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Makah Tribe Entitled to Percentage of Pacific Whiting Harvest

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The SANDBAR

Supreme Court Declares *Super Scoop* a “Vessel”

Stewart v. Dutra Constr. Co., 125 S. Ct. 1118 (2005).

Elizabeth Mills, 2L, University of Mississippi School of Law

On February 22, 2005, the United States Supreme Court reversed the First Circuit Court of Appeals holding that the *Super Scoop*, a dredge used during the Boston Big Dig, qualified as a “vessel” for purposes of federal law.

Background

As a part of Boston’s Central Artery/Tunnel Project, also known as the “Big Dig,” the *Super Scoop* dug the 50 foot deep, 100 foot wide, three-quarter mile long trench underneath the Boston Harbor for the Ted Williams Tunnel. At the time, Dutra Construction Company owned the *Super Scoop*, the world’s largest

dredge, which consists of a huge floating platform with a clamshell bucket hanging below the water. The bucket takes sediment off of the ocean floor and deposits it on scows floating beside it.

The *Super Scoop* is similar to traditional seagoing vessels because it has a captain and crew, navigational lights, ballast tanks, and a crew dining area. However, it differs from traditional seagoing vessels because it has limited self-propulsion. The *Super Scoop* uses its anchors and cables to move short distances, but it uses a tugboat to move long distances.

Willard Stewart, a marine engineer, was seriously injured while working on the *Super Scoop* during the harbor dredging project. Stewart’s accident occurred when the *Super Scoop* was idle due to engine problems with Scow No. 4, one of the vessels receiving the dredged materials. Stewart was feeding wire beside a hatch on Scow No. 4 when the *Super Scoop* moved the

See Super Scoop, page 18



Wind Farm Survives Another Challenge

Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 398 F.3d 105 (2005).

Jeffery Schiffman, 2L, Cleveland-Marshall College of Law (Cleveland State University)

In February, the First Circuit Court of Appeals affirmed the U.S. Army Corps of Engineers’ decision to permit the construction of an offshore data tower, the first phase of a controversial wind farm project off the coast of Massachusetts. Alliance to Protect Nantucket Sound, a vocal opponent of the wind farm, challenged the Corps’ issuance of a navigability permit to Cape Wind Associates. The U.S. District Court for the District of Massachusetts granted summary judgment in favor of the Corps and Cape Wind in September of 2003.¹

Background

On November 20, 2001, Cape Wind Associates applied to the U.S. Army Corps of Engineers for a navigability permit under Section 10 of the Rivers and Harbors Act of 1899. Cape Wind wanted to construct and operate an offshore data tower in the Horseshoe Shoals area of Nantucket Sound. The Horseshoe Shoals are located on the Outer Continental Shelf (OCS), which is subject to federal jurisdiction under the Outer Continental Shelf Lands Act (OCSLA). The proposed tower would be 170 feet high and anchored to the ocean floor using three steel piles. The purpose of the tower would be to gather information for use in a feasibility study for a wind energy plant on Horseshoe Shoals. (There was a separate application also submitted in

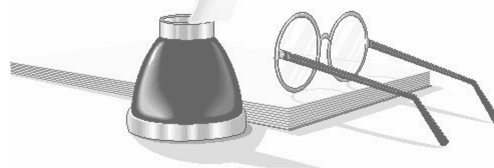
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From the Editor's Desk



Well, here we are again at the start of another volume of THE SANDBAR. Over the past year, many of you have commented positively on our new format and features. Thank you so much! This year we will continue to bring you the latest legislative and judicial developments from across the country with some new twists. First, after noticing that we were covering a lot of cases from Puerto Rico, we've decided to make the Caribbean one of our permanent regions. You can look forward to more cases from Puerto Rico, the Virgin Islands, and other Caribbean nations. Additionally this year, we are very pleased to announce a new regular guest column entitled "Reflections of a Knauss Fellow."

This is a fantastic time to be working in the marine policy field. There is so much going on right now. Between the recommendations in the U.S. Commission on Ocean Policy Report and the action items in President Bush's Ocean Action Plan, it seems like at least one marine-related bill is introduced in Congress every day. Congress is currently considering a number of legislative initiatives that could significantly affect how humans interact with the ocean and coastal environment. We are keeping a close eye on these initiatives and will provide full coverage as those bills become laws.

As always, we welcome your thoughts, comments, and suggestions. We are here to serve you, our subscribers. Please let know what we can do to better address your needs. Thank you again for continuing to support our legal outreach efforts and we look forward to another great year! ☺



Reflections of a Knauss Fellow: Part 1



The Knauss fellowship is a fantastic program which provides graduate students wonderful opportunities to work in Washington, D.C. for a year. Few in the legal community, however, are aware that law students are eligible, strongly encouraged in fact, to participate. The editorial staff here at THE SANDBAR was so excited to learn that a recent law school graduate had been selected as a 2005 Knauss Fellow that we asked her to write a four-part series reflecting on her experiences. After reading Elizabeth's first installment, we cannot wait to see what this year has in store for her. We know you will feel the same way. Enjoy!!!

Elizabeth Taylor, 2005 Knauss Sea Grant Fellow; J.D. Lewis & Clark Law School, Portland, OR (2004); Member CA Bar.

After graduating from law school last spring and wondering what to do next, I am happy to be spending 2005 as a Knauss fellow in Washington, D.C. The Knauss fellowship was established in 1979 by former NOAA administrator John A. Knauss. It provides the opportunity for graduate students interested in marine policy issues to work for a host in either the executive or legislative branch in Washington, D.C. for a year. The fellowship experience begins in November with placement week, an exciting and whirlwind week filled with informative presentations and interviews with potential hosts. My host for the year is the Marine Mammal Commission, an independent agency of the U.S. which was created in 1972 under the Marine Mammal Protection Act (MMPA).

The primary focus of the Commission is to provide independent oversight of the marine mammal conservation policies and programs being carried out by the federal regulatory agencies. The MMPA was enacted in partial response to growing concerns among scientists and the general public that certain species and populations of marine mammals were in danger of extinction or depletion as a result of human activities. The Act was the first legislation anywhere in the world to mandate an ecosystem approach to marine resource management.

My initial impressions of both the fellowship and the Commission have been overwhelmingly positive. The Sea Grant community is an amazing network and Kola Garber, the director of fellowships, does a wonderful job of organizing plenty of opportunities to meet others in the marine policy world. There is also no shortage of former Knauss alums to give advice and provide valuable information. And of course D.C. is an endless source of interesting and knowledgeable persons involved in all aspects of shaping future policy.

To date, my work at the Commission has involved numerous topics, including drafting sections of the 2004 annual report to Congress and participating in various stakeholder meetings. I am particularly interested in international ocean policy issues and one of the annual report sections I worked on was the International Whaling Commission and their activities in 2004, particularly their annual meeting in Sorrento, Italy last July. I am also involved in the planning of several workshops the Commission will be conducting this year at Congress' request. The first of these will be a workshop on killer whales and predator/prey interaction to be held in Seattle this spring. The second is a workshop this fall that will attempt to identify the most endangered marine mammals and measure the cost-effectiveness of the actions being undertaken to conserve them.

A range of marine mammal stakeholders travel to our office to speak with the Commission. Recently, we received visits from the Indigenous Peoples' Council for Marine Mammals - a group of various Alaska Native Organizations - and the Makah tribe from Washington state. The Makah visit was of particular interest to me because I visited the tribe during my first summer of law school while participating in Lewis & Clark's Indian Law Summer program and have been following the course of the Makah whaling developments. The Makah tribe recently filed an application for a waiver under the MMPA, a long and formal process that has never been completed before. Stay tuned for more on the Makah and their intriguing story in my next installment. ☺



Honeywell Must Excavate Contaminated Wetlands

Interfaith Cmty. Org. v. Heller-Jersey City, 399 F.3d 248 (3rd Cir. 2005).

Jason Savarese, J.D.

The Third Circuit Court of Appeals recently upheld an injunction requiring Honeywell International, Inc., a chemical company, to excavate more than one million tons of tidal wetlands soil. The soil was contaminated with toxic waste from the company's factory, and may cost more than \$400 million to clean up.¹

Background

From 1895 to 1954, Mutual Chemical Company of America (Mutual) operated a chemical factory in New Jersey. The factory processed chromium ore, which resulted in a waste product rich in hexavalent chromium. Hexavalent chromium is a known human carcinogen that can also harm animals and benthic creatures. Mutual dumped over one million tons of this waste product into thirty-four acres of tidal wetlands along the Hackensack River. Honeywell is the corporate successor to Mutual.

In 1982, a "green stream" and "yellowish-green plumes" were spotted in the surface water near the dump site. A year later, Honeywell officials observed yellow water discharging into the Hackensack River and said that the site was "extremely contaminated." However, Honeywell did nothing to remedy the situation. In 1988, the New Jersey Department of Environmental Protection (NJDEP) ordered Honeywell to clean up the site. While a permanent remedy was sought, Honeywell erected a temporary, plastic retaining cap over seventeen acres of the site, and used concrete and asphalt to cover the rest. These measures slowed the discharge rate, but did not prevent all toxic discharges from the site.

While seeking land for the construction of affordable housing, the Interfaith Community Organization (ICO), a group of about thirty-five churches in New Jersey, came across the dump site and noticed that little or nothing had been done to clean it up under NJDEP's order. In 1995, ICO and five individual plaintiffs filed suit in federal court under the Resource Conservation and Recovery Act (RCRA), claiming that the site was an "imminent and substantial endangerment to health or the environment."

