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Gradual Takings Claim Not Barred by Statute of Limitations

Banks v. U.S., 314 F.3d 1304 (Fed. Cir. 2003).

Jason Savarese, 2L

The Federal Circuit recently addressed the time limits for filing a gradual takings lawsuit, in which a landowner argues that his property has been taken by government action over the course of several years.

Background

A group of landowners with acreage running along four miles of Lake Michigan sued the U.S. claiming marina jetties installed by the Army Corps of Engineers (the Corps) were causing a gradual, yet steady erosion of their properties. Although the shorelines of the Great Lakes naturally erode, the erosion had been accelerated over the years by the construction of the harbor jetties, built by the Corps in Lake Michigan's St. Joseph Harbor around 1903. The jetties were upgraded using sandtight steel sheet piling from 1950 through 1989. These improvements doubled the annual, natural erosion rate of Lake Michigan's littoral land abutting the jetties from one to two feet per year.

Because of the increased erosion surrounding St. Joseph Harbor, the Corps developed a sand mitigation plan pursuant to the Rivers and Harbors Act.[1] For over fifteen years the Corps attempted to mitigate the erosion by nourishing and replenishing the beaches with fine sand. In 1986, the Corps switched to coarser materials with a longer retention time on the beach.

The Lawsuit

The landowners sued the United States in July of 1999, charging the Corps with restricting the natural flow of sand and river sediment to their properties, causing a slow, yet unceasing taking of their littoral land without just compensation. The owners claimed these jetties and some dredging projects had permanently taken away sand needed to replenish the naturally eroding shorelines along Lake Michigan.

The Corps moved to dismiss for lack of jurisdiction, arguing that the takings occurred more

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NMFS Strengthens Sea Turtle Protections

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

On February 21, 2003, the National Marine Fisheries Service (NMFS) issued a final rule strengthening the protections for endangered and threatened sea turtles. The NMFS amended its turtle excluder device (TED) regulations to improve the effectiveness of the regulation in reducing sea turtle mortality in the southeastern United States. The final rule took effect on April 15, 2003. However, the Gulf Area received a grace period until August 21, 2003.

All five endangered or threatened sea turtles are found within U.S. waters. Large loggerhead and leatherback turtles can be found in the state

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From the Editor's Desk

Isn't it amazing how time flies when you are having fun? The Editorial Staff of *THE SANDBAR* can hardly believe that we are publishing and working on Volume 2. It has been an exciting and rewarding first year. For me, it has been a privilege to work as part of a team to develop and publish the legal reporter for the National Sea Grant Law Center. It is even more of an honor to now serve as Editor.

In the upcoming issues, we will strive to accurately and timely inform the Sea Grant community regarding recent developments in ocean and coastal law from around the nation. Guest authors will be spotlighted more regularly to provide unique perspectives on emerging issues and historical events. Special features, such as book reviews, international law updates, and federal register announcements, will appear on a recurring basis. And, as always, Coast to Coast will highlight fun and interesting news items.

On a personal note, I am really looking forward to our second year. This is a fantastic time to be a part of the marine law and policy community. Significant and groundbreaking legislation is currently before Congress and everyone is anxiously awaiting the reports of the U.S. Ocean Commission and the Pew Oceans Commission. As Editor, I will ensure that our attorneys and research associates are working hard to cover these developments in future issues.

As always, the Staff of *THE SANDBAR* welcomes your thoughts and comments. *THE SANDBAR* is published to serve you, as managers and decision-makers, so please let us know how we are doing. Thanks for all your support during our first year and for continuing the journey with us.

Sincerely,
Stephanie Showalter
Editor

Makah Whaling Plans Delayed Again

Anderson v. Evans, 314 F.3d 1006 (9th Cir. 2002).

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

For the second time in as many years, the Ninth Circuit Court of Appeals determined that the federal government's environmental assessment of the Makah Tribe's whaling plans is inadequate.[1] The court also addressed whether the provisions of the Marine Mammal Protection Act (MMPA) apply to the Tribe's proposed whale hunt.

Background

The Makah Tribe of Washington State is a traditional whaling tribe. The Makah are the only Native American tribe to have entered into a treaty with the United States to protect their whaling rights. In 1855, in exchange for the majority of the Makah's land on the Olympic Peninsula, the Makah Tribe was awarded the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations."[2] The Makah continued to whale until the late 1920s, traditionally targeting the North Pacific gray whale.

There are two distinct populations of North Pacific gray whales, an eastern stock, the California gray whales, and a western stock located in East Asian waters. California gray whales annually migrate between the North Pacific and Mexico. The gray whale was once considered an endangered species, but conservation measures were successful and the whale was removed from the endangered species list in 1994. With the delisting of the gray whale, the Makah began pursuing the revival of whaling off the coasts of Washington State and the Strait of Juan de Fuca.

In 1996, the United States agreed to assist the Makah in obtaining a gray whale aboriginal subsistence quota from the International Whaling Commission (IWC). Whaling is closely regulated in the United States by the Whaling Convention Act and the MMPA, and internationally by the IWC. The IWC sets the annual whaling quotas for a variety of whale stocks. The issue of aboriginal subsistence whaling deeply divides the IWC. Originally, the International Convention for the Regulation of Whaling (ICRW) allowed the taking of gray whales by aboriginal peoples only "when the meat and products of such whales are to be used exclusively for local consumption by the aborigines."[3] This language has undergone several alterations and now the ICRW schedule limits the use of the gray whale quota to aboriginal groups "whose traditional aboriginal subsistence needs have been recognized."[4] Unfortunately, the schedule does not specify whether the subsistence needs have to be recognized by the IWC or the individual countries.

