defendant Commonwealth of Massachusetts specifically denied the allegations in the plaintiff's complaint, and in addition asserted in an affirmative defense that the Commonwealth of Massachusetts, as the successor to certain royal charters, is entitled "to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the plaintiff;" Massachusetts prayed for a declaration of its rights as against the plaintiff to exclusive dominion and control to the seabed and subsoil in question. All defendants except Florida submitted answers generally paralleling Massachusetts' historical claim.

In January of 1970 the plaintiff moved the Court for judgment on the ground that allegedly no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. The defendants in January of 1970 moved that the Court refer the case to a master. By its order of June 8, 1970, the Court granted the latter motion and referred the case to a special master.

The case is presently being heard before the Special Master, the Honorable Albert Branson Maris, Senior United

States Circuit Judge, pursuant to his procedural order of August 27, 1971.

As stated on the attached affidavits, the Defendant Commonwealth of Massachusetts is concerned that the acts of the plaintiff will unilaterally disrupt the status quo, to the serious and irremediable harm of Massachusetts before this case is decided on its merits; for this reason, Massachusetts makes its motion for a preliminary injunction.

## Questions Presented

1. Is the right of the Plaintiff United States of America to conduct or license explorations for mineral resources on the outer continental shelf in issue in the case at bar?
2. Will such explorations *pendente lite* disrupt the status quo to the irremediable harm of Massachusetts?
3. Is Massachusetts entitled to a preliminary injunction to preserve the status quo under the factual situation it has alleged?

## Statutes Involved

1. The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343, provides in pertinent part:

SEC. 2.

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation. [67 Stat. 462, 43 U.S.C. 1331.]

SEC. 3.

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. [67 Stat. 462, 43 U.S.C. 1332.]

* * * *

SEC. 5.

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. [67 Stat. 464, 43 U.S.C. 1334(a)(1).]

* * * *

SEC. 11.

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [67 Stat. 469, 43 U.S.C. 1340.]

2. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315, provides in pertinent part:

SEC. 2.

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or

the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means 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;

* * * *

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

* * * *

(g) The term "State" means any State of the Union;

[67 Stat. 29, 43 U.S.C. 1301.]

* * * *

SEC. 9.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

[67 Stat. 32, 43 U.S.C. 1302.]

SEC. 3.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the

lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; . . . .

[67 Stat. 30, 43 U.S.C. 1311(a)-(b)(1).]

* * * *

SEC. 4.

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that

line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

[67 Stat. 31, 43 U.S.C. 1312.]

3. *Geological Survey.*

Section 31 of Title 43, United States Codes, provides in pertinent part:

(a) The Director of the Geological Survey, which office is established, under the Interior Department, shall be appointed by the President by and with the advice and consent of the Senate. This officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain. The Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations.

(b) The authority of the Secretary of the Interior, exercised through the Geological Survey of the Department of the Interior, to examine the geological structure, mineral resources, and products of the national domain, is expanded to authorize such examinations outside the national domain where determined by the Secretary to be in the national interest.

[20 Stat. 394, *as amended* by
76 Stat. 427, 43 U.S.C. 31(a)-(b).]

## Summary of Argument

Massachusetts alleges that during the pendency of this action the Plaintiff United States of America has, through the United States Geological Survey, licensed a private person, Digicon Inc., to conduct seismic explorations for oil deposits in that area of the North American Atlantic continental shelf which would be subject to the exclusive exploration right of Massachusetts if it prevailed in the case at bar; in addition, the Geological Survey plans to conduct similar explorations of its own in this area. Massachusetts claims that the federal statutes under which plaintiff asserts it's purported exploratory rights are invalid, and are squarely in issue in this case; therefore, the plaintiff is not entitled to assert its claimed exploration rights *pendente lite.*

The exclusive right to explore for oil is an important property right; thus, the conduct of the plaintiff and its licensee threatens to disrupt the status quo by damaging this right claimed by Massachusetts, and, further, by wrongfully pre-empting the decision whether to permanently prohibit exploration on environmental policy grounds, a decision which, if Massachusetts prevails, its legislature is entitled to make. The damage threatened to Massachusetts is serious and irremediable; in contrast, a preliminary injunction would not create an undue hardship to the plaintiff. Under the applicable doctrines of equity, Massachusetts is entitled to a preliminary injunction which will preserve the status quo (the present aggregate of oil exploration data for this area) pending a final decision by this Court.

