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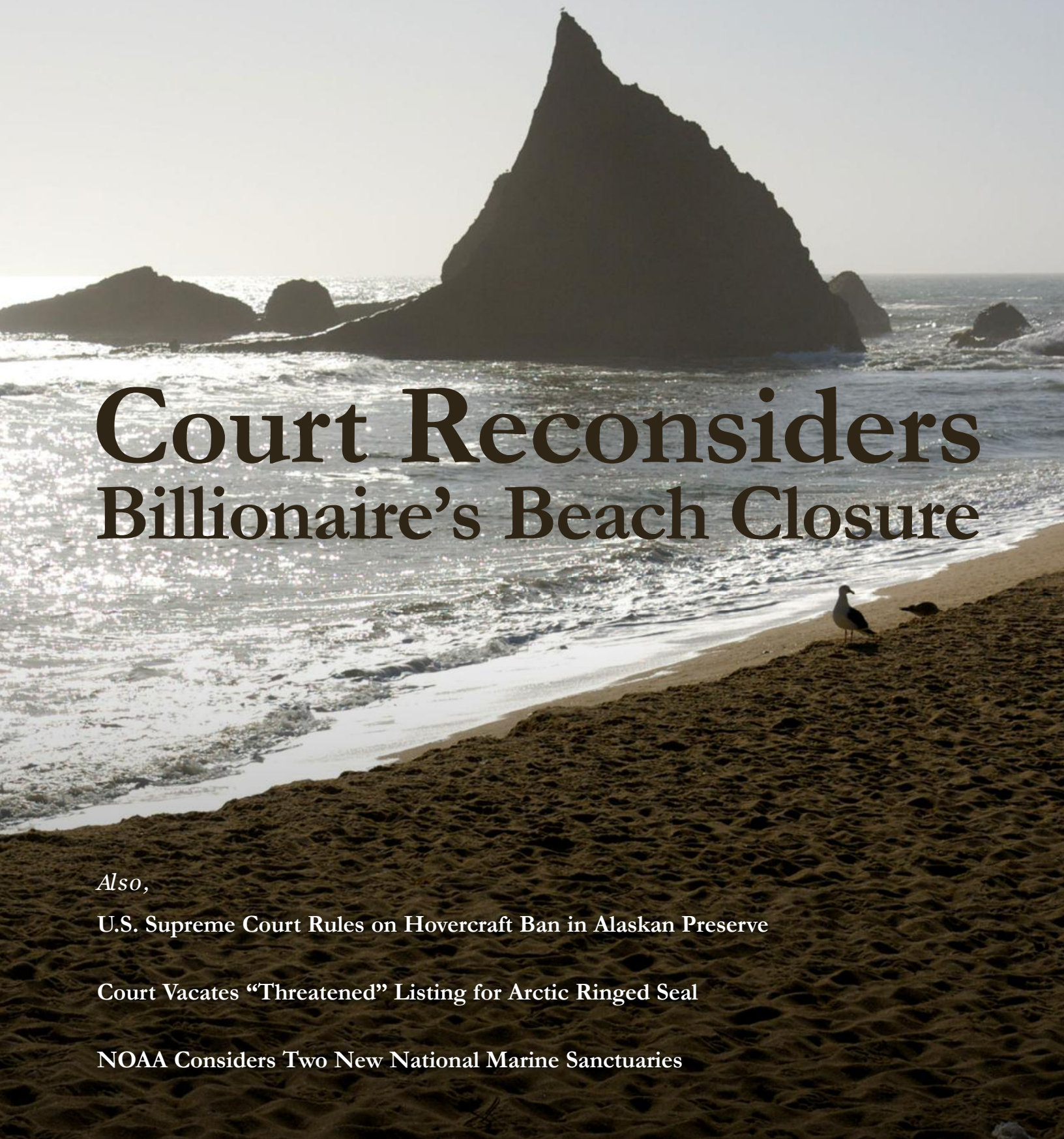

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Also,

U.S. Supreme Court Rules on Hovercraft Ban in Alaskan Preserve

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NOAA Considers Two New National Marine Sanctuaries

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Barry Barnes

Contributors:
Nathan Morgan
Ashley Stilson

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Cover page photograph of the Martin's Beach, CA shore courtesy of Marcin Wichary.

Contents page photograph of bird footprints on Martin's Beach, CA courtesy of Marcin Wichary.

