The SandBar

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Legal Reporter for the National Sea Grant College Program

Balancing Coastal Development and the Public Trust: South Carolina Court Weighs In

Also,

Seafood Businesses Must Pay Property Taxes

Chattooga River Plan Remains Afloat

Hovercraft Ban in Alaskan Preserve Upheld

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Cover page photograph of a coastline in South Carolina, courtesy of Eric Harrison.

Contents page photograph of a lighthouse on Folly Beach, South Carolina, courtesy of Doug Kerr.

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Balancing Coastal Development and the Public Trust: South Carolina Court Weighs In

Niki L. Pace[1]

Shells on Kiawah Beach, courtesy of Bill Sutton.

Late last year, the South Carolina courts were once again called on to resolve development impacts to shorelines on Kiawah Island. In particular, the court considered whether a bulkhead to protect new development on Captain Sam's Spit was in the public interest and in compliance with the Coastal Zone Management Act and other state laws. In a split opinion, the court found that permitting the bulkhead would violate several provisions of state law and the public trust doctrine.

Background

Kiawah Island is a one-mile wide barrier island that stretches about ten miles along the South Carolina coast. Captain Sam's Spit is located at the very tip of the island, bordered on one side by the Kiawah River and the Atlantic Ocean on the other. The Spit consists of high sand dunes, maritime forest, and sandy beaches exposed at low tide. The Spit is eroding along the riverside while simultaneously growing along the Atlantic side through accretion. The Atlantic accretion

Kiawah Island Boardwalk, courtesy of Tinyfroglet Media.

is actually outpacing the erosion so that the entire area is growing land at the moment. Although the Spit is currently experiencing healthy land growth, the Spit has formed and then disappeared through natural forces at least twice in the last 300 years. The current Spit began forming around 1949.

In 1994, the Town of Kiawah Island (Town) and the Kiawah Developers (Kiawah) entered into a development agreement that designated limited uses of the Spit. Under this agreement, the Spit would be undeveloped green space and parkland. Over the next 10 years, continued accretion along the Atlantic side of the island made the land developable. In 2005, the Town and Kiawah entered into a new agreement that allowed for development of fifty homes and two community docks.

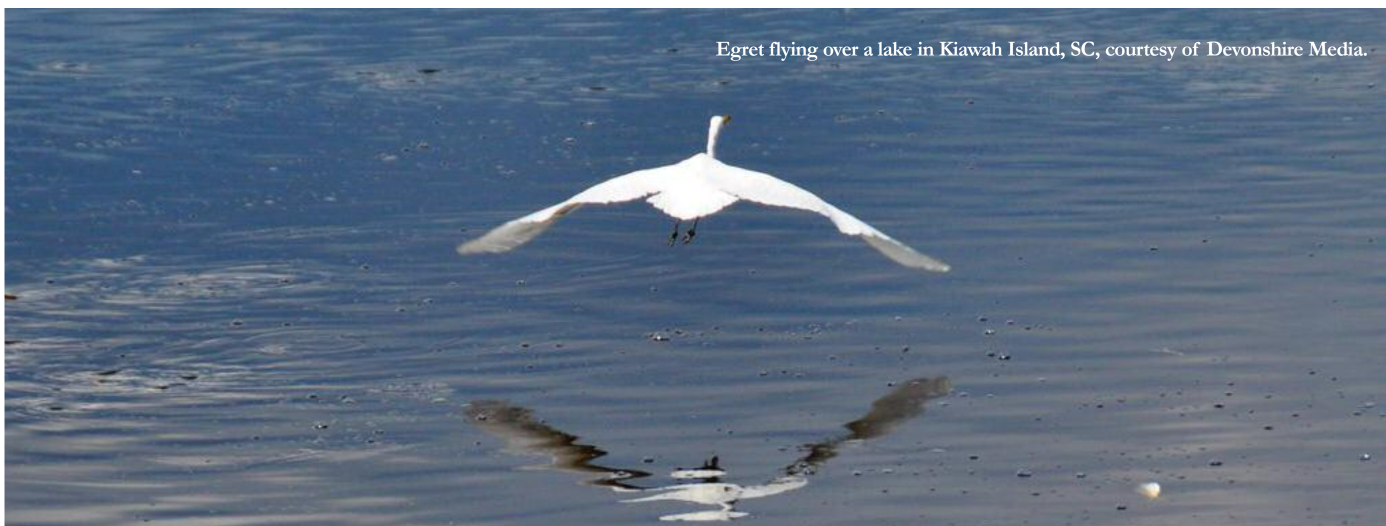
Prior to development, Kiawah hired an engineering firm to address the erosion occurring on the riverside of the Spit. The firm recommended a variety of structures that ultimately resulted in the bulkhead and revetment permit request at issue in this case.