The Environmental Assessment

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of their actions. If a proposed federal action, such as the issuance of a whaling quota, would "significantly affect the quality of the human environment," the agency must prepare an Environmental Impact Statement (EIS) thoroughly analyzing the environmental impacts.[5] An agency may first prepare an Environmental Assessment (EA) to determine whether a full EIS must be completed.

In 1997, the first EA related to this controversy was prepared as a result of pressure applied by several conservation organizations. In the EA, the National Marine Fisheries Service (NMFS) made a "finding of no significant impact" and, therefore, did not prepare an EIS. The NMFS awarded the Makah a quota to take five gray whales per year. The "finding of no significant impact" was challenged in federal court. The district court granted summary judgment in favor of the NMFS. In 1999, the Makah resumed whaling and killed one whale. On appeal, the Ninth Circuit held that the EA was inadequate because it was prepared by the NMFS after, not prior to, making a commitment to the Makah to authorize the management plan.[6] The court ordered the preparation of a second EA.

A new Draft EA was issued in January 2001. The EA was based upon the Makah's management plan which restricted the hunt to a particular location to ensure the hunters only targeted migrating whales. Before the comment period on the Draft EA expired, the Makah amended their management

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Public Comment Period Required in Pacific Coast Groundfish Fishery

Natural Resources Defense Council v. Evans, 316 F.3d 904 (9th Cir. 2003).

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

The Ninth Circuit Court of Appeals recently determined that the National Marine Fisheries Service (NMFS) is required to provide a public comment period prior to issuing management measures for the Pacific Coast Groundfish Fishery.

Background

The Pacific Fishery Management Council (Council) is authorized, under the Magnuson Act, to prepare fishery management plans for the fisheries off the coasts of California, Oregon, and Washington.[1] In 1990, the Council adopted framework procedures for the management of the Pacific Coast Groundfish Fishery. Those procedures were approved by the NMFS. During each annual management cycle, several events take place. A public meeting is held in September to assist the Council in developing recommendations for the groundfish fishery for the upcoming year. The preliminary recommendations are made available to the public and a second meeting is held in November to develop final recommendations. The final recommendations regarding harvest levels and management measures are submitted to the NMFS. Upon approval of the submission by the Secretary of Commerce, the recommendations are published in the Federal Register and become effective on January 1 of the upcoming fishing year.

The Council and the NMFS followed the above procedures in recommending and issuing specifications and management measures for 2001. Public meetings were held in October and December 2000 and the recommendations were published in the Federal Register on January 11, 2001. The recommendations were effective as of January 25, 2001, but public comments were invited through February 12, 2001. The NMFS stated there was "good cause to waive prior notice and the opportunity for public comment under the [Administrative Procedure Act (APA)] on the grounds that delay in implementing management measures could be harmful to stock."[2] The NMFS has relied on this same exact rationale to avoid a public comment period every year since the adoption of the framework procedures in 1991.

The Challenge

In early 2001, the National Resources Defense Council (NRDC) and several other environmental organizations filed suit against the NMFS claiming the agency failed to comply with the public notice and comment requirements of both the APA and the Magnuson Act. The parties consented to proceed in front of a magistrate judge who ruled that the recommendations were "proposed regulations" which were invalid for failing to comply with the notice and comment requirement of the Magnuson Act. The judge also ruled that the NMFS failed to establish good cause to deviate from the APA's notice and comment requirements. The NMFS appealed.[3]

Mootness

Initially, the NMFS argued that the NRDC claims were moot because the 2001 specifications and management measures have been replaced by subsequent rules in 2002 and 2003. A claim or case is moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."[4] The Ninth Circuit held the NRDC's claims were not moot, because they were "capable of repetition, yet evading review."[5] This exception allows otherwise moot cases or claims to continue when (1) the duration of the challenged government action is too short to allow full litigation before the action ceases and (2) there is a reasonable expectation that the plaintiffs will be subject to the same action in the future. The one-year management cycle of the Pacific Groundfish Fishery would most likely prevent the full litigation of a particular set of regulations prior to the adoption of a new set and as the NMFS has repetitively invoked the good cause exception,

there is a reasonable expectation that these issues will arise again in the future. The court, therefore, allowed the action to proceed.

Good Cause Exception

The crux of this dispute is whether the NMFS properly invoked the good cause exception to the APA's notice and comment requirements. Public notice of an agency's proposed rulemaking must be published in the Federal Register and "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[6] Notice does not need to be given "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor[e] in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[7] An agency should only invoke the good cause exception when a delay would cause real harm or interfere with the agency's ability to fulfill its mission.[8]

Although there are plenty of opportunities for the public to make comments to the Council during the public meetings, there is no opportunity for interested parties to submit formal comments to the NMFS. Each year the NMFS invokes the good cause exception on the same grounds, that a delay in implementation would be harmful to stocks and would prevent the management measures from being in place by the first of the year. However, the agency failed to provide any explanation of why providing public notice and comment prior to January would have interfered with their ability to promulgate specifications and management measures in 2001. Rather, the NMFS relied on generic timeliness concerns. Such generic explanations are not sufficient to invoke the good cause exception. The NMFS must provide specific reasons why the provision of a public notice and comment period are impractical or would hinder their ability to issue the management measures *for that year*.

