

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

SECRETARY OF THE INTERIOR, ET AL.,	)	
Petitioners	)	
v.	)	NO. 82-1326
CALIFORNIA, ET AL.:	)	
WESTERN OIL AND GAS ASSOCIATION,	)	
ET AL.,	)	
Petitioners	)	
v.	)	No. 82-1327
CALIFORNIA, ETC., ET AL.; and	)	
CALIFORNIA, ET AL.,	)	
Petitioners	)	
v.	)	No. 82-1511
SECRETARY OF THE INTERIOR, ET AL.	)	

PLACE: Washington, D. C.

DATE: November 1, 1983

PAGES: 1 thru 53



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1	IN THE SUPREME COURT OF THE UNITED STATES		
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4	Petitioners	:	
5	v.	:	No. 82-1326
6	CALIFORNIA, ET AL.;	:	
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14	SECRETARY OF THE INTERIOR, ET AL.	:	
15	----- x		

16 Washington, D.C.

17 November 1, 1983

18 The above-entitled matter came on for oral

19 argument before the Supreme Court of the United

20 States at 10:11 a.m.

21 APPEARANCES:

- 22 REX E. LEE, ESQ., Solicitor General of the United
- 23 States, Department of Justice, Washington, D.C.;
- on behalf of the Petitioners.
- 24 E. EDWARD BRUCE, ESQ., Washington, D.C.; on behalf
- 25 of the Petitioners.
- THEODORA BERGER, ESQ., Assistant Attorney General
- of California, Los Angeles, California; on behalf
- of the Respondents.

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5	E. EDWARD BRUCE, ESQ.,	17
6	on behalf of the Petitioners	
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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in Secretary of the Interior against  
4 California and others, and the consolidated cases.

5                    Mr. Solicitor General, you may proceed whenever  
6 you are ready.

7                    ORAL ARGUMENT OF REX E. LEE, ESQ.

8                    ON BEHALF OF THE PETITIONERS

9                    MR. LEE: Mr. Chief Justice, and may it please  
10 the Court:

11                   Oil and gas leasing on the Outer Continental  
12 Shelf occurs in four distinct stages. The first stage  
13 is the preparation by the Secretary of Interior of a five-  
14 year leasing plan. It is followed by the lease sale,  
15 exploration, and finally production and development.

16                   The statutes also provide for step-by-step  
17 decision making throughout these four stages in a process  
18 which has two major aspects. The first aspect is that  
19 each decision is made at a time when an optimum amount  
20 of information needed to support that particular decision  
21 is available.

22                   The second aspect is that the decision to proceed  
23 through any given stage of the total OCS process does not imply  
24 a commitment to any later stage.

25                   The question in this case is one of statutory



1 interpretation. It is whether the substantive require-  
2 ment of Section 307(c)(1) of the Coastal Zone Management Act  
3 that federal activities directly affecting a state's coastal  
4 zone be conducted in a manner that is consistent to the  
5 maximum extent practicable with approved state coastal  
6 zone management programs applies at the lease sale stage,  
7 the second of the four stages, in all instances.

8           The most helpful guide to what the statute means  
9 is what the statute says.

10           What brings the CZMA's substantive requirements  
11 into play is not a functional relationship or a link in  
12 a chain of events, it is rather a direct effect.

13           Out of the several accepted meanings, dictionary  
14 meanings, meanings approved by decisions of this Court  
15 of that word "direct," not one of them, not one, supports  
16 the Respondents' position in this case. And, indeed,  
17 the Respondents have not even suggested any.

18           There are several meanings of the word that  
19 are directly helpful to the issue before this Court.  
20 Among other things, it is language of proximity, of  
21 certainty, of immanence, language that says there will  
22 be no intervening agency or event.

23           Just last term in *Bowsher versus Merck* this  
24 Court, in construing the word "direct" in another context  
25 said, and I am quoting, "That whether the reference that

1 the word obviously ..." "It is plain from the face of  
2 the provisions that these are words of limitation  
3 requiring some close connection between the type of record  
4 sought and the particular contract." There is the require-  
5 ment of some close connection between the thing directly  
6 affected and the directly affecting entity.

7 In any event, whether the reference is to this  
8 Court's ruling in Bowsher or whether it is to any ordinary  
9 dictionary definition, it is very clear that the words  
10 "directly affecting" are the complete antithesis of the  
11 remote and speculative circumstances that obtain at the  
12 lease sale stage of Outer Continental Shelf phase develop-  
13 ment. At that stage, it is uncertain, for example,  
14 whether there will be any hydrocarbons found at all;  
15 whether if they are found, they will be oil or gas and  
16 how and where they will be brought ashore.

17 There may be effects on the coastal zone from  
18 what happens on the Outer Continental Shelf, but in this  
19 case and almost all cases those are effects from what may  
20 or may not happen years after the lease sale at the time  
21 of exploration or production and development.

22 QUESTION: May I ask, Mr. Solicitor General,  
23 this has to be in the context of a coastal zone plan,  
24 does it?

25 MR. LEE: That is correct.

1                   QUESTION: And, how does one of those come into  
2 being?

3                   MR. LEE: Drafted first by the relevant state  
4 then submitted to the Secretary of Commerce for approval,  
5 then after that that is the charter with which con-  
6 sistency must be determined.

7                   QUESTION: What does one of those look like?  
8 Are there many of them?

9                   MR. LEE: Well, there are a couple of dozen  
10 or so.

11                  QUESTION: There are?

12                  MR. LEE: Yes. And, they simply set up -- They  
13 vary. Some of them can be very general and in our view  
14 most of them are extremely general. Some of them --

15                  QUESTION: Not very detailed then?

16                  MR. LEE: They can have a certain amount of  
17 detail, but in general they are quite general and that  
18 gives the state additional leadway.

19                  QUESTION: Can you suggest what they cover?

20                  MR. LEE: Well, such things as the protection  
21 of the environment and the protection of animal life and  
22 so forth along the coastal zone which is from the shore  
23 and three miles out to the territorial sea.

24                  QUESTION: But, none of the four stages comes  
25 into play until there is such an agreement arrived at?

1 MR. LEE: That is correct.

2 QUESTION: And, that has to be arrived at between  
3 whom?

4 MR. LEE: Of course, the four stages can come  
5 into play, but the CZMA would not come into play until  
6 there is such a --

7 QUESTION: Yes.

8 MR. LEE: It is a plan that is adopted  
9 by the state, submitted to the Secretary of Commerce  
10 and then approved by --

11 QUESTION: Secretary of Commerce?

12 MR. LEE: -- the Secretary of Commerce, that  
13 is correct.

14 In 1976 and 1978, Congress amended respectively  
15 the CZMA and the Outer Continental Shelf Lands Act.  
16 Though the hearings for the amendments to the two statutes  
17 were held in tandem and certainly the two have to be  
18 considered in tandem, and it was in those amendments  
19 that specific provision was made for phased decision  
20 making.

21 The OSC leasing process is one which, by its  
22 very nature, lends itself to decision making by stages.  
23 The total process takes years, and in some instances,  
24 even decades, but there are identifiable points along  
25 the line at which decisions have to be made whether



1 to proceed further.

