No. 118, Original

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

MOTION FOR SUMMARY JUDGMENT
BRIEF OF STATE OF ALASKA

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QUESTION PRESENTED

The question presented in this case is whether the United States Army Corps of Engineers ("Army Corps") can require, as a condition to issuing a permit to a third party to construct a causeway from shore, that the State in which the structure will be located disclaim its right to submerged lands to which it otherwise would be entitled under the Submerged Lands Act of 1953, 43 U.S.C.A. §§ 1301-1315 (1986).

The scope of agency authority is a question of law. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

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JURISDICTION

This is an action of original jurisdiction of this Court under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

MOTION FOR SUMMARY JUDGMENT

Defendant State of Alaska moves this Court for an order of summary judgment that dismisses the claims of Plaintiff United States with prejudice, and enjoins the United States Army Corps of Engineers from imposing upon permits for coastal projects the condition that the

State in which the project will be located relinquish its valid claims to certain submerged lands.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Since the parties have stipulated to the pertinent facts, and since the Army Corps has clearly exceeded the scope of its authority under applicable statutes, regulations, and decisions of this Court, Alaska is entitled to judgment as a matter of law.

STATEMENT OF THE APPLICABLE LAW

A. Early Court Rulings Establish States' Rights to Submerged Lands

This Court has adopted the English common law rule that the beds and banks of tidal and navigable waters are not privately owned, but are held by the sovereign in trust for the benefit of the public. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). In *Waddell*, the governmental sovereign asserting the common law was one of the thirteen original States. This Court concluded that the sovereign owned the lands as successor to the English crown. The ownership of such lands was simply one of the incidents of sovereignty which each of the thirteen original States assumed upon achieving independence from England.

Three years later, this Court extended the rule of State ownership to those States subsequently admitted to the Union. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). This Court reasoned that new States must join the Union on an equal footing with the original States in terms of sovereignty. One incident of sovereignty under this "equal footing doctrine" is the ownership of submerged lands underlying navigable waters. As between the States and the United States, this Court unequivocally stated: "The shore of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States, respectively." 44 U.S. (3 How.) at 230. Significantly, this Court noted that the State's territorial limits "extended all her sovereign power into the sea," clearly implying that the rule of State ownership extended offshore. *Id.* at 230.

This Court subsequently upheld State regulation of offshore fishing activity, *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *McCready v. Virginia*, 94 U.S. 391 (1877), relying in large part on the equal footing doctrine ownership cases. Indeed, this Court acknowledged that, under international law, the limits of a nation's right to control offshore fishing "have never been placed at less than a marine league from the coast on the open sea." *Manchester v. Massachusetts*, 139 U.S. 240, 256-59, 35 L. Ed. 159, 164 (1891).[1] It went on to state that "[t]he extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation." *Id.* at 261-64, 35 L.Ed. at 166.

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[1] A marine league is three nautical miles. *See* 2 A.L. Shalowitz, *Shore and Sea Boundaries*, U.S. Dep't of Commerce, Government Printing Office at 580 (1964).

These and other cases applied the equal footing doctrine rule of States' jurisdiction to bays,[2] tidal rivers,[3] harbors,[4] nontidal rivers,[5] lakes,[6] and tidelands.[7] None of these cases specifically addressed State ownership or jurisdiction (other than for fishing) offshore, but it was universally assumed that State ownership and jurisdiction was the rule.[8] That, however, proved not to be the case.

In *United States v. California*, 332 U.S. 19, 38-39 (1947) ("*California I*"), this Court held that the United States, not California, had plenary jurisdiction over submerged lands offshore. *California I* acknowledged that earlier cases had "used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *Id.* at 36. However, *California I* held that none of those cases compelled a decision in the State's favor, and that the United States,

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[2] *E.g., Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

[3] *E.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844); *McCready v. Virginia*, 94 U.S. 391 (1877).

[4] *E.g., Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57 (1873).

[5] *E.g., Barney v. Keokuk*, 94 U.S. 324 (1876).

[6] *E.g., United States v. Holt State Bank*, 270 U.S. 49 (1926).

[7] *E.g., Borax, Ltd. v. Los Angeles*, 296 U.S. 101 (1935).

[8] *See, e.g.*, discussion in H.R. Rep. No. 1778, 80th Cong., 2d Sess. 13-16 (1948).

not California, was the owner of the original title to the three mile marginal belt along the coast. *Id.* at 38.

B. Current Law Protects States' Rights to Submerged Lands

California I prompted a firestorm of protest from the States.[9] Congress acted quickly to reverse it by passing legislation transferring the federal government's interest to the States. The Submerged Lands Act of 1953[10] restored to the coastal States the rights to their offshore submerged lands.[11] Determining the seaward boundary of State-owned submerged lands has been the subject of a considerable amount of this Court's original jurisdiction litigation.[12] For example, this Court held that the Submerged Lands Act grants to Texas and Florida (along her Gulf of Mexico coast) extended three marine leagues (nine nautical miles). *United States v. Louisiana*, 363 U.S. 1, 84 (1960); *United States v. Florida*, 363 U.S. 121 (1960). In

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[9] One commentator suggested that *California I* was more a product of timing – the United States had just emerged victorious from World War II, and concern for national security was high – than logic. J. Briscoe, *Federal-State Offshore Boundary Disputes: the State Perspective*, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in *The Developing Order of the Oceans* 380 (R. Krueger and S. Riesenfeld, eds. 1985).

[10] 43 U.S.C.A. § 1301, et seq. (1986).

[11] *See United States v. Louisiana*, 363 U.S. 1, 20-24 (1960).

