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Legal Reporter for the National Sea Grant College Program

No Easy Answers for the Native Village of Kivalina

Also,

Ninth Circuit Approves West Coast Groundfish Program

Supreme Court Rules on Takings Claim for Temporary Flooding

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Cover page photograph of the Chukchi Sea, courtesy of the Rebecca Noblin.

Contents page photograph of sunset over the Chukchi sea, courtesy of Rebecca Noblin.

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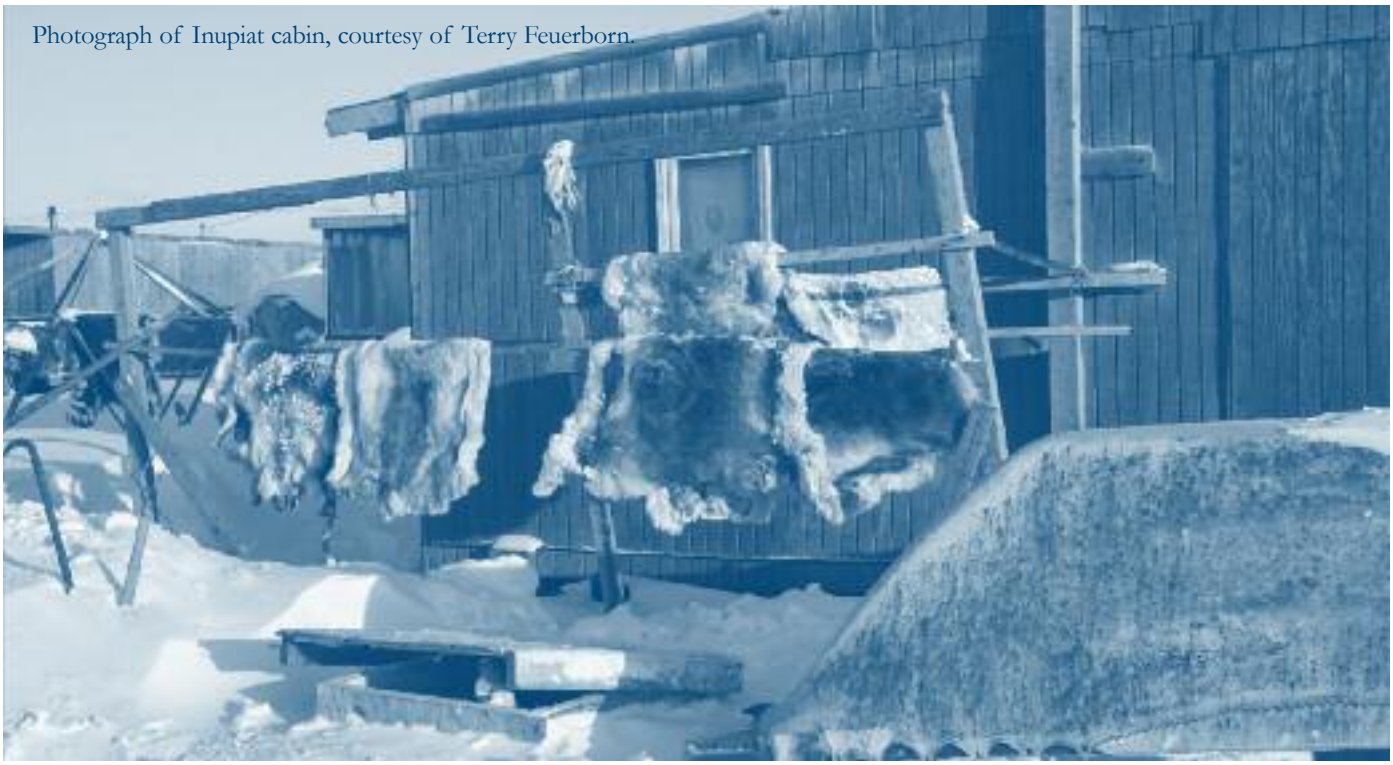
No Easy Answers for the Native Village of Kivalina

Niki L. Pace[1]



Photograph of Inupiat cabin, courtesy of Terry Feuerborn.

Over half of the U.S. population lives within fifty miles of the coastline. What happens when changing conditions make some coastal locations virtually uninhabitable? A recent Ninth Circuit decision considers the plight of a native Alaskan tribe living on a storm ravaged barrier island and its efforts to relocate.