Conclusion

The Ninth Circuit determined that the NMFS failed to comply with the public notice and comment requirements of the APA with regards to the specifications and management measures issued in 2001. This ruling, however, does not mean that the NMFS must provide a public comment period for future specifications. As long as the NMFS adequately justifies its invocation of the good cause exception, the agency fulfills its duties under the APA, regardless of whether public notice and comment is actually provided.

ENDNOTES

1. 16 U.S.C. § 1852(a)(1)(f) (2003).
2. *Natural Resources Defense Council v. Evans*, 316 F.3d 904, 908 (9th Cir. 2003).
3. Because the Ninth Circuit Court of Appeals determined that the APA required a notice and comment period, the court declined to address whether such notice and comment was also required by the Magnuson Act. The court stated that "if at some point NMFS validly invokes the APA's good cause exception, then it may be necessary to consider whether the Magnuson Act separately requires notice and comment." *Id.* at 913 n.11.
4. Black's Law Dictionary 1008 (6th ed. 1990).
5. *NRDC*, 316 F.3d at 910.
6. 5 U.S.C. § 553 (2003).
7. 5 U.S.C. § 553(b)(B) (2003).
8. *NRDC*, 316 F.3d at 911.

Photo courtesy of NOAA Photo Library

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than six years before the Plaintiffs' filed suit, and thus the claim was barred by the six-year statute of limitations. Claims against the government must be filed "within six years after such a claim first accrues."[2] The landowners argued that their gradual takings claims were unclear until the end of the 1990s, when, through the compilation of three Corps technical reports, they learned that the visible erosion of their littoral land was both permanent and irreversible. The Court of Federal Claims determined that the statute of limitations began to run in 1989, the year the Corps completed the steel sheet piling upgrades. Because the landowners waited to file their claims until July 9, 1999, ten years later, the court ruled their claims time-barred and dismissed the lawsuit. The landowners appealed.

Photo of St. Joseph Harbor Courtesy of Fishweb.com at http://www.fishweb.com

Stabilization Doctrine

In this situation, the erosion of the landowners' properties was not sudden nor obvious. Rather, the taking occurred over the course of a century. A gradual physical takings claim accrues when the condition stabilizes, or when the result of the government action is demonstrated to be a permanent taking. It is important to note that a claim does not accrue simply because the process causing the gradual taking ceases nor does it accrue when the full extent of damage can be determined. The law requires the condition to stabilize so that a more accurate damage assessment can be made. This also ensures that the landowner receives notice of the permanent nature of the condition. Before a claim can accrue, the situation must stabilize to the point that the "consequences of [the government action] have so manifested themselves that a final account may be struck."[3] Basically, under the stabilization doctrine, "a claim stabilizes when the 'permanent nature' of the taking is evident."[4]

The Corps' Technical Reports

In the present case, the main question was whether the landowners were justifiably uncertain about the impacts of the Corps' mitigation efforts on the permanence of the damage to their land no earlier than 1999. The Court held that the vast uncertainty caused by the Corps' twenty-three year period of mitigation, which appeared successful, stayed the accrual of the takings claims until the release of the Corps' three technical reports revealed the permanent and irreversible nature of the erosion. Technical reports on the St. Joseph mitigation endeavor were issued by the Corps in 1996, 1997, and 1999. The June 1996 report expressed uncertainty about the impact of the beach nourishment program, but stated that mitigation might provide partial protection against erosion. The 1997 Technical Report described the erosion as irreversible, but also discussed a favorable change in the amount of sand eroding in the area. The court held that these two reports would have confused landowners as to whether they were suffering a permanent and irreversible taking or if the mitigation measures were succeeding. It was not until the January 1999 Report that the Corps stressed the irreversible and possibly permanent nature of the erosion. The permanent

nature of the taking could not have been known by the landowners until the Reports were issued. The court ruled that accrual of the landowners' claims began when the 1996, 1997, and 1999 reports were issued.

Conclusion

The landowners are not barred by the statute of limitations since their claims were filed within six years of the time the claim accrued. The case was remanded for further proceedings before the Court of Federal Claims.

ENDNOTES

1. River and Harbor Act of 1968, Pub. L. No. 90-483, 82 Stat. 731, 735 (1970). Section 111 of the RHA gives the Secretary of the Army the power "to investigate, study, and construct projects for the prevention or mitigation of shore damages attributable to Federal navigation works."
2. 28 U.S.C. § 2501 (2003).
3. *United States v. Dickinson*, 331 U.S. 745, 749 (1947).
4. *Banks v. United States*, 314 F.3d 1304, 1309 (Fed. Cir. 2003).

The 1953 International North Pacific Fisheries Convention: Half-century Anniversary of a New Departure in Ocean Law

Harry N. Scheiber, Co-Director, Law of the Sea Institute, University of California, Berkeley

In June 1953, just fifty years ago, the International North Pacific Fisheries Convention—one of the most important fishery treaties in modern history—entered into force. Negotiated in Tokyo in November and December 1951, its signatories were Japan, Canada, and the United States. Under its terms, the tripartite North Pacific Fisheries Commission was established, its charge being to oversee and evaluate scientific research on the condition of salmon, halibut and other designated fish stocks in the eastern North Pacific Ocean area. In addition, the Commission was empowered to establish actual allocation levels for the catch in high seas waters.[1]

This treaty was truly historic in ways that are well worthy of our attention today, as we recall the several dimensions of its context when the three North Pacific nations fashioned its terms.

