No. 118, Original



# In the Supreme Court of the United States

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

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*ON BILL OF COMPLAINT*

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## MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT AND BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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## QUESTION PRESENTED

Whether the Secretary of the Army may decline to issue a permit for construction of an artificial addition to the coast line unless the coastal State agrees that the construction will be deemed not to alter the location of the federal-state boundary.

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UNITED STATES OF AMERICA, PLAINTIFF

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## MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT

The United States of America, by its Solicitor General, moves for entry of summary judgment in its favor in this case. The United States initiated this action to quiet title to certain offshore submerged lands beneath Norton Sound, near Nome, Alaska. The State of Alaska has asserted a claim to those lands under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, on the basis that the City of Nome has constructed port facilities projecting into Norton Sound that extend the coast line and alter the federal-state boundary. The United States submits that Alaska has waived all such claims through a disclaimer that it executed in connection with the Secretary of the Army's issuance of a federal permit, under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, for construction

of the Nome port facilities. Alaska answers that the disclaimer is invalid as a matter of law.

The United States and the State of Alaska have filed a joint stipulation of facts with this Court, and there is no disputed issue as to any material fact. The controlling legal issue is whether the Department of the Army had legal authority to decline to issue the Section 10 permit unless Alaska executed the disclaimer. For the reasons set forth in the accompanying brief, the United States submits that the Department of the Army may refuse to issue a Section 10 permit on account of the effects of the proposed construction on the location of the federal-state boundary and that the Department lawfully declined to issue the permit for the Nome facilities until Alaska executed a disclaimer preserving that boundary. The disclaimer, accordingly, is valid, and the United States is entitled to judgment as a matter of law.

The United States therefore requests that this Court enter a judgment declaring that the City of Nome's construction of its port facilities did not alter the State of Alaska's entitlement to submerged lands in Norton Sound.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

OCTOBER 1991

# In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 118, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

*ON BILL OF COMPLAINT*

## BRIEF OF THE UNITED STATES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

### JURISDICTION

On January 7, 1991, the United States requested leave to commence this original action. On April 1, 1991, the Court granted the United States' motion for leave to file a bill of complaint. On May 31, 1991, the State of Alaska filed its answer. On September 6, 1991, the United States and the State of Alaska filed a joint stipulation of facts. The jurisdiction of this Court rests on Article II, Section 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. 1251(b)(2).

### STATUTE AND REGULATIONS INVOLVED

Section 10 of the Rivers and Harbors Appropriation Act of 1899 provides in pertinent part as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any * * * structures in any * * * water of the United States * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge * * * unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. 403.

The Department of the Army's regulations governing the issuance of Section 10 permits provide in pertinent part as follows:

> (a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. * * * All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. * * *
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> * * * * *

> (f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. * * * Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will * * * request [the Solicitor's] comments concerning the effects of the proposed work on the outer continental rights of the United States. * * * The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

33 C.F.R. 320.4.

## STATEMENT

The United States seeks to quiet title to certain submerged lands beneath Norton Sound, near Nome, Alaska. The State of Alaska has asserted a claim to those lands under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which grants to the States ownership of submerged lands from the coast line to a point, in most cases, three geographical miles seaward thereof. Alaska bases its claim on the fact that the disputed lands are within three geographical miles of the ordinary low-water mark of certain port facilities that the City of Nome has constructed. The United States submits that Alaska has waived all such claims through a disclaimer that it executed in connection with the Secretary of the Army's issuance

of a federal permit, under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, for construction of the Nome port facilities. Alaska contends that the Secretary of the Army lacked authority to insist that Alaska execute the disclaimer and that the disclaimer accordingly is invalid as a matter of law.

### A. Federal/State Ownership of Submerged Lands

1. The discovery of offshore petroleum and mineral deposits at the turn of this century led to litigation between the United States and the coastal States over ownership of offshore submerged lands. The State of California asserted that it owned all submerged lands, and the related mineral resources, within three miles of its coast. This Court rejected that contention in the landmark case of *United States* v. *California*, 332 U.S. 19 (1947) (*California I*). The Court ruled that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. See 332 U.S. at 805 (Order and Decree).

2. Following this Court's decision in *California I*, Congress comprehensively addressed the question of resource development of offshore submerged lands. In 1953, Congress enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which, as a general matter, grants the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. 1311. The Act generally defines the "seaward boundary" of each State "as a line three geographical miles distant from its coast line." 43 U.S.C. 1312. It defines the "coast

line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c).

