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Not Just a Walk in the Park: Beach Access and the Public Trust Doctrine in New Jersey

Raleigh Avenue Beach Association v. Atlantis Beach Club, 370 N.J. Super. 171 (App. Div. 2004).

Jennifer Simon[1]

On June 3, 2004, the Appellate Division of the New Jersey Superior Court ruled that a private beach club cannot limit vertical or horizontal access to the dry sand beach, and that the club may not restrict the public's right to traverse the dry sand property for "intermittent recreational purposes."[2] Moreover, the court held that while a beach club may ask for a fee from those who wish to use the beach for an extended period, the club must provide lifeguard services, and maintain the beach by providing waste receptacles and picking up trash regularly. Furthermore, the New Jersey Department of Environmental Protection must approve the fee, and it must be comparable to the fees charged by the municipality for beach tags. The Appellate Division decision relies upon and extends the holding of the seminal New Jersey beach access case, *Matthews v. Bayhead*[3] which extends the public trust doctrine to apply to dry sand areas of beaches as well as submerged lands. The *Atlantis* decision enlarges the scope of the public trust doctrine to unprecedented effect, holding that the public has a right not only to submerged lands, and a right of passage over dry sand, but must also have recreational access to dry sand areas even when those areas are held in trust by private owners. Moreover, the court held that while beach clubs may charge membership fees, the club cannot exact more than what it requires to maintain the actual services provided to its members.

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Agencies Prohibited from Curtailing Summer Spill

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2004 U.S. Dist. LEXIS 15239 (D. Or. July 29, 2004).

Luke Miller[1]

The northwest portion of the United States has been slowly but surely sliding into a head-on collision between salmon and energy production. With the risk of losing certain types of salmon stocks forever, conservation groups, tribal representatives, a governor, and several others have won a significant court battle to continue summer spill programs on the Columbia and Snake Rivers. A district court in Oregon recently enjoined the Army Corps of Engineers (Corps) from curtailing summer spill at The Dalles, Bonneville, Ice Harbor, and John Day dams in August 2004.

Background

December of 2000 marked the official recognition by NOAA Fisheries[2] that the existence of several salmon stocks (or evolutionarily significant units (ESUs)) and their critical habitat were likely to be jeopardized by the continuing operations of the Federal Columbia River Power System (FCRPS) – a series of federally controlled dams producing hydroelectric power.[3] In its 2000 Biological Opinion (BiOp), NOAA Fisheries proposed several reasonable and prudent alternatives (RPA) to avoid jeopardy and adverse modification of critical habitat. The most significant of these was providing seasonal spill over dams instead of ushering water through the dam turbines.

The plaintiffs challenged the 2000 BiOp arguing that the RPAs had not undergone proper Endangered

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"Dolphin-Safe" Tuna Label Safe for Now

Earth Island Institute v. Evans, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. Aug. 9, 2004).

Maureen McGowan[1]

On August 9, 2004, the U.S. District Court for the Northern District of California rejected the Commerce Department's efforts to weaken the "dolphin-safe" tuna labeling program. In a scathing decision the court accused the administration of sacrificing science for politics by failing to complete required scientific studies before determining that there would be no significant impact to the dolphin population by changing the tuna labeling standards. The court found as a matter of law that the final finding of the Secretary of Commerce (Secretary) must be set aside, and the definition of "dolphin-safe" should remain unchanged.

Background

Yellowfin tuna in the eastern tropical Pacific (ETP) often swim below schools of dolphins, and a fishing technique was developed where purse seine nets were placed on dolphins in order to catch the tuna. This method, which involves chasing and netting dolphins and tuna in mile-long nets, decimated the dolphin population by killing over seven million animals since the early 1950s. In response to public outcry Congress passed the Marine Mammal Protection Act in 1972, which prohibited U.S. fishing boats from dropping nets on dolphins, and then imposed the same standard on foreign imports in the 1980s.

In 1992, Congress passed the Dolphin Protection Consumer Information Act, creating the "dolphin-safe" label for tuna caught without netting dolphins. Over the twelve years that the labeling program has been in effect, dolphin deaths have decreased by 98 percent in the ETP.[2] However, by selling only "dolphin-safe" tuna, major U.S. tuna processors effectively banned imports from Mexico and other Latin American companies with large tuna fleets. Those nations that lost a huge part of their market due to the higher standards, as well as other nations fishing in the ETP, joined together in the International Dolphin Conservation Program in 1992. Eventually a binding agreement, the Panama Declaration, was for-

malized, in which the U.S. agreed to ease embargoes and improve market access for ETP tuna coming from Mexico and other Latin American fleets.

In 1997, the International Dolphin Conservation Program Act (IDCPA) authorized the "dolphin-safe" label to be applied to tuna caught in nets that trap and release dolphins when shipboard observers found that no dolphins were harmed or killed, but only if the Commerce Department concluded after conducting studies that the trap and release process does not harm depleted dolphin populations. The law required the Secretary of Commerce to conduct a population abundance study and three different stress studies in order to determine whether chase and encirclement with purse seine nets is having a significant adverse impact on the dolphins in the ETP.

Initial findings were issued by the Secretary on May 7, 1999, stating that "there was insufficient evidence that chase and encirclement by the tuna purse seine industry 'is having a significant adverse impact' on depleted dolphin stocks in the ETP."[3] The Secretary was prevented from lessening the "dolphin-safe" standard based on his initial findings after environmental groups successfully challenged the findings. The Ninth Circuit held that the Secretary was "required to affirmatively find that the fishery either was or was not having a significant adverse impact, and could not rely on 'insufficient evidence' to default to a finding of no significant adverse impact . . . Such an approach would discourage proactive fact-finding and research."[4]

Preliminary Injunction

In 2002, the Secretary issued his final findings, determining that "the intentional deployment on or encirclement of dolphins with purse seines is not having a significant adverse effect on any depleted dolphin stock in the ETP."[5] Based on these findings the "dolphin-safe" label was redefined to include tuna caught when dolphins were trapped and released, but not killed.

In response to the weakening of the "dolphin-safe" standard Earth Island Institute, the Humane Society of the United States, the ASPCA, Defenders of Wildlife, and several other environmental groups filed suit against Donald Evans, the Secretary of Commerce, to enjoin the administration from changing the "dolphin-safe" standard until the administrative record could be completed. The court found that a preliminary injunction was appropriate because the plaintiffs would likely succeed on the merits of the case, and the public interest weighed in favor of "maintaining the status quo pending resolution of the case."[6] In the meantime, major U.S. brands (Starkist, Chicken of the Sea, and Bumble Bee) had already declared that they will not buy tuna caught by chasing and netting dolphins, regardless of what happens to the labeling standards.

Summary Judgment under the Administrative Procedure Act

The Administrative Record was completed in June 2004 and the parties went back to the Northern District Court on cross-motions for summary judgment. In order to succeed on their motion for summary judgment, Earth Island Institute (EII) would have to show that the Secretary's final finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The burden would be on EII to demonstrate that (1) the Secretary's explanation for his decision runs counter to the evidence before the agency, (2) the agency relied on facts which Congress did not intend it to consider, or (3) the agency entirely failed to consider an important aspect of the problem. While there is considerable deference given to an agency, it is not unlimited and the courts will conduct a "searching and careful" inquiry into agency decisions.[7]

Congressionally Mandated Research

Congress specifically rejected language in the IDCPA that would have automatically changed the labeling standards, and instead required the Secretary to conduct several scientific studies to determine the effects that trap-and-release fishing were having on the depleted dolphin populations in the ETP before making any decisions. Through "mandatory and direct" language Congress required the Secretary to carry out three stress studies: (1) a series of necropsies (comparable to a human autopsy), (2) a review of historical demographic and biological data, and (3) an experimental chase and encirclement stress study (CHESS). In prior decisions, the Secretary was expressly warned that "he could not fail to comply with the required research and then invoke a 'lack of stress-related information to trigger a change' in the dolphin-safe label standard."[8]

Best Available Scientific Evidence

The applicable standard, requiring the Secretary to evaluate best available scientific evidence, "does not demand conclusive evidence and is intended to give 'the benefit of the doubt to the species.'"[9] In this case

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the best available scientific evidence consisted of the Final Science Report and the reports from two scientific panels. The Secretary adopted an "Organized Decision Process," and focused on four different questions when making his final finding: "(1) whether there have been changes to the ETP ecosystem that have affected the ability of depleted dolphin stocks to recover, (2) current direct mortality levels, (3) whether stress or other indirect effects of the fishery are affecting the ability of dolphin stocks to recover, and (4) the growth rates of depleted dolphins stocks."[10] On every question the Secretary tried to spin the relevant data in support of the position that the depleted dolphin stocks are not being adversely affected by the fishery; however the court found that virtually all of the best available scientific evidence "points towards the fishery having a significant adverse impact."[11]

Integrity of the Decision-Making Process

Both the Northern District Court and the Ninth Circuit held that the Secretary could base his final findings "[only] on the best available scientific data, and without deference to trade politics or competing policy viewpoints."[12] Yet the evidence indicated that the Secretary was persuaded by political and diplomatic concerns unrelated to the scientific data, particularly the influences of the U.S. Department of State and Mexico. The court stated that it was "convinced that the Secretary's decision-making process was infected by the very policy considerations that Congress had directed should not be considered."[13]

Conclusion

In his 24 years on the bench, the judge claimed he had "[never] reviewed a record of agency action that contained such a compelling portrait of political meddling."[14] The best scientific evidence "indicates that (1) dolphin stocks are still severely depleted and are not recovering despite extremely low reported mortality rates, (2) that their recovery is being risked or appreciably delayed, (3) that changes to the ecosystem are unlikely to explain this phenomena, and (4) that indirect effects from the fishery can plausibly account for the lack of recovery."[15] In spite of the evidence, the Secretary made a final finding that the "intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse effect on any depleted dolphin stock in the ETP."[16] Earth Island Institute successfully demonstrated that the Secretary's offered explanation for its decision ran counter to the evidence before the agency and that the agency relied on facts which Congress did not intend it to consider. Therefore, for now, the "dolphin-safe" labeling standard will remain as it has been for the past twelve years.

