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Ninth Circuit Upholds the Corps' Adjacency Jurisdiction Over Wetlands

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Michigan Supreme Court Protects Public's Right to Walk on Beach

Glass v. Goeckel, 703 N.W.2d 1 (Mich. 2005).

Priscilla Adams, J.D.

In *Glass v. Goeckel*, the Supreme Court of Michigan was faced with this question: where, if anywhere, can a member of the public walk on the private beach of one of the Great Lakes without trespassing on a lakefront (littoral) owner's property? On July 29, 2005, the court ruled that the general public has the right to walk along the shore of Lake Huron on land below the ordinary high water mark. The court based its decision on the language of the public trust doctrine and found that walking along the lakeshore is a traditionally protected public right.

Background

Richard and Kathleen Goeckel own property on the shore of Lake Huron. The deed to their property specifies one of the boundaries as the "meander line of Lake Huron." Plaintiff Joan Glass owns property across the highway from the Goeckels. Glass brought suit to enjoin the Goeckels from interfering with her walking along the shoreline. The trial court held that Glass had a right to walk below the natural ordinary high water mark as defined by the Great Lakes Submerged Land Act (GLSLA).

The Goeckels appealed the trial court's decision and the Court of Appeals reversed the trial court's order.[1] The Court of Appeals stated that although the State of Michigan holds title to pre-

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Virginia Supreme Court Upholds Issuance of Permits for King William Reservoir

Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d 78 (Va. 2005).

Stephanie Showalter

Opponents of a massive water supply project in southeastern Virginia suffered a major setback in November when the Supreme Court of Virginia upheld the issuance of a building permit by the State Water Control Board (Board).

Background

In 1993, the City of Newport News (City) filed an application for a permit to build the King William Reservoir. The City contends that the Reservoir is necessary to ensure adequate future water supply to cities in southeastern Virginia, including Newport News, Hampton, and Williamsburg. The Board issued the City a permit in December 1997. If constructed as planned, the Reservoir would flood more than 1,500 acres, including 400 acres of wetlands and over 100 archaeological sites, and draw up to 75 million gallons of water a day from the Mattaponi River. The Mattaponi River is a popular recreational river and provides prime spawning and nursery habitat for important commercial freshwater fish like striped bass and American shad.

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'Ohana Pale Ke Ao v. Board of Agriculture, Civil No. 051-144K (Hawaii 3rd Cir. Dec. 16, 2005).

Stephanie Showalter

In October, a Hawaii trial court ruled that the Hawaii Board of Agriculture (Board) must conduct a full environmental review prior to permitting the importation of genetically modified algae. Although the completion of an environmental review is usually prudent, Earthjustice's victory appears to have had more to do with people's fear of genetically modified organisms (GMO) than the actual environmental risks presented by the project.

Background

In May 2005, Mera Pharmaceuticals announced that it was partnering with Rincon Pharmaceuticals to test whether microalgae can be cultivated on a large scale for the production of human protein therapies. The San Diego-based Rincon Pharmaceuticals develops recombinant protein therapeutics, such as monoclonal antibodies, using an eukaryotic algae, *Chlamydomonas reinhardtii*, as a production system. The technology was developed at Scripps Research Institute and "involves introducing the gene sequence responsible for producing a particular human protein into the cells of the algae."[1] The algae will then produce that protein which can be harvested and developed into a drug. Rincon currently produces proteins in the laboratory, but the technology will only be useful to the pharmaceutical industry if production can occur on a commercial scale.

Pharmaceutical companies currently use industrial fermenters to cultivate bacteria from which they produce drugs. Unfortunately, microalgae cannot be cultivated in fermenters because the plants need sunlight. Mera Pharmaceuticals believes it has solved this problem. According to the company's website it has developed a "closed, controlled system that admits through its transparent walls the light that plants need to grow." A mixture of algae, nutrients, and freshwater is kept in constant circulation within these "photobioreactors" where computers closely monitor pH, temperature, nutrient levels, and light. The photobioreactors, which must be located outside, resemble small trenches covered in plastic. Mera currently uses this system at its facilities at the Natural Energy Laboratory Hawaii (NELHA), a land-based aquaculture technology park in Kona, Hawaii, to produce dietary supplements.

Photograph courtesy of ©Nova Development Corp

If the algae-based production system proves successful, it could reduce the cost of producing monoclonal antibodies to $100 to $150 per gram. Today, a gram costs between $1,000 to $1,500 and some drug companies charge as much as $20,000 per patient for some protein drugs.[2]

Regulatory Framework

Chlamydomonas reinhardtii is included on Hawaii's "List of Restricted Microorganisms" and a permit is required from the Plant Quarantine Branch (PQB) to import and possess. Mera applied for an importation permit and the PQB determined that the particular GM algal strains Mera sought to import posed an above-moderate risk which triggered a requirement that the Board approve the permit. Several contentious public hearings were held. Opponents seem particularly worried that the algae could escape and become established in Hawaii or cross with native strains of *Chlamydomonas*.[3] Mera and Rincon insist the risks are low (the algae will be enclosed in plastic and not open to the environment) and can be mitigated by containment procedures. The Board eventually granted Mera permission to import seven strains of *Chlamydomonas* to start field trials at NELHA. No written opinion was issued. Earthjustice, on behalf of a number of citizen groups including GMO-Free Hawaii and the Hawaii Chapter of the Sierra Club, filed suit soon thereafter.

Lawsuit

Earthjustice focused on the fact that the Board had not conducted an environmental review pursuant to the Hawaii Environmental Policy Act (HEPA). HEPA applies to, among other things, actions that "propose the use of state or county lands."[4] HEPA requires the preparation of an environmental assessment (EA) to determine whether an environmental impact statement is necessary. The court held that, at a minimum, an EA should have been prepared because the algae is intended for use at NELHA, a state-owned and -operated facility. Although the record revealed that the Board undertook a detailed assessment pursuant to its importation procedures, the court found no case law to support the Board's position that this supplemented HEPA review. Two environmental impact statements prepared for NELHA in 1976 and 1985 did consider the production of algae, but the court found that the mass production of GM algae is a "new circumstance which may constitute a different environmental impact."

Conclusion

The court's ruling rendered the Board's approval invalid. The Board will need to prepare at least

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First Circuit Upholds Rhode Island Lobster Regulation

Medeiros v. Vincent, 2005 U.S. App. LEXIS 27093 (1st Cir. Dec. 12, 2005).

Stephanie Showalter

Fisheries lawsuits move through the First Circuit like clockwork. Most recently, the court was called on to examine the constitutionality of a Rhode Island Department of Environmental Management (DEM) regulation restricting the number of lobsters harvested by methods other than lobster traps.

Background

The fifteen Atlantic States and the District of Columbia jointly manage the fish stocks within state waters (three miles from shore) through the Atlantic States Marine Fisheries Commission (Commission). The Commission develops interstate fishery management plans (IFMP) for the various East Coast fisheries. The Atlantic Coastal Act authorized the Commission to require member states to adopt and comply with IFMP terms the Commission deems are "necessary."[1] If a state refuses to comply with a necessary term, the Secretary of Commerce may impose a fishing moratorium in the offending state's coastal waters.

In December 1997, the Commission promulgated a number of "necessary" measures for the Atlantic lobster fishery. Almost all lobsters caught along the Atlantic coast are harvested by lobster traps. A very small percentage are harvested by netting or trawling. Amendment 3 reduced the number of lobster traps a vessel could carry and, in an attempt to allow more juvenile lobsters to escape the traps, reduced the trap capacity and the size of trap vents. For the other gear sectors, Amendment 3 limited the daily harvest to 100 lobsters, 500 for vessels at sea for five or more days.

The Rhode Island Marine Fisheries Council (RIMFC) issued Regulation 15.18 implementing these provisions soon thereafter. Not all state officials were supportive of Amendment 3, however, and in June 2000, the RIMFC repealed Regulation 15.18. The Commission quickly notified the Secretary of Commerce that Rhode Island was no longer in compliance with the necessary terms of Amendment 3. Rhode Island avoided a lobstering moratorium only by reinstating Regulation 15.18.

