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New Lobster Regulations Do Not Violate Atlantic Coastal Act,

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Stocking Project Deemed "Commercial Enterprise"

Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051 (9th Cir. 2003).

Luke Miller, 2L[1]

Salmon are creatures of habit, especially when it comes to spawning. Up the same creek or river they swim until they reach the spot where their own life began. Humans are habitual as well. We wait at the mouth of the river where we have watched the salmon leave their spawning grounds for the open ocean and proceed to scoop them out of the water for subsequent sale. In order to perpetuate this human habit in one particular spot off the Alaskan coast, a group of commercial fishermen joined together and took over a salmon-stocking project once used to study fish stocks in the wild, and proceeded to turn research into a commercial activity. For years, the number of fish returning to the ocean remained unnaturally high providing an adequate harvest for regional fishermen because researchers were collecting the eggs of returning salmon, hatching the eggs in captivity and releasing half-grown salmon back into the wild. This was a fairly well designed project except for one detail - the development of the salmon to adulthood required the resources of the Kenai National Wildlife Refuge in Alaska.

Background

Kenai National Wildlife Refuge has a deep-rooted past. In 1941, Franklin D. Roosevelt set aside roughly two million acres of Alaska's Kenai Peninsula as the Kenai National Moose Range. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which updated the name of the Kenai Moose Range to the Kenai National Wildlife Refuge; expanded the Refuge's territory; and designated 1.35 million acres of the Refuge, including Tustumena Lake, as national wilderness under the 1964 Wilderness Act.

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Water Users Awarded Over $14 Million

Tulare Lake Basin Water Storage District v. U.S., 59 Fed. Cl. 246 (2003).

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

In 2001, the U.S. Court of Federal Claims determined that certain California water users were entitled to compensation under the Fifth Amendment for the loss of contractually conferred water due to governmental restrictions imposed to protect the delta smelt and winter-run chinook salmon.[1] In December 2003, following a separate trial on damages, the court concluded that the water users were owed damages in the amount of $13,915,364.78 plus interest.

Background

This litigation revolves around two water projects in California: the Central Valley Project (CVP),

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From the Editor's Desk

The Law Center is two years old! I can hardly believe it. As with any program establishing an identity, there have been many changes over the years. Thank you, our loyal subscribers, for supporting us through these transitions. Your support will not go unrewarded. Our third year is shaping up to be the best one yet!

Welcome to the new, expanded version of THE SANDBAR! We have expanded to twenty-four pages, as sixteen was just not enough space to cover all of the developing legal issues across the nation. Now that the Editorial Staff has ample space, each issue of THE SANDBAR will feature a case summary or article from each region of the United States - New England, the Mid-Atlantic, the Southeast, the Great Lakes, Alaska, California, and Hawaii. Gulf of Mexico issues will continue to be covered in WATER LOG, the legal reporter for the Mississippi-Alabama Sea Grant Legal Program.

As always, we urge you to contact us with your thoughts and suggestions. Are there certain cases or issues we should be covering? Is there a job opening or new publication you would like us to announce? Please let us know how we can serve you better. We would love to hear from you. Enjoy!

Stephanie Showalter
Editor

Court Enjoins Mute Swan Cull

Fund For Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003).

Shannon McGhee, 2L[1]

The U.S. District Court for the District of Columbia determined there was substantial evidence to support a claim that the issuance of a depredation permit by the Fish and Wildlife Service (FWS) to the State of Maryland for the killing of 525 mute swans failed to meet requirements of the Migratory Bird Treaty Act (MBTA) and National Environmental Policy Act (NEPA) and thereby justified a preliminary injunction.

Background

The "Atlantic Flyways," which is comprised of seventeen states along the Eastern Seaboard of the United States, is home to approximately 14,000 non-native mute swans. Under MBTA regulations, a depredation permit must be sought from FWS in order to legally "pursue, hunt, shoot, wound, kill, trap, capture, or collect" mute swans.[2] Before any depredation permit is issued, FWS, under NEPA regulations, must assess all of the significant impacts a proposed action might have on the human environment.

However, through a "categorical exclusion"[3] under NEPA, FWS issued Maryland a depredation permit without performing any type of environmental assessment. The state of Maryland was granted a permit authorizing the killing of up to 1,500 mute swans as part of "a comprehensive mute swan management plan" that would be implemented in 2003. The Fund for Animals, a wildlife protection organization, filed suit challenging Maryland's permit. However, Maryland promised to voluntarily surrender its permit pending the preparation of an Environmental Assessment (EA) by FWS and the suit was dropped. On July 2, 2003, the FWS registered a *Draft Environmental Assessment on the Management of Mute Swans in the Atlantic Flyway* (Draft EA) for review, setting July 16, 2003 as the deadline for public comments.

After reviewing public comments, FWS issued a Final EA on August 7, 2003 concluding that mute swans were causing critical environmental damage to the underwater plant communities of Chesapeake Bay by consuming up to eight pounds per day of Submerged Aquatic Vegetation (SAV).[4] The Final EA further explained the "taking" of mute swans as a method of minimizing such environmental damage would have no "significant impact on the human environment" and, therefore, an Environmental Impact Statement (EIS) was unnecessary. Maryland then renewed its depredation permit for the "taking" of 525 mute swans. Shortly thereafter, the Fund for Animals commenced an action asking the Court to enjoin the state of Maryland's renewed depredation permit.

Standard of Review

On a motion for preliminary injunction, plaintiffs must demonstrate "(1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that there will be no substantial injury to other interested parties, and (4) that the public interest would be served by the injunction."[5] No one factor, however is determinative.

Irreparable Harm

The Fund for Animals argued if all of the depredation permits from the Final EA were considered in the aggregate, irreparable harm to their aesthetic interests to view, interact with, study and appreciate mute swans would ensue because 86 percent of the mute swans in Maryland and 67 percent of the current mute swans in the Atlantic Flyway would be at risk of being killed.[6] Plaintiffs also contended irreparable harm from the violation of their procedural rights under NEPA. The Maryland Department of Natural Resources (MDNR) refuted these claims, by arguing that: (1) Maryland or any state's maximum "take" limits are adjusted upward or downward on an individual and annual basis, (2) plaintiffs failed to allege irreparable harm from the issuance of permits to other states in the Atlantic Flyway, and (3) plaintiffs presented no evidence of harm from the past killing of 1,700 mute swans in Maryland. In addition, MDNR con-

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Mute Swan, from page 3

tended the "taking" of 525 swans, a mere 14.5 percent reduction of the current mute swan population in Maryland from remote areas where plaintiffs neither travel nor live, would result in minimal or no irreparable harm.

The court found MDNR's arguments unpersuasive, stating that the plaintiffs' claim for irreparable harm was pursuant to the particular swans located in Maryland and not all swans in the Atlantic Flyway. Furthermore, the plaintiffs were claiming they would suffer not from the past killing of mute swans, but from the additional taking of 525 mute swans. The court concluded that, although a NEPA violation standing alone was insufficient to support a preliminary injunction, when that violation was combined with the plaintiffs' other claim of aesthetic irreparable harm, plaintiffs adequately established the existence of irreparable harm absent a preliminary injunction.

Substantial Harm to Other Parties

MDNR further argued even if the plaintiffs demonstrated irreparable harm, the Chesapeake Bay and native wildlife would suffer greater harm by the daily degradation caused from the present mute swan population and its progeny. The court disagreed, noting the current 9.2 percent mute swan growth rate was easily manageable even if the agency's course of action was delayed a year. MDNR officials explained that the supposed 10 percent consumption of SAV biomass by mute swans has a negligible bay-wide effect; thus the court held that an injunction delaying the "taking" of swans a few months to ensure the vindication of the public's interest would surely not result in irreparable harm to the Chesapeake Bay. Finally, the court found MDNR's immediate need for the taking of 525 mute swans to be a mere assertion that it would be "easier" to take swans now than later.

Likelihood of Success on the Merits

NEPA

The Fund for Animals argued that the FWS finding of no significant impact (FONSI) and its decision not to proceed with an EIS to further evaluate the environmental impacts of depredation permits were arbitrary and capricious. Under the Administrative Procedure Act (APA), FWS actions may only be overturned if they were arbitrary, capricious, or an abuse of discretion. Under this standard of review courts examine "(1) whether the agency took a 'hard look' at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum."[7] MDNR contended that "by describing the proposed action, examining reasonable alternatives, considering environmental impacts, and providing a list of individuals and agencies consulted" in the Final EA all of NEPA's requirements were met.