Specifically, Kiawah sought permission to construct a 2,783-foot long bulkhead and revetment over State tidelands.[2] According to court documents, this would permanently alter more than 2.5 acres of pristine tidelands. The bulkhead would serve to stop erosion along that area, stabilizing the adjacent uplands where the landowner seeks to construct a residential development.

The initial permit request was largely denied by the South Carolina Department of Health and Environmental Control (DHEC), though a small 270-foot bulkhead was permitted. DHEC staff found that the proposed erosion control project would violate state law by preventing the normal shoreline migration, impacting sensitive areas, and affect rare and endangered species. The decision was appealed through various administrative review boards until the matter ultimately found its way before the South Carolina Supreme Court.

CZMA

On appeal, the court was asked to determine whether the bulkhead and revetment would violate the Coastal Zone Management Act (CZMA) as well as two provisions of state law addressing cumulative impacts and public access. However, as noted by the court, the basic principle underlying the legal issues in this case is the public trust doctrine "which provides that lands below the high water line are owned by the State and held in trust for the benefit of the public."[3] Under the public trust doctrine, state tidelands can, in limited circumstances, be altered and still serve the public interest. But under South


Egret flying over a lake in Kiawah Island, SC, courtesy of Devonshire Media.

Carolina law, the public interest is generally best served when the tidelands are preserved in their natural state.

In reviewing compliance with the CZMA, the court noted that the area in question is a "critical area" within the meaning of the law and therefore activities must meet numerous requirements. In particular, use of the critical area must provide "the maximum benefit to the people" which does not necessarily mean it will "generate measurable maximum dollar benefits."[4] Applying this standard, the court found that the bulkhead would only benefit the developer and that the public would receive no benefit from the construction. Therefore, this standard was violated. The court rejected rationale advanced by Kiawah that the public benefit requirement would be met through the financial benefit of the project. The court maintained that the financial benefit would still lie with Kiawah rather than "the people."

In reviewing additional state law matters, the court found that a cumulative impacts analysis, as required by state law, must take into account both the project's impact on the critical area as well as impacts on upland areas with the coastal zone.[5] In this instance, the purpose of the bulkhead and revetment was to stop erosion so that residential homes could be constructed on the uplands. This would transform the uplands from a completely natural area to a developed area. The court found that these impacts should be taken into consideration when reviewing the permit request.

The court also considered another state law that bulkheads are prohibited "where public access is adversely affected unless no feasible alternative exists."[6] After reviewing several related provisions of state law, the court concluded that the intent of the law was to "achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other."[7] However, the law also acknowledged that historically environmental and public considerations had been "sacrificed at the alter of economic development" and therefore should be afforded greater protection going forward.[8]

The court then examined evidence of public use of the beach to determine its significance and found that all evidence presented suggested that the public regularly uses the area that would be impacted by the bulkhead. Since the public uses the area, feasible alternatives to the project must be considered unless none exist. The court noted that a feasible alternative is not just one that stops erosion. Rather, a feasible alternative may include no action or the preservation of the natural shoreline processes.

Conclusion

In reaching its conclusion, the court stressed the importance of public tidelands to the people of South Carolina and the many social benefits found there. However, the court reiterated that its review of the matter was based on the laws of South Carolina. The matter will be returned to the agency to re-evaluate the permit request in light of the court's decision.

Endnotes

1. Niki Pace is Sr. Research Counsel for the Mississippi-Alabama Sea Grant Legal Program.
2. Kiawah Development Partners v. South Carolina Dept. of Health and Environmental Control, 2014 WL 6992119 (S.C. Dec. 10, 2014).
3. *Id.* at *5.
4. *Id.*
5. *Id.* at *7 discussing Regulation 30-11.
6. Regulation 30-12(C)(d).
7. *Kiawah Development Partners,* 2014 WL 6992119 at * 11.
8. *Id.*

Seafood Businesses Must Pay Property Taxes

Terra Bowling

The Boston Fish Pier in Boston, MA, courtesy of William Cassidy.

