

Recent Developments in Environmental Law

I.	HAZARDOUS WASTE.....	167
	<i>OHM Remediation Services v. Evans</i>	
	<i>Cooperage Co., Inc.</i>	167
	<i>U.S. EPA v. Olin Corporation</i>	169
II.	CLEAN WATER ACT	170
	<i>United States v. Banks</i>	170
	<i>Forest Properties, Inc. v. United States</i>	173
III.	ENDANGERED SPECIES ACT	175
	<i>Bennett v. Spear</i>	175
IV.	LAND MANAGEMENT AND DISPUTES.....	176
	<i>United States v. Gardner</i>	176
	<i>United States v. Alaska</i>	178

I. HAZARDOUS WASTE

OHM Remediation Services v. Evans Cooperage Co., Inc., 116 F.3d 1574 (5th Cir. 1997)

Appellants OHM Remediation Services (OHM) sued to recover the fees earned during cleanup of a hazardous waste leak at Louisiana Oil Recycle and Reuse (Louisiana Oil) that flooded adjacent property and escaped into the local storm sewer system. Appellees Evans Cooperage (Evans) sent large volumes of waste to the site for treatment or disposal. OHM safely contained the emergency and left the site in a secure condition.

The Louisiana Department of Environmental Quality (DEQ) closed down Louisiana Oil after discovering the spill contained hazardous materials. Louisiana Oil subsequently went out of business. Its insurance could not cover the \$3 million bill to OHM. OHM thereafter sued Evans to recover the clean-up fees under two sections of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), sections 107(a) and 113(f). Evans named additional potentially responsible parties (PRPs), who named multiple additional parties. The total number of third parties, seventy in all, included OHM, who had delivered ten drums of waste to Louisiana Oil six years prior to the case.

At the district court level, Evans filed a motion to dismiss the claim. The district court dismissed OHM's 107(a) claims, holding that a plaintiff

must have a “protectable interest” in the clean-up site to recover response costs. Additionally, the district court dismissed OHM’s 113(f) claims, holding that OHM could not maintain a 113(f) contribution claim because OHM had not shown the defendants were “liable or potentially liable” in the initial 107(a) claim, and OHM could not bring the claim unless it admitted it was jointly and severally liable as a PRP. The Fifth Circuit reversed both holdings.

The court first addressed the 107(a) claims for recovery of response costs, examining the plain text of the statute, the legislative history, and the scope of the regulatory scheme as a whole. The Fifth Circuit determined that the district court’s “protectable interest” requirement, based on the term “causes” in the statute, was an unreasonable interpretation. The natural effect of the district court’s limitation would bar contractors from recovering response costs from anyone other than the contracting entity, a result the court found inconsistent with the Congressional intent surrounding the statute and illustrated by the statute’s grant of a right of action to “any other person” for recovery of response costs.

The court next addressed the 113(f) claims for contribution. Section 113(f) only allows contribution claims against third parties after an initial liability determination under 107(a). Upholding the validity of the 107(a) claim eliminated the district court’s first reason for dismissing the section 113(f) claim as moot. Examining the second rationale for dismissing the claim in light of the text, legislative history, and scope of section 113 as a whole, the court held that only a PRP may bring a 113(f) contribution claim, but that in this case, OHM was a potentially responsible party because it was also a named defendant in the case. The court reasoned that the most sensible reading of the statute allowed a party to be “potentially” liable even before a court makes a determination of actual liability. The effect of this interpretation allows named third party defendants to bring contribution actions as soon as they are impleaded under CERCLA.

While the Fifth Circuit’s holdings in this case provide guidance on sections 107 and 113, the decision is also important for what the court did not address. Left for another day were the issues of whether a PRP may seek to hold other parties to joint and several liability for response costs and whether a court may consider a party to be a PRP before being named in a CERCLA suit.

Amanda M. Hubbard

U.S. EPA v. Olin Corporation,
107 F.3d 1506 (11th Cir. 1997)

The Olin Corporation (Olin) has operated a chemical manufacturing facility in McIntosh, Alabama, since 1951. Until 1982, the plant produced mercury-cell chloralkali that contaminated significant segments of Olin's property. This contamination made the property unfit for future residential use.