## Argument

I. THE UNITED STATES GEOLOGICAL SURVEY PLANS TO CONDUCT, *Pendente lite,* EXPLORATIONS OF THAT PORTION OF THE OUTER CONTINENTAL SHELF SUBJECT TO THE CLAIMS OF MASSACHUSETTS, AND HAS APPROVED, *Pendente lite,* SUCH EXPLORATIONS BY PRIVATE PERSONS IN THAT AREA; IN SO DOING, THE GEOLOGICAL SURVEY IS ACTING SOLELY IN RELIANCE ON PURPORTED FEDERAL STATUTORY AUTHORITY WHICH IS UNDER CHALLENGE IN THE CASE AT BAR.

A. *The Alleged Statutory Authority For The Activity By The Federal Government Which Massachusetts Seeks To Enjoin Is The Outer Continental Shelf Lands Act, Sec. 11, 67 Stat. 462, 43 U.S.C. 1340.*

The basis for the alleged authority of the United States Geological Survey to conduct such explorations itself and to approve of their being conducted by private persons, is the Outer Continental Shelf Lands Act, sec. 11, 67 Stat. 462, 43 U.S.C. 1340. This statute states:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. 1340.]

Before discussing the relevance of this statute, we would like to make some preliminary comments on its interpretation and present implementation. The words "any agency of the United States" could not, we believe, be interpreted as an omnibus enabling act for any federal agency to con-

duct such explorations even if the latter had no possible relevance to its general purpose or function. Rather, these words would seem to refer to any federal agency otherwise legally authorized to carry on general activities of this nature. The latter interpretation is supported by the legislative history of this section. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83 Cong., 1st Sess. (1953) 638.

The second comment we would make on the wording of this statute is that the requirement for authorization by the Secretary pertains only to "persons" as defined in the Act; there is no need for an "agency" to obtain this authorization. This is clearly indicated by the legislative history —the Justice Department recommended that "persons" be obliged to obtain approval by the Secretary as a prerequisite to exploration. Hearings on S. 1901, *supra,* at 706.

We submit, therefore, that an accurate paraphrasing of this statute is that the relevant offshore area is open to exploration by any federal agency, otherwise legally authorized, and by persons who obtain the approval of the Secretary of the Interior. The Secretary of the Interior has delegated to the Director of the United States Geological Survey this alleged prerogative to authorize exploration by "persons."

We return now to the relevance of this Section to the subject matter of this Motion—as we argue, this Section is the sole authority which the Geological Survey can allege for its conduct of exploration of this offshore area. We think it most significant that the Department of the Interior, which has under it the Geological Survey, [See Act of Mar. 3, 1879, 20 Stat. 394, 43 U.S.C. 31(a).] has expressed precisely the same position in a document of most recent vintage. The Chairman of the Senate Committee on Interior and Insular Affairs submitted a series of questions to Mr. Hollis M. Dole, Assistant Secretary for Mineral Re-

sources; Department of the Interior. One of several questions under the heading "The Present Legal Regime For The Outer Continental Shelf" was "Which entities within which Federal Agencies have been assigned O.C.S. [Outer Continental Shelf] responsibilities...?" The Assistant Secretary of the Interior replied: "The Geological Survey is also responsible for geological and geophysical exploration under section 11 of the OCS Act (43 U.S.C. §1340)." Oversight Hearings held pursuant to S. Res. 45, by the Senate Committee on Interior and Insular Affairs, 92nd Cong., 2nd Sess. (Mar. 23, 1972) part A., p. 2. These were written questions and answers, prepared in advance of the hearings and inserted into the record at the Under Secretary's request. Oversight Hearings, *supra,* "Opening Remarks," p. 8.

B. *Absent The Provisions Of Section 11 Of The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1340, The United States Geological Survey Has No Other Legal Authority To Conduct These Explorations Of The Outer Continental Shelf.*

The question now arises whether, if section 11 (43 U.S.C. 1340) is invalid, the Geological Survey has any recourse to other legal authority for its explorations of this offshore area. We submit it has none. It is our contention that the Geological Survey could not rely on its general enabling act, (20 Stat. 394, *as amended* by Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(a)-(b).), to give legitimacy to its Outer Continental Shelf exploration. That statute provides in subsection (a) that the Director of the Geological Survey "...shall have the ... examination of the geological structure, mineral resources, and products of the national domain." [43 U.S.C. 31(a).] Surprisingly, the term "national domain", which has existed in that statutory context since

1879, has apparently never been afforded a precise statutory or judicial definition. The term has been rather loosely defined by a Louisiana statute (which admittedly is not controlling here):

> "The national domain, properly speaking, comprehends all the landed estate and all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to reenter on them." Art. 486, West La. Civil Code (1952).