In November, a Massachusetts appellate court ruled that several seafood companies who remained at their locations five years past the end of their leases are required to pay property taxes.[1]

Background

The Boston Fish Pier is owned by Massachusetts Port Authority (Massport) and located in the Commonwealth Flats area of South Boston. From 1998 to 2004, several wholesale

The Boston Fish Pier in Boston, MA, courtesy of William Cassidy.

fish and seafood businesses held leases on the pier. The leases required the companies to pay taxes and fees for the leased premises; however, only one company paid tax during that period.

When the companies attempted to renew their leases, Massport refused based on the fact that the companies were not current on their taxes. The companies filed an action seeking a determination that they were not liable for taxes on the properties. A lower court ruled, and the appellate court affirmed, that the companies were liable for taxes during that period.[2] The courts rejected the companies' contention that they were exempt from taxation, since Massport itself and its lessees are not required to pay real estate taxes on its properties.[3] The courts noted that the law contained an exception to the exemption for business lessees of property in the Commonwealth Flats.

The companies remained in their locations beyond the expiration of their leases, paying rent on a month to month basis. When the city attempted to collect taxes, the companies claimed that since their leases had expired, they were no longer "business lessees" required to pay taxes. The city filed supplemental counterclaims in the original action, seeking to recover additional unpaid taxes for the time the companies had remained on the property after their leases ended.

Tall ships docked along the Boston Fish Pier in Boston, MA, courtesy of JD Kin.

The city moved for summary judgment, and the court ruled in favor of the city. On appeal, the court had to determine whether the plaintiffs were liable as lessees for the taxes assessed during the holdover period.

Exemption

On appeal, the companies maintained that they should be exempt from taxation under Massport's enabling act, which provides exemption from taxation for Massport and its lessees. The court noted that the purpose of the exemption is to assist Massport in establishing and maintaining public transportation. It cited the exception to the exemption for business lessees in the Commonwealth Flats. The companies argued that "after the lease term expired and they remained on the property, they could no longer be considered lessees and, therefore, were no longer subject to taxation under the section 17 exception for business lessees of Massport's commonwealth Flats properties."[4]

The court noted that the companies' leases contained a holdover provision that set out the conditions of a continued tenancy after expiration of the lease term. The court noted that since the companies signed the leases that contained these provisions, the companies would continue to be "lessees" governed by the holdover provisions of the lease. The court concluded that the plaintiffs should be characterized as business lessees and therefore not entitled to the tax exemption for MassPort properties. The court noted that,

> *It defies common sense to permit the plaintiffs in this case, who agreed to the leases' holdover provision and who were statutorily and contractually bound to pay taxes during the lease term, to be excused from the obligation by virtue of their simply remaining on the leased property, without Massport's consent, after the expiration of the lease term.*

The city may now seek to have the companies pay back taxes as far as statutorily allowed. According to the companies' attorney, they plan to appeal the ruling.[5]

Endnotes

1 Cape Cod Shellfish & Seafood Co, Inc. v. City of Boston, 86 Mass. App. Ct 651 (2014).

2 Cape Cod Shellfish & Seafood Co. v. Boston, 74 Mass.App.Ct 1127 (2009).

3 G.L.c. 91 App. Section 1-17 (section 17), as appearing in St. 1978, c 332, section 2.

4 *Cape Cod Shellfish,* 86 Mass. App. Ct. at 654-55.

5 Mary Moore, *Appeals Court Upholds Ruling That Fish Companies on Pier Owe City Taxes*, Boston Business Journal, Nov. 24, 2014. http://www.bizjournals.com/boston/news/2014/11/24/appeals-court-upholds-ruling-that-fish-companies.html?page=all.

