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EDITORS: Joseph T. Bockrath & Michael W. Wascom
SEA GRANT LEGAL PROGRAM LSU Law Center (504)388-5931

LOUISIANA COASTAL LAW



GEAR COMPENSATION FOR COMMERCIAL FISHERMEN

Recent emphasis on increased oil and gas leasing activity on the Outer Continental Shelf (OCS) has aroused fears among U.S. commercial fishermen of an increase in gear damage and loss incidents, with resultant economic loss, caused by equipment and materials of unknown ownership that are associated with the increased OCS activity. Since the party liable to a fisherman in such instances would not be identifiable, the fisherman would be precluded from recovering for his damages.

To provide a means of compensation to a fisherman in such situations and also to encourage the labelling of OCS equipment so that an owner can be identified by a fisherman who suffers injury, Congress included the Fisherman's Contingency Fund as Title IV of the recently enacted Outer Continental Shelf Lands Act Amendments of 1978 (Public Law 95-372, signed September 18, 1978). The provisions of Title IV also require the Secretary of Commerce to conduct a two-year survey of obstructions on the OCS, to identify and classify all potential hazards to commercial fishing caused by OCS activities (including all obstructions on the bottom, throughout the water column, and on the surface), and to develop charts for commercial fishermen identifying obstructions on the OCS. The Fund provisions are the result of the efforts of Reps. David Treen of Louisiana and Gerry Studds of Massachusetts and Sen. Lowell Weicker of Connecticut.

THE FUND

The legislation establishes a \$1 million Fisherman's Contingency Fund in the U.S. Treasury designed to compensate commercial fishermen for gear damage or loss and any resulting economic loss caused by items related to OCS activities when the owner of the item cannot be identified.

According to the legislation, if "a financially responsible party" (i.e., the owner of the property causing damage) can be found, then the Fund is not available to the fisherman, and he must recover his damages from the owner of the item.

Within the Fund, the Secretary of Commerce is authorized to establish area compensation accounts. The accounts may be established for any area of the OCS and are to be funded by assessments on the holders of leases, exploration permits, pipeline easements, and pipeline rights-of-way located in that particular OCS area. Each party subject to assessment may be charged an amount up to \$5000 per year. The accounts are to be maintained at a level not to exceed \$100,000 and, if depleted, are to be replenished by additional assessments on the parties subject to the charge. Fifteen percent of the accounts may be used for administrative expenses with the remainder to be used to pay claims and reasonable attorney's fees associated with the claims. The House-Senate conference committee report on the legislation specifies that the Administrator of the National Oceanic and Atmospheric Administration will be the responsible official for administering the Fund within the Department of Commerce.

CLAIMS

Only a commercial fisherman, defined by the legislation as "any citizen of the United States who owns, operates, or derives income from being employed on a commercial fishing vessel," will be able to make a claim against the Fund. Fishing gear is defined to include the vessel as well as any equipment of the vessel, whether or not attached to the vessel. A fisherman who files a claim under the Fund may recover not only for damages to and

loss of fishing gear, but also for loss of profits that result. The Secretary is required to make compensation from the "appropriate" area account for damages and/or loss resulting from OCS activities in that area, "whether or not the damage occurred in that area." The conference report explains that this last clause was included in the legislation in order "to avoid administrative and other problems when the exact location of the occurrence which led to damage is unknown or disputed or when the damage occurs somewhere along the supply route between the oil drilling equipment on the OCS and the shore."

BURDEN OF PROOF

The burden of proof must be borne by the fisherman making the claim (the claimant). However, the legislation establishes a presumption of the validity of a claim if the claimant shows:

- That the commercial fishing vessel was being used for fishing and was located in an area affected by OCS activities.
- That a report on the location of the item which caused the damage and the nature of the damages was made within five days after the date on which the damages were discovered. Neither the Act nor the conference report specify how such a report is to be made; regulations promulgated by the Secretary of Commerce will, presumably, spell this out.
- That there was no record on nautical charts or the Notice to Mariners on the date the damages were sustained that the item causing the damage existed in the area.
- That there was no proper surface marker or lighted buoy attached or closely anchored to the material, equipment, etc., which caused the damages.

LIMITATION ON RECOVERABLE DAMAGES

The legislation lists six instances where compensation will be denied or limited to a portion of the damages claimed:

(1) When a financially responsible party causes the damage, no claim will be allowed under the Act. A financially responsible party means the owner of the item that caused the damage.

(2) No recovery will be allowed to the extent that the damage or loss is caused by negligence or fault of the commercial fisherman making the claim. The legislation adopts the modern tort principle of comparative negligence: a fisherman who is only partially to blame for his own damages will not be precluded altogether from recovering under the Act.

(3) No recovery will be allowed for damages sustained prior to the date of enactment of the Fund legislation (September 18, 1978).

(4) In the case of claims for damage or loss of fishing gear, only amounts up to the replacement value of the gear will be allowed.

(5) Claims for loss of profits will be allowed for only six months of lost profits and such claims must be supported by the claimant's profit records for the previous 12-month period.

(6) No recovery will be allowed for any damages compensable from the claimant's insurance.

CLAIM PROCEDURE

(1) A fisherman who suffers damages compensable under the Act must file his claim with the Secretary of Commerce within 60 days after discovery of the damages.

(2) Upon receipt of the claim, the Secretary must send a copy of the claim to the Secretary of the Interior (the official charged with administering OCS oil and gas leasing operations) and must refer the matter to a hearing examiner.

(3) After receiving notice of the claim, the Secretary of the Interior is required to make reasonable efforts to notify persons engaged in energy activities in the vicinity of the damage. Those notified must "promptly" admit or deny responsibility for the damage; they may also submit evidence at any hearing on the claim.

