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Hawaii Protects Groundwater Using the Public Trust Doctrine

Also,

California Court Considers Meaning of “Best Available Science” in
Environmental Reviews

Public Trust Doctrine Limited by Wisconsin Supreme Court

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HAWAII PROTECTS GROUNDWATER USING THE PUBLIC TRUST DOCTRINE

Rebecca F. Rushton¹

Photograph of groundwater being vaporized by underground magma in Hawaii; courtesy of Joshua Gardner.



Groundwater serves a variety of important purposes. It is pumped from wells and into households for domestic uses, it irrigates crops and livestock, and it replenishes springs and rivers to support surface flows. If too much groundwater is pumped, then the water table is lowered and people are forced to dig deeper wells, less water is available for agriculture, and surface waters begin to dry up. Protection of groundwater is becoming increasingly important as climatic changes extend droughts and agricultural and industrial pressures increase on scarce water resources.

Historically, states have regulated groundwater and surface water differently because of a lack of scientific understanding of their hydrologic connection. Today, the hydrologic connection between groundwater and surface water is well established, so some states are beginning to protect groundwater the same way they protect surface water.

In 2006, the Hawaii Supreme Court held that political bodies in the state have a duty under the Hawaii State Constitution to protect natural resources subject to the public trust doctrine.² However, the opinion did not state whether groundwater was considered a natural resource for the purposes of public trust protection. Recently, a Hawaii appellate court addressed this question.³

Background

Hawaiian groundwater, found in volcanic-rock aquifers, supplies domestic water for nearly 1.36 million people.⁴ It also supplies water for agriculture, industries, and military purposes. About 50% of water used in Hawaii comes from groundwater.⁵ Despite its significance on the Hawaiian Islands, there was disagreement as to whether groundwater was considered a “water resource” under the public trust doctrine, so it has not been protected as well as other natural resources.

The current dispute arose when Kauai Springs, Inc., a commercial spring water bottling company on the Hawaiian Island of Kauai, sought permits to expand its water bottling operation. In 2006, Kauai Springs applied for three zoning permits in order to expand its bottling operation from about 2,000 gallons per week to at least 35,000 gallons per week. In January 2007, the Kauai County Planning Commission denied Kauai Springs' three permits. In September 2008, a state circuit court reversed the Planning Commission's decision and ordered all three permits be issued to Kauai Springs. The Planning Commission appealed. On appeal, Kauai Springs and the Planning Commission both acknowledged that the Planning Commission had public trust duties, generally. The dispute in this case focused on the scope of those public trust duties and the standards or criteria used for reviewing permit applications.

Scope of Public Trust Duties

To determine whether the scope of the Planning Commission's duties included groundwater, the court first looked at Hawaii's state constitution. The court found that the state constitution and prior case law unambiguously protected water resources under the public trust doctrine. Article XI, section 1 of the Hawaii Constitution requires that the state and its political subdivisions conserve and protect Hawaii's natural resources, including water, and develop resources consistent with conservation. Additionally, Article VIII, section 1 states that the legislature will create *counties* and *other political subdivisions* that will have powers conferred under the general laws. Because the Planning Commission is a political subdivision of Kauai County, the Planning Commission has a general duty to protect resources subject to the public trust.

After determining that the state constitution placed general duties on the Planning Commission, the court looked at the general laws, or statutory authority, related to the Planning Commission's specific duties when issuing zoning permits. The Planning Commission's specific duties are found in Hawaii Revised Statutes (HRS) and the Kauai County Code (KCC). HRS § 46-4(a) confers zoning authority to the counties by requiring a comprehensive general plan. KCC is Kauai County's comprehensive general plan for zoning. KCC: Chapter 2 mandates "careful stewardship of the island's land and waters" and states that "watershed areas ... [should be] managed as part of the public trust."⁶ Additionally, KCC: Chapter 8 states that a permit may only be issued if the Planning Commission finds the activity will not cause

substantial environmental harm to lands or waters. By examining Hawaii's state constitution and the general laws authorizing the Planning Commission to issue permits, the appellate court determined that the Planning Commission had a specific duty to protect water resources when issuing zoning permits.

Finally, the court looked at whether the public trust doctrine applied to the groundwater used by Kauai Springs. The court cited a previous case that rejected the idea that "privately owned" waters, like groundwater or spring water on private land, were excluded from the public trust.⁷ The court went on to state that Kauai Springs' proposed bottling increase from 2,000 gallons per week to 35,000 gallons per week would clearly affect the groundwater source, which was protected under the public trust. The appellate court vacated the circuit court's decision that the record was "devoid of any evidence that Kauai Springs[] existing or proposed uses might affect water resources subject to the public trust" and held that the scope of the Planning Commission's public trust duties extended to considering whether proposed uses would impact groundwater under the public trust doctrine.

Standards or Criteria Used for Reviewing Permits

Because the court determined that groundwater was protected under the public trust doctrine, the court next considered what standards the Planning Commission should apply when reviewing permit applications. The court noted that because Kauai Springs' use is for economic gain, the permit application is subject to a higher level of scrutiny, and Kauai Springs has the burden of proof to justify the use of water in light of the public trust protections. Additionally, the court stated that the Planning Commission should make appropriate assessments based on its statutory authority. The court found that the Planning Commission did place the burden of proof on Kauai Springs and made appropriate assessments but did not consider its statutory or regulatory authority when it denied the permits.

