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Court Grants Stay of Injunction in Navy Sonar Case

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Hawaii DOT Must Prepare an EA for Superferry

Sierra Club v. DOT, 167 P.3d 292 (Haw. 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

The Supreme Court of Hawaii has concluded that the Hawaii Department of Transportation (DOT) must prepare an environmental assessment (EA) for the Hawaii Superferry project.

Background

The Hawaii Superferry project is an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i, and Hawai'i that utilizes harbor facilities on each island. Hawaii Superferry, Inc. proposed to develop and operate the service, which would include two ferries capable of carrying up to 866 passengers and 282 cars per trip. The state and Hawaii Superferry negotiated the details of the project and DOT concluded that several improvements to Kahului Harbor were necessary to accommodate the project. These improvements included the construction of a removable barge configured with a removable ramp, operational support with utility services, security fencing, pavement striping, the placement of boarding gangway ramps, and installation of tents at inspection points or customer waiting areas.

DOT prepared a draft EA, but did not reference the needed improvements. DOT later determined that the property "will have minimal or no significant effect on the environment and is therefore exempt from the preparation of an EA."[1] The plaintiffs, environmental organizations Sierra Club, Maui Tomorrow, and the Kahului Harbor Coalition, challenged DOT's determination that the improvements to the harbor were exempt from the requirements of the Hawaii Environmental Protection Act (HEPA) and the preparation of an EA. DOT and Superferry filed a motion to dismiss or alternatively for summary judgment. The circuit court ruled that the plaintiffs lacked standing and ruled in favor of DOT and Superferry. The plaintiffs appealed these holdings to the Supreme Court of Hawaii.

Agency Analysis

HEPA requires that EAs and environmental impact statements (EIS) be prepared for certain development projects. The law also assures the public the right to participate in planning projects that may affect the community. Compliance with HEPA involves several steps. First, it must be determined whether a project or program is subject to the environmental review process. If the project is exempt, then the process stagnates. The Environmental Council determines the procedures for certain actions that will probably have "minimal or no significant effects on the environment" and that will be declared exempt from the preparation of an assessment.[2] When no exemption applies and the project is subject to environmental review, then a draft EA must be prepared.

An EA is an informational document prepared by the agency proposing the action to evaluate the possible environmental effects of a proposed action. Once completed, the public has thirty days to review and comment on the EA. After this, the agency reviews the final EA to determine if any "significant" environmental

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impacts are likely. If not, the agency issues a finding of no significant impact (FONSI), which allows the project to proceed. If so, the agency must prepare a more detailed EIS. The public process is repeated and the governor or mayor, depending on the agency, must approve the final EIS. After this, the action may be implemented. HEPA provides for judicial review when no EA is prepared, when an agency determines that an EIS will or will not be required, and when an EIS is accepted.

The court must determine whether the agency's factual determinations were clearly erroneous and whether it otherwise complied with HEPA and its implementing regulations, as a matter of law. Likewise, exemption determinations should be reviewed as a matter of law.

The organizations contended that they had standing in this case based on two grounds: traditional injury in fact and procedural standing. The court found that the plaintiff could sue on either basis. Standing is a determination of whether the parties have the right to bring suit. The court utilized a three-part standing test: 1) has the plaintiff suffered an actual or threatened injury; 2) is the injury fairly traceable to the defendant's actions; and 3) would a favorable decision likely provide relief for plaintiff's injury. The test has been relaxed for environmental cases. The plaintiff must prove 1) injury in fact; 2) economic harm including aesthetic and environmental well-being as interests deserving of protection; and 3) an individual's injury is not much different from that of a public injury. The "procedural standing doctrine is a means of accommodating the standing inquiry to special circumstances created by injuries to statutory procedural rights."[3]

The court concluded that there is procedural standing for members of the public under HEPA because it is a procedural statute that accords procedural rights. The court held that the threatened injury in fact was due to DOT's decision to bypass conducting an EA and that the procedural injury was due to violations of their procedural rights under HEPA. The appellants also demonstrated that the injuries were caused by

DOT and Superferry and that they may be addressed by the court.

DOT and Superferry also contested whether the organizations had standing to bring a claim against them on behalf of individual members. The court stated that an organization may sue on behalf of its members when 1) its members would otherwise have standing to sue on their own; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The parties contested the last requirement. Normally, individual participation is required where the plaintiffs request money damages or where there are conflicts of interests between members. Since neither of those situations applies in this case, the court concluded that the organizations had standing to file suit on behalf of its members.

Photograph of Hawaii courtesy of ©Nova Development Corp.

Having established standing, the appellants argued that DOT's exemption determinations were in violation of the law for several reasons. The court characterized the issue as "whether DOT was correct to analyze only the harbor improvements in making its exemption determination, or was also required to consider the potential environmental impacts caused by the Hawaii Superferry project."[4] The court stated that an agency must first determine whether the project meets the definition of exempt action which is a minor project that will probably have minimal or no significant effects on the environment. The court concluded that the Superferry project was not such an action because DOT's exemption determination did not consider the secondary impacts that could result from the use of the Superferry on the Kahului Harbor or whether the Superferry operations would have any significant effects on the environment. As a result, the court concluded that DOT's determination that the improvements to Kahului Harbor were exempt from the requirements of HEPA were erroneous as a matter of law. The court vacated the circuit court's judgment, entered a summary judgment on behalf of the appellants, ordered DOT to conduct an EA before the project could proceed, and remanded on other issues.

Conclusion

The court held that the appellant organizations had standing to sue based on traditional standing and procedural standing tests. The court also held that the appellants had organizational standing to sue on behalf of their individual members. The court agreed with the appellants that DOT had erroneously declared the Hawaii Superferry project an exempt action thereby exempting it from HEPA requirements. The court entered judgment on behalf of the appellants and ordered DOT to conduct an EA on the entire Superferry project before it could continue operating and the necessary improvements could be made.

Since the Supreme Court of Hawaii entered this judgment in favor of the appellants, the Hawaii legislature has approved a bill allowing the Hawaii Superferry to resume operation. The new legislation, supported by Governor Linda Lingle, allows the ferry to make its Oahu-to-Maui and Oahu-to-Kauai voyages while the environmental assessment is being conducted.[5]

Endnotes

1. *Sierra Club v. DOT*, 167 P.3d 292, 310 (Haw. 2007).
2. *Id.* at 300.
3. *Id.* at 318.
4. *Id.* at 329.
5. Christopher Pala, Legislature Clears Way for Hawaii Ferry, N.Y. Times, Oct. 31, 2007.

Court Grants Stay of Injunction in Navy Sonar Case

***Natural Resources Defense Council v. Winter*, 2007 WL 3377229 (9th Cir. Nov. 13, 2007).**

Alicia Schaffer, 2L, Roger Williams University School of Law

The views expressed herein are those of the author and do not necessarily reflect the views of the Sea Grant Law Center, NOAA, or any of its sub agencies.

