FROM PRESIDENT TRUMAN TO GOVERNOR BLANCO: THE CONTINUING SAGA OF FEDERAL-STATE REVENUE SHARING[1]

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[1] Portions of this paper were first published in "View From The Platform – The Coastal States' Impacts On The Federal Offshore Leasing Program," at the Institute for Energy Law's 58th Oil and Gas Law Conference, February 2006.

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§ 5.03 Onshore

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§ 5.01 Introduction

Among the many products of the disastrous hurricane season of 2005 was a renewed discussion of the rights of the coastal states to revenues generated by offshore oil and gas exploration and production. Coastal states, and Louisiana in particular, asserted that it was essential that they receive additional revenue (1) to remedy the effects of oil and gas exploration on their infrastructure, and (2) most importantly, to combat coastal erosion, which increasingly has exposed the states to the catastrophic effects of hurricanes. However, while the coastal states' claim for additional federal revenue may have increased in intensity after the 2005 hurricane season, the fact that the states were seeking additional revenue was nothing new. This was simply the latest stage of a debate that has been going on since the origins of the offshore oil and gas industry in the United States.

The purpose of this paper is to review the federal-state relationship with regard to the allocation to the states of revenues generated by federal oil and gas leases. Although the primary focus of this paper will be on the offshore federal leasing program, this paper will also discuss the division of revenues from oil and gas leases of onshore federal lands.

§ 5.02 Offshore

[1] The Tidelands Litigation and The Enactment Of The Submerged Lands Act and the Outer Continental Shelf Lands Act.[2]

[a] Coastal State Leasing, The Truman Proclamation, And The *California* Decision.

The offshore story starts with the coastal states granting leases affecting water bottoms adjacent to state lands. In the 1920s and 1930s, California, Texas, and Louisiana granted hundreds of such state oil and gas leases. In 1938, the Louisiana Legislature enacted legislation asserting jurisdiction over submerged lands extending well into the Gulf of Mexico.[3] In 1941, the Texas Legislature passed a similar act.[4]

Within the United States government, the executive and legislative branches did not see eye-to-eye on the states' assertion of jurisdiction over their coastal water bottoms. In 1945, President Truman issued a proclamation declaring that the United States had jurisdiction over natural resources of the subsoil and seabed of the Outer Continental Shelf.[5] In 1946, Congress responded to the Truman Proclamation by passing "quitclaim" legislation that would have given the coastal states ownership of the seabed, but President Truman vetoed that legislation. Thereafter, over objections of both Congress and the United States Attorney General, President Truman authorized the United States the file a trespass action against the State of California, challenging California's right to grant oil and gas leases off of its coast. What is known as the "Tidelands Litigation" had begun.

In 1947, the United States Supreme Court rendered its seminal decision in *United States v. California*,[6] holding in favor of the United States on the basis that the federal government had "paramount rights" to the marginal sea. Although the United States had filed suit against

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[2] Much has been written about the history of the disputes between the states and the federal government over the offshore leasing program. *See, e.g.*, *The Law of Federal Oil and Gas Leases*, Chapter 25 (Matthew Bender) (Patrick Martin, updated by Edward B. Poitevent, II and Carlos A. Sole); Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 Ecology L.Q. 401 (1984); Edward A. Fitzgerald, *The Seaweed Rebellion: The Battle Over Section 8(g) Revenues*, 8 J. of Energy L. & Pol. 253 (1988). Further, the MMS has undertaken to write the history of the offshore industry. *See* Volume 1: Papers on the Evolving Offshore Industry, "History of the Offshore Oil and Gas Industry in Southern Louisiana," OCS Study MMS-2004-049 (July 2004) (Diane Austin, Bob Carriker, Tom McGuire, Joseph Pratt, Tyler Priest, Allan G. Pulsipher). *See also State of Texas v. Sec'y of the Interior*, 580 F. Supp. 1197 (E.D. Tex. 1984) (reviewing the history of the federal-state relationship with respect to offshore oil and gas exploration and production).

[3] Louisiana Act No. 55 asserted jurisdiction extending 27 miles from the state's coastline into the Gulf of Mexico.