(4) The hearing is to be conducted within the United States judicial district nearest to, or within which, the damage occurred, or, if the damage occurred in more than one judicial district, in any of them.

(5) The hearing examiner must hear the case and render a decision within 120 days of referral of the claim. If the examiner finds in favor of the fisherman, the damage award must include an amount for reasonable attorney's fees incurred by the fisherman to process his claim.

(6) If no party adversely affected by the examiner's ruling seeks judicial review, the amount to be paid to the fisherman must be certified to the Secretary of Commerce who is required to pay the claim, promptly. The Secretary cannot review the hearing examiner's decision. When the Secretary pays the claim, he becomes subrogated to the fisherman's claim against any party found to be responsible for the damage.

(7) Any person who denies responsibility for damages with respect to which a claim is made and who is subsequently found to be responsible for such damages, and any commercial fisherman who files a claim for damages and who is subsequently found to be responsible for such damages, will be required to pay the costs of the claim proceedings.

(8) If an affected or aggrieved party wishes to have a court review the hearing examiner's decision, he must file an appeal within 60 days of the examiner's decision in the U.S. Court of Appeals for the circuit in which the damage occurred or nearest to where the damage occurred.

LABELLING OF MATERIALS

An extremely significant provision of the legislation requires the Secretary of the Interior to establish regulations requiring materials, equipment, tools, containers, and items used in OCS oil and gas activities to be properly color coded, stamped, or labelled with the owner's identification, prior to actual use. The success of the labelling requirements will have a major effect on the claims provisions of the Fund because if a fisherman is able to identify the owner of the item that causes damage to his gear, he will not be allowed to recover under the compensation provisions of the Fund. In such a situation, the fisherman will be able to sue the owner of the item for recovery of his damages.

SURVEY AND IDENTIFICATION OF OBSTRUCTIONS

The Fund provisions require the Secre-

tary of Commerce to identify and classify all potential hazards to commercial fishing caused by OCS oil and gas operations, including obstructions on the bottom, through the water column and on the surface; and to conduct, with the cooperation of the Secretary of the Interior, a 2-year survey of OCS obstructions for purposes of identifying natural and man-made obstructions posing a hazard to commercial fishing. The Secretary of Commerce, on the basis of this survey and regulations he promulgates, is required to develop charts for commercial fishermen identifying obstructions on the OCS.

During the first six months of the survey, the Secretary of Commerce is required to concentrate on areas of the OCS where oil and gas production has begun, or is expected to begin prior to the expiration of the two-year survey period.

ANNUAL REPORT

The Fund provisions also require the Secretary of Commerce to submit an annual report to Congress with information on damages claimed and compensation awarded under the Fund. The first report is also to include an evaluation of the feasibility and comparative costs of preventing or reducing obstructions which pose hazards to commercial fishing by either imposing fines or penalties on lessees or permittees (or their contractors or subcontractors), or by requiring them to obtain bonds to cover any damages caused fishermen by their equipment.

Anyone seeking more information concerning the Fund may contact the Sea Grant Legal Program, Room 52 LSU Law Building, Baton Rouge, Louisiana 70803.

LAKE BOUNDARIES

by Ernest Easterly, III

Although the beds of lakes by law belong to the state, areal jurisdiction is important to parishes bordering lakes because of severance taxes, revenue sharing, and the exercise of certain parish powers which have a direct effect upon their domestic affairs. An adequate determination of parish boundaries in many instances is further needed because of speculation concerning the development of energy resources which lie beneath the lakes.

The boundary claims of Jefferson, Livingston, Orleans, St. Charles, St. John the Baptist, St. Tammany, and Tangipahoa Parishes on one or both of Lakes Pontchartrain and Maurepas have never been adequately defined. In an effort to reach an amicable determination of their boundaries in regard to the lakes, the several parishes formed the Lake Pontchartrain Boundary Committee in late 1976.

It now appears the parishes are very close to agreement among themselves as to the exact location of their boundaries. The only substantial problem in the way of a final agreement is the dispute between Livingston and Tangipahoa Parishes concerning their mutual boundaries in Lakes Maurepas and Pontchartrain. (The legislation creating Tangipahoa Parish in 1869 established its southern boundary as the upper shores of the two lakes, and thus under a strict reading of the law, Livingston and St. Tammany remain in possession of the lake area immediately adjacent to Tangipahoa. Both Livingston and Tangipahoa Parishes have recently expressed interest in re-opening bilateral negotiations in order to resolve their boundary differences.) When the Livingston-Tangipahoa problem is resolved, the Lake Pontchartrain Boundary Committee should have little difficulty in finalizing the deli-

mitation of parish boundaries in the lakes. If the Livingston-Tangipahoa dispute appears to be protracted (through negotiations or by court action), the parishes along the south shores of the lake may agree among themselves as to the precise location of their mutual lateral boundaries, leaving the boundaries of the north shore parishes to a later determination. This is possible because of the existence of an east-west line through the middle of the lakes which separates the jurisdictions of the north shore parishes from those of the south shore. Such a boundary has been historically allocated by international boundary agreement through treaties between 1763 and 1810, federal acts between 1810 and 1812 and state legislative enactments. The east-west boundary allocation has been judicially recognized by the Louisiana Supreme Court in certain instances.

If the parishes comprising the Lake Pontchartrain Boundary Committee can agree on the geographic limits of their jurisdiction over Lakes Maurepas and Pontchartrain, without resorting to court litigation, they will have exercised their legal authority to conclude a landmark agreement unprecedented in Louisiana.

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LOUISIANA STATE UNIVERSITY

SEA GRANT LEGAL PROGRAM
56 LAW CENTER, L. S. U.
BATON ROUGE, LA. 70803

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