Background

The City of Kivalina, Alaska is the long-time home of the Village of Kivalina, a federally recognized Inupiat Native Alaskan tribe (collectively Kivalina). The city is perched on the tip of a narrow barrier island along the Chukchi Sea on Alaska's northwest coast. Historically, sea ice shielded the island from damaging erosion and coastal storms. In recent years however, the sea ice has been less extensive and thinner, allowing storm waves and surges to destroy the land. In the words of the court, "if the village is not relocated, it may soon cease to exist."[2] But relocating the village will be costly and who will fund the relocation of Kivalina?

Kivalina attributes this damage to global warming. To that end, Kivalina brought this lawsuit against a variety of energy and utility companies (collectively Energy Producers). Kivalina alleges that the Energy Producers, as substantial contributors to global warming, are responsible for the damages to the island. According to Kivalina, the Energy Producers' greenhouse gas emissions constitute a public nuisance by interfering with the right to use and enjoy both public and private

property in Kivalina.[3] Kivalina sought an award of monetary damages to facilitate relocating the community. After the district court dismissed the case, Kivalina appealed the decision to the Ninth Circuit.

KIVALINA ALLEGES THAT THE ENERGY PRODUCERS, AS SUBSTANTIAL CONTRIBUTORS TO GLOBAL WARMING, ARE RESPONSIBLE FOR THE DAMAGES TO THE ISLAND.

Doctrine of Displacement

Federal common law defines public nuisance as "an unreasonable interference with a right common to the general public."[4] In general, a public nuisance claim requires proof that the defendant "unreasonably interfered with the use or enjoyment of a public right and thereby caused the public-at-large substantial and widespread harm."[5] In this case, Kivalina claims that the Energy Producers released greenhouse gases which contribute to the global warming that threatens the island's existence.

Historically, courts have applied federal common law to this type of transboundary pollution litigation. However, the courts can only apply federal common law in cases where a federal statute does not apply. Federal common law claims like public nuisance fill the gaps of federal laws enacted by Congress.[6] In other words, a person cannot bring a federal public nuisance claim if Congress has enacted a law that directly addresses the basis of the claim. In those instances, the doctrine of displacement applies. That is, the congressionally enacted statute displaces the common law claim. Here, the court considered whether the Clean Air Act displaced the public nuisance claim.

To determine displacement, the court must decide whether the Clean Air Act directly speaks to the question at issue – regulation of greenhouse gases from stationary sources.[7] Finding in the affirmative, the court looked to U.S. Supreme Court precedent for guidance. In 2011, the Supreme Court examined a similar public nuisance claim brought against several large emitters of domestic carbon dioxide seeking the abatement of emissions.[8] On the issue of displacement, the Supreme Court concluded that the Clean Air Act provides an existing framework for limiting carbon dioxide emissions from domestic power plants. As such, the Clean Air Act and authorized EPA actions displace federal common law claims for abatement. Applying the Supreme Court analysis to this case, the Ninth Circuit determined that the Clean Air Act equally displaced Kivalina's public nuisance claims.[9]

Conclusion

So where does this decision leave Kivalina? The court's parting remarks capture the essence of Kivalina's plight:

> *Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.*[10]

The courtroom may not be the answer, but what is the solution? Should residents move away? Should the community be relocated with government assistance? Currently, state and federal funding sources are uncertain. There are no easy answers to this dilemma but the questions bear consideration as coastal communities across the U.S. face rising seas and storm surges.

Endnotes

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2. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).
3. *Id.* at 854.
4. *Id.* at 855.
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6. *Id.* at 856.
7. *Id.*
8. American Electric Power Co., Inc. v. Connecticut, 131 S.Ct. 2527 (2011).
9. *Kivalina*, 696 F.3d at 857-58.
10. *Id.* at 858.

Ninth Circuit Approves West Coast Groundfish Program

Anna Outzen[1]

Photograph of Alaskan fishing trawlers in Bellingham, Washington, courtesy of Mike Kelley.

The Pacific Coast Groundfish Fishery, arguably the most valuable fishery on the West Coast, targets over 90 species of groundfish that dwell along the sea floor. Between 1999 and 2002, seven of these species were declared overfished. The Pacific Fishery Management Council, which is in charge of the fishery's conservation and management, has made various attempts over the years to rebuild the overfished stocks, such as setting fishing trip limits and area closures. After these attempts resulted in economic hardship for commercial fishermen and little progress in rebuilding overfished stocks, the Council decided to amend its groundfish fishery management plan for the trawl sector, which consists of fishermen who target groundfish by dragging trawl nets along the sea floor. Wary of the new plan's potential effects on small fishing companies and the local fishing communities, various groups of non-trawl fishermen challenged the amendments in September 2012 for failing to consider fishing communities' needs and ignoring various procedural requirements during the decision-making process.