2 Now, as an integral part of this compre-  
3 hensive change to phased decision making, Congress provided  
4 in Sections 11 and 25 of the OCSLA, added in 1978, and  
5 in Section 307(c)(3)(B) of the CZMA which is the only section  
6 that deals expressly with Outer Continental Shelf  
7 transactions. That these consistency certifications  
8 with their substantive capacity to halt further develop-  
9 ment would be made at the exploration stage and at the  
10 production/development stage.

11 At the lease sale stage, the provision is dif-  
12 ferent. That is expressly dealt with by Section 19 of  
13 the OCSLA which provides for state input of information  
14 regarding the size, timing, and location, which, analogous  
15 to NEPA the Secretary of Interior must take into account  
16 and must give reasons for his rejection of the state's  
17 suggestion.

18 QUESTION: At the lease stage, is anything con-  
19 templated except survey?

20 MR. LEE: At the lease sale stage, it is surveying,  
21 that is correct.

22 QUESTION: That is all?

23 MR. LEE: That is correct. Now, there can be  
24 some drilling in connection with that, but no one is  
25 contending that that has any environmental -- Well, just

1 because of the drilling itself.

2 QUESTION: My next question was are there any  
3 effects at that stage from surveying?

4 MR. LEE: There could be. In some isolated  
5 instances, you could have -- It is basically a sonar,  
6 seismic type soundings and you could have, in some  
7 instances, a circumstance where the mere carrying on of  
8 those surveys and those sound waves going out could have  
9 some effect on animals in the area. But, this is not  
10 that kind of case and will not be in the great majority  
11 of instances.

12 QUESTION: Mr. Solicitor General, may I ask  
13 a question about the phased decision making? As I under-  
14 stand it, the approval requirements for exploration,  
15 development, or production are found in 307(c)(3)(B),  
16 is that right, which was enacted in 1978, was it?

17 MR. LEE: '76.

18 QUESTION: '76. Now, during -- I take it the  
19 critical language we are focusing on was enacted some  
20 years earlier?

21 MR. LEE: That is correct.

22 QUESTION: Now, during the period between the  
23 enactment of 307(c)(1) and the later enactment of the  
24 phased decision making, during the five or six years when  
25 there was no phased decision making, would you say

1 directly affecting meant the same thing?

2 MR. LEE: Yes, I would. I certainly would.  
3 That is definitely our position. What it refers to are  
4 those instances, the kind of thing that I was referring  
5 to in my response to Justice Brennan whether, in fact,  
6 it would be direct affect.

7 QUESTION: So, you would say the directly  
8 affecting requirement for your position doesn't depend  
9 at all on the successive phased decision making then?

10 MR. LEE: Well, except that it bears on -- The  
11 decision making reflects the fact that Congress knew at  
12 the time it adopted it that that provision for a con-  
13 sistency determination was not already contained in the  
14 earlier language adopted in 307(c)(1).

15 QUESTION: But, the language adopted in the  
16 later stages applies to what the lessee must do?

17 MR. LEE: That is correct. That is correct.

18 QUESTION: Is there any provision directing  
19 the government, the federal government, in its activity  
20 to comply with this consistency requirement?

21 MR. LEE: The answer is yes, and it is  
22 307(c)(1), but it rarely applies. It applies only in  
23 those instances in which there is, in fact, a direct  
24 effect; that is an effect that does not depend on any  
25 intervening agency coming into play.

1           Now, that becomes very apparent when you look  
2 at what, in fact --

3           QUESTION: I still don't understand. What  
4 language makes the government do anything in this regard,  
5 the federal government?

6           MR. LEE: It is 307(c)(1).

7           QUESTION: Where is 307(c)(1) in the petition?

8           MR. LEE: In the petition for certiorari it  
9 is at page 84a, about the middle of the page.

10          QUESTION: Thank you.

11          MR. LEE: In 1976 and 19 --

12          QUESTION: Excuse me, may I ask one more question?

13          MR. LEE: Yes.

14          QUESTION: Under your reading of these Acts,  
15 would the state lose anything by waiting until the  
16 exploration stage for consistency --

17          MR. LEE: Absolutely nothing in our view. That  
18 is correct. Because the other thing that the Secretary  
19 has at that exploration stage is the authority to stop.  
20 Up until that point, he must take into account the views,  
21 and if there is a direct effect, he stops it then. That  
22 is the other essential feature of OSC phased development.  
23 At the exploration stage, notwithstanding the fact that  
24 the oil companies have vast amounts of money involved,  
25 he can nevertheless say or nevertheless, if at that stage,



1 the state determines that it is inconsistent, that, in  
2 and of itself, stops the development. The state can do  
3 it all by itself.

4 Now, there is authority in the Secretary of  
5 Commerce to override in the event that he makes an over-  
6 riding decision.

7 But, in our view, no, the state does not lose  
8 by waiting until the later stage.

9 What happened in '76 and '78 was that in the  
10 initial phases of the congressional consideration, the  
11 position that prevailed in both Houses was one which  
12 was identical to the positions favored by the Respondents  
13 here; that is that the consistency determination, the  
14 consistency certification, would have to be made at the  
15 lease sale stage. In both Houses there were proposals  
16 to that effect that were introduced and, during the initial  
17 stages, they were the ones that prevailed.

18 However, they were never enacted into law.  
19 There was -- The word "lease" was included in this  
20 307(c)(3)(B).

21 QUESTION: May I ask just this though? If  
22 that had not been enacted, as you read 307(c)(1), the  
23 government nevertheless would have been under an  
24 obligation at that time to make the determination, would  
25 it not?

1 MR. LEE: Well, if there had never been the  
2 subsequent -- the result still would have been the same.

3 QUESTION: So, you really didn't need the  
4 subsequent history?

5 MR. LEE: That is correct. My reliance on what  
6 happened in '76 and '78 simply -- strengthens our view  
7 as to (c)(1).

8 During the course of the legislative debates,  
9 the Executive Branch expressed its concern that at the  
10 lease sale stage we simply don't know enough. And, if  
11 you will look at page 30 of our brief, you will see that  
12 Congress shared that view. They shared that concern that  
13 the leases were being stopped at the lease sale stage  
14 and as a consequence they opted for the phased  
15 development.

16 The net result was that the original language,  
17 which included leases within its consistency certifications  
18 requirements, was dropped and in its place or instead  
19 rather Section 307(c)(3)(B) was added. It was a new  
20 section. It is the only part of the entire statute that  
21 deals with OCS transactions.

22 And, as a net result, the provisions of the  
23 CZMA which deal with CZMA applicability to OCS trans-  
24 actions are identical to the provisions of the OCSLA  
25 dealing with CZMA applicability to OCS transactions;

1   namely, that CZMA's substantive requirements apply only  
2   at the exploration and production and development stages  
3   and that is what expressly Section 307(c)(3)(B) says in  
4   the CZMA and that is what Sections 11, 19, and 25 of the  
5   OCSLA says. And, any other view puts these two  
6   necessarily related statutes out of sync with each other.

7               At the lease sale stage what happens is it is  
8   a procedural requirement of coordination, involvement,  
9   cooperation that the Secretary is required to consider,  
10   but there is not substantive authority to stop the  
11   project.

12              Now, the Respondent's contention is that a CZMA  
13   obligation at the lease sale stage is imposed on the  
14   federal government by the directly affecting language  
15   and this gets to Justice Steven's question.

