

The SAND BAR

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Legal Reporter for the National Sea Grant College Program



Recent Cases Explore Public Beach Easements on Dynamic Beaches

Also,
Legal Killing of Sea Lions
Halted

Landowners Adjacent to
Artificial Bodies of Water in
N.C. Have Riparian Rights

F r o m t h e E d i t o r

As spring approaches, thoughts turn to spending more time outdoors, and in many cases, spending time at the beach. But with our beaches facing many competing uses, public access issues also come to the forefront. For example, when hurricanes or other events cause beaches to shift and change, does the public's right to access the beach change with it? This issue of *The SandBar* features an article from a University of Florida law student looking at the future of beachfront public easements following two recent cases, one from Florida and one from Texas.

As you may have noticed, law students write many of the articles in *The SandBar*. As part of our mission to provide education on ocean and coastal law issues, we employ law students from the University of Mississippi School of Law, as well as law students from across the nation. Students or others who would like to contribute to the newsletter should email us at sealaw@olemiss.edu.

As always, thanks for reading *The SandBar*!

Terra



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RECENT CASES EXPLORE PUBLIC BEACH EASEMENTS ON DYNAMIC BEACHES

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Photograph courtesy of Terra Bowling.

Recent court cases in Florida and Texas have confronted thorny issues surrounding beachfront access on dynamic beaches. Namely, when public beaches disappear is the public's right to access the beach extinguished? The loss of public lateral beach access can threaten the tourism industry as well as cause quality of life issues for coastal residents. Predicted rates of sea-level rise and of increased intensity for tropical cyclones affecting the southeastern United States highlight the importance of these issues. Below is a discussion of two recent cases affecting public beach access on dynamic beaches in Texas and Florida.

Trepanier v. County of Volusia

In September 2007, a Florida appeals court considered whether Volusia County had caused a taking of property by allowing regulated driving lanes and parking areas on several property owners' beachfront lots.¹ Initially, the driving lanes were seaward of the affected properties and led to a parking area, also seaward of the properties, where beachgoers parked their vehicles before walking to the recreational beach area located seaward of the driving lanes. However, hurricanes in 1999 and 2004 caused the shoreline to move landward, jeopardizing the driving and parking areas. After the hurricanes, the county shifted the driving lanes and parking areas landward, causing them to now be situated on the property owners' lots.

The property owners sought monetary compensation for an inverse condemnation—an action alleging a government taking of property without compensation. They claimed that the county had affected a regulatory taking by administering the driving and parking areas on their properties; while they did not claim the coun-

ty took the land, they believed the county was unreasonably interfering with their use of it. The property owners further claimed that even if the property had not been effectively taken, its value had diminished dramatically and they were due compensation for that diminution in value.

The court stated that under Florida law, erosion does change property boundaries. There was no doubt, according to the court, that in the case of erosion the public's right to the use of the land up to the mean high water mark migrated with that demarcation. However, in the case of avulsion—defined as a sudden, perceptible change—property boundaries do not change. The court noted that whether the public's customary right to the use of the sandy beach landward of that line was migratory was unclear.

In Florida, easements for the public use and enjoyment of beachfront land can be gained through custom. The court noted that “if it can be shown that, by custom, use of the beach by the public as a thoroughfare has moved seaward and landward” onto private property, the right of the public remains. To satisfy the test for customary use, it must be proved that the public uses the area and that the use is ancient, reasonable, and uninterrupted. The biggest sticking point is often whether the use is considered ancient, which is a fact specific inquiry to be undertaken on a case-by-case basis. The court noted that “it is not evident, if customary use of a beach is made impossible by the landward shift of the mean high water line, that the areas subject to the public right by custom would move landward with it to preserve public use on private property that previously was not subject to the public's customary right of use.”²

This language is unclear and subject to varying interpretations. If the dry sand beach, in response to current erosion, moves onto a private parcel where it was not previously located, has the public's customary right moved onto that private property as well? In this case, the court intimated that, like in *Severance v. Patterson*,³ discussed below, an easement for public use based on custom does not necessarily move with the dry sand beach. The court remanded the case for evidentiary findings on whether the public held the right to the use and enjoyment of the sandy beach area, including the activities of parking and driving, under the test established in *City of Daytona Beach v. Tona-Rama*,⁴ namely, whether the use was ancient, reasonable, and without interruption.

Trepanier Remand

On remand from the appellate court, the trial court denied all inverse condemnation and takings claims of the property owners.⁵ The trial court held that evidence proved that the public held a customary right to the use and enjoyment of the dry sand area landward of the mean high water mark. The court further held that evidence showed that parking and driving on the beach was an ancient and reasonable use and was included in the public's customary right. Much of the opinion was dedicated to findings concerning proof that the use of motor vehicles should be considered ancient and reasonable under the requirements for an easement for customary use. The court found that vehicles were driven and parked on the area in question before the time of motor vehicles and that such use was continuous and without substantial interruption for nearly a century. The court further found that the dynamics of the beach area caused the property owners' lots to be intermittently situated in an area customarily used by the public for driving and parking. The trial court adduced that the evidence demonstrated that this occasional use of the plaintiffs' property had been "continual and without dispute." This led the trial court to find that use of the plaintiffs' property by the public was clearly based on the evidence necessary to establish a public easement.