Background and History

The Pacific Fishery Management Council manages the fisheries off the coasts of California, Washington, and Oregon, extending about 200 miles into the Pacific Ocean. Under the Magnuson Stevens Fishery Conservation and Management Act (MSA), the Council must create and maintain fishery

management plans for those fisheries in need of conservation and management. Plans must include measures to prevent overfishing and rebuild overfished stocks, as well as assess and establish an annual catch limit from each fishery. This catch limit is allocated among different fishery sectors, such as trawlers and non-trawlers.

Although fishermen use a variety of gear types to target groundfish, the trawl sector of the groundfish fishery has historically dominated the harvest of groundfish. The Council and National Marine Fisheries Service decided to amend the groundfish fishery management plan for the trawl sector in order to increase economic efficiency, reduce environmental impacts, and simplify future decision-making. Amendment 20 created a "limited access program" in which fishery participants receive "privileges" or "quota shares" to harvest a specific portion of the allowable catch limit of a particular species. Amendment 21 limited pacific halibut bycatch and fixed allocations of 19 groundfish stocks among the trawl and non-trawl sectors. Various non-trawl fishermen's associations and groups (collectively, fishermen), fearing that their longtime participation in the groundfish fishery would shrink, brought suit challenging these amendments for failing to comply with the MSA and ignoring its obligations under the National Environmental Policy Act (NEPA).[2]

MSA Statutory Obligations

The fishermen in this case relied on the MSA to argue that NMFS made its amendments without protecting the needs of both participants in the fishery and fishing communities. The MSA requires NMFS to "establish procedures to ensure fair and equitable initial allocations," which should "include consideration of" the current and historical participation of fishing communities.[3] NMFS must also "consider the basic cultural and social framework of the fishery"[4] and "the importance of fishery resources to fishing communities."[5] The court relied on the plain language of these provisions to determine that NMFS was only required to consider fishing communities, not "guarantee [fishing] communities any particular role in that program."[6] The court further found that NMFS met this requirement when it surveyed the current status of fishing communities, described the potential effects of the program and other management tools on those communities, and adopted features to mitigate the impact on fishing communities.

The fishermen also argued that the MSA required fishing privileges to be restricted to those who substantially participated in the fishery. The MSA requires programs to "authorize limited access privileges to harvest fish … [for] persons who substantially participate in the fishery."[7] The court stated that this provision does not require authorization of privileges only or solely for those who substantially participate. Furthermore, the Act only excludes "any person other than" a U.S. citizen, legal permanent resident, or entity that satisfies the program's participation requirements.[8] Lastly, the court found that granting privileges to only those who substantially participate in the fishery would conflict with other provisions of the Act, such as the provision requiring NMFS to assist entry-level participants, meaning those who do not yet substantially participate in the fishery. Ultimately, the court held that NMFS was not required to restrict quota shares to those who "substantially participate" in the fishery.

NEPA Procedural Obligations

NEPA is a purely procedural statute that requires federal agencies to study and disclose the environmental impacts of their major actions in a detailed Environmental Impact Statement (EIS). Specifically, the EIS must evaluate the proposed action's direct, indirect, and cumulative impacts, as well as compare the proposed action with reasonable alternatives.[9] In this case, the fishermen made four unsuccessful arguments that NMFS ignored its NEPA obligations.

First, the fishermen argued that NEPA required NMFS to analyze the amendments in one single EIS and that NMFS issued separate EISs in order to ignore public comments outside the scope of a certain EIS or Amendment. NEPA requires agencies to study "connected actions" in one single EIS. When two projects could have reasonably been completed separately, then they are considered to have "independent utility" and thus are not "connected" for NEPA's purposes. The Ninth Circuit found that Amendment 20 and 21 had independent utility in that they served different

purposes, and Amendment 20 was limited to trawling whereas Amendment 21 applied to trawl and non-trawl sectors in its allocation of catch limits. The Ninth Circuit found that "[w]hile it is true the record is replete with statements about how Amendments 20 and 21 are linked, two actions are not connected simply because they benefit each other or the environment."[10] The court also noted that NMFS sufficiently studied the combined effects of the amendments in the respective EIS statements. Furthermore, the court found that the record showed that NMFS did not ignore public comments, but actually clarified what each amendment did, substantively addressed the public's misdirected comments, and referred readers to the appropriate EIS for their concerns.

