



The SAND BAR

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Legal Reporter for the National Sea Grant College Program

Ninth Circuit Rules Washington's Culverts Violate Tribal Treaties

Also,

New National Marine Monument Designations Enhance Protections for Sensitive Ocean Environments

Bonanno, Gambino, Greenpeace? Resolute Forest Files Civil Suit Against Greenpeace Under Anti-Mafia Law

Waukesha Diversion Approved Under the Great Lakes Compact

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Cover page photograph of the Columbia River Gorge in eastern Washington state courtesy of Lindley Ashline.

Contents page photograph of a view of the Columbia River in Washington state courtesy of Tony Fischer.





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NINTH CIRCUIT RULES WASHINGTON'S CULVERTS VIOLATE TRIBAL TREATIES

Nathan Morgan¹

The Columbia River downstream from the Grand Coulee Dam courtesy of Mark Pouley.



Of the several anadromous fish species in the state of Washington, salmon are by far the most influential. For a time, long before Washington's statehood, native tribes of Washington relied on the salmon runs for subsistence and as a spiritual resource. Salmon were "not much less necessary to the existence of the Indians than the atmosphere they breathed."²² With harvesting pressure limited to that of the native tribes up to the 19th century, salmon populations flourished. However, as settlers moved into the region, salmon populations declined.

As they established their presence, white settlers built on the same riverbanks and streambanks where tribes had been accustomed to fishing, effectively blocking the tribes' access to those sites. As they built, the settlers established a commercial presence in the region, harvesting large quantities of salmon to supply canneries. In 1854 and 1855, Governor Isaac Stevens of the then-territory of Washington negotiated treaties with twenty-one Indian tribes in Washington. While communication between the settlers and the tribal leaders was difficult, one thing was clear – the tribes

The 60th anniversary of Treaty Day celebrated on Jan. 22, 1914 in Tulalip, Washington.



were to maintain their fishing rights both on and off their reservations. Governor Stevens agreed to this in treaty language commonly known as the “fishing clause.” The clause guaranteed “the right of taking fish, at all usual and accustomed grounds and stations...in common with all citizens of the Territory.”³ Since these negotiations, the state and tribes have fought extensively over the breadth of the fishing clause.

A Century of Conflict

In 1905, the U.S. Supreme Court first reviewed the earliest lawsuit regarding the treaties. In that dispute, private property owners refused to allow Yakima tribe members to enter their land to access a traditional fishing area on the Columbia River. The United States sued the property owners, on behalf of the Yakima tribe, which had signed one of the Stevens Treaties. The Supreme Court ultimately ruled that, by the language of the treaties, private owners must allow access to “usual and accustomed” fishing areas.⁴

In the decades to follow, Washington sought to regulate tribal fishing rights through license fees and gear regulations. In a case against a Yakima tribe member, the Washington Supreme Court upheld charges for fishing without a license in violation of state law. The U.S. Supreme Court later reversed the state court decision, explaining that enforcing a license fee against tribal fishermen was not appropriate pursuant to the treaties.⁵

Beginning in the 1960s, tribes staged “fish-ins” to protest the harsh enforcement of state fishing laws against them. Members gathered to fish openly without state licenses to bring attention to the conflict, to which Washington State responded with violent enforcement.⁶ In 1970, in light of the escalating conflict, the United States filed an action against the state of Washington, on behalf of the tribes, initiating the long line of litigation still alive today.

The United States, representing the tribes, sought relief against Washington in federal court. The federal district court sought to define the scope of rights the tribes have under the fishing clause. In the first ruling of these cases, the U.S. District Court for the Western District of Washington established that the tribes were entitled to fifty percent of the total salmon population. The court stated that this allotment provided “so much as, but no more than, is necessary to provide the Indians with a livelihood...” It also established continuing jurisdiction over the issue. This allowed any parties to the case to submit a “Request for Determination” with the court to seek relief on an issue having to do with the treaties’ fishing clause language.

The district court handled a second round of litigation in 1976, where it established that the fishing clause included protections against environmental degradation and tribal access to hatchery salmon. The Ninth Circuit disagreed on appeal. It upheld the district court’s finding that the hatcheries were included but stated that the district court’s holding on environmental degradation was too broad, and must be determined on a case-by-case basis. In 2001, the United States filed a “Request for Determination” based on Washington’s culverts, bringing about the most recent litigation.