Also in 1953, Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, which confirms the United States' authority to exercise jurisdiction and control over all submerged lands lying seaward of the lands granted to the States under the Submerged Lands Act. 43 U.S.C. 1331(a), 1332. Congress described those lands as the "outer Continental Shelf," 43 U.S.C. 1331(a), and declared that it is "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.

43 U.S.C. 1332(1). Congress has further declared that the outer Continental Shelf

> is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.

43 U.S.C. 1332(3). Congress also has prescribed various policies and requirements for coordinating activities on the outer Continental Shelf and sharing resource revenues with the States. See, *e.g.*, 43 U.S.C. 1332, 1333(a), 1337(g).

3. The United States and the State of California subsequently invoked the principles set forth in the Submerged Lands Act and the Outer Continental Shelf

Lands Act in addressing California's offshore ownership interests. The ensuing litigation involved various disputes over the application of the Submerged Lands Act, including the question whether man-made structures, such as jetties and harborworks, alter the "coast line" for purposes of the Submerged Lands Act. See 43 U.S.C. 1301(c). This Court subsequently concluded, upon recommendation of the Special Master, that man-made additions are to be treated as part of the coast line. *United States* v. *California*, 381 U.S. 139, 176-177 (1965) (*California II*). In doing so, however, the Court cited the Special Master's conclusion 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." *Id.* at 176. Accord *United States* v. *Louisiana*, 394 U.S. 11, 40 n.48 (1969); compare *United States* v. *California*, 447 U.S. 1 (1980) (*California III*) (structures, such as open piers, that lack a low water mark, do not extend the "coast line").

**B. The Secretary of the Army's Authority to Regulate the Placement of Structures in Navigable Waters**

1. The Submerged Lands Act generally "relinquished" the United States' ownership interests in submerged lands that are within three miles seaward of the coast line, 43 U.S.C. 1311, but it expressly retained "all [of the United States'] navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. 1314. As one aspect of its powers of "regulation and

control," the United States strictly supervises the placement of artificial structures in navigable waters.

Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, restricts such structures in three ways. First, Section 10 imposes a *complete* prohibition on the placement of "any obstruction" in the waters of the United States, except as authorized by Congress:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *.

Second, Section 10 prohibits the erection of "any structures" in the waters of the United States except as the Secretary of the Army allows:

> [A]nd it shall not be lawful to build or commence the building of any * * * structures in any * * * water of the United States * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; * * *.

Third, Section 10 prohibits the commencement of "work" altering conditions of any harbor, canal, lake, or like waters unless the Secretary of the Army consents:

> [A]nd it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge * * * unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Thus, Section 10 amounts to a general prohibition on the placement of any obstruction in coastal waters,

but empowers the Secretary of the Army to make exceptions for the building of structures and undertaking of work affecting those waters. See *United States* v. *Republic Steel Corp*, 362 U.S. 482, 486-487 (1960).

2. Section 10 does not specify what factors the Secretary of the Army should take into account in determining whether to authorize the placement of a structure or undertaking of work in the waters of the United States. In these circumstances, the Secretary has determined that the Department of the Army should consider all factors relevant to the public interest in determining whether such construction or work should go forward. He has therefore adopted, by regulation, a permitting process based on a "public interest review." See 33 C.F.R. 320.4. The Army's regulations state at the outset:

> The decision whether to issue a permit will be based on an evalution of 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). The regulations further provide:

> All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. 320.4(a)(1).

The Army's regulations address in greater detail a number of those factors, 33 C.F.R. 320.4(b)-(r), including, of particular relevance here, the "Effects on limits of the territorial sea," 33 C.F.R. 320.4(f). The latter provision begins by observing that under *California II*:

> Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law.

Thus, the regulation recognizes the central role that the coast line plays in determining the location of the Nation's international and federal-state boundaries.[1] The regulation then provides:

> Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of

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[1] At the time the Secretary adopted the regulation, the "territorial sea" described the area three miles seaward of the coast line. 33 C.F.R. 329.12. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Since that time, the President has proclaimed that the United States claims a territorial sea extending 12 nautical miles seaward of the coast line for purposes of international law. See *ibid.*; Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1989). That Proclamation, however, does not affect the location of the federal-state boundary, which remains defined by the Submerged Lands Act as a line three miles seaward of the coast line, 43 U.S.C. 1312. See 54 Fed. Reg. 777 (stating that nothing in the Proclamation "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom").