[4] Tex. Act of May 16, 1941.

[5] 3 C.F.R. 67 (1945), *reprinted in* 59 Stat. 884 (1945).

[6] *United States v. California*, 332 U.S. 19 (1947).

California asserting trespass, the Supreme Court held in favor of the United States without finding that the federal government actually *owned* the seabed – an unusual ruling in a trespass action.[7] Rather, based on a series of "national" interests (*e.g.*, security of its coastline, ensuring peace and participating in world commerce), the court found that the United States had "paramount rights" and therefore "full dominion of the resources of the soil under that water area, including oil."[8]

While California had asserted title to only 3.5 miles of the "marginal sea," Louisiana and Texas had asserted much more aggressive claims. In 1950, relying on its 1947 *California* decision, the Supreme Court rejected the claims of ownership by both Louisiana and Texas.[9]

[b] Enactment Of The Submerged Lands Act and the Outer Continental Shelf Lands Act

As a result of the Supreme Court's decisions in the *California*, *Louisiana*, and *Texas* cases, the states had no rights to explore for or produce oil and gas off of their coastlines, and the validity of hundreds of existing state leases was questionable at best. Consistent with its efforts of the mid-1940s, in 1953 Congress acted to rectify this situation. Through the Submerged Lands Act[10] and the Outer Continental Shelf Lands Act[11] (the "OCSLA"), Congress vested the coastal states with title to submerged lands within at least three geographic miles from their respective coastlines, and Congress "validated" as federal leases those state leases that had been granted over water bottoms that were now in federal waters beyond the limit of the granting state's submerged lands. Further, the Submerged Lands Act allowed each state with a coastline on the Gulf of Mexico to prove an entitlement to lands extending more than three miles into the Gulf, based on the state's "historical boundaries"; however, even if a state could prove an historical entitlement to more than three miles, the Submerged Lands Act limited a state to a maximum seaward boundary of three marine leagues (about 10 miles) from its coast.[12]

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7 The failure of the Court to declare that the United States "owned" the seabed prompted strong criticism from Justice Frankfurter in his dissenting opinion.

8 332 U.S. at 39.

9 *United States v. Louisiana*, 339 U.S. 699 (1950) (rejecting Louisiana's claim to ownership of the seabed extending twenty-seven miles into the Gulf of Mexico); *United States v. Texas*, 339 U.S. 707 (1950) (rejecting Texas' claim to ownership of the seabed extending twenty-four miles into the Gulf of Mexico); *see also United States v. Maine*, 420 U.S. 515 (1975) (Atlantic states had no claim to seabed beyond three-mile marginal sea); *United States v. Alaska*, 422 U.S. 184 (1975) (applying three-mile limit to Alaska).

10 43 U.S.C. § 1301 *et seq*.

11 43 U.S.C. § 1331 *et seq*.

12 43 U.S.C. § 1301 (defining "lands beneath navigable waters" and "boundaries" to extend no more than "three geographical miles into the Atlantic Ocean or Pacific Ocean, or more than three marine leagues into the Gulf of Mexico"), § 1311 (vesting states with title to and ownership of lands beneath navigable waters), § 1312 (seaward boundary may extend beyond three miles "if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or it has been heretofore approved by Congress").

[c] Problems With Fixing The Boundary: Three Miles Or Three Leagues? Where Is The "Coastline"? What If The Land Changes?

The OCSLA and the Submerged Lands Act intentionally left open two critical questions affecting the division of offshore oil and gas revenues: (1) does a state in the Gulf of Mexico have a claim to ownership of lands extending three leagues from its coastline based on historical boundaries?, and (2) where is the location of each state's "coastline"? In 1960, the Supreme Court resolved the first question, declaring that Texas and Florida (on Florida's gulf-side only) were entitled to three marine leagues from their coastlines, but that Louisiana, Mississippi and Alabama were only entitled to three geographic miles from their coastlines.[13] Texas was entitled to three marine leagues, because Texas was able to demonstrate that it had asserted jurisdiction over such a distance when it was a sovereign nation prior to its admission to the United States. Florida was entitled to three marine leagues based on the Act of Congress pursuant to which Florida was admitted to the Union.[14]

