In the
Supreme Court of the United States

OCTOBER TERM, 1972

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 AND GEORGIA.

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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MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION

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 drilling or boring, by what-

ever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) 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 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar 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; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against foreign nations under applicable international law.

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 (a and b) 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;

on the grounds that

1. Unless enjoined by this Court the Plaintiff, United States of America will commit the acts referred to in prayers numbered one and two above;
2. Such action 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 Massachusetts.

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

May, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

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 AND GEORGIA.

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 drilling activities, through the Geological Survey 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. Proposes to contract with private companies to carry on the activity referred to in 1(a) above.

2. Defendant Commonwealth of Massachusetts contends that the plaintiff's conduct of such drilling as referred to in 1(a) above, and the plaintiff's contracting with private persons as referred to in 1(b) above would be unlawful and contrary to the rights of exclusive exploration, and the exclusive right to control and regulate such activity 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 expose Massachusetts to irreparable injury and serious damages, in an amount difficult or impossible to determine, resulting from oil spills in the area off the Massachusetts coast leading to serious, widespread, and irreparable damage to the marine environment in that area, 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 drilling or boring, by whatever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area

of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) 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 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N34°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; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against foreign nations under applicable international law.

2. Enjoined 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 (a and b) 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.

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 drilling beyond a depth of twenty-five feet, by any federal agency or its licensee, in the area of the continental shelf to which Massachusetts makes claim in the case of *United States* v. *The State of Maine et al* until such time as the Court shall have rendered a decision in that litigation.

On May 1, 1973, at a meeting held at the office of the Department of the Massachusetts Attorney General, I was informed by representatives of the United States Geological Survey (Messrs. John Behrendt and John Hathaway) that the latter agency plans this summer to initiate a core drilling program off the coast of Massachusetts. I was given a copy of U. S. Geological Survey Map No. I-451 which had twenty prospective drilling sites indicated by markers thereon.

A cartographical analysis of this map revealed that all the sites marked thereon are in the offshore area claimed by Massachusetts in the case at bar. For the convenience of the Court, I attach hereto as Exhibit "A" a reproduction of the relevant portion of that map showing the sites marked by the Geological Survey.

I was informed by the Geological Survey that the core holes it intends to drill will have a depth of up to 50 feet in consolidated material and up to 1000 feet in unconsolidated material.

The purpose of this drilling program was alleged to be an analysis of the geological structure of this continental shelf area for scientific purposes; it was conceded, however, that "resource evaluation" was one of the motivating factors for this drilling.

The Geological Survey stated that there has been "shallow" drilling and bottom sampling of less than fifty feet in depth performed in the past both by the Survey and by private researchers in this area. The Survey admitted, however, that to their knowledge there had been no drilling in the past in this area even approaching the depths planned for this summer (up to 1000 feet).

The Survey representatives stated they had attempted to minimize the possibility of accidentally drilling into an oil or gas pocket by careful choice of the drilling sites based on the available seismic data, which includes the results of last years "Digicon Survey" (which Massachusetts sought to enjoin). Since the latter data is proprietory and restricted, the Geological Survey Scientist responsible for the choice of the sites stated that he had had access to only a part of what is alleged to be the latest and most accurate seismic survey of this area.

The Geological Survey conceded that the data they hoped to amass by this drilling would be of substantial benefit to oil companies if the latter obtained a lease for that area.

It was stated by the Survey that they hoped to begin the drilling in July of this year, subject to final approval by the Director of the Geological Survey and final confirmation of a $200,000 appropriation for this drilling project. The actual work would be contracted out to a commercial offshore drilling company.

The Survey representatives stated that they did not at this time consider it desirable or legally necessary that an Environmental Impact Statement under the National

Environmental Policy Act of 1969 be prepared. They stated that an "in house" environmental assessment was in the final stages of preparation, but that they were unable to provide Massachusetts with a copy at this time.

The Attorney General of Massachusetts wrote to the Secretary of the Interior of the United States on May 10, 1973, requesting "immediate and explicit" assurance that the drilling would not be conducted. No reply has as yet been received.

On the basis of the affidavits of Messrs. Cornelius J. Wilson and Donald J. Zinn, as expert witnesses, attached hereto, I believe that prospective federal drilling program in this area exposes Massachusetts to the risk of accidental oil spillage and resultant serious harm to its marine environment. Consequently, I believe that Massachusetts is threatened with immediate, serious, and irreparable harm for which it lacks an adequate remedy at law.