> the Department of the Interior is required before final action is taken.

33 C.F.R. 320.4(f). Accordingly, the regulation requires the Army Corps of Engineers to request comments from the Solicitor "concerning the effects of the proposed work on the outer continental rights of the United States," although the final decision on the application is made "by the Secretary of the Army after coordination with the Attorney General." 33 C.F.R. 320.4(f). See also 33 C.F.R. Pt. 322 (prescribing additional requirements for Section 10 permits); 33 C.F.R. Pt. 325 (setting forth procedures for processing permits).

**C. The Present Dispute**

The facts surounding the present dispute are set forth in the joint stipulation (J.S.) filed by the United States and the State of Alaska in this case. The contents of the joint stipulation can be summarized as follows:

1. In 1982, the City of Nome, Alaska, filed an application with the Department of the Army, Alaska District Corps of Engineers (the Corps), for a permit to construct port facilities, including a causeway extending into Norton Sound. J.S. 2, 1a-10a. The Corps issued a public notice and invited comments, see 33 C.F.R. 325.3, in accordance with the Army's public interest review procedures. J.S. 2, 11a-16a. The Alaska Office of the Department of the Interior's Minerals Management Service filed an objection to the issuance of a permit on the ground that the port facilities would constitute an artificial accretion to the legal coast line. J.S. 2, 17a-19a.

The Corps requested comments from the Solicitor, in acordance with 33 C.F.R. 320.4(f), quoted above.

J.S. 2, 20a-21a. The Solicitor responded that construction of the Nome facility would "move Alaska's coastline or baseline seaward of its present location" and that "[f]ederal mineral leasing off-shore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline." J.S. 2-3, 22a. The Solicitor therefore recommended that "approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary." J.S. 3, 22a.

The Corps transmitted the Solicitor's letter to the Alaska Department of Natural Resources and stated that a Department of the Army permit would not be issued to the City of Nome unless Alaska executed a waiver or quit claim deed preserving the coast line and the state-federal boundary. J.S. 3, 24a. The Alaska Department of Natural Resources submitted a conditional disclaimer stating in pertinent part:

> Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

J.S. 3, 30a. Paragraph 4 provided that the disclaimer "becomes ineffective and without force and effect" if a court determines that "the Corps of Engineers does not have the legal authority to re-

quire such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 4, 30a-31a. The Department of Justice informed the Corps that Alaska's disclaimer satisfied any objections that the Departments of Justice and the Interior might have to the issuance of the permit. J.S. 4, 32a.

The Corps issued a statement of findings supporting the issuance of the permit pursuant to the Department of the Army's public interest review criteria, and it issued a validated permit on July 25, 1984. J.S. 4-5. 33a-37a, 39a-49a. The City of Nome subsequently constructed the port facility, which includes a causeway extending approximately 2700 feet from the coast line into Norton Sound. J.S. 5, 62a.

2. In 1988, the Minerals Management Service published a request for comments and nominations for a proposed lease sale for hard-rock minerals, including gold, in the Norton Sound area. 53 Fed. Reg. 8134. The State of Alaska submitted comments stating, among other things, that the proposed sale involved submerged lands subject to the Nome project disclaimer and that the State intended to file a legal action, in accordance with paragraph 4 of the disclaimer, challenging the Corps' authority to require a waiver of rights to submerged lands. J.S. 5, 52a-54a. Alaska subsequently provided notice, pursuant to 28 U.S.C. 2409a(m), of its intention to file a suit to quiet title to the submerged lands in Norton Sound that are more than three miles from the natural shoreline but within three miles of the low water line of the constructed, solid-fill Nome causeway. J.S. 6, 55a-59a. Although the Nome causeway is only 85 feet wide and 2700 feet long (occupying about 5 acres), it has placed in dispute approximately 730

acres of submerged lands. J.S. 5, 6, 60a-61a. See J.S. 62a (map showing disputed acreage).