The United States Justice Department brought a civil action in the Southern District of Alabama, seeking a cleanup order against Olin and reimbursement for response costs, pursuant to sections 106(a) and 107 of the comprehensive Environmental Response, Compensation and Liability Act (CERCLA). After negotiations, the parties agreed to a consent decree that called for Olin to pay all costs associated with remediation of the contaminated site. The parties submitted this consent decree to the district court, but the court, *sua sponte*, ordered them to address the impact of the United States Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995).

Olin complied by answering the Justice Department's original complaint and asserted that the Supreme Court's construction of the Commerce Clause in *Lopez* precluded constitutional application of CERCLA in the present case. Olin also contended that CERCLA liability should not be imposed retroactively. Agreeing with Olin on both counts, the district court denied the motion to enter the consent decree and dismissed the government's complaint.

The Eleventh Circuit Court of Appeals reviewed *de novo* the constitutional challenge to CERCLA, and the retroactivity of the statute's liability provisions. Addressing the constitutionality of CERCLA, the Eleventh Circuit determined that, like *Lopez*, the present case implicated Congress's right to regulate intrastate activities that substantially affect interstate commerce. The court reasoned that Congress can maintain the constitutionality of its statutes under the *Lopez* standard by: (1) including a jurisdictional element to ensure, through case-by-case inquiry, that the activity in question actually affects interstate commerce; or (2) making legislative findings indicating that a statute regulates activities with a substantial effect on interstate commerce. The court stated that when Congress fails to employ one of these methods of ensuring constitutionality, courts must determine independently whether the statute regulates "activities that substantially affect interstate commerce."

The Eleventh Circuit next found that although Congress included neither legislative findings nor a jurisdictional element in CERCLA, the statute is constitutional, as applied, because it regulates a class of

activities that substantially affects interstate commerce. The court reasoned that the disposal of hazardous waste “on-site” constitutes the narrowest possible “class of activities” that could be constructed in this case. The Eleventh Circuit then concluded that the regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress’s broader scheme to protect interstate commerce from pollution.

The court further concluded that Olin’s disposal activities were not “economic” in nature. Congress’s power to regulate commerce is governed not by the quality of the activity, but by the impact the activity has on interstate commerce. Thus, in this case, a company whose disposal activities were unregulated would have an economic advantage over companies elsewhere that were regulated.

Next, the Eleventh Circuit dealt with the validity of CERCLA retroactivity. The court analyzed the proposition set forth by the district court that the recent decision by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) “demolishes the interpretive premises on which prior cases had concluded that CERCLA is retroactive,” while recognizing that *Landgraf* provided “a new analytical framework” concerning retroactivity. The court emphasized the judiciary’s obligation to effectuate congressional intent.

In this case, the court held, Congress intended CERCLA to apply retroactively. The court based this conclusion on several provisions, which allude to responsibility for the past actions of owners and operators, as well as on legislative history in which Representatives and Senators expressed the belief that CERCLA would be applied retroactively. Having decided that the district court’s decision was wrong on both counts, the Eleventh Circuit reversed the lower court’s decision and remanded for further proceedings.

Jason D. Holleman

II. CLEAN WATER ACT

United States v. Banks, 115 F.3d 916 (11th Cir. 1997)

In 1980, Park B. Banks (Banks) purchased and began developing three lots of land on Big Pine Key in Florida. Banks intended to use the land for coconut farming and began to bulldoze and cover the lots with fill. By 1983, Banks had built a house upon one lot and planted the other two lots in coconut trees.

In March of 1983, the United States Army Corps of Engineers (Corps) informed Banks that his properties consisted of wetlands and that

further discharge and filling was illegal without a permit. In April 1983, the Corps issued a “cease and desist” order that advised Banks that he would be subject to enforcement actions if he continued his activities. The order further advised Banks to seek an “after-the-fact” permit that would apply retroactively to his development activities and to enter into restoration negotiations with the Corps. Banks failed to negotiate any type of restoration plan with the Corps. He continued and expanded his fill discharges by purchasing two additional lots for coconut farming in 1988.

In 1990, the Corps cited Banks with four cease and desist orders claiming that he had discharged fill into United States waters without a permit and in spite of prior notification from the Corps of his violation. In December 1991, the Government filed suit against Banks seeking (1) an injunction against future discharge of fill material into the wetlands on the property, (2) the restoration of the wetlands to their condition prior to Banks’ development, and (3) the payment of civil penalties. The United States District Court for the Southern District of Florida held that Banks violated § 404 of the Clean Water Act (CWA).