This manner of framing and addressing the issue avoided issues touched upon by the appellate court: Does a public easement by custom migrate or "roll" landward with the dry-sand beach onto previously-unaffected private property? How does the distinction between erosion and avulsion affect the analysis? The

case was not appealed. While the defendants prevailed in this case, it falls to future cases to answer many important and difficult questions of how coastal dynamics affect the future of public easements based on custom on Florida beaches.

Severance v. Patterson

The issue of public easements for the use of private beach property have also been a hot legal issue in Texas. Recently, the Texas Supreme Court had to decide if the public's easement moved with the dry-sand beach. Texas and its Open Beaches Act (OBA) have often been held up as the model for protecting the public's right to utilize beaches based on historic usage. The OBA guarantees the public a free and unrestricted right to use state-owned beaches from the mean low-tide mark to the vegetation line. A Texas property owner, Carol Severance originally sued Texas for a taking of her property when the state sought to enforce provisions the OBA.⁶

In 2005, Hurricane Rita caused a severe landward shift of the vegetation line, causing a house on the Severance's property to be entirely situated on a public beachfront easement, interfering with the public's right to the use and enjoyment of the beach. The State of Texas sought to enforce the easement, attempting to force the movement of the house off of the disputed area. Severance sued, claiming it was an unconstitutional taking because the easement was extinguished when the ocean engulfed the land previously encumbered and that the state could not enforce an easement on a previously unencumbered property without first proving its existence independent of the extinguished easement. The federal district court found that the easement did "roll" onto Severance's property and ruled against her. Severance appealed.

On appeal, the Fifth Circuit Court of Appeals certified three questions of state law to the Texas Supreme Court: 1) Are rolling public beachfront access easements recognized in Texas? 2) If they are, is the source in Texas common law or the Texas Open Beaches Act? 3) What compensation would be due to property owners for the limitations on property caused by such easements?

The Texas Supreme Court held that while changes by erosion can expand or shrink the land subject to an easement, in the case of avulsion such as occurred in the *Severance* case, the public's easement is lost to the ocean. The court attaches the easement to the physical

Michigan Supreme Court Restores Citizens' Right to Sue State for Environmental Harm

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In a recent ruling regarding the reasonableness of an energy company's discharge plan, the Michigan Supreme Court held that the state could be sued for issuing permits that could result in environmental harm.¹ The recent decision overruled a controversial opinion holding that the Michigan Department of Environmental Quality's permitting decisions were insulated from judicial review under the Michigan Environmental Protection Act (MEPA). The Michigan Supreme Court further held that any citizen has standing to bring suit under MEPA, overruling another state Supreme Court opinion requiring a more restrictive standing test.

Background

In 2004, the Merit Energy Company acquired the Hayes 22 Central Production facility located in Otsego County, Michigan. As a condition to purchasing the facility, Merit entered into a settlement agreement with the Michigan Department of Environmental Quality (DEQ) to remediate a plume of contaminated groundwater that had originated from the facility. The plume, which at the time was continuing to expand, contained several harmful contaminants, including benzene, a known carcinogen. The plume was known to have already contaminated several residential drinking wells.

As its remediation plan, Merit chose air stripping, a process that forces a stream of air through water causing hydrocarbons to evaporate. Air stripping does not completely decontaminate the water, however. Merit's plan was to air strip 1.15 million gallons of plume water a day and then send the water from its site into Kolke Creek through a 1.3-mile pipeline. Kolke Creek feeds into several other waterways. The DEQ approved Merit's plan and also granted the company an easement

through state-owned land to allow Merit to construct the pipeline from the air stripper to the discharge point.

Riparian owners and recreational users along the affected waterways (collectively Anglers of the Au Sable) filed suit against Merit and the DEQ in the Otsego County Circuit Court. Anglers of the Au Sable alleged violations of surface water law, riparian law, and MEPA, and sought an injunction against the discharge plan.

The trial court issued the injunction, concluding that the discharge plan would severely harm the Au Sable water system because of the increased flow of water and the increased level of substances not previously found in Kolke Creek. The court applied the "reasonable use balancing test" from a previous case, *Mich. Citizens for Water Conservation v. Nestle Waters North America, Inc.* (Nestle) and concluded that Merit's proposed amount of discharge constituted an unreasonable use.² The court ruled that the proposed discharge, and the DEQ's authorization of the discharge, violated MEPA.³

All parties appealed and the court of appeals affirmed the trial court's decision regarding the reasonableness of Merit's proposed discharge plan. However, the court dismissed the DEQ as a defendant, applying the court's precedent from another previous case, *Preserve the Dunes, Inc., v. Dep't of Env't'l Quality*, which held that the DEQ's permitting process was insulated from review under MEPA.⁴ Anglers of the Au Sable appealed to the Supreme Court of Michigan and on appeal, the court considered whether *Preserve the Dunes* and *Nestle* were correctly decided.

