Legal Reporter for the National Sea Grant College Program

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Groundfish Management Proves Daunting to Court, Fishers

Conservation Law Foundation v. Evans, 211 F. Supp. 2d 55 (D. D.C. 2002).

Kristen M. Fletcher, J.D., LL.M.
Sarah Elizabeth Gardner, J.D.

Since the passage of the Sustainable Fisheries Act[1] in 1996 and dwindling fish stocks across the nation, litigation over the management of U.S. fisheries has increased dramatically. In the spring of 2002, Judge Gladys Kessler of the U.S. District Court for the District of Columbia issued a decision that greatly reduced the fishing effort in the New England groundfish fishery. Since the decision, negotiations between the parties and doubts regarding the science of groundfish management have resulted in a daunting challenge to stabilize the fish stocks and the fishing industry.

Managing Groundfish

The New England Fishery Management Council is mandated by the Magnuson-Stevens Act to develop a fishery management plan (FMP) for the groundfish fishery which had seen severe depletion in the last two decades. By law, the Council is required to prevent overfishing and rebuild depleted fish populations, and to report, assess, and minimize bycatch.[2] Amendment 9 to the FMP revised the maximum annual fishing mortality rates for 12 depleted groundfish species.[3]

A coalition of environmental groups, led by the Conservation Law Foundation, alleged that by approving Amendment 9, the Secretary of Commerce and National Marine Fisheries Service (NMFS) failed to minimize bycatch and failed to comply with the overfishing and fishery rebuilding provisions of federal law. In December 2001, Judge Kessler granted the summary judgment motion made by the Conservation Law Foundation, finding that the agency had not complied with the overfishing and rebuilding provisions of the Magnuson-Stevens Act. Kessler found that the record did not show that the agency had properly reviewed the fishery and their management measures and disregarded the agency's argument that the required reporting measures under federal law are "impractical and unnecessary."

The agency admitted it had not complied with the overfishing and rebuilding provisions in Amendment 9 but claimed that "Framework 33," a separate provision implementing fishing mortality targets, provided adequate protection for the groundfish fishery until a new amendment could be completed.[4] Judge Kessler found for the plaintiffs because

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Off-Site Mitigation of Beach Access Upheld

La Costa Beach Homeowner's Assn. v. California Coastal Comm'n., 124 Cal. Rptr. 2d. 618 (Cal. App. 4th 2002).

Joseph Long, 2L

A California appellate court recently reviewed whether off-site mitigation was appropriate for the maintenance of public beach access and view corridors in Malibu. The court held that the California Coastal Commission has the authority to approve off-site mitigation if the Commission determines that the public will receive a greater benefit from the off-site location rather than from the parcels in question.

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Ninth Circuit Denies Relief to Seattle Tideland Developers

Esplanade Properties v. City of Seattle, 307 F.3d 978 (9th Cir. 2002).

Kristen M. Fletcher, J.D., LL.M.

Last fall, the Ninth Circuit Court of Appeals denied damages to a developer in Seattle who charged that the city's denial of a development application for shoreline property on Elliot Bay was a taking in violation of the Fifth Amendment of the Constitution. Applying the Supreme Court's ruling in the 1992 *Lucas* decision, the Ninth Circuit found that the proposed development, houses and parking over tidelands, was inconsistent with the public trust doctrine that the State of Washington is obliged to protect.

Esplanade's Development

After purchasing property in 1991 for $40,000, Esplanade Properties began its development process in 1992 by applying to construct nine waterfront homes, all single-family residences, on platforms supported by pilings over tidelands. The Esplanade property is "classified as first class tideland, and is submerged completely for roughly half of the day, during which time it resembles a large sand bar"[1] and is located near a large city park and marina.

Under Washington's Shoreline Management Act,[2] enacted in 1971, developers like Esplanade must meet the city's shoreline regulations, the Seattle Shoreline Master Program. Under Seattle's Program, and at the time that Esplanade applied for permission to build, above-water residential construction was "seemingly allowed where the lots had less than 30 feet of dry land."[3] In reviewing Esplanade's application, the city identified three significant compliance issues: the size of the proposed piers and docks, the design of the causeway access to the house, and the lack of parking on dry land.

Subsequently, the city was asked to review and interpret the code with respect to the proposal, resulting in a decision rejecting Esplanade's application. When Esplanade failed to formally modify its plans with respect to the three design issues, the City cancelled the application. Esplanade challenged the denial on federal and state substantive due process grounds and as a violation of the constitutional provision prohibiting the taking of private property without just compensation. The district court denied the claims on both the due process and taking grounds.

Takings & the Public Trust

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[4] In addition to instances of physical invasion or confiscation, a government regulation may be recognized as a taking if it "goes too far."[5] While no set formula exists for determining when a regulation amounts to a taking, the Supreme Court has found that when the landowner has lost all economically beneficial use of the property, a taking has occurred.[6] In that case, known as the *Lucas* decision after its plaintiff landowner, the Court held that a taking has occurred unless "the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[7]

In other words, if the "background principles" of state law already serve to deprive the property owner of the proposed use, then the state is not liable for a taking. The district court found that there was no taking of Esplanade's property because the City's actions were not the proximate cause of the developer's damages[8] and because the public trust doctrine, a background principle of Washington law, already precluded Esplanade from using its property in the proposed manner. On appeal, the Ninth Circuit found that the public trust doctrine does preclude Esplanade's proposed development.