The court determined that the standards for the Planning Commission required that decisions must be based on statutes and regulations related to the permitting process, appropriate assessments must be made, and reasonable measures must be taken to protect the resource in question. To determine whether the first standard, which required decisions be based on statutes and regulations, had been met, the court looked at Kauai's general plan for zoning. The court noted that government bodies "should practice careful stewardship," permits should not cause substantial

environmental harm, and that the Planning Commission could impose any conditions deemed necessary. The court found that the order denying the permits did not indicate whether the Planning Commission's decision was based on statutory or regulatory authority. The court held that because the Planning Commission did not make the permit requirements clear, the decision to deny the permits was arbitrary and capricious. The court vacated and remanded the lower court's opinion, and, on remand the Planning Commission could have used the court's standards to clearly articulate whether or not the permits should be denied in order to protect Hawaii's groundwater. However, in September, the Hawaii Supreme Court agreed to hear an appeal of the case filed by Kauai Springs.⁸

THE COURT FOUND THAT THE ORDER DENYING THE PERMITS DID NOT INDICATE WHETHER THE PLANNING COMMISSION'S DECISION WAS BASED ON STATUTORY OR REGULATORY AUTHORITY.

Hawaii & Other States' Efforts to Protect Groundwater

The Hawaiian legislature took a major step in protecting natural resources when it incorporated the public trust into its state constitution. Now, the Hawaiian courts have ensured that the state's groundwater resources will also receive consideration and protection against economic and societal pressures for development.

States like Hawaii have protected groundwater and other natural resources by incorporating the public trust doctrine into their state constitutions. States that haven't explicitly protected groundwater through the public trust are finding other ways to encourage groundwater protection. One example is Maine, whose surface waters are protected by the public trust, but groundwater is subject to "absolute dominion." Absolute dominion allows landowners to extract as much groundwater as they want without legal consequences. In 2005, Maine citizens began pressuring the state legislature to set an extraction tax for commercial groundwater bottling in the state.⁹ Poland Springs, a company that pumps nearly 500

million gallons of groundwater every year from its Maine wells,¹⁰ would be taxed almost \$7 million a year.¹¹ In 2010, Maine citizens were still pushing for an extraction tax and an end to "absolute dominion" so that groundwater could be protected under the public trust the same as surface water.¹²

As the global population increases, so does pressure on natural resources such as water. If groundwater pumping outpaces recharge, natural aquifers and other important water sources will no longer be able to support the local population. The public trust doctrine is one way to protect water resources, but it is important to realize that the doctrine is less important than the result – protection of water supplies for the people who depend on them. ❧

Endnotes

- ¹ 2014 J.D. Candidate, University of Oregon School of Law.
- ² *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205 (2006). The Public Trust Doctrine is a principle that maintains certain resources are preserved for public use and that the government must protect them for the public's use.
- ³ *Kauai Springs, Inc. v. Planning Comm'n of Cnty. of Kauai*, 2013 WL 1829587 (Haw. Ct. App. Apr. 30, 2013).
- ⁴ U.S. Geologic Survey, Regional Groundwater Availability Studies, <http://water.usgs.gov/ogw/gwrp/activities/gw-avail.html>.
- ⁵ Commission on Water Resource Management, Groundwater (1997) <http://www.state.hi.us/dlnr/cwrp/groundwater.htm>.
- ⁶ *Kauai General Plan* at 2-3.
- ⁷ *See In re Water Permit Use Applications*, 94 Hawai'i 97, 133 n.31 (2000) (rejecting the contention that the reference in Article XI, section 1 to "public natural resources" indicates an intent to exclude "privately owned" waters from the public trust inasmuch as "apart from any private rights that may exist in water, 'there is, as there always has been, a superior public interest in this natural bounty.'").
- ⁸ *Kauai Springs v. Planning Comm'n of Kauai*, 2013 WL 4779589 (Haw. Sept. 4, 2013).
- ⁹ Jerry Harkavy, *Bottled Water Giant Becomes Target*, THE WASHINGTON POST (Nov. 12, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/12/AR2005111200771_pf.html.
- ¹⁰ *Id.*
- ¹¹ Noel Gallagher, *Challenges Piling Up for Poland Springs*, PORTLAND PRESS HERALD (Mar. 12, 2010), available at http://www.pressherald.com/archive/challenges-piling-up-for-poland-spring_2009-02-05.html.
- ¹² *Id.*

CALIFORNIA COURT CONSIDERS MEANING OF “BEST AVAILABLE SCIENCE” IN ENVIRONMENTAL REVIEWS

Adam Deitz¹



Photograph of a sperm whale diving; courtesy of Tim Ellis.