Since the 1960s, marine mammal stranding events have been documented. There has been evidence that these events have been linked to underwater sonar testing. The first major stranding event to be recorded was in the Bahamas in March 2000. This event coincided with the Navy's use of mid-frequency sonar in the area at the time.[1] Even more recently, thirty-seven whales were stranded off the coast of North Carolina where Naval use of sonar was identified as the probable cause.[2]

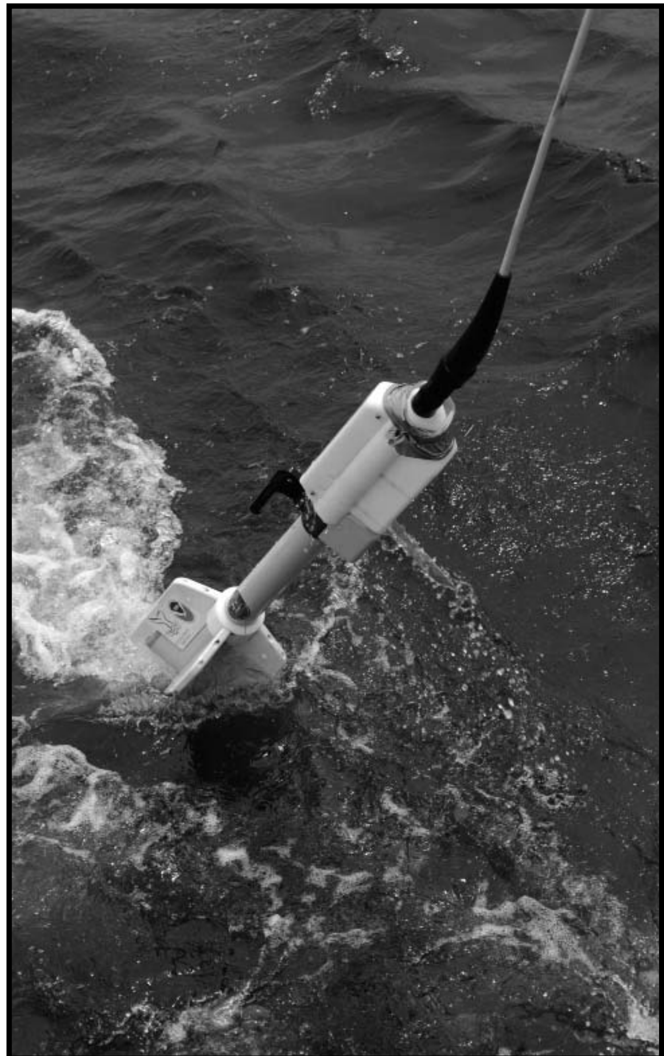
The National Resources Defense Council (NRDC), bolstered by its success in a previous suit against the Navy's use of low-frequency sonar, recently filed suit against the Navy once again for its use of mid-frequency sonar.[3] The ensuing battle between the Navy and the NRDC is based on the Navy's plan to use mid-frequency sonar in fourteen large-scale training exercises off the coast of Southern California between February 2007 and January 2009.[4] The Navy's Environmental Assessment states that the exercises will result in an estimated 170,000 "takes," which can include the harassment, harm, and killing of these creatures.[5]

In this case, the NRDC filed for an injunction to prohibit the Navy's use of sonar. In August 2007, the U.S. District Court for the Central District of California granted an injunction; however, less than a month later, the Ninth Circuit Court of Appeals reversed this decision and stayed the injunction. In November 2007, the Ninth Circuit Court of Appeals, upon hearing the case, reinstated the blanket injunction on sonar testing until the Navy adheres to the mitigating factors prescribed by the district court. As a result, marine mammals have been spared from the full exposure of the Navy's sonar use.

Background

Navy sonar, though not the only cause of noise pollution in the water, is a major one. Mid-frequency sonar is emitted into the water column at a pressure of 235+ decibels for about 0.5 – 2 seconds repeated every 28 seconds.[6] The Navy's Environmental Assessment defines its use of

Photograph of sonar equipment courtesy of the U.S. Navy.



mid-frequency sonar as "Level B" harassment which means that the marine mammals will be "subjected to sound levels of between 170 and 195 decibels."[7] However, the intensity of Level B harassment is difficult to predict given the only comparative test at levels of 235 decibels and greater. The Occupational Safety and Health Administration (OSHA) requires hearing protection to be used where workers are exposed to sounds at "90dB for eight hours or 110dB for as little as thirty minutes."[8] Given that the sound of a rocket taking off is 235 decibels, it is not unreasonable to assume that the use of mid-frequency sonar is potentially disruptive to marine mammals' health and way of life.[9]

Scientists have been looking for a definite link between strandings and sonar. One group of scientists, for example, cited a correlation between low-frequency sonar testing and one major stranding event.[10] These mass-stranding events are just one of the many alleged effects that sonar has had on marine mammals, others include: embolisms, gross damage to the auditory system, hearing loss, interruption in feeding, breeding and nursing, displacement from habitat, and degradation of habitat.[11] Prior to the NRDC litigation, the Navy had been employing mitigation measures to prevent such effects; however, it recently eliminated many of these practices. The district court references the abandonment of such measures as "power-downs" in conditions where sound travels greater distances, within the "twelve nautical mile coastal buffer zone," and "protection measures" during checkpoint exercises.[12]

The Ninth Circuit's Decisions

In August 2007, the Ninth Circuit Court of Appeals took a look at the balance of harms between the two parties when deciding whether to sustain the lower court's injunction in favor of the NRDC. The court concluded that the district court did not properly balance the harms because it failed to give proper consideration to the public interest.[13] The Ninth Circuit suggested that national defense could be a higher priority than the safety of whales. Specifically, the court stated "[t]he public does indeed have a very considerable interest in preserving our natural environment and especially relatively scarce whales. But it also has an interest in national defense…The safety of the whales must be weighed, and so much the safety of our warriors. And of our country."[14]

Furthermore, the court stated that this is an issue where deference should be given, because it is a matter of national security.[15] The majority sided with the Navy based on the premise that there is no other feasible place that this testing could be done, because there is nothing on the record that would suggest a feasible alternative at this time.[16] However, both the majority and the dissent urged the expedient resolution to this case in order to "eliminate a great deal of risk to both our country and to marine wildlife."[17] This goal of eliminating risk to national security and wildlife was evident when the Ninth Circuit handed down its decision on November 13, 2007. The decision enjoins the Navy from continuing with its training exercises unless it adheres to the mitigation measures ordered by the district court. However, if the district court fails to order these measures the stay of the injunction can become effective once again.[18]

Conclusion

The issue can be reduced simply: national security versus the environment. The U.S. Navy touts its commitment to "maintaining the balance between defending freedom and remaining good stewards of the environment" but is resistant to implementing measures that would significantly mitigate the harm caused by its actions.[19] The courts are tacitly allowing the Navy to fulfill its role as *both* steward and defender. The Navy has spent millions of dollars in research on this issue and can point to measures taken to help the animals; hopefully, this, in addition to the court-imposed mitigation measures, means that marine mammals will not suffer the consequences when testing resumes.

Looking to the future, there is a prospect of more litigation if the Navy does not use mitigation measures. The Navy has set its sights on a testing ground near the coast of North Carolina, already the site of a stranding event of thirty-seven whales linked to Naval activity. Suspicion

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arose because of the proximity of the stranding, both spatially and temporally, to the naval testing and the absence of other factors that could have caused it.[20] Hopefully the Navy will learn from the past two lawsuits and implement mitigation measures that are applicable to this area from the start instead of burdening the courts with yet another suit.

Update

On remand, the United States District Court for the Central District of California issued an order limiting the Navy's sonar training exercises off the coast of Southern California. The order limits the use of medium-range sonar to an area beyond 12 nautical miles from shore and requires monitoring to detect the presence of marine mammals before and during the exercises.