Current Litigation

Like other anadromous fish, salmon are born in freshwater streams, but travel to the ocean saltwater to mature. Once matured, they migrate upstream to their original spawning habitat to lay the next generation of offspring.⁸ Because of the salmon’s delicate migration, development has a way of hindering their safe passage. As the state began constructing roadways, culverts were installed under roads where streams flowed to allow fish passage to continue. Culverts, however, can hinder or block fish passage if built incorrectly or improperly maintained.⁹

In filing suit, the United States complained that many of Washington's culverts substantially hindered fish passage, which violated the tribes' treaty right to fish. The United States and the tribes sought a permanent order against Washington, compelling the state to identify all culverts that create a barrier to fish passage and to correct any such obstructions.

Washington objected to the claims. Among other things, Washington argued that the treaties do not give the tribes the "right to prevent the state from making land use decisions that could incidentally impact fish."¹⁰ Washington further asserted that the tribes completely failed to prove that the state-owned culverts significantly hinder salmon passage and populations.

The case first went before the district court, which held that Washington was in fact obligated to ensure there would be salmon for the tribes to catch. Because the culverts hindered the salmon population, the state violated that obligation. As recourse, the district court issued an injunction ordering the state to correct the barrier culverts. Upon Washington's appeal, the Ninth Circuit upheld the injunction.

On appeal, the Ninth Circuit rejected Washington's interpretation of the treaties. It reasoned that the treaties must be interpreted in favor of the tribes, rather than against them. While the goal of the United States at the time of the treaties was settlement, the tribes obviously did not share that intent. Rather, the tribes understood these treaties to ensure their traditional access to the salmon fishery. Reading the treaties in the tribes' favor, as is customary for treaties with native tribes, the court explained that this guaranteed availability of salmon, not just the right to take salmon if they were available.¹¹

The court also rejected Washington's argument that the injunction was too broad and unsupported. In its order, the district court specified what types of culverts would take first priority for correction based on the extent to which they obstructed fish passage, as well as which would only require correction at the end of the culverts natural use. Further, the district court recognized significant support for the tribes' claims. Among other evidence, the tribes provided a report generated by two of the state's agencies, explaining how culverts are one of the "most recurrent and correctable obstacles to healthy salmonid stocks in Washington."¹² The report went on to say that culvert corrections would lead to approximately 200,000 more adult salmonid produced annually.¹³

Washington also asserted several procedural claims, which the Ninth Circuit rejected in favor of the district court's ruling. Ultimately, the Ninth Circuit concluded

that the district court's injunction was appropriate under the language of the treaties, coupled with the projected benefits of culvert correction.

Conclusion

The Ninth Circuit affirmed the district court's injunction against Washington. Pursuant to the Stevens Treaties, Washington must allow the tribes access to "usual and accustomed" fishing sites and must not diminish salmon runs. Washington's culverts therefore violated the treaties. Washington must correct the barrier culverts to allow for natural fish passage.

The courts again preserved the parties' ability to seek relief or clarification from the courts in the future based on the treaties' fishing clause. Given the persistence of the conflict, more litigation will likely occur. However, following this most recent litigation, Washington's obligation is now clearer: the state must not hinder fish populations, even in the name of development. ❧

Endnotes

¹ 2017 J.D. Candidate, Vermont Law School and 2016 Summer Research Associate, Mississippi-Alabama Sea Grant Legal Program.

² *United States v. Washington*, 2016 WL 3517884 at *10 (9th Cir. 2016) (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)).

³ *Id.* at *9 (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443, U.S. 658, 674 (1979)).

⁴ *Id.* at *3 (citing *Winans*, 198 U.S. at 382).

⁵ *Id.* at *3-4 (citing *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)).

⁶ Phuong Le, *Bill Would Clear Native Americans of Fish War Convictions*, THE SEATTLE TIMES, (January 14, 2014) (discussing state enforcement of fishing regulations against tribes throughout the "Fish Wars").

⁷ *United States v. Washington*, 2016 WL 3517884 at *6 (citing *Fishing Vessel Ass'n*, 443 U.S. at 686).

⁸ *Id.* at *5.

⁹ Lynda V. Mapes, *Washington Must Fix Culverts that Block Salmon from Habitat, Court Rules*, THE SEATTLE TIMES, (June 27, 2016).

¹⁰ *United States v. Washington*, 2016 WL 3517884 at *9.

¹¹ *Id.* at *10.

¹² *Id.* at *16.

¹³ *Id.* at *17.

NEW NATIONAL MARINE MONUMENT DESIGNATIONS ENHANCE PROTECTIONS FOR SENSITIVE OCEAN ENVIRONMENTS

Terra Bowling



Photo of a Kemp Ridley's sea turtle courtesy of the U.S. Fish and Wildlife Service.