Endnotes

1. Maureen is a third-year law student at the University of Georgia School of Law.
2. Mark J. Palmer, *Earth Island Sues Again to Save Dolphins*, EARTH ISLAND JOURNAL, June 22, 2003, at 19.
3. *Earth Island Institute v. Evans*, 2004 U.S. Dist. LEXIS 15729 at *10 (N.D. Cal. Aug. 9, 2004).
4. *Id.* at *11.
5. *Id.* at *15.
6. *Earth Island Institute v. Evans*, 256 F.Supp.2d 1064, 1068 (N.D. Cal. 2003).
7. *Earth Island Institute*, 2004 U.S. Dist. LEXIS 15729 at *21.
8. *Id.* at *24.
9. *Id.* at *95.
10. *Id.* at *36-37.
11. *Id.* at *38.
12. *Id.* at *77.
13. *Id.* at *92.
14. *Id.* at *78.
15. *Id.* at *95-96.
16. *Id.* at *98.

Photograph of dolphins caught in early tuna purse seining operations courtesy of NOAA Fisheries Collection

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Species Act (ESA) review and were not reasonably certain to occur. On May 7, 2003, the court agreed and remanded the BiOp to NOAA Fisheries for consultation and review.[4] NOAA Fisheries was required to release a revised BiOp on August 31, 2004.[5]

Before the revised BiOp was issued, the Corps and the Bonneville Power Administration (BPA) submitted amendments to their operating plans in an effort to reduce the number of required spill days for their facilities. The Corps and BPA offered to mitigate by releasing additional water from other facilities to compensate for the potential loss of water. NOAA Fisheries signed off on the plan and, on July 6, 2004, the Corps issued a "statement of decision" (SOD) committing itself to ending summer spill operations earlier than in previous years. On July 9, 2004, the plaintiffs filed a Supplemental Complaint for Declaratory and Injunctive Relief arguing that NOAA Fisheries and the Corps illegally modified the summer spill program.

In general, to secure a preliminary injunction a party must demonstrate a likelihood of success on the merits and the possibility of irreparable harm, or show that serious questions going to the merits were raised and the balance of hardships tips in their direction.[6] Under the ESA, however, preliminary injunctions are issued under a lower threshold than traditional injunctions. A party need only show that a violation of the ESA is at least likely to occur in the future.[7]

The court found two fundamental flaws in the defendant's case. First, NOAA Fisheries, as mentioned above, indicated in the year 2000 that maintaining a certain number of spill days would be necessary to help protect salmon stocks. Yet now NOAA Fisheries claimed that a shorter spill cycle would not impair the fish population. NOAA argued that the summer spill program could be curtailed without harming salmon stocks because of a new mitigation measure proposed by the Corps and BPA - the infusion of 100,000 acre-feet of water from Brownlee reservoir. The district court judge found this reasoning to be arbitrary and capricious because a large portion of the water from the reservoir would not be new water. This secondary reservoir was already providing 77,000 acre-feet. The mitigation measure, therefore, would only provide a gain of 23,000 acre-feet, not 100,000 acre-feet, so NOAA Fisheries had overestimated the amount of new water available to offset reducing the number of spill days.

The second defect highlighted by the court was the agency's assumption regarding how the release of this extra water from the reservoir would occur. NOAA Fisheries assumed the water would be released over a 21-day continuous period with a uniform flow. The court determined, however, that the company in control of the reservoir was under no contractual obligation to release water at a continual flow, and in fact previous year data showed a very large fluctuation in release amounts dependent on regional energy needs. The court concluded that these flawed assumptions "undercut[ ] any confidence in the conclusions reached by the agency regarding the impact on the fish."[7]

Conclusion

The court held that NOAA Fisheries' decision to curtail the summer spill program was arbitrary and capricious. The plaintiffs easily made the requisite showing of harm, as NOAA Fisheries' own documents reveal that diminished spill days would be seriously detrimental to the survival of the salmon stocks. The district court ruled that "spill operations as contemplated by the 2000 BiOp to avoid jeopardy shall continue this summer as they have in past summers" and enjoined the Corps from curtailing summer spill operations at The Dalles, Bonneville, Ice Harbor, and John Day dams.[9]

Endnotes

1. Luke is a third-year law student at the University of Mississippi School of Law.
2. NOAA Fisheries is also known as the National Marine Fisheries Service.
3. Bonneville Power Administration, Federal Columbia River Power System brochure, *available at* http://www.bpa.gov/power/pg/fcrps_brochure_17x11.pdf .
4. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F.Supp 2d 1196 (D. Or. May 7, 2003).
5. The agency issued its new draft BiOp on September 9, 2004. Specific actions proposed by NOAA Fisheries to avoid jeopardy include new improvements to hydro dams, expanded control of fish-eating predators, continued implementation of habitat improvements, and continued funding of critical hatchery programs. Fact Sheet, NOAA Fisheries, Draft FCRPS BiOp Highlights (September 9, 2004) *available at* http://www.salmonrecovery.gov/.
6. *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).
7. *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994).
8. *Nat'l Wildlife Fed'n, v. NMFS*, 2004 U.S. Dist. Lexis 15239 at *12 (D. Or. July 29, 2004).
9. *Id.* at *15.

Framework Adjustment 14 Does Not Violate Magnuson-Stevens Act

Conservation Law Foundation v. Evans, 360 F.3d 21 (1st Cir. 2004).

T. B. Boardman Jr., J.D.[1]

Introduction

In the latest challenge to the National Marine Fisheries Service (NMFS), the First Circuit Court of Appeals denied an appeal by the Conservation Law Foundation and Oceana (together, CLF) concerning a 2001 framework adjustment to the Atlantic Sea Scallop Fishery Management Plan. CLF asserted that the NMFS's failure to close four sensitive scalloping areas was arbitrary and capricious and its failure to provide a notice and comment period for the framework adjustment violated the Magnuson-Stevens Act. The First Circuit denied CLF's claims and also denied the agency's assertion that the case was moot.

Background

Scallops are benthic inhabitants that are typically fished by dredging, a method that is detrimental to the seabed habitat. NMFS manages scalloping in the Atlantic coastal waters through the Atlantic Sea Scallop Fishery Management Plan. For the 2001 and 2002 fishing years, NMFS adjusted the Plan with Framework 14 pursuant to its authorization under the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act). Framework 14 closed approximately 5,000 square nautical miles to scallop fishing. Additionally, it maintained restrictions on days at sea, catch and mesh sizes, and limited seasonal access to sensitive areas.

However, the southeast part of Georges Bank, the Great South Channel, the New York Bright, and Delmarva, all composed of gravel and sandy bottoms and particularly vulnerable to harm from dredging, remained open to scalloping. As a result, the CLF complained that NMFS failed to give habitat protection and the reduction of groundfish bycatch ample consideration. The CLF challenged NMFS's Framework 14 both substantively, as arbitrary and capricious, and procedurally, for failing to provide the minimum fifteen days for public comment required by the Magnuson-Stevens Act in the United States District Court of Massachusetts. The District Court granted the agency's motion for summary judgment and an appeal to the United States Court of Appeals for the First Circuit ensued.

Mootness

On March 1, 2003, while CLF's appeal was pending, Framework 14 was superseded by Framework 15. As a result, the defendants contended that the expiration of Framework 14 rendered the case moot. The First Circuit noted that for the defendant to prevail on the mootness claim it bore a "heavy" burden in demonstrating that the allegedly wrong behavior could not reasonably be expected to recur.[2]

NMFS simply could not carry this burden since Framework 15's only modification to Framework 14 was an increase in the limits on the amount of scallops that could be held on board a fishing vessel. Therefore, the court questioned whether the alleged wrongs had already recurred. Moreover, even though Framework 15 was promulgated in a procedurally proper manner the challenge was not moot because NMFS's preceding procedural deficiencies were capable of repetition. As a result, the court held that the case was not moot.

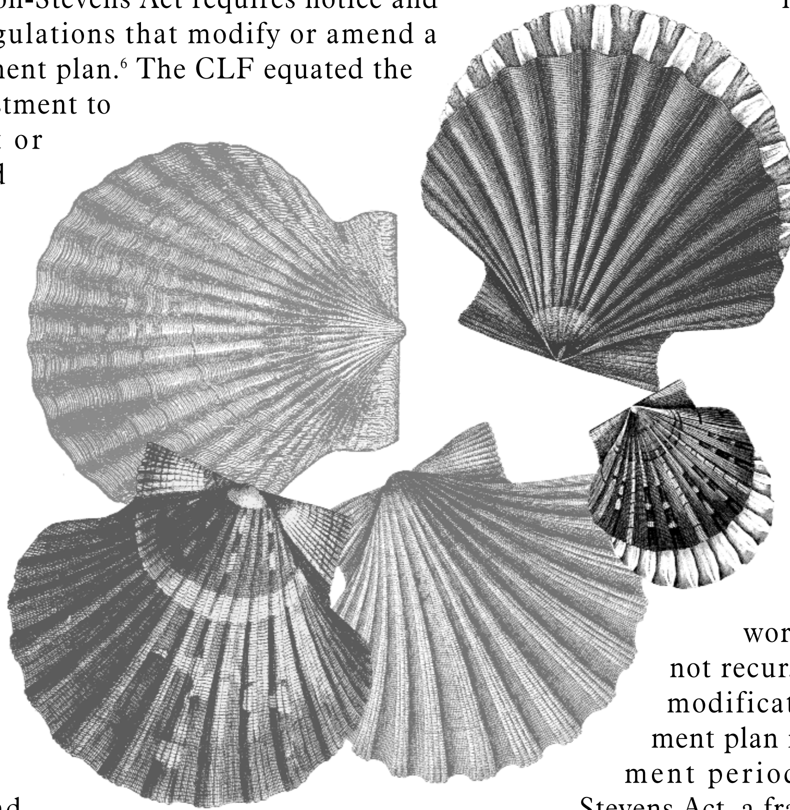
Substantive Challenge

Under the Magnuson-Stevens Act and the Administrative Procedure Act, agency action can only be upset by the court if the action is arbitrary or capricious. CLF contended that NMFS's failure to close scallop harvesting in the four areas was arbitrary and capricious because it failed its duty to minimize, "to the extent practicable": 1) adverse effects on essential fish habitat, and 2) bycatch.[3]

According to CLF, NMFS "ignored relevant factors" that should have been considered and failed to "articulate a rational basis" for declining to close the four areas.[4] However, the Court found that NMFS is only required to minimize adverse effects and bycatch "to the extent practicable," not to implement virtually any measure to address essential fish habitat and bycatch concerns, as the CLF seemed to require. As a result, the CLF's arguments were flawed because they did not account for the existing restrictions on scallop fishing imposed by Framework 14, which statutorily satisfied NMFS's obligations. The court held that the plaintiffs did not show that NMFS acted irrationally in implementing Framework 14 without imposing additional closures.[5]

Procedural Challenge

CLF's final attack was on NMFS's failure to provide a public comment period in developing Framework 14. The Magnuson-Stevens Act requires notice and comment for regulations that modify or amend a fishery management plan.[6] The CLF equated the framework adjustment to an amendment or modification and therefore asserted that notice and comment was required. However, the First Circuit affirmed the District Court's finding that a framework adjustment is distinguishable from an amendment or a modification and therefore is not subject to notice and comment.