Banks appealed, alleging that (1) the Government’s claims for equitable relief were preempted by statute of limitations, (2) his properties were not “adjacent wetlands,” and (3) some of his alleged discharges were allowable under Nationwide Permit 26 (NWP 26). The Eleventh Circuit, however, affirmed, finding that where there was “no clear error” in the application of the CWA to Banks, the decision of the district court must be upheld.

Banks argued that since the CWA does not provide a limitation period in which to bring enforcement actions under 33 U.S.C. § 1319 that the five-year statutory limitation found in 28 U.S.C. § 2462 should apply by default. Banks further urged the court to adopt the “concurrent remedy rule” and relied on *United States v. Windward Properties, Inc.*, 821 F. Supp. 690 (N.D. Ga. 1993) that had a similar fact scenario. The *Windward* court held that the government’s claim for equitable relief had elapsed by application of the “concurrent remedy rule,” which provides, “equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy.” However, the Eleventh Circuit distinguished the instant case from *Windward* in that the government was acting in its official enforcement capacity and not as a private actor. The court noted the well-established rule that “an action by the United States is not subject to any statute of limitations unless Congress has specified otherwise. Further, if a statute of limitations exists and is applied against the government, it must be read in a light favorable to the government.” Thus, the court held that it is proper to enforce a

statute of limitations against the United States only in the absence of clear Congressional intent to the contrary or when the government is acting outside of its sovereign capacity as a private actor. Accordingly, the court held that the government's equitable relief claims were not barred by a statute of limitations.

Banks' second contention was that his properties did not qualify as adjacent wetlands for the purpose of triggering the jurisdiction of the Corps because they were not wetlands and they were not adjacent. A wetland is defined as an area "inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . vegetation typically adapted for life in saturated soil conditions. . . ." 33 C.F.R. § 328.3(b). Under the CWA, a wetland must meet three criteria that are defined in the Corps' 1987 Wetlands Delineation Manual: (1) a prevalence of hydrophobic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils. Banks argues that his properties do not qualify as wetlands because they consist mainly of caprock limestone that is not necessarily a "hydric soil" under both of the 1987 and 1989 Corps' Manuals. These manuals, however, were used by expert wetlands biologists to determine the "wetland" status of Banks' lots. The court found that there was sufficient expert testimony to support the district court's decision that Bank's properties were classifiable as wetlands under the CWA.

Banks debated that his properties could be considered adjacent because each was situated at least one half mile from, and has no hydrological connection to, any navigable waterway. He further argued that a paved road separates his lots from the navigable waters. Government experts testified that a hydrological connection did exist by means of groundwater and surface water during storms and that a wildlife habitat akin to that of an adjacent wetland existed. The court noted that in previous cases it had held that evidence, comparable to that presented in this case, supplied the requisite hydrological and ecological links to establish property as adjacent to a nearby river. The court further noted that Banks' contention that the paved road would preclude adjacency is without merit because under 33 C.F.R. § 328.3(c), man-made dikes or barriers separating wetlands from United States waters, do not defeat adjacency. Thus, the court upheld the district court's determination that Banks' lots were both wetlands and adjacent.

Banks' final argument is that NWP 26 would have permitted some of his discharge activities from 1982 to 1992. NWP 26 licensed the discharge of fill into the navigable water of the United States that are either "(1) above the headwaters or (2) are other non-tidal waters that are not part of a surface tributary system to interstate waters or navigable

waters.” The government offered evidence that properties such as Banks’ that are considered to be adjacent wetlands, have consistently been construed and enforced as inclusive of a “surface tributary system.” The district court deferred to the Corps’ interpretation of its own regulations and enforcement actions and further relied on the notice that was given to Banks in 1983 as justification for the Corps’ determination that his properties were outside of the scope of NWP 26. The court upheld the district court’s decision and found that Banks failed to prove that any of his activities were covered under NWP 26.

Monica A. Hyson

Forest Properties, Inc. v. United States,
No. 92-851L, 1997 WL 456655 (Fed. Cl. Aug. 6, 1997)

Forest Properties, Inc. (FPI) brought a regulatory taking action against the Federal Government, which through the United States Army Corps of Engineers (Corps), had denied the plaintiff’s dredge and fill permit application filed pursuant to the Federal Water Pollution Control Act (FWPA). The permit would have authorized FPI to develop a fifty-three-acre upland property and an adjacent 9.4-acre lakebottom property located at Big Bear Lake in southern California. FPI’s plan was to dredge and fill the lakebottom property to construct a luxury estates residential housing complex on both the upland and filled wetland plots, containing approximately 100 lots and a marina. However, despite FPI’s numerous attempts to correct its permit application by reducing the size of the lakebottom property to be dredged and filled to 4.4 acres and by including extensive mitigation measures, the Corps denied FPI’s application.