Endnotes

1. Jasny, Michael, et al. Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life. Natural Resources Defense Council. Nov. 2005. http://www.nrdc.org/wildlife/ marine/ sound/ sound.pdf . pg. 8-9.
2. NRDC Press Release: Government Report on Mass Whale Stranding in N.C. Identifies Naval Sonar as Possible Cause. March 29, 2006. http://www.nrdc.org/media/press-releases/060329a.asp .
3. NRDC: Protecting Whales from Dangerous Sonar. www.nrdc.org/wildlife/marine/sonar.asp .
4. *Natural Resources Defense Council, Inc. v. Winter*. Unreported in F.Supp.2d, at 1. 2007 WL 2481037 (C.D.Cal., August 7, 2007).
5. *Id*.
6. Jasny, *supra* note 1, pg. 3.
7. *NRDC*, 2007 WL 2481037 at *1.
8. *Id*.
9. *Ocean Noise Affects Marine Life*, ENVIRONMENT, 44 (5):4 (2002).
10. A. Frantzis, *Does Acoustic Testing Strand Whales?* NATURE, 392, (6671):29 (1998).
11. Jasny, *supra* note 1, pg. 7.
12. *NRDC*, 2007 WL 2481037.
13. *Natural Resources Defense Council v. Winter*. 502 F.3d 859, 863 (9th Cir. Aug. 31, 2007).
14. *Id*. at 863-864.
15. *Id*. at 862.
16. *Id*. at 864.
17. *Id*. at 865.
18. *Natural Resources Defense Council v. Winter*. 2007 WL 3377229 at *4-5 (9th Cir. Nov. 13, 2007).
19. U.S. Navy Website: Whales and Sonar. http://www.whalesandsonar.navy.mil/index.htm .
20. NRDC Press Release, *supra* note 2.

Photograph of whale fluke courtesy of NOAA.

Eleventh Circuit Uses "Significant Nexus" Test

United States v. Robison, 2007 U.S. App. LEXIS 24825 (11th Cir. Oct. 24, 2007).

Terra Bowling, J.D.

The Eleventh Circuit vacated a district court's conviction of a company and several members of management for conspiracy to violate and violations of the Clean Water Act (CWA). The court held that in light of the Supreme Court's recent decision in *Rapanos* the district court's jury instructions on "navigable waters" was inaccurate and erroneous.

Background

McWane is a manufacturer of cast iron pipe, flanges, valves, and fire hydrants. At its plant in Birmingham, Alabama, the company discharges wastewater into Avondale Creek. The CWA generally prohibits the discharge of pollutants into navigable waters. However, the CWA authorizes either the EPA or states approved by the EPA to issue permits for the discharge of pollutants pursuant to a National Pollutant Discharge Elimination System (NPDES).

Photograph of industrial water discharge from ©Nova Development Corp.

McWane had an NPDES permit issued by the Alabama Department of Environmental Management (ADEM) that allowed the company to discharge some treated wastewater from one discharge point at the plant, as long as it met certain requirements. However, evidence showed that the company discharged wastewater into the creek from several unauthorized discharge points. The permit also allowed the discharge of stormwater runoff from specified stormwater discharge points. Polluted wastewater was spilling into stormwater run off points and flowing into Avondale Creek.

The company and several of the company's employees were indicted, including several managers - James Delk, Michael Devine, and Charles Robison - and Donald Bills, the plant engineer. At trial, several McWane employees offered evidence of the violations. The district court dismissed Bills from the case, and the rest were convicted of various offenses. McWane, Delk, and Devine appealed their convictions.

Navigable Waters

On appeal, McWane, Delk, and Devine (appellants) argued that Avondale Creek did not meet the definition of "navigable waterway" under the CWA and, therefore, they did not violate the CWA. The Eleventh Circuit noted that the Supreme Court had interpreted the term "navigable waters" in *Rapanos* while this appeal was pending; therefore, the court looked at whether the district court used the correct definition of navigable waterways.

The *Rapanos* decision, a plurality decision, did not provide a clear test for lower courts to use when determining whether a body of water is a "navigable waterway." Justice Scalia's opinion would require navigable waters to be "relatively permanent, standing or flowing bodies of water," and have a "continuous surface connection."[1] Justice Kennedy's concurring opinion would require a "significant nexus" between a water or wetland and another water that is or was navigable in fact or could reasonably be made so. The circuit courts are split over which opinion to use. The Seventh and Ninth Circuits have used Kennedy's opinion, while the First Circuit has said that either test may be used.

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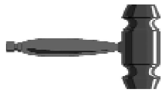
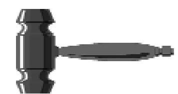


Litigation Update



In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

On August 29th, 2005, before Hurricane Katrina reached New Orleans, the levees of the 17th Street Canal failed and caused water to inundate the area. Several homeowners sued their insurance companies seeking compensation for the loss of their property. The insurance companies objected and claimed that the damage was excluded from their policies. The Eastern District Court of Louisiana ruled in favor of the homeowners and concluded that without a specific definition included in an exclusion in the policy, the term "flood" in many of the policies was ambiguous. The court contemplated common dictionary definitions to determine that the term "flood" in some of the insurance policies referred to natural events and a "rising over," an "overflowing," or an "overtopping" of water. The court concluded that the insurance policies containing an ambiguous definition of "flood" were therefore required to compensate the homeowners according to their policies.

The Fifth Circuit Court of Appeals, however, disagreed with the court's decision. On appeal, the court concluded that even if the plaintiffs could prove that the construction or maintenance of the levees caused the damage to their property, the flood exclusions in the homeowners' policies unambiguously precluded their recovery. The court held that the term "flood" included in the insurance policies was unambiguous. The court also looked to dictionaries to determine that a "flood" is defined as an "inundation of land." The court also considered other court interpretations of similar insurance coverage as it related to the failure of structures such as dams or dikes. In these cases, the courts uniformly held that the inundation of water falls within the policy exclusions. Additionally, the court noted that the levee is a flood-control structure, designed to prevent floods, which is what happened in this case. The court also disagreed that a "flood" is limited to natural events. The court vacated the judgment of the district court and entered judgment in favor of the defendant insurance policies.

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In this instance, the appellants argued that Kennedy's "significant nexus" test should be used, while the government argued that either test could apply. The Eleventh Circuit looked at the reasoning used by the circuit courts in reaching their conclusion. Citing *U.S. v. Gerke*, a Seventh Circuit case heard after the *Rapanos* decision, the Eleventh Circuit noted that "when a majority of the Supreme Court agrees only on the result of a case, lower courts 'are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.'"[2] The *Gerke* court believed that Justice Kennedy's test would be the narrowest ground. Therefore, the Eleventh Circuit concluded that Kennedy's significant nexus test should be the governing definition of navigable waterway.

Jury Instruction

In the district court, the jury did not mention the phrase "significant nexus" in its "navigable waters" instruction to the jury or instruct the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River. The court held that because the instruction did not include Justice Kennedy's "significant nexus" test, it was erroneous. The court therefore vacated the district court's judgment, reversed the convictions, and remanded the case.

Endnotes

1. *Rapanos v. United States*, 126 S. Ct. 2208 at 2242-44 (U.S. 2006).
2. *United States v. Robison*, 2007 U.S. App. LEXIS 24825 (11th Cir. Oct. 24, 2007).

Alaska Upholds Commercial Fishery Decision

Pasternak v. State of Alaska, Commercial Fisheries Entry Commission, 2007 Alas. Lexis 107 (Alaska Sept. 7, 2007).

Sara Wilkinson, 3L, University of Mississippi School of Law

The Alaska Supreme Court has upheld the decision of the Alaska Commercial Fisheries Entry Commission (CFEC) regarding participation in non-distressed fisheries. The Supreme Court specifically addressed a 1985 CFEC decision that limited Alaska's Northern Southeast Inside sablefish longline fishery to seventy-three permits.

Background

The CFEC, under the authority of Alaska's Limited Entry Act, is charged with determining both the optimum and the maximum number of permits for a fishery and outlining the qualifications for the issuance of permits. The CFEC distributes permits based on a point system used to determine an applicant's order of priority, taking into account past participation as a skipper or crew member in the particular fishery, as well as economic dependence on the fishery. Points for permit priority may also be awarded based on income dependence and vessel investment.