In our opinion, perhaps the most encompassing definition of "national domain" which we could advance to the Court would parallel the delineation of the areas subject to the authority of the Conservation Division of the Geological Survey:

> "... lands under the supervision or control of the Federal Government. These lands are divided for administrative purposes into five categories: First, the public lands or, as sometimes referred to, the public domain; second, the acquired lands which are lands acquired by the Federal Government for various purposes; third, the Indian lands, both tribal and allotted, for which the United States acts as trustee for the Indian owners; fourth, certain naval petroleum reserve lands by virtue of a cooperative arrangement with the Department of the Navy; fifth, the so-called military and miscellaneous lands, which are not subject to any of the mineral leasing laws." Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 563. (Statement of H.J. Duncan, Chief, Conservation Div., Geological Survey, Dept. of Int.).

We would note that only the assertion of federal dominium by virtue of the Submerged Lands Act, §9 [67 Stat. 29, 43 U.S.C. 1302] and the Outer Continental Shelf Lands Act, § 3A [67 Stat. 462, 43 U.S.C. 1332] would suffice to justify an argument by the plaintiff that the Outer Continental Shelf is included within the aforegoing definition of "national domain." The validity of federal assertion of dominium, however, is precisely what is in issue, and that is why we argue that the Geological Survey cannot rely, in this instance, on its statutory authority to explore the "national domain." We would further note that while we cannot state with utter precision what the "national domain" *is,* we have certain clear indications what it is *not:* as the word "domain" and the above quoted Louisiana statute indicate, the term is by no means co-extensive with the imperium of the United States Government. Further, "national domain" does *not* include the Outer Continental Shelf even if the Federal Government did have dominium over this area. We justify this assertion on the legislative history to the Congressional extension, in 1962, of the authority of the Geological Survey to areas *outside* the national domain. [Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(b).]

The Senate Report on the bill (S. 981) stated, in the paragraph entitled "NEED FOR LEGISLATION": "Passage of S. 981 would permit the Geological Survey to conduct investigations of the Outer Continental Shelves and ocean floor...." S. Rep. No. 650, 87th Cong., 1st Sess. (1961) 1. This much seems clear: if the Geological Survey, in order to explore the Outer Continental Shelf, required authority to operate *outside* the "national domain," then the latter was *not* considered to encompass the Outer Continental Shelf. We would like to add that "Outer Continental Shelf," in this Senate Report, had to refer to the Continental Shelves of the Coasts of the United States since "Outer Continental Shelf" has no legal or scientific meaning other

than a term of art created by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343.[1]

The fact that the Geological Survey, since 1962, has had its exploration authority extended *outside* the "national domain" raises the question whether the Survey could rely on this amendment in the case at bar, assuming as we argue, that the Outer Continental Shelf Lands Act is invalid and that the Outer Continental Shelf is not *within* the "national domain." We submit that the Survey definitely cannot rely on this extension of its authority to areas outside the "national domain"; the clear implication of this 1962 amendment is that the Survey may operate outside the national domain (anywhere in the world) subject to the consent of the relevant property owner, whether the latter be the foreign, state, or local government or private person having dominium over the area to be explored. Only in the case of *res nullius* could the Survey act unilaterally. For example, the legislative history to the 1962 Amendment states that explorations by the Survey in foreign countries was contemplated. H. Rep. No. 2156, 87th Cong., 2nd Sess. (1962) 2. It seems axiomatic that Congress did not intend to authorize the Survey to conduct explorations in areas subject to the political control of a foreign government *without* the latter's consent. We suggest, further, that there is no need for the Court to reach the issue whether it would be within the legitimate exercise of Congressional authority to authorize the Geological Survey to explore the oil and gas deposits *anywhere* within the imperium of the United States Government, if the lands in question were State or privately owned. If we assume, *arguendo,* that this would indeed be within the power of the Congress, then the imple-

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[1] The term "Outer Continental Shelf" is utilized in this brief for convenience of geographical reference only; we do not thereby recognize any legal implications of the creation of that term by a federal statute, the validity of which we are challenging.

mentation of such authority to survey would have to be accompanied by just compensation to the property owners involved together with proper procedural safeguards. The exclusive right of an owner to explore for oil and gas on his land has been held to be an important property right by all federal and state courts which have had occasion to rule on this issue: *See,* e.g., *Phillips Pet. Co.* v. *Cowden,* 241 F.2d 586 (5th Cir. 1957); *Holcombe* v. *Superior Oil Co.,* 213 La. 684, 35 So. 2d 457 (1948); *Layne Louisiana Co.* v. *Superior Oil Co.,* 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946). Therefore, if we were to interpret the provision of the 1962 amendment, 76 Stat. 427, 43 U.S.C. 31(b), as omnibus authority for the Geological Survey to explore for oil and gas on state or privately owned land, we submit that the exercise of this authority, against the will of the property owner involved, would, in the absence of due process and just compensation, be unconstitutional by virtue of the provisions of the Fifth Amendment to the United States Constitution. We submit that the same argument would apply to any federal agency other than the Geological Survey which purported to have the right to explore this area under color of federal law.