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Contents

Court Reconsiders Billionaire's Beach Closure

Ashley Stilson[1]

Martin's Beach, CA courtesy of Marcin Wichary.

For decades, a billboard along the California coast welcomed surfers, swimmers, and fisherman to Martin's Beach and invited them to use Martin's Beach Road to access the coastline's sandy shores and remarkable surfing.[2] The property, then owned by the Deeney family, provided visitors with a general store, public toilets, and a parking area for a fee.[3] Today, Martin's Beach Road, the beach's only access point, is anything but welcoming.

In 2008, billionaire venture capitalist Vinod Khosla, under Martin's Beach 1, LLC and Martin's Beach 2, LLC (LLCs), purchased Martin's Beach for $32.5 million. He had the billboard painted over, the gate locked, "No Trespassing" signs placed, and security posted to "provide a visible presence to deter members of the public."[4] However, this has not prevented surfers and the public from challenging the closure. In April, a California appellate court reopened a portion of a

Gulls on Martin's Beach, CA courtesy of Marcin Wichary.

lawsuit filed by Friends of Martin's Beach against the LLCs, finding Friends had alleged facts sufficient to state a common law dedication claim.[5]

Superior Court

In 2012, Friends filed a lawsuit against the LLCs on behalf of the general public claiming it and the public had a right to access and use Martin's Beach.[6] Friends sought a recreational easement to use the tidelands, inland dry sand, and parking area, and an easement over Martin's Beach road for beach access.[7] While Friends claimed the public trust doctrine, California Constitution, and common law dedication prevented the LLCs from restricting beach access, the trial court granted the LLCs' motion for summary judgment, finding that the 1848 Treaty of Hidalgo, which required the U.S. to recognize Mexican land grants, barred the public trust and Constitutional claims and evidence negated a finding of dedication.[8] Friends subsequently appealed.[9]

California Constitution

Friends first alleged that the California Constitution entitled the public to an easement over Martin's Beach road for beach access. Article X, section 4 of the California Constitution states that "No individual…possessing frontage or tidal lands of [navigable water] in this State shall be permitted to exclude the right of way to such water whenever it is required for any public purpose…"[10] The appellate court held that this article "at least in part" codifies the public trust doctrine, which conditions tideland ownership to the public's right to use.[11] However, the property interest in Martin's Beach is unique because it is derived from an unperfected Mexican land grant.[12] Because the State did not assert a public interest during the federal land patent proceedings in the mid-1800s, the court declared that the State did not acquire a public interest in the property and cannot now assert one to create an easement over the property.[13]

Friends alternatively argued that the State acquired a public interest in Martin's Beach when California was admitted into the United States because the Mexican land grant was unperfected. However, the court interpreted the Treaty of Hidalgo, as well as the implementing Act of 1851, to uphold unperfected property interest claims based on "equitable interests," such as long-term possession or improvements.

Common Law Dedication

Friends next alleged that common law dedication entitled the public to a recreational easement to use the tidelands, inland dry sand, and parking area and an

easement over Martin's Beach road for beach access. Common law dedication is a grant of land or interest in land to the public for public use. The property owner must intend, expressly or impliedly, to offer the land for public use, and the public must accept the offer either formally or by use.

Friends claimed that the Deeneys intended to dedicate the tidelands, inland dry sand, parking area, and Martin's Beach road to the public because they offered the use of Martin's Beach road to access the tidelands through a billboard and offered the use of the beach by constructing a parking lot, providing toilets, and opening a convenience store. Additionally, Friends claimed the public accepted the Deeneys' offer by using the beach and road over an extended period of time. While the LLCs argued the fee charged by the Deeneys and commercial nature of the use negated the Deeneys' intent to dedicate, the court ruled that commercial activity favored a finding of dedication, and there was limited evidence to conclude charging a fee created a permissive use. In doing so, the appellate court reversed the lower court's ruling, which allows Friends' common law dedication claim to proceed to trial.

Conclusion

While the appellate court found that the public did not have a right to access and use Martin's Beach under the California Constitution, it concluded that Friends had alleged facts sufficient to state a common law dedication claim. This allows Friends' dedication claim to proceed to trial.

