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CASE NOTES

LAW OF THE SEA—The Continental Shelf—United States Proprietary Claim To The Continental Shelf Gives Rise To A New Public Domain. United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969).

A few years ago a Louisiana contractor named Louis M. Ray and a group of investors embarked upon a scheme to create an ocean resort complex upon lands heretofore untapped for private enterprise, to wit: a partially submerged reef approximately five miles off the Florida coast. The plan was to create a twenty acre artificial island by dredging operations which would start upon the receipt of a permit from the Secretary of the Army. The permit was denied, whereupon the entrepreneurs commenced dredging operations anyway, presumably on the theory that they were in international waters and, hence beyond the jurisdictional bounds controlled by United States permit requirements. The United States Government promptly brought a suit to enjoin the defendant's further activity in the area, whereupon the court granted a temporary restraining order on April 21, 1965.¹ Atlantis Development Corp., Ltd., a Bahamian Corporation which had previously engaged in a somewhat similar operation on the very same reef, filed an application to intervene. The entrepreneurs thus maintained they were, in fact, creating colonies upon the reefs, which were islands in the high seas, and subject only to international law. The Government, on the other hand, contended that the reefs were not islands but, instead, natural resources of the Outer Continental Shelf's seabed and subsoil and thus, well within the United States jurisdiction as set forth in the Outer Continental Shelf Lands Act of 1953.² The district court *held* that the reefs are not islands but seabed; therefore, any artificial islands or fixed structures erected thereon are subject to the jurisdiction and control of the United States as part of the seabed and subsoil of the Outer Continental Shelf, hence,

1. *United States v. Ray*, 281 F. Supp. 876 (S.D. Fla. 1965).

2. 67 Stat. 462, 43 U.S.C. §§ 1331-43 (1964).

no private individual can acquire any proprietary claim as against the United States.³

THE LEGAL DEVELOPMENT OF THE CONTINENTAL SHELF

The developmental stage of ocean law pertaining to the Continental Shelf has been slow and, to some extent, scant, both internationally as well as domestically. In the international area it was as late as the close of the Seventeenth Century that the first major concept, "freedom of the seas", became firmly established, thus setting the stage for surface zone demarcation and ocean bottom status.⁴

The zone concept evolved out of the limitation of "territorial waters" upon the phrase "freedom of the seas", whereupon, the remaining "free sea" became the high seas zone. The territorial sea, that water which a state exercises sovereignty over, was defined as a three mile zone, or belt, that surrounded every coastal state. The definition was premised on the maxim "that area which a state can effectively defend from shore" which in turn was defined in terms of that defense, the range of a cannon shot.⁵

Far later in time, a third zone evolved. This area, labeled the "contiguous zone" was a larger buffer zone established for states to more effectively enforce their immigration and customs laws as well as for defense purposes. This was an additional nine mile belt for law enforcement, but not, as is the case with territorial waters, subject to plenary or sovereign control by a coastal state.⁶

The status of the ocean bottom under these zones was not as well agreed upon historically as was the status of their surface water counterparts. There evolved three basic theories⁷ which were expounded by international lawyers and are as follows:

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3. United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969).
 4. Griffin, *Emerging Law of Ocean Space*, 1 INT. LAW. 548 (1967).
 5. 48 C.J.S. *International Law* § 7 (1947).
 6. Griffin *supra* note 4, at 553.
 7. Pardo, *Limits of the Continental Shelf—And Beyond*, 62 AM. SOC. INT L. PROC. 216 (1968).

- 1) *res omnium communis*, common property of all nations such as the high seas,
- 2) *res nullius*, land presently unappropriated, yet capable of acquisition by a state, such as uncolonized islands,
- 3) the recent trend of distinguishing between seabed and subsoil by labeling the seabed *res communis* and the subsoil *res nullius*, such as the lease of oil or mineral rights without ownership of the land itself.

United States domestic ocean law used as its foundation the international common law, whereupon a new age of concepts evolved out of case law as well as statutory laws in attempts to solve new areas of conflict brought about by technological advances. The international community in turn recognized the effectiveness of many of these domestic laws which thereby became the foundation for the ever expanding international body of statutory law. Chronologically, the first major step was the Truman Proclamation of 1945⁸ in which the term "Continental Shelf" was born as the President proclaimed United States jurisdiction and control over its adjacent continental shelf. Next, in that same year, the United States brought suit against California,⁹ as the offshore oil boom was in full swing, in an effort to establish Government ownership of the submerged lands beneath the three mile territorial belt. The Court held for the United States and against California, thus, vesting title to these offshore submerged lands in the Federal Government instead of within the States.