First, it was noteworthy if for no other reason than it was the first international engagement undertaken by the Government of Japan beyond the Peace Treaty and defense pact that ended the postwar Occupation (1945-52), restoring Japan to full sovereign status in the global community of nations. The timing accurately reflected the exceptionally important place of ocean fishing in the Japanese economy and in Japan's diplomatic priorities.

A second historic feature of the Convention was that it represented the culmination of the United States government's postwar policy of promoting the rapid and full restoration of Japanese fishing capacity. The Occupation, under General Douglas MacArthur, had given highest priority to rebuilding Japan's fishing fleets as a way of stimulating general economic recovery while providing for Japanese nutritional needs. Over the bitter objections of the British Commonwealth, China, and the Philippines, MacArthur's occupation regime returned Japan in a major way to Antarctic whaling; and it promoted the expansion of distant water fishing, including factory ship expeditions for tuna in the South Pacific. The Occupation also built up the trawling fleet to the point where by 1949 it was depleting stocks in waters off the Chinese and Korean coastlines; and it promoted fish exports even when they meant new competition for the American fishing industry. Hence in

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this feature of its contemporary context, the North Pacific Convention should be seen as the capstone of an established policy. To be sure, as will be explained below, the treaty placed a seaward limit in the Northeast Pacific beyond which Japan was committed to refrain from fishing salmon or halibut under specified conditions, and in that sense worked against Japan's desires. But in the large sense it was only one feature of a larger U.S. policy that had championed Japanese fishing interests and the expansion of Japan's fishing enterprises in far-flung areas of the globe. Perhaps most important to remember is that this largely benevolent U.S. policy toward Japan was pursued in a way that overrode and ignored the wishes and interests of America's wartime Allies.[2]

A third aspect of the Convention that gave it great significance in 1953 was its introduction into ocean law and diplomacy of what was known as the "abstention doctrine" or "abstention rule." This phrase referred to terms of the Convention by which each power agreed to abstain from fishing of those species that were determined scientifically to be under exploitation at the point of "maximum sustained yield." In this respect, the treaty represented a major departure from the traditional doctrine of freedom of fishing on the high seas, out beyond the limits of offshore national jurisdiction (that is, beyond the boundaries of the coastal States' territorial seas, typically three miles offshore). Abstention was by agreement, hence voluntary, so that technically, freedom of the seas as the overriding principle was preserved. Moreover, as became an issue later on, no other nations than the three signatories were in any way legally obliged to abstain from fishing on stocks that the Convention was protecting.

For many Japanese commentators, then and even today, the Convention represented a surrender of the "freedom of the seas" principle, entirely to Japan's disadvantage, as they claim; and they attribute it to duress, because in effect the U.S. Government had extracted from Japan's prime minister in 1951, while the Occupation was continuing, a promise to conclude a fisheries agreement as part of Japan's commitments in return for an early peace-treaty settlement.[3]

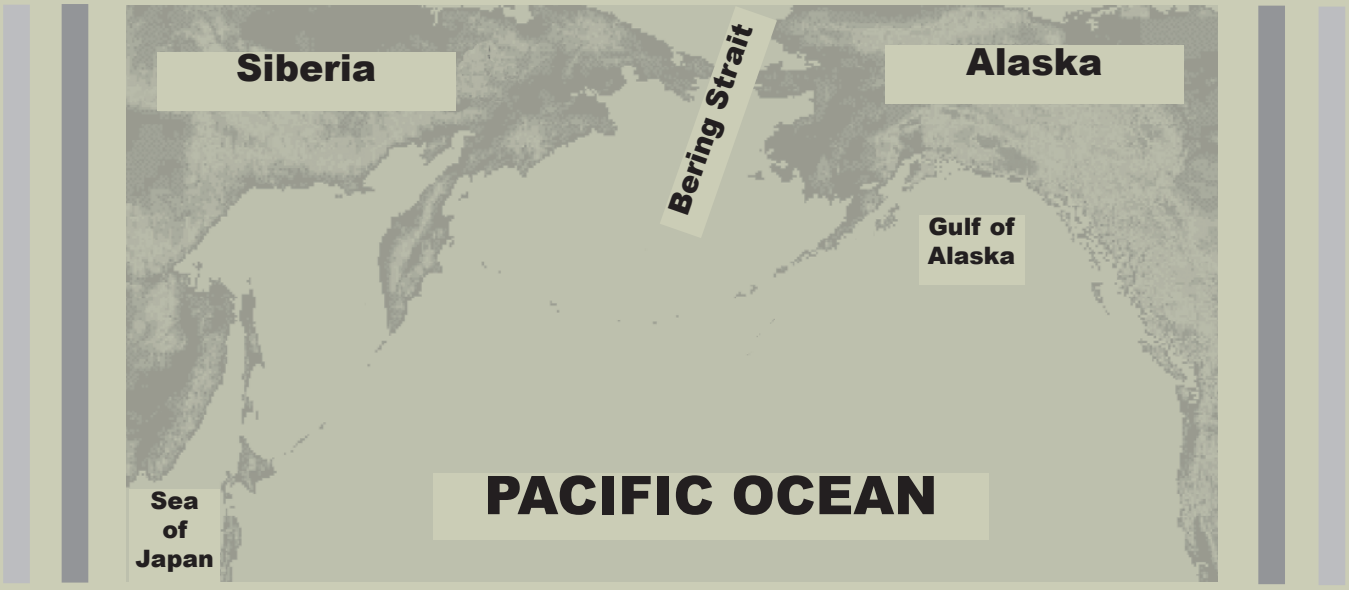
In fact, the U.S. diplomatic archives reveal that the State Department did not force the terms of the treaty upon Japan; to the contrary, the American negotiators were deeply worried that the talks would break down at one point. In addition, the terms of the Convention—typically denounced by Japanese legal and political commentators as harmful to Japanese fishing interests—in fact were highly advantageous to Japan in ways that the Japanese fishing industry and government officials fully understood in 1951-53, as evidenced in recently opened archival records in Tokyo. This was so because "abstention" as defined in the Convention would apply only to fish stocks that were already under a scientific management regime with conservationist purposes, and where proof was forthcoming that the fish were being exploited at maximum sustained yield. There was no other such regime in effect anywhere in the Pacific Rim or Indian Ocean at the time, and so the Japanese negotiators were victorious in establishing the precedent on terms that placed them in a position to resist efforts by other governments (such as Australia's, which wanted to exclude Japan's fleets from waters in the entire Southern Hemisphere!) to use the North Pacific Convention as a model for exclusionist policies.[4]