The judge found that Honeywell was responsible for the site, that it had violated RCRA, and entered an injunction requiring Honeywell to excavate the contaminated soil. Honeywell appealed the judgment, challenging the plaintiffs' standing to sue, the trial court's endangerment determination, and the injunction.

To determine if the injunction was proper, the Appeals Court looked to see if the trial court had abused its discretion by relying on a "clearly erroneous" finding of fact. The Court weighed the RCRA endangerment claim under the "clear error" test. No clear error was found and both the injunction and the RCRA claim were upheld.

Standing

To file suit in federal court, a plaintiff must have both constitutional and statutory standing. To have constitutional standing, a plaintiff must show that there was an injury-in-fact, that the injury was caused by the conduct complained of, and that the injury could be redressed by a favorable decision of the court. Honeywell claimed that the plaintiffs lacked the standing to file suit. The court disagreed. The individual plaintiffs lived near the toxic site, and walked along or fished in the Hackensack River. The Appeals Court held that these activities were enough to establish injury-in-fact, despite Honeywell's argument that standing required proof of direct use, like swimming, wading, etc. The trial court found that the plaintiffs were able to show that their injuries were traceable to Honeywell and were redressable, as an injunction would have "more than a substantial likelihood" of reducing or permanently ending the plaintiffs' concerns and exposure to the site.²

The plaintiffs also had statutory standing under RCRA, which allows any person to file a lawsuit against someone "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."³ The Court found the plaintiffs' complaints to be reasonable and based on a direct threat, satisfying RCRA's requirements. ICO and the other plaintiffs had standing to sue Honeywell.

Imminent and Substantial Endangerment

Honeywell claimed it did not violate RCRA and that its discharges into the Hackensack River could not be “substantial,” since New Jersey had only tentatively, not formally, adopted remedial standards for river sediment chromium when the lawsuit was filed. Honeywell, however, conceded that it was legally responsible for the dumping and that chromium qualified as a solid, hazardous waste under RCRA. The only question remaining for the court was whether the site poses an imminent threat of serious harm to health or the environment.

The plastic liner and asphalt cap used to partially contain the site’s toxic waste was riddled with holes and cracks. These breaches allowed hexavalent chromium to discharge into the Hackensack River, groundwater, and river sediment. Honeywell admitted that the site was discharging pollutants, which could harm nearby aquatic organisms. NJDEP found that the site’s chromium constituted a “substantial risk of imminent damage to public health and safety and imminent and severe damage to the environment.”⁴ At trial, the court required the plaintiffs to prove (1) that the site might present an imminent and substantial endangerment to a potential population; (2) that the dangerous pollutant at the site was a hazardous waste or solid under RCRA; (3) that the toxin at the site was found in an amount greater than what New Jersey determined was safe; and (4) that there was a conduit for exposure to the toxin now or in the future.⁵ The trial court found that the plaintiffs met this standard, holding that the site was an endangerment to human health and the environment and that it was actually harming the environment.

The Third Circuit found that the district court held the plaintiffs to a higher-than-necessary endangerment showing by requiring them to prove the third and fourth elements mentioned above. RCRA contains no such elements. The court found, however, that the use of this elevated standard was harmless error, as the plaintiffs proved more than was necessary for an endangerment showing, and upheld the trial court’s determination that the site posed a substantial and imminent danger to the environment, people, and animals.

Injunction

Finally, Honeywell argued that the trial court should not have required excavation of the site, that the injunction was not narrowly tailored, and not “necessary” under RCRA. The Third Circuit found that the injunction was necessary under RCRA, noting that nothing less than excavation would stop the site’s toxic waste from leaching into surrounding waters and sediment. It also found that the injunction was “reasonable and narrow,” since it simply required Honeywell to do what was necessary to alleviate the site’s endangerments. Honeywell is required only to excavate the polluted soil, “remedy” the tainted river sediments, and study the condition of deep groundwater at the site. Honeywell does not have to treat the groundwater unless the trial court finds such actions to be necessary.

Conclusion

The Third Circuit held that the plaintiffs had standing to sue Honeywell, the dump site posed an imminent danger to human health and the environment, and the excavation injunction against Honeywell was proper. ❧

Endnotes

1. David B. Caruso, *Appeals Court Upholds Cleanup Order on Jersey City Pollution*, MIAMI HERALD, Feb. 18, 2005.
2. *Interfaith Cmty. Org. v. Heller-Jersey City*, 399 F.3d 248, 257 (3rd Cir. 2005).
3. 42 U.S.C. § 6972(a)(1)(B) (2004).
4. *Interfaith Cmty. Org.*, 399 F.3d at 263-64.
5. *Id.* at 259.

Photograph of tidal wetlands courtesy of NOAA’s Office of Response and Restoration.





Hawai'i Supreme Court Voids Lease for Lack of Sufficient Environmental Review

Kepo'o v. Kane, 103 P.3d 939 (Haw. 2005).

Daniel Park, 2L, University of Hawai'i School of Law

On January 4, 2005, the Supreme Court of Hawai'i ruled that the Department of Hawaiian Home Lands (DHHL) could not lease state land without first completing and accepting an Environmental Impact Statement (EIS). The court based its decision on Chapter 343 of the Hawai'i Revised Statutes (HRS), as well as the Hawai'i Administrative Rules (HAR).

Background

In 1993, DHHL prepared a final EIS for the Kawaihae Master Plan. The master plan, which covered approximately 10,000 acres of Hawaiian home lands, designated part of the land for industrial purposes. The EIS acknowledged a request for 30 acres of land to construct a new power plant and required further analysis of environmental impacts before siting the plant. In December 1993, DHHL leased a parcel (Lease No. 242) to Waimana Enterprises, Inc. (Waimana) for construction and operation of a power plant. Kawaihae Cogeneration Partners (KCP), a partnership that included Waimana, obtained a sublease on a portion of Lease No. 242 and prepared a draft Environmental Assessment (EA) for the proposed cogeneration power plant. After reviewing the EA, the Hawaiian Homes Commission (HHC) issued a negative declaration, indicating that a separate EIS for the proposed power plant would not be required.

In late 1993, KCP submitted an application for an operating permit for the power plant to the Department of Health (DOH). The DOH issued a draft permit for public comment and review and approved the final permit in October 1996. James Growney, Mauna Kea Homeowners' Association, Lillian K. Dela Cruz, and Josephine L. Tanimoto (collectively "the plaintiffs") participated in the public comment and review of the draft operating permit. After permit issuance, the plaintiffs subsequently filed petitions for review of the permit with the Environmental Appeals Board and the Administrator of the Environmental Protection Agency (EPA), which were denied. The plaintiffs then filed suit chal-

lenging the negative declaration and the failure to prepare a full EIS for the power plant.

The Court's Analysis

In its opinion, the Hawai'i Supreme Court addressed several arguments raised by KCP, Waimana, HHC, and DHHL (Defendants). First, KCP and Waimana argued that Growney and Mauna Kea failed to meet several prerequisites for seeking judicial review under Hawai'i's EIS statute. The Court rejected these arguments because the three other plaintiffs (Kepo'o, Dela Cruz and Tanimoto) brought judicial proceedings within the thirty-day statute of limitations, and the statute did not bar the Court from allowing other parties to intervene at a later time. In addition, the court held that Growney and Mauna Kea were not required to submit comments to the draft EA in order to intervene.

Next, the Court held that the proposed power plant required completion of an EIS. The Court reasoned that the plant would result in "substantial



Photograph of Mauna Kea provided by NOAA.

energy consumption," which is a significance factor that triggers completion of an EIS.¹ KCP and Waimana contended that when the decision not to require an EIS was made in 1993, the "substantial energy consumption" factor did not exist because it was added to the HAR in 1996. The Court, however, determined that the power plant would trigger a separate significance factor that did exist in 1993. HRS requires an EIS when an agency determines that the proposed action will likely have a significant effect on the environment. "Significant effect" is defined as the

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Federal Maritime Jurisdiction Pushes Inland

Norfolk Southern Railway Co. v. Kirby, 125 S. Ct. 385 (2004).

Benjamin N. Spruill, 2L, Roger Williams School of Law

In November 2004, the United States Supreme Court ruled that Norfolk Southern Railway Company can limit its liability to approximately \$500 per package after a train derailment caused an estimated \$1.5 million in damage to auto machinery shipped by an Australian manufacturer. The decision is noteworthy as it extended federal admiralty jurisdiction inland by holding that inland cargo carriers can limit their financial responsibility for damage incurred during transport pursuant to the Carriage of Goods by Sea Act (COGSA), provided that the agreement to transport goods is a maritime contract and that the contract evidences an intent to extend limitation of liability to the various carriers.

Background

International maritime commerce is characterized by shipping contracts that link ocean shipping lines with road, rail, and air transportation. Shippers often enter into a single contract for the transportation of goods across sea, land, and air. Generally, a manufacturer faced with intermodal transport will enter into a "through contract" with a freight forwarder. A freight forwarder, something akin to a travel agent for cargo, arranges for the transportation of goods by contracting with a cargo carrier to move the goods. The cargo carrier may then additionally contract with a "downstream carrier" to complete a rail, road, or air leg of the transport. Using a single through shipping contract, a manufacturer in China can efficiently arrange for the transportation of clothes from a remote Chinese factory to a retail warehouse in Ohio. Although the Australian manufacturer in this case, James N. Kirby Pty. Ltd. (Kirby), entered into a single contract to ship goods from departure to final destination, other shipping contracts existed between the manufacturer's freight forwarder, cargo carriers, and downstream carriers.