Friends are not alone in asserting their right to access their treasured coastline. The Surfrider Foundation has also filed a lawsuit against the LLCs, claiming they engaged in development in violation of the California Coastal Act by blocking access to Martin's Beach Road.[14] Any development within the Coastal Act's jurisdiction requires a Coastal Development Permit (CDP), and development includes "conduct which causes an indirect effect on" coastal access. Because Martin's Beach is within the Act's jurisdiction and the LLCs did not obtain a CDP prior to locking the gate across Martin's Beach Road, painting over the billboard, and posting security guards, the court found the LLCs engaged in development in violation of the Act. While the court ordered the LLCs to open Martin's Beach Road for public access, the Road has only been open occasionally, and the LLCs have appealed the case.[15]

The State of California is also asserting the public's right to access their coastline. In 2014, the state senate passed Bill 968, which allows the State Lands Commission to negotiate for public easements or to acquire easements through eminent domain.[16] Following the legislation, Khosla and the Commission engaged in negotiations for the restoration of public access.[17] Khosla offered to restore public access for nearly the entire property's price: $30 million.[18]

Endnotes

1 2017 J.D. Candidate, Elisabeth Haub School of Law at Pace University and Summer Research Associate, National Sea Grant Law Center.

2 Friends of Martin's Beach v. Martin's Beach 1 LLC et al., 201 Cal. Rptr. 3d 516, 521 (Cal. Ct. App. 2016); Christine Hauser, *Mogul Seeks $30 Million From California to Give Beach Access*, N.Y. TIMES (Feb. 23, 2016).

3 *Friends of Martin's Beach,* 201 Cal. Rptr. 3d at 521.

4 *Id.*; Surfrider Foundation v. Martin's Beach 1 LLC et al., No. CIV520336, 2014 WL 6634176, at *5 (Cal. Super. Ct. Nov. 12, 2014).

5 *Friends of Martin's Beach,* 201 Cal. Rptr. 3d at 521-22.

6 Complaint at 1, Friends of Martin's Beach v. Martin's Beach 1 LLC et al., No. CIV517634, (Cal. Super. Ct. Apr. 30, 2014); Friends of Martin's Beach v. Martin's Beach 1 LLC et al., No. CIV517634, 2014 WL 2945900 (Cal. Super. Ct. Apr. 30, 2014).

7 Complaint, *supra* note 6, at 9; *Friends of Martin's Beach*, 201 Cal. Rptr. 3d at 524 ("Tidelands" refers to area between the mean high tide line and the mean low tide line.).

8 *Friends of Martin's Beach*, 2014 WL 2945900; *see* Friends of Martin's Beach v. Martin's Beach 1 LLC et al., No. CIV517634, 2014 WL 2807186 (Cal. Super. Ct. Apr. 30, 2014).

9 *Friends of Martin's Beach*, 201 Cal. Rptr. 3d at 523.

10 *Id.* at 524.

11 *Id.* at 532; *Friends of Martin's Beach*, 2014 WL 2945900.

12 *Friends of Martin's Beach*, 201 Cal. Rptr. 3d at 520-21; *Friends of Martin's Beach*, 2014 WL 2945900 (A land patent is a quitclaim deed from the United State's government to the claimant relinquishing all government or other citizen interest in the property.).

13 *Friends of Martin's Beach*, 201 Cal. Rptr. 3d at 525-27 (citing Summa Corp. v. Cal. *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984)).

14 *Surfrider Foundation,* 2014 WL 66341765, at *3.

15 *Id.* at *11; Angela Howe, *Khosla Appeals Martin's Beach Ruling: Surfer's Fight Continues*, SURFRIDER FOUNDATION (Feb. 23, 2015).

16 Howe, *supra* note 15.

17 Hauser, *supra* note 2.

18 *Id.*

Litigation Update:
U.S. Supreme Court Rules Wetlands Determination is Final Agency Action

In May, the U.S. Supreme Court ruled that landowners may sue the U.S. Army Corps of Engineers (Corps) to challenge the agency's wetlands determinations. The Corps makes Jurisdictional Determinations (JD) to determine whether a property contains "waters of the United States" subjecting it to regulation under the Clean Water Act (CWA). Under the Administrative Procedure Act (APA), a court may only review a JD if it is "final agency action."[1] Prior to the Supreme Court ruling, there was a split among the federal circuit courts as to whether a JD was a "final agency action."[2]

The current case arose when three companies sought a CWA permit to mine peat on their property. The Corps issue an approved JD, finding the property contained "waters of the United States." The companies appealed the JD to the Corps' Mississippi Valley Division Commander, who then remanded the issue for further fact finding. The Corps issued a revised JD reaffirming its initial finding. The companies eventually sought judicial review under the APA. The federal district court held the revised JD was not "final agency action for which there is no other adequate remedy" and dismissed the case for lack of subject matter jurisdiction. On appeal, the Eighth Circuit reversed, and the U.S. Supreme Court granted certiorari.