Second, the plaintiffs argued that NMFS failed to consider a reasonable range of alternatives to the proposed action as required by NEPA. Agencies are not required to consider every available alternative, but must only discuss those alternatives that are necessary to "permit a reasoned choice." Therefore, agencies do not have to consider alternatives that are inconsistent with basic policy objectives. NMFS discussed seven alternatives for Amendment 20 and six alternatives for Amendment 21. The court found that the alternatives discussed fit the amendments' purposes and needs. Specifically, Amendment 20's purpose was to establish a limited access program through the use of quota programs; therefore, studying alternatives that varied in how such a program would be designed and implemented was sufficient. Similarly, Amendment 21's purpose was to fix allocations for certain groundfish stock; therefore, studying alternatives that materially differed as to how allocations would be divided was also sufficient.

The fishermen's third argument was that NMFS inadequately discussed the potential environmental impacts on fish habitat and non-trawl fishing communities. Under NEPA, agencies are required to take a "hard look" at the potential environmental consequences of its proposed action. Here, NMFS provided a 384-page effects analysis for Amendment 20 and a 102-page effects analysis for Amendment 21. Turning to the EIS, the court found that the EIS extensively discussed the potential effects on non-trawling communities and the known impacts of trawling on habitats, while also acknowledging that the full extent of trawling on fish habitats is unknown.

Lastly, plaintiffs argued that the discussion of potential mitigation measures in the EIS documents was "vague, uncertain, and inadequate." Amendment 20's EIS included two primary mitigation features as well as a five-year review provision, a cap of quota share accumulation, and a two-year moratorium on transferring shares. Amendment 21 contained only the five-year review provision. The court rejected plaintiffs' argument because it had previously found mitigation evaluations that were reasonably detailed such as these to be sufficient.

Conclusion

As fishermen adapt to the new limited access program, new challenges will inevitably arise. The Council spent six years exploring and planning the changes that were necessary to bring back a vibrant groundfish fleet on the West Coast and ease economic hardship. So far, their time appears to have been well spent. As of March 2012, reports show that trawl fishermen revenues have increased since the program was implemented and non-targeted incidental catches have significantly decreased, which is promising for overfished stocks.[12]

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5. 16 U.S.C. § 1851(a)(8).
6. Pac. Coast Fed'n of Fishermen's Ass'n, 693 F.3d at 1092.
7. 16 U.S.C. § 1853a(c)(5)(E).
8. *Id.* at § 1853a(c)(1)(D).
9. 40 C.F.R. §§ 1500-1508.
10. Pac. Coast Fed'n of Fishermen's Ass'n, 693 F.3d at 1098.
11. *Id.* at 1100.
12. Natalia Real, *Catch shares resulting in higher revenues for West Coast fishers,* Fish and Info Services, Co. (Mar. 6, 2012) *available at* http://www.fis.com/fis/worldnews/worldnews.asp?monthyear=&day=6&id=50459&l=e&special=&ndb=1%20target=.

Transocean Escapes Total Ban from Operating in Brazil

Benjamin Sloan[1]

After an oil spill off the coast of Brazil in November 2011, prosecutors succeeded in their quest to ban Transocean from operating in Brazil. The prosecutors' victory was short lived, however, because Brazil's second highest court overturned the injunction, citing the undue harm to the public.[2]

Background

In November 2011, an estimated 3,700 barrels of oil spilled from an offshore rig in the Frade oil field located 230 miles north of Rio de Janeiro. The rig was owned by Transocean and was operated by Chevron. Transocean owns 10 rigs in Brazil, which makes up about 13% of the total number in operation.[3]

In April 2012, a Brazilian federal prosecutor requested an injunction denying Transocean the right to operate anywhere within the country. However, a trial court denied this request, as did a court on appeal. The appeals court ruled that a judicial injunction would be improper because it was not within the judiciary's power to issue this type of injunction. It found that it is within the national oil agency's (ANP) power to issue this type of injunction.[4]

Prosecutors appealed this denial, and in August a Brazilian federal court reversed the lower courts and granted the injunction. The injunction carried a penalty of at least $245 million for each day Transocean was found to be out of compliance and up to $20 billion in damages. Transocean appealed.[5]

Transocean Ban

In late August, a panel of three judges upheld the injunction, once again rejecting the argument that only the ANP could issue this type of injunction. The court reasoned that because the ANP failed to prevent the oil spill, it had failed as a regulator and that the courts must enforce this ban while litigation is pending. Prosecutors asked for $20 billion in damages.[6]