Two critical areas in U.S. waters—one off the New England coast and one off the Hawaiian coast—recently received increased protection through national marine monument designations. In August, President Barack Obama enlarged the Papahānaumokuākea Marine National Monument in Hawaii, creating the largest marine conservation area in the world. In September, he designated the first marine national monument in the Atlantic Ocean, the Northeast Canyons and Seamounts Marine National Monument. During President Obama's tenure, the amount of federal waters designated for protection increased from 6% to 25.5%.¹

National Marine Monument Designation

There are several means by which waters may receive federal protection. Under the National Marine Sanctuaries Act, the Secretary of the Department of Commerce is authorized to designate areas of the marine environment as national marine sanctuaries. The U.S. Congress can also designate national marine sanctuaries through legislation. Finally, the president can use the authority of the Antiquities Act to establish marine national monuments. This is the authority under which the latest designations took place.

The Antiquities Act was signed by President Theodore Roosevelt in 1906 to protect the nation's cultural and natural resources. It authorizes the President to protect "...historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States..."²² Federal agencies are required to oversee the management of these National Monuments. The Department of Commerce and the Department of the Interior will manage the recently designated and expanded national marine monuments.

Northeast Canyons and Seamounts

The designation of the Northeast Canyons and Seamounts Marine National Monument off the coast of New England marks the first marine national monument in the Atlantic. The monument encompasses 4,913 square miles of ocean and includes three underwater canyons and four underwater mountains known as "seamounts."²³ These features draw a wide-range of rare species, including species of coral found only in the region. Additionally, the canyons and seamounts provide habitat for protected species, such as sperm, fin, and sei whales and Kemp's Ridley turtles.

The unique marine environment faces threats that warrant protection. Earlier in 2016, the National Oceanic Atmospheric Administration (NOAA) released a study finding that "ocean temperatures in the Northeast are projected to warm close to three times faster than the global average."²⁴ Many hope that the designation could help build resilience in the region by prohibiting activity detrimental to these species.

Although many groups hailed the designation, some commercial fishermen objected to fishing bans within the monument. While recreational fishing will be allowed within the monument, most commercial fishing operators must cease operations in the area by November 14, 2016. Red crab and lobster fishermen are given more time. They have seven years to leave the monument area. The fishing ban could have a devastating impact on the industry, as some species, such as red crab, are primarily found within the monument.²⁵

Papahānaumokuākea

Established in 2006 by President George W. Bush, the Papahānaumokuākea Marine National Monument originally encompassed almost 140,000 square miles of ocean off the Hawaiian coast. In August, President Obama quadrupled the national monument to 582,578

square miles, making it largest marine protected area on earth.²⁶ The monument contains more than 7,000 marine species, including many species unique to the Hawaiian Islands.²⁷ Additionally, this area has great cultural significance to the Native Hawaiian community and is used to practice important traditional activities. The state of Hawaii acts as a co-trustee with both the Department of Commerce and the Department of the Interior in managing the monument.

Expansion of the monument was not without controversy. Commercial fishing and other resource extraction activities are prohibited within the monument boundaries. Some groups, including longline fishermen, lobbied against the expansion, stating that it would negatively impact their industry.²⁸ Scientific research and noncommercial fishing, such as recreational fishing and the removal of fish and other resources for Native Hawaiian cultural practices, is still allowed by permit.

Conclusion

With the designation of the first-ever monument off the Atlantic Coast and the significant expansion of the Hawaiian monument, vast areas of sensitive ocean have received increased protection. Although some industry groups, like commercial fishermen, will be impacted by the limitations within the monuments, many hope the designations will result in a healthier ocean in the long term, benefitting the oceans and the human population alike. ♻

Endnotes

- ¹ Juliet Eilperin, *Obama Designates the First-Ever Marine Monument off the East Coast, in New England*, THE WASHINGTON POST, Sept. 15, 2016.
- ² The Antiquities Act of 1906, 16 U.S.C. 431-433.
- ³ Press Release, The White House, Fact Sheet: [President Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean](#) (Sept. 15, 2016).
- ⁴ *Id.*
- ⁵ Laura Crimaldi, *National Monument in Waters off Cape Cod Causes Rift*, THE BOSTON GLOBE, Sept. 16, 2016.
- ⁶ Press Release, The White House, Fact Sheet: [President Obama to Create the World's Largest Marine Protected Area](#) (August 26, 2016).
- ⁷ *Id.*
- ⁸ Juliet Eilperin, *Obama Creates the Largest Protected Place on the Planet, in Hawaii*, THE WASHINGTON POST, August 26, 2016.