Kirby entered into a through contract with International Cargo Control (ICC) for the transportation of automobile machinery from Sydney, Australia to Huntsville, Alabama. An ocean voyage

was arranged with a German carrier, Hamburg Sud, to take the goods from Sydney to Savannah, Georgia. The 336-mile inland voyage to Huntsville was to be carried out by rail on the Norfolk Southern line.

Contracts for the shipment of goods via ocean transport between foreign and American ports are classified as maritime contracts and are governed by the COGSA, a federal uniform body of law for regulating maritime contracts and settling disputes. When cargo is damaged during transportation, the COGSA allows a carrier to limit its liability for any fault giving rise to the damaged goods. The default limitation rate is \$500 per package; however, parties can negotiate a different rate. "Himalayas clauses" extend the limitation of liability to agents or independent contractors of the initial cargo carrier that contracted with the freight forwarder; parties known as downstream carriers, which can include inland carriers such as Norfolk Southern.

As Kirby's freight forwarder, ICC was responsible for contracting with a cargo carrier to transport Kirby's automobile machinery. In their contract, Kirby and ICC agreed on the COGSA default limitation of liability rate for any potential accidents arising from the ocean leg of the journey. A Himalayas clause was incorporated into the shipping contract, but the parties negotiated a higher limitation rate for potential accidents arising during the inland leg of the journey (Savannah to Huntsville).

ICC's contract with Hamburg Sud to ship Kirby's equipment from Sydney to Savannah also adopted the COGSA limitation default of \$500 per package. A Himalayas clause extended the \$500 per package limitation to all downstream carriers. Hamburg Sud arranged for the downstream carrier, Norfolk Southern, to complete the inland leg of the journey. While the ocean leg of the journey was completed without harm, the Norfolk Southern train derailed en-route to Huntsville, causing an estimated \$1.5 million in damage to Kirby's equipment.

The Lawsuit

Kirby, claiming tort and contract damages, brought suit against Norfolk Southern in the District Court for the Northern District of Georgia. The court found Norfolk Southern protected by both Himalayas

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clauses and limited the company's liability to \$500 per package. However, on review, the Eleventh Circuit found that the limitation of liability did not extend to Norfolk Southern and that Kirby was not bound by the Himalayas clauses. The court reasoned that Norfolk Southern was not covered by Kirby's through contract with ICC because at the time the agreement was entered into, Norfolk Southern had not been contracted as the downstream carrier, and therefore lacked the necessary relationship with the contracting parties. Second, Kirby was not bound by the Himalayas clause in the ICC and Hamburg Sud shipping contract because ICC's negotiations did not extend to Kirby. On review, the United States Supreme Court found that, pursuant to federal maritime law, both Himalayas clauses extended limitation of liability protection to Norfolk Southern.

Federal Maritime Law

Whether downstream, inland carriers are protected by limitation of liability clauses in maritime shipping contracts depends on the applicable law. Outcomes can vary widely depending on whether state or federal law governs the dispute. Federal maritime law applies when there is a "maritime" contract and the dispute is not inherently local. A maritime contract is determined by the nature and character of the business and whether the principle objective of the contract is to further maritime commerce.¹

In this case, the Court easily concluded that the primary objectives of both Kirby's through contract and the ICC/Hamburg Sud shipping contract were to accomplish transportation of goods by sea. The land portion of the journey, although significant because it

was required to complete delivery of Kirby's automobile machinery, did not render an intercontinental ocean voyage non-maritime. The true essence of the shipping contracts were maritime in nature.

As for the local nature of the dispute, the Supreme Court reasoned that when a state interest overlaps a federal interest, such as preserving the uniformity in the interpretation of maritime contracts, the federal law governs. The purposes of the COGSA, to facilitate the creation of maritime shipping contracts and promote efficient maritime commerce, would be defeated if clauses in contracts were interpreted differently depending upon the applicable party and the leg of the journey. Specifically, if downstream carriers cannot rely on courts to uniformly enforce Himalayas clauses, shipping rates would likely increase because limitation of liability would not be guaranteed.

Himalayas Clauses Do Not Require Privity of Contract

The Court disagreed with the Eleventh Circuit's finding that since Norfolk Southern did not have a relationship with a contracting party when Kirby and ICC negotiated the through shipping contract, Norfolk is not protected by the limitation of liability clause extended to downstream carriers. The Court rejected a relationship or privity requirement and applied a traditional contract analysis, stating that the COGSA shipping contracts must be construed by their terms, consistent with the intent of the parties.

The expansive terminology of the Himalayas clause easily covered a downstream railroad carrier. A finding of coverage, the Supreme Court held, was consistent with the intent of Kirby and ICC; it was clear during the formulation of the maritime shipping contract that inland travel was required to deliver the equipment to the General Motors plant.

Limited Agency Rule

ICC's shipping contract with Kirby provided for a higher limitation rate for inland carriers while Hamburg Sud's shipping contract extended the default \$500 per package limitation to all downstream carriers, including inland carriers. The Supreme Court held that Norfolk Southern is entitled to the protection of Hamburg Sud's Himalayas clause, thereby limiting liability to \$500 per package. The Court reviewed whether Kirby was subject to

Photograph of Savannah waterfront provided by NOAA; photographer Captain Albert E. Theberge, NOAA Corps (ret.).



ICC's negotiated shipping contract with Hamburg Sud. Kirby contended that ICC was not acting on behalf of Kirby as an agent during the formulation of the Hamburg Sud shipping contract; therefore, Kirby cannot be bound by the lower limitation rate extended to Norfolk Southern.

Ruling in favor of the lower limitation rate, the Supreme Court reinforced an exception to traditional agency law for freight forwarders and cargo carriers.² Although it was clear that ICC was not speaking on behalf of Kirby during its negotiations with Hamburg Sud, "intermediaries, entrusted with goods are agents only in their ability to contract for liability limitations with carriers downstream," thereby "ensuring the reliability of downstream contracts for liability limitations."³ Thus, a manufacturer may be bound by limitation rates where it had no part in negotiating the rate.

The Court reasoned that holding otherwise would increase shipping rates because downstream carriers would be forced to investigate whether freight forwarders and cargo carriers had other contractual agreements on limitation. Additionally, the Supreme Court feared that downstream carriers might unlawfully discriminate against freight for-

warders and cargo carriers by charging higher rates to insure against unreliable limitation clauses.

Conclusion

Consistent with its previous decisions, the Supreme Court held that limitation clauses can be contractually extended to downstream carriers such as Norfolk Southern. This ruling, however, has extended the maritime jurisdiction of the federal courts inland. When a voyage is multi-legged, but conditioned on a maritime shipping contract, inland carriers can enjoy the benefits of limitation of liability pursuant to the COGSA. Limitation of liability and federal maritime jurisdiction could potentially extend thousands of miles from the ocean, and may also protect rail, air, and auto carriers, and in those hard to reach locales, donkeys. ☺

Endnotes

1. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).
2. *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914).
3. *Norfolk Southern Railway Co. v. Kirby*, 125 S. Ct. 385, 399 (2004).

Litigation Update . . .

Commonwealth of the Northern Mariana Islands v. U.S., 399 F.3d 1057 (2005).

In August 2003, as reported in Volume 2:3 of THE *SANDBAR*, the United States District Court for the Northern Mariana Islands ruled that the U.S. possesses superior rights to the Commonwealth's submerged lands. The Mariana Islands appealed and the Ninth Circuit recently issued its opinion upholding the District Court's findings.

The Mariana Islands is a U.S. trust territory which has retained the right of local self-government via a Covenant Agreement approved in 1975. The country's relationship with the U.S. is similar to that of Puerto Rico. Since 1978, the Mariana Islands has been challenging U.S. assertion of sovereignty over its submerged lands, going so far as to pass domestic legislation asserting authority over a twelve-mile territorial sea and a 200-mile Exclusive Economic Zone. The U.S. does not recognize this assertion of jurisdiction.

The Ninth Circuit found that the District Court properly granted summary judgment to the U.S. based on the paramouncy doctrine. Under this doctrine, the U.S. has "paramount rights to submerged lands off the shores of states created from former United States territories." Congress can transfer ownership to a state or territory, but it must be done expressly. Congress transferred ownership of submerged lands out to three nautical miles to the states through the Submerged Lands Act and to Guam, the Virgin Islands, and American Samoa through the Territorial Submerged Lands Act. Unfortunately for the Mariana Islands, Congress has yet to pass legislation transferring ownership and the Ninth Circuit refused to find that the Covenant Agreement, which contains no express reservation of the Commonwealth's ownership, effected an implicit transfer. The court held that the U.S. therefore has paramount authority over the Mariana Islands' submerged lands and any domestic legislation asserting otherwise is preempted by federal law. ☺



Department of Defense Must Comply with National Historic Preservation Act

Okinawa Dugong v. Rumsfeld, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. March 1, 2005).

Danny Davis, 2L, University of Mississippi School of Law

Okinawa dugongs, relatives of the manatee, may be considered cultural property under the National Historic Preservation Act (NHPA), according to a federal district judge for the Northern District of California. Judge Patel, in denying a motion to dismiss brought by the Department of Defense (DOD), held that the dugongs were entitled to protection under the NHPA because the dugongs are listed as a “natural monument” under Japan’s Law for the Protection of Cultural Properties.

Background

In 1995, the U.S. and Japanese governments formed a commission for the purpose of finding ways to reduce the burden of the U.S. military presence on Okinawans. The commission recommended that the Marine Corps Air Station Futenma be replaced by a sea-based facility. In 1997, the DOD released a document which outlined the requirements and concepts of operation of the new facility, which contained a recommendation that the facility be located in Henoko Bay. Japanese government officials, including the governor of Okinawa, accepted Henoko Bay as the relocation site. In 2000, the Consultative Body of Futenma Relocation was formed. The Consultative Body, composed exclusively of local and national officials from Japan, produced the “2002 Basic Plan.” The Basic Plan identified location, size, construction method, and runway orientation of the 1.5 mile long sea-based facility.