Chattooga River Plan Remains Afloat

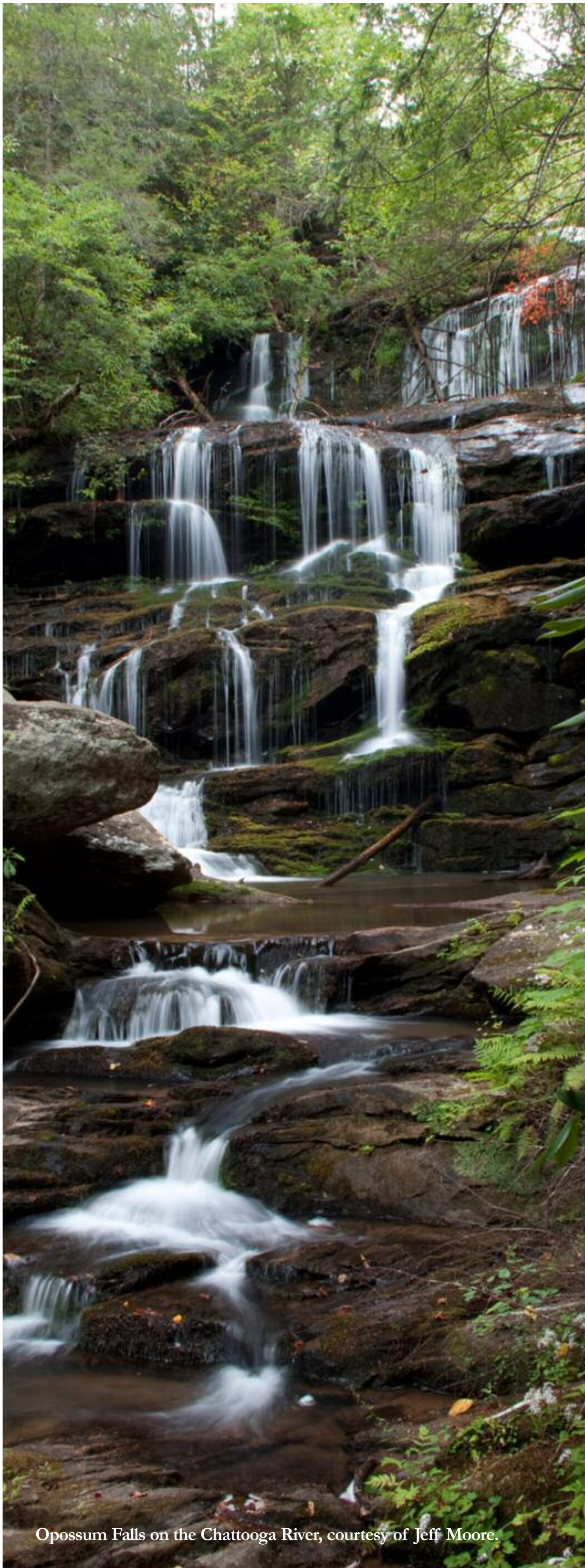
Terra Bowling

The Chattooga River, courtesy of Dianne Frost.

In 1974, Congress designated the Chattooga River and adjacent land for preservation under the Wild and Scenic Rivers Act (WRSA). In its original management plan, the U.S. Forest Service, which managed the Chattooga under WRSA, prohibited non-motorized rafting or "floating" on the headwaters of the river. In 2012, the Forest Service amended its plan to allow floating on the headwaters during the winter months. Suits were filed by various groups, some alleging that the restrictions on floating were too stringent while others argued that no headwater floating should be allowed.

Background

The WRSA outlines a national policy to protect rivers of "outstandingly remarkable value" (ORVs). Rivers designated under WRSA must be managed to prevent degradation of their condition and to preserve their pristine quality for future generations. Pursuant to this, "the outstandingly remarkable values or 'ORVs' that led Congress to designate the river must be "protect[ed] and enhance[d]," while other uses may be limited if they substantially interfere with the public's use of those ORVs."[1]


Opossum Falls on the Chattooga River, courtesy of Jeff Moore.

After the Chattooga River was designated under WRSA, the Forest Service developed the Chattooga Wild and Scenic Development Plan. The original 1976 plan limited floating to the lower portions of the Chattooga. In 2002, American Whitewater challenged the Forest Service's ban on floating in the headwaters. A Forest Service Reviewing Officer agreed and directed the Forest Service to study whether there was an adequate basis for continuing the ban on floating on the headwaters and to develop an action plan establishing capacity limits of the river and potential impacts of headwaters floating on the river's ORVs.