The alleged authority of the Geological Survey, by delegation of the Secretary of the Interior, to license private "persons" to conduct such explorations can find no basis other than the above discussed Section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) which is under challenge here. We would further argue that any attempt by the Congress to authorize other federal officers or agencies to grant such licenses to private persons would be subject to the same constitutional limitations discussed above in the event that the private licensee did not obtain the relevant property owner's consent.

C. *The Statutory Authority Relied Upon By The Plaintiff United States Of America To License And Conduct These Continental Shelf Explorations Is Directly In Issue In The Case At Bar, Since Both The Plaintiff And The Defendant Massachusetts Claim, In Their Pleadings, The Exclusive Right To The Offshore Area In Question.*

On page seven of Plaintiff's Brief in Support of Motion for Judgment, the plaintiff stated the "*Question Presented*" as being: "Whether the right to explore and exploit the natural resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coast line belongs to the United States or to the Defendant States." Furthermore, in the "*Introduction and Summary*" to the argument in the aforementioned brief, the plaintiff stated:

> "*The* issue in this case is whether the United States has, as against the defendant states, *the exclusive right to explore* and exploit the natural resources of the continental shelf under the Atlantic Ocean, more than three miles from the coast line." Brief of the United States in Support of Motion for Judgment, *supra,* pp. 10-11. (Emphasis supplied.)

In its answer, the Commonwealth of Massachusetts alleged as an affirmative defense that it is "entitled to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the Plaintiff;" Mass. Ans., p. 4. In so alleging, the Commonwealth of Massachusetts has directly challenged Plaintiff's United States' contention of exclusive right to explore and exploit the na-

tural resources in question, which according to the plaintiff's pleadings is the issue in this case.

This central issue which has been joined in this case, directly puts into issue also those federal statutes which assert federal dominium over the geographical area in controversy.

With respect to domestic law, the first federal statute to assert the claim of the United States (as against the states) to the natural resources of the area now referred to as the Outer Continental Shelf was the Submerged Lands Act, sec. 9 (67 Stat. 29, 43 U.S.C. 1302).

That section purported to "confirm" the "jurisdiction and control" of the United States, and had the purpose of emphasizing that the Submerged Lands Act would not affect the rights of the United States to the area seaward of the historical boundaries of the States (the Outer Continental Shelf). Federal dominium over this offshore area was subsequently re-affirmed and expanded by the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331-1343). Section 3(a) states:

> "It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition...." 43 U.S.C. 1332(a).

It is crucial to note that federal dominium, presently and at the time of the aforementioned legislation, is precisely what is at issue in this case; if the defendants prevail, the federal legislation which asserts United States dominium is invalid. The federal "right of disposition" under the Outer Continental Shelf Lands Act, sec. 3(a) as manifested, for example in section 11 of that Act (43 U.S.C. 1340), which the Geological Survey relies on, would be non-existent.

Upon protest by the Commonwealth of Massachusetts, the Department of the Interior agreed not to disrupt the status quo *pendente lite* by means of undertaking leasing procedures under the provisions of the Outer Continental Shelf Lands Act 67 Stat. 462, 43 U.S.C. 1331-43. We submit that this is a clear indication that the plaintiff, through the Secretary of the Interior and his solicitor, realizes full well that federal dominium, by virtue of the Outer Continental Shelf Lands Act, is directly in issue in this case. As alleged in the attached affidavit by Henry Herrmann, Special Assistant Attorney General, there were a series of telephone conversations on November 3, 1971 between Mr. Herrmann and both the Honorable Erwin N. Griswold, Solicitor General of the United States and the Honorable William T. Pecora, Under Secretary of the Interior, relating to the grave concern by Massachusetts that the Department of the Interior would upset the status quo *pendente lite*. It was on the next day, according to a letter dated November 23, 1971 to Mr. Herrmann from David E. Lindgren, Esq., Associate Solicitor, Department of the Interior, that the Secretary of the Interior issued a press release which according to the letter, "noted that the issue of seabed jurisdiction, presently in litigation in *United States* v. *State of Maine,* No. 35, Original, is a paramount consideration;" and that in consequence Secretary Morton's press release stated:

> "No leasing procedures—*no action toward such procedures, in fact*—can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision." [emphasis added.]