The public trust doctrine exists in Washington common law,[9] the Washington Constitution,[10] and the Shoreline Management Act.[11] The doctrine reserves a public interest in tidelands and the waters flowing over them, allowing the public to use them for navigation, fishing, commerce, and recreation.[12]

The court found that the doctrine burdens Esplanade's property stating that "[i]n this case, because Esplanade's tideland property is navigable for the purpose of public recreation (used for fishing and general recreation, including by Tribes), and

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located just 700 feet from [a public park], the development would have interfered with those uses, and thus would have been inconsistent with the public trust doctrine."[13] Having found that the doctrine "runs with the title" of Esplanade's property, it alone precluded the proposed development. Thus, the court reasoned, Esplanade never had the right to develop the land and because "a property right must exist before it can be taken," neither the Shoreline Management Act nor the City's Shoreline Master Program effected a taking.

Due Process for Esplanade

The court also affirmed the lower court's denial of Esplanade's due process claims. Federal and state due process claims are precluded when the alleged violation (here, the taking of private property without compensation) is addressed by explicit textual provisions of the Constitution. In Esplanade's claim, the Fifth Amendment directly provides for constitutional protection, and precludes the more generalized claim of substantive due process.

Conclusion

In affirming the district court's decision, the Ninth Circuit found that the City of Seattle properly denied a shoreline development and did not take the property because the public trust doctrine, a background principle of Washington law, already precluded the development. Citing the district court, the Ninth Circuit explained that Esplanade took the risk "that, despite extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment."[14] In a clear example of the application of the *Lucas* decision, Esplanade could not recover damages for its failed application.

ENDNOTES

1. *Esplanade Properties v. City of Seattle*, 307 F.3d 978, 980 (9th Cir. 2002).
2. Shoreline Management Act, WASH. REV. CODE § 90.58.010 (2002).
3. 307 F.3d at 980, note 2. The Seattle City Council later changed this provision to allow for above-water residential construction "only where a lot has at least 15 feet of dry land. . . ." *Id.*
4. U.S. CONST. amend. V.
5. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
6. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).
7. *Id.* at 1027.
8. A plaintiff must show causation exists between the government action and the deprivation, i.e., the City's regulation limiting development over water caused the loss of property value.
9. The court states that "[i]t is beyond cavil that 'a public trust doctrine has always existed in Washington.'" *Esplanade Properties*, 307 F.3d at 985, *citing Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).
10. The Washington Constitution reserves state ownership in the beds and shores of all navigable waters of the state. WASH. CONST. art. 17, § 1.
11. The Shoreline Management Act states that "unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest." WASH. REV. CODE § 90.58.020.
12. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453 (1892).
13. *Esplanade Properties*, 307 F.3d at 987.
14. *Id.*

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neither Framework 33 nor Amendment 9 met federal requirements.

Remedial Phase

Following the December 28, 2001 issuance of a Summary Judgment, the remedial phase began and seven additional parties intervened on behalf of the agency, along with many interested parties who wrote the court to express their concern about the impact of the court's remedy. On February 15, 2002, a status conference was held between the parties where Judge Kessler, due to the far reaching impacts and complexity of the case and the relief it demanded, encouraged the two sides to enter into mediation.[5] Because the fishing season was quickly approaching and the case had to be decided within serious time constraints, the parties entered into a five-day mediation and a "Settlement Agreement Among Certain Parties" was proposed and filed on April 16, 2002.

In the meantime, in March of 2002, the agency filed its "2002 Working Group Report" regarding the status of New England groundfish. According to the report, many New England groundfish were not rebuilding fast enough after years of overfishing. This finding, according to the court, "changed the seascape" for groundfish management.

With the opening of fishing season lingering only eight days away, the court began the painstaking task of developing a remedy. In analyzing the evidence, briefs, and the technical information, Kessler stated "[m]uch of the blame for this situation can be laid at the feet of NMFS [National Marine Fisheries Service]. The very fact that this Court is in the unenviable position of having to decide such an important issue . . . reflects the failure of NMFS to comply with the statute in a timely fashion."[6]

The court reexamined its mandate that the Government has a duty to enforce Amendment 9, claiming that "such course of action is now impossible. . . the scientific basis on which it relies has become invalid even though it may have been the best available . . . when the amendment was adopted"[7] and therefore, neither "the Settlement Agreement Among Certain Parties or the order the Court is now entering complies with Amendment 9."[8] Thus, the court concluded it was suitable to use the settlement agreement as a starting point for the remedy, which provided that, until adoption of Amendment 13, significant restrictions would be imposed on days at sea, on the larger trawl vessels which account for much of the groundfish mortality, and on mesh sizes and gear to reduce bycatch and fish mortality. In addition, the court ordered significant area closures designed to protect the vulnerable Gulf of Maine cod and Georges Bank cod, an increase in the minimum size of cod that can be landed and possession limits. Finally, the court mandated increased observer coverage, the collection and analysis of timely and accurate fishing and bycatch information and a firm schedule for the adoption of Amendment 13.

Photo Courtesy of NOAA

With the groundfish industry alarmed at the severe restrictions, the court granted a motion for reconsideration in May, noting that "the important changes made by the Court in the complex and carefully crafted Settlement Agreement. . . would produce unintended consequences" including the potential to further imperil the species and cause "grave economic and social hardship."[9] The May decision vacated the April 26 order and called for an amended interim rule to be effective June 1, 2002, and an FMP amendment that complies with overfishing, rebuilding, and bycatch provisions of federal law to be submitted by August 22, 2003. The ultimate result was closing certain areas to groundfishing and cutting the numbers of days at sea.

Aftermath of the Decision

Federal Funding. Following the decision, members of Congress from the region called for federal assistance for fishermen harmed by the ruling.[10] Congress appropriated funds for the cause; for example, the core of Maine's groundfishing fleet is to receive $1.7 million designed to assist the industry in surviving the more stringent regulations. The Maine Department of Marine Resources plans to divide the money among over a hundred vessels that actively land groundfish in Maine.[11] The payment, however, is a one-time payment and will not change the fact that the cut in days at sea will remain in place for the foreseeable future.

