The SANDBAR

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The Fall of "the Codfather":

Massachusetts Fisheries Magnate Sentenced for Repeated Violations of Lacey Act

Also,

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Cover page photograph of a cod swimming downward courtesy of Derek Keats.

Contents page photograph of Meadows Beach in Truro, Massachusetts courtesy of M.G. Stanton.

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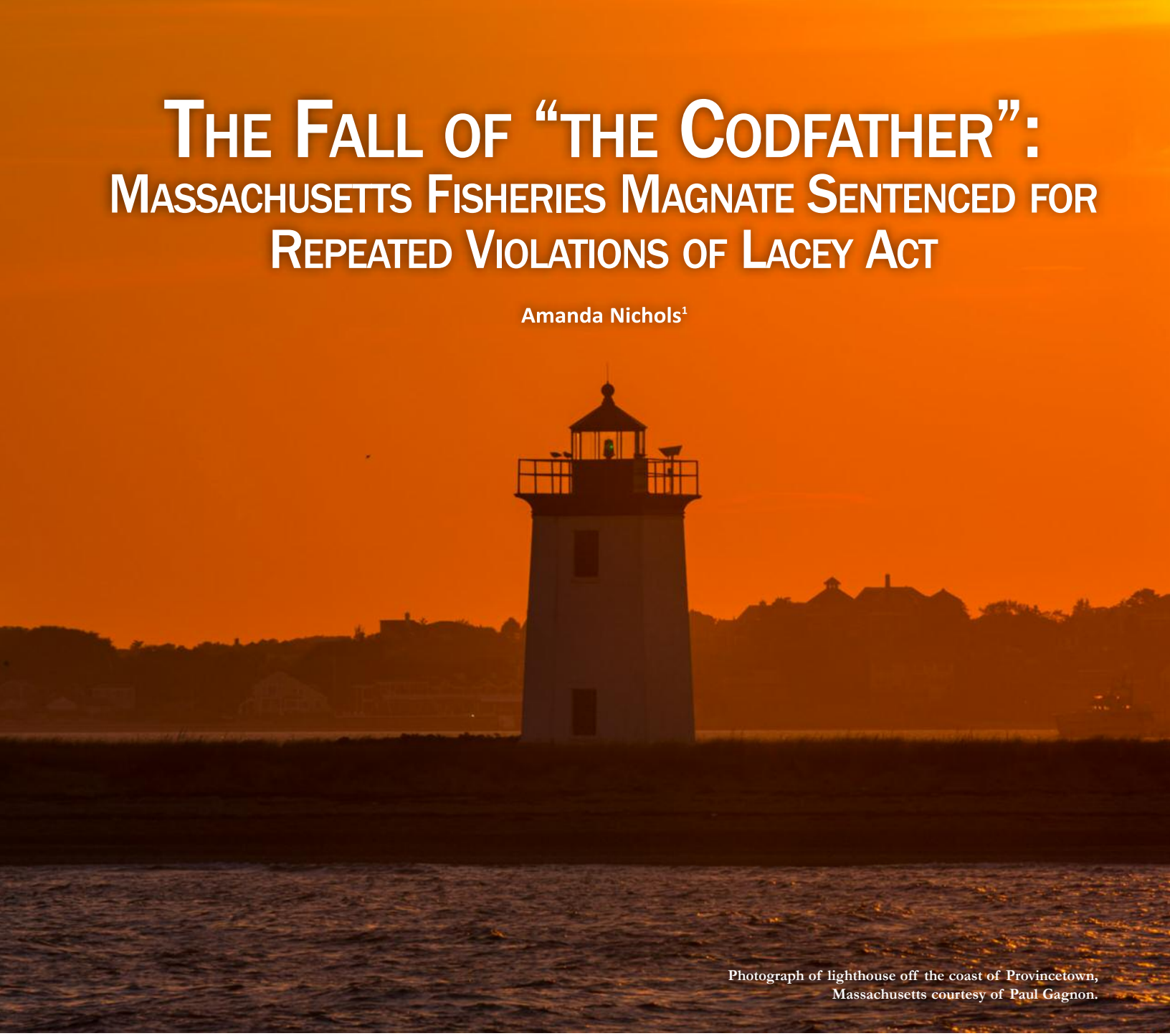
The Fall of "the Codfather": Massachusetts Fisheries Magnate Sentenced for Repeated Violations of Lacey Act

Amanda Nichols[1]



Photograph of lighthouse off the coast of Provincetown, Massachusetts courtesy of Paul Gagnon.

Years ago, Carlos Rafael—CEO of Carlos Seafood, Inc.—remarked, "I am a pirate. It's your job to catch me."[2] Well, earlier last year, catch him they did. Before his much-publicized legal troubles, Rafael—the self-professed "Codfather" of the northwest Atlantic—was the *de facto* king of cod fishermen in the region, with assets worth tens of millions of dollars. That all came crashing down, however, when a months-long investigation into his business practices revealed the truth of his success—Rafael had been flouting federal law for years.

Raphael was initially arrested in February 2016 and pled guilty to twenty-eight criminal counts in March of last year—including twenty-three counts of false labeling and identification in violation of the Lacey Act.[3] By September, the court ordered him to serve almost four years in prison and pay more than $300,000 in fines and restitution. However, Rafael's troubles wouldn't end with these penalties. In October 2017, the court ordered the forfeiture of four of his fishing vessels as well as thirty-four of their associated permits—assets valued at over $2 million combined. Furthermore, now that his criminal charges have been levied, Rafael faces the prospect of a possible civil suit from the National Oceanic and Atmospheric Administration (NOAA).

Background

The Lacey Act makes it unlawful to "import, export, sell, acquire, or purchase fish...that are taken, possessed, transported, or sold: 1) in violation of U.S. or Indian law..."[4] The Codfather violated the Act by repeatedly mislabeling fish (namely, cod), in violation of federal fishing quotas established by NOAA.

Under NOAA's quota-based "catch-share" system, biologists determine the "total allowable catch" of a species (such as cod) that can be harvested annually. To get their piece of the pie, fishermen must either buy permits from the government or from other fishermen who will not or have not used their own.