(s) HENRY HERRMANN
HENRY HERRMANN
Special Assistant
Attorney General
Commonwealth of Massachusetts

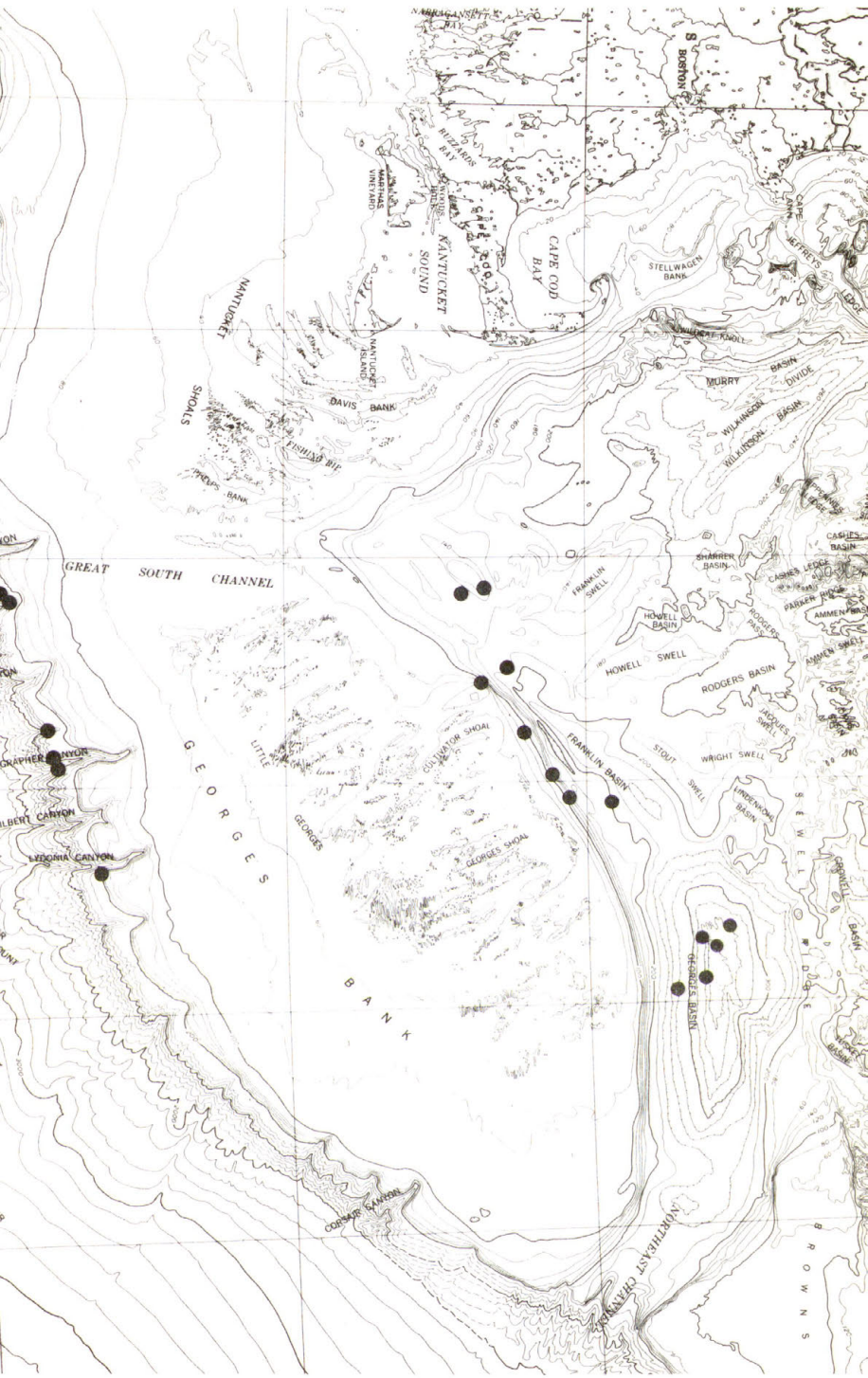
COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

On this seventeenth day of May, 1973 before me personally appeared Henry Herrmann 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) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires:
June 27, 1979