With regard to the second question – the precise location of a coastal state's coastline – it would take another forty-plus years for that issue to be resolved in the Gulf of Mexico.[15] Among the difficulties involved in "fixing" a state's coastline was the impact of ongoing changes to a state's coastline resulting from the forces of nature. In 1969, the Supreme Court rejected Texas's claim that the offshore federal-state boundary should be drawn from the location of Texas's coastline as it existed in 1845 when the state was admitted to the Union. Not only did Texas seek to protect itself against the effects of post-1845 erosion, but Texas also argued that a fixed coastline, rather than an "ambulatory" one, was essential to ensure that mineral operations could be conducted reliably. The Supreme Court referred Texas to Congress to resolve any such problems:

> It is … true that the use of the modern, ambulatory coastline as the baseline from which the limitation is measured will penalize Texas for post-1845 erosion and may present practical difficulties for mineral lessees. But any alleged inequitable results, as well as any alleged detriment to orderly mineral development, derive from a consistent reading of the scheme Congress fashioned; thus Texas must look to Congress for relief.[16]

In response to this problem, in 1986 Congress amended the definition of the term "boundaries" in the Submerged Lands Act to "immobilize" the seaward boundaries of the coastal states:

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13 *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960).

14 In 1965, the Supreme Court rejected California's claim for a three-league seaward boundary. *See United States v. California*, 381 U.S. 139 (1965).

15 The Supreme Court fixed Florida's Gulf of Mexico boundary in 1976, Louisiana's Gulf of Mexico boundary in 1981, the Mississippi and Alabama Gulf of Mexico boundaries in 1990, and the Texas boundary in 1998. *See The Law of Federal Oil and Gas Leases, supra*.

16 *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 5-6 (1969).

> [A]ny boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;[17]

Thus, the federal-state boundary is ambulatory unless and until fixed by the Supreme Court, at which time it becomes "immobilized."

[2] Addressing Drainage And Cooperative Development, And Increasing The Coastal State's Share Of Offshore Revenue Through Amendments To The OCSLA

The Tidelands Litigation, together with the enactment of the OCSLA and the Submerged Lands Act, resolved the question of control over offshore oil and gas resources.[18] As a result, the states and the federal government have implemented their own independent leasing programs, with the states granting oil and gas leases affecting state waterbottoms, and the federal government granting oil and gas leases of submerged lands extending more than 200 miles from the United States coastline. However, resolution of the offshore jurisdictional boundaries did not end the dispute over revenues from offshore mineral resources, as Congress did not adequately address drainage of oil and gas reservoirs that straddle the federal-state offshore boundary. Under the Rule of Capture, a state or federal lessee could produce the reserves from such a common reservoir without incurring liability for drainage. As part of a series of statutory enactments that increased the power of the coastal states with regard to the offshore federal leasing program, Congress took the first step toward addressing drainage through Section 8(g) of the OCSLA, enacted in 1978. Section 8(g) is best understood within the larger context of the expansion of the coastal states' rights.

[a] The Expansion Of The Rights Of Coastal States Affecting The Federal Offshore Leasing Program

Two events from the late 1960s and early 1970s had significant, but countervailing, impacts on the offshore oil and gas industry. First was the Santa Barbara oil spill in January 1969, caused by a blowout on a platform in federal waters offshore of California. Among the many direct and indirect consequences of the oil slick that covered eight hundred square miles of

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[17] 1986 Amendments Subsec. (b). Pub. L. 99-272, § 8005, amending 43 U.S.C. § 1301(b).