[12] Cohen, *Wading Through the Procedural Marshes of Original Jurisdiction Guided by the Tidelands Cases: A Trial Before the United States Supreme Court*, 11 Am. J. of Trial Advoc. 65 (1987).

United States v. California, 381 U.S. 139 (1965) (*"California II"*), this Court held that Monterey Bay constituted inland waters of the State of California and that the sovereignty of the State under the Act extends from both natural and artificial additions to the shore. *Id.* at 169-70, 176-77. Even an unpermitted artificial extension to Louisiana's coastline was found to extend that State's Submerged Lands Act grant in *United States v. Louisiana*, 394 U.S. 11, 41 n.48 (1969) (*"Louisiana Boundary Case"*). Certain low tide elevations were found to be part of Louisiana's coastline, and Ascension Bay was found to constitute inland waters of the State. *Id.* at 47, 53.

In *United States v. California*, 436 U.S. 32 (1978), this Court held that a 1947 presidential withdrawal and reservation of submerged lands for a national monument did not defeat the grant of those lands to the State under the Submerged Lands Act. In *United States v. Louisiana*, 470 U.S. 93 (1985) (*"Alabama and Mississippi Boundary Case"*), this Court held that Mississippi Sound constituted inland waters of Alabama and Mississippi. Finally, in *United States v. Maine*, 469 U.S. 504 (1985) (*"Rhode Island and New York Boundary Case"*), this Court held that Long Island Sound and Block Island Sound constituted inland waters.

C. Under the Submerged Lands Act, this Court has Established That There Be One Coastline Measurement for Foreign and Domestic Purposes

The Submerged Lands Act grants to the coastal States "title to and ownership of" the submerged lands within

their boundaries, 43 U.S.C.A. § 1311(a) & (b) (1986). Generally, these boundaries extend three geographical miles from the coastline. 43 U.S.C.A. §§ 1301(b) & 1312 (1986 & Supp. 1991). *See United States v. Louisiana,* 363 U.S. at 20-25.[13] The "coast line" is defined as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the seaward limit of inland waters." 43 U.S.C.A. § 1301(c) (1986).

That same Congress enacted the Outer Continental Shelf Lands Act, under which the United States asserts "civil and political jurisdiction" to the outer continental shelf. 43 U.S.C.A. § 1331, et seq. (1986). The outer continental shelf consists of "all submerged lands lying seaward and outside of the area of lands" granted to the States under the Submerged Lands Act. 43 U.S.C.A. § 1331(a) (1986). Administration of the outer continental shelf lands is by the Department of the Interior. 43 U.S.C.A. § 1334 (1986).

The Acts leave some very critical terms undefined. *See* 43 U.S.C.A. §§ 1301, 1331 (1986 & Supp. 1991). Chief among these is the term "coastline"[14] from which the

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[13] The grants to Texas and Florida (along her Gulf of Mexico coast) extend to nine geographical miles. *United States v. Louisiana,* 363 U.S. at 64; *United States v. Florida,* 363 U.S. 121 (1960).

[14] Although the Submerged Lands Act uses the two words "coast line," this Court has consistently used the single word "coastline." *See, e.g., United States v. California,* 381 U.S. 139 *passim* (1965). We employ the Court's usage in this brief.

Submerged Lands Act grant is measured. In *California II*, 381 U.S. at 165, this Court adopted the definitions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. No. 5639, for Submerged Lands Act purposes.[15]

Under this Court's holdings, artificial structures located offshore will generally extend a State's coastline for Submerged Lands Act purposes if they would have that effect under the Convention. *See, e.g., United States v. California*, 432 U.S. 40, 41-42 (1977); *United States v. Louisiana*, 389 U.S. 155, 158 (1967) ("artificial jetties are a part of the coastline for measurement purposes"); *California II*,

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[15] The Convention governs the delimitation of certain maritime jurisdictional zones for purposes of international relations. This Court described the three zones of greatest significance for present purposes as follows:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

Louisiana Boundary Case, 394 U.S. at 22-23 (footnotes omitted).

381 U.S. at 176-77 (artificial changes to coastline change extent of Submerged Lands Act grant). *Cf. United States v. California,* 447 U.S. 1, 6 (1980) (open-piling piers do not extend the coastline because they lack a low water line).

D. The Army Corps' Permits Should Conform to Applicable Law

The Army Corps' approval for construction of offshore structures is required by sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. §§ 401, 403 (1986) ("Rivers and Harbors Act"), and section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (1986 & Supp. 1991). In deciding whether to approve such a project, the Army Corps considers "the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1) (1990). Where a proposed project may alter the coastline for Submerged Lands Act purposes, "coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken." 33 C.F.R. § 320.4(f) (1990). Nothing in these statutes or regulations authorizes the Army Corps to require that States waive their rights under the Submerged Lands Act before issuing such permits.

STATEMENT OF THE PERTINENT FACTS

There are no disputed facts in this case, as the parties have filed a Joint Stipulation of Facts ("Stipulation") with this Court. The Stipulation shows that the City of Nome, Alaska, is a remote rural community on the Seward Peninsula, part of Alaska's western coast. Stipulation at 5a. Nome had a 1980 population of 3,200, with more than 11,200 people living in the greater Nome service area. *Id.* Nome, like many communities in Alaska, is not connected to other population centers by road. It is a major trade, service, and transportation center for smaller communities in its area and all of northwest Alaska. Most goods are shipped in by barge during the ice-free period between June and October. *Id.*

On August 25, 1982, Nome filed an application with the Army Corps for a permit to construct a solid fill causeway with road and terminal facility. *Id.* at 2. Nome intended to construct a 3,575 foot causeway with a road, a breakwater, and an offshore terminal facility. *Id.*

Pursuant to the "coordination" requirement of 33 C.F.R. § 320.4(f) (1990), the Army Corps involved the Solicitor of the Department of the Interior and the United States Attorney General as part of its public interest review process under 33 C.F.R. § 320.4(a) (1990). At the conclusion of the review process, the Army Corps found only one reason not to grant the permit: the causeway would alter Alaska's coastline, thereby shifting Alaska's submerged lands boundary seaward off the tip of the causeway. Stipulation at 2-3, 17a-19a, 22a-23a, 24a, 33a-37a. Approximately 730 acres of submerged lands would have been included within the new boundary. *Id.* at 6.

