

5-1-1973

Foreword

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Recommended Citation

Lee Metcalf, *Foreword*, 10 SAN DIEGO L. REV. 425 (1973).

Available at: <https://digital.sandiego.edu/sdlr/vol10/iss3/2>

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Foreword

HON. LEE METCALF*

The San Diego Law Review is to be congratulated for its fifth annual Law of the Sea Issue. The timely and well written articles appearing in this and past issues constitute a substantial contribution to contemporary scholarship related to evolving ocean policy. It is a privilege for me to write the introductory note for this outstanding issue.

With the editors' and readers' indulgence I will comment on the articles submitted to me, giving my reaction to the content and conclusions of each. I would note at the outset that most of the authors are more familiar than I with the very complex issues facing national and international decision makers saddled with the responsibility of formulating law of the sea policy. Accordingly, I am honored to have my brief note included as part of this impressive issue.

Dr. Ann L. Hollick's article on United States Oceans Politics is a well-researched and very readable account of the development of U.S. seabed policy. It is perhaps the best published history of six years of infighting among the various parties with vested interests in our ocean policy.

Dr. Hollick has really performed a dual service with her care-

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fully constructed essay. It is not only a detailed and accurate recounting of the development to date of the U. S. position in the numerous issues relating to law of the sea, but is also an excellent case study of policy formulation in the U.S. government. This particular case affords the student of government an opportunity for vivid observation of the interplay between interest groups and a prime example of how blurred the boundaries are between foreign and domestic affairs—how non-exclusive the two spheres frequently are.

I would footnote Dr. Hollick's article with a few observations of my own relating to the emergence of an oceans policy.

During the period leading up to the May, 1970, White House decision on ocean policy, Mr. Walter Hickel was the Secretary of the Interior. Mr. Hickel was urged by his staff to visit Messrs. Ehrlichman and Kissinger and the President himself in order to present arguments to "save the shelf" and preserve existing United States rights to mine the deep seabed (as opposed to the Defense Department's readiness to trade these off for free transit). The reader may recall that because of Hickel's criticism of Mr. Nixon's Vietnam policy and of the excessive power of the White House staff, his relationship with the President was tenuous at best. As a result, Mr. Hickel did not press his cause beyond a discussion of shelf limits and deep seabed questions with Mr. Ehrlichman. At the same time, visits and telephone calls between high State and Defense Department officials and White House staff and the President were intensive. Had the Nixon-Hickel relationship been more cordial and had Mr. Hickel fought harder, a shelf decision other than the so-called "trusteeship zone" decision regarding the continental margin, and an approach to the deep seabed other than the so-called "common heritage" characterization might have evolved.

Dr. Hollick mentions, only in passing, the role of Congress in ocean policy developments. In 1969 Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, appointed me as chairman of a Special Subcommittee on the Outer Continental Shelf to investigate certain issues, including the impact of various policy options under consideration by the Administration on the development of our natural resources. I would like to believe that the hearings of that Special Subcommittee contributed positively to public education on the issues involved and their importance to this nation.¹ I believe they provided additional

1. Outer Continental Shelf, Report by the Special Subcommittee on Outer Continental Shelf to the Committee on Interior and Insular Affairs, United States Senate, 21 December 1970.

input for the policy makers to consider and, along with subsequent Congressional interest, have served to focus public opinion on this vital issue.

The Senate Interior Committee has continued its active interest in ocean policy developments both within the Administration and within the United Nations Seabed Committee and General Assembly. Our observations have led to doubts about the progress being made toward a satisfactory resolution of law of the sea problems. We have no assurance to date that out of the Law of the Sea Conference will come a treaty which the Senate of the United States will vote to ratify. While we do not wish to hinder progress toward a timely and acceptable Seabed Treaty, if a successful conclusion of the Law of the Sea Conference does not seem probable, I do not see how Congress can responsibly refrain from legislation designed to regulate and protect the deep ocean mining activities of U.S. firms.

The real value of Mr. Terry Leitzell's article on the 1972 Ocean Dumping Convention is the insight it provides into the complexities of attempting to negotiate an ocean pollution treaty amid competing international efforts to deal with the same subject. What is excluded from the coverage of the 1972 Convention on Ocean Dumping provides clues as to such competing international efforts:

The disposal of wastes incidental to the normal operations of vessels and aircraft is already included in the 1954 Convention on Pollution of the Seas by Oil and is the subject of the 1973 Conference on Marine Pollution to be conducted under the auspices of the Intergovernmental Maritime Consultative Organization.

The disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated offshore processing of seabed resources remains within the scope of the 1974 Law of the Sea Conference and that of its preparatory body, the U. N. Seabed Committee. To date, however, there has been little achievement by the latter body in preparing for next year's conference.