Mr. Lindgren added that this appeared to meet the concerns expressed by the Attorney General of Massachusetts.

We are totally at a loss to understand by what reasoning the Federal Government, through the Department of the Interior, recognizes, on one hand, that it has no right *pendente lite* to disrupt the status quo by exercising its leasing prerogatives under the Outer Continental Shelf Lands Act, yet on the other hand, blithely assumes that it may conduct explorations under that same Act. In granting an oil drilling lease under a disputed statute (which the Interior Department admits it cannot do) and granting a permit to a private company for "explorations," under the very same disputed statute (which the Interior Department is confident it can do) there is at best a narrow distinction (and one of dubious relevance) in the context of this Motion for temporary equitable relief. If, as the plaintiff recognizes, federal dominium is in issue, then the plaintiff does not, we submit, have the right unilaterally to make the decision which of its alleged rights under the Outer Continenetal Shelf Lands Act it will assert or refrain from asserting pending a final decision by this Court.

II. The Explorations Which the Plaintiff and Its Licensees Intend To Conduct Will Result in a Change in the Status Quo *Pendente Lite,* to the Serious and Irremediable Harm of Massachusetts, Which, Lacking an Adequate Remedy at Law, Is Entitled to a Preliminary Injunction.

A. *The Purpose Of A Preliminary Injunction Is To Preserve The Status Quo Pendente Lite; The Latter Constitutes, In This Case, The Present Aggregate Of Exploration Data For The Relevant Geographical Area.*

"The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal

proofs and according to the principles of equity." *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932), at 45. Accord, *Meiselman* v. *Paramount Film Distributing Corp.*, 180 F.2d 94 (4th Cir. 1950).

The issue that is in the forefront, therefore, is how to delineate the status quo which Massachusetts seeks to preserve *pendente lite*. We maintain it is certainly *not* definable as the past conduct of the plaintiff and its licensees with respect to explorations in this area (and we would note that we have no reliable knowledge as to their occurrence). Rather the status quo should be defined as the present cumulative result of any such past activities by these parties. Since Massachusetts claims the exclusive right to explore for oil in the relevant continental shelf area, therefore, the status quo is the accumulated data available at the present time; any increase in the aggregate of exploration or survey data is a disruption of the status quo, and an irremediable one. This would hold true whether the exploration data obtained after the present time showed negative or positive results, since the crucial *res* under discussion is the state of knowledge as to the nature, amount, and location of any mineral resources that may or may not be present. The uncertainty as to the presence of oil or gas is an important element in the marketability of the owner's property right (the right to grant exploration permits); *Phillips Pet. Co.* v. *Cowden*, 241 F.2d 586 (5th Cir. 1957); *Layne Louisiana Co.* v. *Superior Oil Co.*, 209 La. 1014, 26 So. 2d 20 (1946). Therefore, a decrease in this element of uncertainty is a change in the status quo. The threatened disruption of the status quo would not be mitigated by any allegations that the results will be confidential pending the outcome of this case. *Cf. Shell Pet. Corp.* v. *Scully*, 71 F.2d 772 (5th Cir. 1934), where recovery was allowed, notwithstanding the fact that the defendant surrendered to the plaintiff the information unlawfully ob-

tained. In view of the large number of major oil companies involved in the current Digicon exploration effort, (as alleged in Mr. Hermann's affidavit) it would be naive to argue that as a practical matter the data thus obtained will not materially affect the marketability of exploration rights to this area in the future. We do not know what the Geological Survey plans to do with the data it wishes to accumulate by its own efforts, but we think it fair to presume that, at least general information as to the data in question will sooner or later reach the oil industry, and thereby affect the commercial value of the exploration rights claimed by Massachusetts.