BONANNO, GAMBINO, GREENPEACE? RESOLUTE FOREST FILES CIVIL SUIT AGAINST GREENPEACE UNDER ANTI-MAFIA LAW

Ashley Stilson¹

Photo of the Athabasca River at Fort McMurray, Canada courtesy of Gord McKenna.



Fraud and extortion were once frequently attributed to organized crime families such as the Bonannos and Gambinos, but there may be a new mob boss in town. Over the past three years, Resolute Forest Products, Inc. (Resolute), the parent company of multiple subsidiaries engaged in the forest products industry in the Canadian Boreal Forest, has been the target of Greenpeace’s “Forest Destroyer” campaign.

Resolute recently fired back, however, accusing Greenpeace of being the Godfather of a “Green” crime family. Resolute recently filed suit claiming that various Greenpeace entities falsified evidence used in its Forest Destroyer campaign to produce millions in fraudulently induced donations and made Resolute’s customers offers they couldn’t refuse: stop doing business with Resolute or face their own reputation destroying campaign.²

Background

The Canadian Boreal Forest covers fifty-five percent of the country's land mass.³ It stores large quantities of carbon dioxide attributed to climate change, purifies air and water, and is home to various wildlife species and over two million Canadians, including many First Nation communities. In order to protect this vast and important ecosystem, Resolute, other forest companies operating in the Boreal, and environmental non-governmental organizations, including Greenpeace, entered into the Canadian Boreal Forest Agreement (CBFA) in 2010, which stated the industrial signatories would voluntarily commit to expand protected areas within the Boreal, develop recovery plans for at-risk species, take action on climate change, and improve local communities.

In 2012, Greenpeace released a report accusing Resolute of logging in areas in violation of the CBFA and withdrew from the Agreement claiming “[it’s] foundation was broken...”⁴ Following its withdrawal, Greenpeace launched its “Resolute: Forest Destroyer” campaign, which accuses Resolute of “[destroying] vast areas of Canada’s magnificent Boreal forest, damaging critical woodland caribou habitat and logging without the consent of impacted First Nations.”⁵

IN 2012, GREENPEACE RELEASED A REPORT ACCUSING RESOLUTE OF LOGGING IN AREAS IN VIOLATION OF THE CBFA AND WITHDREW FROM THE AGREEMENT CLAIMING “[IT’S] FOUNDATION WAS BROKEN...”

Resolute claims Greenpeace’s Forest Destroyer campaign “is malicious, false, misleading, and without any reasonable factual basis...”⁶ First, Resolute alleges Greenpeace has repeatedly manufactured facts and evidence to support its campaign, including publishing staged photos and videos and redrawing maps to misrepresent where Resolute operates. Second, Resolute notes that the campaign designates Resolute as the Boreal “Forest Destroyer” when less than .5% of the Boreal is harvested annually and seeding and planting programs have prevented any permanent tree loss. Third, Resolute claims the Quebec caribou herd is ninety-eight percent self-sustaining, whereas the endangered Canadian woodland caribou are located where Resolute does not operate. Fourth, Resolute claims it has honored its pension and other financial obligations to First Nation

communities where it was forced to close primarily due to the Forest Destroyer campaign. Finally, Resolute alleges Greenpeace, in furtherance of its Forest Destroyer campaign, has made bribes and extortive threats to many of its customers and industry partners, which has resulted in losses of at least \$100 million Canadian dollars.

Tired of the reputation destroying claims and its customers giving into the “Green mob’s” demands, Resolute filed a federal civil suit under the Racketeer Influenced and Corrupt Organization (RICO) Act, originally enacted to address organized crime, claiming “Greenpeace is a global fraud.”⁷ Specifically, Resolute claims they are just another pawn in Greenpeace’s fraudulent scheme where it “identifies or manufactures a hot-button environmental issue; disseminates sensational, alarmist, and false claims about impending calamity related to that issue; targets a high-profile company...including staging fake videos, photographs, and other evidence; bombards supporters with urgent requests to ‘DONATE NOW’; and directs extortive demands...at its targets and their customers,” in order to pay its employee’s salaries and perpetuate more fraudulent fundraising.⁸ Resolute alleges that similar Greenpeace campaigns have targeted the commercial fishing and fossil fuel industries.