Scientific Uncertainty. In its May decision, the court also ordered the Secretary to make public the most current and reliable scientific information available to further the development of Amendment 13 and calculate the total allowable catch for the groundfish species. The scientific information that the Secretary, agencies, and Councils rely upon remains a source of dispute. In the fall of 2002, the NMFS announced that a net set inaccurately on a research vessel may have affected the agency's estimation of the stocks' health. The net was part of a trawl survey that provides stock assessment data to the agency and, in part, helps to determine if regulations are working to restore depleted fish stocks.[12] As a result, Congressional members called for a delay in applying Kessler's fishing restrictions in order to correct the faulty scientific data.[13]

NMFS 2003 Proposal. In the latest chapter of the New England groundfish story, the NMFS announced in January that Amendment 13, now scheduled to start in May 2004, will give fishermen until 2014 (instead of 2009) to rebuild stocks of New England groundfish. While the groundfishing industry applauds the proposal, the environmental community that originally sued federal regulators to win faster rebuilding, see the move as a way to "get around the law."[14]

The New England groundfish industry is not alone. Groundfish controversies are simmering in Alaska and on the west coast. With congressional members weighing in and the likelihood that future delays will be challenged in court, it may be many years before an appropriate remedy is fashioned and

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before a model for addressing fisheries management controversy is developed.

ENDNOTES

1. Pub.L. No. 104-297, 110 Stat. 3559 (1996).
2. 16 U.S.C. §§ 1802 (28)-(29), 1853 (a)(10)-(11), 1854(e) (2002).
3. The 12 species are: cod, haddock, yellowtail flounder, American plaice, witch flounder, winter flounder, redfish, white hake, pollock, windowpane flounder, ocean pout, and Atlantic halibut.
4. 209 F. Supp. 2d 1 (D. D.C. 2001).
5. On April 8, 2002, due to the technical and scientific issues of the case, Kessler appointed a technical advisor to assist in deciding the remedy appropriate for the case. The technical advisor does not testify before the court but instead answers the court's questions about terms, phrases, theories, and rationales.
6. 195 F. Supp. 2d 186, 191 at note 6 (D. D.C. 2002).
7. *Id.* at 191.
8. *Id.*
9. 211 F.Supp. 2d at 68.
10. *See* Susan Young, *Federal Judge Reverses Groundfishing Decision*, BANGOR DAILY NEWS, May 24, 2002, A1.
11. *See* John Richardson, *Maine Fishermen to Share $1.7 Million in Federal Assistance*, PORTLAND PRESS HERALD, January 8, 2003, 9B.
12. *See* Doug Fraser, *U.S. Lawmakers Call for Delay of New Fishing Regulations*, CAPE COD TIMES, October 24, 2002.
13. *Id.*
14. *See* Kay Lazar, *Fishermen Catch Break on Federal Restrictions*, THE BOSTON HERALD, January 15, 2003, News 2.

Editor's Note

The groundfish decisions can be found at:

- **The December 28, 2001** decision granting summary judgment and finding that the federal agency failed to prevent overfishing and minimize bycatch is at 209 F. Supp. 2d 1 (D. D.C. 2001).
- **The April 8, 2002** decision appointing a technical advisor to assist the court in deciding the case is at 203 F. Supp. 2d 27 (D. D.C. 2002).
- **The April 26, 2002** decision granting plaintiff's motion for summary judgment on the remedial issues and issuing an order with detailed provisions governing fishing in the multispecies New England groundfish until promulgation of a new amendment is at 195 F. Supp. 2d 186 (D. D.C. 2002).
- **The May 23, 2002** decision granting reconsideration, vacating the April 26 decision, is at 211 F. Supp. 2d 55 (D. D.C. 2002).

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Background

Three separate, ocean front property owners in La Costa Beach, located on the seaward side of the Pacific Coast Highway, applied for permits to demolish the existing homes upon the sites and to construct larger homes, one per site. These homes, if built as planned, would not meet the twenty percent view corridor or the vertical public access requirements of the Los Angeles County Malibu and Santa Monica Mountains Land Use Plan.[1] The Commission granted the permits, but placed special conditions on the permits requiring view corridors to be maintained on the property. Two of the permits also contained provisions allowing the property owners to seek an amendment to the permit if they provided off-site mitigation of the public view corridor and dedicated a vertical access way in the vicinity of La Costa Beach.

The property owners sought to amend their permits and offered, as an off-site mitigation location, an eighty-foot stretch of ocean front property outside of Carbon Beach at La Costa Beach. The land would be donated to and under the control of the California Coastal Conservancy or another agency for public access and enjoyment. The La Costa Beach property would be held in escrow pending any litigation against the property. Upon a judicial decision, if the property could not be used as a public access area, the property would be returned to the owners who would then donate one million dollars to the Conservancy to provide and maintain public access to beaches.

At public hearings many citizens of the City of Malibu expressed concerns over traffic dangers, inadequacy of public transportation, and lack of parking at the mitigation site. The Commission found these concerns too weak to deny the permits and granted the defendants' request for off-site mitigation.

The Appeal

La Costa Beach Homeowners' Association filed a petition on May 12, 2000, contesting the decision of the California Coastal Commission to grant a permit

to the three ocean front property owners, arguing that, "off-site mitigation of the view corridor and vertical public access requirement violates the basic purpose of the Coastal Act."[2] The California Coastal Act's main purpose is to increase public access to California's beaches. The trial court granted La Costa's petition on the grounds that the Commission had not produced enough evidence to show that the proposed plans for the La Costa Beach site would provide greater access than the necessary public view corridor and beach access at Carbon Beach. The court further noted that the Carbon Beach renovation plans did not include ample space for either the required public view corridor or the public beach access easement.