In September, the ANP appealed the injunction to Brazil's second highest court, arguing that the injunction would damage Brazil's quickly growing energy exploration sector. The court lifted the injunction, citing billions of dollars of projected losses for the state and its oil firm Petrobras.[7] The court found that the economic damages were not restricted to Transocean alone, and would affect many other businesses and the state. The court however did uphold the injunction at the Frade oil field, the site of the November 2011 spill. In the end, Transocean did not experience any interruptions to its revenue. It is trying to clean up all remaining oil.[8]

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1. J.D. Candidate 2014, University of Mississippi School of Law.
2. *Court lifts Brazil ban on Transocean Drilling,* Reuters (Sept. 30, 2012), http://www.reuters.com/article/2012/10/01/transocean-brazil-injuction-idUSL1E8L103W20121001.
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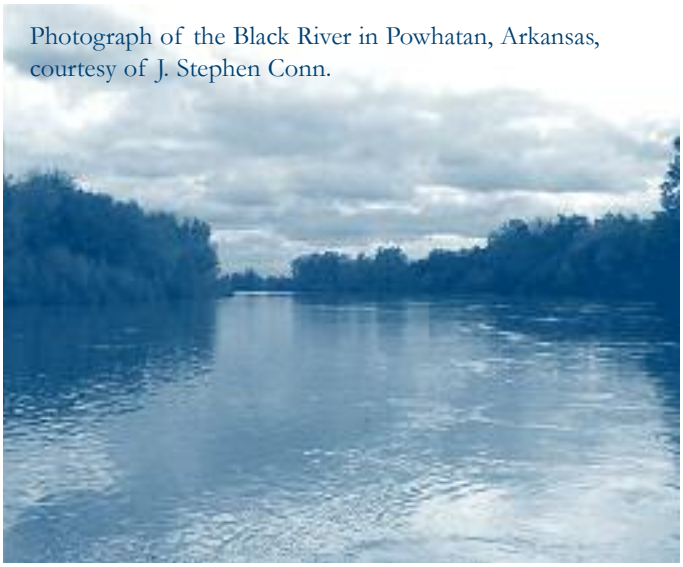
7. *Court lifts Brazil ban on Transocean drilling, supra* note 2.
8. *Matthew Cowley, Brazil Court Partially Lifts Ban on Transocean Operations*, Wall Street Journal, Oct. 1, 2012.

Supreme Court Rules on Takings Claim for Temporary Flooding

Evan Parrott[1]

In December, the U.S. Supreme Court considered whether temporary flooding conditions caused by the government constituted a takings claim under the Fifth Amendment of the Constitution.[2] The Arkansas Game and Fish Commission (Commission) sued the United States, alleging the flooding of its wildlife area caused by the government's operation of a upstream dam constituted a taking of property that entitled the Commission to compensation. The Federal Circuit Court of Appeals held that because the flooding of the area was not permanent or inevitably recurring, the government-induced damage did not establish a foundation for a takings claim. In an effort to clarify this area of takings law, the Supreme Court heard the Commission's appeal.



Photograph of the Black River in Powhatan, Arkansas, courtesy of J. Stephen Conn.

Background

The Commission owns the Dave Donaldson Black River Wildlife Management Area (Management Area), which consists of 23,000 acres along the Black River in northeast Arkansas. The Commission uses the Management Area as a wildlife and hunting preserve, as well as for harvesting timber. The U.S. Army Corps of Engineers (Corps) operates the Clearwater Dam 115 miles upstream from the Management Area. Soon after the dam's construction in 1948, the Corps adopted a manual to establish the rates at which water would be released from the dam. The manual sets out a seasonal release schedule, but allows approved deviations for agricultural, recreational, and other reasons.

In 1993, the Corps approved a deviation to release water at a slower rate than usual in an effort to give farmers a longer harvest time. However, the deviation caused an abundance of water to accumulate in Clearwater Lake, which is located behind the dam. To counteract this accumulation of water, the Corps extended the period throughout the year in which high volumes of water would be released. The Commission claims this extension caused excessive flooding in the Management Area from April to October, which is the peak tree-growing season. The Corps independently approved similar deviations each year until 2000. In 2001, the Corps investigated the effect the deviations had on the Management Area, and subsequently quit approving temporary deviations and abandoned all attempts to permanently revise the manual to include the deviations.