Indeed, insofar as the Convention provided a model in international fisheries diplomacy and management, it was in its advancement of the international commission concept. In that respect, too, it built upon an ongoing aspect of U.S. policy, already expressed in American support for the International Whaling Commission and the initiative of the U.S. Government in creating commissions for tropical tuna in the Eastern Pacific and for the ocean stocks of the Northwest Atlantic.[5] Moreover, despite continuing tensions regarding abstention itself and the allocation policies, the Convention remained in effect for two decades—serving as the mechanism for maintaining the uneasy but steady balance of fishing powers in the Northeast Pacific, and as the protector of maximum sustained yield in the crucially important salmon fishery. In that respect, it bridged the period from the immediate postwar settlement to the advent of the extended 200-mile exclusive zones that rendered necessary a newly designed regime both in the Northeast Pacific and in other ocean fishing areas of the globe. Even today, it casts a long shadow, as the implementation of the United Nations Straddling Stocks

Convention will (if successful) revivify and apply the abstention doctrine in a new context while adapting in this new arena of high-seas fisheries management the international commission model. In one respect there is a major departure, however: the "maximum sustained yield" standard served well in its day, but is now remembered as the precursor of more protective concepts such as the precautionary principle and the conservation of marine ecosystems as central features of modern high seas fishery management.

ENDNOTES

1. 205 United Nations Treaty Series 80. For historical analysis and accounts of the treaty's operation, see Harry N. Scheiber, *Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958,* 16 ECOLOGY LAW QUAR. 23-99 (1989); and Roy I. Jackson and William F. Royce, OCEAN FORUM; AN INTERPRETIVE HISTORY OF THE INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION (1986).
2. *See*, *inter alia,* Harry N. Scheiber, INTER-ALLIED CONFLICTS AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPAN'S WHALING AND MARINE FISHERIES (Tapei: Academia Sinica Press, 2001).
3. The most prominent legal commentator who has advanced this view is Judge Shigeru Oda of the International Court of Justice. *See. e.g.*, Oda, INTERNATIONAL CONTROL OF SEA RESOURCES 90 (1963) (characterizing the abstention doctrine as "very similar to acquisitive prescription . . . [and] completely contrary to the concept of freedom of the sea." A reiteration of this exact view was voiced by Professor Yasuko Tsuru of Japan, in her presentation on the abstention doctrine to the February 2003 Law of the Sea Institute conference, "Multilateralism and International Ocean Resources Law" at UC Berkeley (to be posted on the LOSI website at http://www.law.berkeley.edu/cenpro/earlwarren/lawofthesea.html)
4. A valuable autobiographical account of the Convention's negotiation, by the head of the American delegation and principal author of the abstention doctrine, is by William Herrington, *In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations,* 16 ECOLOGY LAW QUAR. 101 (1989). Based on evidence from the U.S., Canadian, Australian, United Kingdom and New Zealand archives, an account of the diplomatic context, with conflicted Allied and U.S. positions vis-à-vis Japan's long-run interests, is in Scheiber, INTER-ALLIED CONFLICT, *supra,* at 175-96.
5. *See, inter alia*, Albert W. Koers, INTERNATIONAL REGULATION OF MARINE FISHERIES: A STUDY OF REGIONAL FISHERIES ORGANIZATIONS (1973); and Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries*, 13 ECOLOGY LAW QUAR. 381 (1986).



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plan. The Makah's new plan contains no geographic limitations and allows the Makah to take up to five whales per calender year. In 2001, the NMFS issued its Final EA based upon the new management plan and made a "finding of no significant impact." On December 13, 2001, the NMFS granted the Makah a quota of five gray whales in 2001 and 2002 and approved the Makah's management plan.

In January 2002, the second Final EA was challenged by conservation organizations alleging violations of both NEPA and the MMPA. The district court held that the NMFS adequately evaluated the environmental impacts of issuing a subsistence whale quota. The district court also ruled that the Treaty of Neah Bay, which preserved the whaling rights of the Makah, took precedence over the requirements of the MMPA.

NEPA

There are three areas which the environmental groups claim the NMFS's EA fails to adequately address: (1) the impact on public safety; (2) the controversy and uncertainty surrounding the possible effects of the whale hunt; and (3) the precedential effect of approval.