The trial court ordered the California Coastal Commission to rescind its approval of the permit. The Commission then appealed this order to the California Appellate Court for the 4th Circuit.

Off-site Mitigation

The court found that off-site mitigation of the Coastal Act requirements is acceptable. The goal of the California Coastal Act is to "maximize public access to and along the coast and to maximize public recreational opportunities in the coastal zone consistent with the sound resources, conservative principles, and constitutionally protected rights of private property owners."[3] Further, "maximum access and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and the natural resource areas from overuse."[4] Unfortunately, the Act is unclear as to how this goal is to be achieved.

In reviewing the California Coastal Commission's decision under the Coastal Act, the court found that the Act does not require total satisfaction of its conditions on-site. For example, the Act does not require a landowner to provide vertical access if such access exists near the property.[5] The Court determined that, although the Commission's authority allows it to limit site and design requirements to the proposed construction property location, it need not do so. The Commission's mandate, to maximize pubic access whenever possible, supplies the necessary authority for the approval of off-site mitigation.

Conclusion

Upon review of the off-site mitigation alternative, the court held that off-site mitigation of a required view corridor and vertical access easement for the beachfront property is acceptable if the California Coastal Commission reasonably concludes that the proposed mitigation site is acceptable.

ENDNOTES

1. Any new development on beachfront property located on the seaward side of the Pacific Coast Highway is required to reserve twenty percent of the width of the lineal footage of the subject site to provide for views of the beach and ocean from the Highway. The Land Use Plan also provides that a portion of the property connecting the Pacific Coast Highway to the dry sand beach be designated as an easement for public access to the beaches. Public Resource Code § 30200 *et. seq.* (2002).
2. *La Costa Beach Homeowners' Assn. v. California Coastal Comm'n*, 124 Cal. Rptr. 2d 618, 626 (Cal. App. 4th 2002).
3. Public Resource Code § 30001.5(c) (2002).
4. Public Resource Code § 30210 (2002).
5. Public Resource Code § 30212 (2002).

Klamath River Basin Water Shortage Reaches Crisis

Stephanie Showalter, J.D., M.S.E.L.

In September 2002, thousands of chinook and coho salmon were found dead or dying along the banks of the Klamath River in Oregon and Northern California. Diseases, triggered by warm water and low dissolved oxygen levels, decimated the salmon migrating up the Klamath River to spawn. The size of the fish kill alarmed environmentalists and fishermen throughout the Klamath River Basin. Many in the area blamed the deaths on low water levels, due in part from a decrease in water flowing downstream from the Upper Klamath Lake, a result of the Bureau of Reclamation's decision to retain water in the Lake for irrigation. Pictures of the fish kill quickly spurned a media campaign, which focused on the federal government's management of the water resources of the Basin. The Pacific Coast Federation of Fishermen's Associations immediately filed a lawsuit challenging the National Marine Fisheries Services' and Bureau of Reclamation's long-term irrigation plan, claiming the plan fails to require adequate protections for the salmon.

The 2002 fish kill, however, was only a symptom of a much larger illness, the over-allocation of a limited resource. Intrigued by the troubled history of federal management of the water resources in the Klamath Basin and the large number of conflicting uses in the region, *The SandBar* solicited articles from guest authors to learn more about the positions of the various stakeholder groups in the regions. Pursuant to those requests, each author wrote about the Klamath River Basin water crisis from a different perspective, specifically, Tribal, environmental, and irrigator. The articles illustrate the incredible demand for water in the Basin and the management struggles. We are grateful to our three guest authors for giving us and our readers the opportunity to view a highly charged conflict through several pairs of eyes.

A Tribal Perspective

Carl Ullman, Director, Water Adjudication Project

The water crisis in the Klamath Basin is often portrayed as "fish vs. farmers," however that description is incorrect and detrimental to finding solutions to provide for all Basin water interests. The Klamath problems involve people and livelihoods on all sides, and are the inevitable consequence of long-standing, unresolved conflicts. Viewed correctly, the Basin situation presents a unique opportunity to develop a policy balancing economic and environmental concerns and upholding the honor of the United States in its dealing with both indigenous peoples and water contractors.

There are two problems driving the situation – overcommitment of water resources and degradation of an ecosystem that must support all Basin residents. "Fish vs. farmers" is a misguided phrase since it ignores these real problems that face the Klamath Basin.

Too Many Promises

Promises of water badly outstrip supply. At the same time, the holders of the promises feel they have done everything required of them to have their promise fulfilled.

Indian tribes: In the 19th Century, the United States promised that Indian tribes could keep some of the water the tribes had depended on for millennia. This promise was necessary in order to secure the Indians' lands for settlement. For example, in the Treaty of 1864 the Klamath Tribes ceded 20 million acres of land and reserved, with the United States' consent, fisheries and the water to support themselves.

The Klamath Reclamation Project: Throughout the 20th Century, the United States recruited farmers to occupy and develop the land. Recruiting flyers included promises of water for anyone willing to put in the hard work of homesteading an arid land. No mention was made of the preexisting promises of water to the Indian tribes of the Basin.

State water permitting: As the 20th Century unfolded, the states of Oregon and California issued state water rights permits to hundreds, perhaps thousands, of applicants for water use. The states felt no obligation under the Indian treaties, so state permits were issued without regard to prior water commitments to tribes. And state permitting proceeded independent of prior federal commitments of water to Project farmers.

Wildlife refuges: The Klamath Basin is home to several exquisitely important wildlife refuges. The refuges are largely an afterthought in development of the Basin, so most of the Refuges hold a junior priority date to water. So even in an average water year they must struggle with inadequate water availability.

Ecosystem degradation

Three examples of the Basin's ecosystem problems illustrate what must be addressed to remedy the situation.