The RICO Act

Under RICO, it is unlawful for any person to *use income* derived from a pattern of racketeering activity to acquire an interest in an enterprise, to *conduct the affairs* of an enterprise through a pattern of racketeering activity, and to *conspire* to commit any of the two previous offenses.⁹ A RICO violation therefore occurs when 1) the conduct 2) of an enterprise 3) occurs through a pattern of racketeering activity.¹⁰

The Enterprise Element

Under RICO, an “enterprise” is either a legal entity or an “associated-in-fact” group of individuals that “associate together for a *common purpose* of engaging in a course of conduct.”¹¹ To establish a “common purpose,” the group must: 1) be “an ongoing organization” with some decision-making structure; 2) have “the various associates function as a continuing unit” and perform a role consistent with the organization’s structure; and 3) exist “separate and apart from the pattern of [racketeering] activity in which it engages.”¹² The enterprise’s structure need not be hierarchical, but it “must have at least three structural features: a purpose, relationship among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”¹³

In its claim, Resolute alleges the Forest Destroyer campaign was conducted by the “Greenpeace Enterprise,” an illegal “associated-in-fact” group of individuals. First, Resolute claims the Enterprise’s common purpose “was to target Resolute with a disinformation campaign that could be used to fraudulently induce millions ... from individual donors and foundations that could be used to fund the salaries of [Greenpeace], perpetuate more fraudulent fundraising, and expand the campaign ... [to] provide even more powerful fundraising opportunities.”¹⁴ Second, Resolute alleges the Enterprise consists of various legally distinct environmental organizations and individuals, which are “associated-in-fact” through their use of the Greenpeace name and “their long-term and regular long-standing interrelationships and associations, shared objectives, and concerted action.”¹⁵ Finally, Resolute claims the Enterprise has been pursuing its purpose for four years and is still doing so today.

The Pattern of Racketeering Activity

Mail fraud, wire fraud, and extortion are listed as “racketeering activities” under RICO.¹⁶ Mail or wire fraud occurs when a person uses mail or wires to defraud another of money or property in furtherance of a scheme.¹⁷ Extortion occurs when a person communicates, with an extortive purpose, a threat to injure the property or reputation of the recipient.¹⁸ However, in order to violate RICO, these activities must form a pattern of activity. A “pattern of racketeering activity” requires at least two racketeering acts to occur within ten years that are related and present a likely threat of continued criminal activity.¹⁹

Resolute alleges Greenpeace’s scheme was to disseminate falsehoods via mail, phone, email, and social media platforms to produce millions in fraudulently induced donations. To establish a pattern of racketeering activities for mail and wire fraud, Resolute lists over one hundred instances of mail, phone, email, and social media communications that occurred over the past nine years relating to Greenpeace’s Forest Destroyer campaign. Resolute also alleges Greenpeace communicated extortive threats to Resolute’s customers in order to advance its campaign’s success and thus increase donations. Resolute describes numerous Greenpeace communications threatening to expose Resolute customers to “reputational risks” if they continued to source Resolute materials. The complaint alleges that some customers did face such risks, including 3M, Best Buy, and Rite Aid, through their own Greenpeace targeted forest destroyer campaigns. Both the various communications and threats pose a likely threat of continued criminal activity.

Conclusion

Greenpeace is not the stereotypical Italian mob, but the “Green” family has allegedly engaged in fraud and extortion, acts frequently attributed to organized crime families, not environmental organizations. It is up to the court to decide whether there is a new mob boss in town or just a new forceful form of environmental activism.