One of the factors an agency must address in an EA is the "degree to which the proposed action affects public health or safety."[7] The plaintiffs argued that the Makah's proposed whale hunt, involving high-powered rifles, small boats, and powerful marine mammals, presents a serious safety issue. To evaluate the safety issues surrounding the whale hunt, the NMFS relied on an expert hired by the Tribe. The safety expert had previously made recommendations to the Tribe, which are reflected in the Tribe's management plan, including requiring safety officers on the vessels and firing restrictions. The plaintiffs argued that the EA is deficient because the NMFS relied on a non-independent expert. However, a government agency may rely on experts hired by others if the agency objectively analyzes the qualifications and conclusions of the expert, which the NMFS did in this situation. After evaluating all the scientific evidence, the NMFS determined that public safety would not be endangered by the proposed whale hunt. The Ninth Circuit held that the NMFS findings with regard to public safety were not arbitrary or capricious.

When determining whether an EIS needs to be prepared, an agency must evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial"[8] or "highly uncertain."[9] The parties to this action agreed that the Makah whale hunt will not have a significant impact on the overall California gray whale population. The plaintiffs, however, argued that the impact on the whales in the local area is uncertain. A small number of whales arrive in the Makah's proposed hunting area each summer. A portion of these whales are returning whales, whales which have been in the area in previous summers, although not necessarily returning every year. There is no scientific information available on the recruitment mechanism of this smaller group of whales. There is also no information on what impact the hunt will have on the local whales. The main concern is whether whales who have not previously visited the local area will do so to

Photo courtesy of Debbie Preston, Northwest Indian Fisheries Commission

replenish the population, in the event that returning whales are killed during the Makah's hunt. The NMFS failed to address this crucial question of impact on the local area. Because of the controversial and uncertain nature of the effects, the court determined a full EIS must be prepared by the agency.

An agency must also look at "the degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration."[10] The approval of the Makah's whale hunt could have significant precedential impact. The declaration by the United States of the subsistence needs of one of its own aboriginal groups, instead of the IWC, could be used as a precedent for other countries to do the same, thereby undermining the authority of the IWC. As the EA failed to examine the potential precedential impact of the approval in other IWC nations, a full EIS is required.

MMPA

The environmental groups also argued that the United States issued a gray whale quota in violation of the MMPA. Under the MMPA, the taking of marine mammals is prohibited in the absence of a permit or a waiver. The federal government and the Makah Tribe claim that § 1372(a)(2) of the MMPA exempts the Makah's whaling from this moratorium. A taking of a marine mammal is lawful under the MMPA if the take has been "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before [1972] or by any statute implementing any such treaty, convention, or agreement."[11] The Ninth Circuit rejected the application of this exemption, reasoning that the approval of the Makah's gray whale quota in 1997 does not predate the MMPA. Furthermore, it is unclear from the vague language of the 1997 aboriginal quota whether the IWC intended to benefit the Makah Tribe. The federal government cannot rely on the treaty exception to exempt the Makah's whaling activities.

Because the Makah have a preexisting treaty right to hunt whales, the MMPA is applicable only if (1) the United States has jurisdiction where the whaling occurs, (2) the MMPA applies in a nondiscriminatory manner, and (3) the application of the MMPA to the Makah's treaty rights is necessary to achieve the conservation purposes of the statute.[12] The court held that the MMPA is applicable to the Tribe's proposed hunt. First, the U.S. has jurisdiction over the whaling, as the Makah plan to hunt in U.S. waters. Secondly, the MMPA's moratorium applies to everyone except certain native Alaskans with subsistence needs and is, therefore, not discriminatory. Finally, the MMPA must be applied to the proposed hunt to effectuate the conservation purposes of the Act. If the Makah were allowed to proceed with its whale hunt free from regulation under the MMPA, future hunting could jeopardize the gray whale populations. Without regulation, the Makah could expand the quota or utilize more efficient technology to kill more whales. In addition, other tribes with treaties reserving traditional "hunting and fishing" rights might attempt to resume hunting without complying with the MMPA. The court concluded that "the Tribe has no unrestricted right to pursue whaling in the face of the MMPA."[13]

Conclusion

The Ninth Circuit vacated the whale quota issued to the Makah Tribe by the United States. The NMFS must prepare a full EIS addressing the concerns raised by the court. In addition, the Tribe must apply for a permit or waiver under the MMPA before whaling may resume legally.

ENDNOTES

1. For an in-depth analysis of the court's original decision in 2000, *see* Fletcher, *New Assessment Required in Makah Whale Hunt*, 20:4 WATER LOG 8 (2000).
2. Treaty of Neah Bay, 12 Stat. 939, 940 (1855).
3. ICRW, 62 Stat. 1716, 1723 (1946).
4. *Anderson v. Evans*, 314 F.3d 1006, 1013 (9th Cir. 2002) (*citing* IWC Chairman's Report of the 49th Annual Meeting, 19 (1997)).
5. 42 U.S.C. § 4332(C) (2003).
6. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000).
7. 40 C.F.R. § 1508.27(b)(2) (2003).
8. 40 C.F.R. § 1508.27(b)(4) (2003).
9. 40 C.F.R. § 1508.27(b)(5) (2003).
10. 40 C.F.R. § 1508.27(b)(6) (2003).
11. 16 U.S.C. § 1372 (a)(2) (2003).
12. *Anderson*, 314 F.3d at 1026.
13. *Id.* at 1029.

Miners Allowed to Fill Kentucky's Rivers and Streams

Photo courtesy of the Library of Congress

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003).

Sarah Elizabeth Gardner, J.D.