Preserve the Dunes overruled

In *Preserve the Dunes*, a group of citizens brought suit against the DEQ for authorizing a permit for a sand

dune mining operation. The citizens filed suit under MEPA and the majority of the court held that reviewing the DEQ's permit decisions was outside the judicial authority under MEPA. The majority noted that MEPA provides for a private cause of action regarding damage to the environment.⁵ However, the DEQ's permit application review was based on technical aspects of the application process, and not damage to the environment itself. Therefore, the DEQ's permitting process was insulated from review under MEPA.

In the instant case, the Supreme Court of Michigan held that the majority's holding in *Preserve the Dunes* was incorrect for several compelling reasons. The court noted that *Preserve the Dunes* violated the legislative intent behind MEPA, which was to prevent conduct that is likely to harm the environment as well as to stop conduct that is presently harming it. The permit from the DEQ serves as the trigger for the environmental harm to occur. The permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit.⁶ The court also noted that previous case-law supported review of the issuance of permits likely to pollute, impair, or destroy natural resources under MEPA.

Further, the court noted that MEPA was enacted as part of the environmental protection mandate to the legislature contained in the Michigan Constitution. *Preserve the Dunes* subverted the people's will as expressed in Michigan's constitutional requirement that the legislature "shall" protect the environment. Therefore, the court overruled *Preserve the Dunes* and ruled that the DEQ could be sustained as a defendant in a MEPA action for its permitting decisions.

Having dispensed with that issue, the court then examined the *Nestle* case to determine if Anglers of the Au Sable had standing to bring a MEPA action and whether Merit's discharge plan was an unreasonable use.

***Nestle* overruled**

One of the issues in *Nestle* was whether the plaintiffs had standing to challenge the defendant's pumping of groundwater

that it intended to bottle and sell.⁷ *Nestle* held that a person only has standing with respect to property that they owned or used. In the instant case, the court noted that it had previously overruled the standing doctrine in *Nestle*, explaining that statutes granting standing, such as MEPA, should be applied as written. MEPA specifies that "any person may maintain an action... against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."⁸ Therefore, applying MEPA as written, the court determined that Anglers of the Au Sable certainly qualified as "any person" and had standing to maintain an action to protect Michigan's natural resources. Having dispensed with the standing issue, the court then determined whether Merit's discharge plan was an unreasonable use under the balancing test outlined in *Nestle*.

Reasonableness is the determining factor in deciding water use cases, such as Merit's proposed discharge plan. The court stated that Merit had presented no authority for the proposition that its diversion of contaminated water from one source to an uncontaminated watershed should be considered reasonable. The court held that it would be unconscionable and destructive to determine that it is reasonable to spread dangerous contamination throughout Michigan, as proposed in Merit's discharge plan. Accordingly, the court held that Merit's discharge plan was not an allowable use of water because it was manifestly unreasonable.

See Environmental Harm, page 10



Photograph of the Au Sable River courtesy of the University of Michigan Department of Geology.

Legal Killing of Sea Lions Halted

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In a lawsuit brought by the Humane Society of the United States, the Ninth Circuit Court of Appeals ruled that the National Marine Fisheries Service (NMFS) did not provide an adequate explanation for allowing three states to kill sea lions in order to prevent a “significant negative impact” on salmon populations.¹ The court sent the case back to NMFS for further explanation, noting that earlier NMFS findings showed that fisheries paralleled if not surpassed sea lions in causing negative impacts on salmon populations. The court also found that NMFS failed to explain why the California sea lion’s predation rate would significantly damage the salmon population if it exceeded one percent.²