Henoko Bay is rich with coral reefs and sea grass beds that are feeding grounds for the Okinawa dugongs. The Okinawa dugong population has decreased to about 50. Dugongs are currently listed as endangered under the U.S. Endangered Species Act. They are also listed as a protected “natural monument” under Japan’s Law for the Protection of Cultural Properties due to the central role they play in the creation mythol-

ogy, folklore and rituals of traditional Okinawan culture. According to a 2002 United Nations Environmental Programme report, construction of the sea-base facility in Henoko Bay would have serious repercussions for the dugongs because it would destroy some of the last remaining dugong habitat in Japan.

Conservation groups in the U.S. and Japan joined in bringing a lawsuit against the DOD alleging that the DOD failed to comply with the requirements of the NHPA. The DOD filed a motion for summary judgment for failure to state a claim and for lack of subject matter jurisdiction.

National Historic Preservation Act

The purpose of the NHPA is to preserve the “historical and cultural foundations of the Nation . . . in order to give a sense of orientation to the American People.”¹ The Act establishes a policy of the U.S. federal government to be a leader in the “preservation of the prehistoric and historic resources of the United States and of the international community of nations.”² Under the NHPA, the Secretary of the Interior is to maintain a National Register of Historic Places which includes districts, sites, buildings, structures and objects that are significant in American history, architecture, archeology, engineering, and culture.

Section 470a-2 requires the head of a federal agency involved in an “undertaking” outside of the U.S. to take into account the effect on property list-

Photograph of Thailand dugong stamp.



ed on the World Heritage List or on the applicable country's equivalent of the National Register.

The Issues

The DOD argued that § 470a-2 of the NHPA did not apply to their actions in Okinawa for several reasons. First, it claimed the dugongs' listing on Japan's Law for the Protection of Cultural Properties is not equivalent to being listed on the National Register because the dugong cannot constitute "property" under the Act. Second, the DOD has not taken any action that would be considered a federal "undertaking" under the NHPA because the base relocation was being done by the Japanese government. Third, since the relocation project is an action taken by the Japanese government the court lacked jurisdiction over the matter.

The DOD argued that "equivalent" in § 470a-2 meant equal to the U.S. National Register. According to the DOD, Japan's Law for the Protection of Cultural Properties allows both inanimate and animate objects to be listed whereas the NHPA only allows inanimate objects and does not include animals. However, the court was not convinced by this interpretation. The court stated that if equivalent was to be read as "equal to," it would defy the basic proposition that cultures vary and, furthermore, no foreign nation's list would meet this standard.

To determine the proper meaning of equivalent, the court consulted Webster's Third New International Dictionary which defines equivalent as "corresponding or virtually identical in effect or function." Using this definition, the court interpreted the section to require the list be equivalent in effect or function.³ The court concluded that Japan's list was equivalent with the U.S. National Register because both lists "reflect similar motives, share similar goals, and generally pertain to similar types of property."⁴ Also, since § 470a-2 is concerned with property that is listed on a foreign government's list, it only makes sense that "property" should be defined according to that government's standards and not the U.S. domestic standard. So, if Japan considers the dugongs cultural "property" then any U.S. federal undertaking affecting the dugongs falls under § 470a-2 of the Act.

The court also rejected the DOD's argument that the replacement facility was not a federal undertaking. Section 470a-2 defines an "undertaking" as: "a project, activity, or program funded in whole or in part under the direct or indirect juris-

diction of a Federal agency."⁵ This includes projects that are carried out on behalf of or for the agency, carried out with Federal financial assistance, or require agency approval. Since there are no cases that interpret the meaning of "undertaking" in § 470a-2, the court looked to cases interpreting the domestic application of the NHPA for guidance. Courts have broadly defined "undertaking" to include a wide range of direct or indirect federal support, such as financing, licensing, construction, land grants, and project supervision.⁶ The court concluded that it would amount to a legal absurdity for it to dismiss the case based on the replacement facility not being a federal undertaking when the facility is being built for the U.S. military according to the DOD's specifications.

Finally, the court rejected the DOD's argument that the court lacks jurisdiction because of the "act of state doctrine." The doctrine bars judicial review if the action being challenged involves an official act of a foreign government within its own territory and court action would result in the invalidation of that official act. The court concluded the evidence before the court did not indicate the construction of the replacement facility was truly an official act of Japan within its own territory. Rather it appears that it is an action intertwined with DOD decision-making. For the doctrine to apply, the DOD would have to show that it has untangled itself from the project.

Conclusion

The denial of the motion to dismiss brought by the DOD does not in itself stop the replacement facility from being built. However, the court's decision does require the DOD to argue more than simply "don't blame us, blame the Japanese - they're the ones building it."✎

Endnotes

1. 16 U.S.C. §470(b)(2) (2004).
2. *Id.* § 470-1(2).
3. *Okinawa Dugong v. Rumsfeld*, 2005 U.S. Dist. LEXIS 3123 at *22 (N.D. Cal. March 1, 2005).
4. *Id.* at *20.
5. 16 U.S.C. §470a-2.
6. *Dugong*, 2005 U.S. Dist. LEXIS 3123 at *43.



Makah Tribe Entitled to Percentage of Pacific Whiting Harvest

Midwater Trawlers Co-operative v. Dep't of Commerce, 393 F. 3d 994 (9th Cir. 2004).

Lance M. Young, 2L, Roger Williams School of Law

Several fishing industry groups, the state of Washington, and the state of Oregon have been engaged in a decades-long dispute with the National Marine Fisheries Service (NMFS) over regulations that accommodate the Makah Indian Tribe's right to harvest Pacific whiting. Upon request of the Makah Tribe, NMFS adopted a "sliding scale method" for determining the proper percentage of whiting to be allocated. The sliding scale method, which takes into account migration patterns, replaced the "biomass method." The change is favorable to the Indian tribe and consequently not favorable to others that fish Pacific whiting. Previously, the Ninth Circuit struck down the regulation change because NMFS failed to show that the sliding scale method was based on the best available scientific information. On further review, in December 2004, the Ninth Circuit upheld the change in allocation methodology.

Treaty of Neah Bay, 1855

The Makah Indian Tribe has guaranteed fishing rights, pursuant to the Treaty of Neah Bay, in both marine and fresh waters of Washington. In 1855, Makah leaders signed a peaceful agreement with Washington Territory Governor Isaac Stevens that relinquished most of their lands to the United States.¹ Article 4 of the treaty specifically reserved the right to hunt, fish, seal, and whale in the Tribe's "usual and accustomed grounds." Usual and accustomed grounds have been defined in specificity by modern regulation.² Article 4 has been the subject of national controversy in recent years because the Tribe invoked its reservation of whaling rights, which are contrary to other laws and public opinion.³

The United States and seven Indian tribes initiated litigation in 1970 to clarify fishing rights provided by the Neah Bay and other treaties. After nine years of litigation, the United States Supreme Court held that treaty and nontreaty fishers had equal rights to the fishery.⁴ As the Court explained, catching fish was central to social, religious, and commercial life of the Makah and other coastal tribes who had developed

preservation techniques that enabled long distance trade.⁵ The right to fish was a vital treaty term and, according to the Court, Governor Stevens sought to protect the fisheries from monopolization by future settlers. The Court noted that the fishing right article "was not a grant of rights to the Indians, but a grant of rights from them."⁶ The Court further supported the Washington Supreme Court's proposition that Indians deserve special rights based on the well-recognized principle that the United States has an obligation to protect Indian rights for the purpose of promoting self-government of tribes.⁷ The fifty percent apportionment of the fishery is a maximum allotment. NMFS, or another applicable permitting agency, may allot less than fifty percent, so long as the allotment supports the tribe's livelihood.

In 1995, the Makah Tribe invoked its fishing rights and petitioned NMFS to allocate 25,000 metric tons (one half of the harvestable surplus) of Pacific whiting from its "usual and accustomed fishing grounds."⁸

Makah Fishing Rights & Allocation Methodology

NMFS regulates federal ocean waters, which extend 197 miles outward from Washington's state jurisdictional waters.⁹ The Magnuson-Stevens Act, which authorizes NMFS to manage federal waters, requires consistency between regulations and other laws including Indian fishing rights.¹⁰ According to the *Seattle Post – Intelligencer*, the Pacific whiting is the most commercially valuable fish off the coast of Washington and prior to 1996, the Makah Tribe was not allocated any licenses for Pacific whiting,¹¹ leading critics to claim that the large harvest amounts requested by the Makah would have significant effects on the existing whiting industry.

In 1996, NMFS established a framework for determining the harvestable surplus of whiting that would be allocated to the tribes in their usual and accustomed fishing areas. Oregon, Washington, and others filed suit to challenge this regulation in its entirety. Meanwhile, the tribe challenged the method used to calculate its allocation.