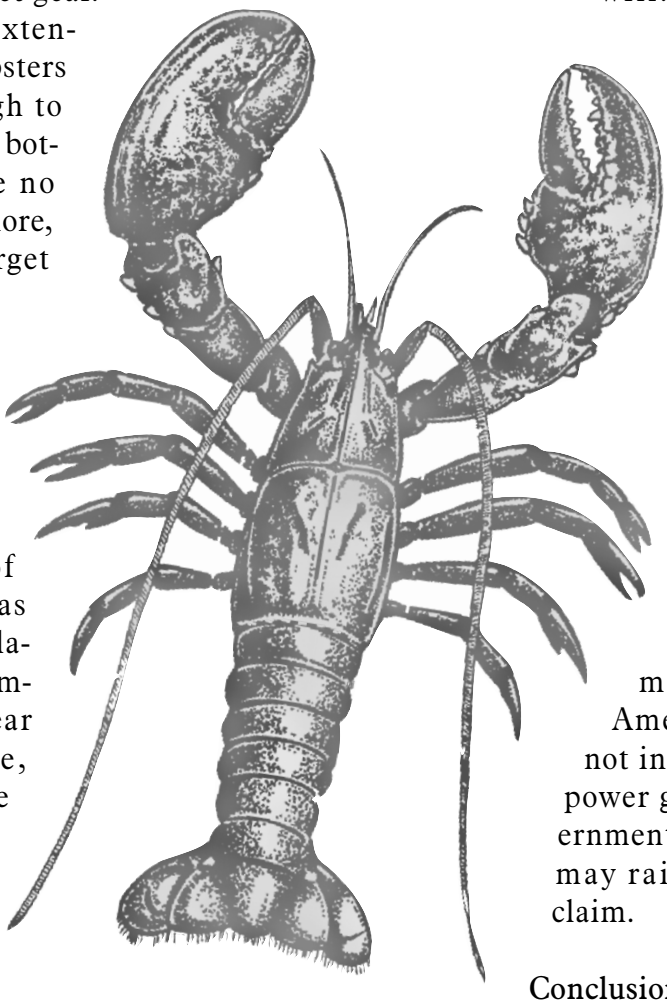
While all this was going on, Stephen Medeiros was indicted in June 1999 for violating Regulation 15.18 after he landed 131 lobsters harvested with trawl gear. Although the charges were ultimately dismissed, Medeiros, most likely due to the recission of the regulation, filed suit in state court against the Commission and the DEM alleging that Amendment 3 and Regulation 15.18 are unconstitutional. The case was removed to the U.S. District Court for the District of Rhode Island. The district court granted summary judgment in favor of the governmental agencies. The First Circuit affirmed the district court's rulings.

Equal Protection

Medeiros first argued that Amendment 3 and Regulation 15.18 violate the Equal Protection Clause of the U.S. Constitution. Unless a statute or regulation employs a suspect classification, such as race or gender, or impairs a fundamental right, it need only bear a rational relationship to a legitimate government purpose. Medeiros conceded that non-trap lobstermen are not a suspect class. He argued instead that Amendment 3 and the state regulation infringed on his fundamental right to pursue the livelihood of his choosing. As there is no fundamental right "to make a living," the court dismissed Medeiros's argument and subjected the provisions in question to a rational relationship review.

The Commission and Rhode Island defended their differing treatments of trap and non-trap lobstering based on the gear's impacts on

lobsters. To ensure adequate egg production, regulators focus on protecting "soft shedders," newly molted lobsters. Soft shedders are generally not caught in lobster traps because they can escape through the trap vents. This is not true of trawl and net gear. Trawl gear can cause extensive shell damage if lobsters are unfortunate enough to be run over while on the bottom and nets provide no escape routes. Furthermore, lobsters are not the target species of trawlers. Trawlers are fishing for finfish and the lobsters are caught as unintentional bycatch.



The First Circuit found that, in light of these differences, it was reasonable for the regulators to enact different limits for the different gear sectors. For example, increasing the mesh size of nets as with the vent sizes would diminish the ability of trawlers to catch finfish. The 100/500 limit reasonably accounted for the historic incidental catch. The low limit on lobster harvesting by trawlers may also provide some conservation benefit in the future, the court found. The limit is "a prophylactic measure to prevent any future redirection of efforts from trap lobstering and finfishing into non-trap lobstering methods."[2] There was sufficient evidence that Amendment 3 and Regulation 15.18 were rationally related to the legitimate government purpose of lobster conservation.

Tenth Amendment

Medeiros also argued that the Atlantic Coastal Act, specifically the moratorium provision, is an impermissible "commandeering" of the states' legislative prerogatives by the federal government.[3] Basically, Medeiros claims that the mere threat of a moratorium caused Rhode Island to adopt the provisions of Amendment 3 against its will. The defendants countered by challenging Medeiros's standing to raise this issue.

The Tenth Amendment states that "the powers not dedicated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." The U.S. Supreme Court has ruled that private citizens lack standing to maintain Tenth Amendment claims.[4] The Tenth Amendment protects states, not individual citizens, against power grabs by the federal government. Only a state, therefore, may raise a "commandeering" claim.

Conclusion

The First Circuit upheld the rulings of the District Court affirming the constitutionality of Amendment 3 and Rhode Island Regulation 15.18. The 100/500 limit remains in effect.

Endnotes

1. *See* 16 U.S.C. § 5101(a).
2. *Medeiros v. Vincent*, 2005 U.S. App. LEXIS 27093 at *15 (1st Cir. Dec. 12, 2005).
3. *Id.* at *19.
4. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939).

Ninth Circuit Upholds the Corps' Adjacency Jurisdiction Over Wetlands

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005).

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In *Baccarat*, the Ninth Circuit held that the Army Corps of Engineers (the Corps) could regulate "adjacent wetlands" regardless of whether such wetlands have a "significant hydrological or ecological connection" to navigable waters.[1] Further, the court distinguished the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) by finding that *SWANCC* merely invalidated the migratory bird rule[2] and did not address the issue of jurisdiction over adjacent wetlands.

Background

Baccarat Fremont Developers purchased a 30.98-acre site that contained 7.66 acres of wetlands. The purchased wetlands were adjacent to two flood control channels that are navigable and connect to the San Francisco Bay. The flood channels run parallel to the site's southern and western boundaries and are separated from the wetlands by man-made berms.

Photograph courtesy of ©Nova Development Corp.

In February 1998, the Corps determined that it had jurisdiction over the 7.66 acres of wetlands under the Clean Water Act (CWA) because the wetlands were adjacent to navigable waterways.[3] On January 29, 2001, Baccarat requested that the Corps reconsider its jurisdiction in light of the Supreme Court's decision in *SWANCC*.[4] The Corps reaffirmed its determination of jurisdiction, explaining that *SWANCC* "did not eliminate the Corps' authority to regulate wetlands adjacent to a tidal waterway."[5]

In February 2002, the Corps offered Baccarat a permit to fill 2.36 acres of wetland subject to the condition that it create 2.36 acres of seasonal freshwater wetlands and enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat sued the Corps in California Superior Court, seeking declaratory and injunctive relief from the Corps' determination that it had jurisdiction over the wetlands. Upon removal to federal District Court, the District Court granted summary judgment to the Corps, finding that the agency has adjacency jurisdiction over the wetlands.

Supreme Court Case Law

The Supreme Court has explicitly addressed the Corps' jurisdiction over adjacent wetlands based on the CWA in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside*, the Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to waters of the U.S. The Court concluded that all adjacent wetlands are waters of the U.S. even though some adjacent wetlands may not be environmentally significant to their adjoining bodies of water. The fact that a majority of adjacent wetlands have an ecological connection to waters of the U.S. is sufficient to support broader jurisdiction over other wetlands. The Court rejected the idea that for the Corps to have jurisdiction it must demonstrate a significant hydrological or ecological connection between the wetlands and the adjacent water.

Baccarat argued that all jurisdictional claims by the Corps must be factually based and the Corps cannot assert jurisdiction over all adjacent wetlands because such a broad determination is "arbitrary and capricious" for failure to articulate a rational connection between the facts found and the choice made.[6] The Court disagreed with

Baccarat's argument because if the Corps encounters a wetland that is not significantly connected to adjacent waterways it may issue a permit authorizing construction. The Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the CWA.