Because the numbers of cod are relatively small in comparison to more abundant fish like haddock, the number of fishing permits available each year in the northwest Atlantic is similarly small. To cover up the fact he was taking much more cod than his permits allowed, Rafael purposefully misrepresented both the number of fish his vessels caught, as well as the species of those fish. Afterward, he illicitly sold many of those fish to a New York City buyer for cash—much of which he smuggled into his home country of Portugal to avoid federal taxes.

TO COVER UP THE FACT HE WAS TAKING MUCH MORE COD THAN HIS PERMITS ALLOWED, RAFAEL PURPOSEFULLY MISREPRESENTED BOTH THE NUMBER OF FISH HIS VESSELS CAUGHT, AS WELL AS THE SPECIES OF THOSE FISH.

Sentencing

Despite Rafael's claims that he fraudulently mislabeled his catch to save workers' jobs from a shrinking industry, the U.S. District Court of Massachusetts convicted him of violating the Lacey Act and sentenced him to serve forty-six months in prison as well as pay a $200,000 fine and $108,929 in restitution to the U.S. Treasury. Furthermore, the court sentenced him to three years of supervised release following his prison sentence, during which time he would not be allowed to participate in the fishing industry in any way. The court noted that Rafael had misreported approximately 782,812 pounds of fish over the course of his fraudulent activity—enough to perceptibly skew NOAA's stock assessments for cod in the region. The court agreed with the state's position that, "Mr. Rafael profited at the expense of other hard-working commercial fishermen by falsifying records so he could keep fishing while they were sidelined."[5]

Forfeiture

When someone violates the Lacey Act, a forfeiture of their property may be statutorily required.[6] If the violator is actually convicted of the crime with which they were charged, the Act *mandates* confiscation of all property associated with the criminal act. In Rafael's case, this property included the vessels used in the course of the violations as well as the federal fishing permits associated with those boats.

Although the state asked that thirteen of Rafael's vessels and their associated permits be confiscated, the court decided that such a penalty would be excessive and violate Rafael's constitutional rights. Ultimately, the court ordered Rafael to forfeit four of his vessels as well as their thirty-four associated permits (only four of which concerned groundfish). In its analysis, the court looked toward the "excessive fines" clause of the Eighth Amendment. The Eighth Amendment states that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[7] To determine whether their forfeiture order was excessive, the court analyzed four factors: 1) whether the defendant fell into the class of persons at whom the criminal statute was principally directed; 2) other penalties authorized by the legislature; 3) the harm caused by the defendant; and 4) whether the forfeiture would deprive the defendant of his or her livelihood.[8]

As to the first factor, the court decided that Rafael did fall into the class of people at which the statute was directed, because misreporting one's catch is exactly the type of offense the Lacey Act was designed to prevent. As to the second factor, the court determined that the penalties levied against "the Codfather" were needed because of his extensive reporting violations, the harm those violations caused, and the need to deter similar crimes in the future. Therefore, any other penalty would not be as effective or appropriate. As to the harm Rafael caused, the court noted that it was quite substantial—impacting both the industry as well as the fishery itself. Rafael's crimes constituted one of the largest misreporting schemes ever identified by NOAA, and his conduct was "calculated, repeated, and done for his own benefit."[9] As to the final factor, the court determined that the forfeiture it ordered would not deprive Rafael of his livelihood, since he would retain at least twenty other vessels and their associated permits.

The court also took time to determine whether the forfeiture order would be grossly disproportionate to the maximum fine set under the sentencing guidelines for Rafael's crimes.[10] It ruled that forfeiture of assets valued up to approximately ten times the maximum guidelines fee, and probably a bit more, would be within the limit of constitutional proportionality because of the seriousness of Rafael's crimes. Therefore, the court's chosen sanction of $2 million plus assets would be within the permissible scope

Photograph of a cod courtesy of August Linnman.

of a constitutional forfeiture. While the state moved for the court to reconsider its sanctions (as the state thought they were too lenient), the court denied that motion at the end of October. Raphael was required to report to federal prison on November 6, his assets were seized, and this chapter of the Codfather's saga came to a close.

Conclusion

With Rafael in prison and his empire effectively demolished, the question remains as to what will happen to his confiscated assets—his fishing permits in particular. With federal quotas becoming smaller and smaller for some species, many have advocated for a redistribution of Rafael's confiscated permits to local fishermen from the northwestern Atlantic region. Some have even advocated for a type of "bank" in which the permits could be deposited and made available to those who have been most disadvantaged by federal fishing regulations—small boats, for example, or young fishermen who weren't grandfathered into the catch-share system. The issues don't end here, however.

On November 20, NOAA withdrew its approval of the 2017 and 2018 Northeast Fishery Sector IX operations plan. Sectors are self-selected groups of three or more separately employed people who agree to certain fishing restrictions, and are allocated a catch limit in order to achieve objectives consistent with the applicable fishery management plan. The New England Fishery Management Council determined that the sector—Rafael's fleet, in particular—had not complied with the plan's requirements. NOAA reasoned that allowing continued operations under this plan would undermine achievement of the conservation and management objectives of the Northeast Multispecies Fishery Management Plan. Practically, this order called back to port any vessels in the sector that were currently at-sea on a groundfish trip and disallowed any future groundfishing for those approximately twenty vessels and seventy fishermen. It is currently unknown how long these vessels will be prevented from landing groundfish, as this measure is unprecedented. Regardless of what federal authorities decide regarding Rafael's assets and the future of groundfishing in his home sector, the Massachusetts fishing community can take solace in knowing that one of the biggest fishing kingpins of the age has finally been dethroned—hopefully for good.

Endnotes

1 Ocean and Coastal Law Fellow, National Sea Grant Law Center.

2 Ben Goldfarb, *The Deliciously Fishy Case of the "Codfather,"* MOTHER JONES (March, 2017).

3 Other counts included: One count of conspiring to commit offenses against the United States; two counts of falsifying criminal records; one count of bulk cash smuggling; and one count of tax evasion.

4 *Lacey Act*, U.S. Fish & Wildlife Service.

5 Press Release, The United States Attorney's Office: District of Massachusetts, *Owner of One of the Nation's Largest Commercial Fishing Businesses Sentenced for Falsifying Records & Smuggling Proceeds Abroad* (Sept. 25, 2017).

6 16 U.S.C. § 3374.