The court held the plaintiffs demonstrated a likelihood of success on the merits for their claim that FWS failed to involve the public "to the greatest extent possible" in taking a "hard look" at alternatives for managing Maryland's mute swan population. The court reasoned that the public was given a total of only nine working days in the middle of the summer to review and submit comments on a Draft EA that lacked specific information, e.g., which local environments would be affected by the proposed action. The court noted that describing the location of the action as "covering 6000 square miles and 15 of 24 counties within the state," did not translate into any greater specificity as to the effects on local mute swan populations.[8] In addition, the court pointed out, the FWS assertion that it received and reviewed "thousands of comments" from 13 state wildlife agencies, 53 organizations, and 2,620 individuals in such a short period of time between July 16 and the July 31, 2003 deadline, as weighing more heavily for plaintiffs, i.e., FWS did not take the appropriate "hard look."[9]

The court also found FWS's post-hoc rationalization of issuing depredation permits prior to a Final EA unconvincing, stating that MDNR's assertion that FWS actions are "entitled to a presumption of regularity" does not protect the agency from its obligation to perform a "thorough, probing, in-depth review" of the agency's proposed course of action.

The Fund for Animals also successfully argued that although the "taking" of mute swans may have a minimal environmental impact on the entire state, FWS failed to evaluate the significant impacts, whether adverse or beneficial, at the local level. Additionally, the court reasoned that the "uncertainty as to the impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on broader populations, is 'a basis for a finding that there will be a significant impact' and setting aside a FONSI [finding of no significant impact]."[10] Therefore, plaintiffs have shown a likelihood of success on the merits that the FWS decision to issue a FONSI was arbitrary and capricious.

The court found FWS had established a sufficient nexus between identifying the degradation of SAV by mute swans and its proposed action to correct it by reducing the mute swan population. Moreover, the court was not convinced that the FWS issuance of permits had created a precedent since the permits contemplated by the Final EA are reevaluated on an annual and individual basis. Similarly, the court ruled the plaintiffs failed to identify any scientific controversy of the effects of killing mute swans throughout Maryland or the "Atlantic Flyway" region. Nevertheless, the court found the plaintiffs raised "substantial questions" as to the existence of at least two significant factors, and therefore demonstrated a likelihood of success on the merits.

Mute Swan, courtesy of NOAA's Coastline Collection
Photographer - Mary Hollinger, NODC biologist

MBTA

MBTA regulations stipulate that migratory birds may only be killed pursuant to a depredation permit which states "the 'location where the requested permitted activity is to be conducted,' as well as a 'description of the area where depredations are occurring,' the 'nature of the crops or other interests being injured,' and the 'extent of such injury.'"[11] The Fund for Animals alleged that the FWS's failure to ensure MDNR met MBTA requirements or to explain how such requirements were satisfied prior to the issuance of Maryland's depredation permit amounted to arbitrary and capricious agency action.

The court held that although MDNR specified which public lands would be rendered "swan free" as well as provided a generalized description of the types of areas where "removal" activities would take place, MDNR failed to specify the localized and specific types of damage mute swans cause in those areas, nor did MDNR indicate the number of swans planned to be removed from each area. Furthermore, MDNR only chose the depredation permit to cover areas where mute swans are most likely to be found, not where the greatest extent of SAV damage is occurring. Finally, even though defendants assert an equally strong public interest in preservation and restoration of the Chesapeake Bay, they ultimately fell short of meeting the burden of establishing why their long-term goal could not be accomplished in the future. As a result, the court was persuaded that plaintiffs had a "substantial case on the merits," that defendants failed to comply with MBTA standards, and therefore plaintiffs were entitled to injunctive relief.

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Public Access to Non-Navigable Rivers - Ideas for Change in Georgia: A Comment

Tripp Bridges, 3L

Tripp Bridges is a third-year law student at the University of Georgia School of Law in Athens, Georgia. The views expressed below are the author's own. This article does not necessarily reflect the opinions and positions of the National Sea Grant Law Center and its affiliates.

Georgia is fortunate to have many rivers that can be used for recreational boating. Canoeing and kayaking are recreational activities enjoyed by many people in the state. These numbers will undoubtedly increase with the population growth of Atlanta and its suburbs. Generally canoeists have enjoyed relatively free access to many of Georgia's larger rivers, however in recent years there have been some notable exceptions.

The following two cases exemplify the problems that the public has had in gaining access to some of Georgia's non-navigable rivers. In *Georgia Canoeing Assoc. v. Henry*, 482 S.E.2d 298, 267 Ga. App. 814 (1997), the Court of Appeals affirmed the trial court's opinion that the public did not have a right of passage down Armuchee Creek where it flowed through Mr. Henry's land. The Georgia Canoeing Association was seeking to enjoin Mr. Henry from stopping free passage by the public down the river. In *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 268 Ga. 710 (1997), the court found that the Ichauway-nochaway Creek was non-navigable, and therefore inaccessible to boaters, even though the appellant was able to navigate a small raft carrying two people, a goat, and a bale of cotton in attempts to prove navigability under the standard of commerce of the nineteenth century.

As illustrated by the aforementioned cases, current Georgia law does not allow a right of passage for the public down non-navigable rivers. According to O.C.G.A. § 44-8-2 the adjacent landowner owns the bed of a non-navigable river to the midpoint, and if the landowner owns both sides of the river, then ownership extends to the entire streambed. The same is true if the river is a boundary between properties; the landowners both own to the midpoint, and could join together and prohibit passage down the river.[1] The legislature passed this law long before the start of any significant recreational boating in the region. This section of the code effectively prohibits the public from using many of Georgia's scenic rivers. Consideration should be given to changing it to allow a right of through passage down non-navigable rivers.

At this time Georgia boaters only have a right of passage down navigable waters. Georgia's definition of navigable is surprisingly restrictive. Under Georgia law, navigable streams are those "capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year. The mere rafting of timber or the transporting of wood in small boats shall not make a stream navigable."[2] Few rivers in Georgia qualify under Georgia law as navigable due to the fact many barges are over 200 feet long, and few rivers would be able to support such boats.[3] This restrictive definition precludes a right of passage on most of Georgia's rivers, including the Chattooga, Chestatee, and Toccoa, which are frequently used for canoeing.

Remedies

Several legislative options are available to remedy this situation. The first option is to establish by statute the right of free passage down non-navigable rivers. The second option is to broaden Georgia's definition of "navigable." Thirdly, the state could condemn specific riverbeds for recreational use.

The first option, establishing a right of free passage down non-navigable rivers, may be the simplest answer to this problem. This option avoids the uncertainty of judicial interpretation of navigability, which would be required if Georgia's definition of navigability was changed. When establishing a right of passage for the public on non-navigable rivers, the landowner would still retain ownership of the streambed. Boaters would simply obtain a statutory right to pass over it. This option would also avoid the costs of litigation and compensation involved with condemning the riverbeds.

Canoeing in Georgia
Courtesy of USFWS, Photograph by Joe Doherty

One possible objection to this option is that establishing free right of passage may be considered an unconstitutional taking of property under the Fifth Amendment. A free passage mandate could be considered a taking because it precludes a landowner from excluding others from his property. It can be argued, however, that the landowner merely owns the streambed, and allowing the public to pass over the streambed in boats does not affect his ability to exclude the public from the streambed itself. Anchoring on the riverbed or walking on the bank would still be forms of trespassing. The passage of boaters on streams where the water flow is insufficient to allow passage without portage, could be avoided by allowing a right of passage to the public only on streams that had an average annual flow above a certain specified cubic feet per second.

The second option, changing Georgia's definition of navigable rivers to be more inclusive, is also a viable alternative. The statutory definition could be amended to include streams capable of being used for canoeing. Another possibility is adoption of the federal standard of navigability, as set forth in *United States v. Harrell*, 926 F.2d 1036, 1039 (11th Cir. 1991), which depends on whether a river is used, or susceptible of being used, in its ordinary condition to transport commerce. Under this definition, the ability to commercially float logs is evidence of navigability. This standard is much more lenient than Georgia's standard, which requires the ability to handle commercial barges. The federal standard would allow for more access to appropriate rivers, and avoid use on rivers that are clearly unfit for public use.

However, if Georgia changed its requirements for navigability to the federal standard, there would still be a large number of streams that are currently used for kayaking and canoeing, which would not qualify because they cannot support commercial log floating. Thus, Georgia should consider going beyond the federal standard to allow free access to rivers currently being used for boating.