16              There are at least two flaws in that argument.  
17   The first one is that it flies in the face of what the  
18   statute says for reasons already discussed, means  
19   direct. It simply cannot mean something that may or may  
20   not come about depending on events which have not yet  
21   occurred. That is an undisputed description of the lease  
22   sale circumstance and it fits no definition of the word  
23   "direct."

24              Second, if Congress -- If the reason that Con-  
25   gress eliminated the blanket requirement of consistency

1 determinations at the lease sale stage from the only part  
2 of the statute that expressly deals with OCS transactions  
3 after months of consideration of the issue was because  
4 of some discovery that it was already contained in another  
5 part of the Act that was already in existence, Congress  
6 surely would have said so.

7           If Section 307(c)(1), which is the directly  
8 affecting section, already contained a CZMA lease sale  
9 requirement, why did Congress give such extensive con-  
10 sideration to whether that self same requirement should  
11 be written in the OCS subsection?

12           There is not one word in the legislative history  
13 that so much as hints that the reason that leasing was  
14 not included, indeed, was deleted from Section 307(c)(B)  
15 was redundancy. It was rather impracticability,  
16 incompatibility with the phased development of the OCS  
17 that was the centerpiece.

18           QUESTION: Isn't it also true that the (B). --  
19 these are long titles --

20           MR. LEE: Yes, I know.

21           QUESTION: The one added imposes an obligation  
22 on lessee with respect to land that has already been leased?

23           MR. LEE: That is correct.

24           QUESTION: Whereas, the one that is in dispute  
25 here is the one that imposes the obligation on the federal



1 government.

2 MR. LEE: That is correct.

3 QUESTION: So, they have rather different  
4 spheres of operation.

5 MR. LEE: That is correct.

6 QUESTION: Yes.

7 MR. LEE: If the Court has no further questions  
8 at this time, I would like to --

9 QUESTION: What do you do with the contrary  
10 legislative history, just say that it is post-enactment  
11 legislative -- What about the Senate and House reports?

12 MR. LEE: Well, there is only one footnote prior  
13 to 1980 that really supports that proposition. That is  
14 Footnote 52 in 1977. And, that is consistent. What we  
15 think that refers to is our view, as I have already  
16 explained it, that there will be some direct effects in  
17 some instances and in those cases it will apply to the  
18 leasing stage.

19 The 1980 legislative history, I think my answer  
20 is obvious. Those were simply the views of some  
21 individual congressmen concerning their interpretation  
22 of what an earlier Congress meant. That is not legis-  
23 lation. That is not the proper function for Congress  
24 to play. The only way that Congress can change the law  
25 is by passage by two Houses and signature by the

1 President.

2 QUESTION: I gather, Mr. Solicitor General,  
3 a lessee who has to wait until the exploration stage may  
4 lose his whole investment if there is a finding that  
5 stands up of inconsistency later, doesn't he.

6 MR. LEE: For the answer to that question, I  
7 now yield to the lessee.

8 CHIEF JUSTICE BURGER: Mr. Bruce?

9 ORAL ARGUMENT OF E. EDWARD BRUCE, ESQ.

10 ON BEHALF OF THE PETITIONERS

11 MR. BRUCE: Chief Justice Burger, and may it  
12 please the Court:

13 I think I know the first question I must answer  
14 and the answer to the question, Justice Brennan, is that,  
15 indeed, the statute makes it quite clear that if an  
16 inconsistency determination is made later and if the  
17 Secretary of Commerce does not override it, as he has  
18 the power to do, then the lessees under the statute --

19 QUESTION: Incidentally, may I ask you, what  
20 are the circumstances under which the Secretary may over-  
21 ride it?

22 MR. BRUCE: He may do so --

23 QUESTION: What does national security mean,  
24 for example?

25 MR. BRUCE: What does it mean?

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QUESTION: Yes.

MR. BRUCE: Well, the regulations define it hardly adding much to the language of the statute itself. There is a regulatory definition within the Department of Commerce as to the policy matters the Secretary of Commerce may consider. To my knowledge, no successful appeal has yet been invoked, but I should add that this statute still is rather new to us. There is little experience under it.

I would like to also amplify, Justice Stevens, one of the answers that the Solicitor General gave to one of your questions. At the later stages, under 307(c)(3)(B), it is not simply a matter of lessee compliance. The Secretary of the Interior, under Section 11 and Section 25 of the Outer Continental Shelf Lands Act, is directed not to approve the requisite permits for exploration or production and development unless consistency is achieved.

So, he doesn't step out of the picture. He is very much into the picture. Congress explicitly put him into the picture.

QUESTION: He was not in the picture in 1972, was he?

MR. BRUCE: Well, in 1972, that part of the OCS Lands Act did not exist.

1 QUESTION: That is my point.

2 MR. BRUCE: But, our position --

3 QUESTION: To look at the problem as of '72,  
4 we would have nothing but the language, directly affected,  
5 to deal with.

6 MR. BRUCE: I would go back even further. I  
7 would go back to 1953 and consider what Congress did in  
8 reaction to this Court's decisions in the so-called  
9 tidelands oil controversy, look at that determination,  
10 and then ask the question whether the statutory language  
11 that they used in 1972 and the legislative history associated  
12 with the 1972 -- radically changed that. The Plaintiffs  
13 say that it did, but the Plaintiffs offer no definition,  
14 as the Solicitor General has told us, of the term  
15 "directly affecting" that begins at all to comport with  
16 their position. To the contrary, it is their position  
17 in their briefs -- California's position that the meaning  
18 of these terms are unclear and they urge upon this Court  
19 what they themselves characterize as a broad, liberal,  
20 or expansive definition in order to suit their needs.

21 They not only ignore the language of Section  
22 307(c)(1), they ignore the very specific arrangements  
23 of Section 19 of the Outer Continental Shelf Lands Act,  
24 where in 1978 Congress addressed this very question, what  
25 role shall we create for the states in the OCS tract



1 selection process at the leasing stage and provided an  
2 arrangement quite different than the one that emerges  
3 from their interpretation.

4 They ignore 307(c)(3)(B) and what it says about  
5 the role of the CZMA in the OCS process and they ignore  
6 Sections 11 and 25 that interlock these two.

7 Now, how do they justify this? They do it  
8 ultimately on a policy argument. They say really that  
9 OCS leasing is simply so important that we simply must  
10 have this authority, we must have input at the leasing  
11 stage.

12 There are three, at least three depositive answers  
13 to that argument. In the first place, this Court has  
14 repeatedly held in recent years and in past years that  
15 we start with the language with which Congress expressed  
16 itself. We don't ask the judges to delve into policy  
17 and create a different scheme.

18 A second answer is this: In 1978, when the  
19 OCS Lands Acts was completely revised, Congress addressed  
20 the very policy question upon which Plaintiffs stand  
21 here; that is the need for state input into the process.  
22 That was defined as a major policy goal of the Outer  
23 Continental Shelf Lands Act.

24 When Congress did that it adopted Section 19.  
25 Indeed, it adopted it at the urging of California,

1 Massachusetts and other states who, notwithstanding the  
2 existence of the 1972 CZMA said, we need a role in the  
3 tract selection process and Congress gave them that role.  
4 And, that role was for governors to make recommendations;  
5 that role was for the Secretary of the Interior to have  
6 final authority to assess a balance between state and  
7 national interests subject, of course, to judicial review  
8 in a well-defined means.