EXHIBIT A


BOSTON
MASSACHUSETTS BAY
BUZZARDS BAY
MARTHAS VINEYARD
NANTUCKET SOUND
CAPE COD BAY
CAPE COD
JEFFREYS LEDGE
STELLWAGEN BANK
NANTUCKET
SHOALS
NANTUCKET ISLANDS
DAVIS BANK
FISHING BIF
PERCYS BANK
GREAT SOUTH CHANNEL
MURRY BASIN
DIVIDE
WILKINSON BASIN
SHARRER BASIN
CASHES LEDGE
CASHES BASIN
PARKER RIDGE
AMMEN BASIN
AMMEN SWELL
HOWELL BASIN
HOWELL SWELL
RODGERS BASIN
RODGERS PASS
JACQUES SWELL
FRANKLIN SWELL
FRANKLIN BASIN
STOUT SWELL
WRIGHT SWELL
LINDENKOHL BASIN
SEWELL RIDGE
CROMWELL BASIN
GEORGES BASIN
CULTIVATOR SHOAL
LITTLE GEORGES
GEORGES SHOAL
GEORGES BANK
CORSAIR CANYON
NORTHEAST CHANNEL
BROWNS
LYDONIA CANYON

AFFIDAVIT

My name is Cornelius J. Wilson. I am Assistant Director of Engineering and Research at the University of Rhode Island, a position which I have held for the last seven years.

I have a degree in engineering from the Massachusetts Institute of Technology. I hold engineering licenses from the State of New York and from the State of California. I am the President-elect of the Providence Engineering Society, the state engineering association in Rhode Island.

Immediately following World War II, as a Colonel in the United States Air Force, I was appointed Director of the entire German chemical industry under SHAEF (Supreme Headquarters Allied Expeditonary Forces).

Thereafter, I was employed for over ten years as an engineer and a Senior Project Engineer in the oil industry, including Union Oil Company of California, C. F. Braun Construction Engineers, and the Shell Oil Company. In addition, for over two years, I was the Assistant Technical Director of the National Oil Fuel Institute, a national oil industry organization.

As a result of over thirty years professional experience, all of it related to the petroleum industry, I consider myself conversant with all major aspects of the petroleum industry. I have in recent years been particularly interested in offshore petroleum technology, and I have followed with special interest the matter of the Santa Barbara offshore spill, especially its causes. For this reason, I consider myself professionally qualified to testify concerning the inherent risk factors in the offshore core drilling presently under consideration.

At the office of the Massachusetts Attorney General, I have had the opportunity to examine in detail U. S. Geological Survey Map No. I-451, which shows the offshore

area in which the Geological Survey intends to drill core holes of up to 1,000 feet in depth in unconsolidated material and up to fifty feet in depth in consolidated material. The prospective drilling sites were indicated on the map. In addition, I have examined the available published geological data relating to these sites and this overall continental shelf area.

It is my professional opinion that there is an element of risk, in the drilling of these holes, of accidentally penetrating an oil or gas retaining geological structure. The degree of risk would, of course, vary with the precise location of the drilling site and the precise depth. However, even assuming that a particular site has been carefully chosen, on the basis of seismic data of the most precise and up-to-date nature, with a view to minimizing such risk, a certain degree of risk nevertheless is inherent in this activity and cannot be discounted or eliminated. This is because the present state of the art is not an exact science. If seismic data were sufficient, there would clearly be no need at all for core drilling. Any such drilling venture has to be a journey into the unknown to some extent. I would like to point out that the major oil companies lose many millions of dollars annually in dry holes at sites where, based on information obtained by present state of the art technology, they had fully expected to strike oil.

Obviously, the converse is true: there can be no assurance that one will not strike oil even if one is attempting to avoid doing so, especially in a general area which has generated exploration interest. This is certainly the case at the drilling depths under consideration in the present instance.

The same element of inherent uncertainty pertains to the extent of damage if oil were to be accidentally released. The damage would, of course, vary with the

amount of release, the duration of release, and water currents and meteorological conditions. Rapidly containing an accidental release can be a major enterprise of uncertain success, depending on many interrelated complex factors.