The third option, condemning specific riverbeds for public recreational use, would be costly, but would avoid takings challenges. Besides the cost of the actual compensation, there could be large litigation costs as well because of disputes over the amount of compensation. One advantage to this course of action would be that if the state condemned the riverbed, then not only would a right of passage be allowed for boaters, but this would also open fishing rights on the river to the public.

Fishing in many of Georgia's rivers and streams requires wading down the stream. This would not be allowed under a law merely providing a right of passage to the public because a person wading actually touches the streambed, which still belongs to the adjacent landowner.

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Ohio H.B. 218 - An Update

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

After publication in our last issue of some cursory research on H.B. 218, a controversial bill pending before the Ohio State Legislature that attempts to shift the boundary between private and public land along Lake Erie, additional information came to light which altered portions of the original analysis. This update serves to clarify the Law Center's original position. It is not, nor is it intended to be, a work of advocacy. The information presented below should not be relied on in litigation or cited as established fact. In such a contentious and unsettled area of law there are often many potential interpretations of the same doctrines.

The Public Trust Doctrine

The public trust doctrine is a common law doctrine. The common law "consists of those principles, usage, and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."[1] In its simplest terms, common law is judge-made law.

Under the common law, the public trust doctrine provides that "public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of public uses."[2] Public trust waters are the state's navigable waters and public trust lands are the lands beneath those navigable waters, up to the ordinary high water mark.[3] Public trust lands include tidelands, shorelands, and the land beneath oceans, lakes, and rivers.

To some extent, states can supercede the common law with legislation. Although the public trust lands extend to the high water mark under the common law, a state is free to establish different boundaries through legislation. For example, Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Virginia, and Wisconsin have all granted private property owners rights seaward of the high-water mark. These states are low-water states, meaning the boundary between public and private land is the low-water mark. However, even in these states a coastal property owner's rights in the intertidal zone are subservient to the public's right of access for fishing, fowling, and navigation, which is in turn subservient to the private owner's right to wharf out, by means of docks, etc.

The Boundary of Lake Erie

The Ohio Legislature has established the boundary of Lake Erie through legislation. Section 1506.10 of the Ohio Code states that

> the waters of Lake Erie extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.[4]

The demarcation line between public and private land and, therefore, the upper boundary of the public trust lands in Ohio is the "southerly shore" of Lake Erie. While the term "southerly shore" has not been explicitly defined by the Legislature or the courts, it is clear that "a littoral owner along Lake Erie has no title beyond the natural shoreline."[5] In 1948, the Ohio Supreme Court held that "the littoral owners of the upland [along Lake Erie] have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters."[6] Unfortunately, the Supreme Court failed to define "natural shoreline" and determining where the natural shoreline falls on a particular parcel of land remains a question of fact for a jury or other factfinder.

Because the term is not defined in the act, the responsibility falls to the state agencies to define "southerly shore" through regulations, policies, and actions. ODNR's activities in this area have not been consistent, although the agency does currently use the high water mark to establish the boundary between public and private land. Over the years shorefront owners have challenged ODNR's actions in court, but the Ohio courts have failed to either expressly or clearly define the term "southerly shore." In cases not involving boundary disputes, both the Ohio Court of Appeals and the Ohio

Supreme Court have ruled that the territory of a shorefront city extends to the low water mark.[7] The Court of Appeals recently had the chance to rule on the ODNR's use of the Ordinary High Water mark. Shorefront property owners challenged the issuance of a submerged land lease for Lake Erie. Beach Cliff, an adjacent property owner, contended that "there is no support for ODNR's arbitrary assignment of 573.4' or the ordinary high water ("OHW") mark as the elevation from which a determination is made whether land is submerged."[8] The Ohio Court of Common Pleas had avoided ruling on whether the OHW was the appropriate boundary by finding the elevation level not to be the determinative factor. The trial court "found that the definition of submerged land is based upon the location of the natural shoreline."[9]

The Court of Appeals sidestepped the issue. "Even if we were to assume that the OHW elevation of 573.4' is the demarcation point for submerged lands, the record before us supports that the parties' evidence is in dispute as to whether the property at issue is below this elevation mark." The Court did recognize that "ODNR uses the OHW in determining whether land is submerged and whether a submerged land lease must be issued," but made no ruling on whether the actions of the ODNR were appropriate. The Court of Appeals affirmed the judgment of the trial court, but on different grounds, stating "that there is no genuine issue of material fact regarding the issue of the presence of historic fill on the site of the beachfront property. This finding [by ODNR of the presence of historic fill] satisfies the definition of 'territory' contained in R.C. 1506.11 and likewise satisfies the requirements for the issuance of a submerged land lease on land subject to the state's public trust."[10]

The issuance of the submerged land lease was upheld by the trial court and affirmed by the Court of Appeals, without a determination regarding the appropriateness of the OHW. ODNR's reliance on the OHW appears to have been upheld on a technicality – the ability of the courts to find another, acceptable ground for issuance of the leases.

Conclusion

For over a century, Ohio courts have recognized that certain waters and lands are held by the state in trust for the public. The public has a right to access these "public trust" areas to fish, for navigation, and sometimes for recreational purposes. Private littoral and riparian owners, however, have rights as well. Every state struggles to find a way to balance the public right of access with the rights of private owners. Currently under Ohio law, the boundary between public and private land on Lake Erie is the "southerly shore," which is usually defined as the "natural shoreline." H.B. 218 attempts to shift that line, among other things. Due to the potentially significant implications of H.B. 218, which is currently stalled in the Senate, the Law Center will continue to track this legislation as it moves through the Ohio Legislature.

Endnotes

1. Black's Law Dictionary, 276 (6th Ed. 1990).
2. Coastal States Organization, Putting the Public Trust Doctrine to Work 1 (1997).
3. *See Shively v. Bowlby*, 152 U.S. 1, 58 (1894).
4. Oh. Rev. Code § 1506.10 (2003).
5. Office of the Attorney General of the State of Ohio, 1993 Op. Atty. Gen 128 at *15 (1993).
6. *State ex rel. Squire v. Cleveland,* 82 N.E.2d 709, 726 (Ohio 1948).
7. *See City of Avon Lake v. Bird*, 1974 Ohio App. LEXIS 3129 (Ohio App. 1974); *Mitchell v. Cleveland Electric Illuminating Co.*, 30 Ohio St. 3d 92, 94 (Ohio 1987).
8. *Beach Cliff Board of Trustees v. Ferchill*, 2003 Ohio 2300, 2003 Ohio App. LEXIS 2132 at *10 (2003).
9. *Id.* at *12.
10. *Id.* at *16-17.

Beach at East Harbor State Park, Port Clinton, Ohio
Courtesy of U.S. EPA, Great Lakes National Program
Photo by Arnold W. Ehrsam

New Lobster Regulations Do Not Violate Atlantic Coastal Act

Little Bay Lobster Co. v. Evans, 352 F.3d 462 (1st Cir. 2003).

T.B. Boardman, Jr., 3L[1]

Recently, the First Circuit Court of Appeals denied an appeal by the New Hampshire-based Little Bay Lobster Company (Little Bay) claiming: first, that the expansion of a stringently regulated fishing area was in conflict with certain national standards set forth in the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and; second, that the agency's rule-making process denied Little Bay certain procedural safeguards afforded to it by the Regulatory Flexibility Act (RFA). The First Circuit denied both contentions reasoning that Little Bay had improperly argued its claims and that the rule-making agency met its requirements of reasonability.

Background

This case concerns Northeast lobster fishing and the enlargement of a stringently regulated area in the Gulf of Maine. In 1983, pursuant to its authorization under the MSA, the National Marine Fisheries Service (NMFS) implemented a fishery management plan (FMP), recommended by the New England Fishery Management Council (Council), to remedy the population decline of the Northeast lobster.

A decade after its implementation, a study revealed that the population was still in danger. As a result, a new FMP was developed delineating the Gulf of Maine into four distinct areas, each subject to different restrictions. Specifically pertinent to Little Bay was the boundary between the stringently regulated Area 1 and the less stringently regulated Area 3. Area 1 begins three miles offshore and extends seaward to the beginning of Area 3 thirty miles from the coast.

During the implementation of the 1983 FMP, Congress had adopted the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act). Congress charged the Atlantic States Marine Fisheries Commission (Commission) with the development, implementation and enforcement of coastal fishery plans. Although primarily concerned with regulating fisheries within state waters, when regulations do not exist for federal waters under the MSA, the Secretary of Commerce can adopt plans, under the Atlantic Coastal Act, for those federal waters so long as several requirements are met. For example, the Secretary must consult with the regional Councils and the plans must be consistent with the National Standards of the MSA.