The court pointed to section 1855(f) to explain such a distinction. Section 1855(f) clearly makes a distinction between "regulations promulgated by the Secretary" and "actions that are taken by the Secretary under regulations which implement a fishery management plan."[7] The Court recognized that "a framework adjustment such as Framework 14 was implemented through an action of the Secretary after a finding by the Council that a formal regulation was neither necessary nor appropriate."[8] As a result, the Court held that the District Court properly classified Framework 14 as an action, not a regulation, and found that it was not subject to notice and comment.

In the alternative, CLF alleged procedural harm under the Administrative Procedure Act because NMFS failed to demonstrate good cause for waiving notice and comment. The First Circuit quickly dismissed this claim by first noting that fourteen public meetings, a supplemental environmental impact statement, CLF's submission of written and oral comment prior to and during Council meetings, and NMFS's responses to CLF's concerns, demonstrated that CLF was not ignored. Moreover, the court found that CLF "failed to identify any comment that they were prevented from making because of this alleged procedural defect that would have made a difference in the result."[9] Accordingly, even if CLF's allegations were true, the omission of a formal public comment period would be mere harmless error because the omission of a formal public comment period would have no bearing on the decision reached by NMFS.

Conclusion

A challenge to a framework adjustment that has been superceded will be considered moot only if under the new framework the alleged wrongs will not recur. While an amendment or modification to a fishery management plan requires a notice and comment period under the Magnuson-Stevens Act, a framework adjustment, such as Framework 14, is distinguishable and does not require such attention. Pursuant to the Magnuson-Stevens Act, an agency is not required to implement every measure that would minimize the adverse effects to essential fish habitats. Instead, it has an obligation to implement actions only to the extent practicable.

Endnotes

1. Terrell B. Boardman Jr. is a graduate of Roger Williams School of Law, Bristol, Rhode Island, and is currently pursuing a Masters in Marine Affairs at the University of Rhode Island.
2. *Conservation Law Foundation v. Evans*, 360 F.3d 21, 24 (1st Cir. 2004).
3. 16 U.S.C. § 1683 (2004).
4. *Conservation Law Foundation*, 360 F.3d at 28.
5. *Id.*
6. 16 U.S.C. § 1854 (2004).
7. *Id.* § 1855(f).
8. *Conservation Law Foundation*, 360 F.3d at 29 (internal quotations omitted).
9. *Id.*

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New Jersey Beaches and the Problem of Beach Access

The State of New Jersey is host to nearly 130 miles of coastline bordering the Atlantic Ocean. The New Jersey shore provides a haven for tourists, vacationers, surfers and other water recreationists, nature lovers, and people who simply want to spend the day at the beach. In addition to providing pleasure, the New Jersey beaches also lure in a substantial supply of consumers that support a wide array of coastal businesses including restaurants, real estate agencies, bars, and general retailers. Moreover, New Jersey beaches are close enough to several large metropolitan areas (New York City, Philadelphia, Newark and their suburbs) that it is common for beachgoers to come just for the day, or to commute from less expensive areas slightly farther inland.

In the last century, beachfront property has become an increasingly valuable commodity as undeveloped property becomes more and more scarce. Many beaches along New Jersey's coast are now bordered by a virtual wall of hotels and homes on adjacent lots of land. In order to get to the beach itself, the public is forced to either traverse private property, or find a municipally sanctioned access point. To add to the difficulty, many public access points are hidden between private lots of land and it is not uncommon for landowners to obscure or obstruct the entry point, or even to place "private property" signs in such a way as to convince the public that there is no access available at all at the site. As a result, the public is often forced to circumnavigate these blocked-off areas to obtain access which may involve going miles out of their way. In the alternative, municipalities have requested landowners to provide easements across their properties and have even gone so far as to require an easement before granting building or zoning permits.[4] While it is well settled that the public may use lands located below the tide lines, it is less clear whether the public can also make use of the beach, and, if so, where the public beach ends and private property begins, given that tide-washed beaches are inherently changing pieces of land. Additionally, even when a beach area is called "public," municipalities or other private entities frequently charge for permits that allow beachgoers to do more than simply pass through the beach area. Therefore, the issues are threefold:

(1) whether the public has an inherent right to use the beach;
(2) if the public does have a right to use the shore, whether the public has a right to convenient physical access; and
(3) whether the government or a private owner has a right to regulate access to the beach by requiring that beachgoers obtain permits for a fee.

The issues raised by the problem of beach access require a review of the public trust doctrine, which provides that lands held in trust for public use must not be restricted for private use, in light of the takings clause of the Fifth Amendment, which requires that private property owners be compensated if their property rights have been unjustly infringed upon by the government. Customary law, dating back to the time of Justinian, has held that "everyone could use the seashore 'to dry his nets there, and haul them from the sea . . .'"[5] However, while it is clear that submerged lands fall under the scope of the public trust doctrine, it is less clear whether areas that are occasionally submerged by the tides are protected.[6]

Thus, while the public has an inherent right to the use of tidal areas, there is no public right to private property. If the dry sand beaches which lie between the uplands and the water can be held by private owners who may by all rights exclude the public, the public may have no physical route to gain access to the waters which would essentially create a cordon of exclusive beaches. Since the public trust doctrine clearly disallows this complete exclusion of the public, it seems that private owners must allow the public to gain access to the beach despite their property rights. However, the Fifth Amendment of the United States Constitution explicitly provides that private property "shall [not] be taken for public use without just compensation." Inversely then, while the public may have a right to use the beach, the right of a property owner to exclude the public from his property could serve to prevent the public from traversing his property to gain access to the beach.

The Public Trust Doctrine in New Jersey

New Jersey has long held that submerged lands are held in trust by the state for the public benefit and use. In 1870, the New Jersey Court of Errors and Appeals held that "all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public."[7] Prior to the upsurge of beachfront developments and attendance, there was little need for municipal maintenance or supervision of the beaches, and thus, beaches were free.[8] However, as the tourist population increased and the need for maintenance, service, and

safety facilities increased, municipalities began charging fees for beach access.[9]

Challenges to mandatory municipal fees and permits began almost immediately after the requirements took effect. In 1954, the New Jersey Superior Court held that while municipalities may charge a fee for beach access, "an oceanfront municipality may not absolutely exclude non-residents from the use of its dedicated beach, including, of course, land seaward of the mean high water mark."[10] In 1972, the New Jersey Supreme Court further held that "while a municipality may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and non-residents"[11] thus requiring that the same fee apply to both residents and non-residents. The Court reasoned that municipal actions with discriminatory effect are unconstitutional on land held in trust for the public, which extended to municipally owned dry sand flanking the high water mark.[12]

Twelve years later, the New Jersey Supreme Court, in its seminal *Matthews* opinion, opined that quasi-municipal property owners that provide the beach services and maintenance ordinarily provided by a municipality may not exclude the public from the dry sand area of the beach: "To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge upon, if not effectively eliminate, the rights of public trust doctrine."[13] Moreover, the court held that the public's right to municipally owned dry sand "is not limited to passage . . . [because] [r]easonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed."[14] Therefore, the court held that the public trust doctrine must extend to provide for "public access to and use of privately-owned upland sand areas as reasonably necessary"[15] subject to an accommodation of the needs of the owner. However, because the facts of the *Matthews* case pertained to the exclusivity claims of a quasi-municipal landowner, the court stopped short of discussing the property rights of non-municipal private land owners.

Factual and Procedural Background of *Atlantis Beach Club*

The Atlantis Beach Club owns beachfront property in Lower Township, New Jersey in an area known as Diamond beach. Atlantis' property consists of dunes, dry sand beach, and ocean floor. At high tide, a large portion of the property is entirely submerged. To the north and south of Atlantis' property are La Vida del Mar and La Quinta Del Mar, condominium and hotel complexes. SeaPointe Village, another hotel and condominium complex, lies north of La Vida del Mar, and provides lifeguard services, a public restroom, outdoor showers, and parking facilities. With the approval of the New Jersey Department of Environmental Protection's Division of Coastal Resources, Seapointe sells daily, weekly, and seasonal beach tags.[16] Neither of the resort complexes that directly border Atlantis restrict or limit access to their beach properties.

In 1996, Atlantis began to limit access to its property by mandating a minimum seasonal "membership rate" of $300.00 for a family of six. By 2002, Atlantis had significantly augmented its rates, increasing the minimum membership fee to $700.00 for a family of eight, with an available lifetime membership priced at $10,000.00. Atlantis' owners certify that the club provides "security, maintenance, and lifeguard services, together with some recreational activities."[17] Atlantis does not provide showers, restroom facilities, refreshments, beach chairs or other amenities to its members, and the property boasts only two permanent structures: a boardwalk which runs between the adjacent condominium complexes, and a bulkhead.