The Supreme Court held that an approved JD from the Corps is a final agency action because it is the point at which the agency's decision making process is finalized and legal consequences may flow.[3] The court reasoned that risking enforcement from performing unpermitted activities or seeking judicial review once an unsatisfactory permit has been received were not adequate alternatives to APA review. For additional background on the case, please see John Juricich, *Are CWA Jurisdictional Determinations Immediately Appealable?,* 15:2 SandBar 9 (2016).

The U.S. Supreme Court courtesy of Matt Wade.

Endnotes

1 *See* 5 U.S.C. § 704. The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." *Id.*

2 *See* Hawkes Co. v. United States Army Corps of Engineers, 782 F.3d 994 (8th Cir. 2015), cert. granted, 136 S. Ct. 615 (2015) (holding CWA jurisdictional determination was final agency action immediately reviewable). *Cf* Belle Co. v. United States Army Corps of Engineers, 761 F.3d 383 (5th Cir. 2014) (holding CWA jurisdictional determination was not final agency action immediately reviewable); Fairbanks North Star Borough v. United States Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) (same).

3 U.S. Army Corps of Eng'rs v. Hawkes Co., 2016 WL 3041052 (U.S. May 31, 2016).

U.S Supreme Court Rules on Hovercraft Ban in Alaskan Preserve

Terra Bowling

The Yukon-Charley River Reserve courtesy of the National Park Service.

In March, the U.S. Supreme Court ruled on an Alaskan hunter's challenge to the National Park Service's ban on the operation of hovercrafts.[1] The U.S. Court of Appeals for the Ninth Circuit and a federal district court had previously upheld the NPS's enforcement of the regulation on a river that partially fell within a federal preservation area.[2] The Supreme Court vacated the lower court's ruling, finding that land within conservation system units in Alaska may be treated differently from other federally managed preservation areas across the country.

Background

John Sturgeon has hunted moose on the Nation River on an annual basis for over forty years. The lower six miles of the Nation River are included in the Yukon-Charley Rivers Preserve (Preserve), a unit of the National Park System. The Preserve encompasses 2.5 million acres of pristine land located in the interior of Alaska. Sport hunting and trapping are permitted in the Preserve, as long as hunters obtain the necessary licenses and permits and follow other state regulations.

Twenty-five years ago, Sturgeon purchased a personal hovercraft to use in his hunting expeditions. In 2007, NPS enforcement officers informed Sturgeon that NPS regulations prohibited the operation of hovercrafts within the Preserve.[3] The hovercraft ban applies to any federally managed preservation areas across the country. Sturgeon filed suit alleging that the NPS regulation violated the Alaska National Interest Lands Conservation Act (ANILCA). The state of Alaska intervened in support of Sturgeon's suit. Both the district court and the Ninth Circuit granted summary judgment to the federal government, finding that the plain language of ANILCA allowed enforcement of the ban on both private and public lands.

ANILCA

In 1980, Congress enacted ANILCA to preserve land within the state of Alaska. The Act resulted in approximately 105 million acres of land being set aside "for protection of natural resource values by permanent federal ownership and management."[4] Some of these lands were used to expand and create units of the National Park System, called "conservation system units" (CSUs).

In Alaska, many of the CSU boundaries have been drawn to encompass entire ecosystems and therefore may include state, Native, or privately owned land. ANILCA addresses the regulation of these lands within conservation system units. Specifically, § 103(c) of ANILCA provides that state, Native, and privately owned land is not subject to regulations applicable *solely* to public lands within conservation units. ANILCA defines "public lands" as federal lands in which the U.S. holds title after December 2, 1980.[5] Sturgeon argued that the regulation only applied to federally managed land within the Preserve, and ANILCA prevented the application of the hovercraft ban to state-owned lands within the preserve.