Mid-frequency sonar is the most common method used by the U.S. Navy to locate enemy vessels in anti-submarine warfare. According to the Navy, sonar training is of vital importance to the safety of the United States, as hostile nations develop submarines that are more difficult to detect. The effective use of sonar requires a significant amount of training by Navy personnel in order for the technology to be useful against an enemy submarine.²

Despite the need for sonar use in national security, its use in the ocean has a strongly negative effect on wildlife. Some sonar systems operate in excess of 235 decibels, producing sound waves that can travel across tens or even hundreds of miles of ocean. In fact, noise from low-frequency sonar systems used off the coast of the U.S. are

detectable across the breadth of the northern Pacific Ocean. Noise from sonar is disturbing, deafening, and even deadly for some marine wildlife. Whales and dolphins are particularly sensitive to noise interference, as they use sound for navigating, hunting, and even reproducing. In response to extreme auditory interference like sonar, whales become disoriented, flee from their habitats, or even injure themselves by altering their dive patterns.³

Recently, courts have addressed the disconnect between the needs of the Navy for sonar training and the resulting harm to marine wildlife. For instance, in 2008 the U.S. Supreme Court held that the Navy was not required to turn off its sonar when whales surface nearby.⁴ In 2013, the U.S. District Court for the Southern District of Georgia ruled in favor of the Navy after environmental groups challenged

the Navy's use of an underwater submarine warfare training range in the only known breeding grounds of the endangered North Atlantic right whale.⁵ In the case at hand, the U.S. District Court for the Northern District of California ruled on whether an agency used the best scientific information available when allowing anti-submarine warfare training exercises off the coast of Northern Washington, an area that is home to marine mammals protected by the Endangered Species Act.⁶

NMFS Requirements under the ESA and MMPA

The Endangered Species Act (ESA) provides for the listing of species as threatened or endangered and for the protection of their critical habitat.⁷ The Secretary of Commerce administers the ESA through the National Marine Fisheries Service (NMFS).⁸ ESA § 7(a)(2) requires each agency of the government to consult with the Secretary to insure that any actions taken by the agency do not jeopardize the continued existence of any species.⁹

Where adverse effects are likely, NMFS issues a biological opinion (BiOp) as to whether the proposed agency action is likely to jeopardize the continued existence of any listed species. Furthermore, the BiOp must be based on the "best scientific data available."¹⁰ If NMFS determines that an agency's actions will harm a protected species or its habitat, it will suggest reasonable alternative plans to the acting agency.¹¹ However, where NMFS finds that no harm is likely, it issues a finding of no jeopardy and the proposed action may proceed as planned.

Section 9 of the ESA also generally prohibits the "take" of any protected species without permission from NMFS. Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹² Thus, it is possible for agency actions to violate the ESA by "taking" a protected species even after NMFS has advised that the agency's action will not violate § 7(a)(2). In these circumstances, NMFS must also issue an Incidental Take Statement (ITS) specifying the terms, conditions and limits of the take.¹³

Just as the ESA prohibits the "take" of protected species, the Marine Mammal Protection Act (MMPA) prohibits the "take" of marine mammals.¹⁴ The MMPA is also administered by NMFS on behalf of the Secretary of Commerce to protect whales, dolphins, porpoises, seals, and sea lions. Under the MMPA, an agency may receive a Letter of Authorization (LOA) based on a determination that the level of taking will be consistent with the total allowable take.¹⁵ LOAs will specify the period of validity and any additional terms and conditions appropriate for the specific request.¹⁶

Background

In 2008, the Navy applied to NMFS for authorization under the MMPA and the ESA to conduct anti-submarine warfare training exercises, including the use of mid-frequency active sonar, in the Northwest Training Range Complex (NWTRC). The NWTRC is located approximately 50 nautical miles from the coast of Northern Washington and is the size of California.

In November 2010, NMFS granted the Navy's application and issued regulations under the MMPA governing the take of marine mammals incidental to Navy training in the NWTRC for a period of five years, from November 2010 through November 2015. On June 15, 2010, NMFS issued the Final Biological Opinion ("Five Year BiOp"), concluding that the training activities were not likely to jeopardize the continued existence of any species listed as threatened or endangered under the ESA. In October 2012, NMFS issued its Final Letter of Authorization (LOA) under the MMPA regulations, reaffirming its no jeopardy conclusion.

In an attempt to void the permit granted to the Navy by NMFS, environmentalists filed suit, claiming that NMFS used the same data collected during the 2010 Five Year BiOp for its 2012 LOA and, therefore, abused its discretion in issuing the permit. The abuse of discretion question, and the fate of the permit as it stands, revolves largely around one major issue: was NMFS using the "best scientific data available" at the time of issuing the 2012 LOA?

Historically, it has been unclear as to when an agency is abusing its discretion by excluding certain scientific data. With new scientific information becoming available every day, the court must carefully balance the need to protect the environment while not creating a system in which agencies are so inundated with new data that it becomes impossible to issue a binding decision.

New Research

After NMFS issued the Five Year BiOp in 2010, additional research started to surface that contradicted the agency's finding of no jeopardy. First, in 2010, new peer-reviewed material demonstrated that higher frequency sounds induced hearing loss at lower exposure levels in some protected species and that the previous threshold for hearing loss (assumed by NMFS) was no longer correct.¹⁷ Furthermore, in 2011, scientists developed newer and more accurate methods to estimate how dolphins and whales perceive the loudness of received sounds of varying frequencies.¹⁸ Thus, even though there were only two years between the Five Year BiOp and the LOA, the scientific community learned significantly more about how acoustics negatively affect

marine wildlife. In issuing its decision, the court looked at whether the agency should have used these findings in the interest of using the “best scientific data available.”