Congress replied to the Court's decision in *California* a few years later by passing the Submerged Lands Act of 1953.¹⁰ This Statute acted as an effective reversal of the Court's decision by ceding to the individual coastal states the United States proprietary interests in the submerged lands. Later in 1953 Congress passed the Outer Continental Shelf Lands Act,¹¹ which attempted to expand and define the inter-

8. Presidential Proclamation No. 2667, 10 Fed. Reg. 12303, Sept. 28, 1945.

9. *United States v. California*, 332 U.S. 19 (1947).

10. 67 Stat. 29, 43 U.S.C. §§ 1303-15 (1964).

11. 43 U.S.C. §§ 1331-43 (1964).

ests involved in the Truman Proclamation,¹² and the Submerged Lands Act.¹³

Internationally, by 1956 most of the world community followed suit by acquiescing to the United States claims, and further, by claiming similar jurisdiction over their own continental shelves. The Geneva Convention on the Law of the Sea met two years later in 1958 in an effort to codify into international agreement as much of the quickly developing law as possible. The most important agreement that arose was Article I which defined the Continental Shelf and the right of every coastal state to maintain jurisdiction and control over its own adjacent continental shelf for the purposes of developing the natural resources thereon.¹⁴

A compilation of the domestic and international law that had evolved by 1960 produced an era of uncertainty as to just what proprietary interests were involved in submerged lands; particularly the newest accessible frontier—The Continental Shelf. Little beyond theorization was done internationally after the Geneva Convention, but domestically a State and Federal conflict arose over submerged lands rights whereby a line of United States cases started the process of defining ocean bottom interests by first defining interests on the Continental Shelf.

The first case of importance was *United States v. Louisiana*,¹⁵ in which the Government sought to stop the five Gulf States from authorizing offshore oil wells beyond the three mile territorial belt, in order that the wealth of these regions could be harvested by the Federal Government. The Court's holding was for the most part in favor of the Government, but more importantly, the case effectively defined most of the interests ceded to the states under the Submerged Lands Act.

The next case that arose was the "second" *United States v. California*,¹⁶ in which the Government sought to resolve

12. *Supra* note 8.

13. 43 U.S.C. §§ 1301-15 (1964).

14. Griffin, *supra* note 4, at 551.

15. 363 U.S. 1 (1960).

16. 381 U.S. 139 (1965).

the remainder of the issues left unsettled by *Louisiana* in the area of demarcation of state and federal submerged land interests. The Government renewed its 1945 suit by amended complaint in order to stop California's liberal interpretation of "inland waters" which allowed the state to drill for oil up to fifty miles off shore, yet still within the bays claimed by California. The Court held that "inland waters" and other terms were left undefined by the Submerged Lands Act because Congress had left that task to the courts. The Court modified the original Special Masters Report and left the parties to submit proposed decrees.¹⁷

The culmination of *California* and the state-federal conflict was the supplemental decree entered January 31, 1966.¹⁸ The decree defined into black letter law most of the terms involved in submerged land conflicts, thus crystalizing into sharper focus the demarcation line between state and federal rights.

THE SECOND PHASE—UNITED STATES V. RAY

The next logical phase of Continental Shelf Development, a step beyond the state-federal conflict over oil resource exploitation, was the private enterprise—federal conflict over colonization rights. The case which embodied this step was *United States v. Ray*¹⁹ wherein two groups of entrepreneurs, one of United States origin, the other of Bahamian origin,²⁰ realized that colonization was now technologically feasible on some areas of the United States' Outer Continental Shelf.

The Government, in an attempt to avert certain obvious consequences which would result from such colonization, decided to test the extent of power inherent in the Outer Continental Shelf Lands Act. Couching its suit in the terms of the Act²¹ the Government argued that the reefs were in fact

17. *Id.* at 177.

18. 382 U.S. 448 (1966).

19. *United States v. Ray*, *supra* note 3.

20. It is significant that Atlantis is not of United States origin for the reason that as a Bahamian corporation its claim effectively joins international colonization rights into issue.

21. 43 U.S.C. § 1333 Section 4 (a) (1) (1964). The Government sought to bring the activity within the following language of the statute:

The constitution and laws and civil and political jurisdiction of the

natural resources of the seabed or subsoil of the Outer Continental Shelf.²² The suit, if successful, would subject the entrepreneur's actions to United States jurisdiction and control and therefore, the regulatory body of the Secretary of the Army.²³

The defendants and intervenors premised their answer on the argument that the reefs are islands which beyond the three mile limit would be *res nullius*, as are all unclaimed islands, and subject to international colonization.²⁴ The issue presented to the Court then became one concerning the character of the reefs, a seemingly easy question of law yet pregnant with numerous ramifications no matter which way the question was decided. This was evidenced by the court's deliberation on the decision for one year, whereupon the court found for the Government.