9           Indeed, even in 1976, when Congress was  
10 addressing policy under the CZMA, in making these major  
11 amendments to that Act, taking into account the need to  
12 have an aggressive OCS program, it addressed the policy  
13 question and it said we are giving the states a right  
14 to apply their programs at these later stages, at  
15 exploration and development. And, the conference report  
16 said that this would satisfy state needs for complete  
17 information on a timely basis about the details of the  
18 oil industry's plans.

19           That is, by the way, in our brief at page 42.

20           Congress made this policy statement at exactly  
21 the time it was rejecting a proposal to make leases  
22 subject to consistency review. Congress has rejected  
23 their policy argument. Congress has found an expression  
24 or place for the policy to be achieved elsewhere.

25           A final answer to their policy argument, we

1 submit, can be found in their steady resistance to offer  
2 to this Court or any court what would flow from adopting  
3 their directly affecting argument. What consequences  
4 would we have?

5 In the lower court, certainly in the trial court,  
6 they said they would have final authority, recognizing  
7 the improbability, shall I say, of that position. They  
8 now retreat to some undefined degree of deference that  
9 would have if (c)(1) applies as they say it applies.

10 The point to nothing in the CZMA, the OCS Lands  
11 Act, the Administrative Procedure Act, general principles  
12 of administrative law, that this Court or any court could  
13 consider in deciding how much deference they were due.

14 They would create, it seems to me, litigation  
15 over the years trying to make these case-by-case adjust-  
16 ments as the Ninth Circuit itself recognized.

17 Now, sometimes, indeed, all too often, this  
18 Court is confronted with statutory schemes where Congress  
19 hasn't been specific enough and litigation must be  
20 resorted to to solve these kinds of problems.

21 We submit in this case the confusion implicit  
22 in the Plaintiff's position could be achieved only be  
23 ignoring Congress' repeated statements time and time again  
24 as to how these two statutory schemes are to work.

25 We submit that the Court should hold that the

1 leasing stage, the selection of tracts itself, does not  
2 directly affect the coastal zone.

3 The Court, in its opinion, should also recognize  
4 that Section 19 provides a ready means for state input  
5 into the process.

6 In so holding, the Court would harmonize the  
7 two statutes, the CZMA and the OCSLA. It would recognize  
8 the basic policy position upon which the Plaintiffs stand,  
9 the need for state input, and it would channel disputes  
10 into a congressional defined administrative mechanism  
11 with judicial review.

12 We submit that this is a far better way to resolve  
13 the issues in this case rather than to indulge Plaintiffs  
14 in their expansive and liberal approach to the legislation  
15 which raises far more problems than it settles.

16 If the Court has no questions, I will sit down.

17 CHIEF JUSTICE BURGER: Very well.

18 MR. BRUCE: Thank you.

19 CHIEF JUSTICE BURGER: Ms. Berger?

20 ORAL ARGUMENT OF THEODORA BERGER

21 ON BEHALF OF THE RESPONDENTS

22 MS. BERGER: Mr. Chief Justice, and may it please  
23 the Court:

24 I am going to try and explain this morning why  
25 it is important to apply state coastal zone management



1 programs which are federally approved to the Department  
2 of Interior's Outer Continental Shelf leasing activities  
3 and how that process can, in fact, work.

4 But, before I get to that point, I am going  
5 to be addressing what Petitioners' definition of the  
6 directly affecting test is.

7 And, let me just say at the outset that they  
8 would like to have this Court define the phrase  
9 "directly affecting the coastal zone" in Section 307(c)(3)  
10 of the Coastal Zone Management Act solely be reference  
11 to the purposes and policies of an entirely different  
12 statute, the Outer Continental Shelf Lands Act amendment.

13 Now, as Justice Stevens pointed out earlier,  
14 those amendments were not passed until 1978. This entire  
15 system of phased development that they are relying on  
16 for their definition of the directly affecting test was  
17 a subsequently enacted statute.

18 The words "directly affecting the coastal zone"  
19 were enacted in 1972 and that is the statute that is before  
20 the Court for construction.

21 Let me also emphasize that it is a phrase we  
22 are talking about, "directly affecting the coastal zone."  
23 Petitioners would like to have the Court simply define  
24 the word "directly." That is not the issue here. It  
25 is legislative intent on that phrase in the Coastal Zone

1 Management Act.

2 It is also important --

3 QUESTION: When you say that the issue is not  
4 the meaning of the words "directly affecting," but instead  
5 it is the legislative intent in using those terms?

6 MS. BERGER: It is the meaning of the phrase  
7 "directly affecting the coastal zone." It is not one  
8 word "directly," as Petitioners would have it.

9 It is also important to focus on how Petitioners  
10 have suggested that that phrase be defined. According  
11 to Petitioners, no federal activity directly affects the  
12 coastal zone unless it has immediate physical impacts  
13 on the coastal zone without subsequent governmental  
14 approvals. You will find that test in the Solicitor's  
15 brief and in the letter to California refusing to do a  
16 consistency determination for Lease Sale 53.

17 Now, we have to ask ourselves where did that  
18 test come from? You can't find it in the legislation  
19 history. To the contrary, all of the legislative history  
20 contradicts that test.

21 It doesn't really foster the purposes of the  
22 Act because this was an Act that was designed for the  
23 long-term management of the coastal zone through a process  
24 of federal/state coordination and cooperation. I submit  
25 that that process would not be fostered by a restrictive

1 definition such as the one put forth by Petitioners.

2 The only thing they can site for this narrow  
3 definition is the dictionary. Now, if you look -- Again,  
4 the dictionary definition is only of the word "directly."  
5 It doesn't give us any definition of the phrase.

6 But, if you look at the dictionary definition,  
7 you will not find the definition offered by Petitioners.  
8 The dictionary doesn't say that you have to have physical  
9 impacts. The dictionary doesn't say anything about  
10 subsequent governmental approvals.

11 The only thing -- The closest thing that they  
12 can find in the dictionary is the notion of intervening  
13 cause. And, the trial court analyzed that test and said  
14 even under that test Lease Sale 53 would directly affect  
15 the coastal zone because this is the activity that sets  
16 in motion the whole chain of events which lead to the  
17 coastal zone impacts with which we are concerned. This  
18 is the key activity.

19 The other important thing to understand about  
20 Petitioners' definition is that it virtually exempts all  
21 of the Department of Interior's significant OCS decision  
22 making; that is tract selection and the imposition of  
23 lease stipulations.

24 Now, Mr. Bruce said this morning that under  
25 their definition tract selection is exempt. You will

1 that also in the Joint Appendix at page 72.

2 In the letter to California refusing to do the  
3 consistency determination, the Department of Interior  
4 explained that under their definition tract selection  
5 is not an activity that requires compliance with the  
6 Coastal Zone Management Act. In fact, as I must admit,  
7 it is only in the rarest of cases under their definition  
8 that lease sales would ever come into this process of  
9 coastal zone management that was anticipated by Congress.  
10 And, in fact, there has only been on instance in the entire  
11 history of OCS leasing since 1972 that I am aware of where  
12 they have ever actually applied consistency to a lease  
13 sale.

14 QUESTION: Where as that?

15 MS. BERGER: That was an instance in Alaska,  
16 Your Honor, in 1977. That was a particularly unusual  
17 situation where the Department of Interior imposed a  
18 stipulation requiring the lessee to immediately build  
19 gravel islands and the Department felt that the gravel  
20 islands themselves would cause impacts on the coastal  
21 zone.