The Corps explained that its denial was based on numerous reasons. The most important reason cited was the adverse impact of the project on Bear Lake’s water quality. Second, the habitats of several endangered plant and animal species would be threatened. Finally, the practical alternatives available to FPI’s proposal would not have included the development of aquatic sites.

Eventually, FPI was forced to abandon its original plans and chose to proceed with the development of its housing complex constricted to the fifty-three-acre upland property. In the end, the development contained 106 lots, fourteen less than in FPI’s original plan, a result of the fifteen percent reduction in the amount of developable land. As of April 1996, FPI had sold twenty-eight lots resulting in proceeds of \$4,208,000. In December 1996, FPI filed its complaint in the Court of Federal Claims,

claiming that the denial of its dredge and fill permit amounted to a taking requiring just compensation.

The Fifth Amendment to the United States Constitution states that “private property [shall not] be taken for public use without just compensation.” It is also recognized that governmental regulation can result in a taking. The court approached the question of whether the Corps’ permit denial amounted to a regulatory taking with a three-step analysis. The first issue was whether FPI possessed sufficient ownership or compensable interest in the lakebottom property to properly invoke the protection afforded by the Fifth Amendment. Applying California law, the court analyzed the complex land contract and option agreement through which FPI asserted its equitable title to the lakebottom property. The court concluded that FPI had properly exercised its option right to purchase the lakebottom property, and therefore, the land contract was binding for the sale and purchase of that property. Finally, since contract rights are considered property interests under California law, the court decided that FPI’s equitable title to the lakebottom property was protected and compensable under the Fifth Amendment.

The second issue addressed by the court was the size of the parcel of land. The court determined that the parcel included the entire sixty-two-acre property owned by FPI, consisting of both the upland and lakebottom properties. This conclusion was reached by focusing on the short period of time that elapsed between FPI’s purchase of the two pieces of property, their contiguous location in relation to one another, and FPI’s demonstrated economic intentions to use the two properties together as one income-producing unit.

The third and final issue was the application of the regulatory takings analysis to determine whether the Corps’ actions consisted of a noncompensable “mere diminution” in the economic value of the plaintiff’s land, or a compensable “partial taking.” The court reasoned that: (1) the character of the governmental action was legitimate in that it furthered an important public welfare duty to preserve the nation’s wetlands; (2) FPI’s investment-backed expectations in the project were unreasonable and that FPI, as a sophisticated real estate developer, had both constructive and actual knowledge that development of the wetland property was conditioned on the granting of a FWPA permit; and (3) the remaining fifty-three-acre property retains considerable value sufficient to provide FPI with an overall profit of \$5 million.

Accordingly, the court found that FPI had not established a regulatory taking or “partial taking” claim against the United States and dismissed the plaintiff’s complaint accordingly.

Eric M. McLaughlin

III. ENDANGERED SPECIES ACT

Bennett v. Spear,
117 S. Ct. 1154 (1997)

Several Oregon irrigation districts filed an action under the Endangered Species Act (ESA) challenging a biological opinion issued by the Fish and Wildlife Service (Service). The biological opinion concluded that a federal reclamation scheme known as the Klamath project in northern California and southern Oregon might affect the Lost River Sucker and the Shortnose Sucker, fish species listed as endangered in 1988. The biological opinion recommended that the Bureau of Reclamation (Bureau) maintain minimum water levels on Clear Lake and Gerber reservoirs to avoid any harm to these endangered species. The Bureau notified the Service that it intended to operate in compliance with the biological opinion. Petitioners sued the Service claiming that implementation of the biological opinion was in violation of the ESA and was arbitrary and capricious under the Administrative Procedure Act (APA). The district court dismissed the suit for lack of jurisdiction concluding that petitioners lacked standing to bring the case. The Ninth Circuit Court of Appeals affirmed. In a unanimous decision, the United States Supreme Court reversed the Ninth Circuit and held that petitioners had standing under the broad language of the ESA.