Endnotes

- ¹ 2017 J.D. Candidate, Elisabeth Haub School of Law at Pace University and 2016 Summer Research Associate, National Sea Grant Law Center.
- ² Complaint at 10, *Resolute Forest Products, Inc. v. Greenpeace Int’l*, No. 1:16-tc-05000 (S.D. Ga. May 31, 2016).
- ³ *Id.* at 48 (Canada’s “First Nations” are the country’s indigenous populations that live in the Boreal Forest); *Boreal Forest*, CANADIAN ENCYCLOPEDIA, (last visited July 19, 2016).
- ⁴ Complaint, *supra* 2, at 32.
- ⁵ *Resolute Forest Products Can Save Forests and Jobs and Respect Indigenous Rights*, GREENPEACE, (last visited July 18, 2016).
- ⁶ Complaint, *supra* note 2, at 4.
- ⁷ *Id.* at 1.
- ⁸ *Id.* at 19, 24.
- ⁹ 18 U.S.C. § 1962(a)-(d).
- ¹⁰ *Salinas v. U.S.*, 522 U.S. 52, 62 (1997).
- ¹¹ 18 U.S.C. § 1961(4); *U.S. v. Turkette*, 452 U.S. 576, 583 (1981).
- ¹² *Turkette*, 452 U.S. at 583; *U.S. v. Riccobene*, 709 F.2d 214, 222-23 (3d Cir. 1983).
- ¹³ *Boyle v. U.S.*, 556 U.S. 938, 946, 948 (2009).
- ¹⁴ *Id.* at 19.
- ¹⁵ Complaint, *supra* note 2, at 14 (The various legally distinct environmental organizations and individuals including Greenpeace International, Greenpeace Fund, Inc., Greenpeace, Inc., Greenpeace Canada, and numerous Greenpeace employees).
- ¹⁶ 18 U.S.C. § 1961(1).
- ¹⁷ 18 U.S.C. §§ 1341, 1343; *Fountain v. U.S.*, 357 F.3d 250, 255 (2d Cir. 2004).
- ¹⁸ 18 U.S.C. §§ 875-77, 880.
- ¹⁹ 18 U.S.C. § 1961(5); *H.J. Inc., et al. v. Nw. Bell Tel. Co. et al.*, 492 U.S. 229, 239 (1989) (Related activities have “the same or similar purposes, results, participants, victims or methods of commission... and are not isolated events.”) (“Continued criminal activity” can either be conduct that occurred over a substantial period of time or conduct that by its nature poses a future threat of repetition).

WAUKESHA DIVERSION APPROVED UNDER THE GREAT LAKES COMPACT

Catherine M. Janasie¹

This past June, the Great Lakes-St. Lawrence River Basin Water Resources Council approved Waukesha, Wisconsin's application to divert water from the Great Lakes due to water quality and quantity concerns with its current water source. Waukesha was seeking to divert water under the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact). After years of review, the city's application was the first diversion allowed under the Compact.

The Great Lakes Compact

The Great Lakes (Lakes) are a vital U.S. and international resource. The Lakes create the world's largest freshwater surface area, containing 90% of the U.S.'s and 18% of the world's freshwater. In addition to providing the drinking water for 40 million people, the Lakes also provide about 56 billion gallons of water each day for industrial, agricultural, and municipal uses. Further, the Lakes are a valuable ecological and economic resource, supporting 250 fish species and a sports fishery worth around \$4 billion. Finally, the Lakes provide innumerable miles of shipping routes and water to generate power for the region.²

The Great Lakes are also an interstate resource, with multiple states having borders on the Lakes' shores. Whenever there are interstate water resources, conflicts often arise between states over the rights and management of the water. States have the ability, with Congressional approval, to enter into agreements that govern how interstate water resources will be managed. In 2005, the Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin), with the consent of the U.S. Congress, entered into the Compact "[t]o act together to protect, conserve, restore, improve and effectively manage" and "remove causes of present and future controversies" in the Great Lakes Basin.³ The Compact also aims to prevent the adverse impacts



Satellite view of the Great Lakes courtesy of NASA Goddard Space Flight Center.

that withdrawals from the Lakes could have on the Basin's watersheds and ecosystems.⁴ As a result of the Compact, the Great Lakes-St. Lawrence River Basin Water Resources Council (Compact Council) was formed on December 8, 2008. Among other duties, the Compact Council is supposed to regulate diversions of water from the Lakes.

Under the Compact, "[a]ll New or Increased Diversions are prohibited," with limited exceptions.⁵ These exceptions include proposals by Straddling Communities or Straddling Counties and Intra-Basin Transfers.⁶ A Straddling Community is a community that "is partly within the Basin or partly within two Great Lakes watersheds" while a Straddling County is any county that partially lies within the Basin.⁷ In order to be approved, these exceptions have to meet certain standards. For example, the new diversion must not be able to be fulfilled through

the increased efficiency or conservation of an existing water supply and be limited to a reasonable quantity for the proposed use. Further, the water withdrawn has to be returned to the Basin, and the diversion cannot adversely impact the Basin's water quality or quantity.⁸

Waukesha Application

Waukesha has been facing both water quality and quantity issues with its public water supply. Traditionally, the City obtained its water from a deep aquifer using groundwater wells. Due to population growth, the water level in the aquifer is now much lower, in fact hundreds of feet lower, than historic water levels. The lower water levels have increased the amount of radium concentration in the water. Currently, the City is supplementing its supply with another shallow aquifer, but that aquifer also has water quality and quantity concerns. Further, the City is under a court order to solve the radium contamination of its drinking water supply by 2018.⁹

Located 17 miles west of Lake Michigan, the City of Waukesha is in Waukesha County, which qualifies as a Straddling County under the Compact. Pursuant to the Compact, the City made an application to divert water from the Great Lakes. Specifically, Waukesha sought to divert 10.1 million gallons of water a day to serve an estimated population of 97,400 by the year 2050. The City would then treat its wastewater and discharge it into the Root River, which is within the Lake Michigan Basin.¹⁰ The City claimed in its application that diverting water from the Great Lakes was the only environmentally and economically feasible option for meeting its public water supply needs.