In 1985, the CFEC limited participation in the Northern Southeast Inside sablefish longline fishery over concern for the economic and environmental health of the fishery. The commission limited the fishery to seventy-three permits to be distributed on a points-based application system. In determining the number of permits, the CFEC was required to set a maximum number of permits "no lower than the highest number of units of gear in the fishery in the four years prior to the January 1, 1985 qualification date."[1] Since the fishery had seventy-three units of gear in one of those years, the maximum number could be no lower than seventy-three. Because the fishery was considered non-distressed, the CFEC had the authority to set the optimum number of available permits at a number higher than seventy-three.[2] After the issuance of a public notice, seventy-three became the optimum and the maximum number of permits available in May 2001.

In November 1987, Walter Pasternak submitted an application for a limited entry permit, claiming fifty-one points based on past participation in the fishery, vessel ownership, and income dependence. In April 1989, the CFEC awarded Pasternak forty-three and one-half points, reducing the vessel ownership points because Pasternak's wife jointly owned the vessel. Pasternak requested a hearing regarding the points distributed for vessel ownership and in March 1991 was issued a written decision awarding all fifteen vessel ownership points bringing his point total to fifty-one points.

In January 2003, the CFEC denied Pasternak's application because fifty-one points were insufficient to qualify him for a fishery permit. In February 2003, Pasternak filed petition for reconsideration with the CFEC and, shortly thereafter, an appeal in superior court alleging that the CFEC set the maximum number of permits available for the fishery too low. Pasternak's case was stayed pending the court's decision in a similar case, *Simpson v. State, Commercial Fisheries Entry Commission*.

Maximum Number of Permits

The court noted that in its review of an agency's interpretation of its own regulation, a reasonable basis standard of review was appropriate. In essence, the Alaska Supreme court will defer to the agency's expertise and decision unless its "interpretation is plainly erroneous and inconsistent with the regulation."[3]

Pasternak claimed that the CFEC erred in setting the maximum number of permits at seventy-three and sought a ten-permit increase. In discussing Pasternak's claim, the court looked

See Fishery Decision, page 10

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primarily at *Simpson*, in which the plaintiff challenged both the maximum and optimum number of permits set for the fishery by the CFEC. The court rejected Simpson's claim using a two-pronged test. The test first clarified that the maximum number of permits should be set at a level that is no lower than the highest number of units of gear in operation in any one year for the four years prior to the limitation on the fishery. Second, the CFEC must meet its primary goals of conserving the fishery while enabling fishermen to receive adequate compensation. The court held that the CFEC met both requirements and found in favor of the CFEC's allotment of seventy-three permits for the fishery.

Photograph of sablefish being measured courtesy of NOAA.

Relying on *Simpson*, the court rejected Pasternak's argument that the maximum number of permits should be increased for the fishery. Pasternak also argued in the alternative that the maximum number of permits should simply be increased to seventy-four permits. However, the court noted that there was no evidence to indicate that if the maximum number was increased to seventy-four Pasternak would be eligible for a permit.

Optimum Number of Permits

In addition to challenging the maximum number of permits, Pasternak challenged the CFEC's decision regarding the optimum number of permits for the fishery. In *Simpson,* the court upheld the CFEC's decision to set the optimum number of permits at seventy-three. Pasternak asserted that positive changes in the fishery justified an increase in the optimum number of permits set at seventy-three. The court rejected Pasternak's argument based on the holding in *Simpson* and evidence that the fishery was actually declining.

Permitting Points Based on Past Participation

Pasternak's final argument asserted that the CFEC erred by refusing to consider his claim for participation in 1983. Past participation points are awarded based on a harvest of at least 2,000 pounds or a proof of some extraordinary circumstance that prevented participation in the year in question. Pasternak did not participate in the fishery in 1983, rendering him ineligible for participation points absent the showing of extraordinary circumstances that prevented his participation.

Pasternak explained that he did not participate in the fishery in 1983 due to concerns over his equipment and the advice of other fishermen. The court found that Pasternak's explanation did not fall within the scope of extraordinary circumstances because he did not make all reasonably possible efforts to participate in the fishery in 1983.

Conclusion

The Alaska Supreme Court upheld the CFEC's decision regarding the maximum and optimum number of permits for Alaska's Northern Southeast Inside sablefish longline fishery. In addition, the court held that Pasternak was not entitled to participation points for extraordinary circumstances for 1983. In essence, the court primarily relied on its past holding in *Simpson*, which upheld the CFEC's decision for the same fishery.

Endnotes

1. *Simpson v. State, Commercial Fisheries Entry Comm'n*, 101 P.3d 605, 607 (Alaska 2004).
2. The Alaska Supreme Court differentiated between distressed and non-distressed fisheries in *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1262 n.6 (Alaska 1988). The court noted "a non-distressed fishery may tolerate more units of gear than the historic high. In contrast, a distressed fishery, by definition, cannot…Second, a distressed fishery is one which is overgeared as of January 1, 1973."
3. *Simpson*, 101 P.3d 605.

NPDES Permit May Allow Photography of Premises

Bowman Apple Products Co., Inc. v. State Water Control Board, 2007 Va. App. LEXIS 345 (Sept. 18, 2007).

Margaret Enfinger, 2L, University of Alabama School of Law

The Virginia Court of Appeals has found that companies requesting permits to discharge into state waters may have to allow inspectors to photograph their premises.

Background

Bowman Apple Products uses well water in bottling its products in Virginia. The company is required to have a Virginia Pollutant Discharge Elimination System (VDPES) permit issued by the State Water Control Board to discharge wastewater into a nearby river. The permit contains an "inspection and entry provision" that allows an agent of the Virginia Department of Environmental Quality (VDEQ) to enter the property to ensure compliance with the permit. During an inspection, Bowman officials refused to let a VDEQ agent take photographs.

When the time arrived for a new permit, the State Water Control Board added another requirement to the company's permit: Bowman must allow photography during inspections. Bowman objected to this new rule and sued under the Virginia Administrative Process Act, claiming that the agency's implementation of the new requirement was "arbitrary and capricious." Specifically, the company objected to the overbroad nature of the new requirement, which would result in an automatic violation of the permit if the company had *any* restrictions on photography, even restrictions to protect the company's proprietary interest. In its complaint, the company also alleged that the VDEQ did not follow the proper administrative procedures in instituting the requirement and noted that the rule was not included on any other permit in the state.

The circuit court held that the new requirement was reasonable, although the language of the provision could result in different interpretations. The court remanded the case to the agency, directing it to amend the permit's special requirement to only allow photography that was reasonably related to the investigation.

Virginia Disagrees

On appeal, relying upon the EPA's inspection manual, the Virginia Court of Appeals reasoned that photos are a reasonable part of a thorough and accurate inspection report. They document conditions and are evidence in enforcement proceedings. In fact, they are similar to the already established permit requirement of allowing access to and copying of records.

While this permit requirement of allowing photography is unique in Bowman's permit, this does not automatically mean that it is impermissible. In fact, this special requirement became necessary for the inspections because of Bowman's continued refusal to permit photography. Also, Bowman did not give up all privacy as the company could restrict photography that was not related to the investigation. The court of appeals subsequently upheld the circuit court's amended permit requirement.

Conclusion

The Supreme Court of Virginia has held that the control of discharges into Virginia's waters is necessary for the common good. The court of appeals seemed to think that photography is a reasonable way for an agency to control and enforce its discharge permits. In other words, photography may be a necessary part of the inspection process.

Seaman Bound by Employment Contract

Skowronek v. American Steamship Company, 2007 U.S. App. LEXIS 23926 (Oct. 12, 2007).