In 2005, the Commission filed a lawsuit against the United States, claiming the approved deviations constituted a taking of property eligible for compensation under the Fifth Amendment. The Commission claimed the flooding created by the six years of deviations destroyed timber in the Management Area, substantially changed the character of the property, and required costly repairs. The Court

of Federal Claims held the Corps' deviations and subsequent flooding constituted a taking of the Commission's property despite the flooding's temporary nature. The court stressed the deviations' cumulative effect and the fact that more than 18 million board feet of timber were destroyed. As a result of the taking, the court awarded the Commission $5.7 million. The Federal Circuit reversed the decision, holding that government-induced flooding can give rise to a taking claim only if the flooding is "permanent or inevitably recurring."[3]

THE COURT OF FEDERAL CLAIMS HELD THE CORPS' DEVIATIONS AND SUBSEQUENT FLOODING CONSTITUTED A TAKING OF THE COMMISSION'S PROPERTY DESPITE THE FLOODING'S TEMPORARY NATURE.

Taking Claims for Government-Induced Flooding

The Fifth Amendment bars the government from taking possession of a person's property without providing just compensation. However, there are very few bright line rules to determine whether interference with a person's property constitutes a taking subject to compensation.

In this case, the government insisted that past decisions established a categorical exception to the taking clause of the Fifth Amendment for temporary flooding. In other words, no taking exists in situations in which temporary flooding causes damage. However, the Court found that its precedent indicated the opposite. In the past, the Court has found that government-induced flooding[4] and seasonally recurring flooding[5] can both constitute a taking of property. Further, there is nothing to suggest that that government-induced flooding of a temporary nature is not actionable under the takings clause. Therefore, the Court held there is no categorical exception excluding temporary flooding situations from giving rise to takings claims.

Instead, the Court reiterated that flooding cases, like other taking claims, should be decided on the particular circumstances of each case. Courts should avoid creating blanket exclusionary rules based on time, foreseeability, or any other factor, and should instead focus on the totality of circumstances of each case or scenario. For example, a court should consider whether the government knew the flooding and resulting damage was likely to occur, how long the flooding occurred, and whether or not the property owners should have expected the possibility of flooding when they purchased the land or decided to build on the property.

In this case, the Court explicitly stated that its decision was only that government-induced flooding does not need to be permanent or recurring to give rise to a takings claim. The Court remanded the case to the Federal Circuit Court of Appeals to decide all other issues, such as whether the government invasion was foreseeable or if the reasonable expectations of the landowners, as set out in Arkansas law, preclude the Commission from being compensated.

Conclusion

The Court's decision in *Arkansas Game and Fish Commission v. United States* has clarified an area of takings claims and made the law more doctrinally consistent. The Court has now made it clear that flooding cases, like other taking claims, should be evaluated on a case-by-case basis and not by any categorically exclusive rules. However, this will not be the last opportunity for the Court to clarify takings law this term, as the Court will soon hear arguments on *Koontz v. St. Johns River Water Management District*,[6] a case that presents the issue of whether a government-imposed condition on its approval of a private development project is compensable under the takings clause of the Fifth Amendment. The Florida Supreme Court held that the landowner's claim was not compensable under the takings clause, but the Supreme Court has issued certiorari and is scheduled to hear arguments in early 2013.

Endnotes

1. 2013 J.D. Candidate, University of Miss. School of Law.
2. Ark. Game & Fish Comm'n v. U.S., No. 11-597, Slip Op. (S. Ct. Dec. 4, 2012).
3. *Id.* at 6 (citation omitted).
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Court Clears the Way for Navy's Training Range in Calving Grounds

Jon Paul S. Brooker[1]

In the early winter of 2011 a juvenile right whale washed up dead on a St. John's County, Florida beach. In her short two years she had become known to local biologists through a satellite tracking program that monitored her travels and for a rescue that removed fishing net rope that had become entangled around her head and flippers. When her body ultimately landed on the beach she also became notable for her slight size – she was nearly 20% underweight, likely on account of fishing line that had lodged in her mouth and throat, preventing her from feeding. Her inability to feed inevitably weakened and slowed her, and when she was found on Butler Beach near Jacksonville she was riddled with shark bites. The loss of this whale marked another blow to the dwindling North Atlantic right whale population, which some biologists estimate stands at around 313 individuals.[2]

The North Atlantic Right Whale

The North Atlantic right whale was long the target of whalers who considered it the "right" whale to hunt because it was easy to catch, did not venture too far offshore, and because once killed it floated and its oil could be harvested without bringing it onto the deck of ship. After centuries of whaling, the population had plummeted to around 100 by 1935, leading to a global moratorium on right whale harvesting in 1937.[3]