In 1999, the NMFS proposed Amendment 3, which would withdraw the existing MSA regulations and adopt new regulations under the authority of the Atlantic Coastal Act. Specifically, not only would the new plan bestow more stringent regulations in both Areas 1 and 3 but would move the thirty mile boundary between the areas an additional twenty miles offshore. The consequences were significant for lobster fishermen, especially those accustomed to

Hauling in lobster trap
Courtesy of NOAA Fisheries Collection

fishing in the area lying between the old boundary and the new. Following a public comment period, the Secretary adopted Amendment 3.

A number of Portsmouth, New Hampshire lobster boat operators, including Little Bay, brought suit in federal district court challenging Amendment 3. The district court granted summary judgment in favor of the Secretary, and this appeal ensued.

Failure to Consult

Little Bay claims that the Secretary's failure to adequately consult the Council, a requirement of the Atlantic Coastal Act, unduly prejudiced Little Bay by not affording it an opportunity to appear before the Council and argue against the amendment. However, the First Circuit determined that "this is a standard harmless error argument" and looked to whether the decision would have been altered with more formal consultation. The court undertook this inquiry and held that "there is no reason to think that consultation would have produced a different result."[2] Therefore, Little Bay was not unduly prejudiced by the agency's failure to formally consult.

National Standards

Little Bay then focused on a second condition mandated by the Atlantic Coastal Act; essentially, that the regulations must conform to the National Standards set forth in the MSA. Specifically, Little Bay contends that the new regulations are in conflict with National Standards 2, 4, and 8.

Standard 2: National Standard 2 provides that a FMP must be "based upon the best scientific information available."[3] Little Bay claims that the Secretary failed to present any scientific analysis or reasoning to support the shift in boundary line. Specifically, Little Bay refers to the unique restrictions of Area 3 which require a showing of historic participation to fish in that area. In this regard, it contends, a net increase in lobster catches will result since Area 3, prior to the amendment, was restricted only to those that could prove historic participation. With the change in boundary line, Area 3 can now be accessed by all. The court conceived the logic of the argument yet deemed it fatal since Little Bay failed to further develop the contention.

Standard 4: National Standard 4 provides that any action that "allocates or assigns fishing privileges . . . [be] . . . fair and equitable to all such fishermen."[4] Little Bay contends that the boundary shift was a form of allocation but the court quickly disposed of this argument by noting that the line shift does not in any way prevent fishermen from operating in any areas. That argument, the court remarked, would be once again focusing on the "historic participation" limitations which were not at issue in the case.

Standard 8: When adopting restrictions National Standard 8 requires the Secretary, "to the extent practicable," to minimize the negative effects on local fishing communities.[5] Little Bay argued that the EIS had not assessed the boundary line shift's influence on local communities. The court agreed, but nonetheless found that the EIS analysis was not "clearly unreasonable" and therefore, satisfied the requirements of Standard 8. Its decision was based on a "rule of reason" that does not require every element of a plan to be addressed. Therefore, since the impacts of the boundary line shift were the subject of a full scale study and Little Bay failed to show why the impact was unreasonable, the Secretary did not act unreasonably.

Regulatory Flexibility Act

Little Bay's final challenge was based on the RFA. This procedural safeguard, similar to that of National Standard 8, is intended to ensure that during the agency's rule-making process attention is given to the concerns of small entities affected. Little Bay contended that separate attention was not given to comments regarding the change in the boundary line and therefore, it was deprived of its privileges afforded by the RFA. The court recognized that the agency's final statement did little more than acknowledge that several commentators had objected to the boundary line and admitted that the agency did not separately analyze the impacts of new regimes with and without the boundary shift. Nonetheless, the court found that the agency's obligation is simply to make a reasonable good faith effort to address comments and alternatives and there is no obligation to treat every element of a plan as a separate alternative.

See Lobster, page 20

"No-fault" Derelict Gear Recovery: An End to the Blame Game Leads to Successful Gear-removal in Puget Sound

Gary Wood, J.D., NORTHWEST STRAITS COMMISSION

Marine Killing Fields

Abandoned, lost, and discarded fishing equipment lays submerged wherever the world's oceans have been fished, and the salmon-rich inland sea of Puget Sound is no exception. The designation *derelict fishing gear* consists of nets, traps, hooks, weights, lines, or crab and shrimp pots abandoned or lost during commercial and sport fishing. Since modern fishing equipment is composed of synthetic monofilament, lost nets survive for decades.[1] All the while they present safety, liability, and nuisance issues, but the real harm is their persistent, deadly impact on species and habitats.

"Ghost nets" — so called by divers because monofilament is invisible underwater[2] — entangles divers and swimmers, often with fatal results; while huge trawl nets damage propellers and rudders, putting even the largest oceangoing vessels and crews in peril.

At a minimum, such gear continues to do what it was designed to do: entangle and kill fish. At loose in the benthic environment each net becomes a veritable "killing field" trapping fish and fin — even shellfish, crabs, birds and marine mammals, including endangered or threatened species — depending on the site. Each entanglement becomes bait for the next, in turns, so the nets passively 'fish up the food chain.' The consequence of this historic accumulation is an "unobserved mortality" that continues unabated in most harbors and oceans today. The economic impact of these losses is inestimable.

If such a wasteful carnage were to occur terrestrially, imagine the outcry for a solution.

Obstacles to Recovery

The problem cries out for remediation, but the work has just started. Efforts by NOAA in 2002 and 2003 to clean up nets in the Northwest Hawaiian chain yielded a grisly harvest of commercial gear and dead or dying sealife by the tons, but these were very expensive operations involving research ships and dive crews at sea for several weeks. Funding ongoing cleanups there as elsewhere remains an unresolved issue, and the source of 'imported' gear must be addressed.

Puget Sound presents different challenges: the Northwest Straits are within a temperate, deep inland sea with 100 years of commercial and sport-fishing gear (and centuries of tribal nets) hanging on its steep walls and draped on rocky reefs along salmon migratory corridors. In 1999, several wild species of salmon were listed under the Endangered Species Act, the first such action within a metropolitan population and commerce center.[3]

Yet there had never been a concerted effort to deal with the gear problem, other than one report to the legislature deploring the nets problem, but confounded to solve it because of 'liability issues.' In fact, Washington's own state law was the major impediment to gear removal operations, unintentionally.

At the time, a regulatory, punitive approach that penalized commercial fishing operators who reported gear losses constituted the sole redress of the problem. Considering that the value of complex seine and trawl equipment is $15,000 – $40,000, its loss is an immediate and severe economic blow – often cut loose to save a hapless fishing boat from its grasp.

The added imposition of a fine or license suspension for such reported losses, employing classic legislative wisdom, was the lawful "deterrent." Indeed, *reporting lost gear* did cease, wholly deterred. Nonetheless, gear losses – and those unobserved mortalities – persisted out-of-sight, and out-of-mind.

Another principal impediment to recovering this material was the safety issue. The stuff is dangerous. No protocol for removal operations existed; and safety was a paramount concern of the pilot project.

Commission Awarded NOAA Grant

The Northwest Straits Commission, http://www.nwstraits.org , is a regional citizens' panel authorized by the *Northwest Straits Marine Conservation Initiative*,[4] a bipartisan measure authorized by Congress in 1998. This innovative Initiative employs a county-based "bottom-up" approach to the protection of the region's vital marine resources; addressing them community by community, by diverse stakeholders sitting on a Marine Resources Committee (MRC). Over 100 active volunteers, representing local planners, tribal co-managers, and the scientific, economic, commercial fisheries, recreational, aquaculture and conservation communities have accepted appointments to seven county MRCs in the Straits.

Where appropriate, the Commission undertakes regional projects that protect or restore the area's marine resources. The derelict gear problem presented an opportunity to design and initiate a pilot remediation program. Dr. Andrea Copping of Washington Sea Grant co-authored (with this writer) a successful funding proposal,[5] and Sea Grant was instrumental in building the project's team. The ensuing 'Northern Puget Sound Derelict Gear Recovery Project' developed, tested and duly secured approval for new *recovery protocols*[6] for removing fishing gear from those cold, deep waters – safely and with regard for the surrounding habitats.

But first, they had to fix the law.