7 U.S. Const. amend. VIII.

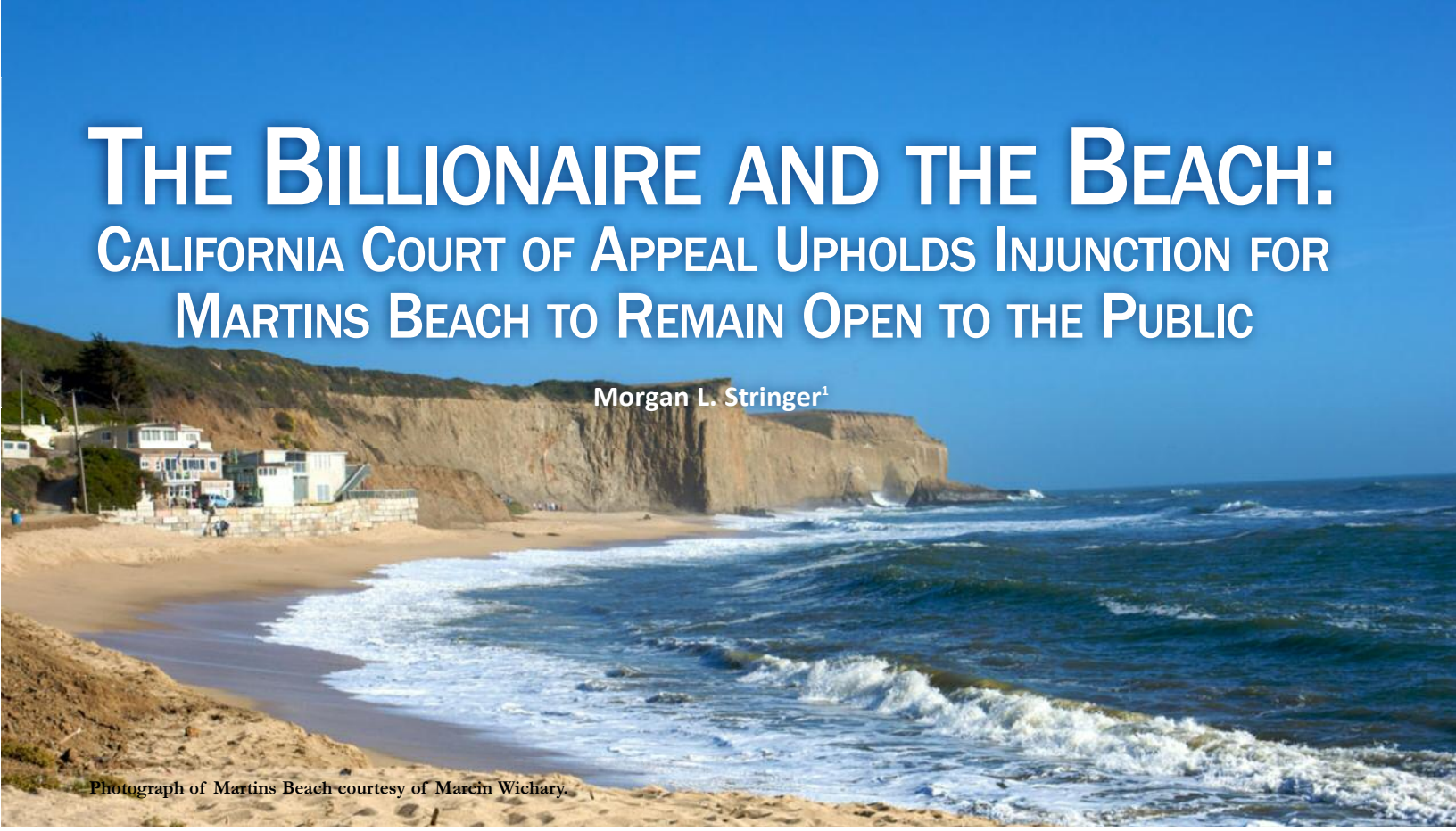
8 *United States v. Rafael,* No. CR 16-10124-WGY, 2017 WL 4542051, at *2 (D. Mass. Oct. 11, 2017), *reconsideration denied,* No. 16-10124-WGY, 2017 WL 4927663 (D. Mass. Oct. 31, 2017).

9 *Id.* at 3.

10 *Id.* at 5.

The Billionaire and the Beach:
California Court of Appeal Upholds Injunction for Martins Beach to Remain Open to the Public

Morgan L. Stringer[1]



Photograph of Martins Beach courtesy of Marcin Wichary.

Martins Beach, a popular California surfing spot, has generated nearly a decade of litigation and local resentment after a Silicon Valley billionaire prevented public access to the beach. In 2012, advocacy groups claimed that the closure violated the California Constitution and the public trust doctrine. Most recently, a California appeals court ruled in favor of Surfrider in a lawsuit claiming that the closure violated the California Coastal Act. For now, the owner must allow the public to access the beach.

Background

In 2008, Vinod Khosla purchased property containing the only public access road for Martins Beach. The previous owners had advertised the public access road and collected a $5 fee for beachgoers to use the road and park at the beach. Khosla painted over the advertisements, closed the gate on the public access road, and put up no trespass signs.[2] Khosla's property manager also hired security guards to deter anyone from accessing the beach. In October 2013, five surfers walked past the security guards to access the beach. "The Martin's 5" were arrested, but the district attorney declined to prosecute the surfers.[3]

In addition to civil disobedience, the blocked beach access also led to two lawsuits. The first, filed in October 2012 by Friends of Martins Beach, claimed that Khosla violated the California Constitution and the public trust doctrine.[4] The California Constitution prohibits waterfront property owners from preventing the public from establishing an easement over roads and sandy beaches to the tidelands.[5] In April 2016, a California appellate court ruled in favor of Khosla. The court determined that the property was subject to a Mexican land grant that preceded California statehood and, thus, the public trust provision of the California Constitution.[6] Proponents of public beach access then continued to fight the closure with a different approach.

Surfrider Lawsuit

In 2013, rather than relying on the public trust doctrine and the California Constitution, Surfrider filed suit under the California Coastal Act (Coastal Act). The Coastal Act requires a permit from the California Coastal Commission (Commission) for any development to take place. Surfrider argued that Khosla's action in closing his gate to prevent public access constituted development. The trial court agreed and granted an injunction to keep the gate open.[7]

In August 2017, Khosla appealed to the California Court of Appeal, arguing that closure of the gate was too simple to be development under the Coastal Act under the plain meaning of "development." Examining the language of the Coastal Act, the court pointed out that the Act itself calls for "development" to be liberally construed.[8] The court noted "the Coastal Act's definition

of 'development' goes beyond what is commonly regarded as a development of real property and is not restricted to activities that physically alter the land or water.'"[9] The court cited a prior case, *Pacific Palisades*, which held that "development" includes activities that would change the intensity of the use of the coast and water.[10] The court reasoned that activities that restricted public access to the beach would decrease the intensity of use of the coast and water; therefore, Khosla's acts in closing the gate and posting no trespass signs were development under the Coastal Act and required a coastal development permit.