Baccarat relied on *SWANCC* to support its contention that adjacent wetlands must be hydrologically or ecologically connected to waters of the U.S. Reading the CWA to extend jurisdiction to inland ponds would effectively read the term navigable waters out of the statute.[7] But *SWANCC* did not address the issue of jurisdiction over adjacent wetlands. The holding in *SWANCC* only overruled the Migratory Bird Rule because it was not "fairly supported by the CWA." Moreover, *Riverside* seems to control the issue of adjacent jurisdiction and there is no indication that *SWANCC* intended to overrule *Riverside*.

Circuit Court Case Law

The Ninth Circuit also reviewed its decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In that case, the Ninth Circuit upheld EPA's jurisdiction over irrigation canals, finding that they were tributaries falling within the regulatory definition of waters of the United States. *Headwaters* only addressed bodies of waters that were connected to tributaries and the holding certainly cannot be read to address the question of whether a significant hydrological or ecological connection to a particular adjacent wetland is required.

The Ninth Circuit joins the Sixth Circuit in rejecting the idea that *SWANCC* modified the holding of *Riverside*. In *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004) the Carabells wanted to fill wetlands and the Corps declined to issue a permit. They brought a suit arguing that the Corps lacked jurisdiction over the wetlands. Similar to *Baccarat*, the wetlands on the Carabells' property are separated from water only by manmade berms. The Sixth Circuit held that *SWANCC* did not decide any issue with regard to adjacent wetlands and the Corps ultimately had jurisdiction over the Carabells' land because the wetlands were adjacent to navigable waters.

Conclusion

By adopting a narrow reading of *SWANCC*, the Ninth Circuit joins most other circuits in essentially eliminating any requirement for a "significant nexus." In these circuits, adjacency jurisdiction does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and the waters of the United States. However, it is important to note that this dispute is ongoing and the Supreme Court has granted certiorari to review the Sixth Circuit's decision in *Carabell* along with *U.S. v. Rapanos*, 376 F.3d 629 (6th Cir. 2004).[8]

Endnotes

1. *Baccarat Fremont Developers v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1158 (9th Cir. 2005).
2. In *SWANCC*, the Corps asserted jurisdiction over intrastate waters used as habitat by migratory birds.
3. The CWA prohibits the discharge of pollutants into navigable waters and grants the Corps the power to issue permits for discharges of dredged or fill material into waters of the U.S. *See* 33 U.S.C. § 1344(a).
4. In *SWANCC* the petitioner's proposed waste disposal site was a habitat for migratory birds and the Supreme Court held that federal agency jurisdiction under the CWA did not extend to such non-navigable, isolated, intrastate waters, because the CWA expressly limits such jurisdiction to navigable waters.
5. *Baccarat*, 425 F.3d at 1152.
6. *U.S. v. Riverside Bayview Homes, Inc*, 474 U.S. 121, 134 (1985).
7. *SWANCC,* 531 U.S. at 171-172.
8. Rapanos, a Michigan developer, was convicted of violating the Clean Water Act for filling his wetlands with sand to make the land ready for development. The acreage is bone dry – intentionally – because the county government dug drainage ditches around it 100 years ago so it could be used for farming.

Lawsuit Against Cessna Aircraft Dismissed for Failure to Allege Non-economic Damages

Isla Nena Air Services, Inc. v. Cessna Aircraft Co., 380 F. Supp. 2d 74 (D.P.R. 2005).

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On August 30, 2003, a single-engine Cessna plane operated by Isla Nena Air Services (Isla Nena) suffered engine failure during a flight from the city of Fajardo, Puerto Rico to Culebra, a Puerto Rican island approximately twenty miles from Fajardo. The pilot was forced to make an emergency landing in the waters near Flamenco Beach on Culebra. Although all nine passengers made it to shore safely, the aircraft suffered extensive damage.

Isla Nena sued Cessna Aircraft Company, the aircraft's manufacturer, and Pratt & Whitney, the aircraft engine's manufacturer, seeking damages for loss of the aircraft, repair costs to the aircraft, lost income during the time the aircraft was out of service and other damages based on tort and strict liability theories for defective products manufacture. The U.S. District Court for the District of Puerto Rico held that Isla Nena's claims were barred by the economic loss rule.

Admiralty Jurisdiction

As a preliminary matter, the district court determined that admiralty law, not Puerto Rican law, controlled. To determine admiralty jurisdiction in land-based aircraft crashes over ocean water, courts apply a two-part test developed by the U.S. Supreme Court in *Executive Jet Aviation Co. v. City of Cleveland, Ohio*. Admiralty law will control if the site of the crash was within navigable waters and there is a nexus between the activity involved and traditional maritime activity.[1]

The district court found that the first prong of the test was met easily as Congress has specifically stated that the waters around Puerto Rico and its islands are navigable waters.[2] Furthermore, even if Congress had not specifically defined Puerto Rico's waters as navigable,"it has long been the rule that all waters within the ebb and flow of the tide are considered navigable waters."[3]

The nexus prong, however, required more analysis. Several Supreme Court cases following *Executive Jet* have further defined the nexus requirement. To have the appropriate nexus, the incident must have a "potentially disruptive impact on maritime commerce" and "the general character of the incident giving rise to the incident [must] bear a significant relationship to traditional maritime activity."[4] The district court found that the crash of an airplane flying between Fajardo and Culebra could have a potential impact on maritime commerce. In *Executive Jet*, for instance, the Supreme Court held that a sinking plane created a potential hazard for other vessels in the water and therefore could have an impact on maritime commerce. Similarly, the Isla Nena plane created a hazard for other vessels. The district court gave no weight to Isla Nena's argument that admiralty law was inapplicable because the air travel had no *actual* effect on maritime commerce, concluding that potential impact was enough to exercise jurisdiction.

The district court also found that the transportation services provided by Isla Nena between the Puerto Rican mainland and islands was a traditional maritime activity. The court reached this conclusion by focusing on the activity, transportation of people from one part of Puerto Rico to another, rather than any particular conduct of Isla Nena or Cessna. Before aircraft, boats transported people between the mainland and the islands. Although planes now perform this function, the transportation of people along these routes is still a traditional maritime activity. In addition, as it is inevitable that a plane operating between Fajardo and Culebra would crash in navigable waters, the flight bears a significant relationship to maritime activities.

Isla Nena argued that the exercise of admiralty jurisdiction was improper because the compo-

nent part responsible for the engine failure was not manufactured exclusively for maritime use. Isla Nena claimed, therefore, that transportation on the aircraft could not be a traditional maritime function. The court rejected this argument, reasoning that the component parts of a defective product need not be manufactured specifically for maritime use as an injury at sea from a defective product is enough for admiralty law to apply.

Economic Loss Rule

Cessna and Pratt & Whitney also argued that Isla Nena's claims were barred by the economic loss rule. The economic loss rule, recognized in admiralty law,[5] precludes recovery for a tort claim between two parties in a commercial relationship when the only damage resulting from an incident is damage to the product itself. To avoid application of the economic loss rule and successfully bring a tort or strict liability claim, a plaintiff must allege that a defective product caused damage to property other than itself or that the product caused personal injuries. If a plaintiff fails to allege personal injury or other property damage, the only available theory of recovery is breach of warranty.

The district court determined that the relationship between Isla Nena and Cessna and Pratt & Whitney was a commercial relationship (the sale of an aircraft). Isla Nena alleged only that the aircraft was damaged as a result of the emergency landing, but it made no allegations that the defective engine caused personal injuries or damage to other property. As Isla Nena alleges a defect in the aircraft or a component part caused the damage to the aircraft, its only available remedy is a breach of warranty action.

Conclusion

The district court dismissed Isla Nena's tort and strict liability claims against Cessna and Pratt & Whitney under the economic loss rule because the emergency landing caused damage only to the plane itself.

Endnotes

1. *Executive Jet Aviation Co. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972).
2. *See* 42 U.S.C. § 749.
3. *Isla Nena Air Services, Inc. v. Cessna Aircraft Co.*, 380 F. Supp. 2d 74, 77-78 (D.P.R. 2005).
4. *Sisson v. Ruby*, 497 U.S. 358 (1990).
5. *See East River Steamship v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

Photograph courtesy of ©Nova Development Corp.