New Statute Adopted

In 2002, the Commission sponsored and shepherded Washington Senate Bill SB6313 through the state legislature, establishing a new legal framework that enabled actual gear recovery operations – and divers — to get into the water. The proposed revision to state law had three stated purposes:

> The legislature finds that fishing gear that is lost or abandoned may continue to catch marine organisms long after the gear is lost. ***The purpose of this act is to develop safe, effective methods to remove derelict fishing gear, eliminate regulatory barriers to gear removal, and discourage future losses of fishing gear.***[7]

The project's sponsors attacked the problem strategically, and removed the regulatory barriers, while ensuring that future recovery efforts would be safe, monitored and conducted in accord with the new protocols.

Reporting Gear Losses: The Commission was not interested in assessing blame. "The objective was removal of submerged gear and restoration of the affected marine habitats," explains Tom Cowan, the Commission's director, who used his savvy as an ex-legislative aide to guide the legislation. To that end, a remarkable new code section added "encouragement" to the loss-reporting issue, in lieu of penalties: a person who loses or abandons commercial fishing gear within the waters of the state is encouraged to report the location of the loss and the type of gear lost to the department within forty-eight hours of the loss.[8]

The 'encouragement' was not lip service: the Commission's program introduced *no-fault* to net recovery, and followed through by providing for a toll-free "1-800-Gear Hotline"[9] and an on-line reporting website for divers, fishermen, boaters, beach-goers and anyone involved with the marine environment to report sightings with ease - in the water or on shore.[10] (Recreational scuba divers are strongly cautioned in all program materials to avoid the gear because of the inherent dangers.)

Gear Location Database: A GIS database of reported gear has been built to map recovery sites, and help set priorities for removal efforts, based on threats to public safety and marine resources, hazards to navigation and other criteria. The gear locations are not made public.

Removal Guidelines: Another feature of the new statute required the state's Fish & Wildlife agency

Dive Team recovers a derelict net from Puget Sound
Photograph by Gary Wood

See Gear, page 20

Alaska, from page 1

In 1974, the Alaska Department of Fish and Game (Department) had initiated a research project at Tustumena Lake, which involved the release of sockeye salmon fry into the Lake. The project operated without permits issued by the Fish and Wildlife Service (FWS) as the project started before the designation of Tustumena Lake as a national wilderness. When ANILCA was passed, the Kenai Refuge Manager informed the Department that a permit would be required to continue. Because the purpose of the project was to study the effects of stocking on native fish and on the incidence of disease, the FWS issued the Department special permits on a yearly basis. In 1992, the Department requested that the stocking project be upgraded to an enhancement project for the primary benefit of the Cook Inlet fishing industry. The enhancement project was contracted out to the Cook Inlet Aquaculture Association (CIAA) due to a curtailing state budget. The CIAA continue to use the project to provide commercial fishermen with a steady supply of salmon.

Kenai Refuge Lakes
Courtesy of USFWS, Photograph by Spencer

Once CIAA was in control, the Wilderness Society questioned the purpose of the enhancement project especially since it utilized lake resources of the Kenai National Wildlife Refuge. The Wilderness Society filed suit claiming that the FWS's permit to CIAA violated the Wilderness Act on the grounds that the permit offended the Wilderness Act's mandate to preserve "natural conditions" that are part of the wilderness character of the area and that the enhancement project was an impermissible "commercial enterprise" within a designated wilderness area. The district court entered summary judgment for the FWS, "finding that the Enhancement Project [was] not a 'commercial enterprise' that Congress prohibited within the designated wilderness."[2]

Are Commercial Enterprises Prohibited?

In reviewing an agency action, the court must conduct a two-step analysis. First and foremost, if congressional intent has been manifested through the plain meaning of an act or statute, that intent should be enforced without question. If Congress' intent is clear, the agency must give effect to the stated intent of Congress. If Congressional intent is not clear, then the court must consider whether the agency's action is based upon a permissible interpretation of the statute.

The Court began its analysis with the Wilderness Act. Section 4(c) states that, "there shall be no commercial enterprise . . . within any wilderness area."[3] Because commercial enterprise is not defined in the Act, the court examined other sections of the Act to determine Congressional intent. Wilderness is partially defined as "an area where the earth and its community of life are untrammeled by man."[4] Also, the Wilderness Act's declaration of policy includes the goal of "protection of these areas" and "preservation of their wilderness character."[5] The Ninth Circuit found this language unambiguous enough to find clear congressional intent to preclude commercial enterprises in designated wilderness areas, regardless of the form of commercial activity. Thus, the FWS's decision regarding the enhancement project was not entitled to deference as it failed to give effect to the plain meaning of the statute.

Is the Enhancement Project a Commercial Enterprise?
The Ninth Circuit next examined whether the enhancement project was truly a commercial activity that should be banned under the Wilderness Act. To determine whether an activity is a "commercial enterprise," courts examine both its purpose and effect.[6] The CIAA and the FWS claimed the enhancement project was not a commercial enterprise because it was run by a non-profit organization and had previously been run and regulated by the State of Alaska itself. The court points out, however, that the non-profit CIAA is funded by for-profit organizations that directly benefit from the CIAA's fish stocking activities. Furthermore, prior state control of the project is irrelevant because state control was based on research activities, not the maintenance of fish supplies for commercial fishermen.

The court cited several documents in support of this conclusion, such as a report by the Kenai Refuge Manager explicitly stating the primary purpose of the enhancement activity as the increasing of salmon stock available to the commercial fishery. Then there was a FWS briefing statement that noted the CIAA's cost-recovery harvest should be considered a commercial fishing operation. The Ninth Circuit, noting that the commercial fishermen receive an additional $1.5 million in revenue from the project-produced fish, reached the conclusion that the purpose and effect of the enhancement project was commercial and prohibited it from the Refuge.

Conclusion
The Wilderness Society was entitled to summary judgement. The enhancement project's permit was revoked and continued operations were prohibited.

Endnotes
1. Luke is a second-year law student at the University of Mississippi School of Law.
2. *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1055 (9th Cir. 2003).
3. 16 U.S.C. § 1133(c) (2003).
4. *Id.* at § 1133(c).
5. *Id.* at § 1133(a).
6. *See Sierra Club v. Lyng*, 662 F.Supp. 40, 42-43 (D.D.C. 1987).

Mute Swan, from page 5

Conclusion
The district court ruled that FWS failed to meet NEPA and MBTA requirements in its issuance of a depredation permit to the state of Maryland for the taking of 525 mute swans. The Court preliminarily enjoined MDNR from further acting on its depredation permit. (At the press time, according to Dennis O'Brien, a reporter for *The Baltimore Sun*, nothing has happened since this decision.)

Endnotes
1. Shannon is a second-year law student at the University of Georgia School of Law in Athens, Georgia.
2. 16 U.S.C. § 703 (2003).
3. Agencies may determine that certain actions qualify for a "categorical exclusion" from the requirements of NEPA if they find that the actions do not individually or cumulatively have a significant effect on the human environment. *See* 40 C.F.R. § 1508.4; 40 C.F.R. § 1507.3 (2003).
4. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 215 (D.D.C. 2003).
5. *Id*. at 219.
6. *Id.*
7. *Town of Cave Creek, Arizona v. Fed'l Aviation Ass'n*, 325 F.3d 320, 327 (D.C. Cir. 2003); *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985).
8. *Norton*, 281 F. Supp. 2d at 235-26.
9. *Id.* at 227.
10. *Id.* at 234.
11. 50 C.F.R. § 13.12(a)(2); 50 C.F.R. §§ 21.41(b)(1)-(3) (2003).

Horseplay in Bar within "Zone of Special Danger"

Kalama Services, Inc., et al. v. Director, Office of Workers' Compensation Programs, 2004 U.S. App. LEXIS 565 (9th Cir. 2004).

Leah Huffstatler, 2L[1]

The United States Court of Appeals for the Ninth Circuit recently reviewed an administrative decision which compensated an off-duty employee for injuries suffered during horseplay in a bar on a small Pacific atoll. Holding that the injuries arose out of a "zone of special danger" created by the isolation of the island and the limited recreational opportunities available there, the court found the injuries were foreseeable and the workers' compensation benefits were just.

Aerial view of Johnston Atoll
Courtesy of USFWS, Photograph by Gerald Ludwig

Facts

Michael Ilaszczat was an employee of Kalama Services on Johnston Atoll, a United States possession located in the Pacific Ocean about 700 miles west-southwest of Hawaii. The atoll is only two miles long and one-half mile wide and is used by the U.S. military to store and dispose of chemical, nuclear and other toxic weapons. Due to the isolated nature of the island and its military use, certain standards of conduct govern inhabitants of the atoll at all times, including prohibitions of gambling and fighting.