The district court and the Ninth Circuit ruled in favor of the NPS, interpreting ANILCA to limit NPS jurisdiction over non-public lands when the regulation applied only to federal lands within a conservation unit. The hovercraft ban applied to "all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks."[6] The courts found that the ban could be enforced on both public and nonpublic lands, since the ban applied generally to federally owned lands and waters administered nationwide by the NPS and not solely to conservation units in Alaska.

Supreme Court

The U.S. Supreme Court granted certiorari. Sturgeon again argued that the word "solely" in § 103(c) limits NPS from regulating non-public land in Alaska. He contended that the word "solely" was intended to guarantee that non-public lands within conservation units would be subject to laws applicable to both public and private lands, such as the Clean Air Act and the Clean Water Act. The hovercraft regulation, in contrast, only regulates federally managed preservation areas. NPS first suggested that the Nation River was "public" land subject to NPS regulations. The NPS next argued that even if the Nation River is not "public" land, § 103(c) only limits NPS from enforcing regulations that apply solely to public lands within a conservation unit.

The Supreme Court, in an opinion by Chief Justice Roberts, unanimously rejected the lower courts' reasoning. In considering the Ninth Circuit opinion, the Court noted that the lower court's interpretation "…is ultimately inconsistent with both the text and context of the statute as a whole."[7] The Court noted that the intent of ANICLA is to recognize unique circumstances in Alaska. Many Alaska-specific provisions throughout ANILCA "reflect the simple truth that Alaska is often the exception, not the rule."[8] The Court noted that the Ninth Circuit's reasoning would have surprising results: NPS "could regulate 'non-public' lands in Alaska only through rules applicable *outside* Alaska as well."[9] The court rejected this interpretation, as it would lead to a "topsy-turvy" result.

Conclusion

Ultimately, the justices unanimously ruled that the lower courts did not properly interpret ANILCA. The Court did not rule on whether the state-owned Nation River within the Preserve should be considered "public land" under ANILCA, or whether the NPS has authority over activities on the river. The Court left these issues to be handled in lower courts.

Endnotes

1 Sturgeon v. Frost, 136 S. Ct. 1061 (2016).

2 Sturgeon v. Masica, 768 F.3d 1066 (2014).

3 36 C.F.R. § 2.17.

4 *Id.* at 1076, *citing* Nat'l Audubon Soc'y v. Hodel, 606 F.Supp 825, 827-28 (D. Alaska 1984).

5 16 U.S.C 3102(1)-(3).

6 *Sturgeon*, 768 F.3d at 1077-78.

7 *Sturgeon,* 136 S. Ct. at 1070.

8 *Id.* at 1071.

9 *Id.*

Court Vacates "Threatened" Listing for Arctic Ringed Seal

Nathan Morgan[1]

Photo of a Ringed Seal courtesy of JLH3 Photography.

As ambient global temperatures increase, loss of sea ice heavily affects the Arctic Region, leaving federal agencies searching for ways to protect the many species that live there.[2] In doing so, one of the authorities agencies have relied on is the Endangered Species Act (ESA), which is among the strongest environmental legislation for the protection of wildlife species. While the ESA can provide protection for these arctic species, the application of climate change data in the ESA listing process can be controversial.

One of the best-known examples is the "threatened" listing of the Polar Bear in light of population decline influenced by sea ice loss. Several parties challenged the U.S. Fish and Wildlife Service's (FWS) interpretation of climate change factors in listing the Polar Bear, as well as in the critical Polar Bear habitat designation.[3] The reviewing courts ultimately upheld FWS's use of climate change data.[4] However, courts have vacated listing decisions for other species where agencies considered climate change as a factor, such as in the Beringia Bearded Seal listing decision.[5]

Photo of a Polar Bear courtesy of Stefan Cook.

Recently, a district court vacated the National Marine Fisheries Service's (NMFS) listing of the Arctic Ringed Seal as "threatened" under the ESA. The U.S. District Court for the District of Alaska reviewed NMFS's final listing decision, in which NMFS focused primarily on the effects of climate change on the species, identifying habitat alteration due to climate change as the "principal threat."[6] The court found there was a lack of a concrete threat within the reasonably foreseeable future, due primarily to the uncertainty of climate change data and effects after 2050.

Listing "Threatened" Species under the ESA

The ESA states that a threatened species is one that "is likely to become an endangered species within the foreseeable future through all or a significant portion of its range."[7] The ESA does not define what constitutes the "foreseeable future," leaving agencies to decide on a case-by-case basis what the term means in any given listing based on the facts before them.