[18] It is interesting to contrast the declaration in the Submerged Lands Act that the coastal states have "*title and ownership* of the lands beneath navigable waters within the[ir] boundaries," 43 U.S.C. § 1311(a) (emphasis added), with the OCSLA provision that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are *subject to its jurisdiction, control, and power of disposition*." 43 U.S.C. § 1332 (emphasis added). Indeed, the Fifth Circuit has recognized that the United States does not claim "title" to the seabed of the outer Continental Shelf. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*¸ 569 F.2d 330, 339 (5th Cir. 1978) ("an extension of jurisdiction for purposes of controlling the exploitation of natural resources of the continental shelf is not necessarily an extension of sovereignty").

water and thirty miles of beaches was the enactment of the National Environmental Policy Act ("NEPA")[19] and the Coastal Zone Management Act ("CZMA"),[20] as well as far-reaching amendments to the OCSLA. All of this new legislation would empower coastal states with significant leverage over offshore oil and gas activities in federal waters. The second event was the Arab oil embargo of 1973. This too led to amendments to the OCSLA, but rather than imposing greater restrictions on the offshore leasing program, these amendments sought to expand the offshore leasing program through new incentives and efficiencies.[21] Predictably, the tensions between statutory support for both a stronger environmental movement and a more robust leasing program have produced a number of disputes over the last thirty-five years.[22]

[b] Section 8(g) of the OCSLA

One of the central purposes of the 1978 amendments to the OCSLA was to provide the coastal states with a stronger voice in the administration of the offshore federal leasing program. This is evident from a number of statutory provisions, including the following excerpt from the OCSLA's restated declaration of policy:

> It is hereby declared to be the policy of the United States that -
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> …
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> (4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments -
>
> (A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;
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> (B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State

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19 42 U.S.C. § 4332 *et seq*.

20 Pub. L. No. 92-583, *codified as amended* at 16 U.S.C. §§ 1451-1464 (2000).

21 "To summarize, by the early 1970s, two vital national concerns – environmental protection and the need for energy independence – were competing for higher ranking among the list of national priorities." *State of Texas v. Sec'y of the Interior*, 580 F. Supp. 1197, 1202 (E.D. Tex. 1984).

22 *E.g.*, *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), *rev'd*, 464 U.S. 312 (1984) (challenging federal offshore lease sale as violating, *inter alia*, the CZMA and NEPA); *Edwardsen v. U.S. Dep't of the Interior*, 238 F.3d 781 (9th Cir. 2001) (rejecting action by six native Alaskans and Greenpeace challenging the Secretary of the Interior's approval of the development and production plan for the Northstar oil and gas reservoir located off of the north coast of Alaska in the Beaufort Sea).

> lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and
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> (C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.
>
> (5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; …[23]

As referenced in the foregoing, section 1337(g) – also known as Section 8(g) – was designed to provide the states with revenues to mitigate the adverse economic and environmental effects of the federal leasing program. In the initial version of Section 8(g), Congress addressed the drainage of reservoirs straddling the federal-state boundary. In its original form, Section 8(g) provided that the revenues from such common reservoirs were to be shared in a "fair and equitable" manner. To achieve such a result, the funds were deposited into a fund that was to be distributed in one of two ways: pursuant to either an agreement between the United States and each affected coastal state, or a decision by a federal district court. This proved to be unworkable, and billions of dollars accumulated without final resolution.[24] To resolve the deadlock over the distribution of accumulated revenues and to prevent the same problem from recurring, Congress amended Section 8(g) in 1986 to create an objective formula: each coastal state receives twenty-seven percent of the revenues (bonus, rentals and royalties) from federal leases located within three miles of the state's seaward boundary, irrespective of whether production from such leases was or was not from a common reservoir. Further, the amended Section 8(g) authorized the United States and the relevant coastal state to enter into a cooperative development agreement with respect to common reservoirs.

In *State of Louisiana v. United States*,[25] Louisiana asserted that a federal lessee was draining a common gas reservoir having more than eighty percent of the reserves located in Louisiana territory. The state argued that Section 8(g), as amended in 1986, only compensated the coastal states for onshore economic and environmental damage occasioned by exploration and production activities in federal waters, and that the portion of federal revenue that Section 8(g) allocated to the states did not include any compensation for drainage. Accordingly,

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[23] 43 U.S.C. § 1332.

[24] *See State of Texas v. Sec'y of the Interior*, 580 F. Supp. 1197 (E.D. Tex. 1984).

[25] 832 F.2d 935 (5th Cir. 1987).