Background

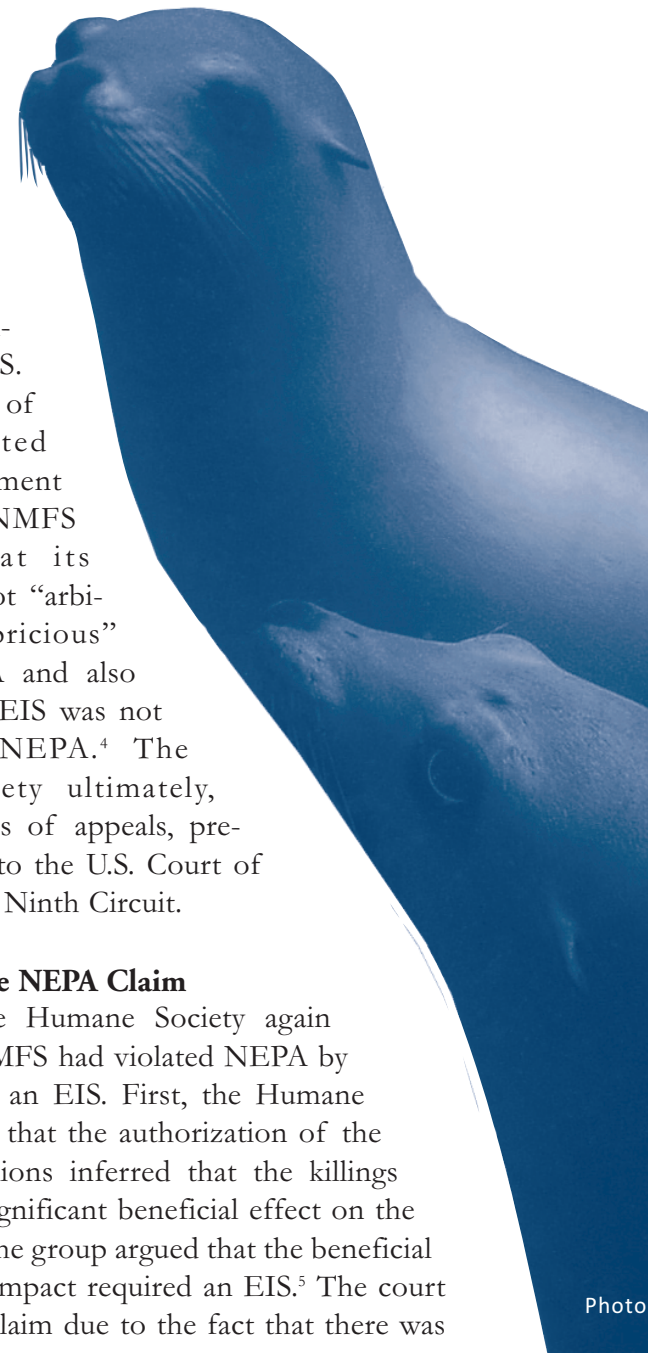
In March 2008, NMFS allowed the states of Oregon, Washington, and Idaho to kill a maximum of 85 California sea lions per year around the Bonneville Dam on the Columbia River. The Marine Mammal Protection Act (MMPA) generally prohibits the taking of marine mammals; however, § 120 of the Act allows states to apply for “the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks” which have been listed under the Endangered Species Act (ESA).³

The Humane Society brought suit against NMFS alleging that the agency’s application of the MMPA was arbitrary and capricious in violation of the Administrative Procedure Act (APA). The suit also claimed that the agency failed to prepare an environmental impact statement (EIS) in violation of the National Environmental Protection Act

(NEPA), which requires an EIS for “major Federal actions significantly affecting the quality of the human environment.” The U.S. District Court of Oregon granted summary judgment in favor of NMFS declaring that its actions were not “arbitrary and capricious” under the APA and also stating that an EIS was not required by NEPA.⁴ The Humane Society ultimately, through a series of appeals, presented its case to the U.S. Court of Appeals for the Ninth Circuit.

Dismissal of the NEPA Claim

On appeal, the Humane Society again claimed that NMFS had violated NEPA by not conducting an EIS. First, the Humane Society claimed that the authorization of the killing of sea lions inferred that the killings would have a significant beneficial effect on the environment. The group argued that the beneficial environmental impact required an EIS.⁵ The court dismissed this claim due to the fact that there was



Photo

no evidence that killing sea lions, whether beneficial to the salmon population or not, would significantly affect the “quality of the human environment.”⁶

The plaintiffs next advanced three theories in support of its argument that NMFS should have prepared an EIS due to the significant adverse impacts of killing sea lions. The plaintiffs first pointed to 40 C.F.R. § 1508.27(b)(4), which states that in deciding whether an EIS is required an agency should consider the degree to which the effects on the quality of the human environment are likely to be highly controversial.⁷ However, after reviewing cases interpreting the term “controversial”, the court decided that NMFS’s final conclusion of no significant controversy was valid. “The term ‘controversial’ refers ‘to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use’... Here, the Commission criticized some aspects of NMFS’s draft EA, but it did not disagree with the EA’s primary conclusions that an EIS was not required, that sea lions are having a significant impact under § 120 and that some sort of lethal removal is reasonable.”⁸

Next, the plaintiffs claimed that an EIS was required under 40 C.F.R. § 1508.27(b)(9), which states that in considering an EIS the “welfare of threatened or endangered species” must be considered. This claim arose from the

fact that the Steller sea lion, which is listed as threatened under the ESA, might be accidentally mistaken for a California sea lion and killed. The court dismissed this argument as well because NMFS has set measures in place to ensure that only the California sea lions would be taken.⁹ Finally, the plaintiffs argued that the killing of the sea lions would reduce sea lion viewing opportunities, but the court rejected this argument stating that “wildlife viewing opportunities” are not a major factor considered when contemplating an EIS.¹⁰

Affirmation of the MMPA Claim

Although the court concluded that an EIS was not required, the court ruled in the Humane Society’s favor on the claim that NMFS acted in an “arbitrary and capricious” manner in authorizing “the killing of sea lions without a substantial explanation of its reasoning.”¹¹ According to the APA, “an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹²