On July 25, 1999, Ilaszczat was off-duty and socializing at the AMVETS, one of several authorized social clubs on the atoll when he sustained an injury to his hip which caused him to be permanently partially disabled. While the injury itself is undisputed, there are conflicting accounts of how it occurred. According to Ilaszczat, after a discussion with Private Clyde Burum regarding whether or not Burum could put his leg over the six-foot tall Ilaszczat's head without touching him, the two men agreed to a $100 wager on the demonstration. Burum, in fact, could not perform this act and Ilaszczat walked away only to fall to the floor after either having his foot swept out from under him or being kicked.

Burum's account differed in that he claimed Ilaszczat sustained his injury when he charged at Burum immediately after the demonstration, lost his balance and then fell to the ground. The administrative law judge deciding the claim found Ilaszczat's version of the story to be more credible.

As a result of his fall, Ilaszczat broke his hip, was hospitalized and underwent surgery. While recovering from the surgery, he was barred from Johnston Atoll by the military commander and prohibited from ever returning as a result of the physical altercation that took place at the AMVETS. Since he could not return to the island, Kalama Services terminated his employment.

Ilaszczat filed a claim for worker's compensation benefits under the Longshore and

Harbor Workers' Compensation Act. At trial, the judge found that Ilaszczat had established a sufficient nexus between his injury and his employment under the "zone of special danger" doctrine to be awarded disability benefits. The decision was affirmed by the Benefits Review Board and Kalama sought a petition for review from the Ninth Circuit.

Holding and Conclusion

The Ninth Circuit held that the Benefits Review Board committed no error in affirming the administrative law judge's decision.[2] The court agreed that the "zone of special danger" - the limited recreational opportunities of the small atoll coupled with the presence of social clubs serving alcohol to employees experiencing lengthy periods of isolation — creates a foreseeable risk that horseplay might occur from time to time and that this risk is incident to one's employment on the atoll.[3]

Endnotes

1. Leah is a second-year law student at the University of Mississippi School of Law.
2. *Kalama Services, Inc., et al. v. Director, Office of Workers' Compensation Programs,* 2004 U.S. App. LEXIS 565 at *15 (9th Cir. 2004).
3. *Id.*

Georgia, from page 7

Condemnation of specific rivers that clearly support recreational boating for most of the year would alleviate the problem of opening up rivers with too low of a flow rate to support recreational boating.

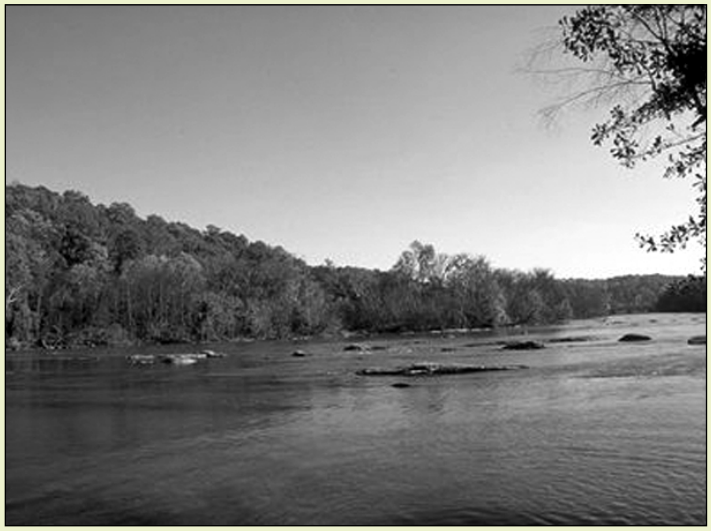
Further measures could be instated to ensure that boaters only had access to appropriate waterways. Classifications by depth and width of the waterway as well as cubic feet per second flow could control which rivers were open to boaters. Also, distinctions could be made regarding non-impacting uses versus impacting uses. Non-impact uses would include recreational boating and possibly catch and release fishing. Impacting uses would include non-catch and release fishing, commercial activities, and other activities that would deplete the resources of the waterway.

Recreational boaters should be allowed down non-navigable rivers because the rivers are an important natural resource that should be available to the public, not just the adjacent land owners. The owners of the adjacent land do not actually own the water in the river, they own the bed of the stream. This ownership should not be enough to preclude boaters from passing over the streambed any more than airplanes should be barred from passing over private land.

The idea that property rights are absolute is obsolete. The laws of our state regarding public rights to rivers are based on common law from two centuries ago as well as the archaic views of feudal property. It is clear that the interests that need to be protected have changed. In order to better serve the citizens of the State of Georgia, the legislature should amend its laws regarding non-navigable rivers in order to unlock the natural resources that the citizens of Georgia value and have a right to use.

Endnotes

1. GA. CODE ANN. § 44-8-2 (2003).
2. *Id.* at § 44-8-5(a).
3. *Givens*, 493 S.E. 2d at 712.

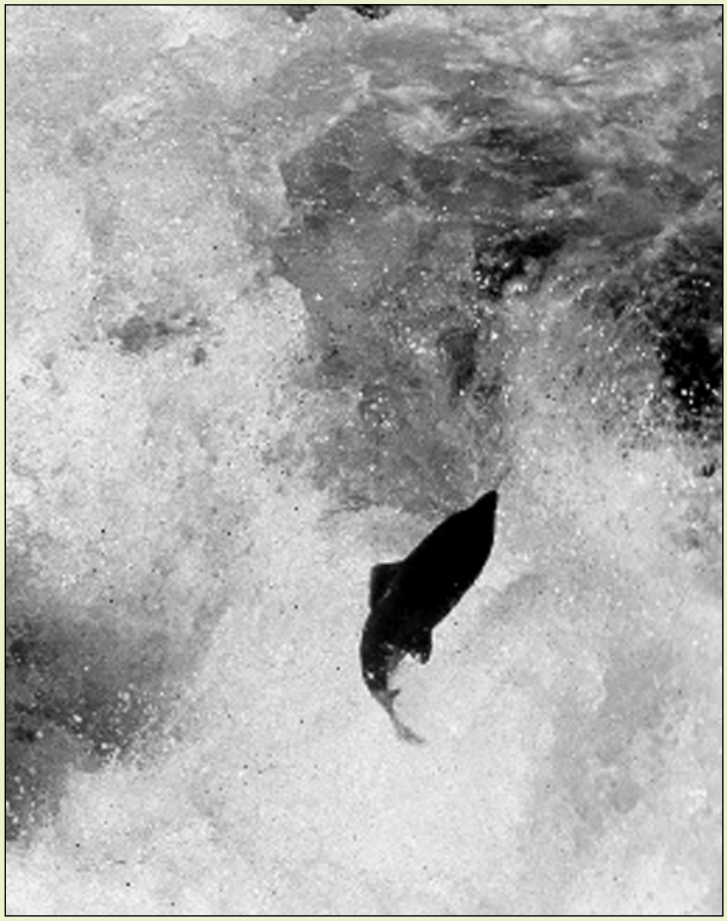


Chattahoochee River
Courtesy of the National Park Service

Tulare Lake, from page 1

operated by the federal government through the Bureau of Reclamation (Bureau), and the State Water Project (SWP), operated by the State of California via the state Department of Water Resources (Department). Both projects draw water from the Sacramento-San Joaquin Delta (Delta) and deliver it to water users on a contract basis.

Due to rising concerns over increasing levels of fish kills in the CVP and SWP pumping stations in the late 1980s, the National Marine Fisheries Services (NMFS)initiated an Endangered Species Act (ESA) consultation with the Bureau and the Department in 1991. On February 3, 1992, the Bureau closed the Delta Cross Channel gates, the gates which divert the water from the Sacramento River toward the pumping stations, to protect the out-migration of the juvenile salmon. A Biological Opinion (BO) issued by NMFS on February 14, 1992 formally recommended that the gates remain closed. Fish kills continued to increase and in May 1993, the U.S. Fish and Wildlife Service (FWS) issued another BO instructing the SWP pumping plant to reduce pumping "when large numbers of larval and juvenile delta smelt appear at the Federal and State fish screens."[2]



Salmon jumping
Courtesy of USFWS, Photograph by Gary Kramer

Tulare Lake Basin Water Storage District, Kern County Water Agency, Hansen Ranches, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Storage District (Plaintiffs) were entitled to two categories of water under their contracts with the Bureau and the Department. The plaintiffs were entitled to an annual entitlement, called "Table A water," and, when available, Article 21 water. Article 21 water is basically surplus water - "water in excess of the amount required to meet the needs of the water project."[3] Due to the pumping curtailments imposed by the federal agencies, the plaintiffs were deprived of water deliveries required under their contracts.