The grim outlook for the right whale has received considerable attention in recent years. As the primary calving ground of the southeastern population of the right whale runs just offshore of northern Florida and southern Georgia, these whales spend a considerable portion of their lives in one of the busiest shipping lanes in the world. Ship strikes on right whales are not uncommon here, and are their greatest source of mortality. Although the whale has been listed under the Endangered Species Act (ESA) since 1973, the National Marine Fisheries Service (NMFS), which is charged with protecting the right whale, has begun to implement measures that would reduce ship strikes on these whales only within the last ten years. Such provisions include speed restrictions in key areas, as well as route recommendations that are intended to direct vessel traffic away from areas where the right whale may be found.[4] Other agencies have also initiated actions to protect right whales from ship strikes, including the U.S. Coast Guard and the National Oceanic and Atmospheric Association's implementation of "Operation Right Speed" to remind vessel operators to slow down, effective November through April.[5]

The vulnerability of the right whale has drawn the focus of numerous conservation groups, which oppose actions that may further jeopardize the right whale. In 2010, environmental advocacy groups filed a lawsuit demanding that the federal government do more to protect critical right whale habitat in the U.S. Northeast.[6] In 2011, groups sued for tougher fishing restrictions that would prevent future entanglements.[7] Many of these groups argue that right whale protections are of paramount importance, pointing out that even NMFS has noted the loss of even a single individual may contribute to the extinction of the species.

Most recently, in the late summer of 2012, the U.S. District Court for the Southern District of Georgia heard a suit filed by a consortium of twelve national and regional environmental groups, headed by the Defenders of Wildlife (collectively, Defenders).[8] This suit alleged that the U.S. Navy and NMFS violated various provisions of the ESA, the National Environmental Policy Act (NEPA), and the

Administrative Procedure Act (APA) when a plan to install an Undersea Warfare Training Range (USWTR) in the shallow waters off Jacksonville, right in the heart of the right whale's calving ground, was green lighted.

A Challenge to the Navy's Plans

The USWTR has been in development for over a decade. After considering other viable sites around the nation, including the Gulf of Maine, and coastal North Carolina and Virginia, the Navy chose the waters off of Jacksonville which have been used for naval exercises for over 60 years. The $100 million USWTR construction will require the placement of undersea cables and transducers across a 500 square nautical mile area. The Navy argued that this cable grid will allow for position tracking of ships and submarines in the area and will concentrate air and sea warfare exercises into this dedicated zone representing only a small portion of the existing tens of thousands of square miles of the Jacksonville Operating Area already managed by the Navy for these purposes.

The Defenders argued that the results of NMFS's formal consultation and biological opinion under the ESA for the USWTR were arbitrary and capricious and that the environmental impact statement prepared by the Navy under NEPA failed to comply with the requisite statutes and regulations. They specifically noted that the Navy failed to consider the impacts of ship strikes, entanglements in debris discarded on the USWTR range, impacts from sonar exercises that could disorient the whales, and similar impacts on other endangered species that may be found in the USWTR area, including sea turtles and manatees.

The court ultimately granted the Navy's cross motion for summary judgment, allowing the USWTR project to go forward unimpeded. It found that despite the Defenders' allegations, the Navy and NMFS had fully met all of the requirements of the ESA, NEPA, and APA, and that the decision to advance the project was well within the confines of the law. Furthermore, it noted that the plaintiffs had failed to satisfy their burden in showing that the agency decisions were arbitrary and capricious, since NMFS had clearly identified reasonable justifications for its determinations in its biological opinion and concurrence.

Conclusion

While this denial is no doubt a setback for these conservation groups, there is little doubt that lawsuits filed in pursuit of right whale protections will continue. As recently as late October litigation involving right whale protections was pending in the northeast where groups have challenged the development of a wind farm in Nantucket Sound due the sighting of four right whales in the area.[9] Nevertheless, because the court held that the Navy took a "hard look" at the environmental repercussions and impacts on the right whale associated with the USTWR project, construction will commence and is expected to be completed within five years.

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Legislative Update 2012

112 Public Law 90: Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (H.R.2845)
Increases civil penalties on an oil, natural gas, or hazardous liquid pipeline facility operator for failure to: (1) mark accurately the location of pipeline facilities in the vicinity of a demolition, excavation, tunneling, or construction; (2) use first a one-call notification system to establish the location of underground facilities in such an area; or (3) comply with safety standards and related requirements, including for inspections, maintenance, risk analysis, and adoption of an integrity management program.