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an EA before re-permitting the project. The additional delay and cost associated with an extensive environmental review seems unnecessary in this case. Mera and Rincon intend to use an existing facility to grow algae in a closed system. Yes, it is genetically modified, but a microalgae production process could result in much-needed new drugs. Opponents of the project voiced generalized concerns related to the use of GM in agriculture rather than focusing on the specific project. This case is a prime example of the need for companies and proponents of new technology to conduct public outreach campaigns. The public is less likely to oppose projects they understand and companies they believe have fully considered the risks.

Endnotes

1. Penni Crabtree, *Algae to Antibodies*, THE SAN DIEGO UNION-TRIBUNE, May 20, 2005.
2. *Id.*
3. Dayton Kevin, *Modified Algae Project Halted*, THE HONOLULU ADVERTISER, Oct. 11, 2005.
4. HAWAII REV. STAT. §343-5(a)(1).

North Carolina Court Affirms Dismissal of Challenge to Public Access Rights

Fabrikant v. Currituck County, 621 S.E.2d 19 (N.C. Ct. App. 2005).

Stephanie Showalter

In a closely watched public access case, the North Carolina Court of Appeals recently upheld the dismissal of the landowners' claims against Currituck County and several state resources agencies. Because the dismissal turned on procedure, the court avoided having to address the real issue - whether the public has access to privately owned dry sand beaches.

Until a couple of decades ago, Currituck County near Corolla, North Carolina was an isolated area of the Outer Banks. Lacking paved roads, access was generally gained by driving a four-wheel drive vehicle across the beach. In the mid-1970s, development began on Whalehead Club. Marketed as an exclusive, isolated beach community, most buyers were from out-of-state, many attorneys from the D.C metro area, New Jersey, and New York. The extension of paved roads into the area in the 1980s and '90s, followed by hotels, restaurants, and shops, resulted in a massive visitor influx.

In 1998, several property owners in Whalehead, fed up with sharing what they considered their private beach, filed suit claiming a right to prevent the public from using the beach in front of their houses. That year state officials estimated that on a typical Sunday 20,000 visitors were coming to the Currituck beaches.[1] It's likely that a few bad seeds pushed the Whalehead residents over the edge. Newspaper accounts repeatedly list the same complaints: noise, trash, strangers knocking on doors to use the bathroom, and "brazen" use of showers on decks or under the houses.[2]

North Carolina is a high water state. That means the seaward boundary of oceanfront property generally extends to the mean high water mark. Although the title to this land is in private hands, it has long been the position of the state that the area between the high water mark and the vegetation line, known as the "dry sand beach," remains open to the public. The plaintiffs strongly disagree.[3]

Unfortunately the court never reached the issue of whether the public has a right to use the dry sand beaches for recreational purposes. The Court of Appeals affirmed the finding of the trial court that the plaintiffs' claims were barred by the sovereign immunity doctrine, which precludes suits against a government without its consent. The plaintiffs argued that immunity was waived by N.C. Gen. Stat. § 41-10.1 which allows actions against the state to quiet title when the state and an individual "assert a claim of title to the [same] land." The court found this provision inapplicable because none of the defendants had asserted a "claim of title to land." North Carolina does not dispute that oceanfront property owners may hold title seaward to the high water mark. Its position is that the public must be permitted access regardless of the deed.

Because the court failed to reach the merits of the case, the extent of public rights remains unclear. The controversy is far from over, however, as the plaintiffs are likely to appeal to the state Supreme Court. A victory for the landowners could have significant ramifications, as about half of the North Carolina shoreline is private owned.

Endnotes

1. Martha Quillin, *Public Beach or Private Land?*, THE NEWS AND OBSERVER, Sept. 5, 1998.
2. *Id. See also* Jerry Allegood, *Beachfront Landowners Lose Public Access Case*, THE NEWS & OBSERVER, July 23, 2003.
3. For a detailed discussion of shoreline property rights in North Carolina and additional background information on the *Fabrikant* litigation, *see* Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869 (2000).

Court Refuses to Recognize Lesser Offense of Attempted DUI

Whiting v. State of Alaska, 2005 Alas. App. LEXIS 115 (Alaska Ct. App. Oct. 12, 2005).

Stephanie Showalter

Whiting v. State of Alaska will definitely make my Top Ten list of favorite cases for 2005. An Alaskan boater recently sought to overturn his conviction for felony driving under the influence by making the intriguing argument that the jury should have been instructed on the lesser offense of attempted DUI. The Court of Appeals of Alaska wasted no time dismissing this argument.

Background

It all started when Michael Whiting decided to go fishing with his girlfriend and her six-year-old son. Whiting piloted his skiff into the Gastineau Channel and turned the motor off. While the skiff drifted and the three fished, Whiting remained near the rear of the skiff by the motor drinking alcoholic beverages.

Things went rapidly downhill when a Coast Guard vessel approached the skiff to see if the little boy was wearing a life vest. The officers soon realized that Whiting was intoxicated and arrested him for driving under the influence despite Whiting's pleas that he was sober when he piloted the boat into the Channel. Shocking!

"Attempted" DUI

Relying on public defenders to keep you out of jail can be risky. Whiting, however, won the public defender lottery. His attorneys vigorously argued at trial that a reasonable juror presented with the above facts could conclude that Whiting was not guilty of operating a watercraft under the influence for the simple reason that the motor was off. That's like arguing a motorist drinking while stuck in a massive traffic jam is not guilty of DUI if the motor is off. Doesn't seem quite right, does it? Although Whiting's attorneys conceded that he intended to start the motor when they were done fishing, they insisted he could be found guilty only of attempted DUI since he had not actually driven the boat while intoxicated. The trial judge refused to instruct the jury on such an offense.

The Court of Appeals affirmed the ruling of the trial judge and highlighted the fundamental flaw in Whiting's argument. Whiting's defense is based on the assumption that the statutory definition of driving under the influence does not encompass the situation in which an intoxicated person is in control of a watercraft whose engine is off.[1] The court disagreed, stating that operating a watercraft includes being in control of a watercraft even when the engine is not running. Since Whiting was in control of the skiff, he was operating the skiff for the purposes of the Alaska DUI statute.

As for Whiting's attempt argument, to constitute an attempt under Alaskan law, the defendant's intent to commit a crime must be accompanied by "conduct which constitutes a substantial step toward the commission of that crime."[2] Until the defendant takes that step, there is no punishable attempt. Whiting's mere willingness or intention to operate the skiff while intoxicated later in the day is not an attempt.

Conclusion

Whiting v. State of Alaska is yet another reminder that fact is often as entertaining as fiction. You simply cannot make this stuff up. And let this be a lesson to all you boaters out there. If you are going to drink while on a fishing trip, move to the front of the boat and sober up before piloting the vessel home. A few extra hours spent fishing might just keep you out of jail.

Endnotes

1. Under ALASKA STAT. §28.35.030(a), "a person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft."
2. ALASKA STAT. § 11.31.100(a).

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viously submerged land, it does so subject to the riparian owner's exclusive use up to the water's edge. Therefore, according to the court, lakefront property owners have the exclusive right to use the land up to the water's edge. Glass appealed to the Michigan Supreme Court.

The Supreme Court of Michigan heard the appeal in March of 2005 in order to decide whether the public has a right to walk along the shores of the Great Lakes, "where a private landowner ostensibly holds title to the water's edge." In reaching its decision that Glass has the right to walk along the shore in front of the Goeckels' property, the court focused on the public trust doctrine. More specifically, it looked at how the doctrine affects a property owner's private title, and whether walking is an activity protected by the doctrine.

History of the Public Trust Doctrine

American law has long recognized that the sovereign must preserve and protect the public's interest in the seas for navigation and fishing. Michigan's courts have held that the common law of the sea applies to the Great Lakes; therefore, the public trust doctrine inherent in the common law of the sea applies to the Great Lakes.

The Supreme Court relied heavily on the public trust doctrine to reach its decision that Glass does not interfere with the Goeckels' property rights when she walks along the shore of Lake Huron. According to common law, the state has an obligation to preserve and protect the waters of the Great Lakes, as well as the lands beneath them. The state, in effect, acts as the trustee.