The United States thereafter requested and was granted leave by this Court to commence this original action. The Minerals Management Service published a final leasing notice soliciting bids, 56 Fed. Reg. 28,656 (1991), and the United States and Alaska entered into an agreement directing the revenues from leasing of the disputed acreage into an escrow account for payment to the United States or Alaska depending on the outcome of this action.[2]

## SUMMARY OF ARGUMENT

Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, confers broad authority on the Secretary of the Army to regulate the placement of structures and the commencement of related work in coastal waters. The Secretary has properly concluded that the decision whether to allow such structures or work should be based on a "public interest review," 33 C.F.R. 320.4(a), which takes into account a range of factors, including the effect of the structure on the "limits of the territorial sea," 33 C.F.R. 320.4(f). In this case, he determined that the Nome port facilities would have such an effect, and he lawfully declined to issue a Section 10 permit until the State of Alaska executed a disclaimer preserving the existing federal-state boundary.

A. The Secretary may properly conduct a "public interest review" to determine whether to issue a Sec-

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[2] The bidding process closed and no bids were received. The United States and Alaska agree, however, that a live controversy remains, in light of their continuing disagreement as to the location of the federal-state boundary and the prospect of future lease sales in the area. J.S. 6-7.

tion 10 permit. Section 10 does not specify what factors the Secretary should consider in issuing such a permit. It is therefore reasonable for the Secretary to consider all factors relevant to the public interest in order to ensure a sound and fully informed exercise of his discretion. The Secretary has considered such factors for more than half a century. His adoption of a formal process for public interest review ensures that Section 10 permits are issued consistently with the policies that Congress has set forth in other laws.

B. The Secretary may properly consider, as part of his public interest review, the effects of a coastal structure on the "limits of the territorial sea." A structure that alters the coast line may substantially alter the Nation's international and federal-state boundaries, affecting the United States' vital national interests in the outer Continental Shelf. There is no reason to believe that Congress, sub silentio, required the Secretary to ignore those important federal interests when deciding whether to issue a Section 10 permit. Indeed, the Secretary's consideration of those interests in the permitting process is consistent with this Court's decisions, which contemplate that such matters will be considered before a federal permit is issued.

C. The Secretary lawfully declined to issue a Section 10 permit in this case until the State of Alaska issued a disclaimer preserving the existing federal-state boundary. The Secretary's public interest review revealed that the Nome port facilities would alter the coast line and impair the United States' interests in the outer Continental Shelf. The Secretary was entitled, on that basis, to deny a Section 10 permit. He therefore could lawfully insist that the

State of Alaska execute a disclaimer, preserving existing rights, as a less drastic alternative to an outright denial of the permit.

## ARGUMENT

### THE SECRETARY OF THE ARMY MAY DECLINE TO ISSUE A PERMIT FOR CONSTRUCTION OF AN ARTIFICIAL ADDITION TO THE COAST LINE UNLESS THE COASTAL STATE AGREES THAT THE CONSTRUCTION WILL BE DEEMED NOT TO ALTER THE LOCATION OF THE FEDERAL-STATE BOUNDARY

The Secretary of the Army has long considered the "public interest" in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899. As one aspect of the inquiry, the Secretary may consider whether the placement of a structure in coastal waters will affect the location of the federal-state boundary. The Secretary properly concluded, after consultation with the Solicitor of the Department of the Interior, that the Nome port facilities would have such an effect, and he lawfully declined to issue the Section 10 permit unless the State of Alaska executed a disclaimer preserving the existing federal-state boundary.

#### A. The Secretary may consider the public interest in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899

1. When a court reviews an agency's construction of a statute that the agency administers, the court must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute "is

silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In this case, Section 10 plainly prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress" to the navigable capacity of the United States' coastal waters. 33 U.S.C. 403. Just as plainly, Section 10 empowers the Secretary of the Army to authorize the placement of "structures" including port facilities, and the undertaking of excavation, fill and other work, in such waters. 33 U.S.C. 403. Section 10 is silent, however, as to what factors the Secretary should consider in determining whether to authorize such structures or work. Thus, the initial question for this Court is whether the Secretary's use of a "public interest review," 33 C.F.R. 320.4(f), "is based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843. Clearly it is.

Congress has elected to impose a complete prohibition on the creation of "any obstruction" in navigable waters. 33 U.S.C. 403. It has then given the Secretary of the Army, who is charged with executing the law, the power to allow exceptions on a case-by-case basis, where the structure or work is recommended by the Corps of Engineers. 33 U.S.C. 403. But Section 10 neither specifies the factors the Secretary must consider in deciding whether to authorize construction in coastal or other waters nor limits the range of factors he may deem relevant. Section 10, on its face, therefore commits the identification of relevant factors to the discretion of the Secretary of the Army. Compare *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956).