The court found NMFS’s claim that sea lions were having a significant negative impact on the salmon population contradicted an earlier finding which showed that fisheries were having the same or greater impact on the salmon and were not considered to be significant negative impacts.¹³ NMFS argued that the impact of the sea lion was assessed under the MMPA while the impact of the fisheries was assessed under NEPA, therefore they could not be compared.¹⁴ The court dismissed this argument and stated that although the two impacts were assessed under two different acts, the impact of the fisheries is “relevant” data that should have been considered in later findings, and that NMFS could not turn a blind eye to this connection without an explanation.¹⁵

Due to lack of adequate evidence, the court also found issue with NMFS’s claim that the California sea lion’s predation rate, if greater than one percent, would cause a significant negative impact.¹⁶ First, the court noted that NMFS failed to explain “why this level of predation amounts to a ‘significant negative impact,’ and, secondly, it observed that NMFS had also neglected to describe “how this level of removal is related to the decline or recovery of listed salmonids.”¹⁷ Timothy J. Hagen, Executive Director for the Marine Mammal Commission, summed up

what an adequate explanation might entail in a letter to NMFS which states:

There are two issues about which the Service should be particularly clear in its rationale. The first is the basis for determining the extent to which predation must be reduced to promote conservation and recovery of the salmonid stocks. . . . The second is the manner and rationale by which the Service is, in effect, allocating allowable salmonid mortality among different sources of mortality.¹⁸

NMFS argued that the predation rate was set to try and balance protecting all the sea lions under the MMPA while also protecting salmon/endangered species under the ESA. The court said that although this might be a good public policy strategy it still does not meet the “satisfactory explanation” standard under the APA.¹⁹

Conclusion

In this case, the Humane Society prevailed in stopping an action which it found to be offensive. However, the Society did not prevail because the humane treatment of sea lions was required by the law; rather the Society won due to an error in the procedural process leading up to the agency’s decision. So although the Society may have halted the killing of sea lions for a while, NMFS could resume the killings if it shows a “cogent explanation” as to the reasoning behind its decisions.²⁰ According to an article in the *Seattle Times* a spokesman for NMFS, Brian

Gorman, is quoted stating that “the agency is disappointed with the decision but hadn’t decided on its next step.”²¹ But, at least for a while, the California sea lion can swim worry free.🐾

Endnotes

1. *Humane Soc’y of the United States v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010).
2. *Id.* at 1050.
3. 16 U.S.C. § 1389(b)(1) (2010).
4. *Humane Soc’y of the United States v. Gutierrez*, 625 F. Supp. 2d 1052, 1072 (D. Or. 2008).
5. *Locke*, 626 F.3d at 1055-1056.
6. *Id.*
7. *Id.* at 1057.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Locke*, 626 F.3d at 1048.
12. 5 U.S.C. §§ 701-706 (2010).
13. *Locke*, 626 F.3d at 1048.
14. *Id.* at 1050.
15. *Id.* at 1050-1052.
16. *Id.*
17. *Id.* at 1052.
18. *Id.* at 1053.
19. *Id.*
20. 5 U.S.C. §§ 701-706 (2010).
21. Tim Fought, *Court Halts Sea lion Killing at Columbia River Dam*, SEATTLE TIMES, Nov. 23, 2010, available at http://seattletimes.nwsources.com/html/local-news/2013506979_sealions24.html.

Environmental Harm, from page 7

Conclusion

The Michigan Supreme Court held that Merit’s discharge plan was unreasonable and was therefore not an allowable use of water. The court sustained DEQ as a defendant and held it accountable under MEPA for issuing Merit’s permit. Further, the court held that any citizen has standing to bring suit under MEPA. This case was important in that it restored the right of the public to bring suit under MEPA against the state for issuing permits that could result in environmental harm.🐾

Endnotes

1. *Anglers of the Au Sable, Inc. v. Dep’t of Env’t Quality*, 2010 Mich. LEXIS 2591 (Mich. Dec.

- 29, 2010).
2. *Mich. Citizens for Water Conservation v. Nestle Waters North America, Inc.*, 479 Mich. 280 (2007).
3. *Anglers of the Au Sable, Inc.*, 2010 Mich. LEXIS at *5 (2010).
4. *Preserve the Dunes, Inc. v. Dep’t of Env’t Quality*, 471 Mich. 508 (2004).
5. *Id.* at 516.
6. *Anglers of the Au Sable, Inc.*, 2010 Mich. LEXIS at *9 (2010).
7. *Id.* at *15.
8. Mich. Comp. Laws 324.1701(1).

Landowners Adjacent to Artificial Bodies of Water in N.C. Have Riparian Rights

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The North Carolina Court of Appeals recently held that landowners adjacent to a manmade harbor have riparian rights in its waters.¹ This ruling is contrary to the rule in most states that riparian rights only attach to land adjacent to natural bodies of water.² In making its decision, the court focused on the issue of navigability and a prior court of appeals case that treated both natural and artificially-created navigable waters the same in the context of the public's right to use the waters.³ The court also examined two easements granted at the time of construction of the harbor to determine the county's extent of control over the waters.