Terra Bowling, J.D.

The Sixth Circuit Court of Appeals has found that an injured seaman is bound by maintenance rates in the collective bargaining agreement (CBA) governing his employment.

Background

A maintenance fee is paid by ship owners to cover the cost of food and lodging of ill or injured seamen while they are unable to work. In September 2004, Larry Skowronek was working aboard an American Steamship Company vessel when he suffered a heart attack. Skowronek remained out of service for almost two months while he was recuperating. The company paid Skowronek $56.00 per week as a maintenance fee, in accordance with the CBA between his union and his employer.

Skowronek filed suit, arguing that instead of the $56.00 rate for ill crew members he should be awarded the CBA's $300 per-week rate for injured crew members. The United States District Court for the Eastern District of Michigan granted Skowronek summary judgment.

Fair Deal

On appeal, the Sixth Circuit examined whether the maintenance rate for ill crew members was enforceable under the CBA, in light of the injured crew member rate of $300 per week. The court acknowledged that federal courts generally enforce negotiated maintenance rates in a CBA, even if the rates do not cover a crew member's daily food and lodging expenses.

In a previous case regarding negotiated maintenance rates, the Sixth Circuit held "when a benefits package includes an express reference to a precise rate of maintenance, it must be presumed that this rate was arrived at by negotiation."[1] The court concluded that these negotiated rates are the "result of give and take collective bargaining between parties" and should be binding.[2] Therefore, the court presumed that the rates in Skowronek's CBA were negotiated and binding and did not speculate whether $8.00 per day was sufficient to provide Skowronek with food and lodging.

The court held that when a maintenance rate is negotiated, the plaintiff has the burden of proving that the rates were not legitimately negotiated, that the agreement was unfair as a whole, or that the union did not adequately represent him. Skowronek did not present evidence to prove any of these issues.

Conclusion

The Sixth Circuit reversed the district court's decision. The court found that the maintenance rates were the result of the collective bargaining between the parties and, therefore, should be binding. The court also held that the plaintiff has the burden of proving that the rates were not legitimately negotiated, that the agreement was unfair as a whole, or that the union did not adequately represent him.

One judge dissented, finding "the collective bargaining agreement presently before the court contains an unusual provision that discriminates between ill and injured seamen. This provision is inconsistent with the common law of admiralty, and at odds with the reasons why courts originally developed and protected seaman's right to maintenance."[3]

Endnotes

1. *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 588 (6th Cir. 1989).
2. *Skowronek v. American Steamship Company*, 2007 U.S. App. LEXIS 23926 at *9-10 (Oct. 12, 2007).
3. *Id.* at *20.

Court Dismisses Seaman's MRSA Claim

Crawford v. Elec. Boat Corp., 2007 U.S. Dist. LEXIS 74385 (D. Conn. 2007).

Amber Myers Robinson, 3L, University of Mississippi School of Law

In an admiralty suit filed by a seaman who claimed to have contracted a staph infection while working aboard a ship, the United States District Court for the District of Connecticut granted motions to dismiss in favor of defendants, the United States and Electric Boat. The court granted defendant United States' Rule 12(b)(1) motion to dismiss the Federal Torts Claim Act (FTCA) claim for lack of subject matter jurisdiction and the United States' and Electric Boat's Rule 12(b)(6) motion to dismiss an unseaworthiness claim, for failure to state a claim upon which relief could be granted.

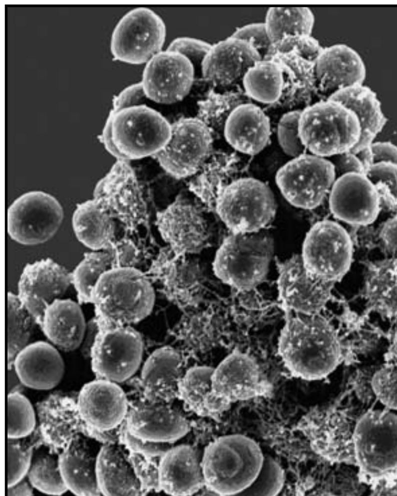
Background

Bruce Crawford, an engineer for Electric Boat, was assigned to take the vessel SSN-023 on a final sea trial before it was released as a Navy Ship. Crawford alleged that while on the voyage, he contracted a serious infection known as Methylin Resistant Staph Aureus, due to the vessel's unsanitary condition. The infection eventually spread to Crawford's family causing open sores, disfiguring wounds, and pain. The Crawford family incurred the cost of medical care and disinfecting procedures to rid them of the infection. Crawford and his family, including his wife and two minor children, filed suit.

The plaintiffs filed suit for negligence and unseaworthiness under the Federal Torts Claim Act (FTCA), Suits in Admiralty Act (SAA), Public Vessels Act (PVA), the Jones Act, the Longshore and Harbor Workers' Compensation Act (LHWCA), and general maritime law. The plaintiffs also brought suit against both Electric Boats and the United States, claiming that the United States was already in control of the vessel; however, the court did not visit this question.

Motion to dismiss FTC claim

The United States moved to dismiss the FTCA claim under Rule 12(b)(1) for lack of subject matter jurisdiction. The United States claimed that the FTCA claim should be dismissed, since the SAA alone gives the court jurisdiction. Also, the language of the FTCA provides that the act does not apply to "any claim for which a remedy is provided by chapter 309 [the Suits in Admiralty Act] or 311 [the Public Vessels Act] of title 46 relating to claims or suits in admiralty against the United States."[1] The plaintiffs argued that the FTCA claim should not be dismissed since it was only pled in the alternative; however, the court disagreed, holding that if the plaintiffs' suit was in admiralty it could only be brought under an admiralty statute and not the FTCA. As a result of this holding, the court looked at the facts of the case to determine if this was a suit that could be brought under an admiralty statute.



Scanning electron microscopy of Staphylococcus courtesy of NIH.

The court applied the "situs/status" test laid out in *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[2] to determine whether there was admiralty jurisdiction. The "situs/status" test requires (1) that the tort took place on navigable waters or was caused by a vessel on navigable waters and (2) that the tort had a significant relationship to traditional maritime activity. The court quickly determined that Crawford's satisfied the "situs" portion of

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Admiralty, from page 13

the test, since he was injured while he was aboard a vessel that was at sea. However, the court had to conduct a different analysis to determine if the injuries to the other three plaintiffs fell within admiralty jurisdiction.

Under the Extension of Admiralty Jurisdiction Act, "the admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."[3] Therefore, if the other three plaintiffs' injuries were caused by a vessel on navigable waters then their injuries would fall under admiralty jurisdiction, regardless of the fact that they came into contact with the infection on land.

The defendants argued that because the vessel was conducting a sea trial, it was not "in navigation." The court, following the *Stewart v. Dutra*[4] analysis, determined that there is no separate "in navigation" requirement. All that is required is that the vessel is used or is capable of being used as maritime transportation. The court noted that not only was the vessel capable of being used for maritime transportation, that it was actually being used as maritime transportation. Therefore, the court held that the other three plaintiffs also satisfied the "situs" portion of the test for admiralty tort jurisdiction.

Finally, the court applied the second portion of the admiralty tort jurisdiction test, the "status" test. Under the "status" test there are two issues: (1) the court looks at the incident and determines whether it has a potential to disrupt maritime commerce; and, (2) the court determines whether the nature of the activity giving rise to the incident has a substantial relationship to traditional maritime activity. The court found that all plaintiffs met the "status" element of the test. The court, using persuasive case authority, determined that unsafe conditions occurring on a vessel under repair has a potential to disrupt maritime commerce. The court also determined that a naval sea operation was considered traditional maritime activity, therefore satisfying the second element of the "status" test.