Another obstacle to international agreement regarding marine pollution not mentioned by Mr. Leitzell is the attitude of some developing countries on this issue. Many suspect that proposals by developed countries to clean up the ocean are insensitive to the aspirations of developing nations to advance economically. These nations feel the developed countries have polluted unin-

hibitedly in the race for industrial and technological superiority, and now wish to impose standards that would impede developing countries' growth.

Two other impediments to progress in combating ocean dumping, mentioned by Mr. Leitzell, pertain to international organization and the jurisdiction of coastal states to police ocean dumping beyond their territorial seas.

Resolution of the organizational issue related to which international body, if any, would be given administrative responsibility for the Ocean Dumping Convention was deferred until the first consultative meeting of the parties to the convention following its entry into force. Thus, until this issue is resolved individual states party to the convention will provide the exclusive means of its enforcement.

The jurisdictional reach issue remains difficult to resolve because of the conflict between those states which would limit a coastal state's enforcement jurisdiction and other nation-states such as Canada which would prefer to see a broader band of water over which the coastal state would be given enforcement authority. The outcome of the 1974 Law of the Sea Conference insofar as coastal state jurisdiction is concerned will most certainly have a substantial impact on the future resolution of this issue.

Regardless of these and other unsettled issues related to the curbing of marine pollution, the Ocean Dumping Convention, as Mr. Leitzell pointed out, is at least a first step.

Before discussing the articles pertaining to the Deep Seabed Hard Mineral Resources Act by Messrs. Knight and Laylin, I would like to make an introductory point or two. First, the bill (S. 1134) is now before my subcommittee. By the time this article goes to press several days of hearings on this legislation will have been completed. I would like to emphasize that my sponsorship of S. 1134 does not imply my support of all of its provisions. The predecessor bill grew out of the appearance by representatives of the American Mining Congress before my Special Subcommittee on the Outer Continental Shelf in September of 1970. At that time, as our hearing records will show, I told industry witnesses that I would introduce their proposals for circulation and discussion.

I am not committed to this particular bill nor to any part of it. That was my position when I introduced S. 2801; it is my position today. The purpose of the hearings is to expose this bill to the full debate which is needed to assess its strengths and its weaknesses.

Preparatory to writing this introductory note it was necessary to review carefully the two articles concerning the Deep Seabed

Hard Mineral Resources Act. I have long believed that the adversary process helps not only judges, but also legislators, to make decisions best serving the public interest. Thus, I am grateful for the opportunity to weigh the pros and cons put forward by Messrs. Knight and Laylin concerning S. 1134.

Although I am not yet convinced of the wisdom of this bill or its urgency, I must admit that of the two articles I found Mr. Laylin's more in line with my views at present. I say so recognizing full well that Mr. Laylin not only participated in the drafting of the bill but also continues to actively represent one of the U.S. companies quite active in ocean mining, whose officers testified before my subcommittee in favor of the bill. There are, however, parts of Mr. Laylin's testimony which raise questions in my mind which I shall later discuss. First I will comment on Mr. Knight's article and some of the assertions he has made.

Mr. Knight summarizes his arguments against the bill as follows:

- . . . (1) it is inconsistent with this Nation's present oceans policy;
- (2) it will probably have an adverse effect on the current law of the sea negotiations; and (3) it contravenes international expectations evidenced in the "principles" resolution of the General Assembly.

He bases these arguments on what he believes to be "inappropriate timing."

I suppose Mr. Knight's first assertion is the one that gives me the greatest trouble. He claims S. 1134 is not consistent with current United States oceans policy. It would be more correct to say that it is not consistent with current administration oceans policy. I cannot resist the temptation to remind Mr. Knight that we have ample proof in the last decade alone that just because there is an administration blessing on a policy does not automatically sanctify that policy. This is, after all, the same administration that gave us some questionable policies in other areas. We in Congress happen to be of the persuasion that Congress has a legitimate and vital role to play in the formulation of U.S. policies—foreign and domestic. Before a policy is U.S. policy, it should represent more than the viewpoint of only one branch of government. In addition, it is a false argument. To state that proposed legislation is unacceptable because it does not conform to conventional administration wisdom is like arguing against legislation to ban U. S. bombing in Cambodia on the basis that it is inconsistent with U. S. Asian policy.

I must also take issue with M. Knight's claim that it is "clearly the intent of the Act" to establish a "flag nation" approach to deep seabed mining. He implies that because the bill does not establish any international legal system, the intent is to rely solely on "domestic legislation." I do not see that it must be an "either-or" proposition. In fact, the intent of this bill or, I presume, any similar legislation that might be proposed, is to provide for interim regulations relating to ocean mining until such time that an international regime comes into effect. Indeed the bill reads "To provide the Secretary of the Interior with authority to promote the conservation and orderly development of the hard mineral resources of the deep seabed, *pending adoption of an international regime therefore.*" (emphasis added). Mr. Knight concludes this particular phase of his presentation by saying "It seems unlikely that the President would sign such a bill if he wished to maintain the Administration's existing oceans policy." Mr. Knight might recall that the President in his U. S. oceans policy statement on 23 May, 1970, made the following remarks regarding development of the deep seabed:

"Although I hope agreement on such steps can be reached quickly, the negotiation of such a complex treaty may take some time. I do not, however, believe it is either necessary or desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process. Accordingly, I call on other nations to join the United States in an interim policy. I suggest that all permits for exploration and exploitation of the seabeds beyond 200 meters be issued subject to the international regime to be agreed upon."