History

Marshallberg, in Carteret County, is a small community on a peninsula in North Carolina. In 1950, Congress passed the River and Harbor Act of 1950, authorizing the construction of a small harbor with an approach channel in Marshallberg for public use. The local community would contribute to the project by building an access walkway, stalls for tying up boats, and a public landing. In order to facilitate construction, the owners of land on or through which the harbor would be built granted a perpetual right and easement to the county, including the right to have all necessary dredged materials deposited on the land. This easement would then be transferred to the United States to dredge and construct the approach channel. Carteret County also granted a perpetual right and easement to the United States to "enter unto, dig or cut away any or all of the ... land as may be required for the construction and maintenance of the [harbor project] or any enlargement thereof."⁴

The Marshallberg Harbor Case

Marshallberg Harbor was constructed in the late 1950s and since then has been used by members of the community and the general public for various purposes. Both

owners of property adjacent to the harbor and people who use the harbor without owning any property have built docks and walkways and other similar facilities throughout the years. In 2005, certain owners of property adjoining Marshallberg Harbor (the landowners) filed suit against Carteret County, certain other landowners of property in the vicinity, and certain individuals who own no property but use the harbor facilities (the County). The complaint asserted that the landowners have riparian rights in the harbor waters and alleged that the easements granted at the construction of the harbor do not restrict these rights or give any person the right to dock boats or build structures on their property, but only give the United States and the County the right to enter their land for the purpose of maintaining the harbor. They requested the court to enjoin anyone from entering or using their land and riparian corridors and to require the removal of all boats from their property.⁵

The trial court found that owners of land adjacent to Marshallberg Harbor have riparian rights in its waters, subject to the easement rights of the County. The court also ordered that the County "has the right to control the demolition, removal, repair, erection, installation, and use made of any docks, mooring stakes, anchorages, berths, or any permanent structure in the harbor, giving due regard to the riparian rights of the...property owners whose property abuts the harbor ... and the right of the public and all boat owners and boaters to use the waters of the harbor," and that Carteret County would be the arbiter of any dispute concerning permanent structures.⁶ Both parties appealed to the North Carolina Court of Appeals.⁷

Riparian Rights

In North Carolina, riparian rights are "vested property rights that arise out of ownership of land bounded or traversed by navigable water."⁸ Therefore, whether

Photograph of Marshallberg Harbor courtesy of Ralph Southerland.



landowners of property adjacent to Marshallberg Harbor have riparian rights in its waters depends on whether the harbor is a navigable water. The County argued that riparian rights only attach to land adjacent to natural bodies of water, and since Marshallberg Harbor was artificially created, the adjoining property owners have no riparian rights.⁹ The court of appeals, however, had recently held in a case applying the public trust doctrine that whether a body of water is natural or artificial does not determine the extent to which it is navigable.¹⁰ The determining factor as to whether a body of water is navigable is “‘the manner in which the water flows without diminution or obstruction,’ so that ‘any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes’” navigable water.¹¹ Consequently, the court of appeals declared that Marshallberg Harbor is clearly capable of navigation by watercraft and therefore concluded that the owners of land adjoining the harbor have riparian rights in its waters.

Right to Control Marshallberg Harbor

On the issue of whether Carteret County has the right to control permanent structures in Marshallberg Harbor and to serve as arbiter of any dispute over such structures, the court of appeals examined closely two easements granted at the construction of the harbor.¹² In the first easement, the landowners on or through which the harbor would be built granted a perpetual right and easement to Carteret County, later to be transferred to the United States government, “said easement to include the right to have all necessary dredged materials deposited

upon the lands.”¹³ The landowners argued that the county no longer had the right to control Marshallberg Harbor because that right had been transferred to the United States. The court, however, focused on language in the easement establishing that the harbor was built to serve public, rather than private, interests. In order to protect that purpose, some entity must have the right to enforce it. In addition, the court found that the clear language did not transfer all of the County’s rights to the United States, but only the right to have all necessary dredged materials deposited on the land. Therefore, this easement “should be

construed to grant Carteret County the rights necessary to permit the construction, maintenance, and oversight of a small boat harbor for the use of the Marshallberg community and the general public.”¹⁴

In the second easement, Carteret County granted a perpetual right and easement to the United States to “enter unto, dig or cut away any or all of the ... land as may be required for the construction and maintenance of the [harbor project] or any enlargement thereof.”¹⁵ The landowners argued that this easement, by giving the United States the rights necessary to construct and physically maintain Marshallberg Harbor, stripped the County of the rights granted to it in the first easement. The court disagreed and concluded that the second easement “simply authorized the United States to take certain actions while leaving the rights granted to Carteret County under the [first easement] intact.”¹⁶ Consequently, the court held that Carteret County has the right to control permanent structures in Marshallberg Harbor and should serve as arbiter of any dispute concerning such structures.