No Jeopardy Finding

First, when NMFS used the 2010 data for its 2012 LOA to determine if the Navy’s exercises posed any jeopardy to protected species, there was new peer-reviewed data available for consultation. The court found that ignoring the research generated by the scientific community between June 2010 and October 2012 was a clear example of an abuse of discretion by NMFS. The new scientific data was a significant update to an area of study that is not otherwise subject to frequent revision; furthermore, the findings were available for not only months, but years before NMFS issued the 2012 LOA. Thus, the “best scientific data available” would include dramatic changes in understanding of a field of study, even if only a year or two old.

THE COURT FOUND THAT IGNORING THE RESEARCH GENERATED BY THE SCIENTIFIC COMMUNITY BETWEEN JUNE 2010 AND OCTOBER 2012 WAS A CLEAR EXAMPLE OF AN ABUSE OF DISCRETION BY NMFS.

Incidental Take Statement

The court also ruled that NMFS’ failure to consider the new scientific data in its estimated amount of “take” in the protected species was an abuse of discretion. Under the ESA, the term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁹ As previously mentioned, when NMFS issues a no jeopardy BiOp, NMFS must also prepare an ITS if the proposed action will incidentally take members of a listed species. The ITS estimates what the level of incidental take will be based on agency actions and any limitations that should be enforced.

Here, after NMFS determined that there was no jeopardy based on the 2010 data, it was still required to use the “best scientific data available” to determine the level of incidental take. According to the most recent research, the sensitivity to acoustics suffered by marine wildlife was much higher than previously thought, thereby making the actual level of take higher than believed in 2010. Thus, the ITS was based on unreliable information. The “best scientific data available” would have included the new data, in which the anticipated harm

to marine wildlife during and beyond the Navy’s exercises was forecast to be much greater.

Conclusion

As humans move more aggressively into the marine environment, courts are more frequently called on to balance human expansion and protection of marine wildlife. The court’s continual refinement of what it means to use the “best scientific data available” may prove to be a consistently effective way to force agencies to strike that balance, and over time it is likely that the concept will receive increasingly more attention. 🐋

Endnotes

- ¹ 2014 J.D., M.M.A. Candidate, Roger Williams School of Law.
- ² *US Navy Ignores California’s Call to Curb Training Involving Sonar, Underwater Blasts*, EARTH ISLAND (Oct. 20, 2013), http://www.earthisland.org/journal/index.php/elist/eListRead/bad_news_for_whales_us_navy_ignores_californias_call_to_curb_sonar_blasts.
- ³ *Lethal Sounds*, NRDC (Oct. 20, 2013), <http://www.nrdc.org/wildlife/marine/sonar.asp>.
- ⁴ *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 13 (2008).
- ⁵ *Defenders of Wildlife v. U.S. Dep’t of Navy*, 12-15680, 2013 WL 5434774 (11th Cir. Oct. 1, 2013).
- ⁶ *Intertribal Sinkyone Wilderness Council v. Nat’l Marine Fisheries Serv.*, No. 1:12-cv-00420 NJV (Filed Sept. 25, 2013), *available at* <http://www.earthjustice.org/sites/default/files/files/NavySonarRulingSept26.pdf>.
- ⁷ 16 U.S.C. § 1533.
- ⁸ *Id.* § 1532(15).
- ⁹ *Id.* § 1536(a)(2).
- ¹⁰ *Id.*
- ¹¹ *Id.* § 1536(a)(3)(A).
- ¹² *Id.* § 1532(19).
- ¹³ *Id.* § 1536(b)(4).
- ¹⁴ *Id.* § 1371(a).
- ¹⁵ 50 C.F.R. §216.106(b).
- ¹⁶ *Id.* § 216.106(c).
- ¹⁷ James J. Finneran, *Frequency-dependent and Longitudinal Changes in Noise-induced Hearing Loss in a Bottlenose Dolphin*, 128 J. ACOUST. SOC. AM. (2) 567, 568 (2010).
- ¹⁸ James J. Finneran, *Subjective Loudness Measurements and Equal Loudness Contours in a Bottlenose Dolphin*, 130 J. ACOUST. SOC. AM. 3124-3136 (2011).
- ¹⁹ 16 U.S.C. § 1538(a)(1)(B).

PUBLIC TRUST DOCTRINE LIMITED BY WISCONSIN SUPREME COURT

Terra Bowling



Photograph of Lake Koshkonong; courtesy of the Wisconsin Department of Natural Resources.

Recently, the Wisconsin Supreme Court ruled that the state's Department of Natural Resources (DNR) overstepped its authority by using the public trust doctrine to regulate water levels of a state lake.¹ The court's opinion, a departure from previous state-court rulings expanding the state public trust doctrine, essentially prohibits application of the doctrine to land and non-navigable water above the ordinary high water mark.

Background

Lake Koshkonong, an approximately 10,500 acre impounded lake, has an average depth of about five feet. Wis. Stat. Ann. § 31.02 states that the DNR "... in the interest of public rights in navigable waters or to promote safety and protect

life, health and property may regulate and control the level and flow of water in all navigable waters ...". Accordingly, the Rock-Koshkonong Lake District (District) petitioned the DNR to increase the level of the lake, indicating that the current water levels negatively impacted economic activity in the local community, as well as the lake's natural resources. The DNR rejected the petition to raise the water levels, and the District subsequently requested a hearing. At the hearing, the DNR argued that the increased water levels would result in erosion of wetlands and harm the lake's fish and wildlife.