I suggest that S. 1134 is simply a first step in developing such an interim policy. It is not, I am sure, the final version that will emerge from the legislative process.

I do not want to spend a disproportionate amount of time on Mr. Knight's article but I feel I must at least briefly address myself to a few other points contained in it. His second major argument is that S. 1134 would have an adverse effect on current law of the sea negotiations. I would say that is a possibility but not a certainty. I do not believe Mr. Knight establishes how enactment of S. 1134 would adversely affect the negotiations. He only speculates. One could also speculate that enactment of S. 1134 would have precisely the opposite effect—that it would demonstrate to our international friends that while we favor an international regime we are not prepared to wait until doomsday for it. The mere discussion of legislation such as S. 1134 may act to spur on the law of the sea negotiations. In any case, the Congress of the United States cannot responsibly meet its obligations to its citizens by pretending that technology to mine the deep seabed is non-existent and relying

on the fragile hope that an international regime soon can be agreed upon.

Mr. Laylin addresses Mr. Knight's claim concerning the contravention of "international expectations." I would only note that Mr. Knight did not say the bill would be contrary to international law, but to international expectations. Still S. 1134 takes due regard to the U.N. General Assembly Resolution 2749. It is designed to be compatible with "the international regime to be established," to be governed by that regime, and to share the benefits with other nations.

Finally, I take exception to Mr. Knight's allusion to "inappropriate timing." The Congress is not taking precipitous action. We are inviting full and free debate on an important issue. We are too often guilty of being "a day late and a dollar short." I believe it is most timely that we examine this proposed legislation now. Let us expose it to close scrutiny so that if we determine that legislation is needed, we enact the best law possible. The surest way to avoid mistakes is to avoid waiting until the last minute and then under pressure, writing an ineffective or unwise law.

Mr. Laylin, on the other hand, points out that there is no international law limiting the freedom to mine the deep seabed. He recognizes that S. 1134 is intended as an interim measure eventually to be replaced by an international regime. He subscribes to the view that such legislation could discourage disorderly development and hopefully forestall claims of prior rights based upon unregulated activities. One of my concerns is that in the absence of either an international regime or United States statute, technology will lead us to a new lawless frontier.

Mr. Laylin advocates that countries having a capability to carry on deep seabed mining put reasonable restraints on themselves and their nationals who encourage mining but do not permit unnecessary assertions of rights, and suggests S. 1134 was drafted with that end in mind.

Although Mr. Laylin states that an interim regime would be preferable to legislation, he notes that there have been no signs pointing toward that possibility. He outlines what the bill does and does not do as an interim legislative measure and describes what protection the bill would afford United States nationals engaged in the mining industry.

He points out that contrary to his promise of 3 May, 1970, President Nixon has yet to put forward a proposal for an interim policy. To date, in fact, the Administration has done little to address the problem other than to reassure United States nationals that they have a continuing right to mine the deep seabed.

Among other things, the bill would establish an Overseas Private Investment Corporation-type insurance program in which the government would practically be required to guarantee the United States licensee mining companies a profit. Mr. Laylin states that the mining companies' bankers insist on such an insurance program because "venturing into an activity so unprecedented as deep seabed mining is itself so risky from a nonpolitical angle that there should not be added" all the risks "of a political nature." This argumentation smacks of hyperbole. So, too, does the argument that foreign competitors mining the ocean floor, such as an agency of the U.S.S.R., or Japanese and West German companies, will be subsidized by their governments, and therefore the U. S. government should insure the operations of its "underdog" mining companies. Taking risks is what big business in the United States is all about. I remain to be persuaded that in addition to insuring competition between ocean mining companies, the bill need go further and guarantee their success in competition against foreign mining companies.

Mr. Laylin questions the Administration's belief that S. 1134 is unnecessary because a seabed regime will be completed by 1974 or 1975. I, too, question the probability of such an event coming to pass so soon, and therefore share Mr. Laylin's prediction that the nations wanting an agreement on deep seabed mining "will go ahead with one arrangement or another if the present lack of progress continues."

What such "arrangements" will turn out to be remains to be seen.

In my view, the progress toward arriving at an acceptable draft seabed regime by the U.N. Seabed Committee at its Geneva session this summer will play no small part in the determination of whether S. 1134 could become one such arrangement.