The Minerals Management Service, the agency within the Department of the Interior which administers the outer continental shelf, and the Solicitor of the Department of the Interior opposed the permit because it would constitute an "artificial accretion that would move Alaska's coastline or baseline seaward." *Id.* at 2. As a result of the Department of the Interior's concern, the Army Corps refused to issue the permit to the City of Nome. *Id.* at 3. Instead, the Army Corps informed the State of Alaska that, "in accordance with the attached letter from the Office of the Solicitor, a permit will not be issued until . . . a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary." *Id.*

On May 9, 1984, Alaska filed the required disclaimer with the Army Corps. *Id.* at 3-4. However, Alaska believed that the Army Corps had no authority to require the State to waive a statutory entitlement before issuing the permit to Nome. *Id.*[16] Accordingly, Alaska made the disclaimer conditional, and specified that "[t]his disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate proceeding that the Army Corps does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coastline." *Id.* at 29a.

Shortly thereafter, on July 25, 1984, the Army Corps issued the permit to the City of Nome. *Id.* at 5.

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[16] *See also* 1980 Inf. Op. Alaska Att'y Gen. (Oct. 30; file no. J-66-477-80).

SUMMARY OF ARGUMENT

I. STATUTORY AUTHORITY

The Submerged Lands Act entitles coastal States to title to and ownership of the lands and natural resources three miles seaward from the coastline. For Submerged Lands Act purposes, the coastline must be the same as that used by the United States in its international relations. The Army Corps cannot change that result through the disclaimer process. The Army Corps is responsible for issuing permits for construction projects in offshore waters. However, the Army Corps' authority must be exercised under applicable enabling legislation. Under existing statutes, the Army Corps' permits must be based on navigation or environmental considerations. There is no additional statutory authority allowing the Army Corps to require States to disclaim their submerged land rights as a condition for coastal construction. Accordingly, the disclaimer for the Nome Causeway is invalid.

II. JUDICIAL DECISIONS

This Court has ruled that the coastline of a State is determined in accordance with rules included in the Convention for the Territorial Sea and the Contiguous Zone. Specifically, this Court has approved rules that recognize changes in the coastline caused by natural accretion and construction of permanent artificial structures such as the Nome Causeway. The Army Corps may not ignore the rules of this Court and the guarantees of the Submerged Lands Act. The Army Corps' action here contravenes this Court's decisions and is without underlying statutory basis.

III. REGULATORY AUTHORITY

The public interest criteria in the Army Corps' regulations do not include any authority for denying permits pending disclaimers from a coastal State. The Army Corps regulations governing coastal construction projects are satisfied if navigational and environmental concerns are adequately addressed. Such was the case in the Nome Causeway permit. Further, the regulations are invalid as they give no notice that they can or will be interpreted to require States to give up submerged lands rights for the sake of a third party's coastal construction project.

ARGUMENT

I. NOTHING IN FEDERAL STATUTES AUTHORIZES THE ARMY CORPS' PROCEDURE AT ISSUE HERE

A. The Submerged Lands Act Entitles Coastal States to an Extension of their Submerged Lands Upon Construction of a Qualifying Structure

As set out above, the Submerged Lands Act gave to the several coastal States the submerged lands within their seaward boundaries. In making the grant, Congress stated that

> [i]t is hereby 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 resources all in accordance with applicable State law be . . . recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C.A. § 1311(a)(1) (1986). The legislative history of the Act, including that cited in *California II*, gives no suggestion that any coastal State would ever receive more or less than the statutory grant.

Nevertheless, reducing a State's Submerged Lands Act grant by the amount of land to which it would otherwise be entitled upon construction of a structure extending the coastline is precisely what the Army Corps seeks to accomplish here. Nothing in the Submerged Lands Act states that the coastline, from which the State's seaward boundary and Submerged Lands Act grant is measured, is not extended by such structures. In fact, as interpreted by this Court, the Submerged Lands Act *requires* that a State's coastline be extended by such structures.

The Act did leave open a number of questions as to the precise location of the coastline from which the grant is to be measured. In *California II*, 381 U.S. at 165, this Court incorporated the provisions of the international Convention on the Territorial Sea and the Contiguous Zone into the Submerged Lands Act to provide answers to those questions. One consequence of the incorporation of the rules of the Convention into the Submerged Lands Act was to clarify the uncertainty that had existed

regarding the location of the coastline from which seaward boundaries were measured.

Under Article 8 of the Convention, artificial structures with a low water line extend the coastline for the purpose of delimiting a nation's maritime zones. *See generally United States v. California,* 447 U.S. 1, 6-9 (1980). As a consequence of this Court's incorporation of the Convention into the Submerged Lands Act, those structures also necessarily extend the coastline for Submerged Lands Act purposes. Lacking an additional act of Congress to the contrary, there is nothing the Army Corps can do to change the Submerged Lands Act. The Submerged Lands Act, by its terms as interpreted by this Court, compels the result that the Nome Causeway qualifies to extend the coastline.