(s) CORNELIUS J. WILSON
CORNELIUS J. WILSON

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this fifteenth day of May, 1973 before me personally appeared Cornelius J. Wilson 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) JOHN J. WARD
JOHN J. WARD
Notary Public

My Commission Expires:
July 3, 1975

AFFIDAVIT

My name is Donald J. Zinn. I am Professor of Zoology specializing in Marine Ecology and a Research Associate of the Narragansett Marine Laboratory at the University of Rhode Island.

I am a graduate of Harvard College with a degree in Zoology, and I hold a Ph.D. in Zoology from Yale University.

In addition to several other professional organizations, I am a member of the Marine Biological Association of the United Kingdom. I am co-editor of the bulletin *Psammonalia,* which deals with the microscopic fauna of the marine sediment. I have devoted considerable time and research to the problem of oil pollution in the marine environment. My most recent publications in this area are "Recommendations for Research on Deep-Ocean Fouling" published by the U. S. Naval Ordnance Systems Command (Tech. Report 4004-1, April, 1970) and "The Impacts of Oil on the East Coast" published by the Wildlife Management Institute, in 1971.

I have been informed of the proposed drilling program by the United States Geological Survey this summer in the continental shelf area off Massachusetts. In this connection, I have examined, at the office of the Massachusetts Attorney General, the U. S. Geological Survey Map No. I-451, which shows the proposed drilling sites.

I consider myself qualified to testify as to the damage that could be caused by the release of oil in any considerable quantity from any holes drilled in this area.

I would first distinguish between long term and short term effects. The latter can be extremely severe and can involve massive fish kills, destruction of marine birds, and the fouling of beaches and resultant effect on recreational use.

The long term effects, even though they have not received equal attention in the news media, are even more severe, and the full extent thereof may not become apparent for years and is at present not yet fully understood.

It seems certain that the toxic material in crude oil will enter the marine food chains and will ultimately have long term effects on innumerable marine species,

including species of important food fishes. The Georges Bank area, of course, is one of the world's most important fisheries grounds and is vital to the Massachusetts fishing industry. The hydrocarbons from oil, once incorporated into a particular marine organism, are stable and pass from one member of a food chain to another.

I would like to provide some specific examples of such damage: Black Quahogs, used in making chowder, have been killed in immense quantities in New Hampshire by oil spills, and the species have not recovered as yet. The same occurred with respect to such commercially important crustaceans such as crabs and lobsters. Professor Blumer of Woods Hole Oceanographic Institute has done fascinating work which indicates that even minute traces of oil in the water may destroy the lobster as a local species by interfering with the animal's sophisticated and, as yet not fully understood, chemical signal mechanisms.

There is presently no known method of satisfactory oil cleanup once the spill has spread along the ocean bottom to any extent. The long term biological effects I have touched upon above could therefore not be arrested or reversed once such a spill has, in fact, occurred.

Damage to the marine environment, on the ocean bottom, off Massachusetts, if oil is released in any quantity, would therefore be of a grievous and permanent nature according to what is presently known.

I therefore look with deep misgiving and concern upon any drilling program in this area, under the presently existing technology, which poses even a slight risk of accidental oil release.

(s) DONALD J. ZINN
DONALD J. ZINN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this fifteenth day of May, 1973 before me personally appeared Donald J. Zinn 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) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires:
June 27, 1979

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 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 examined a copy of the United States Geological Map No. I-451 which I am informed was turned over by the Geological Survey to Special Assistant Attorney General Henry Herrmann, showing twenty drilling sites marked by the Geological Survey.

I have made a professional determination that these drilling sites are within the area encompassed by the description in the Motion.

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this 18th day of May, 1973 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) LAWRENCE J. O'KEEFE
LAWRENCE J. O'KEEFE

My Commission expires:
August 17, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1972

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 AND GEORGIA.

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 Defendant State of Florida was severed from the case for all purposes on June 28, 1971.

The case proceeded to be heard before the Special Master, the Honorable Albert Branson Maris, Senior United States Circuit Judge, pursuant to his procedural order of August 27, 1971.

On June 9, 1972 the Defendant Commonwealth of Massachusetts moved the Court for a preliminary injunction against oil exploration by the United States and its licensees. The Motion was denied by the Court in its order of June 26, 1972.

The hearing of the case before the Special Master has recently been concluded. The Special Master has ordered that the Plaintiff, United States of America submit to him its proposed findings, conclusions and supporting brief on or before June 1, 1973. Pleadings by the Defendants in response thereto are due August 1, 1973.