Above the bulkhead, Atlantis has posted a sign which reads: "Free Public Access Ends Here/ Membership Available at Gate."[18] In 2003, Atlantis sent out a letter to its current membership and to residents in the surrounding area soliciting membership fees with the adage, "[t]he price of exclusivity is not cheap."[19] During the summer of 2003, Atlantis lifeguards were seen patrolling the property with bullhorns announcing that "people who were sitting on the wet sand area (the foreshore) were trespassing and robbing members of Atlantis' services."[20] If residents of the condominium complexes adjacent to Atlantis cannot cross over Atlantis' beach front property to gain access to the public beaches on either side, they must circumnavigate Atlantis' property by walking up to the street and around, which involves nearly half of a mile of additional travel. Atlantis responded by posting an addition to its rules and regulations which reads, "Anyone Attempting to Use, Enter upon or Cross over Club Property for Any Reason Without Club Permission or Who Is Not in Possession of a Valid Tag and Authorized to Use Such Tag Will Be Subject to

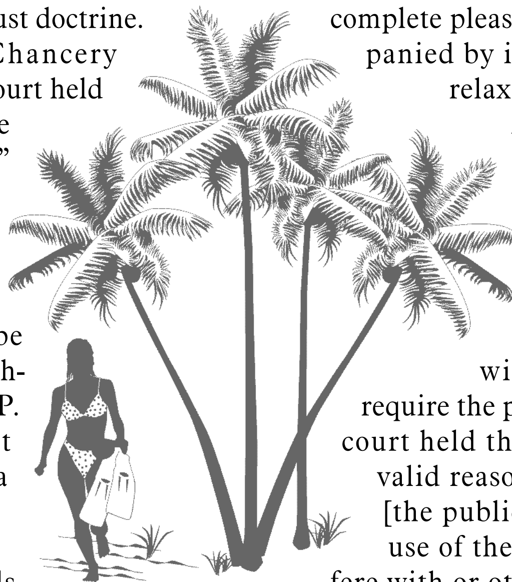
See Walk in the Park, page 10

Walk in the Park, from page 9

Prosecution, Civil and or Criminal to the Fullest Extent Permitted by Law Including All Costs and Legal Fees Incurred by the Club."[21]

Subsequently, in July 2002, Atlantis filed an Order to Show Cause and Verified Complaint against a resident of one of the adjacent condominium complexes and his "class of persons" seeking to enjoin them from trespassing on Atlantis property, and seeking affirmation of its claim that it is not required to provide free passage across its property to anyone not a member of the Club. In response, the Raleigh Avenue Beach Association, whose membership consists of residents of a street bordering Atlantis' property filed a complaint against Atlantis and the State of New Jersey requesting a declaration that they are entitled to access to the wet sand area of Atlantis' property without reserve, and to a "sufficient amount of dry sand above the mean high water line,"[22] and that Atlantis had violated the public trust doctrine.

In an order issued by the Chancery Division in September 2002, the court held that the "public trust doctrine 'applied' to Atlantis's property," but that public access to the dry sand area of the beach was limited to a narrow three-foot strip just above the high water mark, and that vertical access should be provided "insofar as practical" within the discretion of the DEP. Moreover, the court held that Atlantis was entitled to charge a "commercially reasonable fee" for the use of its property subject to the Club's provision of lifeguards and other services and equipment.



Joined by the resident association, the State of New Jersey filed a notice of Appeal in December 2003. The state's appeal was joined by a number of additional citizen's groups who filed a combined amicus brief. Prior to the appellate hearing, the Appellate Division granted a stay on the imposition of Atlantis' 2004 beach fees, and an order to return any beach fees collected after January 2004. Atlantis asserts that the Chancery Court correctly held that the public trust applies to its property and that the access provided for in that opinion satisfies the public access needs under the doctrine. The appellant state and citizen groups argued that the access provided for in the Chancery Court's opinion still violated the public trust doctrine, and moreover, that the fees required by Atlantis were wholly unreasonable.

The Appellate Division Reverses, Modifies and Remands

The Appellate Division first reversed the Chancery Court to the extent that the lower court's opinion limited horizontal and vertical access to Atlantis' property and to the dry sand for sporadic recreational use. The Court then modified the portion of the lower court's opinion that called for a "commercially reasonable fee" and remanded for an assessment of what constitutes a reasonable access fee.

The court began with a detailed historical review of the public trust doctrine citing *Borough of Avon* and *Matthews*. The court took particular notice of the *Matthews* court's finding that "enjoyment of rights in the foreshore is inseparable from use of dry sand beaches"[23] and that the beachgoers' right to the dry sands above the high water mark must incorporate not only passage across those lands, but that "the complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge."[24]

Applying the *Matthews* finding that allows public use of privately held dry sand areas, "subject to an accommodation of the interests of the owner," the court assessed the particular benefits of membership with the beach club that would require the protection of exclusive rights. The court held that because exclusivity "is not a valid reason for limiting use or access, . . . [the public's] intermittent or recreational use of the upland sand [would not] interfere with or otherwise prevent [Atlantis] from servicing its members."[25] However, when Atlantis asserted that its membership benefits also will include access to showers and the sale of refreshments, the court agreed that Atlantis may limit access to those services to its exclusive membership. Thus, the court held that the public may traverse across Atlantis' dry sand beaches both vertically to gain access to the beach from the upland areas, and horizontally to travel between the public beaches bordering the Club property.

Next, the court reviewed the reasonableness of Atlantis' membership fees. Relying on its affirmation of the Chancery Court holding that the public trust doctrine does apply to Atlantis' property, the court reasoned that Atlantis has essentially taken on the burden of holding its parcel of beach front property in trust for the public use. Thus, while Atlantis is a

private organization that may not normally be subject to judicial limitations on its business practices and membership fees, the Club is effectively acting as a trustee of public lands and is thus subject to limits on the profitability of its services. Citing N.J.A.C. 7:7E-8.11(b)4's prohibition on fees, the court held that Atlantis may not exact a greater fee than what is reasonably necessary to cover the costs of maintenance and administration of services. The court did not hazard an estimate of Atlantis' maintenance and administration costs, instead remanding the determination of what constitutes a reasonable membership fee to the Chancery Court for review in light of the present findings. At present, the Atlantis Beach Club website still reflects its original $700.00 seasonal and $15,000.00 lifetime membership fees.[26]

Conclusion: The Effect of the *Atlantis Beach Club* Decision

The holding of the Appellate Division in the *Atlantis* case provides a significant legal precedent to support advocates of beach access throughout the state of New Jersey. This is especially vital as undeveloped shore front land becomes more and more scarce. However, it is unlikely that the decision of the Appellate Division will go unchallenged. The owner of Atlantis has threatened to file an appeal to the State Supreme Court, arguing that DEP-approved fees charged at SeaPointe would barely cover his property taxes notwithstanding the maintenance and service costs associated with the Club. In contrast, environmentalists and citizens' advocacy organizations hail the ruling as a solid blow against private owners that seek to exclude the public from wide swathes of beach area, and against beach clubs which attempt to extort enormous sums of money for the use of what, for all practical purposes, is property held for the public benefit.

Endnotes

1. Jennifer is a third-year law student at Rutgers School of Law in Camden, New Jersey.
2. *Raleigh Avenue Beach Association v. Atlantis Beach Club*, 370 NJ Super. 171, 188 (2004).
3. *Matthews v. Bayhead Improvement Association*, 95 N.J. 306 (1984).
4. *See e.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
5. *Matthews*, 95 N.J. at 317 (1984) citing Justinian, Institutes 2.1.5 (T. Sandars trans. 1st Am. ed. 1876).
6. In a seminal 19th century case, the United States Supreme Court upheld the public trust doctrine, opining in relevant part: "Land under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people." *Shively v. Bowlby*, 152 US 1, 57 (1894).
7. *Stevens v. Paterson & Newark Railroad*, 34 N.J. Law 532, 549 (1870).
8. Prior to the common use of motor vehicles, New Jersey beaches were free to everyone. However, "with the advent of automobile traffic and the ever-increasing number of vacationers, the beaches and bathing facilities became overcrowded and the beachfront municipalities began to take steps to limit the congestion by regulating the use of the beach facilities and by charging fees." *Borough of Neptune v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 300 (1972), quoting *Borough of Neptune v. Borough of Avon-By-The-Sea*, 114 N.J. Super. 115, 117 (1971).
9. Two statutes were enacted in the 1950s authorizing New Jersey municipalities to charge a fee to beach-goers to account for increased maintenance and safety costs. *See* N.J.S.A. 30:92-7.1 (1950) and N.J.S.A. 40:61-22.20 (1955).
10. *Borough of Neptune*, 61 N.J. at 303, citing *Brindley v. Lavallette*, 33 N.J. Super. 344, 348-349 (Law Div. 1954).
11. *Id.* at 310.
12. *Id.* at 309.
13. *Matthews*, 95 N.J. at 323-324.
14. *Id.* at 325.
15. *Id.* at 326.
16. Seapointe currently charges $2.50 daily, $10.00 weekly, and $40.00 per season. The hotel is presently seeking to raise its rates to $3.00 daily, $15.00 weekly, and $50.00 seasonally. *Atlantis Beach Club*, 370 N.J. Super. at 179 n.4.
17. *Id.* at 180.
18. *Id.* at 179.
19. *Id.* at 180.
20. *Id.*
21. *Id.*
22. *Id.* at 181.
23. *Matthews,* 95 N.J. at 322.
24. *Atlantis Beach Club*, 370 N.J. Super. at 187.
25. *Id.* at 188.
26. www.atlantisbeachclub.com.

Sixth Circuit Reaffirms Narrow Reading of *SWANCC*

United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

Lauren Cozzolino[1]

The United States Court of Appeals for the Sixth Circuit recently reaffirmed that a hydrological connection to navigable water is enough to invoke federal jurisdiction and the protection of the Clean Water Act.