Conclusion

The Marshallberg Harbor case answers an important coastal question in North Carolina: adjacent landowners have riparian rights in artificial bodies of water. The court’s ruling giving the landowners riparian rights, which include the right to wharf out into the harbor, means that any existing docks and boat slips built by the citizens of Marshallberg will have to be removed.¹⁷ Given that Marshallberg Harbor has been completely open to public use for over fifty years, the effects of this

case on the harbor and the Marshallberg community may be significant.✎

Endnotes

1. Newcomb v. County of Carteret, 2010 N.C. App. LEXIS 2011 (N.C. Ct. App. Nov. 2, 2010).
2. Joseph J. Kalo, *A Trilogy of Significant Coastal Cases*, LEGAL TIDES, 3 (Autumn 2010).
3. See Fish House, Inc. v. Clarke, 693 S.E.2d 208 (N.C. Ct. App. 2010).
4. *Id.* at **4-8.
5. *Id.* at **8-12.
6. *Id.* at **17-20.
7. These appeals were interlocutory because the trial court had other claims to address before issuing a final judgment.
8. Newcomb, 2010 N.C. App. LEXIS 2011 at **28.
9. *Id.* at **27-28.
10. See Fish House, 693 S.E.2d 208.
11. Newcomb, 2010 N.C. App. LEXIS 2011 at **30 (quoting Fish House, 693 S.E.2d at 212).
12. The trial court erroneously certified this issue for immediate appeal, but the Court of Appeals granted *certiorari* on its own motion to permit it to address the issue. Newcomb, 2010 N.C. App. LEXIS 2011 at **33-38.
13. *Id.* at **44.
14. *Id.* at **45-48.
15. *Id.* at **49.
16. *Id.* at **50-51.
17. Kalo, *supra* note 2.

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location of the original easement, not to the physical feature, the mean high water mark. The dissent contended that in a unique and dynamic area such as ocean shoreline it defies logic to enforce easements in the manner of the majority, citing Texas case law to support its contention that rolling easements are recognized under Texas common law. While the majority answered the first certified question in the negative, and therefore did not reach the latter two, the dissent would have answered the first affirmatively, finding the basis for the recognition of rolling easements in the common law and that there would be no taking and thus no additional compensation due to property owners.

Conclusions

What ultimately links both the Texas Supreme Court ruling in *Severance* and the *Trepanier* cases in Florida is the proposition that the public easement is attached to a geographic *location* (i.e.—specific coordinates on the land) instead of a geographic *feature* (i.e.—the dry-sand beach seaward of the natural vegetation line). The law of lateral public beach access in Texas and Florida seemed worlds apart in 2007. At that time a Florida appeals court had stated that it was not clear that an established public easement on the beach based on custom would move landward with the dry-sand beach. Texas, meanwhile, had well-established case law supporting the Texas Open Beaches Act and its famous “rolling easement” for public access on the beach seaward of the vegetation line.

In 2010 the situation substantially changed. The 2007 remand of *Trepanier* in Florida resulted in a trial court

decision that might still leave some hope alive that courts in Florida will not use the dynamism of the beach environment to undermine existing, historical use of the dry sand beach. Meanwhile, the Texas Supreme Court did exactly this in *Severance* when confronted with questions about the OBA. The *Severance* holding has already caused the cancellation of a large scale beach renourishment program that was to be undertaken on Galveston Island. The effect of the *Trepanier* decision is less clear since the decisions emphasized that the property in question had been affected by the easement in the past. Furthermore, the decision in Florida, while positive for the public’s property right to use the dry-sand beach, came only from a trial court while the Texas decision came from the Texas Supreme Court, binding all other courts in the state. As this issue went to press, the Texas Supreme Court agreed to rehear the suit.✎

Endnotes

1. Trepanier v. County of Volusia, 965 So.2d 276 (Fla. 2007). See also Lynda Lancaster, *Landowners Prevail in Beach Access Case*, 7:1 SandBar, 9 (2008).
2. Trepanier, 965 So. 2d at 293.
3. Severance v. Patterson, 54 Tex. Sup. Ct. J. 172 (2010).
4. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 79 (Fla. 1997).
5. Trepanier v. County of Volusia, 17 Fla. L. Weekly Supp. 782a (Fla.Cir.Ct. March 30, 2010).
6. Joseph Rosenblum, *Rolling Beach Easement Not a Taking*, 7:1 SandBar, 5 (2008).

WASHINGTON STATE'S WATER LAW AMENDMENTS UPHELD

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Photograph courtesy of Roger McLassus.

Recently, the Washington Supreme Court, en banc, upheld the state's water law act, which essentially allows the state to grant water rights based on system capacity rather than actual water use.¹ Various groups had filed actions against the state of Washington, contending that several sections of the legislature's 2003 amendments were unconstitutional.