112 Public Law 123: H.R.5740 National Flood Insurance Program Extension Act H.R.5740
Amends the National Flood Insurance Act of 1968 (NFIA) to extend the National Flood Insurance Program, including its funding, through July 31, 2012. Prohibits the Administrator of the Federal Emergency Management Agency (FEMA) from estimating subsidized flood insurance premium rates for any residential property which is not the primary residence of an individual (such as a vacation home or second home). Increases by 25% each year the chargeable risk premium rate for flood insurance for residential property which is not the primary residence of an individual until the average risk premium rate for such property is equal to the average of the risk premium rates for any properties within any single risk classification.

112 Public Law 133: Salmon Lake Land Selection Resolution Act S.292
Ratifies the Salmon Lake Area Land Ownership Consolidation Agreement, which was executed between the United States, the state of Alaska, and the Bering Straits Native Corporation on July 18, 2007. Requires the land conveyance to the Bering Straits Native Corporation to include the reservation of the easements identified in Appendix E to the Agreement that were developed by the parties to the Agreement in accordance with the Alaska Native Claims Settlement Act. Directs the Secretary of the Interior to carry out all actions required by the Agreement.

112 Public Law 134: Property Conveyance to Pascagoula, Mississippi. S.363
Authorizes the Secretary of Commerce to convey specified property under the administrative jurisdiction of the National Oceanic and Atmospheric Administration (NOAA) to the city of Pascagoula, Mississippi, provided that the United States receives consideration of at least the fair market value of the property or rights conveyed. Specifies acceptable forms of property, cash, and in-kind consideration. Directs the Secretary to determine fair market value based on a highest- and best-use appraisal conforming with the Uniform Appraisal Standards for Professional Appraisal Practice. Requires that the proceeds from any such conveyance be available to the Secretary, subject to appropriation, for activities related to the operations of, or capital improvements to, NOAA property.

112 Public Law 183: Billfish Conservation Act of 2012 H.R.2706
Prohibits any person from offering billfish or billfish products for sale, selling them, or having custody, control, or possession of them for purposes of offering them for sale or selling them. Treats a violation of this Act as an act prohibited by the Magnuson-Stevens Fishery Conservation and Management Act. Subjects a person to a maximum civil penalty of $100,000 for each violation, with each day of a continuing violation constituting a separate offense.

SandBar Volume 11 Index

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Littoral Events

World Aquaculture Society
Nashville, TN • Feb. 21-25, 2013

Aquaculture 2013 will combine the annual meetings of the Fish Culture Section of the American Fisheries Society, the World Aquaculture Society, and the National Shellfisheries Association. The conference will feature extensive technical program featuring special sessions, contributed papers and workshops on all of the species and issues facing aquaculturists around the country. Sample topics will include: open ocean aquaculture, aquaculture engineering, conservation and restoration, as well as law and policy issues.

For more information, visit: http://bit.ly/worldaqua2013

Key Environmental Issues in U.S. EPA, Region 4
Atlanta, GA • Feb. 26, 2013

This is a one-day conference sponsored by the ABA Section of Environment, Energy, and Resources, offering a unique opportunity to engage in dialogue with policy makers and legal professionals involved in environmental issues throughout the Southeast. This conference offers timely updates on key state and regional developments in environmental law in the Region 4 states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

For more information, visit: http://bit.ly/keyenvironment

42nd Spring Conference
Salt Lake City, Utah • Mar. 21-23, 2013

The American Bar Association Section of Environment Energy, and Resources presents its 42nd Spring Conference. Panels presented by leading environmental officials, practitioners, and academics will address both core topics and cutting-edge issues in environmental law. This year's conference will focus on sustainability. Following up on last year's emphasis on air, land, and water, the conference will address sustainable resource development and use and environmental impacts. Expert panels will help attorneys stay up-to-date by addressing the impacts of the 2012 election and recent Appellate Court decisions.

For more information, visit: http://bit.ly/42ndspring

National Working Waterfronts & Waterways Symposium
Tacoma, WA • Mar. 25-28, 2013

In March 2013, Washington Sea Grant, in coordination with Oregon Sea Grant, will sponsor the third national symposium on issues faced by working waterfronts throughout the United States. The conference will provide unique and innovative approaches to address water access needs, using examples of success from various communities. Session topics will include: economic and social impacts of and on working waterfronts; successful local, regional, state, and federal strategies to address working waterfront issues; the future of working waterfronts; and keeping waterfront industries commercially viable.

For more information, visit: www.workingwaterfronts2013.org