B. *The Disruption Of The Status Quo By The Plaintiff And Its Licensees During The Pendency Of This Action Will Cause Serious And Irreparable Harm To Massachusetts.*

As we have indicated above, in *Phillips Pet. Co.* v. *Cowden,* 241 F.2d 586 (5th Cir. 1957), for example, the exclusive right to explore or survey for oil and gas is an important property right, and injury thereto is clearly actionable. Nor is this right necessarily coupled to the surface estate of the land involved; *Holcombe* v. *Superior Oil Co.,* 213 La. 684, 35 So. 2d 457 (1948); even the owner of oil and gas rights that have been fully severed from the ownership of the land in question can maintain an action against persons conducting an unauthorized survey for oil on that property. *Phillips Pet. Co.* v. *Cowden, supra.* The fact, therefore, that Massachusetts cannot restrict the free passage of vessels in the waters above the continental shelf in no way attentuates its position to protect its exploration rights. A leading case succinctly states the essence of the right Massachusetts seeks to protect and the manner in which it may be injured:

> It is a well-known and accepted fact in this, the third largest oil producing State, that the right to geographically explore land for oil, gas or other minerals is a valuable right. Large sums of money are annually paid landowners for the mere right to go upon their land and make geophysical and seismograph tests. The information obtained as the result of such tests is highly valuable to the person or corporation by whom they are made. If the information thus obtained be favorable, it can be used and is used in dealing with the landowner for his valuable mineral rights. If the information be unfavorable, the fact quickly becomes publicly known and thus impairs the power of the landowner to deal advantageously with his valuable mineral rights. Where that information, which is exclusively his [the owner] by virtue of his ownership of the land, is unlawfully obtained by others, the landowner is clearly entitled to recover compensatory damages for the disregard of his property rights.

*Layne Louisiana Co.* v. *Superior Oil Co.*, 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946) at 1020, 22

While it seems settled that this exploratory right exists and that an injury to it is actionable, there is unfortunately utter disagreement and uncertainty as to both what the relevant measure of damages shall be and what proof as to damages is admissible. That is because it is extremely difficult for a finder of fact to evaluate what an exploration permit as to a given area of land would have been worth before the survey, if the results are known to be negative. This becomes even more speculative when only the most promising locations in a large area of land are unlawfully explored. In that event, the issue is whether damages should be appraised only with regard to the acreage actually surveyed, or whether the decreased marketability of the

exploration right to the entire area should be taken into account. After an exhaustive discussion of the elements of this complex appraisal issue, the court in *Phillips Pet. Co.* v. *Cowden, supra,* held (at p. 593 of 241 F.2d) that "[i]n any case it is necessary to establish the reasonable market value of the use appellants made of appellees' property, and this value is independent of the benefit that appellants *actually* received from that use." (citation omitted). In *Holcombe* v. *Superior Oil Co.*, 35 So. 2d 457, 213 La. 684, (1948), for example, in measuring the damages for an unauthorized survey it was admissible to show comparative value of exploration privileges which the defendant had on other acreage, and the proximity, of the area subject to the plaintiff's rights, to the site of actual oil production. In the present factual situation it would be impossible to gauge the market value of the exploration rights which are claimed by Massachusetts, since there are no production sites in the area, and no established regional per acre market rates for exploration privileges (as is the case in the established oil producing states). *See, e.g., Shell Pet. Corp.* v. *Scully,* 71 F.2d 772 (5th Cir. 1934). The exploration rights to the continental shelf area claimed by Massachusetts may have immense market value, but we submit that a trial court would face an insuperable task in trying to appraise it according to any rational guideline. Therefore, while the exploration rights claimed by Massachusets are threatened by unauthorized survey of the area in question, Massachusetts would be left with no adequate remedy at law since the damages would be as difficult to gauge as they would be immense. For this reason, we maintain that Massachusetts is entitled to the equitable remedy of a preliminary injunction.[2]

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[2] In seeking to enjoin activity only on its claimed portion of the continental shelf (as per its geological definition), Massachusetts does not thereby waive its seaward delimitation of its claim "as the

The threat to Massachusetts' property interest is by no means the only basis which we advance as justification for interim equitable relief. Perhaps even more important is the threat to the vital right of the Massachusetts Legislature to permanently proscribe any further exploration for offshore oil or gas in the territory that Massachusetts will control if it ultimately prevails. Our Legislature may well decide, after balancing the hoped for benefits against the environmental dangers, that offshore oil exploitation is simply not an acceptable option under the present state of technology. In that event, as the affidavits of the Honorable David M. Bartley, Speaker of the Massachusetts House of Representatives and of Mr. Charles J. Strumski, President of the Massachusetts Wildlife Federation, state, the formulation and implementation of a legislative decision against offshore oil exploitation would probably be impeded by the prior compilation of specific data as to the location and amount of oil resources in our territory. It is axiomatic that the social, economic and political pressures engendered by the known presence of oil deposits increase exponentially with the certitude of their location. Moreover, to argue that, if Massachusetts ultimately prevails, it can decide for itself how to utilize any previously compiled data and would therefore suffer no injury, is to beg the entire issue. After a favorable judgment, Massachusetts is entitled to decide that offshore oil exploitation in its territory is an environmental Pandora's box; thus Massachusetts is also entitled