Background

Awarding municipalities with expanded water rights enables cities to meet increased water demands if they experience growth. The Washington state legislature significantly amended the Washington water law act in 2003 in response to the court's decision in *Dep't of Ecology v. Theodoratus*.² *Theodoratus* held that Washington statutes required that actual beneficial use must occur before a water right certificate may be issued and concluded that the Department of Ecology had not been following the statute when it vested water rights based upon system capacity instead of actual beneficial use of water. The *Theodoratus* court, however, cautioned that it did not consider "issues concerning municipal water suppliers" and further noted that differences between municipal water use and other water use existed.³ At the time, "municipal water supply" was not statutorily defined nor were "municipal water supply purposes."

In response, the legislature amended the water law act in 2003 to define "municipal water supplier" and "municipal water supply purposes" for the first time, and to establish that municipal water rights were not limited to the number of subscribers.⁴ The bill also declared that water right certificates issued prior to Sept. 9, 2003 for municipal water supply purposes based on a system capacity were rights in good standing, but those granted

after required the Department of Ecology to issue a new certificate only for actual beneficial use of water.⁵

In 2006, two separate groups of challengers—federally recognized Indian tribes, and individuals and environmental groups, respectively—separately sued the state of Washington, alleging that several sections of the 2003 amendments were unconstitutional because they facially violated separation of powers and substantive due process. The two cases were consolidated, and the trial court held that the amendments to the definition of municipal water suppliers and the retroactivity provision violated separation of powers because they effectively overruled the *Theodoratus* decision. The trial court, however, declined to reach the substantive due process claims. All parties sought review.

Separation of Powers

Specifically, the challengers contended that amendments to the definition of municipal water suppliers and the retroactivity provision facially violated separation of powers because they applied retroactively, which the challengers alleged was an overstep of the legislative function. The 2003 amendments included the following changes:

1. defined municipal water suppliers broadly to include private developers whose projects would provide water to more than 15 houses;
2. provided that under certain circumstances, a municipality's water rights would not be limited to the specified number of service connections or stated population so long as the change is "consistent with the approved water system plan";
3. largely made existing water certificates based on system capacity valid and limited the situations

where the Department of Ecology could seek to invalidate a water rights certificate;

4. authorized municipal water suppliers, under certain circumstances, to shift place of use within the boundaries of approved water plans without consulting the Department of Ecology or notifying other water rights' holders;
5. and allowed existing water rights certificates that would now be considered to be for municipal water services to be so amended.⁶

The challengers argued that these provisions changed the requirements set forth in *Theodoratus* for private water rights to vest. Additionally, municipal water suppliers who had water rights certificates issued under the former capacity standard had rights in good standing even if those rights would not have vested under *Theodoratus*.

In order to decide whether the retroactive application of a statute violates separation of powers, the court must determine whether the activity of one branch threatens the independence or integrity, or invades the prerogatives, of another.⁷ The court has held that “[r]etroactive legislation that interferes with vested rights established by judicial rulings, interferes with a judicial function, or results in manifest injustice or threatens the independence, integrity, or prerogatives of the judicial branch may violate separation of powers.”⁸

In the instant case, the court found no general separation of powers violation because the legislature gave deference to the court’s *Theodoratus* opinion, adopting the *Theodoratus* holding prospectively and using the fact that the *Theodoratus* court did not consider issues concerning municipal water suppliers as an opportunity to secure the rights of some existing water certificate holders. Because the legislature made no attempt to apply the law to an existing set of facts, to affect the rights of parties to the court’s judgment, or to interfere with any judicial function, the amendments did not threaten the independence or integrity of the judicial branch.

Substantive Due Process

Because Washington has a “first in time, first in right” water regulatory scheme, junior rights holders take their water rights subject to the rights of senior rights holders, and in times of scarcity, junior rights holders suffer first. The challengers argued the amendments facially violated due process because junior rights holders could suffer potential impairment to their water rights without indi-

vidual notice or prior opportunity to be heard. Additionally, the challengers contended that because the amendments defined municipal water suppliers as anyone who provides water to fifteen or more residences regardless of when that water rights certificate was issued, municipal water suppliers could increase the population they served, potentially impairing other water rights holders’ amount and quality of water without notice or opportunity to be heard.

The court, however, disagreed, noting that mere potential impairment of a hypothetical junior rights owner’s enjoyment of a water right was insufficient for a successful facial due process challenge. The court also reiterated that no case had been pleaded or proved where an individual rights holder’s reasonable expectation of the enjoyment of water rights had actually been impaired or deprived in violation of due process of law, and therefore, the facial challenge had to be rejected.

Conclusion

Although the 2003 amendments may impact the water rights of some junior water rights holders, they do not change the legal rights or prioritization of water rights holders. Nor do the amendments deprive any vested rights holder of any vested right as a matter of law. Therefore, both the 2003 amendments to the Washington state water law act and the *Theodoratus* opinion continue to coexist.☺

Endnotes

1. *Lummi Indian Nation v. State of Washington*, 241 P.3d 1220 (Wash. 2010) (en banc).
2. 135 Wash. 2d 582 (1998).
3. *Lummi Indian Nation*, 241 P.3d at 1225.
4. *Id.* at 1226.
5. *Id.*
6. *Id.* at 1228.
7. *Id.* at 1229.
8. *Id.*



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