Background

Defendants John and Judith Rapanos own various parcels of land in Bay, Midland, and Saginaw Counties in Michigan. In December 1988, John Rapanos asked the state of Michigan to inspect one of his parcels of land known as the Salzburg site. Following the inspection, state representatives informed Rapanos that the site was probably a wetland regulated by the Clean Water Act.

Mr. Rapanos then hired a consultant to prepare a report detailing the wetlands on the Salzburg site. This consultant, Dr. Goff, concluded that there were between 48 and 58 acres of wetlands on the site and presented his findings to Mr. Rapanos. Upset by Dr. Goff's findings, Mr. Rapanos ordered Dr. Goff to destroy his report and all references to Mr. Rapanos in Dr. Goff's files. Dr. Goff refused to do so and Mr. Rapanos threatened to "destroy" Dr. Goff if he did not comply claiming that he would bulldoze the site himself regardless of Goff's findings.[2] In April of 1989, workers began leveling ground, clearing brush, removing stumps, moving dirt and dumping sand to cover most of the wetland vegetation. In August 1989, the state attempted to inspect the site but was denied access. A few months later, authorities returned, armed with a search warrant.

In 1991, a state representative returned to the Salzburg site and noticed that the site had been "tiled" to drain subsurface water. Shortly thereafter, an administrative compliance order was issued by the Environmental Protection Agency (EPA) requiring Rapanos to immediately cease his filling of the Salzburg site. Mr. Rapanos refused to comply with the order. The EPA referred the matter to the Department of Justice and the Rapanoses were charged, both criminally and civilly, with illegally discharging fill material into protected wetlands at this site and two others from 1988 to 1997.

In the criminal case, the United States District Court for the Eastern District of Michigan originally entered judgment in favor of the United States. John Rapanos was sentenced to three years probation and a $185,000 fine. The Sixth Circuit upheld the conviction and Rapanos appealed to the U.S. Supreme Court, contending that the wetlands in question were not subject to federal jurisdiction and the permitting requirements of the Clean Water Act. The Supreme Court vacated the conviction in light of the Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.[3] The case was remanded to the district court for further consideration. Although the district court set aside the conviction, on appeal the Sixth Circuit reinstated Rapanos' conviction basing jurisdiction on other provisions of the Clean Water Act (CWA).

The civil case proceeded simultaneously with the criminal case. On the civil side, in March 2000, the district court concluded that the defendants had filled 54 acres of protected wetlands. The defendants appealed, again arguing that these wetlands fell outside the regulatory authority of the Corps. This article summarizes the Sixth Circuit's opinion in the civil appeal.

The Clean Water Act

In 1972, Congress enacted the Clean Water Act ("CWA"). Section 404 of this statute requires landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. The CWA applies only to "waters of the United States."[4] Waters of the United States have been broadly defined to include "all waters that could be used in interstate commerce and all interstate lakes, rivers, streams, wetlands, sloughs, wet meadows, natural ponds, etc."[5] Thus, only wetlands that have a connection to navigable waters or interstate commerce are protected by the § 404 permitting requirements of the Clean Water Act. Courts have struggled for years to determine how much connection to navigable waters or interstate commerce is necessary to invoke the protection of the CWA.

The United States Supreme Court has tried to clarify the scope of federal authority to regulate discharges of fill materials into wetlands. It is well established that wetlands "adjacent to" traditional navigable waters or their tributaries are within the jurisdiction of the CWA.[6] However, determining which wetlands are considered "adjacent to" navigable water has proven difficult to determine. In *U.S. v. Riverside Bayview Homes*,[7] the Court construed the coverage of the CWA broadly. The Court found that wetlands need not be adjacent to navigable water so long as water from the wetlands is connected to the navigable water. In *SWANCC*, the Supreme Court qualified its holding in *Riverside Bayview* stating that there must be a "significant nexus" between the wetlands and the navigable water.[8]

Stock photograph from the ©Nova. Corp. Collection

In light of these two decisions, there is no requirement that the wetlands directly abut the navigable water. What is required for CWA jurisdiction over "adjacent waters" is a significant nexus between the wetlands and navigable waters. On appeal to the Sixth Circuit, Rapanos argued that the district court erred when it held that the filled wetlands on his property were "adjacent" to navigable water and within the jurisdiction of the CWA. The Sixth Circuit was not persuaded by Rapanos' argument and held that a hydrological connection satisfies the *SWANCC* "significant nexus" test. Using reasoning similar to that in *Riverside Bayview*, the Sixth Circuit held that wetlands that are hydrologically connected to navigable waters may bring pollution to those navigable waters and result in disastrous effects on the habitat and food chain of the native aquatic species. Therefore, federal jurisdiction is appropriate.

Conclusion

In sum, the Sixth Circuit upheld the district court's judgment against Rapanos despite the fact that the wetlands were not directly next to a navigable water. The court held that a hydrological connection to a navigable water is enough to invoke federal jurisdiction. Therefore, Rapanos' filling of the wetlands on his property was in violation of the § 404 permitting requirements of the CWA.

Endnotes

1. Lauren is a third-year law student at the University of Connecticut School of Law.
2. *U.S. v. Rapanos*, 376 F.3d 629, 632 (6th Cir. 2004).
3. 531 U.S. 159 (2001). In *SWANCC*, the Supreme Court held that the Corps had exceeded its authority under the Clean Water Act by adopting its "migratory bird rule" which extended the definition of "waters of the U.S." to isolated waters used as habitat by migratory birds and endangered species.
4. 33 U.S.C. § 1344 (2004).
5. 40 C.F.R. § 122.2 (2004).
6. *Rapanos*, 376 F.3d at 635.
7. 474 U.S. 121 (1985).
8. *SWANCC*, 531 U.S. 159.

NMFS Properly Classified Hawaiian Longline Fishery

Kohola v. National Marine Fisheries Service, 314 F.Supp.2d 1029 (D. Haw. 2004).

Daniel Park[1]

On April 13, 2004, the United States District Court for the District of Hawai'i ruled that the National Marine Fisheries Service (NMFS): (1) did not err when classifying the Hawaiian Longline Fishery as a Category III fishery for 2003 and (2) possessed the discretion to consider the reliability of the existing scientific data in making its 2003 classification decision. The district court based its ruling on the language of the Marine Mammal Protection Act (MMPA), as well as NMFS's own regulations.

Background

The MMPA, in order to regulate the "taking" of marine mammals by commercial fishing fleets, requires NMFS to classify commercial fisheries under one of three categories and to reexamine the classifications once every year.[2] A Category I fishery is a commercial fishery with frequent incidental mortality and serious injury of marine mammals. A Category II fishery has occasional incidental mortality and serious injury of marine mammals. Commercial fisheries with a remote likelihood of or no known incidental mortality or serious injury of marine mammals are classified as Category III. Pursuant to the MMPA, Category I and II fisheries must satisfy several additional regulatory requirements, including displaying certificates of authorization, while Category III fisheries are largely unregulated.

The present dispute involves the "false killer whale" and Hawai'i's commercial longline fishery. Since 1994, NMFS has classified the Hawai'i longline fishery as a Category III fishery. Recent scientific data, though, indicates that every year approximately four to nine false killer whales are caught in longlines used to catch tuna and swordfish. Despite recommendations from the Pacific Scientific Review Group to change the longline fishery's classification to either Category I or II, NMFS left the classification at Category III in 2003.

The plaintiffs Hui Malama I Kohola, Center for Biological Diversity and Turtle Island Restoration Network argued that NMFS's refusal to change the classification was illegal. Relying on the annual mortality rate of false killer whales, the plaintiffs contended that catching even one false killer whale per year put the longline fishery into Category I. However, the uncertainty of scientific data on the population of false killer whales in the relevant area presented a major complication to the plaintiffs' case. Although a 1990 survey estimated a minimum population size of 83 false killer whales, both plaintiffs and defendants agreed that this data was inadequate because areas around the Northwest Hawaiian Islands and beyond twenty-five nautical miles from the main islands were not surveyed and estimates were uncorrected for the proportion of diving animals missed during the aerial survey.

The Court's Analysis

In determining that NMFS's 2003 classification decision was not arbitrary and capricious, the district court analyzed several arguments raised by plaintiffs to support their position that the Hawai'i longline fishery should be classified as Category I. First, the plaintiffs argued that the wording of NMFS's regulation and its definition of Category I left no room for any other classification. The Court rejected the plaintiffs' argument.

NMFS regulations define a Category 1 fishery as:

> a commercial fishery determined by the Assistant Administrator to have frequent incidental mortality and serious injury of marine mammals. A commercial fishery that frequently causes mortality or serious injury of marine mammals is one that is by itself responsible for the annual removal of 50 percent or more of any stock's potential biological removal level.[3]

The Court ruled that the definition of a Category 1 fishery must be read in conjunction with the definitions of Category II and III fisheries. Both the Category II and III definitions state that in the absence of reliable information, NMFS should evaluate other factors in determining the frequency of

incidental mortality or serious injury. The plaintiffs argued that the absence of this clause requires NMFS to classify the longline fishery as a Category 1, because the agency cannot look to other factors. The Court, however, determined that the exclusion of the "in the absence of reliable information" clause from the Category I regulatory definition and the corresponding inclusion in Categories II and III could imply that a Category I classification requires the availability of reliable data. Under that interpretation, because reliable data was not available, NMFS could not classify the longline fishery as Category 1 and could look to other factors when considering other classifications. Since NMFS's interpretation of its own regulations was not plainly erroneous or inconsistent with the regulation, the Court concluded that NMFS's interpretation was controlling.

Finally, the plaintiffs asserted that NMFS failed to consider the "best available scientific evidence" in classifying the longline fishery. The Court also rejected this argument because NMFS took into account stock assessment reports, the known limitations of the reliability of the existing data, and the fact that new data would be used for the 2004 classification. Therefore, the Court held that there was sufficient evidence in the record to allow NMFS to make its eventual decision. The Court also noted that the primary relief sought by the plaintiffs would soon be moot because the 2004 classification decision will be based on new false killer whale population data and will likely result in a reclassification of Hawai'i's longline fishery.