22 Therefore, they did a consistency determination  
23 on the effect of building the gravel islands, but no  
24 consistency determination on the effect of the lease sale.

25 Now, One of the main arguments of the Department



1 of Interior is that you simply cannot apply the con-  
2 sistency process to their OCS leasing activities. It  
3 would be unworkable. You would have a morass of  
4 litigation and the very important federal OCS leasing  
5 program would grind to a halt.

6 Well, I submit that that has been disproven,  
7 Your Honors, because as a result of litigation in this  
8 case, the Department of Interior has been forced to  
9 prepare consistency determinations all over the country  
10 for a great number of states.

11 I would like to bring to your attention the  
12 record --

13 QUESTION: A great number is how many?

14 MS. BERGER: Fifteen.

15 QUESTION: Fifteen. Where are they?

16 MS. BERGER: Would you like a list?

17 QUESTION: No, no, not the whole -- Are they  
18 east or west or what?

19 MS. BERGER: East and west.

20 QUESTION: East and west. Massachusetts  
21 would be --

22 MS. BERGER: Massachusetts is one, yes.

23 I would like to give you a brief summary of  
24 what has happened, because that certainly is very  
25 pertinent here.

1           As to six of those consistency determinations,  
2 and bear in mind that it is the Department of Interior  
3 that makes the consistency determination. They send it  
4 to the state, the state has a right to agree or disagree.  
5 If there is a disagreement, they try and work their  
6 differences out.

7           The Department of Interior in six instances  
8 sent their determination to the state. They said we find  
9 that this lease sale is consistent with your coastal zone  
10 management program. The state looked at the consistency  
11 determination and said, you are right, we agree with you,  
12 and there is no problem with holding this lease sale just  
13 as you have suggested.

14           In five instances, the state said, no, we think  
15 there are problems for coastal zone management if you  
16 go ahead exactly as you have said, but they sat down  
17 together and they tried to resolve the problem in a way  
18 that would allow the lease sale to proceed while still  
19 taking into account these coastal zone management concerns.

20           In each of those five instances, the Depart-  
21 ment of Interior reached a memorandum of understanding  
22 with the state which in no way interfered with the holding  
23 of the lease sale. In only three instances to date, out  
24 of all of these consistency determination, has litigation  
25 resulted.

1                   So, we don't have the disastrous effects that  
2   had been predicted by the Department of Interior.

3                   QUESTION: Are those three instances pending  
4   in litigation?

5                   MS. BERGER: Two of them are pending and one  
6   was dismissed.

7                   QUESTION: Pending district courts or what?

8                   MS. BERGER: Well, let's see, they are in the  
9   district court except the one in Massachusetts went up  
10   on appeal. The court upheld an injunction that was issued  
11   on the grounds of NEPA and now it is back in the district  
12   court.

13                   Now, Petitioners will try and tell you that  
14   this entire process, these agreements that were worked  
15   out, were solely as a result of the Outer Continental  
16   Shelf Lands Act amendments, that they can reach agreements  
17   with the states under the OCS Lands Act. But, the fact  
18   of the matter is that four out of the five agreements  
19   that were reached expressly relied on the coastal zone  
20   management program for the state.

21                   So, I submit to you that the process is work-  
22   able, it can be done at the lease sale stage, notwith-  
23   standing all Petitioners' arguments to the contrary.

24                   QUESTION: Tell me, Ms. Berger, if your position  
25   is not accepted, what is the consequence?

1 MS. BERGER: I am just coming to that, because  
2 we don't think that this process is workable at the  
3 exploration and development stage. It is simply too  
4 late and try to do coastal zone management --

5 QUESTION: You are going to tell us why?

6 MS. BERGER: Yes, I am going to that right  
7 now. The reason is, the difference between Section  
8 307(c)(1) and Section 307(c)(3), which some of the questions  
9 were directed to this morning. Section 307(c)(1) is  
10 the only section in the CZMA that can cover the Depart-  
11 ment of Interior's OCS activities. Those are the  
12 activities of the lease sale where they select tracts  
13 and they impose lease sale stipulations.

14 As one of the Justices pointed out this  
15 morning, a lot of money changes hand at this stage.  
16 These are very expensive propositions when you hold a  
17 lease sale. Lease Sale 53 alone, the total bids were  
18 over \$2 billion, and Chevron bid \$333 million for one  
19 tract in Lease Sale 53. It gives you an idea of the  
20 importance of the lease sale stage.

21 The oil companies are not putting up that  
22 kind of money for the mere ability to apply for subse-  
23 quest permits. They are spending that kind of money  
24 for what they perceived to be the ability to develop  
25 the tract. Otherwise, I submit, that nobody would



1 expend these huge sums.

2 Now, let's take an example of why you can't  
3 work it out under Section 307(c)(3). 307(c)(3) is, as  
4 the Court pointed out earlier, at a subsequent stage.  
5 The lease sale has already been held, the money has  
6 already changed hands. The leases are not in the hands  
7 of the oil companies, the lessees of the tract. The  
8 lessees come to the state for a consistency review  
9 under Section 307(c)(3) on a piecemeal, random basis,  
10 often one tract at a time. There is no way at that  
11 point to address the coastal zone impacts, if you will,  
12 of the lease sale as a whole. And, it is impossible to  
13 do anything more than piecemeal review.

14 QUESTION: Who decides, Ms. Berger, whether  
15 or not there will be piecemeal submission or perhaps a  
16 more general submission?

17 MS. BERGER: Well, in this case, it is the  
18 Department of Interior, because if consistency review  
19 were applied at the lease sale stage, you could address  
20 these concerns on a broader basis. But, if you cannot --  
21 If they refuse to do the consistency determination,  
22 then the state can only reach these concerns on a tract-  
23 by-tract basis which is, of course, not a very satis-  
24 factory way of proceeding.

25 QUESTION: Why is it less satisfactory and

1     why must the state proceed only on a tract-by-tract  
2     basis if it is done at the later stage?

3             MS. BERGER: Because the state has no ability  
4     to do anything at the lease sale stage unless the  
5     Department of Interior is subjected to consistency  
6     review. The state's ability only comes in at the sub-  
7     sequent stages.

8             QUESTION: Well, that would be 307(c)(3), wouldn't  
9     it?

10            MS. BERGER: Right.

11            QUESTION: Why is the state's ability limited  
12     in the 307(c)(3) stage?

13            MS. BERGER: Well, let me give you an example.  
14     One of the major parts of the Department of Interior's  
15     decisions at the lease sale stage is the question of  
16     tract selection. That is the determination of where in  
17     a given area they are going to allow development through  
18     leasing and what areas they are going to exclude from  
19     development.

20            So, suppose you had a situation where the  
21     state was concerned about a coastal zone resource of  
22     national significance that was recognized under its  
23     coastal zone management program, and suppose also that  
24     the only way to protect that particular resource was to  
25     not lease and develop the immediately adjacent OCS tracts --

1 and bear in mind one particular fact about Lease Sale  
2 53. The OCS tracts at issue in this case begin at  
3 the three-mile limit which is immediately adjacent  
4 to the coastal zone that the Coastal Zone Management  
5 Act is concerned with protecting and managing.