Takings

Khosla next argued that any decision from the Commission that denied a Coastal Development permit would be an unconstitutional taking. The appellate court held that Khosla's takings claims were not ripe for review as he had not yet applied for a permit. He must apply for a Coastal Development permit and obtain a final decision from the Commission before he can turn to the courts for a remedy.

Khosla also argued that the injunction granted by the trial court requiring him to open the gates and allow public access was a "per se" physical taking by the court, because it deprived him of the ability to exclude the public from his property. A per se physical taking occurs when the government permanently physically invades a property owner's land. For example, if the government allows a cable company to install permanent cable lines on a property owner's land, or if the government takes land to build a highway, then that is a per se physical taking.

Relying on past U.S. Supreme Court cases regarding per se takings, the court noted that for a per se taking to occur, the taking must be permanent. The court ruled that since the trial court's injunction was temporary until the issues were resolved, a taking did not occur. The court noted that under one U.S. Supreme Court case, *Penn Central*, it is possible to have an action regulating or restricting property use go too far and become a taking. However, this determination requires a multifactor inquiry, and Khosla only raised the argument that the trial court injunction was a per se taking.

The Aftermath

Ultimately, the California Court of Appeal upheld the trial court's holding that Khosla had to complete the permit process with the Commission to close the gate, and it upheld the injunction for the gate to remain open for public access during that time.[11] Despite the ruling from the appellate court, Khosla did not initially open the gates. A week after the ruling, the San Mateo County Sheriff's Office announced that it would not cite or arrest people who accessed the beach from around the gate.[12]

After being threatened with fines up to $11,000 a day, Khosla finally opened the gates in early October.[13] However, Khosla has opened the gate only from 9:00 a.m. to 4:30 p.m., which still angered residents. The editorial board of the *Los Angeles Times* heavily criticized the action as not fulfilling the "maximum access" that the law requires.[14] People could still not access the beach before or after traditional working hours, and people could not enjoy sunrise and sunset views.

Khosla appealed the decision to the California Supreme Court, but it declined to hear the case.[15] If Khosla wants to continue the *Surfrider* litigation, then it will have to be heard by the U.S. Supreme Court. For now, Khosla must ensure public access to the beach or obtain a permit from the Commission to block public access. Only time will tell if the public access will remain.

Endnotes

1 2018 J.D. Candidate, University of Mississippi School of Law.

2 Terra Bowling, *Billionaire Beats Surfers in Beach Access Case*, 13:2 The SandBar 15 (2014).

3 Katy Steinmetz, *Surfers Beat Billionaire in Landmark California Beach Case*, Time (Sept. 25, 2014).

4 Complaint, Friends of Martins Beach v. Martins Beach 1, LLC, No. Civ-517634 (Cal. Sup. Oct. 29, 2012).

5 Friends of Martins Beach v. Martins Beach 1 LLC, 201 Cal. Rptr.3d 516, 522 (Cal. App. 2016); Cal. Const. art. X, § 4.

6 *Friends of Martins Beach,* 201 Cal. Rptr.3d at 522.

7 Surfrider Found. v. Martins Beach LLC, No. Civ-520336, 2014 WL 6634176 (Cal. Sup. Nov. 12, 2014).

8 Surfrider Found. v. Martins Beach LLC, 221 Cal. Rptr.3d 382, 394 (Cal. App. 2017).

9 *Id.* at 394 (quoting Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, 288 P.3d 717, 796 (2012)).

10 *Id.* at 394 (citing Pac. Palisades, 288 P.3d., at 795-96).

11 *Id.* at 415-416.

12 Paul Rogers, *Sheriff Says Visitors to Martins Beach Won't Be Arrested If They Go Around Gates Locked by Billionaire Vinod Khosla*, Mercury News (Aug. 22, 2017).

13 Eric Khuri, *Martins Beach: Tech Billionaire Opens Gate, But for How Long?*, Mercury News (Oct. 5, 2017).

14 Editorial Bd., *Billionaires Don't Get to Decide When and How Californians Reach the Beach*, L.A. Times (Oct. 7, 2017).

15 Eric Kuhri, *Martins Beach: California Supreme Court Declines to Hear Billionaire's Appeal*, Mercury News (Oct. 27, 2017).

Tenth Circuit Rules Wyoming "Ag-Gag" Law Implicates First Amendment

Amanda Nichols[1]

Photograph of a ranch in Wyoming courtesy of Maarten Nijman.

In recent years, "ag-gag" laws—legislation seeking to silence whistleblowers who investigate and report on the day-to-day activities of industrial farms—have grown more prevalent, especially in areas where both animal and plant-based agriculture are ubiquitous. Environmentalists and animal rights activists decry these laws as intentionally building barriers against animal welfare, food safety, marketplace transparency, workers' rights, free speech, and environmental protection.[2] Industry representatives argue these measures are necessary to preserve trade secrets as well as property and privacy rights.

In 2015, the state of Wyoming enacted two statutes with the goal of preventing whistleblowers from trespassing on private land to unlawfully collect "resource data"—defined as "data relating to land or land use, including but not limited to data regarding agriculture, minerals...air, water, soil, conservation, habitat, vegetation or animal species."[3] Critics of the statutes immediately condemned them as broadly targeting whistleblowers and citizen scientists—noting members of these groups often cross private land to collect data on public lands for eventual submission to the government. Lawmakers, landowners,

and industry representatives praised the statute as protective of privacy rights in the face of rampant trespassing.

Background

Wyoming implemented these statutes, known informally as the "Data Trespass Laws," following a lawsuit filed by several of the state's ranchers against Western Watersheds Project (WWP) in 2014. The ranchers challenged WWP's actions in entering onto their property to collect water samples from a stream later found to be polluted with E. coli stemming from cattle ranching.