Initially, NMFS used "biomass methodology" for calculating harvest allocation between treaty fishers and non-treaty fishers. It took snapshots of geographic locations at different times to determine the total

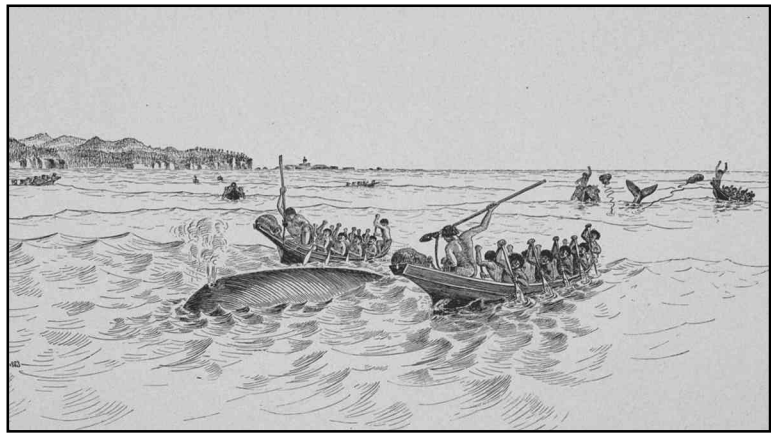
amount of harvestable fish at that location, and allocated harvest amounts accordingly. Scientific data, however, showed that the bulk of whiting migrate through the Makah Tribe's fishing grounds. Biomass methodology does not take into account fish migration patterns, so, the Tribe argued, a sliding scale methodology should be used instead which takes into account migration by varying the tribe's allocation based on a percentage of the "maximum sustainable yield from the fishery."¹² An appropriation based on optimum yield entitled the Makah Tribe to a higher percentage of the harvest surplus.

NMFS sought public comment on the two competing methodologies and ultimately conceded to the Makah's proposed allocation for the 1999 season. Oregon and Midwater Trawlers Co-operative challenged the change as a product of political compromise rather than fisheries science.

The Ninth Circuit upheld the initial regulation but concluded that the 1999 allocation was not in compliance with the Magnuson-Stevens Act because NMFS did not explain the basis of its methodology change.¹³ The Act requires that the allocation methodology be based on the best scientific information available.¹⁴ However, relying on Supreme Court precedent, the court confirmed that the Makah Tribe is entitled to one half of whiting that passes through its usual and accustomed fishing grounds.¹⁵ In subsequent years, NMFS has continued to support the sliding scale method and it has been vigorously challenged by the fishing industry and affected states.

Ninth Circuit Analysis

A court can reverse NMFS regulations and agency actions only if they are found to be arbitrary, capricious, or an abuse of discretion. The 1999 allocation was not judicially reviewable because NMFS did not explain the reason for its agency decision.¹⁶ The 2003 allocation used the same methodology, but this time NMFS explained how the biomass methodology failed to take into account migration of fish and provided data that supported the sliding scale methodology. Scientific data showed that whiting migrate north through Makah fishing grounds. In fact, the court noted "this migration pattern is significant because it means that all migrating coastal Pacific whiting are potentially exploitable by the Makah."¹⁷



Drawing of Makah whale hunt provided by NOAA Historic NMFS Collection.

The court agreed with opponents that the original adoption of this method may have been a political compromise. Since then, however, NMFS has provided scientific data that support its conclusion that the sliding scale method is more appropriate than the biomass method. Because the sliding scale is based on receiving a percentage of optimum yield of the fishery and scientific data suggests that a bulk of the Pacific fishery migrates through Makah waters, NMFS is justified in changing its methodology. Thus, the court deferred to the agency's discretion. The court also acknowledged that scientific understanding of the sliding scale method is incomplete; however, a finding that scientific information is incomplete does not exclude NMFS from concluding that the information is the best available.

Conclusion

The Ninth Circuit held that sliding scale methodology provides the best scientific information available for allocating whiting between the Makah Tribe and other non-treaty fishers. Since 1995, the Makah Tribe has never requested the one half allocation of fish that the Ninth Circuit held it is entitled to; in fact, using a sliding scale methodology, the Tribe will be entitled to harvest between fourteen and seventeen percent of allotted Pacific whiting in their usual and accustomed fishing grounds.✎

Endnotes

1. Treaty of Neah Bay, Jan. 31, 1855, art.1, 12 Stat. 939. *See also*, Kit Oldham, Makah leaders and Territorial Gov. Stevens sign treaty at Neah Bay on January 31, 1855, History Link. (2005), available at http://www.historylink.org/essays/output.cfm?file_id=5364.

See Makah Tribe, page 21

November 2001 for the wind energy plant.)

On December 4, 2001, the Corps announced it was considering Cape Wind's application, and invited public comments during a period ending on May 13, 2002; there were also two public hearings held during the comment period. On August 19, 2002, the Corps issued a § 10 permit to Cape Wind. The permit was subject to sixteen special conditions, including: removal of the tower within five years, posting a \$300,000 bond for emergency repairs or removal, and a requirement that Cape Wind share its data and allow other installations of equipment by government agencies and research institutions. The permit included an Environmental Assessment and Finding of No Significant Impact, as required by the National Environmental Policy Act (NEPA). Cape Wind subsequently constructed the data tower which is now fully operational.

Alliance's suit contained three arguments: first, that the Corps lacked authority to issue a § 10 permit for the data tower; second, that the Corps acted arbitrarily and capriciously by granting Cape Wind a permit when Cape Wind lacked property rights on the OCS; and finally, that the Corps failed to comply with NEPA requirements in determining the tower's environmental impact. Cape Wind intervened in the case on the side of the Corps, and both were granted summary judgment by the District Court. Alliance appealed to the First Circuit Court.

Corps' Authority

The Corps' authority to grant a § 10 permit is based on the agency's interpretation of the OCSLA. Congress enacted the OCSLA to establish federal authority over the OCS and regulate the extraction of minerals from it.² The OCSLA extended the Corps' § 10 authority, "to prevent obstruction to navigation in the navigable waters of the United States . . . to the artificial islands, installations, and other devices referred to in subsection (a) of this section."³ Subsection (a) further establishes federal authority over "devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources."⁴ Alliance argued this language was limited to the extraction of mineral resources, while the Corps countered that the language was not limiting. The District Court agreed with the Corps' interpretation.

The Court of Appeals found the text to be ambiguous, and so it turned to the legislative history to determine the Congressional intent. The Court

quoted a conference report stating: "authority of the Corps . . . applies to . . . fixed structures on the OCS, whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom."⁵ The Court held that this express legislative intent allowed the Corps to issue a § 10 permit to Cape Wind.

Cape Wind's Property Interest

Alliance next argued that the Corps did not properly evaluate Cape Wind's lack of a property interest in the land where it sought to build the tower before granting the § 10 permit. The relevant regulation states that by signing an application, the applicant is affirming that they have, or will have, the requisite property interest to allow for the proposed activity.⁶ The Corps interprets this regulation to require only that it seek affirmation of property rights from an applicant. The agency refuses to involve itself in property disputes. The Appeals Court held that the Corps interpretation was entitled to deference. Therefore, the Corps was under no obligation to consider the sufficiency of Cape Wind's property interest when granting the permit.

In addition, Alliance argued that Cape Wind's affirmation of property rights was false because there is no procedure for private entities to receive a license to construct a tower on the federally controlled OCS. Alliance contended that Cape Wind affirmed a property right that they could not obtain authorization for. However, the Appeals Court felt there was no violation of the federal government's rights in the OCS; the data tower in question was to be temporary and non-exclusive. Furthermore, the tower was a single structure which would provide valuable information for evaluating the wind plant proposal. Since there was no infringement on government interests, additional authorization should not be necessary.

NEPA

Lastly, Alliance alleged that more public involvement was required in the permitting process. Alliance's main complaint was that the Corps did not circulate the draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for public review. Federal regulations require an agency to involve the public, as much as is feasible, in preparing and implementing NEPA requirements.⁷ The Corps claimed it had involved the public adequately by providing an extended comment period, holding two public hearings, and noting and responding to

public comments in the EA. Alliance, however, insisted that the Corps should have circulated a draft of the FONSI because the proposed action was without precedent. Alliance claimed that Nantucket Sound is a pristine, undeveloped area and that there was no precedent for allowing a private research tower on OCS lands. The Corps disagreed, drawing the court's attention to an existing data tower in Martha's Vineyard. The Appeals Court agreed that the Corps' determination of precedent was reasonable because there was an established similar physical structure located nearby. Because the environmental impacts of the wind tower would be similar, there was nothing unprecedented about the data tower's environmental impact. As such the Corps had met its obligations under NEPA in preparing the EA and FONSI.

Conclusion

The First Circuit affirmed the Army Corps of Engineers authority to issue a permit for the construction of a data tower on the Outer Continental Shelf. It is important to note, however, that the case did not address the actual construction of the wind farm, which is covered by a separate permit application filed with the Corps and currently undergoing environmental review.☞

Endnotes

1. For a detailed analysis of the District Court opinion, see Stephanie Showalter, *Cape Wind Associates Wins Round Two*, THE SANDBAR 2:4, 1 (2004) avail-

Photograph of wind turbines provided by the DOE.



able at <http://www.olemiss.edu/orgs/SGLC/-National/SandBar%20PDF/sandbar2.4.pdf>.

2. See 43 U.S.C. § 1332 (1953).
3. *Id.* § 1333(e) (2004).
4. *Id.* § 1333(a)(1).
5. H.R. Conf. Rep. No. 95-1474 at 82 (1978).
6. See 33 C.F.R. § 325.1(d)(7).
7. See 40 C.F.R. § 1501.4(b).

Hawai'i, from page 6

“sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource . . .”² The Court pointed out that operation of the plant would likely cause an irrevocable commitment to loss or destruction of natural resources.³ Therefore, the Court held that both the pre-1996 and post-1996 versions of HAR's significance criteria required completion of an EIS.