Louisiana asserted that Section 8(g) mandated that the United States agree to enter into a unitization agreement with Louisiana. The state relied on the following language in Section 8(g)(3):

> (3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

The Fifth Circuit had little difficulty rejecting Louisiana's claim. The court found that neither the plain language of the statute, nor the legislative history, supported Louisiana's contention that Interior was statutorily compelled to enter into such a unitization agreement: "Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs, but no statutory consequences are provided in the event of failure—either to agree or attempt to agree."[26] Further, the Court emphasized that the 1986 amendments to Section 8(g) were intended to put an end to litigation between the federal government and coastal states over revenue sharing:

> Congressional desire to eliminate litigation over OCS revenues is clearly reflected by the allocation to the states of 27 percent of all mineral resources from federal lands, and by the abolition of the provisions requiring the negotiation of revenue sharing agreements and equitable dispositions by court decree of disputed revenues held in treasury escrow accounts. Louisiana's construction of section 8(g)(3) would emasculate this clear congressional policy by engaging the courts in further litigation over revenue sharing …[27]

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[26] 832 F.2d at 941.

[27] 832 F.2d at 942. The court also rejected two other claims raised by Louisiana: (1) that the federal government and its lessee were violating a policy agreement between the state and the federal government, and (2) that the federal government was violating Louisiana's "correlative rights."

[c] Section 5(j) of the OCSLA

As part of the Oil Pollution Act of 1990, Congress added Section 5(j) to the OCSLA to address further the problems arising from "unrestrained competition" by federal and state lessees having rights to a common reservoir. Section 5(j) provides:

> (j) Cooperative development of common hydrocarbon-bearing areas
>
> (1) Findings
>
> (A) The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including -
>
> (i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;
>
> (ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and
>
> (iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.
>
> (2) Prevention of harmful effects
>
> The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.[28]

The Eleventh Circuit construed this statute in its 1996 decision in *State of Alabama v. DOI*.[29]

Pursuant to its rights under an offshore federal oil and gas lease located adjacent to the seaward boundary of Alabama, Mobil drilled four wells in a reservoir that was situated beneath both federal and state acreage. The State of Alabama and Interior attempted, but failed, to negotiate a revenue sharing arrangement. Alabama then sued Interior, claiming that Section 5(j)

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[28] 43 U.S.C. § 1334(j).

[29] 84 F.3d 410 (11th Cir. 1996).

of the OCSLA compelled Interior to reach an agreement with Alabama to share revenue from the common reservoir, in order to protect Alabama from drainage and lost royalty income.

The Eleventh Circuit rejected Alabama's claim. First, the court concluded that it was clear that Congress intended for Section 8(g)(2) of the OCSLA to resolve permanently any and all disputes between the coastal states and the federal government over compensation for drainage by federal lessees. The court reached this conclusion based not only on its analysis of Section 8(g), but also on its review of the legislative history of Section 5(j). In particular, the legislative history demonstrated that early versions of Section 5(j) had expressly afforded coastal states protection against drainage, but that the enacted version of Section 5(j) had been scaled back considerably, removing all references to drainage. Concerning Section 5(j)'s requirement ("the Secretary shall prevent…") that Interior use cooperative development to prevent the negative consequences of unrestrained development of reservoirs underlying a federal-state boundary, the court held that Section 5(j) requires only that Interior engage in good faith negotiations to enter into a cooperative development agreement. The court found that Section 5(j) does not *mandate* that Interior enter into such an agreement, nor does Section 5(j) give a coastal state the right to dictate the terms of such an agreement:

> Were we to hold … that the DOI may not unilaterally authorize production without first reaching a cooperative development agreement with Alabama under section 5(j), we would be interpreting section 5(j) as requiring the DOI to negotiate until an agreement is reached, thereby allowing Alabama to refuse to agree until its demands are met…. This consequence would give Alabama effective veto power over the DOI's lawful authorization of natural gas and oil production; in other words, Alabama could hold the production of natural gas from federal territory "hostage" until the DOI had agreed to Alabama's terms. We find that Congress could not have intended section 5(j) to give coastal states such veto power over federal territory…[30]

Thus, subject to the statutory requirement that Interior engage in good faith negotiations with the state to reach a cooperative development agreement, the court affirmed that the Rule of Capture applies on the outer Continental Shelf.