One potential way to challenge ag-gag laws like those in Wyoming is through the First Amendment. The First Amendment notes that, "Congress...shall make no law...abridging the freedom of speech, or of the press."[4] The plaintiffs argued that Wyoming's Data Trespass Laws violated their First Amendment rights to free speech by preventing them from reporting on pollution issues. Opponents of ag-gag laws have utilized the First Amendment as a legal theory several times, including recently in Utah[5] and Idaho.[6]

THE PLAINTIFFS ARGUED THAT WYOMING'S DATA TRESPASS LAWS VIOLATED THEIR FIRST AMENDMENT RIGHTS TO FREE SPEECH BY PREVENTING THEM FROM REPORTING ON POLLUTION ISSUES.

Wyoming's Data Trespass Laws, first implemented in 2015, were virtually identical, with one imposing criminal liability and the other, civil. The statutes allowed for civil and criminal penalties to be enforced against any person crossing "open land" or "private open land" to collect resource data without either an ownership interest or permission to do so.[7] "Collecting" data, according to the statutes, could include taking a "sample of material," a "photograph," or "otherwise preserv[ing] information in any form."[8] In order to qualify under the statutes, this collected data must have been actually submitted or intended to be submitted to any agency of the state or federal government. The laws prohibited any information learned in violation of these provisions from being used in any other proceeding other than an action under the statutes themselves. Furthermore, the laws required government agencies to erase any data collected in violation of the statutes and forbid the agencies from using the data in determining agency actions.

District Court

Before the plaintiffs' case challenging these statutes made it to the Tenth Circuit Court of Appeals, WWP filed suit in federal district court. There, the plaintiffs argued Wyoming's Data Trespass Laws were federally preempted as well as in violation of the First and Fourteenth Amendments. While the court dismissed the plaintiffs' preemption claims, it held that WWP had made plausible constitutional arguments.

In response, Wyoming amended its statutes in 2016 to eliminate any reference to "open lands." After these amendments, the statutes penalized any person who entered onto *private* land to collect resource data without proper authorization. This could include trespassing across private land to access public land on which the trespasser wished to collect resource data. Furthermore, the amendments removed the requirement that resource data be submitted or intended to be submitted to a government agency.

Following these 2016 amendments, the plaintiffs amended their complaint to challenge the revisions and re-alleged their constitutional claims. This time, the district court concluded the revised Wyoming statutes did not implicate protected speech and granted the defendants' motion to dismiss. The plaintiffs appealed.

The Tenth Circuit's Decision

On appeal, the plaintiffs claimed subsection (c) of the Data Trespass Laws (punishing trespassing on private land to access public land) prohibited them from engaging in protected speech that would otherwise be permissible on public property. In response, the state argued that the statutes regulated conduct on public land only in the event that an individual first trespassed on private land. The state likened plaintiffs' argument to asking for a "right to trespass."

The court, however, was not swayed by the state's arguments or the district court's ruling and held that the Wyoming statutes, do, in fact, regulate speech protected by the First Amendment. The court reasoned that plaintiffs' collection of resource data constituted the creation of speech—an action protected under the First Amendment. To restrict this creation, the court noted, "'operate[s] at the front end of the speech process' and falls within the ambit of the First Amendment."[9] The court therefore concluded that the statutes "… are not shielded from constitutional scrutiny merely because they touch upon access to private property."[10]

Despite this favorable ruling, the Tenth Circuit made sure to note that not all regulations incidentally restricting access to information necessarily trigger First Amendment protection. It reasoned that, had plaintiffs challenged the state's general trespass statute as impairing their right to gather information, the First Amendment may not have been implicated. This is because, while the state's Data Trespass

Photograph of a stream on a ranch in Wyoming courtesy of Fabcom Media.

Laws targeted the creation of speech—a constitutionally protected action—its general trespass statute did not.

Though the court found the Data Trespass Laws regulated protected speech covered by the First Amendment, it declined to decide whether their implementation had actually violated plaintiffs' First Amendment rights in the factual circumstances present in the case. The court remanded the case back to the lower court for a final ruling.

Conclusion

With the Tenth Circuit's reasoning that the creation of speech is protected under the First Amendment, many environmentalists are seeing this case as a victory against ag-gag laws. Depending on what the district court's ruling is in the future, Wyoming's Data Trespass Laws could be dealt a heavy blow. Critics of the decision see it as a huge loss for privacy rights, even going so far as to say, "the 10th Circuit has just tossed the common law trespass law out the window and has given environmental crusaders...a free pass."[11] Only time will tell whether ag-gag laws have a viable legal future in the agricultural centers of America.

Endnotes

1 Ocean and Coastal Law Fellow, National Sea Grant Law Center.

2 *What is Ag-Gag Legislation?,* ASPCA.

3 WYO. STAT. § 6-3-414(d)(iv) (2015).

4 U.S. Const. am. 1.

5 *See generally* Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00678-RJS, 2017 WL 2912423 (D. Utah July 7, 2017).

6 *See generally* Animal Legal Defense Fund v. Otter, No. 14-CV-00104-BLW, 2016 WL 2910266 (D. Idaho May 18, 2016).

7 WYO. STAT. §§ 6-3-414(c) (2015); 40-27-101(c) (2015).

8 *Id.* § 6-3-414(d)(i) (2015).