In particular, nothing in Section 10 confines the Secretary to considering only those factors that bear on the navigable capacity of the waters involved. Nor should any such limitation be implied. Section 10 does not confer a right to obtain a permit for construction or fill in covered waters, such that the Secretary may deny a permit only if he finds an adverse impact on navigation or other specified factors to be present. Rather, as noted above, Section 10 states a flat prohibition against obstructions not "affirmatively authorized" by Congress itself, and provides for exceptions to that prohibition only where affirmatively authorized by the Secretary.

Because Congress itself obviously could consider all matters bearing on the public interest in deciding whether to authorize a project in the manner referred to in the first clause of Section 10, the logical inference is that the Secretary, too, may consider various factors he deems relevant to the public interest in exercising his delegated power under the second and third clauses to create exceptions to the prohibition in the first clause. This inference is reinforced by the specification that the Secretary's determination under the latter two clauses is to be based upon the "recommendation" of the Chief of Engineers, which strongly suggests that authorization need not be granted unless the Secretary affirmatively finds that the proposed project is, on balance, meritorious and commends itself to approval. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). Thus, as the Fifth Circuit observed, when it appears that a proposed project in covered waters would be contrary to the public interest, "nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see." *Zabel* v. *Tabb*, 430 F.2d 199, 201

(5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). See *id.* at 207-208. Compare *Udall* v. *FPC*, 387 U.S. 428, 450 (1967) (applying a "public interest" standard to hydropower licensing decisions).

A comparison with Section 13 of the 1899 Act, 33 U.S.C. 407, further reinforces the conclusion that the Secretary is not narrowly confined under Section 10 of the same Act to considering only factors bearing on navigation. Section 13 provides that the Secretary "may permit" the discharge of "refuse" whenever "in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." 33 U.S.C. 407. As this Court explained in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), "even in a situation where the Chief of Engineers concedes that a certain deposit will not injure anchorage and navigation, the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—*i.e.*, it provides that the Secretary 'may permit' the deposit." *Id.* at 662. The Court further pointed out that Section 13 "contains no criteria to be followed by the Secretary in issuing such permits." *Id.* at 668. The Court's reasoning in *Pennsylvania Industrial Chemical Corp.* applies equally to the contemporaneously enacted Section 10, which commits the authorization of a structure or other work in covered waters to the Secretary's discretion, and does not specify criteria (such as those pertaining only to navigation or anchorage) that must be followed by the Secretary in exercising that discretion.[3]

[3] The Secretary no longer issues Section 13 permits, in light of the superseding permit program established under the Clean Water Act, 33 U.S.C. 1251 *et seq.* See 33 U.S.C. 1342(a)(5); 33 C.F.R. 320.2(d).

If there could be any remaining doubt about the permissibility of the Secretary's interpretation and implementation of Section 10, it is eliminated by the rule of construction adopted by this Court in *United States* v. *Republic Steel Corp.*, 362 U.S. at 491. There, the Court concluded that "[t]he philosophy of the statement of Mr. Justice Holmes in *New Jersey* v. *New York*, 283 U.S. 336, 342, that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading either of § 13 or of § 10" of the 1899 Act. The Secretary's public interest review, which he has applied to all Section 10 permit applications for more than two decades, furthers that understanding of Section 10.

2. The breadth of the Secretary's authority that is indicated by the statutory text Congress enacted in 1899 is confirmed by subsequent developments. This Court suggested, more than 50 years ago, that the Secretary has discretion to consider public interest criteria when issuing a Section 10 permit. The issue arose in *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933). The relators in that case sought permission from the Secretary to build a wharf projecting from the Virginia shore into the Potomac River. The Secretary refused to authorize the construction solely on the ground that it would be inimical to the establishment of the proposed George Washington Parkway. *Id.* at 353-355.

The relators petitioned for a writ of mandamus to compel the Secretary to authorize the wharf, arguing that the Secretary had a mandatory duty to issue a Section 10 permit unless the proposed structure interfered with navigation. The lower courts denied the petition, concluding that the Secretary had discretion to deny a Section 10 permit for reasons other

than navigational concerns. The court of appeals stated:

> [T]he act confers discretion in the Secretary to grant or refuse permits where the structure will not interfere with navigation, and the Secretary in the exercise of that discretion may take into consideration the character of the structure sought to be built * * *, and in the determination of this matter the Secretary must take into consideration the "location" and the "condition" of the structure and its effect upon other structures or upon the "channel," or the normal flow of the stream.