Conclusion

Based on this analysis, the U.S. District Court for the District of Hawai'i denied the plaintiffs' motion for summary judgment and granted the defendants' and intervenor's cross-motion for summary judgment. The plaintiffs were not entitled to an order requiring NMFS to reclassify the longline fishery.

Endnotes

1. Dan is a second-year law student at the University of Hawai'i School of Law.
2. 16 U.S.C. § 1387(c)(1)(C) (2004). "Taking" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. *Id.* § 1362(13).
3. 50 C.F.R. § 229.2 (2004).

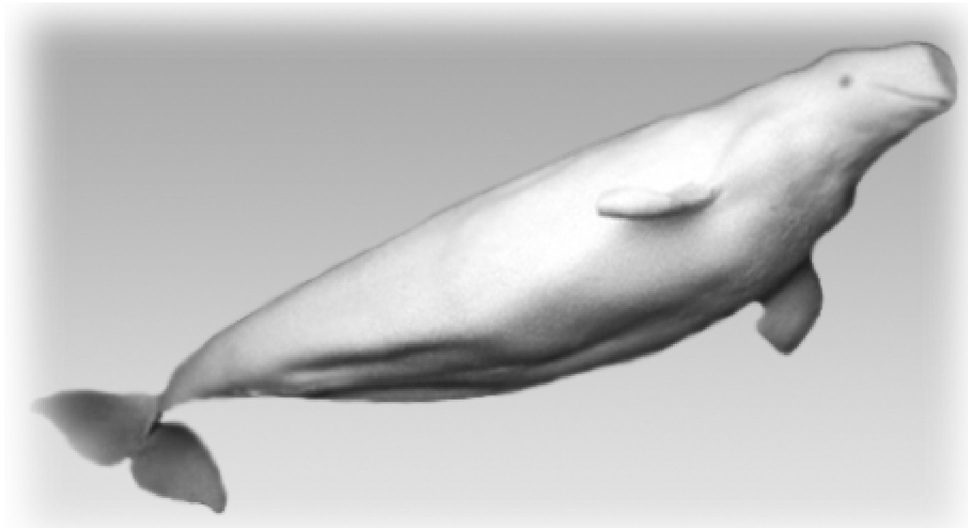
Photograph of false killer whale courtesy of NOAA, taken off the bow of the NOAA ship, Gordon Gunter

Decision Not to List Cook Inlet Beluga Whales as Endangered Upheld

Alaska Center for Env't v. Rue, 2004 Alas. LEXIS 98 (Alaska July 30, 2004).

Danny Davis[1]

In July 2004, the Alaska Supreme Court affirmed the decision of the Alaska Fish and Game Commissioner not to list the Cook Inlet beluga whale as endangered under Alaska's Endangered Species Act. The Court, however, also held that the commissioner used a wrong legal standard in deciding that the whales are not a distinct subspecies.



Beluga whale graphic from ©Nova Development Corp.

Background

In May 2000, responding to a request from the Alaska Department of Fish and Game, the National Marine Fisheries Service (NMFS) listed the Cook Inlet beluga whale as a depleted stock because the beluga's numbers had fallen below the optimum sustainable population level. In the mid-1980's the Cook Inlet belugas numbered over one thousand but by 1998 had declined to around 350, primarily due to overharvesting. Various groups petitioned NMFS to list the belugas as an endangered species under the federal Endangered Species Act.[2] In June 2000, NMFS determined that the cause of the beluga's decline was overharvesting and that the beluga was in no danger of extinction. NMFS believed that restricting the harvesting of belugas would allow the population to recover. A suit was brought in federal district court challenging the decision not to list the belugas as endangered. The court dismissed the case, stating that NMFS acted within the scope of its legal authority.

While the federal ESA process was proceeding, the Alaska Center for the Environment (ACE), along with other groups, petitioned Alaska's Fish and Game commissioner to list the Cook Inlet beluga whales as an endangered species under Alaska's Endangered Species Act. In July 2000, the commissioner issued a decision declining to list the belugas as an endangered species because the belugas were not threatened by extinction. The commissioner also determined that the belugas are not a "species or subspecies" within the meaning of the Act. ACE filed suit seeking declaratory and injunctive relief claiming the commissioner erred in determining that the belugas are not threatened and not a "species or subspecies." The Alaska Superior Court affirmed the commissioner's decision. Although the court questioned the subspecies decision, the court ruled the issue was moot because of the decision that the belugas were not endangered. ACE appealed the decision to the Alaska Supreme Court.

Alaska's Endangered Species Act

Alaska's Endangered Species Act is similar to the federal Endangered Species Act. The Commissioner of Fish and Game is authorized to list a species or subspecies as "endangered." An endangered species or subspecies is one whose "numbers have decreased to such an extent as to indicate that its continued existence is threatened."[3] The commissioner is to consider the following indicators in making a decision:

(1) the destruction, drastic modification, or severe curtailment of its habitat;

(2) its overutilization for commercial or sporting purposes;
(3) the effect on it of disease or predation;
(4) other natural or man-made factors affecting its continued existence.[4]

Also, the commissioner is to seek "the advice and recommendation of interested persons and organizations, including but not limited to ornithologists, ichthyologists, ecologists, and zoologists."[5] Species or subspecies listed as endangered "may not be harvested, captured, or propagated except under the terms of special permit issued by the commissioner."[6]

Listing Decision

The court must "accept the commissioner's decision unless it lacks any rational basis."[7] ACE argued that the commissioner's failure to list the Cook Inlet belugas as endangered was arbitrary and without rational basis because the commissioner failed to consider the small size of the beluga population and the current threats to the population. The court dismissed ACE's claims.

The commissioner, considering all the factors, determined that overharvesting was the likely cause of the beluga's decline. Since federal law gives exclusive authority to NMFS to manage overharvesting of whales, the commissioner concluded that only the federal government could control overharvesting and that rules already adopted by NMFS would likely succeed. The court concluded that the commissioner's decision was rational.

Are the Whales a Subspecies?

The commissioner concluded that the Cook Inlet beluga whales did not qualify as a "species or subspecies" within the meaning of the law. ACE argued that the commissioner misconstrued the meaning of "species or subspecies" and that the commissioner's interpretation of the Act was unduly narrow. The commissioner argued this point was moot.

Typically, a court will not consider a moot issue "when its resolution would not result in any actual relief, even if the claiming party prevailed."[8] However, if public interest would be served by deciding the moot issue, a court may consider it. To address a moot issue under the public interest exception, a court must find (1) that the issue in question is capable of repetition, (2) that it might repeatedly evade review if the mootness doctrine is strictly applied, and (3) that it "is so important to the public interest as to justify overriding the mootness doctrine."[9] The court decided the commissioner's decision met the three-part test for review because the "subspecies" issue will continually come up in future law suits, may evade review if courts continue to find the commissioner has made a rational decision, and is of important public interest because a ruling now could result in a quicker response if the whales become endangered.

The commissioner ruled that the whales are not a subspecies because the scientific literature does not recognize the Cook Inlet beluga whales as a distinct subspecies of the general beluga species. The commissioner argued that, in his view, the act used "species" and "subspecies" in the technical taxonomic sense. The court disagreed with this narrow reading. The court ruled that the act requires the commissioner to take a hard look at all views from informed scientists in determining the existence of a subspecies, not just taxonomy. Because the commissioner only considered taxonomy, the court held that he abused his discretion. The court, however, refrained from expressing a view on whether the Cook Inlet beluga whales would be considered a subspecies under this broader definition.

Conclusion

Even though environmental groups were unsuccessful in getting the Cook Inlet belugas listed as an endangered species, this ruling could be seen as a small victory. Requiring the commissioner to use a broad definition may make it easier in the future for environmental groups to argue that the Cook Inlet belugas are a "subspecies." This is one fewer battle that the environmental groups will have to fight if the beluga's numbers continue to decline.

Endnotes

1. Danny is a second-year law student at University of Mississippi School of Law.
2. An "endangered species" is one that "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (2004).
3. Alaska Stat. § 16.20.190(a) (2004).
4. *Id.*
5. *Id.* § 16.20.190(c).
6. *Id.* § 16.20.195.
7. *Alaska Ctr. for Env't v. Rue*, 2004 Alas. LEXIS 98 at *14 (Alaska July 30, 2004).
8. *Id.* at *18.
9. *Id.* at *19.

A Right to a Salvage Award, Not Title

R.M.S. Titanic v. The Wrecked and Abandoned Vessel et al., 323 F. Supp. 2d 724 (E.D. Va. 2004).

Shannon McGhee[1]

On July 2, 2004, the Eastern District Court of Virginia held that it would not recognize a 1993 "Proces-Verbal" issued by a French maritime official that purportedly granted R.M.S. Titanic, Inc. (RMST) title to 1,800 artifacts salvaged from the Titanic in 1987. RMST would also be estopped from claiming title to 5,900 Titanic artifacts under the law of finds at its October 18, 2004 salvage award hearing.

Background

Since 1987, RMST has salvaged 5,900 Titanic artifacts. 1,800 of these artifacts were salvaged prior to RMST being awarded the exclusive right to recover artifacts from the Titanic wreck in 1994 as salvor-in-possession. Eight months before the U.S. District Court granted RMST exclusive salvor-in-possession status, a French Maritime Affairs Administrator, M. Chapalain, on behalf of the Headquarter of Lorient executed a "Proces-Verbal"[2] which transferred title of the 1,800 artifacts salvaged in 1987 to RMST's predecessor-in-interest, Titanic Ventures limited partnership (TVLP).[3] In 2004, RMST filed a "Motion for Salvage and/or Finds Award" to collect on the salvage liens it had acquired from the Titanic artifacts recovered. In the alternative, RMST asked the court to recognize RMST's title to all 5,900 artifacts under the 1993 "Proces-Verbal" and the "law of finds."[4]

The 1993 Proces-Verbal

In applying principles of international comity,[5] the court declined to recognize the 1993 Proces-Verbal. The court explained "where a foreign court renders a judgment following what appears to have been a fair trial with the participation of all interested parties, an American court should give effect to the court's judgment and should not evaluate its merits."[6] The court pointed out, however, that the Proces-Verbal was not carried out in a full and fair proceeding because the Administrator failed to make any factual findings regarding the value of the artifacts, TVLP's cost of salvage service, the artifacts' importance, or a proposed monetary salvage award for TVLP's approval as required by French law at the time the agreement was executed.