In 2012, the Forest Service issued an Environmental Assessment (EA) on lifting the ban. The Forest Service based its findings on a 2007 report looking at other recreational uses of the headwaters and feedback received during the public comment period. The EA concluded that a total lift of the ban would lead to a significant likelihood of user conflict between floaters and anglers. The EA also noted that floating conditions would be best and fishing would be less frequent during the winter months.

The Forest Service chose a plan that allowed floating on most headwaters between December 1 and April 30 when flows are greater than 350 cubic feet per second. The agency determined that the plan would not have a significant impact on the human environment and therefore did not require an Environmental Impact Statement under National Environmental Policy Act (NEPA). The Forest Service ultimately issued, along with the EA, a Decision Notice and Finding of No Significant Impact (FONSI).

Litigation

American Whitewater, a nonprofit focused on conserving and promoting recreational use of the nation's whitewater resources, filed suit against the Forest Service, claiming that the floating limits were too stringent and therefore inconsistent with the Wild and Scenic River Act (WSRA). An environmental group, Georgia ForestWatch, intervened to support the ban on headwaters floating. The Rust family, which owns approximately 1.7 miles of the headwaters shoreline, also intervened in the suit, arguing that the headwaters running through their land is not navigable and that the Forest Service's plan violated NEPA. The U.S. District Court for the District of South Carolina granted judgment in favor of the Forest Service.

American Whitewater's Claims

On appeal, American Whitewater argued that the limits on floating violated WRSA and the Administrative

Procedure Act (APA). The court first examined the agency's decision under the APA. A court may overturn an action under the APA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[2] The court reasoned that the Forest Service's decision met none of these requirements. The court reasoned that "The Forest Service has provided a cogent justification for the remaining limits on [h]eadwaters floating, supported by the record, and that is sufficient to sustain its decision under the APA."

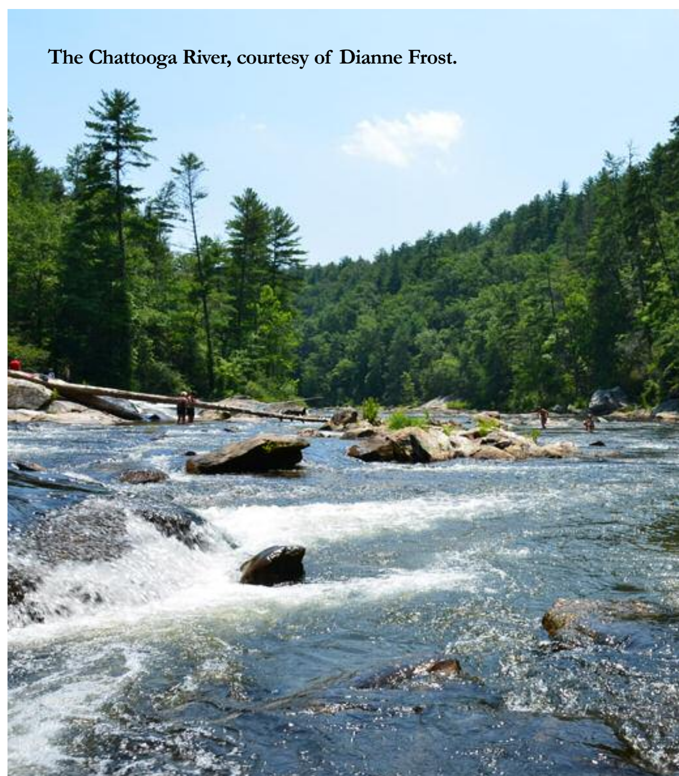
A COURT MAY ONLY OVERTURN AN ACTION UNDER THE APA ONLY IF IT IS "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW."

The court next looked at whether the Forest Service violated § 1281(a) of WRSA. Section 1281 requires the agency to protect the ORVs that led Congress to designate the river without limiting other uses that do not "substantially interfere" with pubic use and enjoyment of the ORVs. American Whitewater argued that floating was an ORV that led to the designation of the river and therefore the agency was required to protect floating. The group also argued that floating should not be limited because it does not "substantially interfere" with other recreational uses.