*United States ex rel. Greathouse* v. *Hurley*, 63 F.2d 137, 141 (D.C. Cir. 1933).

This Court affirmed. It took note of the Secretary's arguments that

> petitioners' riparian ownership and the right to build the wharf which they claim to be derived from it are doubtful; and in any event that the duty of the Secretary under the statute is not plain and certain, since the words forbidding all structures in any navigable water "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War," are only permissive, not mandatory, and there is no plain implication of a duty on the part of the Secretary to authorize a structure * * * to which there is substantial objection that it infringes the rights or obstructs the public policy of the United States as owner and sovereign of the river bed.

289 U.S. at 358-359. The Court, however, found no need to "say what effect should be given to these objections alone, whether considered each separately or

together." *Id.* at 359. It observed that the allowance of mandamus "is controlled by equitable principles," and that "the relief sought by mandamus should be denied here, even if petitioners' title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are." *Id.* at 359-360.

Although this Court's decision in *Greathouse* did not conclusively resolve the issue presented here, it correctly observed that the petitioners' right to a permit was, at best, "doubtful." Indeed, as the D.C. Circuit recognized, 63 F.3d at 141, and the Fifth Circuit has since stated:

> [T]he Corps of Engineers does not have to wear navigational blinders when it considers a permit request. That there must be a reason [for denying a permit] does not mean that the reason has to be navigability.

*Zabel*, 430 F.2d at 208. See also *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1187-1188 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *Bankers Life & Casualty Co.* v. *Callaway*, 530 F.2d 625, 633-634 (5th Cir. 1976); *United States* v. *Joseph G. Moretti, Inc.*, 478 F.2d 418, 423 (5th Cir. 1973); *Citizens Committee for Hudson Valley* v. *Volpe*, 425 F.2d 97, 104-105 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

3. As the dispute in *Greathouse* indicates, the Secretary of the Army has long considered nonnavigational interests in determining whether to issue a Section 10 permit. Those interests have become far more numerous and important in the latter half of this century. The Secretary must now act in the face of an extensive body of federal law establishing, among other things, national policies concerning en-

vironmental matters and natural resource development.[4]

The Secretary has responded by adopting the "public interest review" process to keep pace with the evolution of the law. As the Department of the Army's regulations explain:

> Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. * * * The program is one which reflects the national concerns for both the protection and utilization of the important resources.

33 C.F.R. 320.1. See 42 Fed. Reg. 37,122 (1977); 39 Fed. Reg. 12,115 (1974); 33 Fed. Reg. 18,670 (1968). See also H.R. Rep. No. 917, 91st Cong. 2d Sess. 5 (1970) (praising the Army's use of public interest review factors).

The Secretary of the Army's adoption of a process for "public interest review" reflects a commitment to faithful execution of the law. An administrative agency, like a court, has a duty to reconcile "laws enacted over time" and to "get[] them to 'make

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[4] See, *e.g.*, Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; Submerged Lands Act, 43 U.S.C. 1301 *et seq.*; Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* See also 33 C.F.R. 320.3 (describing other related laws).

sense' in combination," *United States* v. *Fausto*, 484 U.S. 439, 453 (1987), and to implement its statutory authority in a manner that takes account of changed circumstances and its accumulated experience and expertise. See, *e.g.*, *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1546-1547 (1991); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

That is what the Secretary of the Army has attempted to do here. See *Zabel*, 430 F.2d at 209. The Secretary has appropriately chosen to codify by regulation a process that conforms the agency's exercise of discretion to new legal requirements. That process also takes into account evolving evidence and awareness of matters affecting—and affected by—activities in navigable waters. It thus ensures that the Department's issuance of a Section 10 permit is consistent with the policies that Congress has set forth in other laws and with the inherently evolutionary nature of a regulatory program. Cf. *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983).

Moreover, the Secretary of the Army has found that the "public interest review" process is, in practice, an effective method for fulfilling its Section 10 responsibilities. It allows federal *and* state agencies, as well as the general public, to raise important legal and policy issues bearing on the issuance of a Section 10 permit. In this case, for example, the public interest review revealed important considerations bearing on the protection of fish and wildlife resources, shoreline erosion, historic preservation, and other matters, and it allowed the Secretary of the Army to tailor his authorization of the proposed project to meet those concerns. See J.S. 33a-37a. It has served that salutary purpose in a host of other

projects in the course of the Secretary's review of thousands of permits annually. In short, the Secretary's public interest review is a useful, sensible and lawful approach to issuance of Section 10 permits and improves the overall regulatory effort.