As this Court explained, "[t]his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." *California II,* 381 U.S. at 165. Yet, by demanding that States renounce any Submerged Lands Act effect before issuing the permit required to construct such a structure, the Army Corps is unilaterally seeking to establish two separate coastlines, one for international relations and a different one for the Submerged Lands Act. The Army Corps' efforts to create two separate coastlines must fail since that result would be contrary to the mandates of this Court in the *Louisiana Boundary Case,* 394 U.S. at 34, and *California II,* 381 U.S. at 165.

Congress, of course, could authorize the Army Corps to refuse to issue permits for structures which would

extend the coastline for Submerged Lands Act purposes. States have no inherent entitlement to offshore submerged lands, *California I*, and whatever rights they have to such lands are pursuant to the congressional Submerged Lands Act grant. And, as Alaska has freely admitted in this case,[17] Congress has constitutional authority necessary to prevent States from changing their coastlines and their submerged lands grants "through its power over navigable waters." *California II*, 381 U.S. at 177. Indeed, Congress apparently exercised that Commerce Clause[18] power in the Submerged Lands Act. 43 U.S.C.A. § 1314(a) (1986). In the exercise of that power, Congress clearly could give the Army Corps authority to condition permits on waivers of Submerged Lands Act rights. But Congress has never done that. Instead, as shown below, no congressional authorization allows the Army Corps to demand that a State waive its rights to submerged lands.

B. The Rivers and Harbors Act Contains No Grant of Authority to the Army Corps to Demand that States Waive Their Entitlements Under the Submerged Lands Act

The principal source of the Army Corps' permitting authority in navigable waters, including the coastal waters, is the Rivers and Harbors Act, 33 U.S.C.A. §§ 401,

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[17] Memorandum of State of Alaska at 5 (March 1991).

[18] United States Constitution art. I, sec. 8, cl. 3. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

403 (1986). The principal purpose of the Act is to assure that construction projects in navigable waters do not impede navigation.[19] In addition, the Act prohibits the depositing of materials, including pollutants, in navigable waters.[20]

The Administrative Procedure Act, 5 U.S.C.A. §§ 553(b)(2), 706(2)(C) (1977), and interpretive case law, require that agency actions be consistent with underlying statutory authorities. *See, e.g., ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517 (1988). In *ETSI,* this Court set aside the actions of the Secretary of Interior as beyond statutory authority: the Secretary "is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law". *Id.*

The Army Corps is subject to the rule. *See, e.g., Pacific Northwest Bell Tel. Co. v. United States,* 549 F.2d 1313, 1317 (9th Cir. 1977), *cert. denied,* 434 U.S. 820. Accordingly, the Army Corps' decisions must take into account the legislative intent reflected by the stated purposes and policies of the relevant statutes. Under the Rivers and Harbors Act, those purposes and policies relate to navigation and pollution.

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[19] *See, e.g, Wyandotte Co. v. United States,* 389 U.S. 191, 201 (1967); *Wisconsin v. Illinois,* 278 U.S. 367 (1929); *Dow Chemical Co. v. Dixie Carriers, Inc.,* 330 F. Supp. 1304 (D.C. Tex. 1971), *aff'd,* 463 F.2d 120 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040. Indeed, as early as 1909, the United States Attorney General recognized that the Army Corps' authority under this statute was limited to navigation concerns. 27 Op. Att'y Gen. 285 (1909).

[20] *Illinois v. City of Milwaukee,* 406 U.S. 91, 101 (1972).

C. No Other Laws Grant Authority to the Army Corps to Deny Coastal Construction Permits Unless a State Waives Its Rights Under the Submerged Lands Act

A review of the Army Corps' other statutory grants of authority reveals no grounds for denying the permit to Nome and obliging the State of Alaska to issue a disclaimer as a condition to issuing the permit. Most of these statutes involve environmental or historical considerations such as those under the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act,[21] the Marine Protection, Research and Sanctuaries Act of 1972,[22] the Marine Mammal Protection Act of 1972,[23] the National Environmental Policy Act of 1969,[24] the National Historic Preservation Act of 1966,[25] the Fish

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[21] 33 U.S.C.A. § 1344 (1986 & Supp. 1991) (empowers the Army Corps, in conjunction with the Environmental Protection Agency, to specify those locations within navigable waters that may be dredged or filled).

[22] 33 U.S.C.A. § 1413 (1986) (to prevent ocean dumping that will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities).

[23] 16 U.S.C.A. § 1361, et seq. (1986 & Supp. 1991) (to prevent harassment, hunting, capturing or killing of marine mammals).

[24] 42 U.S.C.A. §§ 4321-4347 (1977 & Supp. 1991) (requiring, "to the fullest extent possible, that all agencies of the Federal Government shall . . . insure that presently unqualified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations").

[25] 16 U.S.C.A. § 470, et seq. (1985 & Supp. 1991) (preservation of historic places).

and Wildlife Coordination Act of 1956,[26] the Federal Power Act of 1920,[27] the Endangered Species Act,[28] the Wild and Scenic Rivers Act,[29] the National Fishery Enhancement Act of 1984,[30] etc. A list is included in 33 C.F.R. § 320.2 (1990), *Authorities to issue permits.*

Many of these statutory authorities were included in the Army Corps' public notice and final permit for the Nome Causeway project. *See* Stipulation at 14a-15a, 34a-36a. However, none include a grant of statutory authority to the Army Corps to demand that a State waive its Submerged Lands Act rights before the permit will be issued.

Reported cases confirm the necessity of underlying statutory authority. For example, in *Zabel v. Tabb,* 430 F.2d

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[26] 16 U.S.C.A. § 742a, et seq. (1985 & Supp. 1991) (any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service).