Following the hearing, the administrative law judge (ALJ) ruled in favor of the DNR. The ALJ concluded that "the DNR's decision ... is necessary to protect the public

rights in navigable waters and reasonably balances and accommodates public and private rights, the promotion of safety, and the protection of life, health, and property.”² The ALJ also excluded evidence regarding the economic impacts of water levels. The District appealed to a circuit court, arguing that although the DNR must consider “public rights in navigable waters” under Wis. Stat. Ann. § 31.02, the DNR improperly included private wetlands in its consideration. The District also objected to the ALJ’s exclusion of evidence regarding the economic effects of the low water levels. The circuit court, and subsequently the court of appeals, affirmed the DNR’s decision.

A Lost View

On appeal, the Wisconsin Supreme Court considered whether DNR exceeded its authority in considering the impact of water levels on private, non-navigable wetlands above the Ordinary High Water Mark (OHWM). While the court agreed that the DNR could consider the impact of water levels on public and private wetlands, the majority held that the DNR did not have authority to do so under the public trust doctrine. The court reasoned that

*[E]liminating the element of ‘navigability’ from the public trust doctrine would remove one of the prerequisites for the DNR’s constitutional basis for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land above the OHWM would eliminate the rationale for the doctrine. The ramifications for private property owners could be very significant.*³

Essentially, the court found there was no constitutional basis for applying the public trust doctrine to non-navigable land, and, further, the court was concerned with impacts of such application of the doctrine to private land owners. This is in contravention to previous state court decisions expanding the doctrine, including a 2011 Wisconsin Supreme Court case finding that the DNR had authority to regulate land use under the public trust doctrine.⁴

In the current case, the court concluded that instead of using the public trust doctrine to protect non-navigable wetlands and other non-navigable water resources, the DNR should have used its statutory authority stemming from the state’s police power. The court focused on the DNR’s authority to regulate water levels “to promote safety and protect life, health and property” as outlined in Wis. Stat. Ann. § 31.02(1).

The court next turned to whether the DNR exceeded its authority by considering wetland water quality standards. Wis. Stat. ch. 281 grants the DNR authority to write and enforce state wetland water quality standards; therefore, the court reasoned that it was reasonable for the DNR to consider water quality

standards when making a water level determination. The court did note that the department is not required to use the water quality standards when making a water level determination under Wis. Stat. Ann. § 31.02, since the statute is exempted from provisions of ch. 281.

Finally, the court considered whether the DNR erred in refusing to consider the economic impacts of water levels. The court reasoned that the phrase “protect ... property” in Wis. Stat. Ann. § 31.02(1) had historically been interpreted to include protection from negative economic impacts. Therefore, the court concluded that the DNR should have considered the economic impact of the water levels on residents, businesses, and tax bases surrounding Lake Koshkonong.

**THE COURT REASONED THAT THE PHRASE
“PROTECT ... PROPERTY” IN WIS. STAT.
ANN. § 31.02(1) HAD HISTORICALLY BEEN
INTERPRETED TO INCLUDE PROTECTION
FROM NEGATIVE ECONOMIC IMPACTS.**

Conclusion

The majority ruled that the DNR could not use the public trust doctrine in its water level determination. The decision was not unanimous. Three justices strenuously dissented, stating

*The majority opinion attempts to undermine this court’s precedent, recharacterize its holdings, and rewrite history. Instead of limiting itself to addressing only what must be addressed, the majority seizes this opportunity to limit the public trust doctrine in an unforeseen way, transforming the state’s affirmative duty to protect the public trust into a legislative choice. It needlessly unsettles our precedent and weakens the public trust doctrine that is enshrined in the Wisconsin Constitution. This represents a significant and disturbing shift in Wisconsin Law.*⁵

The case will return to the circuit court, which will rule on the case consistent with the majority opinion. ☹

Endnotes

- ¹ Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res., 833 N.W.2d 800 (2013).
- ² *Id.* at 813.
- ³ *Id.* at 818-819.
- ⁴ Lake Beulah Mgmt. Dist. v. State Dep’t of Natural Res., 799 N.W.2d 73 (2011).
- ⁵ *Rock-Koshkonong Lake Dist.*, 833 N.W. 2d at 836.

A FIGHT BETWEEN CULTURAL TRADITIONS, THE SUPREMACY CLAUSE, AND ENVIRONMENTAL CONCERNS: CALIFORNIA'S BAN ON SHARK FINS

Cullen Manning¹



Photograph of dried shark fins at a seafood shop; courtesy of Choo Yut Shing.

Background

The tradition of eating shark fin dates back to the 14th Century Ming Dynasty in China.² In fact, for nearly 700 years, many Chinese family events have contained one dish that stands out as a status symbol: shark fin soup.³ Serving shark fin at family events is a symbol of the family's wealth, strength, and virility. Despite this time honored tradition, obtaining shark fin is a particularly brutal process. Fishermen catch the sharks, cut off their fins, and then throw them into the ocean where they sink to the bottom and die.