The courts resolution of the issue thus presented allows the theme inherent in *Ray* to emerge—United States plenary control and jurisdiction of the Continental Shelf. In reaching its decision the court was placed in the anomalous position of being able to pre-select the successful litigant since the character of the reefs, heretofore undefined,²⁵ could be defined just as easily as a natural resource as not. The basic issue was therefore not, as the court suggests, the character of the reefs,²⁶ but, instead, whether or not the United States should have jurisdiction sufficient to enable absolute United States control of submerged lands such as the reefs in *Ray*.

United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for resources therefrom. . . .

22. *United States v. Ray*, *supra* note 3, at 536.

23. 43 U.S.C. § 1333 (f) (1964). This act encompasses the authority which had previously been set forth in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 and states as follows:

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the Outer Continental Shelf.

24. *United States v. Ray*, *supra* note 3, at 536. The intervenor cross claimed against the defendants with the additional argument that it had superior title through a prior claim.

25. The Submerged Lands Act, 43 U.S.C. § 1301 (e) (1964) and the Geneva Convention on the Continental Shelf Article 2 (4) (1958) define natural resources according to traditionally exploitable items of which coral reefs are conspicuous by their absence from enumerated lists of such items.

26. *United States v. Ray*, *supra* note 3, at 538.

The court seemingly felt that this question should be answered in the affirmative for obvious national security reasons²⁷ and so proceeded to fashion an opinion which not only complied with the requirement of *stare decisis* but also reached a result palatable to international authorities and United States higher courts.

First, the court pointed out that the reefs do not fit the definition of an island if strictly construed under the mean high water test,²⁸ thus leaving the reefs subject to some definition. However, if liberally construed they rather conveniently fit the definition of a natural resource of the seabed and subsoil of the Continental Shelf.²⁹ So defined, the reefs are an exploitable resource and are therefore subject to the exclusive control of the United States as set forth in the Convention of the Continental Shelf.³⁰

The rather obvious inference is that if these reefs can be so easily defined as encompassed under the proprietary claim sections of both national (Shelf Act) and international (Shelf Convention) law, the entire Shelf has effectively been placed under United States sovereign jurisdiction.

In order to avoid the prospect of international disapproval of such a United States claim to the entire Shelf sounding in fee simple, the Court went to great lengths to define the nature of that interest as some sort of quasi-sovereign interest—based upon existing law.³¹ The court states in conclusion that:

Whatever proprietary interest exists with respect to these reefs belongs to the United States under both national (Shelf Act) and international (Shelf Convention) law. Although this interest may be

27. The court ends its opinion with a comment that points out the necessity of reaching a result favorable to the Government—that conceivably a contrary result would allow alien missile bases to spring up in the waters a few miles off the United States coast.

28. United States v. Ray, *supra* note 3, at 538.

29. *Id.*

30. The Geneva Conference of 1958 adopted the Shelf Convention, wherein Article 2 (1) states that “the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”

31. United States v. Ray, *supra* note 3, at 540-41.

limited, it is nevertheless the only interest recognized by law, and such interest in the United States precludes the claims of the defendants and intervenor.³²

The Court in holding that there was no attainable fee simple title vis-a-vis these reefs and that all the rest of the rights were vested in the United States, made a rather unique conveyance-by-deed of these lands which might be stated as "to the United States for life remainder to God".

CONCLUSION

Out of the preceding perusal of ocean laws as affect the Continental Shelf a definite pattern of development becomes clear. The needs of one nation state dictate legal refinements upon their own adjacent shelf. Once these asserted laws appear practical and sound to other nation states there is general acquiescence which, when formalized, codifies the individual assertions into an international body of law.

It is submitted that *Ray* is the catalyst for the carving of a new public domain by forcing an issue which effectively shows the United States' need in laying sovereign claim to the submerged lands of the entire Continental Shelf. While the exact technique utilized by the court may be subject to criticism as confusing the exact nature of interests involved upon the shelf,³³ the inherent theme is both valuable and sound. True, the international community has to acquiesce to such a claim by the United States but the best selling point is the fact that all nation states with Continental Shelves will undergo a similar reasoning process as the court experienced in *Ray* which in turn will compel them to make similar claims. It remains to be seen whether the United States will reach out and grasp that which history has told her is hers for the asking.

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32. *Id.* at 542.

33. Comment, *International Law—Continental Shelf—Proprietary Interest of United States in Continental Shelf Precludes Claims of Acquisition by Private Entrepreneurs*. 6 SAN DIEGO L. REV. 487 (1969).