Writing for the Court, Justice Scalia reasoned that general standing principles require plaintiffs to show that they are within a “zone of interest” protected by the statute. Section 1540(g)(1) of the ESA provides that “any person may commence a civil suit” under the Act. The Court read this language as an attempt by Congress to expand the class of people in the zone of interest to include any person or group. It noted that such a purpose was consistent with environmental regulations and that it encouraged private citizens and groups to bring claims in order to better protect the environment. Although petitioners here were not seeking to enforce the protections of the ESA, but were in fact asserting over-enforcement of the ESA to their economic detriment, the Court nevertheless found that petitioners fell within the zone of protected interests provided for in the ESA.

The Court also rejected the government's argument that the petitioners lacked standing because they did not present a "case" or "controversy" as required by Article III of the Constitution. Under the case or controversy requirement plaintiffs must generally show that they suffered an "injury in fact." In addition, plaintiffs must show that the injury was fairly traceable to the defendant's action so that a favorable decision for the plaintiffs would redress the alleged injury. Justice Scalia argued that petitioners in the instant case pleaded sufficient facts to meet the injury-in-fact requirement. Petitioners complained that the minimum water levels recommended in the biological opinion would limit the amount of water available for irrigation. This in turn could result in less water for the petitioners. While it was unclear if petitioners would actually suffer a loss in water for irrigation, the Court found the allegations sufficient to overcome the minimal injury in fact requirements for standing.

Finally, the Court rejected the government's claim that petitioners had not shown any alleged injury that was traceable to the biological opinion. The government argued that the Bureau was not required to follow the biological opinion and that any injury was traceable only to the Bureau's action. The Court rejected this argument on the ground that the biological opinion was virtually determinative because of the strict penalties imposed on anyone violating the ESA. Justice Scalia argued that the biological opinion gave notice to Bureau members that failure to maintain minimum water levels could result in death to the endangered fish, and thus subject Bureau members to penalties.

The government further contended that the biological opinion was not yet reviewable by courts under either the ESA or the APA. The Court rejected this claim, holding that petitioners' three causes of action were reviewable under either the ESA or the APA. The Court reversed the Ninth Circuit and remanded the case to the District Court for further proceedings.

Robert D. Dodson

IV. LAND MANAGEMENT AND DISPUTES

United States v. Gardner,
107 F.3d 1314 (9th Cir. 1997)

In 1988, the National Forest Service issued to Clifford and Bertha Gardner a ten-year grazing permit allowing them to graze their cattle on certain portions of the Humboldt National Forest in Nevada. In 1992, a forest fire destroyed over 2,000 acres of the Forest. The burned area was

reseeded, and according to the Humboldt National Forest Land and Resource Management Plan, reseeded areas were not to be grazed by livestock for two years, 1993 and 1994. In May of 1994, the Gardners resumed grazing on the reseeded lands after notifying the Forest Service of their intent to do so. The Forest Service advised the Gardners that they were violating the conditions of their permit and that they must cease grazing immediately. The Gardners refused. The Forest Service revoked the Gardners' permit and fined them for unauthorized grazing. In May of 1995, the United States filed a complaint seeking an injunction against the Gardners to prevent further unauthorized grazing and seeking damages based on the unauthorized grazing. The United States District Court for the District of Nevada granted the injunction against the Gardners and ordered them to pay \$7,030.41 in fees for unauthorized grazing. The Gardners appealed this decision to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit addressed four arguments advanced by the Gardners. First, the Gardners argued that the land on which they grazed their cattle belonged to the state of Nevada and not the United States. The Gardners relied on the Treaty of Guadalupe Hidalgo in 1848, in which the United States acquired land from Mexico. They asserted that the United States was to hold this land in trust for the creation of future states. Once Nevada was created, they argued, the land reverted to the state of Nevada. The court explained that the duty of the United States to hold the land in trust for the creation of future states only pertained to land acquired by the United States from the original thirteen states. Therefore, the court held that Nevada had no independent claim to sovereignty, unlike the original thirteen states, and accordingly, under the Property Clause of Article IV of the United States Constitution, the United States has the right "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

The second argument addressed by the court was the Gardners' assertion that under the Equal Footing Doctrine a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union. However, the court discounted the Gardners' reliance on the Equal Footing Doctrine, explaining that the Doctrine only applies to "the shores of and land beneath navigable waters," and not to fast, dry lands. Further, the court held that this Doctrine applies only to political rights and sovereignty, not to economic or physical characteristics of the states.