Federal law prohibits bringing finless sharks to shore, but a loophole in the law allows imports from China and Mexico. Fishermen kill an estimated 73 million sharks per year in order to fulfill the demand for shark fin.⁴ Recently, California instituted a ban on possessing and selling shark fins. As a result, associations representing concerned Chinese Californians have responded in force.

Shark Fin Ban

California instituted a ban on the buying, trading, and selling of shark fins in 2011.⁵ California is not alone in its disdain for the practice of shark finning. Other states that have banned the practice include Hawaii, Oregon, Washington, Guam, and, even more recently, New York.⁶ All of these states face criticism from portions of their Asian populace, who claim the law is discriminatory because it is clearly aimed at a primarily Asian practice. States justify passing the ban by describing shark finning as a cruel act that damages the ocean's ecosystem.

Shark Fin Ban

Representing concerned Chinese Californians, Chinatown Neighborhood Association (CNA) filed for a preliminary injunction in the U.S. District Court for the Northern District of California to stop enforcement of the ban. CNA's primary reason for seeking the injunction is that it believed the bill directly suppressed Chinese traditions and discriminated against Chinese businesses, which caused extensive economic loss.⁷ CNA supported its claims by noting that California Assemblyman and co-sponsor of the bill, Paul Fong, compared the practice of shark finning to the practice of binding women's feet. CNA argued that the ban violates the U.S. Constitution, specifically the Equal Protection Clause of the Fourteenth Amendment, the Commerce Clause, and the Supremacy Clause.

A preliminary injunction is an extreme remedy for a court to issue. In order to obtain a preliminary injunction, CNA needed to clearly show: the likelihood that they will succeed on the merits; irreparable harm; that the balance of equities is in its favor; and that the injunction would be in the public interest.⁸ In analyzing the request for the preliminary injunction, the district court believed that CNA failed to produce enough evidence to indicate that the ban violated any laws. Therefore, the district court did not believe that CNA met the heavy burden that warrants a preliminary injunction.

On appeal, the Ninth Circuit Court of Appeals ruled that the district court had not abused its discretion in denying the preliminary injunction. Appellate courts grant a great deal of discretion to district court decisions under the abuse of discretion standard. The Ninth Circuit felt that the district court was well within its discretion to deny the preliminary injunction because CNA did not produce enough evidence to clearly indicate they would win their case on the merits or that irreparable harm would occur without the injunction.

Additionally, the Ninth Circuit agreed with the district court that the constitutional issues raised by CNA were not likely to succeed. To succeed on the Equal Protection claim, CNA needed to show either that the bill discriminated against Asian Americans on its face or there was intent to discriminate. Although one of the bills co-sponsors made reference to foot binding, the court refused to conclude that the law therefore discriminated against Asians. In fact, the court stated that CNA produced evidence showing support for the shark fin law in the Chinese-American community. According to the court, CNA's evidence showed that "half of Chinese-Americans actually support the Shark Fin Law; and further, one of the laws sponsors in the legislature . . . is a Chinese-American . . ."

ALTHOUGH ONE OF THE BILLS CO-SPONSORS MADE REFERENCE TO FOOT BINDING, THE COURT REFUSED TO CONCLUDE THAT THE LAW THEREFORE DISCRIMINATED AGAINST ASIANS.

CNA's Commerce Clause claim relied on a legal theory known as the dormant commerce clause, which is the "implied limitation on the state's authority to adopt legislation that affects commerce."¹⁰ CNA failed to convince the court that they had a strong dormant commerce clause claim because they failed to show "that the Shark Fin Law either regulates extraterritorially, or discriminates in favor of in-state interests."¹¹

CNA's Supremacy Clause claim garnered more support than expected. The basic concept behind Supremacy Clause claims is that federal law preempts state law. To the court's surprise, the Justice Department filed an amicus brief in support of CNA. They claimed that the U.S. had a strong interest in the proper application of preemption principles dealing with CNA's Supremacy Clause claim.¹² The Department claimed that California's shark fin ban is preempted by the

federal Magnuson-Stevens Fishery Conservation and Management Act (MSA). The Ninth Circuit Court of Appeals was not impressed with the Justice Department's argument and, possibly, a little aggravated that the government submitted their brief late and immediately prior to oral argument.¹³ The court found that the government's argument was unpersuasive because the language in the MSA does not expressly preempt the shark ban.

Conclusion

Many consider shark fin soup a tradition as time honored as gravy at Thanksgiving. It is difficult for a community to give up long-standing traditions, as they are ingrained in us when we are young. Despite this, many Chinese Americans recognize that it might not survive another generation. This indicates that to many, the shark fin ban does not symbolize the suppression of Chinese culture, but rather, society's movement towards placing a higher value on our environment and wildlife. Until CNA gathers more evidence that the shark fin ban is blatant discrimination against Asian Americans, it will be difficult for them to convince the court that the law is unjust. ❧