The court disagreed that the Forest Service's limitations violated WRSA. First, Congress did not specifically identify floating as an ORV, but uses general categories like "recreational value." The court noted that "the Forest Service reasonably and lawfully identified 'recreational value' as the relevant ORV, and that floating is not a value of the Chattooga that must be protected and enhanced under § 1281."[3] The court also agreed with the district court's finding that the record supported the finding that floating was in fact a substantial interference to other recreational uses. Further, as a "public use," floating is not entitled to protection from substantial interference.

Other Claims

The court next looked at the Rust family's claims. First, the Rusts claimed that the headwaters running through their land are not navigable, making those headwaters private property and precluding public access. The court found that this claim was not one that could be heard by the court, since the Forest Service had treated the Rusts' land as private and had not attempted to regulate it.



The Chattooga River, courtesy of Dianne Frost.

The court next looked at the Rusts' claims that the Forest Service's plan violated NEPA by not analyzing an increased risk of trespass caused by opening headwaters to floating. The court noted that its review under NEPA should be limited to reasonably foreseeable environmental impacts. A risk of trespass did not meet this standard.

Finally, the court looked at ForestWatch's claims. The district court had restricted ForestWatch's intervention in this case to defending the Forest Service's position on floating. Despite this, ForestWatch made claims against allowing any floating at all and alleged the Forest Service violated NEPA and WRSA. The appellate court found that the lower court appropriately limited ForestWatch's intervention. The court noted that the group could pursue its claims in its separate suit.

Conclusion

The U.S. Court of Appeals for the Fourth Circuit ultimately upheld the lower court opinion. For now, the Forest Service's plan allowing limited floating on the headwaters of the Chattooga River will remain in place.

Endnotes

1. American Whitewater v. Tidwell, 770 F.3d 1108 (2014) *citing* 16 U.S.C. §§ 1271, 1281(a).
2. 5 U.S.C. § 706(2)(A).
3. *American Whitewater*, 770 F.3d at 1118.

Hovercraft Ban in Alaskan Preserve Upheld

Terra Bowling

The Yukon River in Alaska, courtesy of Aaron Armono.

Last fall, the U.S. Court of Appeals for the Ninth Circuit weighed in on whether an Alaskan hunter should be allowed to hunt moose using personal hovercraft.[1] Ultimately, the court upheld the National Park Service regulation banning hovercraft in a national preserve.

Background

The Yukon-Charley Rivers Preserve, a unit of the National Park System, is 2.5 million acres of pristine land located in the interior of Alaska. Sport hunting and trapping are permitted in the preserve, as long as hunters obtain the necessary licenses and permits and follow other state regulations. The lower six miles of the Nation River are included in the preserve.

John Sturgeon has hunted moose on the Nation River on an annual basis for over forty years. Twenty-five years ago, Sturgeon purchased a personal hovercraft to use in his hunting expeditions. In 2007, while repairing his hovercraft, Sturgeon was stopped by National Park Service (NPS) law enforcement who informed him that NPS regulations prohibited the operation of hovercrafts within the Preserve.

After the warning, Sturgeon refrained from using the hovercraft to hunt moose but filed suit alleging that the NPS regulation banning hovercraft violated the Alaska National Interest Lands Conservation Act (ANILCA). Specifically, he claimed that ANILCA prevents the application of federal regulations to state-owned lands within the preserve.

The state of Alaska intervened in Sturgeon's suit, echoing Sturgeon's claims that ANILCA prohibited the enforcement of NPS regulations on state-owned lands and waters. The state specifically challenged NPS regulations requiring permits for state scientists studying chum and sockeye salmon on the river.

After the warning, Sturgeon refrained from using the hovercraft to hunt moose but filed suit alleging that the NPS regulation banning hovercraft violated the Alaska National Interest Lands Conservation Act (ANILCA).

The district court granted summary judgment to the federal government, finding that the plaintiffs did not correctly interpret the plain language of ANILCA. On appeal to the Ninth Circuit, Sturgeon and the state of Alaska again argued that the NPS regulations should not be enforced on state-owned land.

Standing

The Ninth Circuit first considered whether Sturgeon and the state of Alaska had standing to bring their claims. First, the court ruled that Alaska did not have standing since the state had already secured the necessary research permits and had no plans to conduct future research in the rivers. The court did find that Sturgeon had standing and considered his claims.