Motion to dismiss for failure to state an unseaworthiness claim

The defendants, United States and Electric Boat, argued that the plaintiffs failed to establish a claim under maritime law for unseaworthiness. The defendants argued that Crawford was not given a warranty of seaworthiness since he was on the voyage in order to test the vessel for seaworthiness. The defendants relied on two Fifth Circuit cases[5] that had established that there was no warranty of seaworthiness for a vessel undergoing a sea trial. The plaintiffs argued that those cases had been overruled by *Stewart*. However, the court disagreed with the plaintiffs and found that *Stewart* only overruled the "vessel in navigation" issue. The court held that a warranty of seaworthiness could not exist before the vessel had completed the sea trial test that was being administered in order to make the vessel seaworthy.

Conclusion

The United States District Court for the District of Connecticut granted the United States' motion to dismiss the FTCA claim, holding that the SAA and PAV were mutually exclusive from the FTCA and since the plaintiffs had an admiralty cause of action that they would have to file suit under an admiralty statute. The court also granted the defendants' motion to dismiss for failing to state a claim for unseaworthiness, holding that a vessel cannot have a warranty of seaworthiness before the sea trial granting its seaworthiness is complete.

Endnotes

1. 28 U.S.C. 2680(d).
2. *Grubert Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527(1995).
3. 46 U.S.C. 3010(a).
4. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005).
5. *Reynolds v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264 (5th Cir. 1986); *Williams v. Avondale shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971).

DOSHA Applies to Jet-Ski Accident in Bahamian Waters

Mellor v. Moe, 2007 WL 2883784 (S.D. Fla. Sept. 27, 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

The Southern District Court of Florida has held that the operators of a 30-foot fishing boat and a jet-ski were equally at fault for a collision that fatally injured the driver of the jet-ski. The court concluded that the Death on the High Seas Act (DOSHA) applied to the collision since it occurred in Bahamian waters and awarded damages to the victim's parents.

Background

The Mellor family took a cruise from Florida to the Bahamas in August 2003. On the day of the accident, the family arrived on a beach from an excursion ferry. While on the beach, Jason Mellor, his brother John Mellor, and Shannon Mitchell rented jet-skis. With Shannon as a passenger on Jason's jet-ski, they departed the beach. At that time, the weather was turning darker and a rain storm was approaching. Jason and Shannon briefly stopped to wipe their glasses and when Jason started driving again, Shannon saw a boat traveling towards them. John briefly saw the boat when it was about 100 feet away and again about 2 to 3 seconds before it collided with Jason's jet-ski. The driver of the boat testified that he did not see the jet-skis until impact, but the passenger in the boat testified he saw the jet-ski a "split-second" before impact. Jason Mellor was fatally injured in the collision. His parents brought an action against the driver of the boat pursuant to DOSHA to recover damages.

DOSHA Claim

The plaintiffs, Jason's parents, contended that the court has jurisdiction pursuant to DOSHA because the incident occurred on the high seas. The defendant, the driver of the boat, argued that the collision occurred in Bahamian waters, not the high seas, and DOSHA should not apply. DOSHA does not include a definition of "high seas" so the court examined prior cases to determine its meaning. In a similar case, the court held that a negligence action filed by the estate of a cruise ship passenger who suffered a heart attack while snorkeling in Mexican waters was covered under DOSHA.[1] The court of appeals, in yet another case, stated that DOSHA applied when the cause of action arose within the territorial waters of a foreign country.[2] Finally, in a third case, the court of appeals concluded that DOSHA applied to a death in the Bahamas.[3] Because the death occurred in Bahamian waters, the court concluded that DOSHA applied to this case.

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In order for the court to apply DOSHA to this case, the court must first have admiralty jurisdiction. To determine admiralty jurisdiction, the court must decide whether the cause of action bears a significant relationship to traditional maritime activity. The court, in the snorkeling case mentioned above, concluded that "the significant relationship test was met because the decedent was a paying passenger aboard a cruise ship sailing from Florida to Mexico which arranged maritime recreational activities for its passengers."[4] Because the only difference between the two cases was that the cruise ship was included as one of the defendants, the court concluded that the significant relationship test would also be satisfied in this case thereby giving the court admiralty jurisdiction.

DOSHA allows the decedent's parents to seek a claim for compensation of the pecuniary loss sustained as a result of the decedent's death. In order to apply DOSHA, the court must determine the comparative negligence of the defendant and the decedent. The parties cited two different rules that they claimed should be the controlling standard to determine comparative negligence. The court concluded that the jet-skis did have the right of way, but according to the International Regulations for Preventing Collisions at Sea (COLREGS), should have taken action to avoid the collision. The court concluded that the boat and the jet-ski equally caused the accident; therefore, the decedent's comparative negligence is 50 percent.

Next, the court must determine the amount of damages the plaintiffs should receive. DOSHA damages are "limited to fair compensation for the pecuniary damages of the parents of Jason Mellor."[5] The court determined that the services Jason performed, such as mowing the lawn, shoveling snow, walking the dogs, and driving his brother various places is compensable. The court determined that these services constituted six hours of work per week at a rate of $18.50 an hour. Also, the costs of the decedent's funeral and burial arrangements could be compensated. The court awarded damages to the parents for the 26.5 years of their life expectancy plus the cost of the funeral and burial, reduced by 50 percent for comparative negligence, for a total of $83,877.08.

Conclusion

The court concluded that the drivers of the boat and of the jet-ski were equally at fault for the collision that occurred in Bahamian waters. The court concluded that it had admiralty jurisdiction for an accident that occurred in foreign territorial waters. The court determined that the parents of the decedent were entitled to compensation for the pecuniary loss of the decedent's services and for the funeral and burial arrangements, minus the amount of the decedent's comparative negligence.

Endnotes

1. *Moyer v. Rederi*, 645 F.Supp. 620 (S.D. Fla. 1986).
2. *Sanchez v. Loffland Bros. Co.*, 626 F.2d 1228 (5th Cir. 1980). This case is binding on this court because the court was part of the Fifth Circuit until 1981.
3. *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982).
4. *Mellor v. Moe,* 2007 WL 2883784 at *4 (S.D. Fla. Sept. 27, 2007); *citing*, *Moyer*, 645 F.Supp. at 624-25.
5. *Id*. at *6.

Photograph of cruise ship courtesy of ©Nova Development Corp.

Ski Resort Plan Approval in Violation of NEPA and NFMA

Oregon Natural Resources Council Fund v. Goodman, 2007 U.S. App. LEXIS 22614 (9th Cir. Sept. 24, 2007).

Terra Bowling, J.D.

The Ninth Circuit has held that the United States Forest Service (USFS) violated the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) by not properly evaluating a proposed expansion of a ski resort within the Rogue River and Klamath National Forest. The court also held that the approval violated the NFMA by not designating riparian reserves and restricted watershed terrain.

Background

For two decades, the Mount Ashland Association (MAA) has been exploring the possibility of expanding the Mount Ashland Ski Area (MASA), located near Ashland, Oregon. MAA, which leases the area from the city, had planned to expand MASA and upgrade its facilities, including the creation of beginner and intermediate ski and snowboard areas.

NEPA requires government entities to look at the environmental effects of major federal projects affecting the environment. Agencies must prepare an Environmental Impact Statement (EIS) that "provide full and fair discussion of significant environmental impacts and … inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[1]

NFMA requires the USFS to develop "forest plans" that maintain the fish and wildlife habitat of area species. The MASA area is subject to two forest plans, the Rogue River LRMP and the NWFP. Under the Rogue River Plan, the USFS must manage and maintain area species, especially sensitive species. The area is home to a sensitive species, the Pacific fisher. The LRMP also requires the agency to conduct an evaluation of recreational lands projects.