The designating agency must determine whether the species is threatened due to 1) present or threatened destruction, modification, or curtailment of its habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) inadequacy of existing regulatory mechanisms; or 5) other natural or manmade factors affecting its continued existence.[8] In making the determination, the agency must examine the best scientific and commercial data available for the status of the species.[9]

Under the Administrative Procedure Act (APA), courts have the authority to review agency action, but that authority is narrow and is quite deferential to an agency's expertise in the matter. A court may only set aside an agency action if the action is somehow "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[10] Thus, unless the agency came to a conclusion that is not rationally connected to the data the agency considered in its decision-making process, the court must uphold the agency's decision.[11]

The Species

The Arctic Ringed Seal is one of five distinct ringed seal subspecies. The species is found throughout the Arctic basin along the Arctic coasts of North America, Europe, and Asia.[12] The seals remain in contact with sea ice throughout the year and migrate with the ice as it expands and recedes.[13] The seals rely on spring snow cover for birthing, insulation, and protection of seal pups. Population figures for the Arctic Ringed Seal are uncertain; however, according to NMFS's final listing rule, most experts estimate the current Arctic subspecies population to be in the millions.[14]

Photo of a Bearded Seal courtesy of Ursula Murray Husted.

Listing Background

The Center for Biological Diversity (CBD) first petitioned to have the species listed under the ESA in May 2008, along with several other subspecies of ringed seal, bearded seal, and spotted seal. The petition relied primarily on projected decreases in sea ice due to climate change, but also elaborated on other listing determination factors including overutilization of the species, disease and predation, inadequacy of regulatory mechanisms, and other natural and manmade factors to explain why the seals should be listed. Over four years later, in December 2012, NMFS published its final rule listing the Arctic Ringed Seal as threatened.

NMFS based the listing primarily on climate change effects, stating that significant sea ice and snow cover loss would occur through a significant portion of its range within the "foreseeable future," decreasing the overall species' population and placing the species in danger of extinction. NMFS projected spring snow covers, which the seals rely on for birthing and raising their young, would be inadequate for seal pups by 2100, resulting in higher seal pup mortality due to premature weaning, hypothermia, and predation.[15] NMFS based these determinations on a 100-year climate projection model, which projected consistently rising air temperatures throughout the 21st century. The Alaska Oil and Gas Association, North Slope Borough, and the State of Alaska (plaintiffs) challenged the listing. CBD intervened, joining NMFS to defend the listing decision.

The District Court's Decision and Reasoning

The district court reviewed both procedural and substantive challenges lodged by plaintiffs. The plaintiffs argued that projecting the species' risk of extinction beyond 50 years was not within the "foreseeable future" and was therefore arbitrary. The district court was careful to reaffirm that the "foreseeable future" is a case-by-case, fact-based concept, which could conceivably extend beyond 50 years. However, based on NMFS's final listing rule, the court agreed that the use of the 100-year projection was arbitrary and capricious in this instance. The court compared the ringed seal case to another case challenging the Beringia Bearded Seal listing decision, which was struck down for using a similar 100-year climate model projection.

In that case, the court used a "*reasonably* foreseeable future" standard and found that a case of "unknown, unquantifiable population reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative" to justify listing a species as threatened.[16] The current court followed this precedent.


Iceberg in Alaska courtesy of Mark Byzewski.

The court reasoned that NMFS projected sea ice and snowpack loss to occur primarily after 2050, which is the year that climate change projection models start to become more variable and uncertain. The data was also unclear on how the species would react to climate change effects. Given the lack of any measurable threat for at least 50 years, with expressed uncertainties on the threats projected after those 50 years, the projected effects were too speculative and remote to justify the listing, according to the court.

Finally, despite its finding that the species was threatened, NMFS deemed ESA take prohibitions unnecessary based on the species' current population size, the long-term nature of the climate change threat, and the protections already in place under the Marine Mammal Protection Act. The only effect of the listing, therefore, would be to require federal agencies to consult with NMFS before acting in a way that may jeopardize the continued existence of the seal species throughout its range (including permitting or otherwise authorizing coastal developments, and oil and gas developments). There would be no additional protection, such as harvesting prohibitions, which are generally implemented whenever an agency lists a species. The court reasoned that NMFS's statement categorizing further protections under the ESA as unnecessary, coupled with the uncertainties in data, made the agency's decision to list the species arbitrary and capricious.