Scope of the Public Trust Doctrine

The Michigan Supreme Court considered whether the public trust doctrine applies only to land that is below the waters of the Great Lakes, as the Goeckels argued, or if it encompasses land up to the ordinary high water mark. Glass relied on the GLSLA arguing that it defines the scope of the public trust doctrine as extending to all lands below the ordinary high water mark. The court disagreed, stating that the GLSLA establishes the scope of the Legislature's regulatory authority pursuant to the public trust doctrine, but it does not purport to establish the boundaries to which the public trust doctrine applies. The court looked to common law to determine the scope of the public trust doctrine in Michigan.

As applied to oceans, the public trust doctrine encompasses an area from the water and the land beneath them to that point on the shore known as the "ordinary high water mark."[2] The court noted that the term "ordinary high water mark" has a more concrete meaning as applied to tidal waters that have predictable high and low tides based on lunar cycles. Nevertheless, the term "ordinary high water mark" is applicable to the Great Lakes because water levels change because of precipitation and other factors. The court recognized that the fluctuation of the water level of the Great Lakes results in the exposure of land where water once was and that rain or other factors could easily render this land submerged once again. The Court defined the "ordinary high water mark" as follows:

> The point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that [it] is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

Walking and the Public Trust Doctrine

Having established that the public trust doctrine applies to land below the ordinary high water mark, the court next had to decide if walking is a protected activity under this doctrine. Fishing, hunting, and navigation for commerce and pleasure have traditionally been protected by the public trust doctrine. It follows that in order to engage in these activities, the public must have a

right of passage over the ordinary high water mark. The Supreme Court of Michigan held that walking along the lakeshore below the ordinary high water mark is an activity that must be safeguarded in order to protect these traditional public rights.

Related Points of Interest

While the court unanimously agreed that the Goeckels could not prevent Glass from walking along the shore of Lake Huron, the dissent raised some interesting points. Justice Markman, citing *Hilt v. Weber*,[3] stated that the public trust doctrine should only apply to lands which are submerged under the Great Lakes and the wet sands. Applying the majority's vague definition of the "ordinary high water mark" could lead to an increase in litigation between the public and lakefront property owners to determine the exact location of this mark. The open beaches of the Great Lakes could become dotted with fences erected by property owners - a viable option according to the dissent.

Furthermore, while the Supreme Court ruled that the public could walk along the shore, it did not address what other activities are permissible in the area below the ordinary high water mark. Litigation may be needed to discern whether various activities such as sunbathing, riding ATVs, building bonfires, etc. are permissible.

Conclusion

The Michigan Supreme Court held that the public trust doctrine protects the public's right to walk along the beach. Not surprisingly, private property groups are unhappy with the decision, although the opinion is consistent with most courts' interpretations of the public trust doctrine.

On December 13, 2005, the Goeckels and Save Our Shoreline filed a petition for a Writ of Certiorari with the U.S. Supreme Court arguing the Michigan Supreme Court's decision effected an unconstitutional taking of private property.[4] A decision on whether to hear the Goeckels' appeal is not expected from the Supreme Court for several months. The Law Center is closely monitoring this case and will issue announcements as it moves forward.

Endnotes

1. 683 N.W.2d 719 (Mich. 2004). For a detailed analysis of the Court of Appeals' decision, *see* Stephanie Showalter, *No Right to Walk Between High Water Mark and Water's Edge*, THE SANDBAR 3:2, 1 (July 2004).
2. *Shivley v. Bowlby*, 152 U.S. 1, 13 (1894).
3. 233 N.W. 159 (Mich. 1930).
4. *See* Traci Anderson-Weisenbach, *SOS Asking Supreme Court for Review of Michigan's Decision on* Glass v. Geockel, THE HURON DAILY TRIBUNE, Dec. 19, 2005.

The Ocean and Coastal Conservation Guide 2005-2006 Now Available

Make room next to your phone book, a new directory is available! *The Ocean and Coastal Conservation Guide 2005 - 2006* is chock full of phone numbers, addresses, and websites for more than 2,000 organizations working to protect and manage our ocean and coastal areas. *The Guide* is very user-friendly with listings separated into marine conservation organizations, government agencies, marine schools and science centers, and national ocean sanctuaries and marine parks. So, whether you are headed back to school, need to locate marine conservation organizations in your region, must track down a government agency, or need to find your next great vacation spot, this is the book for you. For those times you need to locate an organization in a hurry, *The Guide* contains two indexes to facilitate access: an alphabetical organizational name index and a geographic index. Get your copy now and reach out to your colleagues and help the editor build a "seaweed (marine grassroots) rebellion of creativity and solutions-oriented efforts across our land and from sea to shining sea."

The Ocean and Coastal Conservation Guide 2005-2006, David Helvarg, ed. (Island Press, July 2005, Paper: $26.95, ISBN: 1-55963-861-3).

Mid-Atlantic, from page 1

Opposition to the Reservoir is strong. Following the Board's decision, the Mattaponi Tribe and the Alliance to Save the Mattaponi, a coalition of environmental groups which includes the Sierra Club and the Chesapeake Bay Foundation, filed petitions for review with the Circuit Court. The Mattaponi Tribe is a small tribe whose reservation abuts the Mattaponi River. The tribe is not currently recognized by the federal government, but it is recognized by the Commonwealth of Virginia. The Tribe claims that the construction of the Reservoir will impair its members' right to hunt and fish guaranteed by the 1677 Treaty of Middle Plantation. The Alliance contends the project will cause extensive environmental damage and argues that the Board's decision is not supported by substantial evidence.

The Circuit Court dismissed both the Alliance's and the Tribe's appeals due to lack of standing. The Court of Appeals affirmed. The Supreme Court reversed and remanded the case back to the Circuit Court, holding that the organizations had standing because there was a casual connection between their alleged injuries and the Board's decision. The second time around, the Circuit Court found that the Board's decision was supported by substantial evidence. In addition, the court found that it lacked jurisdiction to decide the Tribe's treaty claims. The Court of Appeals affirmed and transferred the treaty claims to the Supreme Court. The Alliance and the Tribe appealed.

Sovereign Immunity

Virginia consistently argued that state law immunized it from suit. Virginia asserted that Virginia Code § 2.2-4002(B)(3), which exempts from judicial review the "location, design, specifications, or construction of public buildings or other facilities," applied to this case because the Reservoir was a public facility. Both the Circuit Court and the Court of Appeals found that the state was not immune. The Supreme Court had not addressed this issue when the case was before it in 2001, but this time it affirmed the findings of the lower courts.

The Supreme Court held that §2.2-4002(B)(3) did not control in this situation because another section, § 62.1-44.29, expressly provides for the judicial review of all final decisions of the Board relating to the issuance of water protection permits. "When one statute addresses a subject in a general manner and another addresses a part of the same subject in a more specific manner, the two statutes should be harmonized, if possible, and when they conflict, the more specific statute prevails."[1] The Court found that the more specific provisions in §62.1-44.29 controlled and Virginia was therefore not exempt.

Board's Decision

The Supreme Court rejected all arguments that the Board's decision was not based on substantial evidence. The court found that the Board considered the scientific studies that were available to it and imposed permitting conditions to address adverse impacts. For example, one permit condition requires the City to create twice as many wetlands as it destroys. The court held that the Board did not abuse its discretion when it determined that wetland losses could be mitigated, only minor salinity changes would occur, and that the project was needed to meet future water demands. The Court also found that the Board adequately considered the cultural value of the Tribe's archaeological sites and was justified in determining that it could not protect both the sites and instream flows. The Alliance's appeal was over. The Tribe, however, had one option left.

Treaty Claims

The Board had refused to consider the Tribe's treaty rights before issuing the permit. The Tribe contended that the Board, as a state agency, has the duty to uphold the state's treaty obligations. The Court of Appeals disagreed and the Supreme Court affirmed. The Board derives its authority from the Virginia Water Control Law. It is authorized only to issue water protection permits, not determine private rights of citizens. The Board, therefore, did lack the authority to consider the treaty claims.

The Tribe also appealed the lower court rulings that the treaty claims are governed by state

law, not federal law. The Tribe argued that the Treaty is governed by federal law because of the Supremacy Clause of the U.S. Constitution which states "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land." The Supreme Court rejected the Tribe's arguments ruling that the treaty could not be federal law because it was entered into in 1677, over 100 years before the Constitution was adopted in 1789. The United States did not exist in 1677 and therefore could not have entered into a treaty with the Mattaponi Tribe. The Tribe made the interesting argument that the Supremacy Clause's reference to "treaties made" refers to all treaties adopted with Indian tribes before 1789. The court stated that while the Constitution does refer to treaties made before 1789, that language is a specific reference to treaties entered into by the U.S. under the Articles of Confederation. It does not apply to treaties entered into by Indian tribes with the British Crown. The treaty is governed by state law.