Background

Kentuckians for the Commonwealth, Inc. filed suit against the U.S. Army Corps of Engineers (Corps) seeking both declaratory and injunctive relief to declare the Corps' interpretation of the Clean Water Act (CWA) illegal and to require the Corps to revoke a permit it issued to the Martin County Coal Corporation under § 404 of the CWA.[1] The permit authorized Martin County to place spoil from excess overburden from one of its coal mining projects into twenty-seven valleys in Martin County, Kentucky, filling approximately six miles of streams at the heads of the valleys.[2] Both sides filed a motion for summary judgment and the United States District Court for the Southern District of West Virginia issued an injunction against the Corps and prohibited them from issuing any future waste disposal permits under § 404. The Corps appealed to the Fourth Circuit Court of Appeals who reversed the lower court's declaratory judgment and vacated its injunction.

Kentuckians Allegations

To support their request for summary judgment and injunctive relief, Kentuckians claimed the Corps had violated § 404, along with the Corps' Nationwide Permit (NWP) 21[3], acting in a "manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the Administrative Procedure Act."[4] Kentuckians argued that the overburden placed in the valleys did not fall within the definition of "fill material" contained in § 404 but instead was "waste disposal" falling within § 402 of the CWA which is administered by the Environmental Protection Agency (EPA).

District Court Decision

The lower court found that the § 404 reference to fill material does not cover waste disposal but only "material deposited for some beneficial primary purpose."[5] Therefore, the court found the Corps had acted beyond its authority in granting § 404 permits for waste disposal and "entered a purely prospective permanent injunction against the Corps" prohibiting any future issuance of § 404 permits for waste disposal, without a finding of a beneficial primary purpose, within the Huntington Corps District which spans across five states. The court however, did not require the Corps to revoke the Martin County fill permit.

While the cross-motions for summary judgment were pending, the Corps and the EPA issued a new rule clarifying the definition of "fill material," so that the interpretation of § 404 by both agencies would be uniform and consistent. In the new rule the agencies define "fill material" as "any material placed in the waters of the United States that has 'the effect of . . . replacing any portion of a water of the United States with dry land or changing the bottom elevation.'"[6] In describing the new rule, the lower court stated that, "[u]nder the guise of regulatory harmony and consistency, the agencies have taken an ambiguous interpretation, that of the EPA, seized the unsupportable horn of the ambiguity, and now propose to make their original error and administrative practice law."[7] The new rule, the court continued, "is

intended to and does allow the massive filling of Appalachian streams with mine waste under auspices of the CWA."[8] The court then declared the new rule exceeded the agencies' statutory authority granted by the CWA.

Court of Appeals Decision

On appeal, the Corps claimed that the lower court's injunction was overbroad due to the fact that Kentuckians only challenged the specific Corps action of issuing the permit to Martin County and therefore, the injunction against it for all future permits in a five-state area exceeded the necessary relief.

The Fourth Circuit looked to whether there would be imminent probable irreparable injury to Kentuckians if the injunction was not issued and harm to the Corps if it was. Kentuckians only alleged injury within the Commonwealth of Kentucky specifically in relation to the Martin County operations. The injunction covered a five-state area; therefore, the court vacated the injunction, finding the lower court's injunction addressed more than the circumstance at issue and was "far broader than necessary to provide Kentuckians complete relief."[9]

The Fourth Circuit then analyzed the new rule issued by the agencies. In reviewing an agency action, the court must conduct the two-step *Chevron* analysis.[10] The first step is to consider whether Congress' intent as to the question at hand was clear within the statutory language. If Congress' intent is clear, then the agency's regulation is inapplicable, because both the court and the agency must give effect to the stated intent of Congress. If Congressional intent is not clear, then the court must consider whether the agency's action is based upon a permissible interpretation of the regulation.

The Fourth Circuit found that the CWA does not contain a definition of "fill material" within its language nor does it suggest the limited definition found by the lower court. The lower court concluded that the CWA discusses the types of fills that fall within § 404 permits, indicating that the CWA was neither silent nor ambiguous. The Fourth Circuit dismissed each element the lower court relied on finding that § 404 only allows for the discharge of fill material for some beneficial primary purpose and concluding that "Congress has not clearly spoken on the meaning of "fill material" and, in particular, has not clearly defined "fill material to be material deposited for some beneficial primary purpose."[11]

The Fourth Circuit then proceeded with the *Chevron* analysis to determine whether the Corps' action was based on a permissible construction of § 404. "A reviewing court can set aside the agency's interpretation of its own regulation only if that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[12] The Clean Water Act clearly intended to divide authority between the EPA and the Corps, as a permitting program administered by the Corps was established in § 404 and a program administered by the states and the EPA was established in § 402. The Corps' 1977 regulation excluding waste disposal from the definition of "fill material" was consistent with this division of power. Such wastes could be subject to regulation under § 402 and fall within the authority of the EPA. The court concluded that the Corps' and the EPA's interpretation of "fill material" as used in § 404 "to mean all material that displaces water or changes the bottom elevation of a water body except for 'waste' . . ." were neither plainly erroneous nor inconsistent with the regulation.[13]

Conclusion

The Fourth Circuit vacated the injunction issued by the lower court and reversed the lower court's declaration that the CWA § 404 "fill material" is limited to material deposited for some "beneficial primary purpose." The case was remanded to the district court.