After MAA submitted a plan to the USFS, the agency prepared a draft Environmental Impact Statement (EIS), which caused the public and the Environmental Protection Agency to express concerns about erosion and sedimentation and the threat to biodiversity, watershed resources, and water quality. The USFS then issued a Final Environmental Impact Statement (FEIS) analyzing six expansion alternatives. A month later, the NFWS issued a Record of Decision (ROD) selecting one of the alternatives for the expansion, with some modifications. The plan selected by the Service proposed several new additions to MASA: (1) the construction of two new chair lifts and two new surface lifts; (2) clear cutting seventy-one acres for new ski runs; and (3) the clearing of four acres for lift corridors and staging areas. The ROD generated 28 notices of appeal, but the Service denied all of the appeals.

Several environmental groups filed suit in federal court seeking declaratory and injunctive relief under NEPA and NFMA. The groups claimed that the Forest Service failed to ensure the viability of the fisher, as well as to adequately consider and disclose the direct and cumulative impacts on the fisher. The groups also claimed that the agency failed to (3) evaluate whether the expansion will comply with wetlands laws; (4) adhere to Rogue River LRMP and NWFP standards and guidelines for protecting watersheds and riparian areas; (5) disclose the error rate of the model used to estimate sediment impacts on the municipal watershed; and (6) adequately disclose cumulative water quality impacts by utilizing a flawed computer model. The United States District Court for the District of Oregon granted summary judgment in favor of USFS, but enjoined construction until the Ninth Circuit ruled on a motion to stay.

The Pacific Fisher

The Ninth Circuit considered whether the district court erred in its decision. The court first

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looked at whether the USFS violated NFMA by failing to evaluate the effects of the expansion on the Pacific fisher, a sensitive species. The USFS had prepared a biological evaluation on the impact of a MASA expansion on the fisher in 1999; however, the Service did not update the 1999 biological evaluation to reflect the Pacific fisher's appearance in the project area two years later. The Ninth Circuit found that the Service's habitat evaluation did not meet the requirements of the LRMP's evaluation requirement; therefore, the USFS violated NFMA.

Photograph of skier courtesy of ©Nova Development Corp., photograph of Pacific fisher courtesy of California Department of Fish and Game

Next, the court considered whether the Service violated NEPA. First, the court found that the Service failed to analyze the incremental impact of the actions, including all past, present, and future projects. The court then noted that the USFS failed to explain the effect of the project on a biological corridor between the Klamath-Siskiyou and Southern Cascades Regions. Because of these failures, the Service was also in violation of NEPA.

The Ninth Circuit also ruled that the USFS violated NFMA by failing to designate riparian reserves and restricted watersheds, as required under the Rogue River LRMP and the NWFP. The riparian reserves and restricted watersheds are intended to provide buffer zones in areas prone to mudslides and other hydrologically important areas. Because the Service failed to do this, the court found that the terrain within the expansion would not be adequately protected.

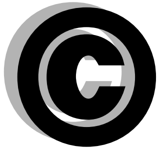
The court held that the district court did not err in ruling in favor of USFS on the remaining claims. The court found that the USFS provided adequate analysis in the FEIS regarding these claims. Furthermore, the court held that the claims regarding the Pacific fisher were the only ones warranting injunctive relief, given the potential for irreparable environmental harm.

Conclusion

Ninth Circuit reversed the district court, holding that USFS had violated the National Environmental Policy Act and the National Forest Management Act by not properly evaluating the project's impact on the Pacific fisher. The court found that the approval also violated the NFMA by not designating riparian reserves and restricted watershed terrain. The court granted injunctive relief and remanded the case to the district court.

Endnotes

1. 40 C.F.R. § 1502.



Using Copyrighted Works

By Will Wilkins

In the last article on copyright basics, we looked at what was required to create a copyrighted work, who owns that work, and what rights went along with ownership. We will spend the next several articles looking in a little more detail at some of these issues.

Today, we will delve into an issue on which I spend a great deal of time and energy. When a copyrighted work is created, the owner of that work inherits some very strong rights to control the use of that work. However, unlike with ownership of other personal property (a car, for instance), the general public is also given some rights to use the copyrighted work even without the consent of the owner of the copyright. Using the car analogy, it would be like someone having the right to drive your car every Tuesday morning without asking. Some of these use rights include the classroom teaching exception, fair use, and library copying, each of which will be discussed below.

First, however, let's look at a way you can use others' works without having to rely on the statutory exceptions. It is very simple: permission. You can use another's copyrighted work if you have their permission to do so. Permissions in the copyright world are generally termed "releases" or "licenses."

In asking for permission, you should consider the exact parameters of the permission since there are infinite variables, such as: the number of times the material may be used, geographic restrictions to the use, notice requests, and the manner in which it may be used. As to the manner in which the material may be used, you could, for instance, limit the use to print or expand it to include print and electronic media. Another issue to consider in obtaining permission is documentation. It is very important to document the permission so that both parties are clear on the terms and scope of the permission, and the preferred method is through the use of written agreements such as licenses or releases. The person requesting the permission will also need to make sure that the person granting the permission actually has the power to grant it so that you are not (to continue the analogy) asking my neighbor if you can borrow my car.

The law, however, does not require permission before using a copyrighted work at all times. In fact, there are some fairly major exceptions to the ownership rights.

One that is not exactly an exception applies to U.S. Government documents. Works prepared by an employee of the U.S. Government as part of his or her job are generally not copyrightable. Exercise caution in dealing with Government documents, however, because the work may actually be the work of someone other than a federal employee or the work may contain within it copyrighted works. Additionally, be aware that the U.S. Government can hold trademarks (no using the presidential seal). So, a little sleuthing is necessary in using Government works.

Another instance when permission is not necessary is where the material is not protected by copyright or is in the "public domain." Works may fall into the public domain in several ways. First, the author may place them there expressly by stating that the work is in the public domain and may be freely used. Second, a copyright may expire and the work is placed in the public domain. The current copyright term is the life of the author plus 70 years, but anything published before 1923 is now in the public domain. Finally, a work may be in the public domain for failure to meet a technical requirement of copyright. For instance, for a period of time (1923-1977), copyright notice was required when the work was published and, without notice, the work

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would fall into the public domain. In my experience, however, it is very difficult to determine whether the work was originally published without notice.

The copyright statutes are filled with other situation-specific exceptions to the owner's exclusive rights. For example, 17 U.S.C. 110(1) provides that in the course of face-to-face teaching activities at non-profit schools, teachers may perform or display copyrighted works. Other sections allow certain library copying of copyrighted materials.

Finally, the mother of all exceptions is the "fair use doctrine." The statute states simply enough that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research is not an infringement of copyright."[1] Unfortunately, the statute continues to define "fair use" in a less than clear manner. Essentially, for a use to be fair, it must pass a four-part balancing test. Each factor is theoretically given equal weight. The factors include:

- The purpose and character of the use: Elements considered here include: Is the use transformative or for a use other than originally intended? Is the use commercial in nature?
- The nature of the work: Important factors here include: Is the work unpublished? How much creativity was involved in the work?
- The amount and substantiality of the work used: Questions I ask with regard to this factor are: Do you want to use the whole work? Even if you're just using a small portion, are you giving away the punch line?
- The effect of the use upon the potential market for or value of the work.[2]

As you can see, there rarely are times when you come away from the fair use test thinking that you have a concrete answer. Many groups have worked on "guidelines" or "best practices" for fair use but most fail to grasp the expansive nature of fair use and seem overly restrictive.