The plaintiffs filed suit under the Fifth Amendment, arguing that the government took their property without compensation. In 2001, the Court agreed, holding that while the federal government could reduce water deliveries to protect endangered species, water users were entitled to compensation for any water lost under their contracts. A separate trial was scheduled regarding damages, in which the plaintiffs sought compensation in the amount of $65,697,866.

Amount of Water Lost

Before the court could determine the total amount of water lost, it had to establish when the governmental takings commenced. The plaintiffs argued that the federal government's liability attached on February 3, 1992, the day the Delta Cross Channel gates were closed. The court disagreed. Prior to the issuance of the first BO on February 14, 1992, the Department's role was voluntary. While the court recognized that the gates were closed in anticipation of a federal directive, the gate closure on February 3 was not actually compelled by a federal mandate pursuant to the ESA. Therefore, the 23,251 acre-

feet of water lost before the February 14, 1992 BO was not the subject of a Fifth Amendment taking.

The February BO, however, was sufficient to confer liability on the United States. Although the BO did not explicitly mandate a gate closure, one of NMFS' reasonable and prudent alternatives recommended that the Delta Cross Channel gates remain in the closed position from February 1 through May 1. This recommendation was essentially an endorsement of the actions taken by the Bureau and the Department. While the federal government is not responsible for actions taken by states on their own accord, it cannot "avoid responsibility for measures that, though initially implemented by the state, are nonetheless subsequently incorporated into the federal government's ecological and hydrological regime."[4]

Beginning in April 1992, therefore, any losses of contractual water deliveries were compensable. The court determined that the plaintiffs lost 114,635 acre-feet of Table A water in April 1992 and 120,892 acre-feet in 1994. The court also determined that the plaintiffs lost an additional 34,400 acre-feet of Article 21 water in 1993 and 59,967 acre-feet in 1994. In general, the "surplus" Article 21 water is allocated to contractors when (1) the San Luis Reservoir is full, (2) the contractor's Table A allocations are otherwise being met, and (3) sufficient water exists to meet state water quality standards.[5] The court found that these conditions were met in 1993 and in early 1994. Absent the pumping curtailments imposed under the ESA, the plaintiffs would have received Article 21 water in 1993 and 1994.

Value of the Water Taken

The plaintiffs were entitled to the fair market value (FMV) of the water lost. The court ruled that the FMV of the Table A water should be calculated based upon the prices of the Drought Water Bank during the years in question. The Drought Water Bank is a program established by the Governor of California and administered by the Department which obtains water from sellers north of the Delta for sale to water users in the south. The court held that the prices charged by the Drought Water Bank "reflected the going rate for water purchases at the relevant times."[6] The FMV of the Table A water, and therefore the value of plaintiff's property interest, was $68.38 per acre-foot for 1992 and $66.34 per acre-foot for 1994.

The calculation of the value of Article 21 water was not so straightforward. Article 21 water allocations are only available during wet years or years in which the supply of water is greater than the demand. During such periods the Drought Water Bank, the best indicator of market value according to the court, is not in operation. The court, therefore, settled on the reasonable profit margin a seller could expect to realize on a sale as the proper value of the Article 21 water. The court endorsed the government's expert's calculations, based on a comparable sale of water by SWP, which identified a reasonable profit margin of $3 per acre-foot.

Final Calculations

	Yr.	Amt.	FMV	Total
Table A Water	1992	82,075	$68.38	$5,612,288.50
	1994	120,892	$66.34	$8,019,975.28
Article 21 Water	1993	34,400	$ 3.00	$ 103,200.00
	1994	59,967	$ 3.00	$ 179,901.00
TOTAL				$13,915,364.78

Conclusion

The Federal Court of Claims determined that the water contractors in California, who had been deprived of their property due to governmental regulation under the ESA, were entitled to over $14 million in compensation from the federal government.

Endnotes

1. For an in-depth analysis of this decision, *see* Roy A. Nowell, Jr., *Government Must Compensate for Water-Use Restrictions*, WATER LOG 21:2, 4-5 (2001) available at http://www.olemiss.edu/orgs/SGLC/21.2wateruse.htm
2. *Tulare Lake Basin Water Storage District v. U.S.*, 59 Fed. Cl. 246, 249-50 (2003).
3. *Id.* at 248.
4. *Id.* at 255.
5. *Id.* at 256.
6. *Id*. at 263.

Gear, from page 13

to draft removal protocols, in consultation with the Commission and other experts: "The Department of Fish and Wildlife, Northwest Straits Commission, the Department of Natural Resources, and other interested parties, ***must publish guidelines for the safe removal and disposal of derelict fishing gear*** . . . by August 31, 2002."[11]

More importantly the statute provided that, "derelict fishing gear removal conducted in accordance with the guidelines prepared in subsection (2) of this section ***is not subject to permitting*** under RCW 77.55.100."[12]

The way was clear: the self-imposed barriers to a real recovery effort were soon replaced with a practical, safe methodology for accomplishing the work. A technical team of experts representing a variety of state and federal agencies, divers, private individuals and tribal interests was convened and drafted guidelines for the safe removal and disposal of derelict fishing gear. They were tested in the water and modified, then made official and published. Throughout this technical process, the Commission kept legislators, state agency heads, and the fourth estate involved: ultimately a 'VIP Vessel' filled with such luminaries attended the first official net recovery, which was carried on National Public Radio and made national news.

Since that start, commercial divers and vessels trained in the new protocols – exempted from permitting delays – have been at work. They analyze hazards with sidescan sonar and videography to reduce risks, then divers physically remove the gear from the waters of the Northwest Straits, under surface gases.

During the first year of the pilot effort fourteen state and federal agencies and other organizations partnered onto the project. In September of 2003, the project participants were awarded the prestigious *2003 Coastal America Partnership Award*.[13] The Governor has even visited the team at work, and the budget for gear removal has tripled, thanks to those additional sponsors.

They will need it; that new project database now contains over 160 locations of known derelict nets in Puget Sound.

Endnotes

1. Monofilament lasts up to 500 years. Chas. Moore, *Trashed*, NATURAL HISTORY, v.112, n. 9 (Nov. 2003).
2. The term 'ghost nets' is objectionable to many fishermen, and this project avoids its use in program materials.
3. ESA listing: 50 CFR parts 223, 224; 64 Fed. Reg. 14327 (March 8, 1999).
4. Title IV, H.R. 3461 (105th Cong., 2nd Sess.).
5. Grant award: NOAA/NMFS CRP Grant.
6. The Guidelines can be downloaded at http://www.nwstraits.org/derelict_gear .
7. WASH. REV. CODE § 77.55 (emphasis added).
8. *Id*. at § 77.12(2).
9. Reporting Hotline: 1-800-477-6224.
10. Report online: www.wdfw.wa.gov/fish/derelict/ .
11. WASH. REV. CODE § 77.12 (2) (emphasis added).
12. *Id.* at § 77.12(3) (emphasis added).
13. The award announcement can be viewed at www.coastalamerica.gov/text/awards .

Lobster, from page 11

Conclusion

An agency's obligation, pursuant to National Standard 8 and the RFA, is merely to make a reasonable good faith effort to address comments and alternatives provided by affected parties. It is not required to assess every element of a plan separately. Additionally, the consultation requirement of the Atlantic Coastal Act was seemingly qualified by "unless there is no reason to think that consultation would have produced a different result."[6]

Endnotes

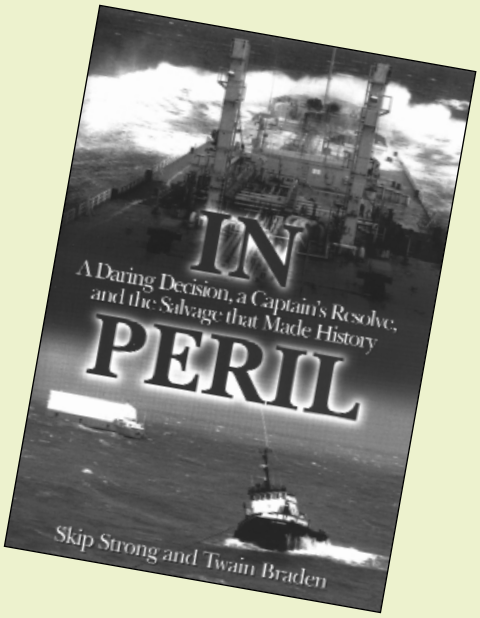
1. Terrell is a student at Roger Williams School of Law in Bristol, Rhode Island, and is pursuing a Masters in Marine Affairs at the University of Rhode Island.
2. *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 468 (1st Cir. 2003).
3. 16 U.S.C. § 1851(a)(2) (2000).
4. *Id.* at § 1851(a)(4).
5. *Id.* at § 1851(a)(8).
6. *Little Bay*, 352 F.3d at 468.