The third argument advanced by the Gardners relied on Nevada's "Disclaimer Clause," in which the United States required Nevada to disclaim all right and title to the unappropriated public lands lying within

its boundaries as a condition of its admittance to the Union in 1864. The Gardners argued that this clause was invalid and unconstitutional as an attempt to divest Nevada of its title to those lands. The court explained that the United States already had title to those lands, and the disclaimer clause merely recognized the preexisting United States title. The clause was not a grant of title from Nevada to the United States.

The final argument addressed by the court rested on the Tenth Amendment. The Gardners argued that federal ownership of the public lands in Nevada is unconstitutional under the Tenth Amendment in that it invades the “core state powers reserved to Nevada,” such as the police power. The court discounted this argument by explaining that the state and federal governments exercise concurrent jurisdiction over the land, and that a state may enforce its laws on federal land as long as those laws do not conflict with federal law. Therefore, Nevada is not deprived of its ability to govern its land.

The Ninth Circuit Court of Appeals affirmed the district court’s ruling in favor of the United States.

Allison S. Gassner

United States v. Alaska,
117 S. Ct. 1888 (1997)

Alaska and the United States entered into a dispute over the ownership of some lands rich in oil and minerals off Alaska’s North Slope. The United States filed a bill of complaint in 1979, seeking to lease mineral rights to some of these submerged lands in the Beaufort Sea. The State of Alaska counterclaimed, seeking to quiet title to Alaska’s ownership of the lands within the National Petroleum Reserve and the Arctic National Wildlife Refuge. The Court assigned a Special Master to oversee extensive hearings and briefings and make recommendations to the Court. Both parties filed exceptions to the report of the Special Master with the Court; those of the United States were adopted.

Alaska raised an exception to the method used to determine the “territorial waters” of the state. The method used was derived from the Convention on the Territorial Sea and Contiguous Zone (Convention). This involves determining a baseline, the low-water line of the Coast, and measuring outward in three-mile arc-circles from the baseline. Alaska objected both to the method chosen for determining the baseline from the coast and the application of the Convention’s method for fringing islands.

The Special Master followed the normal baseline and measuring procedures under the Convention. Using this approach, small “enclaves”

were made of United States territorial submerged lands surrounded by state-owned lands, giving the United States dominion over the mineral rights in these areas.

Alaska argued for different methods by which to measure the baseline, principally that a straight baseline should be made for Alaska's Coast due to its fragmented nature. Such a baseline would provide a larger area of territorial waters for Alaska. The Special Master found, and the Court agreed, that while it is permissible for the United States to use a straight baseline, it is not mandatory and in fact has never been done.

Additionally, Alaska argued that United States policy supports a different rule to be applied here where fringing islands are not more than ten miles apart, declaring the entire area as "inland waters." Alaska was not able to establish that such a firm and continuing rule ever existed, providing no mandate for its application in this case. The Court rejected Alaska's exceptions and adopted the standard baseline and methods of the Convention as recommended by the Special Master.

Alaska raised an exception stating that Dinkum Sands, a gravel and ice formation in the Flaxman Island Chain, should qualify as an island incorporating its own belt of territorial sea. The Court found the Special Master was correct in concluding that Dinkum Sands was not an island under the Convention definition. This requires an island to be above the high water mark except in extreme circumstances. Extensive testing was done showing that Dinkum Sands is submerged seasonally and even during its high season was frequently submerged. The Court found that such a formation was clearly not intended to fit within the definition of an island under the Convention, thus rejecting Alaska's exception and adopting the findings of the Special Master.

The United States sought an exception to the Special Master's determination that the submerged lands within the area now called the Arctic National Wildlife Refuge were not reserved by the United States and passed to Alaska at statehood. The Department of Interior Bureau of Fisheries and Wildlife had filed an application to reserve the land in 1957, before Alaska's statehood, but it was not granted until 1960, after Alaska's statehood.

The Department of Interior regulations at the time of application stated that during the pending of an application, such lands shall be "segregated" and not pass. The Court found this sufficient to show that the lands were reserved at the time of Alaska's statehood, and the United States retained title. In addition, the statement of intent accompanying the application showed that the submerged lands within the range were critical to the goals of the Refuge to preserve aquatic habitats.

The Court sustained the exception of the United States that the land had been reserved including all of the tidelands within the three-mile range of the coast.

Elizabeth S. Nicholas