Finally, the defendants argued that Lease No. 242 should not have been voided by the trial court. Instead, they contended that, at most, construction of the plant should have been enjoined until an EIS was completed. The Court, though, held that when an EIS is required, an agency must first accept the EIS before the agency can approve and commence the proposed action. It concluded that “because the lease of state land is a use of state land even before construction begins,”⁴ DHHL could not enter into a lease

without first completing and accepting a final EIS. The Court noted that “the voiding of Lease No. 242 merely delays the project so that DHHL may appropriately consider environmental effects before rendering a decision to lease.”⁵

Conclusion

Based on this analysis, the Hawai'i Supreme Court affirmed the final judgment of the trial court, but acknowledged that a new lease could be executed after completion and acceptance of an EIS.

Endnotes

1. HAW. ADMIN. R. § 11-200-12.
2. HAW. REV. STAT. § 343-2.
3. *Kepo'o v. Kane*, 103 P.3d 939, 959 (Haw. 2005).
4. *Id.* at 961.
5. *Id.* at 962-63.



Online Fish Auctioneer Ruled Primary Fish Buyer

Deaver v. The Auction Block Company, 2005 Alas. LEXIS 20 (Alaska Feb. 25, 2005).

Stephanie Showalter

The Alaska Supreme Court recently overturned the Superior Court and held that an online auction company which issued a fish ticket to a commercial fisherman was the buyer of the fish and liable for the full price specified on the ticket.

Background

In October 1999, Dennis Deaver, an Alaskan commercial fisherman, contacted The Auction Block Company (Auction Block) to market his halibut and sablefish catch. Auction Block conducted an online auction and Seafood Products, a Canadian company, placed the highest bid (\$2.60 per pound). When Deaver offloaded his catch on October 5, Auction Block issued Deaver an Alaska Department of Fish and Game Halibut/Sablefish Ticket (ticket) listing Auction Block as the buyer of the fish. The price specified on the ticket was \$2.60 per pound. This process differed slightly from a previous auction conducted by Auction Block for Deaver, where Deaver delivered the fish directly to and received the fish ticket from the highest bidder.

Auction Block arranged for delivery of the fish to Seafood Products. When Seafood Products inspected the fish it received a few days later, it felt that some of the fish were of lesser quality because of storage in refrigerated seawater and refused to pay more than

Composite photograph created in-house.



\$2.21 per pound for those fish.¹ Auction Block paid Deaver what it received from Seafood Products, minus its commission of course. Deaver filed suit against Auction Block to recover the difference between the price listed on the fish ticket and that paid by Seafood Products. Auction Block claimed Deaver's suit should have been directed towards Seafood Products as Auction Block was not the actual buyer of the fish. The Superior Court dismissed Deaver's claim and awarded Auction Block attorney's fees and costs after determining that Auction Block was not the buyer. The Supreme Court reversed on appeal.

Was Auction Block the "Primary Buyer"?

To provide some security to fishermen, Alaska law requires primary fish buyers to post a bond with the State conditioned upon a promise to pay "independent registered commercial fishermen for the price of the raw fishery resource purchased from them."² A primary fish buyer is a person "engaging or attempting to engage in the business of originally purchasing or buying any fishery resource."³ A person who is the first purchaser of raw fish may not operate until it receives authorization and fish tickets from the state, which will not be issued until the required bond is posted.⁴

Auction Block argued that it was only the auctioneer, not the buyer, of the fish. The Supreme Court disagreed. Auction Block's status as an auctioneer did not preclude a finding that it was the primary fish buyer for this particular transaction. The court refused to elevate private contractual arrangements over public policy and the legislature's intent to protect fishermen against non-payment or underpayment, stating "if the initial recipient of the fish is deemed the primary fish buyer, its contractual role as auctioneer cannot relieve it of its statutory duties."⁵ To hold otherwise would create an exemption for auctioneers the state legislature did not intend and might result in fishermen contracting away statutorily protected rights.

Although Seafood Products was also a licensed primary fish buyer, the court found that Auction Block was the buyer of Deaver's fish in this situation. Seafood Products was neither the initial recipient of

See Fish Auctioneer, page 19



Landowners Must Exercise Reasonable Care to Avoid Injuring Honeybees

Anderson v. State of Minnesota, 2005 Minn. LEXIS 93 (Minn. March. 3, 2005).

Stephanie Showalter

Cases like this do not come along every day. The Supreme Court of Minnesota recently held that a landowner who knows honeybees are foraging on the property must exercise reasonable care in the application of pesticides. This case has no “salty” flavor (it wouldn’t even qualify as brackish), but we suspect you’ll forgive us this minor indulgence.

Background

Jeffrey Anderson and his fellow plaintiffs are migratory commercial beekeepers with hives located in several Minnesota counties. The beekeepers do not own the land upon which their hives are located; rather they have received permission from the landowners to use their property in exchange for money or honey. The hives are placed near groves of poplar trees, which are owned or managed by either the Minnesota Department of Natural Resources (DNR) or International Paper (IP) for paper production and fuel research.

On July 21, 1999, the DNR arranged for a contractor to apply pesticides on a poplar plantation to combat a cottonwood leaf beetle infestation. The contractor used Sevin XLR Plus, a carbaryl-based pesticide toxic to bees. As a result of the spraying, some of the beekeepers’ bees died. The beekeepers sued DNR and IP for negligently creating an unreasonable risk of harm to the beekeeping operations, negligence *per se* for violating a Minnesota pesticide statute, and creating a private nuisance.

Duty Owed to Honeybees

The court began its analysis by stating that in Minnesota “landowners owe a duty to use their property so as not to injure that of others.”¹ It is not uncommon for landowners to be held responsible for damage caused when pesticides drift onto the property of others. The beekeepers’ bees, however, were not

injured because pesticide drifted over the hives. The bees were harmed while foraging in the DNR and IP poplar groves. The two courts who had previously addressed this issue, the Wisconsin Supreme Court and the California Court of Appeals, refused to assign liability when bees, foraging on the land of another, came into contact with a pesticide because the bees were considered trespassers.²

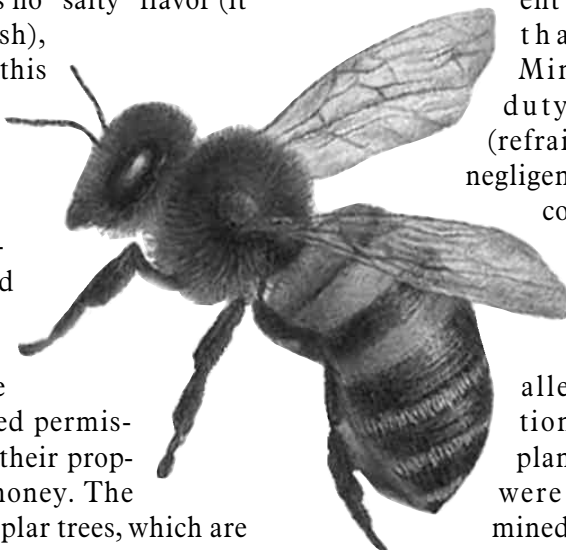
The Minnesota Supreme Court reached a different conclusion. The court found that while landowners in Minnesota owe only a limited duty to trespassing livestock (refraining from willful or wanton negligence), “once the landowner discovers the trespassing animals’ presence, the landowner is ‘bound to use reasonable care to avoid injuring them.’”³ The beekeepers allege that DNR and IP intentionally sprayed pesticide in a plantation where they knew bees were foraging. The court determined that the beekeepers provided

enough evidence of actual knowledge to survive summary judgment and proceed to trial. Specifically, the court stated “if, as the beekeepers allege, the DNR and IP had actual knowledge or were on notice of foraging honey bees, they may have come under a duty of reasonable care.”⁴

As for the beekeepers’ remaining claims, the court held that the beekeepers may have a valid negligence *per se* claim if the pesticide application was not consistent with the label directions (a violation of the Minnesota Pesticide Control Act). The court, however, dismissed the private nuisance claim because the beekeepers did not own the land upon which the hives were located and therefore lacked the required property interest. ❧

Endnotes

1. *Anderson v. State of Minnesota*, 2005 Minn. LEXIS 93 at *5 (Minn. March. 3, 2005).
2. *Id.* at *7.
3. *Id.* at *8.
4. *Id.* at *8-9.



scow causing it to crash into the *Super Scoop*. The collision sent Stewart careening head-first through the hatch and onto the lower deck.

Stewart sued Dutra for compensation under the Jones Act, claiming that he was a seaman, and that his injuries were a result of Dutra's negligence. Stewart filed an alternative claim under the Longshore and Harbor Workers Compensation Act (LHWCA), claiming he was a covered employee who could sue the owner of the vessel for negligence. Prior to the Jones Act, seamen were barred from negligence claims against shipowners because such injuries were viewed as an assumed risk of employment. In 1920, Congress enacted the Jones Act to provide sea-based maritime workers a remedy for tortious injuries. In 1927, Congress extended these worker's compensation benefits to land-based maritime employees through the LHWCA. It is important to note that a worker cannot fall under both statutes. The LHWCA specifically exempts from coverage "a master or member of a crew of any vessel."¹

At trial, Dutra conceded that Stewart was a member of the *Super Scoop*'s crew, but argued that the *Super Scoop* was not a vessel for purposes of the Jones Act. The district court ruled that the dredge did not fall within the meaning of a "vessel" under the Jones Act because its primary purpose was dredging, not transportation. On interlocutory appeal, the First Circuit affirmed this finding and also concluded that Stewart's seaman status "depended on the movement of the *Super Scoop* (which was stationary) rather than the scow."² The First Circuit remanded the case to the district court to decide Stewart's alternate LHWCA claim.