[3] Offshore Revenue Sharing In The New Millenium

[a] The Energy Policy Act

In 2005, Congress enacted the Energy Policy Act, a wide-ranging piece of legislation that, among many other things, directed additional federal OCS revenues to the coastal states for coastal impact assistance. The Act provided for new coastal impact assistance of up to $250 million from federal OCS revenues to be shared annually among the states of Alaska, Alabama, California, Louisiana, Mississippi, and Texas from 2007 through 2010. The annual allocation is to be based on the ratio of federal OCS revenues generated off of a state's coastline to total

[30] 84 F.3d at 418-19.

federal OCS revenues from leases lying beyond three miles past state waters (the 8(g) zone) and within a distance of 200 nautical miles off that state.[31] Use of the funds is restricted to certain specified categories of projects, including projects devoted to the conservation, protection, or restoration of coastal areas, including wetlands, and mitigation of the impact of OCS activities through funding of onshore infrastructure projects and public service needs.

[b] Louisiana's Challenge To Lease Sale 200

The damage to the Louisiana coastline caused by Hurricanes Katrina and Rita in August and September 2005, respectively, needs no introduction. It was devastating. In the immediate aftermath of the storms, Louisiana politicians resounded their call for the state to receive a greater portion of federal revenue from offshore federal lease activity. The focal point of this plea for additional funds was the need to remedy coastal erosion, which had increased the state's exposure to damage from hurricanes. However, having lost the Tidelands Litigation, and having lost in litigation over the implementation of Section 8(g) of the OCSLA, Louisiana had no legal basis for claiming additional revenue from the offshore federal leasing program. Nevertheless, as a coastal state, Louisiana had significant leverage over the federal leasing program through the combination of the Coastal Zone Management Act, the National Environmental Policy Act, and the OCSLA itself. In the summer of 2006, Louisiana exercised that leverage by filing suit to enjoin Lease Sale 200, the long-scheduled Western Gulf of Mexico lease sale that was to be held in New Orleans on August 16, 2006.[32] Although Louisiana did not seek any additional revenues in its lawsuit, it was readily apparent that the impetus for the lawsuit was the state's claim that it should receive a greater share of revenue from offshore federal leasing activities. Moreover, in light of the enactment of the Gulf of Mexico Energy Security Act of 2006 (discussed below) several weeks after the conclusion of this litigation, Louisiana's lawsuit is an essential piece of the background to that legislation.

Louisiana argued that the coastal devastation wrought by the 2005 hurricane season had rendered out-of-date Interior's Environmental Impact Statement ("EIS"), Interior's CZMA consistency determination, and other assessments on which Interior based its authority to hold the lease sale. Specifically, Louisiana asserted that: (1) by relying on a multi-sale EIS conducted in 2002 and failing to supplement that EIS, Interior arbitrarily and capriciously failed to comply with NEPA; (2) by failing to evaluate adequately the impacts of the hurricanes on Louisiana's coastal zone, Interior's "consistency determination" violated the CZMA; and (3) Interior had acted arbitrarily and capriciously in ignoring the recommendations that Governor Blanco had made concerning the lease sale pursuant to Section 19 of the OCSLA. The common

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[31] The eligible states are Alabama, Alaska, California, Louisiana, Mississippi, and Texas. Sixty-seven coastal political subdivisions are also eligible. All of the eligible States will share $250 million annually during the fiscal years 2007 through 2010 for a total of $1 billion. Each eligible State will be allocated their share based on the state's Qualified Outer Continental Shelf Revenue (QOCSR) generated off of its coast in proportion to total QOCSR generated off the coasts of all eligible States. Only States that submit a coast impact assistance plan that meets MMS approval will be eligible to receive funds.

[32] All of the pleadings in this lawsuit, as well as the parties' Settlement Agreement, are available through the website of the Federal District Court for the Eastern District of Louisiana.

theme in all of Louisiana's arguments was that Interior had predetermined that Lease Sale 200 would go forward and had unlawfully rubber-stamped holding the sale.