[27] 16 U.S.C.A. § 691a, et seq. (1985 & Supp. 1991) (protects navigation potential of navigable waters subject to F.E.R.C. licenses).

[28] 16 U.S.C.A. § 151, et seq. (1974 & Supp. 1991) (federal agencies must use their authorities to protect endangered and threatened species).

[29] 16 U.S.C.A. § 1278, et seq. (1985 & Supp. 1991) (no federal agency shall assist any water resources project that would have a direct and adverse effect on values for which the river was designated).

[30] 33 U.S.C.A. § 210, et seq. (1986 & Supp. 1991) (Department of the Army permits for artificial reefs to promote and facilitate responsible and effective efforts to establish artificial reefs).

199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court held that it was permissible for the Army Corps to deny a permit because the project would harm the environment, but only because the Fish and Wildlife Coordination Act, 16 U.S.C.A. § 661, et seq. (1985), and the National Environmental Policy Act, 42 U.S.C.A. § 4331, et seq. (1977), made clear that the Army Corps could deny a permit on that ground.[31]

In *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97, 106 (2d Cir. 1970), the Army Corps was enjoined from issuing a permit where issuance would have effectively foreclosed the Secretary of Transportation's statutory duty to consider the effect of the project on environmental values. *See also Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 358 (D. Md. 1975) ("since the original purpose of the [Rivers and Harbors] Act was to protect navigation, the Act should not be tortured into interpretations which satisfy legislative needs which have not yet been fulfilled").

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[31] In *Zabel*, the Court of Appeals reversed the district court's determination, 296 F. Supp. 764 (M.D. Fla. 1969), that the consultation requirements of the Fish and Wildlife Coordination Act and the National Environmental Policy Act did not give the Army Corps authority to deny a permit application on a basis other than interference with navigation. The District Court had concluded that "[t]he way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by Congress." The Court of Appeals held that such a remedy already had been granted by Congress in the Acts cited.

Significantly, courts have held that the scope of the Army Corps' authority must "be in accordance with the law." *See Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied sub nom. City of New Haven v. Marsh*, 488 U.S. 848 (1988) (under section 10 of the Rivers and Harbors Act and section 404 of the Clean water Act, the Army Corps' authority to consider economic impacts in its public interest review is limited to those economic effects caused by the project's impacts on the physical environment); *see also Missouri Coalition for the Environment v. Corps of Engineers*, 678 F. Supp. 790, 802 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025, 1033-34 (8th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 76 (1989) (the Army Corps is not empowered to regulate economic competition between communities or to make political decisions as to which community's economic interests ought to be preferred, citing *Mall Properties, Inc.*).

This Court has also clearly warned that agencies regulating coastal development must act within their authority. Thus, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), the California Coastal Commission exceeded its police power authority when it tried to extract a public access easement from a shoreline landowner who had applied for a home construction permit. This Court found the obtaining of the easement, however well intentioned, did not conform to the Commission's underlying land-use regulation powers. *Id.* at 838-39. In fact, this Court characterized this *ultra vires* agency action as "out-and-out extortion." *Id.* at 837. Similarly, here, the

Army Corps acts outside its power to protect navigation when it extorts a waiver to a States' Submerged Lands Act rights before it will issue a permit to the applicant.

II. THIS COURT'S DECISIONS PROVIDE NO AUTHORITY FOR THE ARMY CORPS TO REQUIRE STATES TO WAIVE RIGHTS TO SUBMERGED LANDS

A. The Army Corps' Practice of Requiring Waivers of States' Rights Under the Submerged Lands Act Before Issuing Permits Contradicts the Rationale Underlying This Court's Incorporation of the Territorial Sea Convention into the Submerged Lands Act

The Army Corps' practice at issue here directly contradicts and frustrates this Court's purpose in incorporating the provisions of the Convention on the Territorial Sea and the Contiguous Zone into the Submerged Lands Act. In *California II*, this Court explained its rationale as follows:

> It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. *This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations* (barring an unexpected change in the rules established by the Convention).

381 U.S. at 165 (emphasis added).

The goal of a single coastline is frustrated if the determination of seaward boundaries depends on whether or not a coastal construction project has been subjected to a disclaimer.[32] For example, there is no ready reference for mariners to determine if a coastal construction project has been subjected to a disclaimer and, if so, what the disclaimer covers in its terms. This not only confuses the jurisdiction for seabed resources and salvage but every fisherman who harvests crab, salmon, herring, or other species in the area may well wonder if those resources are under State or Federal jurisdiction.

Whether a resource is under State or Federal jurisdiction has civil[33] as well as criminal implications.[34] In fact, there are more than thirty United States laws that refer to Federal jurisdiction that begins at the seaward boundary of the three mile distance from the coastline.[35]

B. The Army Corps Mistakenly Relies on this Court's Decisions For Its Disclaimer Requirement

The United States claims that this Court "has stated that the United States may 'protect itself' from such

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[32] Examples of coastal construction projects that have been and have not been subjected to recent disclaimers will be lodged by the parties with this Court. Stipulation at 7.

[33] *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1982).

[34] *Corbin v. State*, 672 P.2d 156 (Alaska 1983), *appeal dismissed, Corbin v. Alaska*, 467 U.S. 1223 (1984).

[35] Alexander, *The Territorial Sea of the United States: Is it Twelve Miles or Not?*, J. of Maritime Law and Commerce 449, 479-81 (1989).

artificial changes in the coastline and consequent encroachment upon its submerged lands 'through its power over navigable waters.' " Stipulation at 17a-18a; Plaintiff's Brief in Support of Motion at 3, *citing Louisiana Boundary Case,* 394 U.S. at 41-48; *California II,* 381 U.S. at 177.