Book Review . . .

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

In Peril: A Daring Decision, a Captain's Resolve, and the Salvage that Made History

Skip Strong and Twain Braden (Lyons Press 2003)



In November 1994, Tropical Storm Gordon stalled over the Florida Keys, wreaking havoc on land and at sea. On the evening of November 14, the tug *J.A. Orgeron*, adrift near Bethel Shoal near Fort Pierce, Florida after experiencing engine problems, signaled the Coast Guard for assistance. When Skip Strong, captain of the 688-foot oil-tanker *Cherry Valley*, answered the Orgeron's distress call he had no way of knowing that he was about to make maritime salvage history by saving the $50 million external fuel tank of the space shuttle *Atlantis*.

The story behind the rescue of the *J.A. Orgeron* and the barge *Poseidon*, which carried NASA's external fuel tank, and the subsequent salvage claim by the owner and crew of the *Cherry Valley* springs to life in the capable hands of Skip Strong and Twain Braden. Unfortunately, after catching the reader's attention quickly with a tense pre-trial scene, the first fifty pages of *In Peril* bogs down with an extraordinary amount of space devoted to the construction of the external fuel tank and the logistics of towing it from Louisiana to Cape Canaveral, which did not seem all that relevant to the rescue itself. *In Peril*, however, regains its momentum in Part II and quickly carries the reader along to its historic conclusion.

Although the authors assume a high level of familiarity with nautical terms and references, *In Peril*, with its simple style and attention to detail, places the reader right in the middle of the action. The engineers on the *Cherry Valley* operate at a frantic pace, the third mate is stationed in the chartroom ensuring that the *Cherry Valley* does not run aground on Bethel Shoal, and the captains of the *Cherry Valley* and the *J.A. Orgeron* attempt to attach lines without endangering their vessels and men while struggling with the darkness, wind, and waves.

The story of the rescue is exciting enough, but the events that take place once the vessels are safe and the attorneys get involved are fascinating. Keystone Shipping Company sought salvage rights from the owner of the *J.A. Orgeron* and NASA. Despite the fact that the crew of the *Cherry Valley* saved NASA upwards of $50 million, the federal government vigorously fought the salvage award. In the end, the Fifth Circuit Court of Appeals awarded Keystone $4.125 million – the largest maritime salvage award in U.S. history. The crew received $1,752,642, what remained after paying interest, costs, and Keystone's 63 percent share.

In Peril contains eight pages of photographs, illustrations, and maps, including nautical charts identifying the position of the *Cherry Valley* and the *Orgeron* during the rescue and tow. One page of diagrams detailing the actual rescue is especially helpful for landlubbers unable to visualize the rescue maneuvers from words alone. Thoroughly enjoyable, *In Peril* is an excellent selection for adrenaline junkies, history buffs, maritime lawyers, and for anyone curious about what really goes on during daring sea rescues.

Book Review . . .

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

Coastal State Regulation of International Shipping

Lindy S. Johnson (Oceana 2004)

Photo courtesy of NOAA's Alaska Fisheries Science Center

International shipping poses a significant risk to the world's oceans and its resources. Think *Exxon Valdez* or the *Prestige*. Recognizing this threat, the International Maritime Organization (IMO) and its member states have over the years adopted conventions to protect the marine environment, most recently with regard to invasive species and ballast water. While these international guidelines are extremely important, some environmental problems cry out for a local solution. In *Coastal State Regulation of International Shipping*, Lindy Johnson examines the conflicts that arise under the 1982 U.N. Law of the Sea Convention (UNCLOS) between a coastal state's interest in regulating navigation to prevent harm to marine resources and the interest of the shipping industry in remaining free from burdensome regulations.

The authority of a coastal state to prescribe and enforce laws varies among maritime zones. Johnson discusses the options available to coastal states within the maritime zones of the port, the territorial sea, the contiguous zone, and the exclusive economic zone. In general, coastal state authority diminishes as a ship moves away from the coast. For example, a coastal state may take action within its territorial sea to protect its vital interest of sovereignty and security, but states only have sovereign rights in the EEZ for the purposes of exploring, exploiting, conserving, and managing EEZ resources and the economic exploitation and exploration of the EEZ. To illustrate the challenges of prescribing and enforcing domestic laws, as opposed to international rules and standards, Johnson highlights recent actions taken by coastal states, such as the United States and Canada, to address ship strikes of right whales, the unwanted transfer of harmful aquatic organisms through ballast water discharges, and waste water discharges from cruise ships. Johnston also presents case studies of the adoption of a no-anchoring prohibition for Flower Garden Banks National Marine Sanctuary and the single-hull tanker restrictions issued in the wake of the *Prestige* oil spill.

Coastal State Regulation is not written for a general audience nor is it an introductory text on the Law of the Sea or IMO regulation of international shipping. Readers unfamiliar with UNCLOS may have a difficult time grasping many aspects of Johnson's analysis. *Coastal State Regulation* is a text for scholars, attorneys, and other professionals involved with international shipping and environmental policy. Johnson clearly identifies issues that coastal states and policy-makers must be aware of when attempting to regulate international shipping for environment reasons, such as impacts on navigation and enforcement capabilities, and offers several recommendations. In addition, *Coastal State Regulation's* annexes contain essential reference material, including the text of pertinent UNCLOS articles, a chronological list of ratifications and accessions, and excerpts of declarations made by states pertaining to the protection of the marine environment and navigation. *Coastal State Regulation* is a valuable addition to the field.

Coastal State Regulation is the result of Johnson's experience as an attorney with NOAA General Counsel's Office of International Law. She is primarily responsible for land- and sea-based sources of marine pollution, marine protected areas, and ship strikes of right whales. The views expressed, however, are those of the author and do no necessarily represent the views of the U.S. Government, the Department of Commerce, and NOAA. *Coastal State Regulation* is available from Oceana Publications at http://www.oceanalaw.com .

Coast to Coast
And Everything In-Between

The California Court of Appeals recently blocked an attempt by the fishing industry to re-open the no-fishing zones around the Channel Islands. The 175-square mile network of marine reserves was created in 2002 to allow endangered white abalone and other species to recover from years of overfishing. The industry argued that they "have an absolute right to fish" in public waters. The court ruled that fishermen have no constitutional right to destroy or deplete fish in a preserve or marine sanctuary.

Have you always wanted to fish for salmon in Alaska, but shied away because you were too busy to spend a whole season on a commercial boat? Now may be your chance. A bill has been introduced in Alaska that would allow tourists to purchase a one-day commercial fishing license for $30. This idea, similar to "dude" ranching, would allow commercial fishermen to provide tourists with a hands-on experience. While tourists are currently allowed on commercial boats, they may not participate unless they purchase a crew license costing $60 for residents and $180 for non-residents. The only question remains, if the bill passes, will rugged commercial fishermen actually allow tourists on their boats?

Catching a Chinook Salmon in Alaska
Courtesy of USFWS
Photograph by Jo Keller

Around the Globe

In February, the International Maritime Organization adopted the "International Convention for the Control and Management of Ships' Ballast Water and Sediments" to address and hopefully prevent the spread of harmful aquatic organisms via ballast water. The Convention requires all ships to prepare and implement a Ballast Water and Sediment Management Plan and carry a Ballast Water Record Book. There are also requirements for research and monitoring and certification and inspection. The mandatory regulations will be phased in over a period of years, starting in 2009. The Conference was attended by representatives from 74 states and the Convention will come into force 12 months after ratification by 30 states representing 35 percent of world merchant shipping tonnage. For more information, visit the IMO's website at http://www.imo.org .

Boarding the Volga
Courtesy of the Australian Royal Navy

On March 12, 2004, an Australian Federal Court judge ruled that the seizure of a vessel illegally fishing in the Southern Ocean was lawful. The owners of the *Volga*, a Russian-flagged ship confiscated in February 2002 for illegally fishing for Patagonian toothfish, had appealed the seizure of the vessel. Australia's Fisheries Minister praised the decision as signaling support for the government's position that a foreign-flagged vessel, its equipment, and catch are automatically forfeit if the vessel is sighted illegally fishing in Australian waters. Supporters hope this ruling will help curb poaching, especially in the Antarctic.

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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