On Monday, August 14, 2006, just two days prior to the lease sale and after the MMS had already started accepting bids, Judge Englehardt issued a forty-four page decision.[33] Although Judge Englehardt found that Louisiana established "a substantial likelihood of prevailing on the merits of one or more" of its claims at trial,[34] and although he made it crystal clear that he expected Louisiana to prevail at the trial for permanent injunction to be held in November 2006,[35] he denied injunctive relief and allowed the lease sale to proceed.[36]

On August 18, 2006, Lease Sale 200 went forward, generating over $300 hundred million in bids. In a settlement agreement filed with the court on October 24, 2006, Louisiana agreed to drop its lawsuit and not to challenge the leases granted pursuant to Lease Sale 200. In return, Interior agreed (*inter alia*) (i) to postpone any future lease sales (including Lease Sale 201, the Central Gulf lease sale scheduled for March 2007) until a new Environmental Impact Statement could be prepared, which would include a consideration of the impacts associated with Lease Sale 200, in its analysis of "cumulative impacts"; (ii) that the federal consistency determination for the next Gulf of Mexico lease sale would not "tier off of" any prior consistency determination, unless agreed to in writing by Louisiana; and (iii) not to submit to Louisiana any Exploration Plan for any lease issued pursuant to Lease Sale 200 unless Interior also submits an Environmental Assessment for any such plan, which assessment must take into account the intended use of facilities and infrastructure damaged by Hurricanes Katrina or Rita.

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33 *See* No. Civ. A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 14, 2006) (the "Blanco Decision"). However, citations to page numbers in the Blanco Decision refer to the version of the decision that appears on the district court's website.

34 Blanco Decision p.42.

35 Blanco Decision pp.3, 19, 22, 28, 32, 42-43.

36 Notwithstanding that it found that Louisiana was likely to prevail on the merits of its challenge to Lease Sale 200, the court denied the state's request for a temporary injunction, finding that Louisiana had not demonstrated that it would be irreparably harmed during the ninety-one day period prior to trial. The court concluded that the limited nature of the activities that might be conducted by the owners of new leases prior to trial did not support a finding of irreparable harm. Notably, however, the court issued a warning to would-be lease holders bidding at Lease Sale 200:

"[T]hose who bid on Lease Sale 200 do so now with such knowledge that, in the opinion of the undersigned, Defendants' compliance with the NEPA, the CZMA, and the OCSLA is questionable at best, and that Plaintiffs have a substantial likelihood of prevailing on the merits of one or more of these claims at the November trial. Injunctive relief to ensure compliance may well be in order. Thus, Intervenors and others similarly interested in participating in the Lease Sale 200 process may guide their conduct accordingly, and factor in the risks associated with the apparent failure of MMS and/or DOI to satisfy their obligations on one or more of these federally-mandated requirements. Through this Court's candid assessment of Plaintiffs' likelihood of prevailing on the merits, these parties may employ the doctrine of *caveat emptor* [at Lease Sale 200]."

Blanco Decision pp. 42-43.

[c] The Gulf of Mexico Energy Security Act[37]

Late in 2006, Congress enacted the Gulf of Mexico Energy Security Act, which directed additional revenues generated by offshore federal oil and gas leases to the coastal states in the Gulf of Mexico. This legislation was the product of years of lobbying efforts and numerous events, including the extensive coastal damage caused by the hurricanes of 2004 and 2005. The degree to which Louisiana's judicial challenge to Lease Sale 200 contributed to the enactment of this legislation cannot be known, but it is not unreasonable to conclude that the lawsuit had an impact.