In those cases, however, this Court simply acknowledged that the United States has the constitutional power to prevent the several coastal States from unilaterally increasing their Submerged Lands Act grants by extending the coastline seaward through artificial means. Thus, in the *Louisiana Boundary Case,* 394 U.S. at 41 n.48, this Court had no trouble concluding that the United States had the power to deal with an unpermitted and unauthorized artificial extension of the coastline: "If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them."

In *California II,* this Court stated:

> When this case was before the Special Master, the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since enclosed or reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. Furthermore, the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes

> could thus be the subject of agreement between the parties.
>
> . . . .
>
> The considerations which led us to reject the possibility of wholesale changes in the location of the line of inland waters caused by future changes in international law . . . do not apply with force to the relatively slight and sporadic changes which can be brought about artificially. Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

381 U.S. at 176-77.

From this, the Solicitor of the Department of the Interior and the Department's Minerals Management Service conclude that this Court has "encouraged" agreements to "prevent modification of the outer Continental Shelf rights of the United States," Stipulation at 22a-23a, and to "preserve the status quo" in all cases of artificial coastline accretion associated with coastal construction projects. *Id.* at 18a. Although *California II* acknowledged the Special Master's comment on such agreements between the parties, that mere reference does not represent the necessary congressional authority or any judicial "encouragement" for the Army Corps to, in effect, "extort" an agreement that contravenes the Submerged Lands Act.

In addition, the Master's report was completed as a result of the decision in *California I*, prior to the enactment of the Submerged Lands Act in 1953. *California II*, 381 U.S. at 143. Therefore, that report could not have contemplated any renunciation of the States' submerged lands rights.

C. This Court has Strongly Condemned the Use of Governmental Permitting Authority to Obtain a Proprietary Advantage

This Court has expressed strong disapproval of governmental action which seeks to coerce the granting of a proprietary benefit. For example, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the California Coastal Commission conditioned the granting of a permit to replace a small bungalow with a larger house on granting the public an easement to pass across the Nollan's beach. This Court first assumed, without deciding, that there might be legitimate police power purposes for the Commission to simply deny the permit altogether, without violating constitutional limitations. *Id.* at 835-36. This Court then noted that a condition short of denial would be permissible if it served the same police power purpose as an outright denial would have served. *Id.* at 836. But since the condition – the granting of an easement – did not serve the same purposes as an outright denial would have, the condition was not valid. This Court condemned this practice in the strongest language: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use

but *'an out-and-out plan of extortion.'* " *Id.* at 837 (emphasis added).

The overreaching by the Army Corps in the case of the Nome Causeway is even more egregious than that condemned so strongly in *Nollan*. Here, the Army Corps refused to issue a permit to the otherwise deserving City of Nome. In so doing, the Army Corps effectively held the Nome Causeway hostage to advance the proprietary interests of the Department of the Interior over those of the State. Nothing in the cases cited by the United States in support of the Army Corps' action even remotely sanctions such a practice.

III. THE ARMY CORPS' REGULATIONS PROVIDE NO AUTHORITY FOR THE ARMY CORPS' PROCEDURE AT ISSUE

A. Existing Army Corps' Regulations Do Not Authorize the Army Corps' Disclaimer Requirement

Just as regulations governing procedures on the issuance of permits for coastal construction projects must be consistent with statutory authorities, the Army Corps' actions in establishing permit conditions must be consistent with applicable regulations. *See Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen"). Assuming, *arguendo*, that the regulations of the Army Corps are valid, those regulations provide no authority allowing the Army Corps to require a State to disclaim its rights in submerged lands when shifts in the

coastline occur as a result of a coastal construction project.

B. The Army Corps' Decision Is Not Supported by the Plain Language of 33 C.F.R. § 320.4(f)

1. 33 C.F.R. § 320.4(f) addresses activities on submerged lands, not property rights to submerged lands

A regulation generally must be applied in accordance with its plain meaning. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). Thus, though an agency's interpretation is usually controlling, it is set aside when it is "plainly inconsistent" with the wording of the regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977). 33 C.F.R. § 320.4(f) (1990) contains no language that suggests the Army Corps may force a coastal State to abdicate its rights to submerged lands as a condition for a shoreline project, especially where the State is not the entity proposing the project. Instead, the regulation addresses activities on submerged lands, not the property interests in the submerged lands.

2. Interagency coordination does not authorize the Army Corps to require this disclaimer

The United States asserts that the interagency coordination provisions of 33 C.F.R. § 320.4(f) allow the Army Corps to take into account the "effect an addition to a State's coastline will have on the offshore property interests of the United States." Plaintiff's Brief in Support of Motion at 3. It concludes that extension of the coastline of

the State of Alaska would be "to the detriment of the offshore property interests of the United States." *Id.* Therefore, Nome's permit application was denied. Stipulation at 3.

Notwithstanding the Army Corps' contrary interpretation, the plain language of 33 C.F.R. § 320.4(f) (1990) does not encompass consideration of property interests. It simply requires a two-step review that does not even mention property interests. The first step requires the Secretary of the Army to submit "a description of the proposed work and a copy of the plans to the Solicitor [of the Department of the Interior]," requesting "his comments concerning the effects of the proposed work on the outer continental shelf rights of the United States." After the Solicitor's comments are returned to the Secretary of the Army, the Secretary of the Army reviews the application and makes a final decision "after coordination with the Attorney General."

The coordination review is not concerned with property ownership disputes. 33 C.F.R. § 320.4(g)(6) (1990) states that "dispute[s] over property ownership will not be a factor in the Army Corps' public interest decision." This is consistent with the Submerged Lands Act.