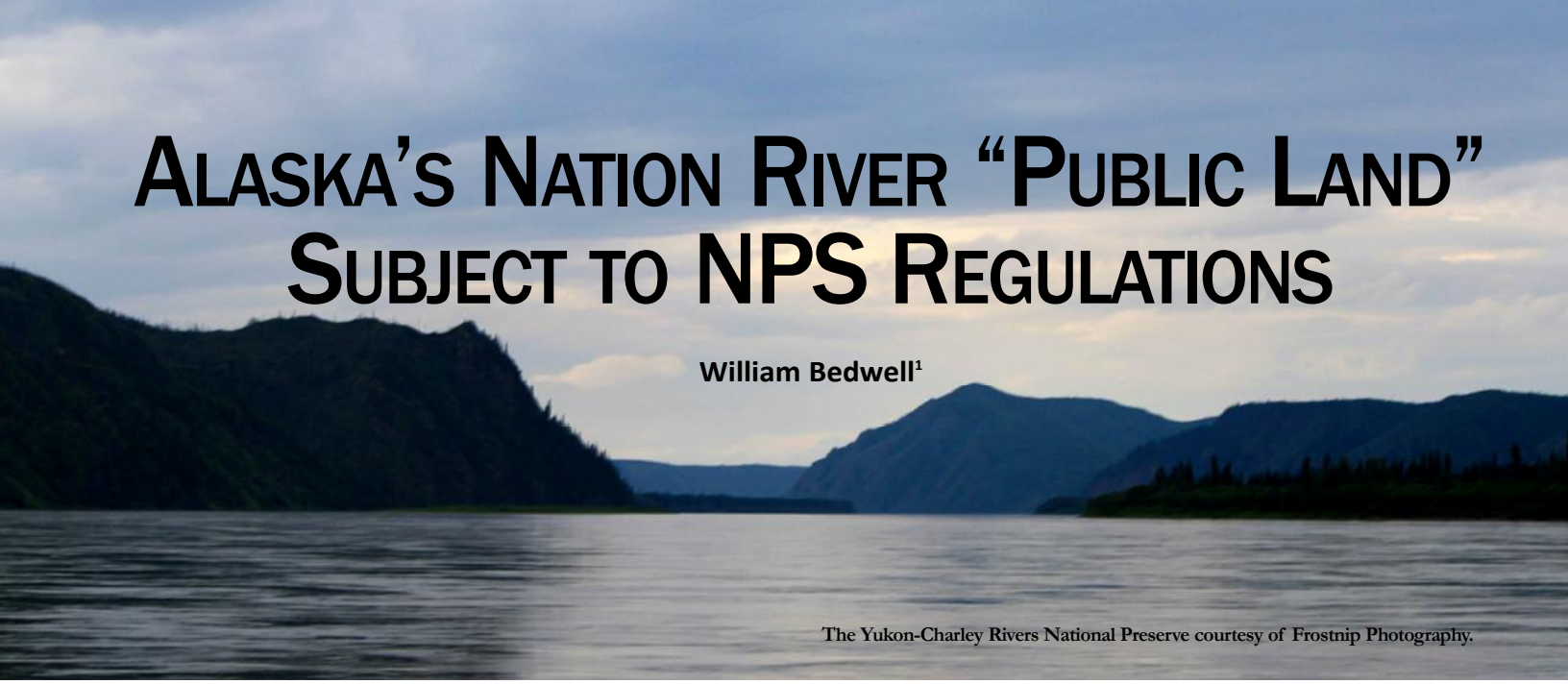
9 W. Watersheds Project v. Michael, 869 F.3d 1189, 1197 (10th Cir. 2017).

10 *Id.* at 1192.

11 Steven L. Hoch, *"Trespass is Fine with Us" sayeth the 10th Circuit,* Lexology (September 29, 2017).

Alaska's Nation River "Public Land" Subject to NPS Regulations

William Bedwell[1]



The Yukon-Charley Rivers National Preserve courtesy of Frostnip Photography.

This October, much to the chagrin of an Alaskan moose hunter, the U.S. Court of Appeals for the Ninth Circuit ruled that a prohibition on the use of hovercrafts in federally managed conservation areas applies to the Nation River in Alaska. The Ninth Circuit based the ruling on its finding that the state-owned river is "public land" under the Alaska National Interest Lands Conservation Act (ANILCA) and therefore the National Park Service (NPS) has authority over activities on the river.

Background

For twenty-five years John Sturgeon used a hovercraft to moose hunt along the Nation River. The lower six miles of the river lie within the Yukon-Charley Rivers Preserve (Preserve). The Preserve consists of 2.5 million acres of pristine land in the interior of Alaska. In 2007, NPS enforcement officers informed Sturgeon that, although moose hunting is allowed, NPS regulations prohibited hovercrafts within the Preserve.[2] Sturgeon then sued alleging that the NPS's regulation prohibiting hovercraft in federally managed preservation areas violated ANILCA.

Congress enacted ANILCA in 1980 to preserve approximately 105 million acres of Alaskan land "for protection of natural resource values by permanent federal ownership and management."[3] NPS created Conservation System Units (CSUs), such as the Preserve, with parts of the preserved lands that includes state, Native, and privately owned land. ANILCA § 103(c) addresses the regulation of lands within the CSUs and provides that privately owned land is not subject to regulations applicable solely to public lands within the CSUs. At issue in this lawsuit was whether the Nation River was public land and whether it would be subject to the hovercraft ban.

U.S. Supreme Court

The Ninth Circuit and the U.S. District Court for the District of Alaska both ruled that the plain language of ANILCA allowed enforcement of the hovercraft ban on both private and public lands.[4] The courts' reasoning was that ANILCA only limits NPS jurisdiction over non-public lands when a specific regulation applies only to federal lands within a conservation unit. Because the hovercraft ban applied to all federally owned lands and waters under jurisdiction of NPS, not just lands within conservation units, the ban should apply to both private and public land within the Preserve.

The U.S. Supreme Court unanimously reversed the ruling, however, finding that the courts did not properly interpret ANILCA.[5] The Court explained such an interpretation would mean NPS "could regulate 'non-public' lands in Alaska only through rules applicable outside Alaska as well" which would result in "topsy-turvy" results.[6] The Court sent the case back to the Ninth Circuit to rule on the issues of whether the Nation River within the preserve should be considered "public land" under ANILCA and whether the NPS has authority over activities on the river.

Ninth Circuit

In determining whether the Nation River should be considered "public land," the Ninth Circuit examined the goals and definitions of ANILCA and the hovercraft ban itself. It determined the goal of ANILCA to provide "sufficient protection for the national interests in the scenic, natural, cultural and environmental values" limited to "public land"[7] could still subject non-public land to such regulations if the U.S. retained an interest in the non-public land "because the land is public to the extent of the interest."[8]

The hovercraft ban states that the ban does not apply to non-federally owned lands inside the boundaries of the National Park system with two exceptions: 1) for waters under the jurisdiction of the United States and 2) other waters that the United States has an interest in to the extent necessary to fulfill the purpose of the NPS's administered interests. Based on this, and ANILCA's meaning of public land, the Ninth Circuit determined that the question on which the case turns is "whether the Nation River is subject to the *jurisdiction* or an *interest* of the United States such that it is public land that the Park Service is authorized to regulate."[9]

Alaska took title to the riverbed underneath the Nation River via the Submerged Lands Act when it gained statehood. Yet, as the court pointed out, lands submerged beneath waterways are distinct from the waterways themselves, so there was still a possibility the United States owned the waterway. Based on its previous ruling in *Alaska v. Babbitt*, however, the Ninth Circuit found that Congress did not intend for the U.S. to appropriate the river when it enacted ANILCA. Rather, based on the language and legislative history of ANILCA, Congress's only explicit intention was to use its authority under the Commerce Clause "to protect and provide for the opportunity for continued subsistence use of the public lands."[10] After determining the United States did not have jurisdiction via ownership, the court turned to whether the United States has an interest in the river that would allow the NPS to impose its regulations.