- The Basin has at least five species listed as endangered or threatened. This results from the destruction of habitats, particularly aquatic habitat, including the incredible pollution of Upper Klamath Lake. The situation severely limits water management options, exacerbating the overcommitment problem.
- Hundreds of thousands of acres of wetland have been converted to uplands. This compromises the Basin's capacity to store water for irrigation and its ability to remove nutrients and other pollutants from the waters.
- Streams tributary to Upper Klamath Lake have been dewatered, channelized and cut off from their flood plains. This causes temperature and chemical problems for fisheries. It reduces the availability of irrigation water in Upper Klamath Lake. It leaves uplands drier, less valuable, and in need of ever-increasing irrigation.

What is to be done?

Restoring stability to the Klamath Basin requires addressing the two fundamental problems of overcommitment of water and ecosystem degradation. Until the too-many-promises problem is addressed there can be no stability. Demand reduction is unavoidable because even in average water years Nature does not provide enough water to meet all demands. The 2001 shut-off of one-third of Basin agriculture is an undeniable demonstration of this fact. Equally illustrative is the demise of the fisheries when agricultural water needs are given unbridled priority, an enormous fish kill on the lower river this year being a case in point. The question is whether systems of governance will take control of this demand reduction process or, instead, will allow it to take place in destabilizing paroxysms.

Similarly, until ecosystem restoration is made a large and lasting commitment, Upper Klamath Lake

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will continue to be toxic to fish and its tributaries will be unable to deliver a stable water supply. Proposals to improve water quality throughout the Basin should be welcomed by everyone.

Proposals for large scale riparian restoration are extremely important. This sort or restoration is key to restoring the Basin's capacity to support all interests. The same is true of efforts to restore the form and function of streams tributary to the Lake. Important projects of this sort are underway, many of them with the support of Reclamation and Basin farmers who deserve recognition for their contributions. These projects, if multiplied, supported and accelerated, will over time result in improved water quality and fish survival, greater flexibility in water management, and reduced tensions between Native American people who harvest fish and project irrigators who harvest potatoes and other crops.

In contrast, proposals for fish screening and fish passage improvement evoke less enthusiasm. The proposals are not bad in themselves and they have an immediate, feel-good appeal. But fish screened from irrigation canals remain in the Lake and die because of pollution. And even if improved passage results in greater spawning, the newborn fish still die in the polluted Lake. Such projects are only meaningful in a larger context of stream and lake restoration.

An Irrigation Perspective

Paul Simmons, Attorney, Somach, Simmons & Dunn

For nearly a century, the Klamath Irrigation Project operated in relative obscurity. In 2001, a drastic, unprecedented curtailment of water deliveries brought national and international attention to the plight of families, businesses, and rural communities who suffered severely. In 2002, water deliveries were resumed, but controversy continues. When the dust settles, the necessary elements for peace in the Klamath Basin will remain what they have always been, namely: (1) equity in regulation; (2) reliable science for regulation and solution-building; and (3) coordinated and effective environmental restoration.

Klamath Project

In 1902, Congress passed the Reclamation Act.[1] The statute provided for federal financing of irrigation works, with construction costs to be repaid over time by project water users. Also, lands were made available for homesteaders who accepted responsibility to pay the water charges. Many projects, of varying size, were constructed throughout the western states.[2]

While settlement and irrigation development had begun in the Klamath Basin by the late 19th century, the federal Klamath Project was authorized in 1905. The Project was a partnership of Oregon and California and the United States. The states ceded land they owned to the national government for homesteading. The Project itself expanded and hastened the private development that had preceded it, and now straddles the Oregon-California border. Two premier national wildlife refuges also receive water through the facilities that deliver water for irrigation.

There is a great misunderstanding of the scale of the Project, whose 230,000 acres of irrigated lands occupy about two percent of the ten-million-acre Klamath Basin. The Project consumes less than five percent of the Basin's runoff. However, it is a ready target; it is the largest individual consumptive user of water in the Basin ("exports" of water out of the Basin exceed the Klamath Project's use). In addition, the water stored in Klamath Project reservoirs for irrigation is coveted for other uses during dry periods.

The oversimplification of Klamath Project issues was very recently demonstrated when a large die-off of immigrating salmon occurred near the mouth of the Klamath River. The immediate cause was disease among fish crowded in warm water and not moving upstream. Some groups immediately indicted the Project. The scientific data is still being sorted, but in few public reports have certain undeniable facts been made clear: the fish die-off was over 200 miles from the Klamath Project; there are multiple hydroelectric dams and over 100 tributaries of the Klamath River (many degraded and depleted) between the Klamath Project and the actual problem; the flows in the mainstem Klamath River were by no means historic lows, and no similar event had occurred in the 96 of 97 years past when the Project received water; and the amount of water flowing out of the Upper Klamath Basin (where the Klamath Project lies) at the time was greater than the runoff, due to releases of water from storage. These facts, and the fact that the salmon run ultimately was quite good, do not, however, lend themselves to media visions of a wild west shootout.

Problems and Solutions

Endangered species of suckers inhabit Upper Klamath Lake, which serves as a reservoir for the Project. Coho salmon, a threatened species, inhabit the Klamath River. An April 6, 2001 decision allocated all of the Project Klamath water to maintaining increased Upper Klamath Lake elevations for suckers and high mainstem river flows for coho. In the local communities, there was great suffering. Some lost all they had. Financial, personal, and social stress flourished. Waterfowl and wildlife that normally rely on irrigated Klamath Project lands suffered similarly.

In 2002, water was returned to the Project, but uncertainty remains. The Bureau of Reclamation and resources agencies are in open disagreement on technical and regulatory issues. Litigation continues. Unfortunately, strategies being conducted almost exclusively in the media are attempting to return the Project to the conditions of 2001. One of these involves a "leaked" draft study used to argue that the country would be better off economically without the Project. The draft study is so obviously full of speculation and leaps of logic that its public use leads one to believe that rational discourse is not possible.