6 All right. So, what can you do about tract  
7 selection? Well, Petitioners say, well, we don't have  
8 enough information at this stage to address the coastal  
9 zone management program, but that certainly is incorrect  
10 because the lease sale stage --

11 QUESTION: When you say "this stage," you  
12 are talking now about the 307(c)(3) stage?

13 MS. BERGER: No, I am sorry, Your Honor,  
14 lease sale --

15 QUESTION: I thought you were going to address  
16 the 307(c)(3) stage, why the states can't do anything  
17 about it at that stage.

18 MS. BERGER: Because you can't do tract  
19 deletion at the 307(c)(3) stage.

20 QUESTION: Why can't you?

21 MS. BERGER: Tract deletion is a leasing  
22 decision made by the Department of Interior.

23 QUESTION: Okay. You can't say we don't  
24 think that should be leased, but you can surely say  
25 at the 307(c)(3) we don't think it should be developed,

1 we don't think you should drill for oil there, can't  
2 you?

3 MS. BERGER: You mean for a state to do that?

4 QUESTION: Yes.

5 MS. BERGER: If a state -- If Your Honors  
6 apply the statute in that way, then the state will  
7 have no recourse but to do that.

8 QUESTION: But, I thought you were saying  
9 a minute ago the state couldn't do that and now you  
10 are saying it can.

11 MS. BERGER: As a practical matter, it is  
12 not a practical way to go about it because all of this  
13 money has now been expended. The oil companies have  
14 acquired rights to develop the tract.

15 QUESTION: Now, wait a minute. You said  
16 the oil companies have acquired rights to develop the  
17 tract. You are saying that either the Secretary couldn't  
18 say at that stage this is inconsistent with the state's  
19 coastal management plan to drill for oil here and do  
20 you think the oil company could simply say, well, gee,  
21 we have put a lot money in this thing, so let's forget  
22 about the consistency determination?

23 MS. BERGER: The Secretary has nothing to  
24 say about consistency under Section 307(c)(3).

25 QUESTION: But, the state does.



1                   QUESTION: The state does.

2                   QUESTION: The state can say it if it wants  
3 to and the oil company takes the risk of being able  
4 to comply with the coastal management plan, doesn't  
5 it?

6                   MS. BERGER: Well, Your Honor, you could  
7 look at it that way, but that is not a very practical  
8 way to go about things.

9                   QUESTION: Well, I don't know. It seems  
10 to me awfully direct if the state says, sorry, you  
11 are out of business.

12                   MS. BERGER: Well, I guess the other main  
13 problem with it, Your Honor, is that this is an Act  
14 that is designed for comprehensive, long-term planning  
15 and management and it is a little late to start that  
16 planning after the major planning decisions have been  
17 made by the Department of the Interior.

18                   QUESTION: Well, Ms. Berger, as I understood  
19 it at least, the first stage of offshore development  
20 and leasing would be the development of the five-year  
21 schedules by the Department of Interior of the OCS  
22 lease sales and during that interval of time, the Secretary  
23 of Interior, as I understand it, is required to solicit  
24 comments from both interested federal agencies as well  
25 as the governors of each state and has to respond in

1 writing to all those state governors' comments. So,  
2 that is the first stage when the state can participate,  
3 right?

4 MS. BERGER: Yes, Your Honor.

5 QUESTION: Before you even get to this section  
6 we are dealing with.

7 MS. BERGER: Yes.

8 QUESTION: Then, in addition, I thought the  
9 second stage, where the state had an opportunity, was  
10 in meeting the requirements of NEPA and the Endangered  
11 Species Act where the governor of every state affected  
12 is given a formal opportunity to submit recommendations  
13 on the size and the timing and the locations of the  
14 proposed leases. So, we have already had two opportunities,  
15 have we not, for states as a whole to impact on the  
16 tract selection in effect?

17 MS. BERGER: Your Honor, but the answer to  
18 that is that Congress intended a different opportunity  
19 for the states under the Coastal Zone Management Act.  
20 And, you can find that expressly stated in the legislative  
21 history of the OCS Lands Act. The legislative history  
22 of Section 1345 of the Act -- This was in Section 19  
23 of the amendments -- that is the very section of the  
24 OCS Lands Act that talks about OCS leasing and that  
25 legislative history expressly states that the Department

1 of Interior's OCS lease sales are expected to comply  
2 with coastal zone management programs.

3 Now, Petitioners always skip over that piece  
4 of legislative history, but we submit that it is extremely  
5 telling.

6 QUESTION: That is in '78?

7 MS. BERGER: That is in '78.

8 QUESTION: That is the House report?

9 MS. BERGER: Yes, the final House report.

10 QUESTION: Is there anything in the Senate  
11 about it?

12 MS. BERGER: No. And, the Act followed the  
13 House report so that is the one that was entitled to  
14 weight.

15 Perhaps I can give you another example other  
16 than tract leasing and that is the imposition of lease  
17 stipulations at the lease sale stage.

18 This is a very important example, because  
19 frequently these agreements, recent agreements with  
20 the states that have been worked out illustrate. Frequently  
21 leasing can be squared with coastal zone management  
22 programs simply by the imposition of stipulations.  
23 You don't need tract deletion at all and that is a  
24 very important reason to start this process at the  
25 lease sale stage rather than waiting for later when

1 you can look at the lease sale as a whole.

2 QUESTION: By stipulate where, Ms. Berger?

3 MS. BERGER: Pardon me?

4 QUESTION: By stipulation where?

5 MS. BERGER: A lease stipulation is a term  
6 of a contract between the Department of Interior and  
7 the lessee oil company. And, that is an important  
8 point because when they issue the lease, all of the  
9 stipulations that the Department of Interior has deter-  
10 mined will be part of this lease sale are then included  
11 in each of the contracts with the oil companies. So,  
12 the companies know from the very outset what the rules  
13 of the game are going to be. That is another important  
14 reason the coastal zone management program must be  
15 brought to bear at that point.

16 Let me give you an example. The California  
17 Coastal Zone Management Program contains a policy which  
18 requires the consolidation of onshore support facilities  
19 for offshore oil and gas development.

20 Now, that is a sensible policy because otherwise  
21 you would have a proliferation of these support facilities  
22 all along the coast and it is in keeping with a requirement  
23 of the Coastal Zone Management Act that you have orderly  
24 siting of onshore support facilities for offshore oil  
25 development.



1           Now, how do you take care of this consolidation  
2 problem? Consolidation is something that requires  
3 the oil companies to cooperate with one another to  
4 agree on a consolidated marine terminal or a consolidated  
5 supply base onshore. They have to reach agreements,  
6 they have to plan for this over a period of time.

7           If you wait until the exploration and development  
8 stage, the oil is about to come on shore. It has to  
9 get there some way. The oil company is now four years  
10 into its lease and they have a five-year lease in which  
11 to get the oil out. It is too late to be telling an  
12 oil company coming in for approval on one tract, we  
13 are sorry, but you have to built a consolidated facility.  
14 The oil company will say we can't possibly do it at  
15 this point, we should have been told this earlier.

16           Now, we are not suggesting that all of the  
17 details of this consolidated facility should be worked  
18 out at the lease sale stage. That certainly wouldn't  
19 be workable. But, we are suggesting that unless you  
20 impose the requirement of a consolidated facility at  
21 the lease sale stage, it simply isn't going to happen  
22 as a practical matter.