As if things were not already confusing enough, on remand Dutra stipulated that the *Super Scoop* was a vessel under the LHWCA. Despite its stipulation,

the district court granted Dutra summary judgment because "Dutra's alleged negligence was committed in its capacity as an employer rather than as owner of the vessel" as required by the LHWCA.³ The First Circuit agreed with the district court, but noted that the LHWCA's definition of vessel is more inclusive than the Jones Act's definition. The Supreme Court granted certiorari to clarify the standard for determining when a watercraft is a "vessel" under the LHWCA.

What is a "Vessel"?

The LHWCA does not define "vessel." Congress, however, provides a default definition for statutes passed after February 25, 1871, in 1 U.S.C. § 3, which states "the word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The question for the court, therefore, was whether the *Super Scoop* was a vessel under § 3. If a watercraft is a vessel under § 3, it is a vessel under the LHWCA.

A dredge is very different from traditional seagoing vessels. Dredges do not have their own means of propulsion and are not designed to carry passengers or cargo. These differences, however, do not prevent dredges from qualifying as vessels under U.S. law. Courts have a long history, even prior to passage of the Jones Act and the LHWCA, of classifying dredges, barges, and floating platforms as vessels because they are capable of maritime transportation. The Supreme Court "has often said that dredges and comparable watercraft qualify as vessels under the Jones Act and the LHWCA."⁴

Dutra argued, however, that the Supreme Court has implicitly limited the § 3 definition through several rulings that denied vessel status when the watercraft was "not practically capable of being used to transport people, freight, or cargo from place to place."⁵ The Court stated that Dutra was misinterpreting this line of cases and clarified that there is a distinction between watercraft that are permanently attached to the shore or on the ocean floor for extended periods of time and those that are temporarily immobile. The Court stated that the former are not 'capable of being used' for maritime transport, but the latter are. If the watercraft is not capable of being meaningfully used for maritime transport, then it cannot be considered a vessel under § 3.

Photograph of Super Scoop provided by Massachusetts Turnpike Authority.



The Court drew the parties' attention to several instances where it denied vessel status for this very reason. These included a wharfboat attached to the mainland; a drydock which was moored and considered a fixed structure because it had not been moved for twenty years; a floating casino which was moored to the shore in a permanent fashion; and a floating processing plant with a large hole in her hull. The Supreme Court did not consider these watercraft vessels under § 3 because "[s]imply put, a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."⁶

The *Super Scoop* was obviously capable of maritime transport. "Indeed, it could not have dug the Ted Williams Tunnel had it been unable to traverse the Boston Harbor, carrying workers like Stewart."⁷ It is therefore a vessel for purposes of §3, the Jones Act, and the LHWCA.

The Supreme Court went on to clarify that a watercraft need not be used primarily for transportation to qualify as a vessel. The ability to be used for transportation is sufficient. The Court also stated that a watercraft does not need to be in motion to qualify. The fact that the *Super Scoop* was idle when

Stewart's accident occurred did not destroy its status as a vessel.

Conclusion

The Supreme Court held that "[u]nder § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment."⁸ The *Super Scoop*, therefore, is a vessel and its workers are eligible for seaman status under the Jones Act if they are masters or members of its crew. If they do not qualify as seamen, they may be entitled to compensation as land-based workers under the LHWCA. The Court remanded the case to the district court for further proceedings.✎

Endnotes

1. 33 U.S.C. § 902(3)(G).
2. *Stewart v. Dutra Constr. Co.*, 125 S. Ct. 1118, 1122 (2005).
3. *Id.* at 1122-23.
4. *Id.* at 1123.
5. *Id.* at 1126.
6. *Id.* at 1127.
7. *Id.* at 1128.
8. *Id.* at 1129.

Fish Auctioneer, from page 16

Deaver's fish nor the issuer of Deaver's fish ticket. "Because Auction Block issued its own fish ticket to Deaver when Deaver delivered his fish to Auction Block, . . . Auction Block was the buyer of the fish."⁶

Was Auction Block a Buyer Under the UCC?

Deaver also argued that Auction Block was a buyer under the Uniform Commercial Code (UCC) and subject to its rules regarding acceptance of non-conforming goods. The Supreme Court found that fish are goods as defined by the UCC and Auction Block qualified as a "buyer" as one "who buys or contracts to buy goods."⁷ In Alaska, acceptance of goods occurs when the buyer "after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity."⁸ Because Auction Block had the opportunity to inspect Deaver's fish and did not indicate than any defects were present, the court found it had accepted Deaver's fish. Auction Block must pay the contract price for any goods accepted, unless it can establish a breach with respect to the goods accepted.⁹

Conclusion

The Supreme Court held that an online fish auction company can be the primary fish buyer. The case was remanded to the Superior Court for further consideration of Deaver's claims against Auction Block.✎

Endnotes

1. Seafood Products downgraded 19,000 pounds of fish. This price reduction was consistent with Seafood Products bid, which "specified that Seafood Products would inspect the halibut at its plant and that it would pay fifteen percent less for 'number two' quality halibut." *Deaver v. The Auction Block Company*, 2005 Alaska LEXIS 20 at *6 (Alas. Feb. 25, 2005).
2. ALASKA STAT. § 44.25.040 (2004).
3. *Id.* §16.10.296.
4. 5 ALASKA ADMIN. CODE § 39.130(a)(1).
5. *Deaver*, 2005 Alas. LEXIS at * 21.
6. *Id.* at *28.
7. ALASKA STAT. § 45.02.103(a)(1).
8. *Id.* § 45.02.606(a)(1).
9. *Id.* § 45.02.607.



Placement of Dredge Material is a Discretionary Function

Reyes v. U.S., 349 F. Supp. 2d 234 (D. P.R. 2004).

Jason E. Brown, 3L, University of Mississippi School of Law

A Puerto Rico district court recently held that the decision of the Army Corps of Engineers (Corps) to place dredge material on a beach was discretionary and not subject to litigation under the Federal Tort Claims Act.

Background

On January 20, 1999 the Corps announced its intention to conduct emergency dredging of the navigation channel in Arecibo Harbor, Puerto Rico. The project involved dredging and removing an estimated 60,000 to 80,000 cubic yards of material from the harbor. The notice stated that the material would be temporarily stockpiled on the beach until the Port Authority could remove it to an upland disposal site. An Environmental Assessment was prepared by the local and federal agencies, but the Port Authority subsequently decided it did not want the dredged material. The Corps' proposed alternative to upland deposit was placement in near-shore circulation to address erosion problems along the Arecibo coast.

The work commenced on June 9, 2000, but was soon halted by the U.S. Fish and Wildlife Service when it found out the Corps was depositing the dredge material on top of a coral community. The Corps then sought and received an exception to a water quality certificate from the Puerto Rico Environmental Quality Board (EQB) to deposit the dredge material on the actual beach. Dredging resumed and the remaining material was placed on the beach, raising the beach's elevation fifteen feet.

Despite the raise in elevation, the top of the sand remained below street level. A stone concrete wall was already in place, but an additional silt fence was constructed to minimize the blowing sand. Local surfers, however, protested the erection of the silt fence (it must have blocked access) and repeatedly tore it down. The fence was replaced several times.

Discretionary Power

The Reyes sought compensation from the Corps for damages they claim resulted from sand and dust blowing onto their property from the disposal site. The United States is immune from law suits except to the extent it has consented. Through the Federal Tort Claims Act (FTCA), the United States has consented to suits for damages caused by negligent acts or omissions of federal employees.¹ The FTCA has some exceptions, however; the most notable prohibits suits based on a federal agency's performance of or failure to perform a discretionary function. A court looks at two factors to determine whether an act falls within the discretionary function exception: first, the existence of discretion, and second, whether or not the type of discretion allowed warrants public policy scrutiny.²

The Reyes argued that the Corps had no discretion in choosing where to place the dredged material because it had to obtain a water quality certificate or waiver from the EQB. The court stated that a permit requirement does not destroy the discretionary nature of the act itself. "Submitting a request for a permit or waiver to the local government pursuant to law does not automatically eradicate the discretion exercised by the federal agency."³ The Corps had to make a number of decisions about where to place the dredge materials and take into account several environmental and public policy concerns. The Corps weighed many alternatives and coordinated with both federal and local agencies. Ultimately, the decision where to place the material is the Corps' to make.

Conclusion

The court dismissed the Reyes' tort claim under the discretionary function exception to the FTCA. The court also found that the Reyes failed to show a causal connection between the deposition of dredged material on the beach and the damage to their house.³

Endnotes

1. 28 U.S.C. §1346(b).
2. *Reyes v. U.S.*, 349 F. Supp. 2d 234, 238 (D. P.R. 2004).
3. *Id.* at 240.

2. 50 C.F.R. § 660.324(c)(1). "Makah — That portion of the FMA north of 48 [degrees] 02'15" N. lat. (Norwegian Memorial) and east of 125 [degrees] 44'00" W. long."
3. See *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).
4. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 689 (1979).
5. *Id.* at 666.
6. *Id.* at 681.
7. *Id.* at 673. See also, *Morton v. Mancari*, 417 U.S. 535, 555 (1974).
8. See *Washington v. Daley*, 173 F.3d 1158, 1162 (9th Cir. 1999).
9. States have ownership of navigable waters that extend three miles from their coastlines. Submerged Lands Act of 1953, 43 U.S.C. § 1301.
10. *Wash. State Charterboat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir. 1983).
11. AP, *15,000 Tons of Whiting for Makah Tribe Entitled to Harvest Groundfish*, Agency Says, SEATTLE POST-INTELLIGENCER, June 6, 1996, at B5.
12. See 16 U.S.C. § 1802(28)(B).
13. *Midwater Trawlers Co-operative v. Dep't of Commerce*, 282 F.3d 710, 719 (9th Cir. 2002).
14. 16 U.S.C. § 1851(a)(2).
15. *Midwater Trawlers*, 282 F.3d at 719; see also, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 (1979).
16. *Midwater Trawlers Co-operative v. Dep't of Commerce*, 393 F.3d 994, 1004 (9th Cir. 2004).
17. *Id.*

Book Review . . .