Conclusion

The district court vacated NMFS's "threatened" listing of the Arctic Ringed Seal under the ESA due to the lack of a concrete threat within the reasonably foreseeable future, and the lack of management measures to preserve the species. The district court sent the decision back to NMFS for consideration. However, NMFS filed a Notice of Appeal for this decision in early May 2016.

While some climate change effects, like sea ice loss, may not occur within the "reasonably foreseeable future," climate change projections will arise again in other ESA listing decisions. When they do, courts will likely re-examine those projections to determine the meaning of the "foreseeable future."

Endnotes

[1] 2017 J.D. Candidate, Vermont Law School and Summer Research Associate, Mississippi-Alabama Sea Grant Legal Program.

[2] *See generally* CLIMATE CHANGE AND THE ARCTIC, MARINE MAMMAL COMMISSION, (last visited Jun. 9, 2016) (discussing sea ice loss and species' reliance on sea ice as habitat).

[3] In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.--MDL No. 1993, 709 F.3d 1 (D.C. Cir. 2013); Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).

[4] *Id.* at 69.

[5] Alaska Oil and Gas Ass'n v. Pritzker, 2014 U.S. Dist. LEXIS 101446 (D. Alaska July 25, 2014).

[6] Alaska Oil and Gas Association v. National Marine Fisheries Service, 2016 WL 1125744 at *11.

[7] *Id.* at *5 (citing 16 U.S.C. § 1532(20); 50 C.F.R. § 424.01(m)).

[8] 16 U.S.C. § 1533(a)(1).

[9] *Id.* § 1533(b).

[10] 5 U.S.C. § 706(2)(A); *Alaska Oil and Gas Association*, 2016 WL 1125744 at *3.

[11] *See Alaska Oil and Gas Association*, 2016 WL 1125744 at *3.

[12] Center for Biological Diversity, PETITION TO LIST THREE SEAL SPECIES UNDER THE ENDANGERED SPECIES ACT: RINGED SEAL (*PUSA HISPIDA*), BEARDED SEAL (*ENIGNATHUS BARBATUS*), AND SPOTTED SEAL (*PHOCA LARGHA*), 6 (May 28, 2008).

[13] *Alaska Oil and Gas Association,* 2016 WL 1125744 at *8.

[14] *Id.* at *8 (citing 77 Fed. Reg. 76714).

[15] *Id.* at *7.

[16] *Id.* (emphasis in original).

NOAA Considers Two New National Marine Sanctuaries

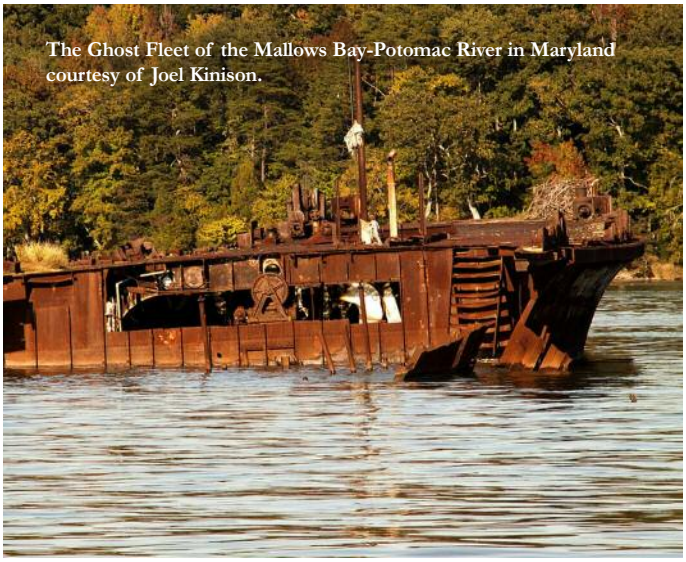
Terra Bowling

Lake Michigan shipwreck courtesy of Andrew McFarlane.

NOAA is currently considering two sites for national marine sanctuary designation under the National Marine Sanctuaries Act. The sites, one in the Great Lakes and one in Maryland, would be the first designations since 2000. Both sites were suggested through the community-based nomination process.