SPECIFICALLY, WAUKESHA SOUGHT TO DIVERT 10.1 MILLION GALLONS OF WATER A DAY TO SERVE AN ESTIMATED POPULATION OF 97,400 BY THE YEAR 2050.

Waukesha made its initial application to divert water from the Lakes in 2010, but amended that application in 2013. After a lengthy review period, the Compact Council approved Waukesha's application in June 2016. In the historic vote, the Compact Council

voted unanimously 8-0 to approve the diversion. However, the Compact Council's approval of the application came with certain conditions. Notably, the Compact Council reduced the amount of water the city could divert to 8.2 million gallons of water a day, and reduced the water distribution area proposed by the city.¹¹

Conclusion

Although Waukesha has received the Compact Council's approval for a new diversion, the City is not yet able to begin diverting water from the Lakes. First, the city must obtain the required environmental and construction permits before beginning the construction of the diversion.¹² Further, a group of Great Lakes states and Canadian mayors are challenging the approval.¹³ The group is challenging the approval on the grounds that Waukesha's application did not meet the requirements for a new diversion under the Compact, stating that granting "an exception to the first application that does not meet the conditions of the compact sets a very bad precedent."¹⁴ Thus, though the Compact Council's approval of Waukesha's application was a landmark decision, it is unclear when the city will begin diverting water from the Great Lakes. ❧

Endnotes

- ¹ Research Counsel, National Sea Grant Law Center.
- ² [NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ABOUT OUR GREAT LAKES: GREAT LAKES BASIN FACTS, GREAT LAKES RESEARCH LABORATORY.](#)
- ³ GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT, Section 1.3 (2005).
- ⁴ *Id.*
- ⁵ *Id.* at § 4.8.
- ⁶ *Id.* at § 4.9.
- ⁷ *Id.* at § 1.2.
- ⁸ *Id.*
- ⁹ WISCONSIN DEPT. OF NATURAL RESOURCES, CITY OF WAUKESHA WATER DIVERSION APPLICATION (2016).
- ¹⁰ *Id.*
- ¹¹ Don Behm, *Great Lakes Governors Approve Waukesha Water Request*, MILWAKEE-WISCONSIN JOURNAL SENTINEL, June 21, 2016.
- ¹² Wisconsin Dept. of Natural Resources, *supra* note 9.
- ¹³ Steven Martinez, *Great Lakes Group Challenges Waukesha's Water Diversion*, Waukesha Now, Aug. 29, 2016.
- ¹⁴ *Id.* (quoting Montreal Mayor Denis Coderre).

MEXICO AND THE UNITED STATES CONTINUE TO SPAR OVER “DOLPHIN-SAFE” LABELING

Alexandra Chase¹



Dolphins swimming on the coast of California courtesy of Gregory Smith.

Consumers are accustomed to picking up a can of tuna in the grocery store and seeing the “dolphin safe” label. Many shoppers assume that the “dolphin safe” image indicates that no dolphins were harmed in the production of the tuna product. The U.S. “dolphin safe” label requirements have changed many times in the past few decades, mostly in response to an ongoing trade dispute with Mexico. Recent regulatory changes have made the “dolphin safe” labeling requirements more restrictive, but the question remains as to whether the “dolphin safe” label actually protects dolphins from harm.

Background

For reasons that remain largely unknown, large yellowfin tuna and dolphins swim together in the Eastern Tropical Pacific Ocean (ETP). Fishermen have long been aware of this phenomenon and pursued dolphin pods to catch the tuna swimming below. To catch the fish, fishermen encircle the dolphin pod with

a purse seine net that closes like a drawstring purse. This practice is called “dolphin sets” and is highly controversial because it can result in substantial dolphin mortality, as dolphins also get trapped in the net and drown or suffer serious injury.