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 on the outer continental shelf in issue in the case at bar?

2. Will such explorations by means of drilling *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, recoginzed, 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, ex-

cept 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 plans, through the United States Geological Survey, to conduct explorations, by means of drilling up to 1,000 feet in depth, 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. Massachusetts claims that the federal statutes under which the plaintiff asserts its 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 drilling which the Geological Survey plans to conduct poses a serious threat to the Massachusetts environment. Accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, to the Massachusetts fishing industry, and to the marine ecology. The commencement of this drilling program by the Geological Survey is therefore a significant and dangeruos alteration of the status quo. Massachusetts will have the right to decide for itself, if it prevails in this lawsuit, whether it will permit this type of drilling off its coast, and this crucial decision-making right should not be preempted by the opposing litigant at this time.

The damage threatened to Massachusetts is serious and irremediable, with no remedy at law available; 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 pending a final decision by this Court.

Argument

I. The United States Geological Survey Plans to Conduct, *Pendente lite,* Explorations, by Means of Drilling, of that Portion of the Outer Continental Shelf Subject to the Claims of Massachusetts; 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 statue states:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Self, 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 conduct 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, 83rd 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 Resources, 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, 1963, 76 Stat. 427, 43 U.S.C. 31(a)-(b).), to give legitimacy to its Outer Continental Shelf exploration. That statute provided 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 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 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, Conversation 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 1963, 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*

[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.

the "national domain." We submit that the Survey definitely cannot rely on the 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 authrize 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 implementation 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 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 ex-

ploit 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 United States' contention of exclusive right to explore and exploit the natural 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 reaffirmed 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. On November 23, 1971, in reply to a letter from Henry Herrmann, Special Assistant Attorney General, Mr. David E. Lindgren, Associate Solicitor for the Department of Interior wrote that in a press release, the Secretary of Interior had

> 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 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." [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 in conducting explorations itself by drilling 1,000-foot deep holes, 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 Continental Shelf Lands Act it will assert or refrain from asserting pending a final decision by this Court.

II. THE DRILLING WHICH THE PLAINTIFF INTENDS 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, Which Constitutes, In This Case, Absence Of This Type Of Drilling Activity In The Continental Shelf Area Claimed By Massachusetts, And The Present State Of Its Marine Environment.*

"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 and according to the principles of equity." *Sinclair Refining Co.* v. *Midland Oil Co.,* 55 F.2d 42, 45 (4th Cir. 1932); *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 submit that the status quo, viewed within the scope of this motion and the physical activity against which it is directed, is the absence, at the present time, of the type of drilling intended by the Federal Government in this particular area. We are not aware of any drilling activity being conducted at all at

the present time. Therefore, we argue, this summer's drilling program is a clear-cut change in the status quo.

In the "Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts", filed in June of 1972, the United States advanced its own definition of the relevant status quo. It noted on page 9 that "exploration of the Atlantic Seabed has been in progress since 1960" and defined the status quo as being the continuation of the "information collecting process." The meaning of "exploration" in this context was further defined, on page 2 of that brief: ". . . the United States unequivocally stated that it would continue with geological and geophysical explorations and informal information gathering activities which would include seismic tests and shallow core sampling." "Shallow" core sampling was defined, with limited success, as not constituting "deep drilling."

Without getting involved in the fruitless semantic morass of discussing what the maximum depth of a "shallow" hole in the ground can be before it must be designated as "deep," we would merely say that if we use the past activity as a baseline, drilling to 1,000 feet is an activity which creates a radically increased magnitude of risk, and is therefore a fundamental departure from the alleged previous practice. The element of risk in drilling holes of such depth is discussed in the affidavit of Mr. Cornelius J. Wilson, attached hereto. Further, we would emphasize that the United States has as yet to clearly demonstrate, rather than vaguely allege, that even this limited "shallow core sampling" has in fact occurred in the area subject to this motion.

Even if we assume, *arguendo,* that the mere allegation that "shallow core sampling" has taken place at some time in the past in this or in a contiguous area suffices to constitute a continuation of such activity as the status

quo, we would nevertheless argue that the drilling which the Federal Government proposes this summer (up to 1,000 feet in depth) is different in kind, and not in mere degree, from the alleged previous activity.