3. "Coordination" does not allow the Department of the Interior and the Attorney General to veto otherwise valid permits

Under the Army Corps' interpretation of its coordination responsibilities in 33 C.F.R. § 320.4(f), the Solicitor of the Department of the Interior and the United

States Attorney General may dictate denial of all applications for coastal construction projects that have any effect on the baseline. Stipulation at 2-3, 18a. Thus, the Department of the Interior requires disclaimers of the State's interests in "all cases of artificial coast line accretion that come to its attention." *Id.* at 18a. The United States Attorney General concurs, *id.* at 32a, and the Army Corps follows suit. *Id.* at 24a.

Delegation of decision-making authority to other agencies is allowed only to the extent the delegation is based on underlying statutory authority. *See Assiniboine and Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 795 (9th Cir. 1986). The statutes and regulations relating to the permitting authority of the Army Corps do not allow such delegation.

Coordination means to "to work together harmoniously."[36] It does not imply that the Army Corps will automatically render whatever decision is dictated by the coordinating agency, as it did in this case. In a similar situation, involving consultations with the Department of the Interior, an appellate court warned that the Secretary of the Army shall make "the ultimate decision" and should not "abdicate his sole ultimate responsibility and authority." *Zabel v. Tabb*, 430 F.2d 199, 211, 213 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Similarly, the Army Corps has no authority to assign its decision-making responsibility in this case to the Department of the Interior or the Attorney General.

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[36] *American Heritage Dictionary* 321 (2d College Ed. 1982).

C. The Army Corps' Public Interest Criteria in 33 C.F.R. § 320.4(a) Do Not Warrant Disclaimer of States' Submerged Lands Rights

The Plaintiff's Brief in Support of Motion at 3 suggests that the Public Interest Review analysis of 33 C.F.R. § 320.4(a) requires that "[a]mong the factors the Secretary and Army Corps of Engineers take into account is the effect an addition to a State's coast line will have on the offshore property interests of the United States." However, the regulation actually makes no reference to property interests of the United States.

33 C.F.R. § 320.4(a)(1) (1990) does include 23 separate criteria to be evaluated in balancing the public interest. The criteria are (1) conservation; (2) economics; (3) aesthetics; (4) general environmental concerns; (5) wetlands; (6) historic properties; (7) fish and wildlife values; (8) flood hazards; (9) floodplain values; (10) land use; (11) navigation; (12) shore erosion and accretion; (13) recreation; (14) water supply and conservation; (15) water quality; (16) energy needs; (17) safety; (18) food and fiber production; (19) mineral needs; (20) considerations of property ownership; (21) the needs and welfare of the people; (22) compliance with Environmental Protection Agency 404(b)(1) guidelines; and (23) other applicable criteria (*see* 33 C.F.R. §§ 320.2, 320.3).

The criteria concerning considerations of property ownership are explained in detail in 33 C.F.R. § 320.4(g) (1990), the same section that, in subsection (6), specifically excludes consideration of "dispute[s] over property ownership." Instead, the section is concerned with

various effects of the project on "property of others," "public health and safety . . . floodplain or wetland values," or which are otherwise "contrary to the public interest." 33 C.F.R. § 320.4(g)(2) (1990). Clearly, these values cannot be extended to cover disputes over property ownership.

When the Army Corps attempted to extend another one of the public interest criteria in 33 C.F.R. § 320.4(a) beyond the physical environment of the project, a District Court warned that the economic and other criteria relating to the public interest evaluation had to be "proximately related to changes in the physical environment." *Mall Properties, Inc. v. Marsh,* 672 F. Supp. at 571. The court held that the economic evaluation should have been limited to those economic effects caused by the project's impacts on the physical environment. Similarly, in *Missouri Coalition for the Environment v. Corps of Engineers,* 678 F. Supp. 790, 802 (E.D. Mo. 1988), *aff'd,* 866 F.2d 1025, 1033-34 (8th Cir.), *cert. denied,* ___ U.S. ___, 110 S.Ct. 76 (1989), the court cautioned that the Army Corps "is not empowered to regulate economic competition between communities or to make political decisions as to which community's economic interest ought to be preferred."

D. Rules Relied Upon by the Army Corps in Reviewing Permits Were Not Adopted in Accordance With the Administrative Procedure Act

1. No public notice was given of the criteria relied on here by the Army Corps

Title 5 U.S.C.A. § 706(2) (1977) provides that a reviewing court shall "hold unlawful and set aside

agency action, findings, and conclusions found to be . . . without observance of procedure required by law. . . . " 5 U.S.C.A. § 706(2)(D) (1977). In accordance with this mandate, the State's disclaimer should be set aside because the Army Corps did not follow procedures required by law.

The first version of 33 C.F.R. § 320.4(f) appeared without public notice in the Federal Register on December 18, 1968 as a revision to 33 C.F.R. § 209. It read:

> All applications for permits for structures or work in Coastal waters will be specifically reviewed to consider the impact on the base line from which to measure the width of the three-mile belt of submerged land given to the States by the Submerged Lands Act. Where any change in the base line would result, the application with report thereon will be forwarded to the Chief of Engineers for discussion with the Attorney General before final action is taken.

33 Fed. Reg. 18669, 18671 (1968) (to be codified at 33 C.F.R. § 209.120(d)(4)). This language no longer exists.

In 1974, the Army Corps renumbered this provision, and revised and expanded it to what is substantially its present form. 33 C.F.R. § 209.120(f)(10) (1974). *See* 38 Fed. Reg. 12217, 12221 (1973); 39 Fed. Reg. 12115, 12123 (1974). In 1977, the Army Corps moved this provision to its current location, 33 C.F.R. § 320.4(f). *See* 42 Fed. Reg. 37122, 37137 (1977). The only other apparent modification to the rule came in 1986, when the phrase "three mile belt" was changed to "territorial sea." *See* 51 Fed. Reg. 41220, 41224 (1986).