Endnotes

- ¹ 2014 J.D. Candidate, University of Mississippi School of Law.
- ² *Chinatown Neighborhood Ass'n v. Brown*, 2013 WL 4517073 (9th Cir. Aug. 27, 2013).
- ³ Patricia Leigh Brown, *Soup Without Fins? Some Californians Simmer*, N.Y.TIMES (March 5, 2011), http://www.nytimes.com/2011/03/06/us/06fin.html?_r=0.
- ⁴ *Id.*
- ⁵ CAL. FISH & GAME CODE § 2021.
- ⁶ Associated Press, *California Governor Signs Ban on Shark Fins*, N.Y.TIMES, (Oct. 8th, 2011), <http://www.nytimes.com/2011/10/08/us/california-governor-signs-ban-on-shark-fins.html>.
- ⁷ *Chinatown Neighborhood Ass'n*, 2013 WL 4517073.
- ⁸ *Id.*
- ⁹ *Id.* at 6.
- ¹⁰ *Id.* at 8.
- ¹¹ *Id.*
- ¹² Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal on the Supremacy Claim, *Chinatown Neighborhood Ass'n v. Brown*, 2013 WL 4517073 (2011), (No.13-15188).
- ¹³ *Chinatown Neighborhood Ass'n*, 2013 WL 4517073.

OIL AND WATER: AGENCY ACTION AND JUDICIAL REVIEW UNDER THE ACT TO PREVENT POLLUTION FROM SHIPS

Marc Fialkoff¹

This past July, the U.S. Court of Appeals for the Fourth Circuit reversed the U.S. District Court for the Eastern District of Virginia, ruling in *Angelex Ltd. v. United States* that the judiciary does not have jurisdiction over U.S. Coast Guard sanctions related to violations of the Act to Prevent Pollution from Ships.² Specifically, the court ruled on whether the Coast Guard has the authority to detain and require a \$2.5 million bond and other assurances on a foreign-flagged vessel with a falsified Oil Record Book. The decision recognizes the role of the Coast Guard in enforcing environmental compliance by vessels, while carefully explaining the relationship between agencies and the judiciary.

International and Federal Marine Pollution Prevention

The U.S. is a signatory to the MARPOL convention, which is a “multi-national treaty aimed at ‘achiev[ing] the complete elimination of international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances.’”³ As a signatory to the convention with the responsibility of passing domestic law to implement it, Congress passed the Act to Prevent Pollution from Ships (APPS) in 1980.⁴

Under the APPS, the Secretary of the Department of Homeland Security, which contains the Coast Guard, has authority to “enforce and administer” MARPOL and any other statutes and regulations related to protecting the marine environment.⁵ In addition, the APPS requires that all oil-carrying vessels maintain an Oil Record Book (ORB) which contains information about the cleaning, ballasting, and discharge of ballast, as well as disposal of oil residues or discharges from bilges near oil/machinery spaces.⁶ The Act calls for accurate record keeping of the ORB and any tampering or violation of the APPS is considered a Class D Felony.⁷

A Routine Inspection Becomes Anything But Routine

The *Angelex* case involves a falsified ORB on the *M/V Antonis G. Pappadakis*, an ocean going bulk cargo carrier built in 1995 and flagged in Malta. The vessel was

registered to Angelex Ltd. and was operated by Kassian Maritime Navigation Agency, Ltd. When the vessel arrived at the Norfolk Southern Terminal in Norfolk, Virginia on April 14, 2013, a routine Coast Guard inspection turned out to be not so routine when a crew member passed a note to the Coast Guard inspector claiming that the oily water separator on the vessel was bypassed, allowing oily discharge that was not noted in the ORB. Upon determination that the separator was bypassed and the ORB was falsified, the Coast Guard referred the matter to the Department of Justice and requested the Customs Border Protection to refuse to give clearance papers to the *Pappadakis* to leave port.

After attempts at negotiation to release the vessel, the Coast Guard required a \$2.5 million bond and other security assurances to ensure the ability for continued jurisdiction over the ship and crew. Angelex and the *Pappadakis* (*in rem*) sued the Coast Guard in federal district court claiming amongst other things that the Coast Guard was unjustified in detaining the vessel and requiring such a high value on the bond.⁸

The District Court Steps In

At first, the district court tried to encourage both parties to negotiate a reasonable bond for the *Pappadakis*; however, after receiving word from Coast Guard Headquarters in Washington D.C. that \$2.5 million was a firm bond requirement, the district court filed a memorandum of opinion holding that the bond was unreasonable. First, the district court determined that it had jurisdiction pursuant to the Administrative Procedure Act (APA), federal question jurisdiction, and admiralty jurisdiction. From there, the court went on to say that the Coast Guard was outside its statutory authority with the imposition of such a high bond on the vessel. The court also altered the bond conditions, setting a new surety bond of \$1.5 million. Furthermore, the court determined that if the U.S. Government, the Coast Guard, or other governmental agencies (Government) wanted to proceed with charges against the Master of the vessel, Gerasimos

Patsalias, it could only do so in civil *or* criminal court, because the court determined that the purpose of the Act was to recover fines, not to provide for criminal prosecution.⁹ Subsequent to the decision, the Government sought a postponement of the proceeding from the district court which was denied, at which time the Government went to the Fourth Circuit and requested a stay, which was granted.