In examining whether the United States had an interest in the river, the Ninth Circuit found that the United States had an implied *reservation of water rights* with regard to waters within the Preserve. Under the reserved water rights doctrine, when the federal government takes land from the public and reserves it for a federal purpose, the government reserves appurtenant water, or water attached to a preserve, even then unappropriated "to the extent needed to accomplish the purpose of the reservation."[11] Whether a reserved water right is implied in the federal government's reservation of public land depends on whether it was the intention of the government to reserve the water. Such intent can be inferred, however, if the water is necessary to accomplish the overall purposes of the reservation.

To determine whether the U.S. intended to reserve water within the Preserve, the Ninth Circuit again relied upon its previous ruling in *Alaska v. Babbitt*. In *Babbitt*, the court found that Congress's intent in ANILCA was to reserve appurtenant waters to the extent needed to accomplish the purposes of the preservations.[12] In that ruling, it also found that ANLICA's definition of public lands includes water the United States has an interest in under the reserved water rights doctrine.

The purpose of the Yukon-Charley Rivers Preserve is "[t]o maintain the environmental integrity of the entire Charley River Basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife ..."[13] The Ninth Circuit concluded that the regulation preventing use of hovercraft in federally managed conservation areas applies to the Nation River, because the river is necessary to protect the natural resources of the Preserve. The court reasoned that this purpose coupled with the river being partly within the Preserve renders the river "public land" under ANILCA, despite Alaska owning the river, and therefore subjects the river to NPS regulations.

Conclusion

Sturgeon will no longer be permitted to use his hovercraft on his moose hunting expeditions along the Nation River. As reported by Alaska Public Media, in response to the ruling, Sturgeon maintained, "The federal government should not have control over state-owned navigable waters. That's the bottom line."[14] The Ninth Circuit ruled that the river, while even being state-owned, is "public land" under ANILCA due to the federal government's conservation purpose in creating the Preserve and the river being necessary to achieve that purpose. Now NPS has authority to enforce its ban on hovercraft on the river in federally managed conservation areas.

Endnotes

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2 36 C.F.R. § 2.17.

3 Sturgeon v. Masica, 768 F.3d 1066 at 1076 (2014), *citing* Nat'l Audubon Soc'y v. Hodel, 606 F.Supp 825, 827-28 (D. Alaska 1984).

4 *Sturgeon v. Masica*, 768 F.3d 1066.

5 Sturgeon v. Frost, 136 S. Ct. 1061 (2016).

6 *Id.* at 1071.

7 16 U.S.C. § 3101(d).

8 Sturgeon v. Frost, 872 F.3d 927, 932 (2017).

9 *Id.*

10 Alaska v. Babbitt, 72 F. 3d 698, 703 (9th Cir. 1995).

11 Cappaert v. United States, 426 U.S. 128 (1976).

12 *Alaska v. Babbitt*, 72 F.3d at 703-704.

13 16 U.S.C. § 410hh(10).

14 Dan Bross, *Ban on Hovercraft Use Within Alaska Preserve Stands, Another Appeal May Come Up*, Alaska Public Media, Oct. 3, 2017.

The Jones Act and the 2017 Hurricane Season

Terra Bowling[1]

Following Hurricanes Maria, Irma, and Harvey, many cited the Jones Act as an impediment to relief efforts. The Jones Act prohibits the transportation of goods within the U.S by any vessel other than a vessel that is built, owned, and operated by U.S. citizens.[1] Critics claim the Act slows disaster relief efforts, as foreign vessels can't readily pitch in to help.

The Act was waived for Hurricanes Harvey and Irma to allow foreign cargo ships to transport oil from the Gulf of Mexico to East Coast refineries. Although the Trump administration ultimately waived the Act following Hurricane Maria, many criticized the administration's slow response to do so. Some argue that the Act should be repealed altogether, while others say it is necessary to protect the domestic maritime industry.

Background

The Jones Act, also known as the Merchant Marine Act of 1920, was enacted for two purposes: 1) to support the domestic maritime industry and 2) to guarantee the availability of a U.S. fleet of ships in the event of war or other emergency. The Act states "A vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port" unless the vessel is wholly owned by persons who are citizens of the United States and was built in and documented under the laws of the United States.[2]

In addition to these provisions, the Act also regulates the treatment of seamen and sets standards for ship maintenance and equipment. The shipping laws may be waived upon request of the Department of Defense by the head of the agency responsible for the administration of the navigation or vessel inspection laws.[3] Prior to 2017, the last Jones Act waiver was issued following Hurricane Sandy in 2012 to allow for petroleum delivery.