**B. The Secretary may refuse to issue a Section 10 permit for a coastal structure based on the effects of the structure on the location of the federal-state boundary**

1. The Secretary of the Army's public interest review regulations expressly provide for consideration of a wide variety of factors.[5] This case arises from the consideration of one particular factor—the effects of the proposed construction on the "limits of the territorial sea." 33 C.F.R. 320.4(f). Since 1969, the Secretary's regulations have provided that Section 10 permit applications for structures or work affecting coastal waters will be reviewed specifically to determine whether the coast line or base line might be altered. 33 C.F.R. 320.4; see 33 C.F.R. 209.120 (d)(4) (1969). That consideration is a proper subject of the Secretary's public interest review.

As the Secretary's regulation recognizes, the location of the coast line has great significance. The Convention on the Territorial Sea and the Contiguous

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[5] See 33 C.F.R. 320.4(b) (wetlands); 33 C.F.R. 320.4(c) (fish and wildlife); 33 C.F.R. 320.4(d) (water quality); 33 C.F.R. 320.4(e) (historic, cultural, scenic, and recreational values); 33 C.F.R. 320.4(g) (property ownership); 33 C.F.R. 320.4(h) (coastal zones); 33 C.F.R. 320.4(i) (marine sanctuaries); 33 C.F.R. 320.4(j) (other federal, state, or local requirements); 33 C.F.R. 320.4(k) (safety of impoundment structures); 33 C.F.R. 320.4(*l*) (floodplain management); 33 C.F.R. 320.4(m) (water supply and conservation); 33 C.F.R. 320.4(n) (energy conservation and development); 33 C.F.R. 320.4(o) (navigation); 33 C.F.R. 320.4(p) (environmental benefits); 33 C.F.R. 320.4(q) (economics); 33 C.F.R. 320.4(r) (mitigation).

Zone, ratified by the United States on April 12, 1961, 15 U.S.T. 1608, establishes international boundaries by reference to the coast line (or base line).[6] In addition—and especially pertinent here—the Outer Continental Shelf Lands Act and the Submerged Lands Act provide that the offshore boundary for purposes of federal and state interests shall be determined by reference to the coast line. See pp. 4-5, *supra*. This Court's 1965 decision in *California II* established that man-made additions to the coast line, which are treated as part of the coast line for the purposes of the Convention (Art. 8, 15 U.S.T. at 1609), should be treated as such for purposes of those Acts. Thus, it is entirely appropriate for the Secretary to consider the effect a coastal structure would have on the location of the coast line as part of the Section 10 public interest review.

Completely apart from any issue that might arise with respect to foreign relations, see *California I*, 332 U.S. at 29, such review is necessary to protect an important federal interest—"the outer continental rights of the United States." 33 C.F.R. 320.4(f). Congress has expressly declared that "the outer Continental Shelf is a vital *national* resource reserve held by the *Federal Government* for the *public*." 43 U.S.C. 1332(3) (emphasis added). If the Secretary is forbidden from taking into account the effect that coastal structures may have on the coast line, portions of that "vital national resource reserve" would be transferred—without public comment or any formal governmental consideration—from national to state hands. That transfer would prejudice the rights of

[6] See also United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982). The United States has not ratified that Convention, but has recognized that its baseline provisions reflect customary international law.

the national citizenry, in violation of the express policy of the Outer Continental Shelf Lands Act, in favor of citizens of a single coastal State. Section 10 of the 1899 Act should not be construed to require a result so at odds with its overriding purpose of protecting important national interests. Accordingly, the Secretary of the Army, in consultation with the Solicitor of Interior and the Attorney General, may refuse to issue a permit that would have such an effect. 33 C.F.R. 320.4(f).

2. The Secretary's consideration of the effect of a coastal structure on the coast line also conforms to and implements this Court's decision in *California II*. As we have explained, the Court agreed with the Special Master in *California II* that coastal structures may be treated as part of the "coast line" for purposes of the Submerged Lands Act. See 381 U.S. at 176-177. See pp. 5-6, *supra*. A central element of Court's *ratio decidendi* was 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.

381 U.S. at 176. The Special Master had specifically observed that

> it may be assumed that in the past the question of the ownership of the lands, minerals and other things underlying these artificial accretions has not been taken into consideration by the United States in passing judgment upon whether the accretions will be permitted; but it seems clear that in the future that aspect of the matter can be, and probably will be, taken into account.