Specifically, the court found the whole Proces-Verbal proceeding suspicious after the Administrator cited a French provision which allowed him to "remit to the salvor ("TVLP"), as his property, all salvage of little value which would produce no appreciable amount at sale."[7] The salvaged property referred to by the Administrator was the first 1,800 artifacts ever collected from the Titanic wreck. The court refused to accept that the Administrator found the first ever salvaged Titanic artifacts valueless, especially when RMST itself estimates all 1,800 artifacts as worth $16,687,316.[8]

Additionally, the court held even if the Proces-Verbal was legitimate, recognizing it would be contrary to U.S. public policy. The United States' public policy of keeping all Titanic artifacts together was adequately expressed, the court reasoned, in 2001

Photograph of Titanic courtesy of NOAA's Ocean Explorer

when the National Oceanic and Atmospheric Administration (NOAA), in implementing the Titanic Maritime Memorial Act of 1986, produced guidelines for the research, exploration, and salvage of the Titanic wreck, stating "all artifacts recovered from R.M.S. Titanic should be . . . kept together and intact as project collections."[9] Awarding RMST title to 1,800 of the 5,900 Titanic artifacts, the court concluded, would surely result in their dispersal.

Finders Keepers

After holding the status as exclusive salvor-in-possession of the Titanic wreck for ten years, RMST asked the court to convert its salvage case into a finds case. Such a change would allow RMST to gain title over all 5,900 Titanic artifacts already in its possession. Under the common law of finds, a salvor must establish by clear and convincing evidence (1) the abandonment of property, (2) possession of the property and (3) intent to reduce that property to ownership, before he or she can be awarded title to the property.[10] In contrast, under the law of salvage, a salvor does not gain title over property found but instead receives a salvage lien against the property to ensure a reasonable reward for his or her salvage services.

The court rationalized it would be inequitable and inconsistent under the doctrine of judicial estoppel for RMST to claim title to the 5,900 artifacts already collected while simultaneously retaining the exclusive right to recover the remaining artifacts in and surrounding the Titanic wreck. Because the court was persuaded for the last ten years by RMST's repeated assertions that it would recover and preserve Titanic artifacts (in part for the public's benefit since RMST believed the public had partial ownership of the Titanic artifacts because of their historical and cultural importance), they therefore lacked the intent to acquire complete ownership as required under the law of finds. Furthermore, under the law of finds a court has no authority to stop other would-be salvors from recovering abandoned property, which it does have under the law of salvage. Thus, awarding RMST title to the artifacts under finds law at this point would give RMST a significant unfair advantage over the entire world or, in other words, a ten-year commercial head start.

Conclusion

For the reasons cited above, the court ruled it would not recognize the 1993 Proces-Verbal under principles of international comity, and would not allow evidence or argument at the October 18, 2004 hearing for the purpose of awarding RMST title to the Titanic artifacts under the law of finds. Moreover, the October 18, 2004 hearing will determine an appropriate salvage award for all 5,900 Titanic artifacts in RMST's current possession based on (1) the market value, (2) expert testimony and evidence of co-venturers' contributions and RMST's past remunerations received for the display of Titanic artifacts, and (3) RMST's portion of the total salvage award, based on the evidence presented.

On August 2, 2004, the district court granted RMST a stay and continuance of the October 18, 2004 proceeding until the Fourth Circuit determines whether it has jurisdiction to hear RMST's interlocutory appeal of the district court's July 2, 2004 decision.[11]

Endnotes

1. Shannon is a third-year law student at the University of Georgia School of Law.
2. A 'proces-verbal,' according to RMST, is "most accurately described as a detailed and authenticated account drawn up by a magistrate, police officer, or other person having authority of acts or proceedings done in the exercise of his duty." Black's Law Dictionary (7th ed. 1999) defines 'proces verbal' as an "official record of oral proceedings."
3. *R.M.S. Titanic v. The Wrecked and Abandoned Vessel et al.*, 323 F. Supp. 2d 724, 727 (E.D. Va. 2004).
4. *Id.* at 730.
5. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).
6. *R.M.S. Titanic*, 323 F. Supp. 2d at 731.
7. *Id.* at 732.
8. *Id.* at 733.
9. *Id.*
10. *Id.* at 735.
11. *R.M.S. Titanic v. The Wrecked and Abandoned Vessel et al.*, 2004 WL 1745922 (E.D. Va.).

Federal Circuit Reverses $37 Million Award to Fishing Vessel

American Pelagic Fishing Co. v. U.S., 379 F.3d 1363 (Fed. Cir. 2004).

Lance M. Young[1]

Photograph of purse seining of herring courtesy of NOAA Fisheries Collection

In 2003, the Court of Federal Claims awarded the owner of a fishing vessel, the *Atlantic Star*, over $37 million because, it reasoned, two appropriation acts amounted to a temporary regulatory taking.[2] The Federal Circuit Court of Appeals recently vacated that award.

Background

Throughout the 1990's, the National Marine Fisheries Service (NMFS) reported that mackerel and herring fish stocks were very high and underfished. The U.S. Senate Finance Committee subsequently recommended the use of larger ships to fish large stocks of mackerel and herring to compete with European fish markets. Lisa Torgersen, the president of American Pelagic Fishing Company, built the *Atlantic Star* vessel in response to these events. The *Atlantic Star* is 369 feet long and has a total of 13,400 horsepower. It cost nearly $40 million to design and build with an advanced freezing system, sorting system, and holding capacity of 400 to 500 metric tons of fish.

In 1997, Pelagic prepared for operation by obtaining the required permits and gear authorizations from the Northeast Regional Office of the NMFS. Simultaneously, the Atlantic States Marine Fisheries Commission and the New England Fishery Management Council voiced opposition to the vessel's operation. The opposition led to legislative proposals in the U.S. House and Senate that would ban fishing vessels of this magnitude. While the legislation failed, Congress successfully revoked the permits and authorization of the *Atlantic Star* by attaching a rider to the 1997 appropriations act. The rider prohibited funding of a fishing permit or authorization for any vessel greater than 165 feet in length, more than 750 gross tons, or with a total horsepower greater than 3,000. The 1998 appropriations act similarly prevented the vessel from obtaining permits and the NMFS has since made it impossible to obtain permits and authorization through its regulatory scheme. The *Atlantic Star* was the only vessel affected by the appropriations acts and regulation changes.

Pelagic then attempted to use the *Atlantic Star* outside of U.S. designated waters. In the Baltic Sea, it served as the "mother ship" for smaller fishing boats. This voyage was not profitable. It also fished off the coast of West Africa, the only other place it could obtain fishing rights, but water conditions and low fish stock resulted in lost profits.

In March of 1999, Pelagic sued the federal government claiming the two appropriation acts amounted to a regulatory taking. The Court of Federal Claims held that the acts did result in a temporary taking[3] and, in a separate damages trial, awarded American Pelagic $37,275,952.67 based on the ship's hypothetical rental value.[4]

Takings Claim

The Fifth Amendment of the United States Constitution requires just compensation when private property is taken for public use. The Fifth Amendment taking clause applies to physical invasion of property by the government or where "regulation denies all economically beneficial or productive use of land."[5] Furthermore, "a regulatory taking may occur when government action, although not encroaching upon or occupying private property, still affects and limits its use to such an extent that a taking occurs."[6]

If all economically beneficial use has not been lost, courts use a balancing test, developed in *Penn Central Transportation Co. v. City of New York*, to determine whether a property interest has been so affected as to constitute a taking by government regulation.

The court considers the economic harm suffered by the claimant, the extent to which the government regulation has interfered with distinct investment backed expectations, and the character of the government action.

A claimant such as Pelagic has to demonstrate that a valid property right exists before it becomes necessary for a court to determine whether a taking has occurred. Traditionally, a metaphorical "bundle or rights" has defined when a property right exists. The bundle of rights includes the ability to possess, consume, exclude, and transfer property. Pelagic claimed it had a property right in the federal fishery permits and authorizations given by NMFS. It alleged a taking as a result of the 1997 and 1998 appropriation acts, which prohibited the *Atlantic Star* from fishing after it had already secured the proper authorizations to fish. Permits and licenses, as the District Court acknowledged, are not property that can be protected by the Fifth Amendment. The right to transfer or sell is one of the "sticks" in the "bundle of rights" and because a permit holder cannot transfer or sell a fishing permit, there is no property right in the permit. Permits are often viewed as *privileges* rather than *rights*.

However, the District Court did determine that a property right existed in the vessel itself. The court found the "stick in the bundle" to be the right to use the vessel, "subject to regulation."[7] Because the NMFS regulations in 1997 and 1998 permitted the use of the vessel, the court determined that Pelagic had an inherent right to use its vessel in U.S. waters. The court then conducted a *Penn Central* balancing test and determined that the appropriation acts thwarted Pelagic's investment backed expectations, left the *Atlantic Star* with no commercially viable use, and that the government regulation was retroactive and targeted only at American Pelagic.[8]

Appellate Court's Analysis

On appeal, the Federal Circuit held that American Pelagic had no right to fish in U.S. waters. The court began its analysis by asking if holding a permit to fish for mackerel is a legally cognizable property interest. First, it distinguished between real property and personal property. The owner of personal property, in contrast to the owner of land, should expect that government regulation can devalue his or her property interest at any time. Furthermore, the court stated that there is a distinction between the government disturbing the use of personal property and having a right to use the property. A takings analysis should begin only if the right to use property has been violated.