23           QUESTION: But, Ms. Berger, isn't it true  
24 in connection with many of the tracts at the lease  
25 sale stage the potential lessees don't eve know what

1 the mineral contents of the tracts are? They don't  
2 know whether they are going to find anything worth  
3 drilling for developing.

4 MS. BERGER: That is true, Your Honor, but--

5 QUESTION: So, why would you be talking about  
6 a consolidated facility at that stage?

7 MS. BERGER: Well, let me respond. First  
8 of all, they do have a fairly good idea of what is  
9 out there because they have resource estimates that  
10 the Department of Interior itself relied on to determine  
11 whether the bids are adequate. In fact, often times  
12 they have even more specific information on expected  
13 resources based upon development of adjacent tracts.

14 But, more importantly, this is the time when  
15 they decide whether the tracts will be developed or  
16 not. In other words, it is possible you may not find  
17 oil in a given tract, but if you do find oil, the lease  
18 sale stage is the time when the Department of Interior  
19 has decided that development is going to go forward  
20 on that tract.

21 QUESTION: But, under 307(c)(3), the state  
22 can object after that stage if it is inconsistent with  
23 its coastal management plan, can't it?

24 MS. BERGER: The state can object, but as  
25 we said, Your Honor, that is a little late to do the

1 comprehensive planning that this statute requires.

2 QUESTION: But, if Congress has said that  
3 is the time you object, why is it too late?

4 MS. BERGER: Well, Congress did not say that  
5 is the only time you object. Section 307(c)(1) is  
6 a residual, catchall category according to the Depart-  
7 ment of Commerce regulations.

8 QUESTION: For things that directly affect?

9 MS. BERGER: That is correct.

10 Perhaps a better answer to Your Honor's question  
11 is the legislative history. Congress has said repeatedly  
12 in the legislative history of both statutes, the CZMA  
13 and the OCS Lands Act, that these decisions of the  
14 Department of Interior must comply with consistency  
15 requirements and that they wanted a broad definition  
16 of the directly affecting test, not a narrow definition.

17 QUESTION: Ms. Berger, is it true that the  
18 original bills involved when this directly affected  
19 language was added to CZMA, under both the original  
20 House and Senate bills, it was reasonably clear, was  
21 it not, that the lease sale stage would not have required  
22 the CZMA consistency submission?

23 MS. BERGER: Your Honor, under -- That is  
24 an interesting question, because under the original  
25 bills, the language in both versions was in the coastal

1 zone.

2 QUESTION: Right.

3 MS. BERGER: And they changed it to directly  
4 affecting.

5 QUESTION: It was only this last-minute amend-  
6 ment that imposed the requirement that we are now dealing  
7 with.

8 MS. BERGER: However, there is some language  
9 in the reports that we have cited indicating -- and  
10 perhaps this is the only explanation of the legislative  
11 history that tells you why Congress did change to the  
12 directly affecting test.

13 There are statements in the legislative history  
14 going back to 1971 that Congress always intended that  
15 federal activities, even if the were outside the coastal  
16 zone, would have to comply with consistency requirements  
17 if they had a functional interrelationship with coastal  
18 zone management.

19 And, the example that was given in the  
20 legislative reports was a situation between the channel  
21 islands offshore California and the mainland. This  
22 is the OCS. That is an area of the OCS. And, the  
23 legislative history plainly states that that was supposed  
24 to be covered by consistency review.

25 So, I submit to the Court that is the only



1 explanation we have of why Congress changed to this  
2 directly affecting test, because they wanted to get  
3 at those kinds of activities.

4 QUESTION: May I ask a question that your  
5 reference to the prior bill affected was originally  
6 in the coastal zone language. Are there situations  
7 in which there are lease sales within a coastal zone?

8 MS. BERGER: Yes, there are.

9 QUESTION: Do they directly affect the coastal  
10 zone?

11 MS. BERGER: Well, within the coastal zone  
12 would not be leasing by the Department of Interior.

13 QUESTION: It wouldn't be any federal activity  
14 connection with it?

15 MS. BERGER: That is right. It was would  
16 be a state --

17 QUESTION: There would be no federal supervision?

18 MS. BERGER: That is correct.

19 QUESTION: I see.

20 MS. BERGER: I might as well continue with  
21 the legislative history if I may. In 1976, Congress  
22 amended the Coastal Zone Management Act and at that  
23 time it made a number of statements to the effect that  
24 the Department of Interior's OCS leasing activities  
25 were always covered by the Act as it existed in 1972

1 and as in the proposed amendments in 1976.

2 Now, Petitioners make much of the fact that  
3 in 1976, Section 307(c)(3)(B) was added specifically  
4 directed to the plans of exploration and development  
5 of oil companies. But, the fact of the matter is the  
6 conference report makes clear that that was added in  
7 order to expedite the post-leasing process to benefit  
8 the oil company. It had nothing to do with the pre-  
9 leasing decisions that were made by the Department  
10 of Interior. Those can only be addressed under Section  
11 307(c)(1).

12 In 1978, Congress amended the OCS Lands Act  
13 and established this phased development that the  
14 Petitioners rely on, but, again, the legislative history  
15 there specifically -- On lease sales, they said lease  
16 sales must comply with coastal zone management programs.  
17 They included a savings clause saying that nothing  
18 in the 1978 amendments was intended to modify in any  
19 way the requirements of the 1972 Coastal Zone Management  
20 Act.

21 In 1980, Congress again amended the Coastal  
22 Zone Management Act and made a number of statements  
23 of great import in this case indicating that they always  
24 intended Interior's pre-leasing activities to be covered  
25 and that they wanted a broad test of directly affecting.

1                   QUESTION: Who made these statements?

2                   MS. BERGER: These statements, Your Honor,  
3 are in the committee reports. And, I recognize that  
4 the Solicitor argues that we shouldn't pay any  
5 attention to those statements, but the fact of the  
6 matter is the very statements that we rely on Congress  
7 specifically linked to a change that was made in 1980,  
8 and that is the fact that they amended a section, a  
9 policy section of the Act in 1980 requiring the federal  
10 government to cooperate with the states on coastal  
11 zone management issues.

12                   QUESTION: Did they amend this section contain-  
13 ing the words "directly affecting?"

14                   MS. BERGER: No, Your Honor, they did not.  
15 What they did do, however, -- These reports were generated  
16 as a result of the year of oversight activity and in  
17 that activity Congress was now dealing for the first  
18 time with the implementation of these state programs.

19                   QUESTION: But, they are all post-enactment  
20 statements, aren't they?

21                   MS. BERGER: They are post -- Well, not insofar  
22 as they discuss this change that was made in 1980.

23                   QUESTION: No, but as to directly affecting.

24                   MS. BERGER: Well, they said that the broad  
25 definition of directly affecting was consistent with

1 the change that they made in 1980.

2 QUESTION: We don't usually give too much  
3 weight to post-enactment statements, do we?

4 MS. BERGER: Well, Your Honor, this Court  
5 certainly has given weight to post-enactment statements  
6 where they are as relevant as these statements are.  
7 Not only that, Congress did not simply come up with  
8 a new test in 1980. They said that the functional  
9 interrelationship test, which I mentioned going back  
10 to 1972, was always the test. It is not as though  
11 Congress is saying at a later date we have now discovered  
12 the test. Instead, what they are doing is saying this  
13 was always the test. We told you that many years ago  
14 and it still is the test.