limits of national seaward jurisdiction established by the plaintiff" (Ans. p. 4.) However, in view of the present uncertainty as to the legal definition, under International law, of the continental shelf beyond the depth of 200 meters, Massachusetts did not wish to be in a position of seeking to enjoin explorations by the United States or its licensees in areas which might, conceivably, under the present rules of International law and the current state of technology, be explored with impunity by foreign vessels. (See Digicon Permit, section 7 — Affidavit by Mr. Herrmann, Exhibit 1).

to insist that the lid stay tightly shut during the pendency of this action.[3]

A criteria frequently stated by the courts for the balancing of the equities in a motion for a preliminary injunction is the seriousness of the irreparable harm alleged by the moving party against the possible damage that the opposing party would incur after injunction was granted. *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 235-36 (4th Cir. 1971); *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d 199, 205 (2nd Cir. 1966). In the present situation, we cannot envisage what material damages could be incurred by the plaintiff if the preliminary injunction prayed for by Massachusetts is granted.[4] The time until the final outcome of this action is extremely limited when measured against the long term program of oil exploration and exploitation which the plaintiff plans. The plaintiff would have difficulty in arguing that delaying exploration until this Court renders its decision, would be detrimental to the national welfare. To maintain successfully such an argument, the plaintiff would have the burden of showing that, even admitting a very temporary slowdown in the location of new American petroleum sources, this limited delay could not be effectively offset by intensified

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[3] We further contend that the plaintiff cannot argue that *pendente lite* it is relying on or enforcing a statute which furthers the public interest, and that this factor takes precedence over whatever good cause is shown by Massachusetts in support of its Motion. Massachusetts, as a state of the Union, is entitled to have its own viewpoint of the public interest given due weight until such time as the Court ultimately determines which governmental body shall have the right to make the pertinent value judgments. *Cf. West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 236 (1971).

[4] There is also no risk of liability to its licensee if the plaintiff is enjoined to suspend or amend the Digicon permit, which states that it "may be amended, suspended, or revoked at any time should circumstances develop which would warrant such action". (Exhibit 1, section 5, to Mr. Hermann's affidavit.)

explorations if it ultimately prevails. We are not seeking interim equitable relief which could affect the maintenance, (for any significant period of time,) of this Nation's aggregate of known petroleum resources. Increased activity by the plaintiff, if it prevails, can undo the effect of any preliminary injunction, which is in sharp contrast to the irremediable injury faced by Massachusetts at this time.

C. *In Its Original Pleadings, Massachusetts Has Raised Serious Issues Going To The Merits Of This Case, And, Under The Applicable Equitable Doctrines, Is Entitled To A Preliminary Injunction.*

It is our contention that to justify the issuance of a preliminary injunction at this time, it is sufficient for Massachusetts to show that in its original pleadings, it has raised questions going to the merits which are serious and difficult, so as to render the issues raised proper for litigation and further deliberation. It is not necessary for Massachusetts to demonstrate that it will with reasonable certainty prevail upon a final hearing. *Unicorn Management Corp.* v. *Koppers Co., Inc.,* 366 F.2d, 199 (2d Cir. 1966). In *Bergen Drug Co., Inc.* v. *Parke, Davis and Co.,* 307 F.2d, 725 (3rd Cir. 1962), the court held at 727:

> The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

As the court stated in *Unicorn Management Corp., supra,* a showing of reasonable certainty that the moving party will ultimately prevail is usually imposed only where the movant has failed to show irreparable damage. Thus, for example, in *Zugsmith* v. *Davis,* 108 F. Supp. 913 (S.D. N.Y. 1952) where the court denied a preliminary injunction be-

cause the moving party had not shown a reasonable certainty that it must succeed upon a final hearing, the court had also found that the moving party had not shown a lack of adequate remedy at law or immediately impending irreparable injury to it. The standard which we suggest as applicable here is set forth in a very recent environmental protection case. In *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d, 232 (4th Cir. 1971) a non-profit membership corporation sought a preliminary injunction to preserve the wilderness characteristics of a particular area. In affirming the granting of interlocutory relief by the district judge, the court pointed out that, while it was expressing no opinion on the merits of the issues raised, it could nevertheless say:

> that their resolution is not immediately apparent. That is enough to say that [movant] has not embarked on frivolous litigation, and thus interlocutory relief is not improper if [movant] can also show a need for protection which outweighs any probable injury to [respondent.] 441 F.2d at 235.