The Gulf of Mexico Energy Security Act did not only provide for a redistribution of Gulf of Mexico federal leasing revenues, but it opened for new leasing certain areas of the Gulf of Mexico lying offshore of Florida. This is critical, because the source of the increased revenues to be allocated to the coastal states initially will be limited to leases affecting the newly opened areas of the Gulf of Mexico. The Act provides that, beginning in Fiscal Year 2007, revenues generated by new leases in the areas that the Act makes available for leasing are to be distributed between the federal government, state conservation programs, and the states of Alabama, Louisiana, Mississippi, and Texas, as follows:

- 50 percent of offshore revenues are directed to the federal Treasury;
- 37.5 percent of offshore revenues are directed to the states of Alabama, Louisiana, Mississippi, and Texas, with each state receiving a minimum of ten (10) percent of shared revenue and coastal political subdivisions of each state receiving twenty (20) percent of the state's revenue;
- The revenues directed to the states are restricted in that the money can be used only for coastal protection, mitigation of damage to wildlife or natural resources, implementation of a federally-approved marine, coastal, or comprehensive management plan, onshore infrastructure projects, or up to three percent of funds for planning assistance and administrative costs of compliance;
- 12.5 percent of offshore revenues are directed to the Stateside Land and Water Conservation Fund (LWCF).

Beginning in Fiscal Year 2017, the revenue distribution formula set forth above will be expanded to apply to revenues from leases of tracts located within the MMS's 2002-2007 planning area (including the Central and Western Planning Areas of the Gulf of Mexico, and a portion of the Eastern Planning area), including historical leases entered into beginning as of October 1, 1982 (or earlier at the discretion of the Secretary of the Department of the Interior).[38] The Act limits the revenue distributed to states and the LWCF to $500 million for each fiscal year between 2016 and 2055.

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[37] Gulf of Mexico Energy Security Act of 2006, S. 3711, 109th Cong. (2006) enacted.

[38] The Act carves out leases in the Section 8(g) areas, thus leaving in place the established method of distributing revenues from such leases.

§ 5.03 Onshore

The United States grants oil and gas leases of onshore federal lands pursuant to the Mineral Leasing Act ("MLA").[39] Since its enactment in 1920, Section 35 of the MLA[40] has provided for the distribution of a portion of federal lease revenues to the state within which the leased federal lands are located. Originally, the MLA called for the affected state to receive thirty-seven and one half percent of lease revenues. In 1976, the MLA was amended to increase the percentage payable to the relevant state from thirty-seven and one half percent to the current fifty percent level.[41] A 1993 amendment called for a deduction from the states' share of revenues to contribute to "the enacted appropriation of the Department of the Interior and any other agency during the preceding fiscal year allocable to the administration of all laws providing for the leasing of any onshore lands"; however, Congress repealed this amendment to the statute in 2000, because it proved to be unworkable.[42] In contrast to the offshore arena, there has been little litigation between the United States and the states over the division of lease revenues from onshore federal lands.[43]

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[39] 30 U.S.C. § 181 *et seq*.

[40] 30 U.S.C. § 191.

[41] The exception is Alaska, which receives ninety percent of lease revenues generated by MLA leases of lands within Alaska. Alaska's disparate treatment derives from the fact that the other states benefit from the Reclamation Fund, which receives forty percent of MLA lease revenues (the remaining ten percent go to the Treasury's miscellaneous receipts). Because Alaska does not benefit from the Reclamation Fund, 30 U.S.C. § 191 was amended to provide that Alaska receives ninety percent of MLA lease revenues.

[42] *See* Act of Aug. 10, 1993, Pub. L. No. 103-66, Title X, § 10201, 107 Stat. 407; Act of Oct. 30, 2000, Pub. L. No. 106-393, Title V, § 503, 114 Stat. 1624.

[43] *See, e.g.*, *New Mexico v. United States*, 831 F.2d 265 (Fed. Cir. 1987) (concerning the interplay between Section 35 of the MLA and the crude oil windfall profits tax); *Watt v. Alaska*, 451 U.S. 259 (1981) (concerning the interplay between Section 35 of the MLA and the Wildlife Revenue Sharing Act); *Wyoming v. Lujan*, 969 F.2d 877 (10th Cir. 1992) (state lacked standing to contest federal government's exchange of federal coal for a conservation easement); *California State Controller*, 166 IBLA 5 (2005) (Board did not have jurisdiction to hear an attempted appeal by California of an MMS Director decision reversing an order to pay royalties).