The court remanded the case to the Circuit Court for further proceedings on the Tribe's treaty claims. The litigation will continue, but against only one defendant - the City. The Court held that Virginia and its agencies are immune from suit on the treaty claims. The doctrine of sovereign immunity "protects the Commonwealth from interference with the performance of its governmental duties and preserves the Commonwealth's ability to control its funds, properties, and instrumentalities."[2] Immunity must be expressly waived by the state. The court found no state law that expressly waived immunity for treaty violations. The City, however, is not protected by sovereign immunity and the Tribe's case against it can proceed.

Conclusion

Although the Alliance and the Tribe have exhausted their remedies regarding the Board's permit, this litigation is far from over. In 2001, the Norfolk District of the Corps of Engineers rejected the City's application for a §404 permit for the dredge and fill of wetlands. The permit application was elevated to the North Atlantic Division in Boston when the Governor of Virginia issued a letter in opposition to the permitting decision invoking a rarely used federal law. 33 C.F.R. § 325.8(b)(2) requires district engineers to refer permit applications to the division engineer "when the recommended decision is contrary to the written position of the Governor of the state in which the work will be performed." After reviewing the referred permit application, the division engineer may authorize the issuance of §404 permits. On November 16, 2005, the North Atlantic Division issued the City a §404 permit for King William Reservoir. The Southern Environmental Law Center has already announced that it will challenge the permit in federal court.

The Corps is not the only agency that has flip-flopped during the permitting process. In 2003, the Virginia Marine Resources Commission voted to deny a permit for a water intake on the Mattaponi River. That should have spelled the end of the project, but in September 2004 the Commission reversed itself. This permit could also be challenged by the Alliance and the Tribe.

Endnotes

1. *Alliance to Save the Mattaponi v. Virginia*, 621 S.E.2d 78, 87 (Va. 2005).
2. *Id.* at 96.

Photograph of flooding on the Mattaponi River courtesy of the USGS.

Agencies Suffer Another Setback in Management of Klamath River Basin

Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005).

Stephanie Showalter

The management of the Klamath River Basin poses significant challenges to federal agencies. Too many demands on a scare resource means there is simply not enough water to go around. The Ninth Circuit recently remanded the National Marine Fisheries Service's (NMFS) latest attempt to balance irrigation with the water needs of the threatened Southern Oregon/ Northern California Coast (SONCC) coho salmon.

Background

The Klamath Project is a federal irrigation system consisting of several dams and reservoirs established in the early twentieth century. The number of coho in the Klamath River is estimated to have decreased to under 6,000 from a population of at least 50,000 in the 1940's. The SONCC coho were listed as a threatened species under the Endangered Species Act (ESA) in 1997. The ESA requires federal agencies to prepare biological assessments when threatened or endangered species are present in an area where a federal action is planned. When an action may affect an anadromous fish species, the agency preparing the biological assessment must consult with NMFS, who must then prepare a biological opinion (BiOp) to determine the impact of the action on the listed species and its habitat.

The first BiOp for the Klamath Project was prepared in 1999. Conflict resulted almost immediately. A severe drought in 2001 resulted in the Bureau of Reclamation (Bureau), the agency in charge of the Project, reducing water deliveries for irrigation in order to comply with the flow requirements of the BiOp. The reduction of deliveries caused significant agricultural losses. The Bureau prepared a new biological assessment in February 2002 which proposed maintaining a flow regime that varied depending on whether it was a "wet" or "dry" year. Any water available beyond what was needed to maintain flows would be made available for irrigation. The Bureau also proposed creating a water bank to store 100,000 acre-feet of water to compensate for shortfalls.

After reviewing the Bureau's assessment, NMFS concluded that the Bureau's plan would jeopardize the coho and adversely modified its critical habitat. The Bureau's planning target was the Klamath's minimum flow over the past ten years, a baseline NMFS thought might reduce the overall average flow of the River. When NMFS makes a jeopardy finding, the ESA requires the agency to develop Reasonable and Prudent Alternatives (RPA) to the proposed action to avoid jeopardy and adverse modification. In its 2002 BiOp, NMFS developed an RPA to replace the Bureau's plan.

RPA

NMFS's RPA covers Klamath Project operations between 2002 and 2012. The RPA assumes that the Bureau should only be responsible for water losses caused by the Project. Because the Project irrigates 57 percent of the land in the Basin, NMFS concluded that the Bureau would only be required to provide 57 percent of the water needed by the coho and that an intergovermental task force should be convened to develop the other 43 percent. NMFS did not state from what sources the other 43 percent would be "developed."

The RPA is divided into three phases. Between 2002 - 2005 (Phase I), the Bureau is to gradually develop the water bank, form the task force, and conduct scientific studies. Between 2006-2010 (Phase II), the Bureau must increase the water bank to 100,000 acre-feet and provide either its 57 percent share or the flows proposed in the Bureau's biological assessment, whichever is greater. Not until Phase III, 2010-2011, will 100 percent of the coho water needs be met when the other sources start contributing their 43 percent in addition to the Bureau's 57 percent share.

After 33,000 chinook, coho, and steelhead salmon died in an unexplained fish kill in the Klamath River in September 2002, the Pacific Coast Federation of Fishermen's Associations (Pacific Coast) challenged the RPA. On July 14, 2003, the district court ruled that the short-term measures, those in Phase I and II, were not arbitrary and capricious. The court found that NMFS had adequately supported its finding that providing less water for coho in the short-term would not jeopardize the species over the long-term. The court, however, did rule against NMFS on a crucial aspect of the RPA. The court found that NMFS's requirement that the Bureau provide only 57 percent of the long-term flows was arbitrary because there was not enough certainty that 100 percent of the flows could be provided through a collaborative process. Neither party appealed this ruling. Pacific Coast did appeal the district court's ruling regarding Phase I and II.

Implicit Reasoning

The Ninth Circuit disagreed with the district court and held that NMFS's RPA was arbitrary and capricious because it contained inadequate analysis of the effect of reduced water flows on coho during the first eight years of implementation. The district court had determined that NMFS's conclusion that the reduced flows would not jeopardize the species was implicit in the agency's phased approach.

"It is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision."[1] The Ninth Circuit held that NMFS had failed to articulate its reasons and that its analysis was too conclusory. The court stated that, for example, NMFS failed to adequately discuss how additions of water from the water bank will affect water levels or water temperatures in the main stem of the Klamath River. Furthermore, with respect to the 57 percent figure, the court found that NMFS failed to explain how providing only slightly more than half of the coho needs would avoid jeopardy. The court reminded NMFS that "the proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural context."[2]

NMFS completely failed to explain how jeopardy would be avoided during Phase I and II where lesser flows were anticipated while the task force was "developing" the other 43 percent of water flows the Bureau was supposedly not responsible for. The court found this especially troublesome because Phase I and II accounted for eight years of the ten-year plan. With a three-year life cycle, five generations of coho would complete their life cycles during those eight years. If water flows during Phase I and II are not sufficient, five generations of coho will be lost and the species will most certainly be jeopardized.

The court acknowledged that NMFS's discussions relating to Phase III and the long-term flow recommendations are much more detailed. The court found that the agency clearly explained how the long-term flow recommendations would improve habitat and increase survival. The detail in the Phase III section of the RPA only served to highlight that analysis was missing with respect to Phases I and II. The Ninth Circuit stated that "the agency's analysis of the beneficial effects of the long-term flows, in combination with the absence of analysis of the effects of substantially lower short-term flows, leads us to conclude that the reasoning behind the agency's plan cannot be reasonably discerned."[3]

Conclusion

The Ninth Circuit remanded the RPA to the district court for issuance of appropriate injunctive relief to avoid jeopardy until a new BiOp can be prepared by the agency. In revising its BiOp, NMFS must explain how the lesser flows anticipated during Phase I and II will provide enough water to ensure the salmon will survive until the Phase III recommendations can be implemented.

Endnotes

1. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005).
2. *Id.* at 1093.
3. *Id.* at 1092.