We respectfully submit that the above discussed test can be met by Massachusetts here. The progress of this lawsuit shows that Massachusetts' claim to these exclusive exploration rights is not frivolous, but, rather, merits further consideration by this Court. In its Motion for Judgment filed with the Court in January of 1970, the plaintiff moved for judgment as prayed for in its Complaint, on the ground that there was no genuine issue as to any material fact, and asserting that the United States was entitled to judgment as a matter of law. In its Brief in Support of Motion, the plaintiff argued on pages 18 and 19: "Accordingly, we believe the present motion is appropriate. If, after considering briefs and oral arguments by

the parties ... the Court should conclude that no State claim in the continental shelf beyond three miles is sustainable, the United States would be entitled to judgment ... If, on the other hand, the Court were to conclude that State claims beyond three miles in the Atlantic are legally tenable, two options would be open. The Court might well now resolve itself the ultimate validity and extent of such claims .... Or it might refer all or part of the remaining questions to a Special Master." The Court did in fact refer this case to a Special Master by its order of June 8, 1970. We would not presume to draw any inference from the Court's reference to a Special Master. We would, nevertheless, submit that it would be fair to infer that in the opinion of the plaintiff, the Court's reference is a prima facie indicia that state claims are "legally tenable," since the plaintiff stated that such a referral would be one of the two options available to the Court if state claims are "legally tenable." Therefore, at the very least until the Special Master submits his report to the Court, we argue that the plaintiff's demeanor and actions should be consistent with the assumption that the claim by Massachusetts to the exclusive right of exploration and exploitation is "legally tenable."

III. In The Event That The Court, In Its Discretion, Deems It Meet And Proper To Grant A Preliminary Injunction, Then Massachusetts Submits That A Bond Should Not Be Required.

We submit that the discretion of the Court as to whether to grant the temporary equitable relief sought may also incline it to dispense with the requirement of a bond, in the event that the Court grants our Motion.

Rule 9.2. of the rules of this Court provides that the Federal Rules of Civil Procedure, "where their applica-

tion is appropriate, may be taken as a guide to procedure in original actions in this Court." Fed. R. Civ. P. 65(c) provides "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

We suggest that the aforestated provision exempting the United States from the requirement of providing security is an indication that this particular rule is one which cannot be applied in unmodified form in an original action in this Court; it's application would not be "appropriate" within the meaning of rule 9.2. of this Court. The very rationale for the constitutional provision that actions between a State and the Federal Government shall be subject to the original jurisdiction of this Court would be defeated if a rule of civil procedure for the lower courts were to be applied so as to put the two parties on an unequal footing before this Court. Since the relevant rule of Federal Civil Procedure provides that no security shall be required of the United States, we suggest that it would be appropriate if Massachusetts, as a State of the Union before the Court on original jurisdiction, should likewise be exempt from the requirement of giving security as a prerequisite for the issuance of a preliminary injunction. For the reason above stated, we respectfully submit that this Court need not reach the issue of whether Rule 65(c) of the Federal Rules of Civil Procedure would require the giving of security by a private litigant under the present circumstances. However, we would like to point out that it has been held that the trial court has wide discretion as to the matter of a bond, and may dispense with this re-

quirement entirely under the proper circumstances. *Ferguson* v. *Tabah,* 288 F.2d 665 (2nd Cir. 1961). Similarly, in *Urbain* v. *Knapp Brothers Manufacturing Co.,* 217 F.2d 810 (6th Cir. 1964), the court held that

> the failure of the District Court to require the prescribed security before issuing the restraining order is not reversible error. The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge. Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the District Judge to require bond of appellees. 217 F.2d at 815.

We maintain that the plaintiff will not be able to show that material damage will ensue to it if the preliminary injunction issues. Further, in *Continental Oil Co.* v. *Frontier Refining Co.,* 338 F.2d 780 (10th Cir. 1964) the court held that no bond is necessary absent a proof of likelihood of harm. An important criteria that the court applied was that the movant was a corporation with considerable assets, and would, therefore, have been able to respond in damages if the party enjoined had suffered injury thereby. While we do not place the balance sheets of the Continental Oil Company and of the Commonwealth of Massachusetts in comparison here, we do, nevertheless, suggest that this dispensation granted a "corporation with considerable assets" be likewise granted to a State of the Union.

## Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction to preserve it from serious and irremediable injury during the pendency of this action.

COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

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