Waivers

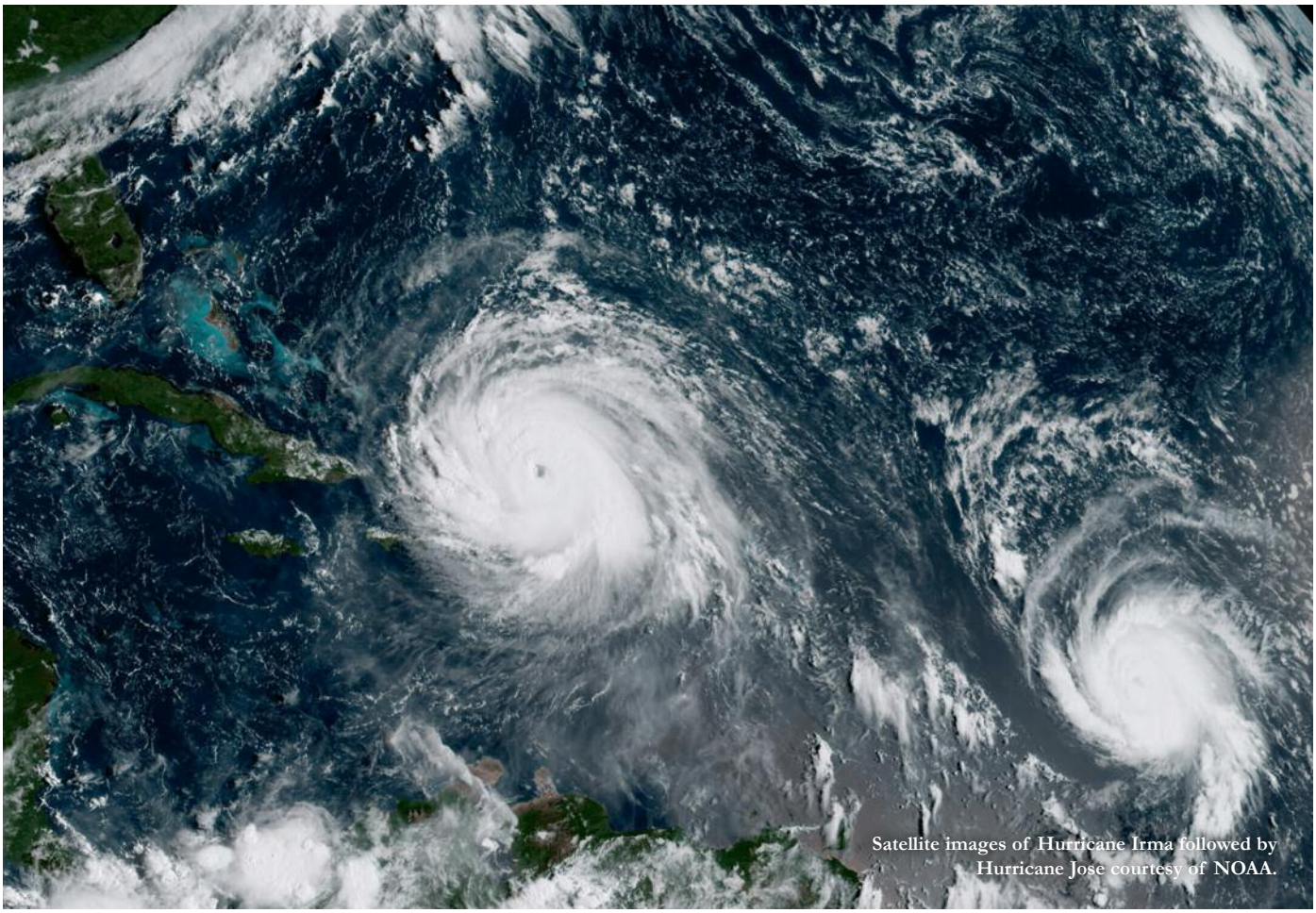
On September 8th, following Hurricane Harvey and in anticipation of Hurricane Irma, the Department of Homeland Security (DHS) granted a 7-day limited waiver of the Jones Act to aid with fuel distribution.[4] Acting Secretary Elaine Duke stated "This is a precautionary measure to ensure we have enough fuel to support lifesaving efforts, respond to the storm, and restore critical services and critical infrastructure operations in the wake of this potentially devastating storm."[5] The waiver was extended through September 22nd due to "a continued shortage of energy supply in areas predicted to be affected by Hurricane Irma."[6]

The Jones Act prohibits the transportation of goods within the U.S. by any vessel other than a vessel that is built, owned, and operated by U.S. citizens.

Following Hurricane Maria, lawmakers and others began calling for a waiver of the Act. Initially, the DHS stated that it wouldn't waive the Act. However, on September 28, 2017, the Department granted a 10-day waiver at the request of Puerto Rico's governor, Ricardo Rosello.[7] Calls to extend the waiver were denied.

Impacts of Jones Act Restrictions

Normally, due to the Jones Act restrictions, there is a small fleet of vessels that carries goods to and from Puerto Rico, which increases the cost of goods on the island.[8] Recently, Senators John McCain and Mike Lee introduced a bill to permanently waive the Jones Act



Satellite images of Hurricane Irma followed by Hurricane Jose courtesy of NOAA.

shipping restrictions for Puerto Rico. McCain called the Jones Act an "antiquated, protectionist law that has driven up costs and crippled Puerto Rico's economy."[9] Proponents of the Act argue that the Jones Act shipping restrictions provide a reliable source of goods to the island, such as dairy, meat, and other supplies, as foreign vessels are less frequent and inconsistent.[10] In addition, some argue that without the Act American jobs would be outsourced.

Whether the Jones Act waiver aided with relief efforts remains to be seen. Some suggest that the Act was never an impediment to relief efforts in Puerto Rico, as there were adequate tankers to get supplies to the island. Rather, there was an inability to distribute critical supplies internally from the ports, due to a shortage of transportation employees and fuel, as well as blocked roads.[11] Others note that the long-term recovery efforts require a waiver, as it isn't clear that the existing fleet will be able to transport the massive amounts of building supplies that are needed on top of every day goods.[12] For now, short-term waivers of the Act's restrictions remain the primary way to expand shipping options following a disaster.

Endnotes

1 46 U.S.C. § 55102.

2 *Id.*

3 *Id.* at § 501(a).

4 Dep't of Homeland Sec., Waiver of Compliance with Navigation Laws (Sept. 8, 2017).

5 Press Release, Dep't of Homeland Sec., DHS Signs Jones Act Waiver, (Sept. 8, 2017).

6 Dep't of Homeland Sec., Waiver of Compliance with Navigation Laws (Sept. 11, 2017).

7 Dep't of Homeland Sec., Waiver of Compliance with Navigation Laws (Sept. 28, 2017).

8 Niraj Chokshi, *Would Repealing the Jones Act Help Puerto Rico?*, N.Y. Times, Oct. 24, 2017.

9 Timothy Garnder, *McCain Introduces Bill to Kill Puerto Rico Shipping Restrictions*, Reuters, Sept. 28, 2017.

10 Chokshi, *supra* note 8.

11 Patrick Gillespie, Rafael Romo, and Maria Santana, *Puerto Rico Aid Is Trapped in Thousands of Shipping Containers*, CNN, Sept. 28, 2017.

12 David A. Graham, *Is the Jones Act Waiver All Politics?* The Atlantic, Sept. 28, 2017.

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