Aruba Resort Has Duty to Warn

Lienhart v. Caribbean Hospitality Servs., Inc., 426 F.3d 1337 (11th Cir. 2005).

Lynda Lancaster, J.D.

In a recent liability case, the Eleventh Circuit held that the Aruba Grand Beach Resort & Casino (Aruba Grand) has the responsibility to warn guests about trucks and boat trailers crossing the beach.

Background

On May 9, 1998, while vacationing at the Aruba Grand, Janice Lienhart was struck by a pickup truck and boat trailer operated by Unique Sports of Aruba (Unique Sports) while asleep on the beach in front of the Aruba Grand. Lienhart suffered extensive injuries to her face, chest, neck, and arm which have required years of medical treatment. At the time of the accident, Lienhart was utilizing a lounge chair placed under a tiki hut by a member of the Aruba Grand's staff.

The Aruba Grand is a large resort operated by Caribbean Hospitality Services, a Florida management company. To draw guests to its facility, the resort heavily promotes its private beach, adjacent public beach, and water activities. Unique Sports offers snorkeling and scuba diving trips which depart directly from the resort. Unique Sports rents space from the Aruba Grand and its facilities are adjacent to the hotel.

Lienhart sued Unique Sports, the Aruba Grand, and Caribbean Hospitality Services for damages resulting from the accident. Lienhart argued that the Aruba Grand was required to inform guests about the trucks on the beach because it knew of the dangerous conditions created by Unique Sports's activities. The Aruba Grand argued that they were not responsible for the injuries to Lienhart because Lienhart's injuries were solely the result of Unique Sports's negligence. The trial court granted summary judgment in favor of Aruba Grand, concluding that the resort could not be held responsible for the negligence of another party.

"Zone of Danger"

The Eleventh Circuit focused on whether the Aruba Grand created a "zone of danger" by directing its guests to an area of the beach frequented by vehicles. Florida law, as a matter of public policy, requires landowners to maintain their property in a reasonably safe condition and imposes a duty to warn of concealed perils that are known or should be known to the landowner, but which are unknown or undiscoverable to guests.[1]

Unlike the trial court, the Eleventh Circuit determined that the Aruba Grand did have a duty to Lienhart. The court found that Lienhart's injuries resulted from a "risk the Aruba Grand created and failed to warn or guard against."[2] The Aruba Grand controlled the area of the beach where Lienhart was sitting and knew that one of its tenants, Unique Sports, transported equipment in the area. The Aruba Grand was also aware that Unique Sports drove across the public beach without any demarcation of a driving path and without back-up devices on the trucks. The Eleventh Circuit concluded that the Aruba Grand had created a dangerous situation by allowing Unique Sports to

Photograph courtesy of ©Nova Development Corp.

trailer boats to and from the beach without separating the lounge chairs and tiki huts from the traffic on the beach. The Aruba Grand, therefore, breached its duty to minimize the risk of harm to its guests.

Conclusion

The Eleventh Circuit held that the district court erred by granting summary judgment and remanded the case to determine whether Caribbean Hospitality manages the Aruba Grand to such an extent that it assumes contractual liability. This issue was never reached on remand as the parties settled prior to the second trial.

Endnotes

1. *Lienhart v. Caribbean Hospitality Servs.*, 426 F.3d 1337, 1339 (11th Cir. 2005).
2. *Id.* at 1340.

Reflections of a Knauss Fellow: Part 4

Elizabeth Taylor, 2005 Knauss Sea Grant Fellow; J.D. Lewis & Clark Law School

It's hard to believe that my year as a Knauss fellow at the Marine Mammal Commission is almost up. The fellowship has given me the opportunity to be involved in numerous fascinating marine resource conservation issues. Most recently, I've taken the lead on drafting the Commission's comments on the southern sea otter translocation program. This issue reflects the complexities involved with ecosystem management given competing resource use demands and the current state of marine habitat.

Southern sea otters once ranged along the California coast and into Baja California. However, the fur trade brought southern sea otters to the brink of extinction, with only a small remnant colony surviving in central California. In 1977, the southern sea otter was listed as threatened under the Endangered Species Act (ESA). As a keystone species, sea otters have a substantial impact on their prey species, including crabs, lobsters, sea urchins and abalone. The near-extinction of the sea otters along the California coast altered the coastal ecosystem, allowing invertebrate populations to increase and shellfish fisheries to prosper. In 1987, the Marine Mammal Commission was integral in designing a zonal management plan as a compromise between sea otter recovery goals and shellfish fisheries. Under the plan, a "no-otter zone" was designated so that any otter found south of Point Conception would be removed to minimize conflicts between shellfish fisheries and sea otters. However, recent information on the population status, behavior and ecology of sea otters has revealed the adverse effects of containment that were not previously considered. A final biological opinion was issued in 2000, concluding that continuation of the containment program would likely jeopardize the continued existence of the species.

Currently, the U.S. Fish & Wildlife Service is proposing to discontinue the zonal management program and allow sea otters to expand their range south of Point Conception. The proposed action, however, presents a serious dilemma for resource managers trying to manage sea otters (a threatened species nearly extirpated by human hunting) and at least two abalone species that have declined significantly in recent years. These abalone species are prey of sea otters and were also valuable fishery resources. The proposed action would benefit otters, but would further exacerbate the decline of white abalone (listed as endangered under the ESA) and black abalone (a candidate for listing). This situation illustrates the need for comprehensive ecosystem management and the importance of considering future consequences of current actions.

2005 Federal Legislative Update

The following is a summary of federal legislation related to coastal, fisheries, water, and natural resources enacted during 2005 by the 109th Congress.

109 Public Law 58 - Energy Policy Act of 2005 (H.R. 6)
Contains numerous provisions affecting renewable energy development and oil and gas production. Grants the Federal Energy Regulatory Commission the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Authorizes the Secretary of Interior (through the Mineral Management Service) to grant a lease, easement, or right of way on the Outer Continental Shelf for the production, transportation, or transmission of "energy from sources other than oil and gas." Prohibits the issuance of federal or state permits and leases for "new oil and gas slant, directional, or offshore drilling in or under one or more of the Great Lakes."

109 Public Law 74 - Sportfishing and Recreational Boating Safety Amendments Act of 2005 (H.R. 3649)
Ensures funding for sportfishing and boating safety programs funded out of the Highway Trust Fund through the end of fiscal year 2005.

109 Public Law 106 - NFIP Enhanced Borrowing Authority Act of 2005 (H.R. 4133)
Amends the National Flood Insurance Act of 1968 to increase from $3.5 billion to $18.5 billion, through FY2008, the total amount which the Director of the Federal Emergency Management Agency may borrow from the Secretary of the Treasury with the President's approval to carry out the flood insurance program.

109 Public Law 117 - An Act to Amend Public Law 89-366 (H.R. 126)
Allows for an adjustment in the number of free roaming horses permitted in Cape Lookout National Seashore from 100 to not less than 110, with a target population of between 120 and 130.

109 Public Law 121 - Senator Paul Simon Water for the Poor Act of 2005 (H.R. 1973)
Amends the Foreign Assistance Act of 1961 to authorize the President to furnish assistance for programs in developing countries to provide affordable and equitable access to safe water and sanitation. Directs the President to develop a strategy to be implemented by U.S. AID to further U.S. foreign assistance in this area. Directs the Secretary of State to report to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate on U.S. efforts to promote programs that develop river basin, aquifer, and other watershed-wide mechanisms for governance and cooperation.

109 Public Law 135 - Gulf Opportunity Zone Act of 2005 (H.R. 4440)
Amends the Internal Revenue Code to establish a program of tax benefits for businesses and individuals in the Hurricane Katrina disaster area, to be known as the Gulf Opportunity Zone or GO Zone. Authorizes the issuance of Gulf Opportunity Zone bonds as tax-exempt facility bonds by the states of Alabama, Louisiana, and Mississippi and requires that 95 percent of the net proceeds of such bonds be used for the cost of acquisition, construction, reconstruction, and renovation of nonresidential real and residential rental property and public utility property in the GO Zone. Extends tax benefits currently available to businesses and individuals in Hurricane Katrina disaster areas to victims of Hurricane Rita and Wilma.