The essential truth remains that there is need for strong leadership from the federal government and other major interests focusing on key principles. To succeed, there must be a recognition of shortcomings from the recent past.

First, the Klamath Project has been subject to regulatory discrimination. A great many factors have affected populations of listed species. Yet the lone, certain regulatory response has been to look to the Klamath Project to guarantee certain instream water levels. In some cases it has been expressly stated that Project water will be used to mitigate other impacts. This is both inequitable and ineffective. In June, the Bureau of Reclamation completed a biological assessment (BA), a step in ESA compliance, for future operation of the Klamath Project. The BA recognizes, much more so than in the past, the number and breadth of other activities affecting listed species. It properly recognizes that the "effects" of operation of the Klamath Project itself do not require it to cure impacts caused by other factors. Further, it recognizes that section 7(a)(2) of the ESA[3] does not require release of stored water to augment flows beyond baseline levels. Additionally, the State of Oregon is proceeding expeditiously with the Klamath River adjudication. At present, even though the Klamath Project's water rights are senior to many others, it is effectively last in line for water because the State does not regulate for or against unadjudicated rights. Uniquely federal obligations (ESA section 7 and tribal trust obligations) have resulted in the Project bearing the entire burden of meeting non-consumptive demands. The adjudication will determine and quantify rights currently in dispute, and should lead to regulation based on priority.[4]

Second, decisions on Project operations have not been informed by solid science. In brief, the April 2002 Interim Report of the National Research Council (NRC) Committee regarding the NRC's review of the two 2001 biological opinions, finds that the regulatory decisions in 2001 were not technically justified. Many water professionals and scientists not involved in Klamath were not surprised that there is a lack of definitive data. In March of 2001, however, this was not the message given to water users; indeed, the message was that the science was overwhelming, there simply was no choice. Too much of the science relied on by agencies has been developed for advocacy purposes to support a position, including positions in the ongoing Klamath River adjudication. The NRC report ultimately performs a simple exercise. It holds up data to the hypotheses that drove the decisions, and rejects the hypotheses. Technical argument may never end, but one hopes it can occur in the future within appropriate bounds.

A third problem is the lack of effective or coordinated restoration planning, or of true accountability in such planning. Recovery plans are written and not implemented. Large restoration projects are undertaken without monitoring. Regulatory relief is promised but not given. The NRC Committee has been asked for its final report to assist in identifying data gaps and effective restoration strategies. This fresh look and broad vision are welcome.

Drought was, of course, a factor in the decisions of 2001. But drought of similar magnitude has been experienced in the past without serious adverse effects to any one user or group. The drought is, at most, partially to blame. In the meantime, appropriately, incremental progress has been made in augmenting supply, and should continue in the future.

There is a long way to go before the pain, shock, fear, and mistrust caused by 2001 can subside. Recent events suggest that there may be resistance to measured, coordinated strategies. Unless there is strong leadership to overcome this resistance, the lessons of the past will be lost.

ENDNOTES

1. Pub. L. No. 57-161, 32 Stat. 388 (1902).
2. *See California v. United States*, 438 U.S. 645 (1978).
3. 16 U.S.C. § 1536(a)(2).
4. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994).

A Conservationist's Perspective

Bob Hunter, Staff Attorney, WaterWatch

A National Treasure at Risk

The Klamath Basin is one of the nation's great natural treasures, often referred to as the Everglades of the West. It is home to a tremendous variety of fish and wildlife. Eighty percent of the geese, ducks, and swans in the Pacific flyway use the basin's six national wildlife refuges during migration. The refuges support the largest wintering population of bald eagles (approximately 1,000) in the lower 48 states. The 200-mile long Klamath River was once the third most productive salmon and steelhead river in the West, supporting the economies of the Yurok, Karuk, Hoopa and Klamath Tribes as well as coastal communities in northern California and southern Oregon. Klamath Lake, Oregon's largest freshwater lake, contains remarkably large native trout, and once teemed with thousands of Kuptu and Tshuam (unique species of suckers that are only found in the Klamath Basin and that are an important part of the culture and economy of the Klamath Tribes).

The Klamath Basin now faces an ecological crisis that began a century ago, when the state and federal governments put in place a system that gave away more water than the environment could sustain. In 1905, the Bureau of Reclamation initiated a massive irrigation project in the basin, the Klamath Project. By the 1970's the Klamath Project had grown to over 200,000 irrigated acres. At the same time the states of Oregon and California had given out rights to individual irrigators to irrigate another 200,000 acres. Seventy-five percent of the basin's wetlands were drained to make way for irrigated agriculture.

So much water has been taken from Klamath Lake and the Klamath River, and the water quality from agricultural return flows is so poor, that the lake is dying and the river's salmon runs are in steep decline. We now have an environment in crisis with species on the brink of extinction. The natural resources of the Klamath are a shadow of what they once were, and if current federal policies continue we could see a precious part of our natural heritage slip away.

The Endangered Species Act

Because of severe population declines, the two unique species of suckers in Klamath Lake are now listed as endangered and the coho salmon in the Klamath River are now listed as threatened under the Endangered Species Act (ESA). The ESA requires the Bureau of Reclamation to assess the impacts operation of the Klamath Project has on the listed species, and to consult with the United States Fish and Wildlife Service (USFWS) on impacts to suckers and with the National Marine Fisheries Service (NMFS) on impacts to salmon. The USFWS and NMFS found in their biological opinions that operation of the Klamath Project put the listed species in jeopardy of extinction and in 2001 recommended that survival levels of water be maintained in Klamath Lake and the Klamath River to protect the listed fish.