Nomination

The National Marine Sanctuaries Act authorizes NOAA to designate discrete areas of the marine environment as national marine sanctuaries.[1] The area must meet certain requirements, such as being of special national significance due to ecological, historical, cultural,



The Ghost Fleet of the Mallows Bay-Potomac River in Maryland courtesy of Joel Kinison.

archaeological, and recreational qualities.[2] Further, it must be demonstrated that existing authorities are not adequately protecting the environment and that designation under the Act will improve, enhance, or maintain the areas.[3]

In 2014, NOAA reestablished the community-based nomination process. The previous nomination process, the Site Evaluation List, was discontinued in the mid-1990s to allow the agency to focus on managing existing national marine sanctuaries. The new community-based nomination process allows communities to suggest significant marine and Great Lakes areas they believe would benefit from designation as a national marine sanctuary.[4] Under the process, communities submit nomination applications to NOAA. Communities are identified as a collection of interested individuals or groups; local, tribal, state, or national agencies; elected officials; or topic-based stakeholder groups at the local, regional or national level.

Once NOAA has a completed application, the agency will determine whether the area meets the requirements of a national marine sanctuary noted above and has "broad community support." After the nomination is accepted, it is added to the "inventory" of sites to consider. NOAA requests public comment once it begins the designation process.

Since 2014, four nominations have been accepted by NOAA for possible designation: the Chumash Heritage area off the central coast of California; the Lake Erie Quadrangle; Lake Michigan-Wisconsin; and Mallows Bay-Potomac River in Maryland.[5] The Lake Michigan-Wisconsin and Mallows Bay Potomac areas have been selected for designation by NOAA, while the Chumash Heritage area and the Lake Erie Quadrangle remain on the inventory list.

Mallows Bay-Potomac River in Maryland, a 14-square mile area, contains 200 shipwrecked vessels.[6] Several of the wrecks date back to the Revolutionary War. The site also includes the remains of the largest "Ghost Fleet" of World War I wooden steamships.

Lake Michigan-Wisconsin is an 875-square mile area that contains 39 known shipwrecks.[7] Fifteen of the shipwrecks are listed on the National Register of Historic Places. This would be the second National Marine Sanctuary in the Great Lakes, following the Thunder Bay National Marine Sanctuary in Lake Huron.

Next Steps

The Mallows Bay-Potomac nomination was submitted in September 2014 and the Wisconsin-Lake Michigan nomination in December 2014. In October 2015, NOAA announced its intent to begin the designation process for both. The public was invited to make public comment on both designations until January 15th, 2016.

The next steps in the designation process require NOAA to develop a draft environmental impact statement, draft management plan and potential regulations for each site. These documents will be available for public review. After reviewing those comments, NOAA will then make a final decision on the proposed action.

Endnotes

1 16 U.S.C. 1431 *et seq.*; 15 C.F.R. § 922.10. The U.S. Congress can also designate national marine sanctuaries through legislation. In addition, the president can use the authority of the Antiquities Act to establish marine national monuments to be managed as part of the National Marine Sanctuary System.

2 15 C.F.R. § 922.10.

3 *Id.*

4 Re-Establishing the Sanctuary Nomination Process, 79 FR 33851-01, June 13, 2014.

5 Notice of Sites Added to the Inventory of Possible Areas for Designation as New National Marine Sanctuaries, 81 FR 35737-01, June 3, 2016.

6 Notice of Intent to Conduct Scoping, Hold Public Scoping Meetings and to Prepare a Draft Environmental Impact Statement and Management Plan, 80 FR 60634, October 7, 2015.

7 Notice of Intent to Conduct Scoping, Hold Public Scoping Meetings and to Prepare a Draft Environmental Impact Statement and Management Plan, 80 FR 60631, October 7, 2015.

The University of Mississippi
THE SANDBAR
Sea Grant Law Center
Kinard Hall, Wing E, Room 258
University, MS 38677-1848

Littoral Events

American Fisheries Society Annual Meeting Fisheries Conservation and Management: Making Connections and Building Partnerships

August 21-25, 2016
Kansas City, Missouri

For more information, visit: http://2016.fisheries.org

IUCN World Conservation Congress

September 1-10, 2016
Honolulu, Hawaii

For more information, visit: www.iucnworldconservationcongress.org

American Bar Association:
Section of Environment, Energy, and Resources 24th Fall Conference

October 5-8, 2016
Denver, CO

For more information, visit: http://bit.ly/aba24fall