International Law Update

Below is a summary of the coastal- and marine-related international law developments in 2005.

Basel Convention on Hazardous Wastes and UNEP Regional Seas Program Partner (March 2005)
The United Nations Environmental Program's Regional Seas Program and the Secretariat of the Basel Convention on Hazardous Waste entered into a Memorandum of Understanding to address coastal pollution. The agreement allows the two organizations to support each other with technical and legal training and cooperate on the environmentally sound management of hazardous wastes in order to prevent coastal and marine pollution.

FAO Adopts Voluntary Eco-labeling Guidelines for Marine Fisheries (April 2005)
The UN Food and Agriculture Organization's (FAO) Committee on Fisheries adopted guidelines for eco-labeling of fish caught at sea in an attempt to ensure the sustainability of marine fisheries. The new guidelines provide guidance to governments and organizations that maintain, or are considering establishing, labeling schemes for fish and fishery products from well-managed marine capture fisheries. The guidelines are available at ftp://ftp.fao.org/docrep/fao/008-/a0116t/a0116t00.pdf .

FAO Establishes New Regional Fisheries Body (May 2005)
The FAO established a new regional fisheries body to promote responsible and sustainable fishing in the southwestern Indian Ocean. The South West Indian Ocean Fisheries Commission is made up of fourteen coastal states and will function as an advisory body to promote the sustainable development and utilization of coastal fishery resources off the shores of East Africa and several island states of the region.

Water and Health Protocol Enters into Force (August 2005)
The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes entered into force on August 4, 2005 following the ratification by France in May 2005. The Protocol aims to promote the protection of human health and well-being through improvement of water management, including the protection of water ecosystems, and prevention, control, and reduction of water-related disease. The text of the Protocol is available at http://www.unece.org/env/documents/2000/wat/mp.wat.2000.1.e.pdf .

New Regulations For Mediterranean Fishing Enter into Force (September 2005)
New fishing regulations banning towed trawl nets and dredges at depths greater than 1,000 meters entered into force in the Mediterranean. The measures were agreed upon by the twenty-four members of the FAO's General Fisheries Commission for the Mediterranean and must now be enforced at the national level. Mediterranean countries will also require trawlers to use a minimum mesh-size opening of 40 mm in the "cod end" section of the nets which should allow more juvenile fish to escape and reduce bycatch.

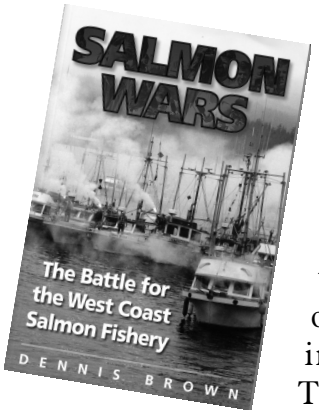
Book Review . . .

Stephanie Showalter

Salmon Wars

The Battle for the West Coast Salmon Fishery

Dennis Brown (Harbour Publishing, 2005).



In *Salmon Wars: The Battle for the West Coast Salmon Fishery*, Dennis Brown provides a eulogy for the Canadian salmon fishery as he knew it. In the 1990's, just as the cod stocks were collapsing on the East Coast of Canada, Canadian salmon fishermen were battling for their right to harvest Pacific salmon. The fishermen were fighting a losing battle against the Canadian Department of Fisheries and Oceans, the canning industry, conservationists, and, most appallingly, Americans. The individual fishermen did not stand a chance. Fleet reduction in the '70s and '80s pushed many owner-operator fishermen out of the industry and conservation concerns in the '90s almost shut the fishery down entirely.

Salmon Wars is not an account of industry greed and declining fish stocks. Millions of Pacific salmon were returning to Canadian rivers in the late '90s. This is a tale of politics - domestic, international, corporate. The salmon were the unfortunate pawns in a game of chess being played by politicians, corporate executives, native leaders, and fishermen. Brown served on the front lines during the Pacific salmon crisis, first as a union organizer for the United Fishermen and Allied Workers Union and later as fishery policy advisor to the Premier of British Columbia. Through Brown's eyes, the reader sees how the Canadian salmon fishermen are pushed to the edge by government inaction, indifference, and compromise. It's an important case study of one of the most contentious fish wars in the history of Canada-U.S. relations.

Public Interest Environmental Law Conference to Highlight Marine and Coastal Issues

Marine and coastal issues will occupy a significant part of the agenda for the 12th annual University of Florida College of Law Public Interest Environmental Law Conference from March 8th - 11th of this year. The overall theme of this year's conference is "In Fairness to Future Generations," drawing on the environmental policy principle of Intergenerational Equity. This year's conference also serves as the annual conference of the National Association of Environmental Law Societies (NAELS). The Keynote banquet speaker will be Sylvia Earle, National Geographic Underwater Explorer and former NOAA Chief Scientist.

The marine and coastal track begins with a plenary address by Tulane Law Professor Oliver Houck, who will put Hurricane Katrina in its downstream context. Panels will address conservation leasing of submerged lands led by Kristen Fletcher of Rhode Island Sea Grant; marine ecosystem management led by David White of the Ocean Conservancy; Fortress Florida?: The Future of Florida Coastal Policy led by Gary Appelson of the Caribbean Conservation Corporation, and Getting There From Here: Marine and Coastal Access Issues, led by Scott Shine of the Surfrider Foundation.

Other Keynote Speakers include a kickoff address by Robert F. Kennedy, Jr., author of the book *Crimes Against Nature*, Richard Louv, author of *Last Child in the Woods* and Carole Browner, former EPA administrator. For more information including the full agenda, registration and contacts visit http://www.ufpiec.org or http://www.naels.org .

The Minerals Management Service (MMS) issued an Advance Notice of Proposed Rulemaking (ANPR) on December 30, 2005 seeking comments on alternate energy-related uses of the Outer Continental Shelf (OCS). The Energy Policy Act of 2005 authorized the Department of Interior, via the MMS, to grant leases, easements, and other rights-of-way on the OCS for the development and support of energy resources from sources other than oil and gas, such as wind, wave, solar, and current, and to allow for alternative uses of existing facilities, which could include offshore aquaculture and recreation. In its announcement, MMS was clear that it "is not seeking the authority over activities such as aquaculture, but only the decision to allow platforms to be converted to such uses, if the appropriate agency approves the underlying activity." The ANPR, published at 70 Federal Register 77,345, contains a lengthy list of general issues the MMS is seeking information on in five major program areas: access to OCS lands and resources; environmental information, management, and compliance, operational activities; payments and revenues; and coordination and consultation. The MMS is accepting comments until February 28, 2006.

Five years after Atlantic salmon were declared endangered, federal regulators have released their recovery plan for the species. In 2000, the year the salmon were listed, about 300 mature salmon returned to eight rivers in Maine. By 2004, between 60 and 113 fish returned. The focus of the recovery plan is to stop the decline and ultimately restore salmon runs from the Kennebec River to the Canadian border. The recovery plan contains nine key recovery actions, including conserving land to protect river watersheds and improving aquaculture practices. The recovery plan would cost $35 million over three years to implement in full.

The Michigan Court of Appeals recently limited the pumping operations of Ice Mountain Spring Water, a bottling plant about 50 miles north of Grand Rapids. Although Ice Mountain currently pumps about 250 gallons per minute, the company has state permits authorizing it to pump as much as 400 gallons per minute from a nearby spring. The court held that Ice Mountain is entitled to make "reasonable use" of the area's available water resources, but that a 400-gallon-a-minute withdrawal rate would unreasonably interfere with rights of adjacent landowners.

Around the Globe

In November, conservation groups and landholders in the U.S. and Mexico reached agreement on a plan to protect 110,000 acres surrounding a Mexican lagoon used by gray whales as a calving ground. Gray whales migrate from the Bering Sea to Laguna San Ignacio, about 450 miles south of San Diego, to mate and bear their young. San Ignacio is part of the Vizcaino Biosphere Reserve, a UNESCO World Heritage Site. The communal landholders in Mexico agreed to limit development around the lagoon in exchange for $25,000 a year from a trust fund established by the San Diego-based International Community Foundation. A Mexican conservation group, Pronature, will manage the funds which will be used to fund environmentally friendly projects in the area and provide loans to landholders wanting to undertake ecotourism activities such as whale watching tours.

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*.

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