Unfortunately 2001 was one of the worst droughts of record in the Klamath Basin and there was not enough water after providing survival flows to fish to make full irrigation deliveries to irrigators. This set off a series of protests by irrigators and attacks on the ESA that led to the resumption of full water deliveries to irrigators in 2002 at the expense of all other interests in the basin.

Politicization of Science Results in Major Fish Kill

The Bush Administration, not liking the science that supported the 2001 decisions to provide survival flows for fish, sought a different opinion and used a National Academy of Science's program to appoint a Natural Resource Council (NRC) panel to review the science. The NRC in a 26 page interim report found there was not "substantial" science to support the biological opinions, and then made a recommendation based on no science whatsoever to continue operating the Klamath Project the same as it had been for the last ten years. In making decisions about endangered species it is important to err on the side of caution and that is why the law only requires that the best available science be used. In 2002, the Bush Administration instead pressured its federal scientists to accept the NRC recommendations though that would perpetuate the degraded conditions that brought the listed fish to the brink of extinction. The result of playing Russian roulette with the fish was 33,000 dead salmon that died in the fall of 2002 from lethal conditions created by low flows.

Balancing the Basin's Water

Attacking endangered species only avoids and perpetuates the real problems in the Klamath Basin and will

not solve them. The problem in the basin is that there simply is not enough water to meet all the legitimate interests. A perpetual state of crisis will continue with one interest or another suffering, until irrigation water demand is reduced to a sustainable level.

Even before the water crisis farmers in the basin were suffering because of falling prices and foreign competition. A federally financed voluntary program to give financial assistance to willing sellers by buying their land and/or water at a fair price would be an equitable way to start bringing water use in the Klamath Basin back into balance. Another logical step would be to phase out a harmful program on the Tule Lake and Lower Klamath National Wildlife Refuges where over 20,000 acres of refuge lands are leased for commercial farming. These leased lands consume scarce water resources to grow onions and potatoes on our refuges, while adjacent refuge wetlands go dry. Eliminating this program would be a major step in securing the water and habitat needed for waterfowl, eagles, and salmon.

Only by working together to find real solutions can the basin have a future that provides for fish and wildlife and a sustainable level of agriculture.

State May Condemn Land for Wetlands Mitigation

Cannon v. Delaware, 2002 Del. LEXIS 557 (August 28, 2002).

Sara E. Allgood, 3L

Last August, the Delaware Supreme Court addressed the Delaware Department of Transportation's authority to condemn land for a highway improvement project. The Cannons, landowners of the condemned land, challenged the Delaware Department of Transportation's (DelDOT) decision to condemn the land for wetlands mitigation.

Background

Wetlands are very important to the overall control of water pollution, serve as breeding grounds for many species of fish and as a mechanism for flood control. Because of these functions, a party wishing to fill in and develop a wetland must apply to the Army Corps of Engineers for a permit pursuant to the Clean Water Act. Before issuing a permit, the Corps will analyze the purpose of the proposed project, measure its impact on wetlands and attempt to mitigate any loss of wetlands. To further the U.S. "no net loss" policy, lost wetland acreage can be "banked" in another wetland area to stabilize the total amount of wetland acreage.

In 1992, the DelDOT commenced a study addressing the problem of flooding along Route 54. This roadway serves as a primary route for hurricane evacuation, but at times, had been unavailable due to flooding. The study examined the problem along the evacuation route and proposed seven alternatives to remedy the flooding. The DelDOT settled on a plan to construct a viaduct across the Cannons' land as well as federally protected wetlands.

Because a portion of the land needed to complete the selected alternative was wetlands, the DelDOT had to receive a permit from the Army Corps of Engineers in order to comply with the Clean Water Act. When considering whether to grant a permit to fill a wetland, the Corps reviews the possible sites offered for wetlands mitigation, preferring a mitigation site that is both "on-site" and "in-kind." Because the Cannons' land was adjacent to the wetlands needed for the highway improvement, it was the best ecological site, fitting both the on-site and in-kind requirements. The Cannons' land was subsequently condemned by the DelDOT for wetland mitigation and highway improvement.

The Lawsuit

Upon the condemnation, the Cannons, who did not challenge the condemnation of their land for the actual highway improvement project, refused to surrender the land needed for the wetlands mitigation. The Cannons commenced suit claiming that the DelDOT

See DelDOT, page 14

DelDOT, from page 13

lacked authority to condemn land for wetlands mitigation. First, the Cannons claimed that the language in the statute does not grant the Delaware DOT the authority to condemn land for wetlands mitigation. The Cannons also argued, in the alternative, that even if the DelDOT has the authority, it abused that authority by selecting the Cannon's land.

The DelDOT's Authority

The power of the government to condemn land derives from the Constitution. The Fifth Amendment states, " . . . nor shall private property be taken for public use without just compensation."[1] The right of eminent domain entitles the government to condemn private property if the acquisition will benefit the public. The court states that this power belongs "exclusively" to the legislative branch.[2] The state of Delaware, through its legislative branch, may confer the authority to condemn private land to an agency, such as the DelDOT.

The statute authorizing the DelDOT to condemn land states that the agency may: "acquire by condemnation or otherwise any land, easement, franchise, material or property, which in the judgment of the Department, shall be necessary therefore . . . "[3] Furthermore, the Delaware legislature granted the DelDOT the more general power to do "whatever is incidental and germane to the scope of duties and powers conferred on it by law."[4] The court recognized that these provisions must not be read too broadly because the power to condemn land for a public purpose greatly infringes on the important and fundamental right of a citizen to own private property. However, the court states that its "overriding goal" in deciding whether the DelDOT has the authority to condemn land for wetlands mitigation is to determine the legislature's intent.[5]

In order to determine the intent, the court first focused on a Delaware Superior Court decision that the DelDOT's condemnation of land to build a toll plaza and an administrative building was "necessary for the construction and use of a state highway."[6] The court also looked to other state court decisions that have concluded that environmental mitigation is a "practical necessity for the public construction projects."[7] The court reasoned that because public roadways are constructed and maintained for "public use," in order to maximize the public's benefit of these roadways, the DelDOT must also have the authority to operate in a flexible manner. Thus, the court held that the DelDOT has the authority to condemn land for the purpose of wetlands mitigation.