Stephanie Showalter

Marine Affairs Dictionary: Terms, Concepts, Laws, Court Cases, and International Conventions and Agreements

Niels West (Praeger, 2004)



We've all had this experience. You sit down to read a case involving fisheries, ports, coastal management, or any other marine policy issue and within the first few paragraphs the legal analysis is obscured by jargon, scientific terminology, and an alarming number of acronyms. Brownfields, maximum sustainable yield, indicator species, upwelling, UNCLOS, IMO, LMEs, LIDAR, etc., etc. It's impossible for anyone to keep up.

Well, our lives have just gotten a little easier with the publication of Niels West's new *Marine Affairs Dictionary*. Inspired by a student's complaint "that there were too many terms and concepts within the broad rubric of marine affairs that were difficult to search out and identify," West set out to compile descriptions of key marine affairs concepts and terms - a task that would take him seven years to complete. It was worth the wait.

Attorneys, economists, resources managers, and coastal planners now have a source to turn to when they need something explained, be it a scien-

tific term, legal concept, case, or international convention. Don't know what a hammock or a dugong is? Look it up. Forgot the holding in *Lucas v. South Carolina Coastal Council* or *National Audubon Society v. Superior Court of Alpine County*? It's in there. Need the definition of maelstrom? You guessed it, it's in there. (FYI - "an area of disturbed water about 7 km (4.3 mi) long created by the opposing forces of winds and tides which results in a circular motion of the water.") The *Marine Affairs Dictionary* even has an entry for Zulu time, allowing me to keep track of the events in JAG for the very first time.

With hundreds of entries on maritime terminology, U.S. statutes, international bodies, and non-governmental organizations such as the Mangrove Action Project and the National Maritime Council, the *Marine Affairs Dictionary* is destined to become an invaluable reference guide for marine affairs professionals and students. It should never, however, be far out of the reach of anyone working on marine issues.☺

Book Review . . .

Stephanie Showalter

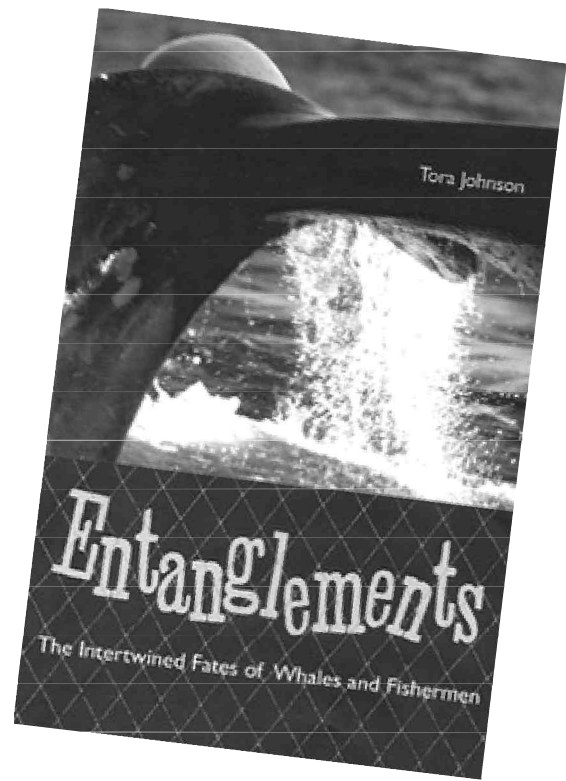
Entanglements: The Intertwined Fates of Whales and Fishermen

Tora Johnson (University Press of Florida, 2005)

Approximately 300 right whales remain in the North Atlantic. The whales' future looks rather bleak. Decimated by years of whaling, right whales need time to recover and reproduce. While it may sound like hyperbole, the loss of one female could send the species the way of the dodo, the passenger pigeon, and the Steller's sea cow. Although right whales are no longer hunted and are protected by endangered species laws in both the United States and Canada, human activities continue to pose a significant threat to the survival of these creatures. Because right whales spend a large portion of their lives feeding at the surface, they are particularly prone to ship strikes and entanglement in fishing gear.

To reduce the ship strike threat, the U.S. and Canada issue warnings to mariners and alter shipping lanes. While these measures are not as simple as they sound, the ship strike issue seems to engender less conflict than entanglement. The politics of U.S. fisheries management have always been heated and the right whale issue is a classic battle pitting fishermen, environmentalists, and government regulators against each other. Tora Johnson, despite taking on the daunting task of "mapping the political minefields of fisheries management and whale protection," has written an extremely readable history of whale entanglements in the North Atlantic. In *Entanglements: The Intertwined Fates of Whales and Fishermen*, Johnson allows the reader to tag along on her journey to discover why, despite the efforts of hundreds of scientists, fishermen, and ordinary citizens on both sides of the border, whale entanglement remains such a serious problem.

Anyone involved in fisheries management should read *Entanglements*. Johnson's accounts of annual meetings of the North Atlantic Right Whale Consortium, the Atlantic Large Whale Take Reduction Team (TRT), and the Maine Fishermen's Forum are an invaluable case study of how long-simmering tensions, mistrust, and the federal bureau-



cracy can smother great ideas and frustrate participants to the point they walk away from the table. It is apparent that everyone involved in New England fisheries management agrees that something must be done to reduce whale mortality due to fishing gear. Getting individual members of such disparate interest groups as disentanglement specialists, commercial fishermen, environmental activists, National Marine Fisheries Service (NMFS) employees, and the members of the TRT to agree on what should actually be done, however, is a Sisyphean task. Johnson's frustration with the process and lack of progress is palatable.

Entanglements is not all doom and gloom. There are glimmers of hope - the fisherman who received money from the International Fund for Animal Welfare to remove abandoned gear; the state manager who is respected and trusted by fishermen. These glimmers, unfortunately, might be too little, too late. Humans have caused this problem. "As the past dissolves before our eyes, some people mourn the tragic loss, beg for vestiges to be preserved, yearn for the old days. But when we are alone at night staring at the ceiling, we can't escape the fact that the ways of the past have lead us here." Let's hope for the sake of the whales and the fishermen, we are able for once to accept responsibility, put our differences aside, and solve it. ♡

Coast to Coast

And Everything In-Between

The Monterey Bay Aquarium reluctantly released its juvenile great white shark back to the wild after it began hunting its tankmates. The aquarium acquired the baby shark after its capture by a halibut fisherman in August 2004. You don't have to be a rocket scientist to anticipate that it might be difficult to keep a great white shark in captivity. Until recently, the longest a great white had survived in captivity was 16 days. Monterey's shark made it 168 days, but the Aquarium staff decided it would be best to cut the 162-pound shark loose after it killed two soupfin sharks in February and exhibited classic hunting behavior. Incredibly, the Aquarium claims it will try to find another juvenile shark to place in the exhibit. There goes the neighborhood.

As directed by a Congressional rider, on March 15, 2005 the U.S. Fish and Wildlife Service (FWS) published a Final List of Bird Species to Which the Migratory Bird Treaty Act Does Not Apply (70 Fed. Reg. 12,710). On December 8, 2004, Congress amended the Migratory Bird Treaty Act (MBTA) to exclude non-native, human-introduced birds from its protections and required the FWS to identify excluded species. The MBTA was amended in response to the court-ordered injunction of the Chesapeake mute swan cull. The mute swan is, of course, a listed species as well as numerous other migratory birds such as the black swan, blue tit, orange-breasted bunting, Eurasian spoonbill, and silver gull. The development of the list was vigorously opposed by the Humane Society and several other animal-rights groups.



Photograph of mute swans provided by NOAA, Photographer Mary Hollinger, NESDIS/NODC biologist.

The National Ocean Service (NOS) has issued Final Criteria and Data Fields for an Inventory of Existing Marine Managed Areas (70 Fed. Reg. 3,512). Executive Order 13158, signed by President Clinton in May 2000, directs the Department of Commerce (DOC) and the Department of Interior (DOI) to develop a national system of Marine Protected Areas (MPAs). The criteria and data fields will be used by NOS to develop the Marine Managed Areas (MMA) inventory, which may be used in the future to determine which marine sites should be placed on the national MPA list and included in the network. NOS uses six criteria - area, marine, reserved, lasting, protection, and cultural - to select sites for inclusion in the inventory. For more information, please visit the National MPA Center's website at <http://www.mpa.gov/>.

Around the Globe

On March 23, the U.N. Food and Agriculture Organization (FAO) Committee of Fisheries adopted voluntary guidelines for the ecolabelling of fish products. Ecolabels indicate that a product has been produced in a sustainable, environmentally-friendly manner and enable consumers to make informed choices about the products they buy. Ecolabelling schemes are growing in popularity and the Marine Stewardship Council is leading the charge with respect to wild fisheries. The new guidelines are directed at governments and organizations with or considering ecolabelling programs for marine capture fisheries and outline general principles, including the need for independent auditing and transparency, and minimum requirements and criteria for assessing fisheries. The guidelines are available on the FAO's website at <http://www.fao.org/newsroom/en/news/2005/100302/index.html> ☼



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