ENDNOTES

1. Section 404 allows the Secretary of the Army to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
2. "Overburden" is the soil and rock that overlies a coal seam, and overburden that is excavated and removed is "spoil". *Kentuckians for the Commonwealth, Inc. v. John Rivenburgh*, 317 F.3d 425, 430 (4th Cir. 2003).
3. NWP 21 allows the permit holder "to construct hollow fills and sediment ponds in waters of the United States." *Kentuckians*, 317 F.3d at 430.
4. *See* 5 U.S.C. § 706(2) (2003).
5. *Kentuckians*, 317 F.3d at 430, 433.
6. *Id.* at 432 (*citing* 33 C.F.R. § 323.2 (2003)).
7. *Id.* at 433.
8. *Id*. at 433-434.
9. *Id*. at 436.
10. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).
11. *Kentuckians*, 317 F.3d at 444.
12. *Id.* at 446-447.
13. *Id.* at 448.

Coast to Coast

And Everything In-Between

On April 3, 2003, two California men, a sport-fishing company, and a charter boat were criminally charged under the Marine Mammal Protection Act for the November 2002 crossbow shooting of a sea lion pup. Investigators were able to link the defendants to the crime because the pup was found with the arrow still lodged in her body. The serial number on the arrow was used to locate the store where the crossbow had been sold. The company, who owns the charter boat, pled guilty and received a fine of $6,200 for taking and attempting to kill a protected marine mammal. The sea lion pup survived the attack and has been released back into the wild.

The Bush Administration announced that it would not appeal the ruling of the Ninth Circuit Court of Appeal requiring the federal government to submit offshore oil and natural gas lease extension applications to the state of California for consistency review. The federal government had approved extensions for 36 unproductive leases off the coast of San Luis Obispo, Santa Barbara, and Ventura counties. California filed suit claiming the state has a right to review the applications prior to approval. The Administration hopes that the controversy can be resolved through negotiation.

Twenty-one years in the making, the "Final Revised Recovery Plan for the Southern Sea Otter" is finally available. The plan issued by the U.S. Fish and Wildlife Service identifies habitat degradation and human impacts as the two major threats to the California, or southern, sea otter. The plan states that the "optimal sustainable population" is 8,400 sea otters. Delisting under the Endangered Species Act or the Marine Mammal Protection Act can only occur if the population reaches that level. Additional information is available at http://pacific.fws.gov/ecoservices/ .

Around the Globe

In January, the U.S. Department of State determined that Honduras and Venezuela are not meeting the U.S. sea turtle conservation regulations which require imported shrimp to be harvested in a manner that does not harm sea turtles. Shrimp imports from the two countries are suspended indefinitely. However, shrimp harvested through artisanal or other methods not posing a threat to sea turtles can still be imported.

In April, a half-grown female colossal squid was caught by fishermen in the sub-Antarctic Ross Sea south of Wellington, New Zealand. A full grown colossal squid has eyes the size of dinner plates and its eight arms and two tentacles have up to 25 razor-sharp hooks that can rotate 360 degrees. The female caught in April had been eating Patagonian toothfish at the time. As if that species, better known as Chilean Sea Bass, did not have enough to worry about.

Sea Turtle, from page 1

waters of Alabama, Mississippi, Louisiana, and Texas. Under the Endangered Species Act (ESA) the taking of sea turtles is prohibited. To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[1] Shrimp trawling is the main contributing factor to sea turtle mortality throughout the world. Sea turtles must come to the surface to breathe and they will drown if trapped in a shrimp trawl. TEDs were introduced to the U.S. shrimp fishery in the late 1980s as a means to reduce the numbers of turtles caught in shrimp nets. A TED is a device that deflects a captured turtle towards an escape hatch in the net, while at the same time preventing shrimp from escaping. To be approved by the NMFS, a TED must be at least 97 percent effective in preventing the entrapment of sea turtles.[2]

The NMFS prepared a "Biological Opinion on Shrimp Trawling in the Southeastern United States" in December 2002, after concerns arose regarding the status of leatherback and loggerhead turtle populations and the fact that current approved TEDs were not adequately protecting all sizes of sea turtles. The Biological Opinion estimated that 62,000 loggerhead turtles and 2,300 leatherback turtles have been killed due to interactions with shrimp trawls. The Opinion also revealed that 75 percent of the loggerhead turtles in the Gulf of Mexico are too large to escape through the majority of approved TEDs.

The new TED requirements are intended to allow all sizes of leatherback and loggerhead turtles to escape shrimp trawls. The amendments:

- Increase the minimum size of TED Grids and TED Openings in all inshore and offshore waters of the Southeastern United States;
- Disallow the use of the hooped hard TED in all offshore waters in the Atlantic and Gulf Areas and change the description of a hooped hard TED for use in inshore waters;
- Disallow the use of the Jones TED and require a brace bar for weedless TEDs;
- Require bait shrimpers to use TEDs in states where a state-issued bait shrimp license holder can also fish for food shrimp from the same vessel; and
- Require the use of tow times on small try nets.

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Although the final rule will go into effect in the Atlantic Area on April 15, 2003, there will be a six month delay in implementation in the Gulf Area. The NMFS stated the delay was appropriate because "fishermen in the Gulf Area use smaller TEDs with smaller grids than fisherman in the Atlantic Area, and the Gulf Area also has the majority of hooped hard TED users, bait shrimpers, and weedless TED users."[3] The delay is to provide fishermen and suppliers in the Gulf Area adequate time to come into compliance with the new regulations.

ENDNOTES

1. 16 U.S.C. § 1532(19) (2003).
2. 50 C.F.R. 223.207(e) (2003).
3. The Atlantic Area encompasses all waters south of the North Carolina/Virginia border. The Gulf Area is all waters of the Gulf of Mexico west of 81 degrees longitude, which is approximately the Florida Keys. Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements, 68 Fed. Reg. 8456, 8462 (Feb. 21, 2003).

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