Abuse of Discretion

The court then examined the Cannons' second claim that the DelDOT abused its authority to condemn land when choosing the Cannons' property. Again, the court turned to the language of the statute, which reads that land may be condemned when, "in the judgment of the Department," it is necessary. The court deferred to the DelDOT's judgment as to what is necessary for the maintenance of the State's highways. Because the DOT has been delegated the power to condemn property for the public good, it has also been given the power to determine what property should be condemned. The court states there is "little question" that improvements to a hurricane evacuation route serve the public.[8] However, the court notes, the exercise of condemnation power must not be thoughtless or arbitrary.

The court reads a "presumption of regularity" in an agency's determination that the condemned land is necessary for the public use, which is a difficult burden for the challenger to overcome. In order to defeat this presumption, the plaintiffs must prove that the agency acted fraudulently, in bad faith, or with an abuse of discretion. Finding no evidence of fraud, bad faith, or abuse, the court concludes that the agency acted reasonably in its choice to condemn the Cannons' land for wetlands mitigation. The court determined that the decision to condemn the land was justified because the DelDOT's decision to improve the highway for hurricane evacuation serves the public interest and the Cannon's site provided the DelDOT with the best chance to receive a permit from the Corps.

Conclusion

The power of eminent domain as conferred upon an agency is not to be abused by selecting property and projects in an arbitrary manner. However, as the Supreme Court of Delaware indicated, a great amount of deference will be given to the agency in its decision to pursue a project for the public. This deference extends to federal requirements that states must meet in order to engage in certain actions.

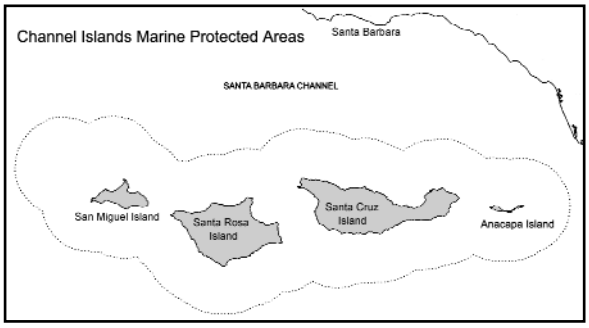
ENDNOTES

1. U.S. CONST. amend. 5.
2. *Cannon v. Delaware*, 2002 Del. LEXIS 557 at *11 (2002).
3. *Id.* at *7 (*citing* DEL. CODE ANN. tit. 17, §132(c)(4) (2002)).
4. *Id.* (*citing* DEL. CODE ANN. tit. 17, §132(d) (2002)).
5. *Id.* at *7.
6. *Id.* at *8 (referring to *State v. M Madic, Inc.*, Nos. 96C-11-192, 96C-11-193, 96C-11-196, 96C-11-197, slip. op. 17-19 (Del. Super. Jan. 24, 1997)).
7. *Id.*
8. *Id.* at *10.

Coast to Coast
And Everything In-Between

Map courtesy of The Nature Conservancy

In October, the Nature Conservancy announced its acquisition of 11,500 acres along the bottom of **Great South Bay** off Long Island, New York. The Great South Bay purchase is the Conservancy's most recent effort to expand their conservation strategy of land acquisition to the marine environment. The Conservancy is working with outside agencies and organizations to develop a management plan for the Great South Bay that will include restoration, sustainable aquaculture, and the creation of a nature sanctuary. For more information on the Nature Conservancy's use of submerged lands to conserve the marine environment, visit their website at http://nature.org/success/greatsouthbay.html .



In a landmark decision, the California Fish and Game Commission recently created a network of marine reserves within state waters surrounding the **Channel Islands National Marine Sanctuary**. Fishing is banned in most of the reserves, although there is a recreational-only fishing zone off Santa Cruz Island and limited commercial and recreational fishing off Anacapa Island. The new reserve is the third largest reserve in the U.S., totaling 175 square miles, behind reserves in the Northern Hawaiian Islands and the Dry Tortugas in the Florida Keys. A full system of marine reserves extending into federal waters is planned and, if adopted by the federal government, would cover 426 square miles.

Imperial Beach, California has one of the more unusual coastal user conflicts. **Bow fishing**, hunting fish with a bow and arrow, is still allowed from the public piers, except during prime beach hours in the summer. A license is not required, but bow fishermen must attend a two hour archery safety course. The waters on both sides of the public pier are popular recreational spots and, not surprisingly, swimmers and surfers are uncomfortable with the weaponry wielded at the public beach. No one has been injured yet, but many believe it is only a matter of time before a fisherman spears more than a sea bass.

Around the Globe

Iceland has been admitted as a full member of the **International Whaling Commission**. Iceland, which left the IWC in 1991 after agreeing to be bound by the IWC's moratorium on commercial whaling, failed on its two previous attempts to rejoin the IWC. Iceland's application for membership was, and remains, contentious because it includes a reservation from paragraph 10(e) of the Convention, the section prohibiting commercial whaling. The vote at the special session held in Cambridge, England was tight. Iceland was readmitted as a full member and its reservation accepted in a 19 - 18 vote, with Iceland casting the deciding ballot. Britain and the United States were among the opposition. Iceland has announced that it will resume commercial whaling by 2006.

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