At no time did any of the above publications of the rule contain an explanation of its purpose. There was never any statement by the Army Corps of a possible federal claim to priority in ownership of submerged lands contrary to the Submerged Lands Act. More important, however, neither the current version of the rule nor its predecessors contain any mention of criteria the Army Corps actually uses when evaluating permits that affect ocean boundaries. Hence, the regulation is void under 5 U.S.C.A. § 706(2) (1977).

2. The Army Corps has violated section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 552

Section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 552(a)(1) (1977), requires that agencies publish and explain their operational rules. Unlike section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553 (1977), which is applicable to proceedings for the promulgation of substantive rules, section 3 applies to a broad range of agency policies, rules, and procedures. This section of the Administrative Procedure Act was adopted to provide, among other things, that administrative policies "be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). *See generally* S. Rep. No. 752, 79th Cong., 1st Sess. 12-13 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21-23 (1946). While the primary purpose of this section is to open administrative processes to the scrutiny of the general public, Congress was also concerned about those "forced to litigate with agencies on

the basis of secret laws." *See Renegotiation Bd. v. Bannercraft Co.*, 415 U.S. 1, 9 (1974).

Here, the Army Corps' failure to promulgate the criteria it employed in evaluating the permit application of the City of Nome is no less egregious than the failure to promulgate eligibility criteria in *Morton v. Ruiz*. The appropriate remedy is to enjoin the Army Corps from imposing conditions on shoreline permits pursuant to these rules or procedures, and set aside the disclaimer at issue here. *See Renegotiation Bd. v. Bannercraft*, 415 U.S. at 20 (the court may enjoin agency action or provide other equitable remedies for violations of 5 U.S.C.A. § 552).

3. The Army Corps has failed to observe the procedures of section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553

The Administrative Procedure Act requires that rules used as a basis for agency decisions be published in the Federal Register. 5 U.S.C.A. § 553(b) (1977). Interested parties must be given a "reasonable opportunity to participate in the rulemaking process." *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984).

While agencies may articulate policies, interpret rules, and develop guidelines in the course of adjudicative proceedings, adjudication may not be used as a substitute for substantive, legislative rulemaking. *See generally NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 761 (1969). In the case of the Nome Causeway, the Army Corps, under the guise of its power to rule on the merits of permit applications, is actually employing an unknown

substantive rule to resolve boundary disputes between the States and the federal government. Such a rule is subject to formal rulemaking procedures, and is invalid until those procedures have been followed.

4. The Army Corps' actions here are arbitrary and capricious, and not based on substantial evidence

The Administrative Procedure Act proscribes agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(1)(A) (1977). An arbitrary decision is one not based on consideration of the relevant factors. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989).

The denial of Nome's application for a causeway permit pending a disclaimer of submerged lands from the State of Alaska is an arbitrary and capricious act. There is no rational connection between the denial and the factors the Army Corps is empowered to consider by Congress. The Army Corps' denial appears to have been automatic and without statutory or regulatory standards. By relying on factors not relevant and not intended by Congress, the Army Corps' decision is arbitrary and capricious and must be invalidated. *Cf. Marsh,* 490 U.S. at 378. *See Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

Moreover, since the Army Corps relied upon factors it did not publish and that were not authorized by Congress, there was no substantial evidence in the record. As a result, the City of Nome could not have prepared itself in any meaningful way to provide information to the Army Corps (and to the Departments of Interior and Justice) to avoid rejection of their permit. Similarly, it would have been impossible for the State of Alaska to have predicted in advance that the Army Corps, or the Solicitor of the Department of the Interior, or the United States Attorney General, would have rejected a third party's permit application unless the State waived its rights to certain submerged lands. Since no evidence was submitted on the factors relied upon by the Army Corps, there was no evidence for the Army Corps to consider. Its decision cannot be said to be based on substantial evidence and is invalid. 5 U.S.C.A. § 706(2)(E) (1977).

CONCLUSION

The Army Corps exceeded its authority by withholding a permit for the City of Nome for a coastal construction project until the State of Alaska disclaimed its submerged lands entitlements under the Submerged Lands Act. This Court has affirmed that natural shifts in the coastline and artificial coastal construction projects, such as the Nome Causeway, change the coastal baseline and alter the coastal boundaries for purposes of the Submerged Lands Act. The Army Corps has no authority to contravene the limits of existing statutes or its own applicable regulations in this regard. Nor may the Army Corps

disregard the decisions of this Court and unilaterally dictate a State's submerged lands boundaries.

For the reasons given above, the State of Alaska requests the following relief:

1. That the Court enter a decree declaring that the Army Corps does not have the legal authority to require a State to waive any submerged lands claims it might make following construction of an artificial structure extending the coastline before the Corps will issue a permit for construction of such a structure.

2. That the Court enter a decree declaring that, as a consequence of the Army Corps' lack of authority to require such waivers, the waiver executed by the State of Alaska with respect to the Nome facility, by its terms, is void and of no force and effect.

3. That the Court enter a decree declaring that, as a consequence of the voiding of the waiver, the submerged lands described in paragraph IX of the Complaint appertain to the State of Alaska and are subject to its exclusive jurisdiction and control, and that the United States has no title thereto or interest therein.

4. For such other relief as the Court may deem appropriate.

DATED: October 21, 1991

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