*California II*, Report of the Special Master, at 46. The Court agreed, stating:

> 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 177. Thus, the Court effectively endorsed the Special Master's view that the United States could protect the paramount national interests at stake by revising its Section 10 permitting process, which is the means by which the United States "pass[es] judgment upon whether the accretions will be permitted." Report of the Special Master, at 46. See also *United States* v. *Louisiana*, 394 U.S. at 40 n.48.

The Department of the Army promptly amended its permitting process to implement the solution offered by the *California II* decision. The Department formally revised its Section 10 regulations in 1968 to require consideration of "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." 33 Fed. Reg. 18,670, 18,671 (1968). Since that time, the Department has further refined those regulations. See 39 Fed. Reg. 12,115 (1974). And since as early as 1970, it has entered into numerous agreements, like the one involved here, to resolve or pretermit questions regarding the effect of a coastal structure on the location of the coast line and the federal-state boundary. J.S. 7.[7] There is no basis in Section 10 for the Court, at

[7] See Joint Lodging of the United States and the State of Alaska (providing copies of various disclaimers).

this late date, to reject this established method for ensuring protection of the United States' vital national interests in the outer Continental Shelf, as part of the Secretary's broader public interest review.

### C. The Secretary lawfully declined to issue a Section 10 permit in this case unless the State of Alaska executed a disclaimer preserving the federal-state boundary

1. The Department of the Army properly exercised its regulatory authority in this case. When the City of Nome applied for a Section 10 permit, the Alaska District of the Department of the Army's Corps of Engineers sought public comment in accordance with 33 C.F.R. 325.3. The Alaska Office of the Department of the Interior's Minerals Management Service objected to the issuance of the permit on the ground that it would affect the coast line and, consequently, the United States' offshore interests. The Corps therefore consulted with the Solicitor of Interior in accordance with 33 C.F.R. 320.4(f). J.S. 2, 20a-21a. Such consultation is, of course, entirely permissible and, in fact, desirable.

2. The Solicitor objected to Nome's application for a Section 10 permit based on a valid federal concern:

> The proposed construction would move Alaska's coastline or baseline seaward of its present location. Federal mineral leasing offshore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline.

J.S. 22a. As subsequent events have shown, the Solicitor's concerns were well founded. The Minerals Management Service has determined that the affected offshore acreage may contain valuable mineral deposits. J.S. 5, 6; 53 Fed. Reg. 8134 (1988); 56 Fed. Reg. 28,656 (1991). The Solicitor correctly antici-

pated that Alaska might raise a claim to those lands as a result of construction of the Nome port facility. See J.S. 5-6, 52a-54a, 55a-61a.

3. The Solicitor recommended that "approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary," noting that "[s]uch agreements have been encouraged by the Supreme Court, and have been entered into by other states as well as Alaska." J.S. 22a-23a. The Solicitor was entitled, like any participant in the Corps' process, to make such a suggestion, and the Corps was entitled to weigh his recommendation in its permitting decision.

4. The Corps informed the City of Nome and the State of Alaska of the Solicitor's objection, and it reasonably insisted, in light of the Solicitor's recommendation, that a permit would not be issued

> until an agreement has been reached between the Alaska Department of Natural Resources and the City of Nome, and a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary.

J.S. 24a. The Corps acted lawfully in insisting on such a disclaimer. As we have explained, Section 10 of the Rivers and Harbors Appropriation Act of 1899 does not require the Secretary of the Army to issue a permit for coastal construction that is inimical to the public interest—including the United States' interest in the outer Continental Shelf. See pp. 15-28, *supra*. If the Secretary of the Army can legitimately prohibit the construction of the proposed port facilities, he can certainly provide the City of Nome and the State of Alaska with a less drastic "alternative to that prohibition" that satisfies the government's

regulatory objective. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 836-837 (1987).

5. In this case, the State of Alaska elected to execute a binding disclaimer stating that "the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act." J.S. 30a. Alaska reserved, as the sole condition to the disclaimer, its right to challenge the Secretary's "legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 30a-31a. As we have shown, the Secretary of the Army has such legal authority. The disclaimer is therefore valid, and the United States is entitled to judgment as a matter of law.

## CONCLUSION

The motion for summary judgment in favor of the United States should be granted.

Respectfully submitted.

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