ANILCA

In 1980, Congress enacted ANILCA to preserve land within the state of Alaska. The Act resulted in approximately 105 million acres of land being set aside "for protection of natural resource values by permanent federal ownership and management."[2] Some of these lands were used to expand and create units of the National Park System, called "conservation system units" (CSUs).

Photo of hovercrafts in Alaska, courtesy of Taralaska Photos.

In Alaska, many of the CSU boundaries have been drawn to encompass entire ecosystems and therefore may include state, Native, or privately owned land. ANILCA addresses the regulation of these lands within conservation system units. Specifically, § 103(c) of ANILCA provides that state, Native, and privately owned land is not subject to regulations applicable solely to public lands within conservation units. ANILCA defines "public lands" as federal lands in which the U.S. holds title after December 2, 1980.[3]

The court had to determine whether the hovercraft ban would apply to the Nation River and the Yukon-Charley Rivers National Preserve. The court noted that the hovercraft ban applied to "all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks." Since the ban applied generally and not only to federal lands, the court found that the ban could be enforced on both public and nonpublic lands.

Endnotes

1. Sturgeon v. Masica, 768 F.3d 1066 (2014).
2. *Id.* at 1076, *citing* Nat'l Audubon Soc'y v. Hodel, 606 F.Supp 825, 827-28 (D. Alaska 1984).
3. 16 U.S.C § 3102(1)-(3).
4. *Sturgeon*, 768 F.3d at 1077-78.

2014 Federal Legislative Update

113 Public Law 34 – A bill to amend Public Law 93-435 ... (S.256)
Conveys to the government of the Commonwealth of the Northern Mariana Islands (CNMI) submerged lands surrounding such Islands and extending three geographical miles outward from their coastlines. Provides parity with Guam, the Virgin Islands, and American Samoa.

113 Public Law 121 – Water Resources Reform and Development Act of 2014 (H.R. 3080)
Revises requirements for feasibility studies initiated under the Water Resources Development Act of 1986 to: (1) require a final report on a study not later than three years after its initiation; (2) limit the maximum federal cost of any such study to $3 million; and (3) require personnel of the Army Corps of Engineers to conduct concurrent reviews of feasibility studies (currently, sequential reviews are permitted).

113 Public Law 124 – Harmful Algal Bloom and Hypoxia Research and Control Amendments Act of 2014 (S.1254)
Reauthorizes, revises, and expands the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998.

113 Public Law 235 – Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83)
Funds most of the government through September 2015. In addition, revokes Environmental Protection Agency's "waters of the U.S." interpretive rule with fifty-six agricultural exemptions that the agency issued along with its proposed rule on waters of the United States. The EPA may still issue its proposed rule on waters of the U.S.

113 Public Law 253 – To Revise the Boundaries of Certain Coastal Barrier Resources System Units (H.R. 3572)
Revises boundaries of certain units within the John H. Chafee Coastal Barrier Resources System in North Carolina, Rhode Island, Florida, and South Carolina.

113 Public Law 264 – Duck Stamp Act of 2014 (H.R. 1068)
Amends the Migratory Bird Hunting and Conservation Stamp Act to increase the price of duck stamps, which are required to hunt migratory waterfowl, from $15 to $25. Establishes a subaccount in the Migratory Bird Conservation Fund to be used to acquire easements for the conservation of migratory birds.

113 Public Law 273 – Chesapeake Bay Accountability and Recovery Act of 2014 (S. 1000)
Requires the Office of Management and Budget to submit to Congress a financial report on restoration activities in the Chesapeake Bay watershed by September 30 of each year. Specifies what should be included in the report. Establishes an Independent Evaluator for the Chesapeake Bay watershed to review and report to Congress every two years on restoration activities and related topics that are suggested by the Chesapeake Executive Council.

113 Public Law – 281 Howard Coble Coast Guard and Maritime Transportation Act of 2014 (S.2444)
Authorizes fiscal year 2015-2016 appropriations for the Coast Guard. Also authorizes certain activities and amends policies. Sets forth provisions concerning the Coast Guard's response to oil spills.

113 Public Law 287 – Enact Title 54 (H.R. 1068)
Gathers provisions relating to the National Park System and restates these provisions as a new positive law title of the United States Code. The new positive law title replaces the former provisions, which are repealed by the bill.

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