Massachusetts, therefore, argues that the definition of the status quo in this instance is either the aggregate of alleged prior activity, or a change in the nature of the activity, (a radical increase in drilling depth); under either definition, the proposed drilling is a significant alteration of a material status quo *pendente lite.*

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

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). We would like to focus at this point on the contrast between the harm with which Massachusetts is threatened, and the absence of possible damage to the United States if the preliminary injunction were granted. If the Federal Government proceeds to drill holes of this depth, the very real possibility exists that there will be substantial oil spillage or leakage, which will be difficult or impossible to contain rapidly. (See Mr. Wilson's affidavit to this effect, attached hereto). We emphasize that the United States should not prevail on an argument that they are attempting

to minimize the risk or that the probability of serious harm is being kept as low as possible.

The fact is that the Geological Survey is *ab initio* not in complete control of the factors which will determine whether an accidental release of oil will occur, since, as Mr. Wilson stated in his affidavit, there is an irreducible element of luck in this venture — "a journey into the unknown," as he put it. The risks involved may well be acceptable to the Geological Survey; however, it is not that Agency, but the Commonwealth of Massachusetts which will have to contemplate the ruination of its coastal recreation area, the economic decline of its important fishing industry, and the general destruction of its offshore environment if the game of chance to which Massachusetts is being unwillingly subjected ends to its disadvantage. Professor Zinn, in his attached affidavit, has outlined how grave the scope of damage is, and how irreparable under our present state of knowledge. This factor, we argue, should certainly be balanced against any statement by the United States that the Agency involved has in good faith attempted to minimize the risk, for, we submit, the element of risk cannot be divorced from the resultant damage. This is not a two-stage analysis, with an abstract exercise in probability, to be followed by a separate and unrelated estimate of damages; the two are intertwined in such a factual situation.

The damages involved would be severe and pervasive; at present, they could not be empirically assessed by present methods of technology, much less quantified or reduced to monetary terms by any rational formula. To assess damages at law would therefore be difficult, if not impossible, to say nothing of the serious legal problems in proving liability and establishing that there is a tortfeasor subject to suit. It is therefore likely that if such grievous damage occurs, Massachusetts may not only lack

an adequate remedy, but may well have no remedy at all. Interim equitable relief is the only means of affording it protection under our legal system.

We therefore submit that Massachusetts should not be exposed, against its will, to this grave risk to its economy and environment before this Court has ruled whether Massachusetts or the United States Government has the exclusive right to decide whether this exploration program should be set into motion at all.

In contrast to the danger to which the Federal Government intends to expose Massachusetts, the former will suffer no appreciable harm if a preliminary injunction were to be granted.

Several factors bear on this issue. The first is the time element. We are not seeking a preliminary injunction which would be of any prolonged duration. It should be noted that in the case at bar, the evidentiary proceedings before the Special Master have now been completd and this preliminary injunction will remain in effect only until this Court renders its decision.

The next factor is the Federal Government's contention that it needs to conduct explorations on this Continental Shelf area *pendente lite* in order to formulate a national energy policy. (Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts, pages 8 and 9, — filed June 1972). At that time, Massachusetts had moved the Court to enjoin seismic surveys by the Federal Government's licensee. Whatever validity that argument may have had at that time, we submit that it is severely attenuated by the fact that the Court refused to enjoin such seismic surveying *pendente lite.* An important and useful surveying method is therefore available *pendente lite* to the Federal Government in this area. We would also note that we have restricted our motion to only encompass drilling beyond

the depth of twenty-five feet, with the intent of avoiding unnecessary interference with the bottom sampling and "shallow" coring which has allegedly occurred from time to time. Massachusetts does not seek to enjoin mere technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment. We submit that since the Federal Government has at present complete freedom to conduct seismic surveys and "shallow" core sampling, the burden is on it to show convincingly that a delay in drilling merely until the outcome of this lawsuit (if it should prevail) will cause material and irreparable injury to a substantial national interest. In view of the considerable freedom of action the Federal Government presently enjoys, Massachusetts considers the sudden commencement of a radically deeper drilling program during the remainder of this lawsuit to be provocative, unnecessary, and unwise.

A recent case involving the issuance of a preliminary injunction against offshore drilling explicitly balanced the imminent threat of irreparable harm to the plaintiffs and the "energy crisis" argument advanced by the government, and resolved the issue decisively in favor of granting the preliminary injunction. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 165 (D.D.C. 1971), *aff'd.,* 458 F.2d 827 (D.C. Cir. 1972).