Opinion of the Fourth Circuit

The Fourth Circuit's analysis was primarily concerned with the reviewability by the courts of the Coast Guard's actions in line with the APPS. The court disagreed with the district court's analysis that the judiciary was able to review Coast Guard actions under the APA because the APA itself cannot be the grounds for agency review. Rather, the court must look to the statute at issue, here the APPS, to determine whether judicial review was appropriate.¹⁰ While the APA provides guidance for determining whether agency action was outside the scope of the enabling statute, the federal statute must be the starting point, not the APA.¹¹

In reviewing the APPS, the Fourth Circuit determined that the Coast Guard was within its statutory authority granted by the APPS. The APPS "grants the Coast Guard broad discretion to deny bond altogether and it can dictate the terms of any bond that it may accept."¹² Further, the court determined that when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," deference must be given to the agency.¹³ In this case, the court determined that the Coast Guard was within its purview to assess such a high bond because the Coast Guard acted within its discretion provided by the Act.

While the thrust of the opinion resolved the question as to the authority the Coast Guard possessed under the APPS, the court also determined that the Coast Guard decision was not a final decision that could be reviewed by the court.¹⁴ The court was concerned that because the Act created no "judicially manageable standard" by which adjudication was possible, the district court erred in its determination that the court had jurisdiction in the first place.¹⁵ Angelex also claimed there was irreparable harm to the vessel and crew given its "unlawful" detention; the court held that the APPS has economic remedies if it is determined that harm has occurred as a result of unreasonable detention.¹⁶ In this argument, the court essentially told Angelex that it could argue economic harm after-the-fact and claim redress through the statute, but seeking injunctive relief while the case was pending was improper.

Finally, the court quickly dismissed the admiralty jurisdiction claim. The court rejected the district court's assertion of admiralty jurisdiction and the argument made by Angelex that the detention of the vessel constituted an arrest under admiralty jurisdiction because the Coast Guard was acting under statutory instruction from the APPS and not the traditional *in rem* actions usually pursued under admiralty law.¹⁷ Although Angelex tried to argue that the arrest of the vessel was harmful, the court determined that the Coast Guard was only acting under the authority provided by the statute and that no admiralty jurisdiction existed to allow the case to proceed within the courts.¹⁸

Conclusion

Ultimately, the Fourth Circuit reversed the district court's ruling primarily on the ground that under the APPS, there is no manageable judicial standard under which the court could review the actions of the Coast Guard. Although the case was dismissed on jurisdictional grounds, the court's analysis carefully described the role of the Coast Guard in enforcing marine pollution standards and the broad latitude given to it by the APPS. The court pointed out to Angelex that a remedy existed for economic recovery if the vessel was unreasonably detained, however it should be sought after the fact, and not through injunctive relief. ❏

Endnotes

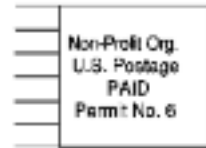
- ¹ 2014 J.D. Candidate, Roger Williams University School of Law.
- ² 723 F.3d 500, 506 (4th. Cir. 2013).
- ³ *Id.* at 500 (internal citation omitted).
- ⁴ *Id.* (Act to Prevent Pollution from Ships, 94 Stat. 2297 (1980) (codified as amended at 33 U.S.C. §§ 1901-15)(1996)).
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.* at 502.
- ⁸ *In rem* means "against a thing;" usually associated with actions brought by or against vessels in admiralty law. *Black's Law Dictionary* 864 (9th. ed. 2013).
- ⁹ *Angelex Ltd. v. United States*, 2013 AMC 1217 (E.D. Va. 2013).
- ¹⁰ *Id.* at 505-06.
- ¹¹ *Id.*
- ¹² *Id.* at 507.
- ¹³ *Id.*
- ¹⁴ *Id.* at 508.
- ¹⁵ *Id.* at 507.
- ¹⁶ *Id.* at 508-09.
- ¹⁷ *Id.* at 509.
- ¹⁸ *Id.* at 510.



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Littoral Events

Aquaculture America 2014

Seattle, WA • February 9 – 12, 2014

The U.S. Aquaculture Society (formerly U.S. Chapter of WAS) joins with National Aquaculture Association and the U.S. Aquaculture Suppliers Association to produce the annual Aquaculture America meeting. This year's meeting will be held in Seattle. The program will feature special sessions, contributed papers and workshops on topics such as offshore aquaculture, aquatic invasive species, science and public policy, and federal agency updates.

For more information, visit: www.was.org/meetings/default.aspx?code=aa2014

World Ocean Summit

San Francisco, CA • February 24 – 26, 2014

The Economist hosts a second World Ocean Summit to continue the unique outcome driven dialogue first established at the 2012 summit. The summit will convene more than 200 global leaders from government, business, international organizations, NGOs, think-tanks and academia.

For more information, visit: <http://www.economistinsights.com/sustainability-resources/event/world-ocean-summit-2014>

ASBPA Coastal Summit

Washington, D.C. • February 26 – 28, 2014

The American Shore and Beach Preservation Association will convene the 2013 Coastal Summit in Washington, D.C. to discuss the future management of the nation's beaches and shores. ASBPA encourages policy makers, state and local officials, scientists, and attorneys to attend the conference. Among other topics, the conference will examine Hurricane Sandy's impact and aftermath in repairing the New Jersey and New York shorelines.

For more information, visit: www.asbpa.org/conferences/sum_13.htm