By the 1970s, approximately 100,000 dolphins a year were dying in the ETP as a result of tuna purse seine fishing operations. In the late 1980s, consumers motivated by a highly effective advocacy campaign, which included graphic video of dolphin deaths, boycotted the canned tuna industry. In 1990, the three largest tuna companies, StarKist, Bumblebee, and Chicken of the Sea, pledged to adopt “dolphin safe” purchasing procedures and only buy tuna not caught using dolphin sets.

Later that year, Congress codified “dolphin safe” labeling requirements through the Dolphin Protection Consumer Information Act (DPCIA). According to the DPCIA, the only ETP tuna that could be labeled

“dolphin safe” were tuna 1) caught without purse seine nets and 2) accompanied by an observer certification that no dolphin sets occurred during the entirety of the fishing trip.² Because the U.S. fleet had already phased out the use of dolphin sets as a result of the passage of the Marine Mammal Protection Act of 1972, only foreign fleets would be affected by the new labeling requirements. Also during this same period, Congress placed import restrictions on tuna caught in violation of U.S. standards, effectively shutting noncompliant foreign tuna fleets out of the U.S. market.

International Trade Dispute

In January 1991, Mexico requested the formation of a General Agreement on Tariffs and Trade (GATT) (a forerunner of the World Trade Organization) dispute resolution panel to examine the U.S. restrictions on the import of tuna. Mexico argued that the direct import prohibition on yellowfin tuna products was inconsistent with U.S. obligations under GATT. The GATT panel ruled in favor of Mexico, but the ruling was never formally adopted because Mexico and the U.S. elected to reach an agreement outside of GATT. In the years following the GATT panel decision, the U.S. entered into environmental agreements with tuna fishing countries, including Mexico, to establish a voluntary program that worked towards avoiding dolphin deaths and incorporated the use of on-board observers.

In an effort to resolve the GATT trade dispute, the U.S. agreed to loosen the trade restrictions on tuna. In 1997, the International Dolphin Conservation Program Act (IDCPA) relaxed the “dolphin safe” label standards. Under the IDCPA, tuna caught using dolphin sets could be labeled as “dolphin safe” as long as any ensnared dolphins were released and the onboard observer certified that no dolphins were harmed or killed. Environmental groups challenged these relaxed measures, arguing that the stress associated with these new chase and encirclement practices caused dolphins harm. A dolphin calf, for instance, might die hours or days later as a result of being separated from its mother. Following a Congressionally mandated study, the National Oceanic and Atmospheric Administration (NOAA) determined there was insufficient evidence that these encirclement practices were harming dolphins. A federal court upheld these relaxed standards in 2007.³

Despite the enforcement of less rigorous standards, Mexico remained frustrated by the U.S. labeling requirements. Mexico pursued several successful WTO actions, arguing that the “dolphin safe” measures were discriminatory.⁴ Most recently, the WTO held that the

U.S. and other countries have easier access to the “dolphin safe” label than Mexico; therefore, the labeling requirements violate international trade agreements.⁵ The U.S.’s failure to comply with these WTO rulings enabled Mexico to petition for the imposition of \$500 million in retaliatory tariffs on imports of U.S. high fructose corn syrup.

March 2016 Interim Final Rule

In March 2016, NOAA published an interim final rule to enhance “dolphin safe” requirements for all countries that import tuna. The new rules require tuna fleet captains to certify that no purse seine net or other gear was used to encircle dolphins, that no dolphins were killed or seriously injured during the fishing operations, and that the captain of the fishing vessel has completed a “dolphin safe” captain-training course.⁶ The stricter regulations are meant to bring the U.S. into compliance with the WTO ruling by applying the U.S. labeling standards evenly and across the board to all countries. On June 22, 2016, upon the request of both countries, the WTO established a compliance panel to determine if these regulatory changes bring the U.S. into compliance.⁷

Conclusion

The “dolphin safe” labeling measures have significantly reduced dolphin deaths in the ETP, and the recently enhanced requirements show a continued U.S. effort to protect dolphin populations. Whether the new regulations will be enough to satisfy the WTO remains to be seen. Regardless of international rulings, domestic environmental groups and consumers are likely to continue to call for action to protect these marine mammals. ❧

Endnotes

¹ Ocean and Coastal Law Fellow, National Sea Grant Law Center.

² 16 U.S.C. §1385(d).

³ *Defs. of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336 (2001).

⁴ Panel Report, United States – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011).

⁵ *Id.*

⁶ Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 81 Fed. Reg. 15,444-15,449 (Mar. 22, 2016).

⁷ Dispute Settlement Body, *Note by the Secretariat: United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/39 (July 11, 2016).



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