The 1976 Fisheries Conservation and Management Act (now the Magnuson-Stevens Act) created the United States fishery conservation zone out to 200 miles, in which the U.S. has management authority over fish. According to the court, "sovereignty indisputably encompasses all rights to fish."[9] However, the Magnuson-Stevens Act does not give individual fishermen the right or title to fish resources.

Because the court found that American Pelagic had no property interest, Pelagic's taking claim failed. The government did disturb Pelagic's use of the *Atlantic Star*. The NMFS permits and authorizations did not, however, give Pelagic a right to fish in U.S. waters. In other words, when Pelagic purchased the *Atlantic Star*, its right to fish in U.S. waters was not one of the sticks in the bundle of rights that were inherent in the ownership of that vessel. For that reason, a taking claim could not prevail.

Conclusion

The District Court's $37 million award was vacated. The result of this dispute has an important implication for fishermen. The right to fish within U.S. waters is held exclusively by the government; thus, permits and authorizations grant privileges to individual fishermen to utilize the government's resources but do not transfer property rights for purposes of the Fifth Amendment.

Endnotes

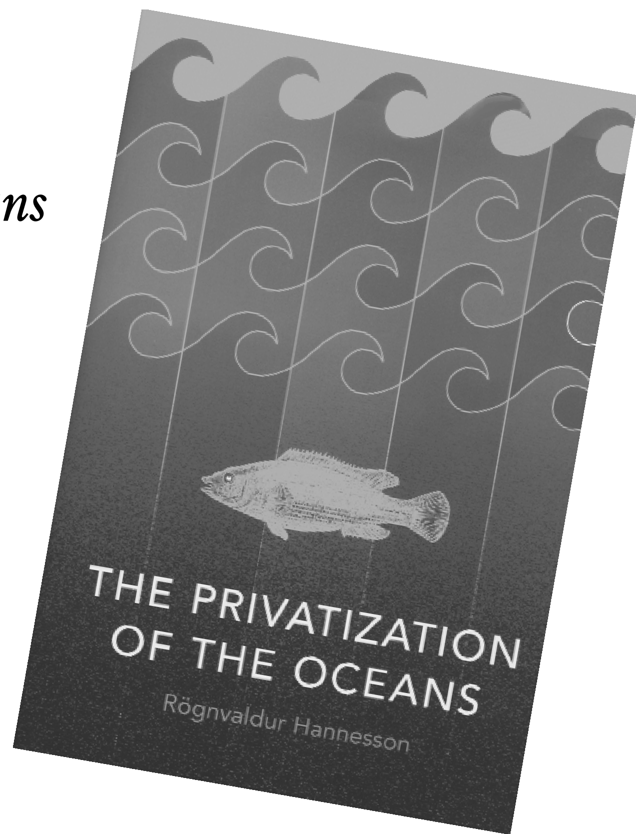
1. Lance is a second-year law student at Roger Williams School of Law in Bristol, Rhode Island.
2. For analysis of the Federal Court of Claims decision, *see* Stephanie Showalter, *Vessel Owner Awarded Over $37 Million for Temporary Taking*, THE SANDBAR 2:2, 1 (2003).
3. *American Pelagic Fishing Co. v. U.S.*, 49 Fed. Cl. 36 (Fed. Cl. 2001).
4. *American Pelagic Fishing Co. v. U.S.*, 55 Fed. Cl. 575 (Fed. Cl. 2003).
5. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 (1992).
6. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).
7. *American Pelagic Fishing Co.*, 49 Fed. Cl. at 48 (Fed. Cl. 2001).
8. *Id.* at 48-51.
9. *American Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1378 (Fed. Cir. 2004).

Book Review . . .

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

The Privatization of the Oceans

Rögnvaldur Hannesson (MIT Press 2004)



How can governments prevent the tragedy of the commons from playing out on a global scale in the world's oceans? The current fisheries management regulatory regime based on open access has proven ineffective at preventing the overcapacity of fleets and the unsustainable harvest of fish stocks. New and innovative management techniques are desperately needed. Rögnvaldur Hannesson in *The Privatization of the Oceans* presents a persuasive argument that Individual Fish Quotas (IFQs) are the best management tool currently available. According to Hannesson, "the role of property rights in fisheries in no different from the role of property rights elsewhere in the economy: property rights, if adequately defined and enforced, encourage efficient use of resources in the present with appropriate regard for the future."

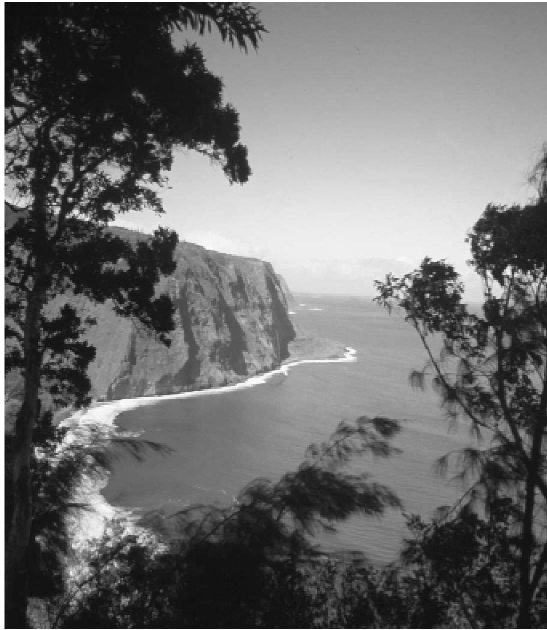
Mixing history with economic theory, Hannesson examines the privatization of the oceans beginning with extension of national jurisdiction to 200 miles in the 1970s and concluding with the development of IFQ systems in New Zealand, Chile, Norway, Canada, Iceland, and the United States. While the existing IFQ systems have not always resulted in the recovery of the fish stocks they were designed to manage, most have increased the efficiency of the fisheries by reducing the size of the fleet and the amount of capital invested. The case studies, especially the failures, provide scholars, fisheries managers, and policy makers with some valuable insights into the necessary elements of an IFQ regime and potential sources of conflict. The creation of an IFQ system will affect some of sectors of the fishery more than others and there will be perceived "losers." Hannesson's case studies reveal that these "losers" are different in every fishery and can be very powerful opponents. In New Zealand, the Maori argued that the IFQ system violated their traditional fishing rights protected by a treaty with Great Britain. In Alaska, the crab processors worried about losing business to fresh fish markets as the season grew longer. Valuable lessons can be learned from the various approaches taken by each nation to address the real and perceived losses of the different sectors.

It is important to note that Hannesson approaches IFQs from a purely economic perspective. Some environmental groups, mainly in the United States, have strongly opposed the development of IFQs. Hannesson acknowledges their arguments, which are generally based on the premise that marine life is valuable in and of itself, and recognizes that "exclusive use rights have no role to play in that universe." IFQs, however, may hold the key to the ultimate conservation of the world's fish stocks by giving fishermen a vested interest in their survival. *The Privatization of the Oceans* is a fascinating look into the early development of IFQs around the world and a great starting point for anyone interested in learning more about the evolution of private property rights in fisheries.

Rögnvaldur Hannesson is a Professor of Fisheries Economics at the Norwegian School of Economics and Business Administration and Research Director at the Center for Fisheries Economics in Bergen, Norway.

Coast to Coast
And Everything In-Between

Pierce County in Washington State is the first county to update its land use regulations as required by the state's Growth Management Act. The Act was passed in 1990 to address the negative impacts of population growth and suburban sprawl. The county's proposed changes would require developers to retain 30 percent of Garry oaks and 10 percent of other significant trees and authorize the reduction of the average size of residential lots to preserve wildlife habitat and wetlands. The county had also proposed a 100-foot "no touch" marine buffer, but politics forced the county to postpone the issue of marine buffers until 2006 when it will review its shoreline master plan. Until then, the county will continue to apply site-specific standards to protect sensitive shorelines.



Photograph of North Pacific shoreline, ©Nova Development Corp.

NOAA and the EPA recently warned New Jersey that its new "fast-track" environmental permitting law may threaten a portion of the state's federal funding. The law, which takes effect in November, is designed to provide a quicker review of state environmental permit applications. Federal agencies could cut funding or assume authority over the state's permitting process if the new law hinders the state's ability to protect its coastal environment. For example, mandatory deadlines can lead to permit approvals by default if the state is unable to meet the deadlines. New Jersey receives approximately $3 million from the federal government annually for coastal projects and environmental permitting programs.

The Smithsonian's National Museum of Natural History has embarked upon a $60 million restoration project culminating in 2008 with the opening of Ocean Hall, a 28,000 square-foot exhibit dedicated to the oceans. Ocean Hall will contain a 50-foot-long model of a northern right whale, an immersion theater that will allow visitors to experience diving into the deep, a captured giant squid, and a display highlighting the coelacanth. The Museum also plans to feature cutting-edge research by Museum scientists through videos and temporary exhibits.

Around the Globe

Chaos continued to reign in the Galapagos during September, but not at the hands of fishermen this time. Following a fishermen strike in June 2004 and a contentious court battle over sea cucumber harvest limits, the Ecuadorean government decided to remove Edwin Naula from his post as director of Galapagos Island National Park. Naula, popular with environmentalists and the tourist industry, was replaced by Fausto Cepeda. Over 300 park wardens went on strike to protest Cepeda's appointment and Cepeda was escorted across the picket line by fishermen armed with clubs and machetes. The strike concluded on September 28 with the announcement that the government had dismissed Cepeda as director. So the search is on for a new director, the park's ninth in two years.

Photograph of Galapagos tortoise, ©Nova Development Corp.

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR,* contact: the Sea Grant Law Center, Kinard Hall, Wing E, Room 262, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu . We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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

Publication Design: Waurene Roberson

Research Associates:
Danny Davis
Luke Miller

Contributors:
Terry Boardman, J.D.
Lauren Cozzolino
Shannon McGhee
Maureen McGowan
Daniel Park
Lance M. Young
Jennifer Simon

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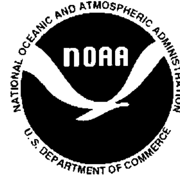

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Sea Grant Law Center
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848