15 But, another important point is that no coastal  
16 zone management programs were approved until 1977.  
17 So, the 1980 legislative history is the first time  
18 that Congress was actually focusing on how the process  
19 worked and this is their explanation of how Section  
20 307(c)(1) works and why they didn't amend the Act in  
21 1980.

22 I might point out that the oil industry was  
23 lobbying heavily at that point asking that the con-  
24 sistency requirements be changed. And, this was Congress'  
25 explanation of why they were not going to change Section.



1 307(c)(1).

2 QUESTION: And the '78 amendments to the  
3 OCS Act, that legislative history is not post anything.  
4 It is in connection with those amendments. And, I  
5 understand the committee to have said that nothing  
6 in these amendments should indicate that you should  
7 rely on the Act, on those amendments or on the OCS  
8 Act for any inference that lease sales weren't covered.

9 MS. BERGER: That is absolutely correct,  
10 Your Honor.

11 I see that my time is up. Thank you.

12 CHIEF JUSTICE BURGER: Do you anything further,  
13 Mr. Solicitor General?

14 ORAL ARGUMENT OF REX E. LEE, ESQ.

15 ON BEHALF OF THE PETITIONERS -- Rebuttal

16 MR. LEE: I would like to call to the Court's  
17 attention, Chief Justice Burger, a public document  
18 clearly subject to judicial notice, which I think may  
19 be of help to the Court, staff recommendation to the  
20 California Coastal Commission, File No. CC-783, which  
21 reviews recommendations at the production and development  
22 stages for Exxon.

23 The table of contents contains, among other  
24 things, references to cumulative impacts at the pro-  
25 duction stage.

1 QUESTION: Does each of us have one of those?

2 MR. LEE: Excuse me?

3 QUESTION: Does each of us have one of those?

4 MR. LEE: I will be happy to make it available  
5 to the Court.

6 Pages 53 through 56 deal with this subject  
7 citing Section 30250 of the Coastal Act which refers  
8 at the development stage to significant adverse effects,  
9 either individually or cumulatively, and then it goes  
10 on to talk for the next three pages about cumulative  
11 impacts at the development stage.

12 In fact, these --

13 QUESTION: Mr. Solicitor General, you referred  
14 to this in your papers before?

15 MR. LEE: No, I have not, Justice Blackmun,  
16 but it is -- In fact, it just recently came to my attention,  
17 but it is a public document of the State of California  
18 and it is subject to judicial notice.

19 QUESTION: Well, that isn't ordinarily that  
20 counsel put in as a matter of rebuttal though.

21 MR. LEE: Well, it is in reponse to the assertion  
22 that cumulative impacts simply cannot -- That it is  
23 too late at the development stage.

24 QUESTION: How long have you had that document?

25 MR. LEE: How long have I had it?

1                   QUESTION: Well, how long has the government  
2 had it?

3                   MR. LEE: I really don't know. It was called  
4 to my attention just a couple of days ago.

5                   QUESTION: I, for one, would welcome any  
6 comment from your opposition in due course.

7                   QUESTION: May I ask -- I am not sure I understand  
8 the argument you are making based on the document.  
9 You are saying, I gather, from the document that  
10 is possible to make cumulative impact analysis later.

11                  MR. LEE: Yes.

12                  QUESTION: But, I guess it could also be  
13 more difficult, couldn't it?

14                  MR. LEE: In the sense that you have this  
15 problem of the investment already having been made.

16                  QUESTION: Yes.

17                  MR. LEE: But, I see no reason -- I see no  
18 reason why it would be any more difficult at the develop-  
19 ment stage to say we now know, based on other facts  
20 that have developed during the interim that there are  
21 these cumulative impacts and we are going to take those  
22 into account.

23                  QUESTION: Well, isn't it possible that,  
24 say, you have a very large area that you must look  
25 at at the beginning of the lease sale and you then

1 have to look at the total picture, but you could execute  
2 the leases and you might have development of ten percent  
3 of the tract the first year and nothing even looked  
4 at for awhile. Now, if you only had ten percent to  
5 start with, how could you then do the whole cumulative  
6 impact?

7 MR. LEE: Because of the difference between  
8 the -- what happens at the early stage, at the lease  
9 sale stage under Section 19, which provides for input,  
10 and the substantive requirement -- the result of the  
11 substantive requirement once the determination of no  
12 consistency is issued by the relevant state.

13 At the early stage, it is a matter of coordi-  
14 nation, of long-range planning. That was provided  
15 for by Section 18 at the five-year plan stage and by  
16 Section 19 at the lease sale stage. But, once you  
17 pass that, then you are out of simply cooperation,  
18 coordination, and then it is a question of the authority  
19 substantively to stop the project.

20 As Mr. Bruce indicated, there have been only  
21 two or three of these appeals for the Secretary of  
22 Commerce to override thus far, but the fact of the  
23 matter is that none of those have been successful.

24 And, with regard to 307(c)(1), significant  
25 we think, there is no authority of the Secretary of



1 Commerce override. One of the obvious reasons -- The  
2 reason in my view is simply that it was not intended  
3 that the -- The certification requirement was not intended  
4 to apply at that stage.

5 QUESTION: Do you have any comment that you  
6 would care to make on the letter?

7 ORAL ARGUMENT OF THEODORA BERGER

8 ON BEHALF OF THE RESPONDENTS -- Surrebuttal

9 MS. BERGER: I certainly do, Your Honor,  
10 and I thank you for giving me that opportunity.

11 I think that the table of contents of one  
12 document offered by Petitioners at the last moment  
13 is hardly very probative, but if the Court wishes to  
14 supplement the record in this fashion, I would like  
15 to be able to submit documents that would disprove  
16 Petitioners' statements if that --

17 QUESTION: Do you have any documents that  
18 bear on this and tend to develop what you have just  
19 suggested?

20 MS. BERGER: I certainly do.

21 QUESTION: We will receive them.

22 MS. BERGER: All right.

23 QUESTION: What happens if they want to answer  
24 those documents?

25 (Laughter)

1 MS. BERGER: I think, Your Honors, the better  
2 course of action would be to keep the record as we  
3 have it and just allow me to answer the point that  
4 was raised about cumulative impacts.

5 The fact of the matter is, as many of the  
6 questions have pointed out this morning, those impacts  
7 are best addressed at the lease sale stage. If you  
8 are going to put the state in the position where they  
9 can only be addressed under Section 307(c)(3), then  
10 the state has no choice but to simply say we can't  
11 allow this to go forward, we can't have this tract  
12 developed because we didn't care of this earlier on.

13 If you took care of it at the lease sale  
14 stage, as I pointed out earlier, you could impose stipu-  
15 lations that would allow the leasing to proceed, that  
16 it is really too late to take care of these problems  
17 at the exploration and development stage.

18 CHIEF JUSTICE BURGER: We have your point.

19 Thank you, counsel, the case is submitted.

20 We will hear arguments next in Dickman against  
21 the Commissioner of Internal Revenue.

22 (Whereupon, at 11:13 a.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1326-SECRETARY OF THE INTERIOR, ET AL., v. CALIFORNIA, ET AL.; #82-1327

~~WESTERN OIL & GAS ASSOCIATION, ET AL., Petitioners, vs. CALIFORNIA, ETC., ET AL~~

AND #82-1511 - CALIFORNIA, ET AL, PETITIONERS V. SECRETARY OF THE INTERIOR, ET AL

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