> The Court recognizes that there is a tremendous national energy crisis and that the Outer Continental Shelf has proved to be a prolific source of oil and gas. However, as President Nixon stated in his message to Congress on June 4, 1971, the Outer Continental Shelf "has been the source of troublesome oil spills in recent years." Furthermore, this area of the United States could be seriously harmed and contaminated by the

> possible oil pollution resulting from all too frequent oil spills. 337 F.Supp. at 167.

Furthermore, in a related decision, it becomes apparent that the Federal Government had alleged a monetary loss ranging from $750,000 to $2,500,000 per month if the offshore drilling were halted by a preliminary injunction, but the court issued the injunction nevertheless, with only a nominal bond requirement. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 167 (D.D.C. 1971), *aff'd.*, 458 F.2d 827 (D.C. Cir. 1972).

We submit that the preliminary injunction granted in the *Natural Resources* case, *supra* (458 F.Supp. 165) is extremely significant to the relief sought in this motion. What was complained of by the plaintiffs in that case was non-compliance by the Federal Government with a statutory requirement for an adequate environmental Final Impact Statement. However, as the above quoted language shows, the actual irreparable harm against which the plaintiffs were afforded temporary protection was the danger of accidental oil release from offshore drilling, pending adjudication of the merits (on statutory compliance). We submit that it is also very significant that in that case, even if the plaintiffs had ultimately prevailed on the merits (that the Final Impact Statement was inadequate) this would not have given the plaintiffs the right to halt the drilling permanently, yet the preliminary injunction was granted nevertheless. In the case at bar, in contrast, Massachusetts, if it prevails on the ultimate dispute as to title, will have the exclusive right to determine whether the offshore drilling which it considers a grave threat shall be conducted at all in the future.

In the *Natural Resources* case, *supra,* (337 F.Supp. 167) the Court stressed the "public interest" aspect of the plaintiff's suit. We think this is very relevant to the

relief sought here. *Cf. West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 236 (1971).

Massachusetts moves the Court for this preliminary injunction because of a "public interest" motivation to halt a grave threat to its environment. 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.

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 because 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 Com-

plaint, 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."

We have contended that as a general proposition of modern equity, under the proper circumstances, it is sufficient for the issuance of a preliminary injunction that the moving party, in its original pleadings, has raised serious and difficult questions going to the merits. This proposition, in support of which we have cited the above

cases, is buttressed by a more specific modern equity rule having particular application to the case at bar, since the latter concerns a title dispute.

What is at issue in this case is dominium, or *title,* to a particular geographical area. It is well settled that a preliminary injunction is available as an interim remedy to prevent injury to land, even though the title thereto be in dispute at law. A leading decision on this doctrine was handed down by this Court. *Erhardt* v. *Boaro et al.,* 113 U.S. 537 (1885).

> It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law.... This doctrine has been greatly modified in modern times and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. 113 U.S. at 538-39.

In the case at bar, the question as to which party shall ultimately prevail on the merits by having the authority to regulate continental shelf drilling (if it is to occur at all) is dependent simply upon which of the litigants shall prevail in the dispute as to the *title* to this area; we contend that, in the language of *Erhardt* v. *Boaro, supra,* "irremediable mischief" is being done or "threatened"

to the land in dispute. For, what Massachusetts is seeking to enjoin at this time is not merely a technical trespass in the form of the drilling of 1,000-foot deep holes; it is the threat of a major mishap which the drilling of these holes poses that constitutes "irremediable mischief" (See affidavit by Professor Zinn, attached hereto).

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 should 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 application 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; its 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 court 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 requirement 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.

Finally, we would note, in discussing the discretion of the Court under Rule 65(c), that Massachusetts is acting to prevent damage to its environment. In the *Natural Resources* case, *supra* (337 F. Supp. 167) the court listed several recent cases where federal courts had interpreted their discretionary powers under Rule 65 (c) as permitting them to require only nominal bonds in such factual situations. The Court in *Natural Resources* set the bond at one hundred dollars, notwithstanding, as we have stated above, that the Federal Government had alleged monthly damages of up to two and a half million dollars. The court states (at 337 F. Supp. 169) "It would be a mistake to treat a revenue loss to the government the same as pecuniary damage to a private party."

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.

Respectfully submitted,

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