Though many of these exceptions do not yield definitive answers, make no mistake that the exceptions and the rights of the public to use copyrighted works carved out in the statutes are rights as valid as copyright ownership rights themselves. In fact, a string of new cases have confirmed the vitality of the fair use doctrine. In future articles, we will take a detailed look at some of these cases as they, perhaps better than any guidelines, offer guidance on the parameters of fair use.

Endnotes:

1. 17 U.S.C. 107.
2. *Id.*

Federal Legislation, 2007

110 Public Law 22 – Animal Fighting Prohibition Enforcement Act of 2007 (H.R. 137)
Imposes a fine and/or prison term of up to three years for violations of the Animal Welfare Act (AWA). Prohibits sponsoring or exhibiting an animal in an animal fighting venture; buying selling, transporting, or delivering animals for participation in animal fighting; or, using the mail or other form of interstate commerce to promote or further animal fighting. Also amends the AWA to prohibit knowingly selling, buying, transporting, or delivering a knife, a gaffe, or any other sharp instrument for use in bird fighting.

110 Public Law 47 – Grand Teton National Park Extension Act of 2007 (S. 277)
Modifies the boundaries of Grand Teton National Park to include certain land within the GT Park Subdivision and for other purposes.

110 Public Law 69 – America COMPETES Act (H.R. 2272)
Provides an approach for the United States to maintain and improve its technological and scientific innovation by strengthening scientific research, improving education, and enhancing technological expertise.

110 Public Law 94 – Pesticide Registration Improvement Renewal Act (S. 1983)
Amends the Federal Insecticide, Fungicide, and Rodenticide Act to renew and amend the provisions for the enhanced review of covered pesticide products, to authorize fees for certain pesticide products, and to expend and improve the collection of maintenance fees, and for other purposes.

110 Public Law 114 – Water Resources Development Act of 2007 (H.R. 1495)
Reauthorizes the Water Resources Development Act (WRDA), which authorizes projects for navigation, ecosystem or environmental restoration, and hurricane, flood, or storm damage reduction in Alaska, Arizona, Arkansas, California, Colorado, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Missouri and Kansas, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and Washington. Terminates specified projects in Florida.

110 Public Law 115 – Recognition of Navy UDT-SEALS Museum (H.R. 2779)
Recognizes the Navy UDT-SEAL Museum in Fort Pierce, Florida, as the official national museum of Navy SEALs and their predecessors.

110 Public Law 132 – African Elephant Conservation Act (H.R. 50)
Amends the African Elephant Conservation Act and the Rhinoceros and Tiger Conservation Act of 1994. The Act authorizes appropriations for fiscal years 2007-2012, increases administrative expense allowances, and abolishes provisions requiring the Secretary of the Interior to notify countries of approval of conservation projects for African elephants, rhinoceros, and tigers.

110 Public Law 133 – Asian Elephant Conservation Act (H.R. 465)
Amends the Asian Elephant Conservation Act and the Rhinoceros and Tiger Conservation Act of 1994. The Act authorizes appropriations for fiscal years 2007-2012, increases administrative expense allowances, and abolishes provisions requiring the Secretary of the Interior to notify countries of approval of conservation projects for Asian elephants.

International Law Update

Australia Anti-Fouling Convention Enacted

On September 17, 2008, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 will enter into force. The convention requires internationally-traveling ships 400 gross tons and above to have an International Anti-Fouling System Certificate. Ships must pass an inspection to receive the certificate. Ships less than 400 gross tons but 24-meters or longer must carry a Declaration of Anti-Fouling Systems signed by the shipowner or authorized agent.

Red and Pink Coral Export to Be Regulated

In June, a committee at a United Nations Wildlife Conference voted to begin regulating the export of red and pink corals. The corals are threatened by over-harvesting, pollution, seabed trawling, and global warming. The restrictions on international trade should be in effect by the end of 2008.

Australia Signs Kyoto Protocol

In December, Australia signed the Kyoto Protocol. Australia's new Prime Minister, Kevin Rudd, signed the agreement just nine days after his election. Australia's action leaves the United States as one of the few industrialized nations that has not signed the Protocol.

China and South Korea Agree to Green Desert

Beijing and Seoul have signed an agreement to "green" the Ulan Buh Desert in China. The countries will spend about $2 million U.S. dollars to grow trees and build greenhouses in the regions. Officials hope the project will help stop environmental deterioration in the area.

Endangered Turtle Eggs Recovered in Mexico

In October, thousands of endangered turtle eggs were recovered from smugglers in Oaxaca, Mexico, during a routine road-block set up by police. The olive ridley turtles are listed as an endangered species in the United States, but the eggs are part of a traditional diet in the Mexican region of Oaxaca.

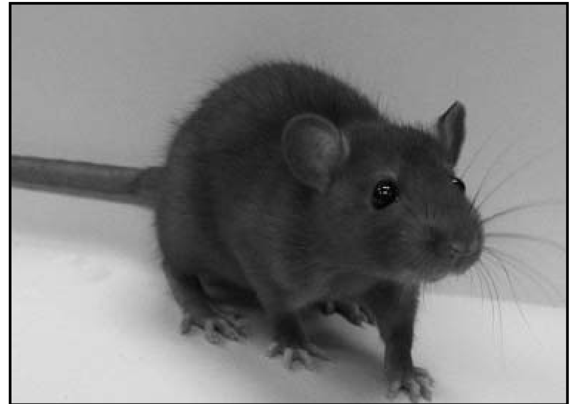
Photograph of olive ridley turtles in Mexico courtesy of NOAA, photographer Michael P. Jensen

Correction: A photograph in The SandBar 6:3 p.14 was incorrectly identified as the USS Missouri Memorial in Pearl Harbor. The photograph was a picture of the USS Arizona Memorial.

Coast to Coast

And Everything In-Between

State and federal officials have plans to eradicate the rats from Rat Island in Alaska. Introduced to the island in 1780 by a rat-infested ship, the rats feed on seabirds and their eggs and chicks and have annihilated the bird populations of the island. The state enacted regulations requiring ships to check for rats and eradicate them. The state is issuing brochures to mariners that will explain how to control rats on ships and prevent them from going ashore. Additionally, biologists will drop rat poison from helicopters onto the island.



Photograph of rat courtesy of National Institute of Health.

Ireland's only salmon farm has been devastated by jelly fish. A huge pack of jelly fish – estimated to be 10 square miles and 35 feet deep – descended on the farm killing 100,000 salmon. Workers tried to save the fish, but their boats were unable to reach the pens in time. The jelly fish, *Pelagia nocticula*, usually do not travel so far north. The company hopes to receive emergency aid from the government.

Photograph of jellyfish courtesy of NOAA NMFS AFSC, photographers Matt Wilson/Jay Clark.

A Charleston man was rescued for the second time in three years when his boat was carried into a river by the tide. When he didn't return home from a fishing trip, his wife called authorities. He spent the night shivering in his boat, while the Coast Guard and local authorities launched a search. After the rescue, he was treated for dehydration and exposure at a local hospital. In 2004, he was rescued after his boat was grounded and he became trapped in knee-deep mud trying to push the boat out. His wife now requires him to have a friend or a cell phone with him on his boating expeditions.

In Kansas, a woman was frying fish on the stove when she briefly stepped out of the house to take out the trash. The family's dog shut the door behind her. A grease fire erupted and fully engulfed the house. The dog made it out safely, but the fire caused over $50,000 in damages.

In England, a canoeist disappeared and was presumed drowned in 2002. Recently, the man showed up in a local police station, claiming that he had suffered amnesia. After some questioning, the police found that the story was false. He had been hiding, with the help of his wife, at his residence since his disappearance. The man and his wife have been charged with fraud. Police believe their two sons, who did not live with the couple, had no knowledge of the hoax.

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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