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Bottled Water Dispute Boils Over

Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc., 709 N.W.2d 174 (Mich. Ct. App. 2005).

Emily Plett-Miyake, 3L, Vermont Law School

On November 29, 2005, the Michigan Court of Appeals decided a case brought by the Michigan Citizens for Water Conservation (MCWC) against Nestlé Waters North America, Inc. (Nestlé). The court, affirming in part, and reversing in part, held that the "reasonable use" balancing test should be applied to disputes between riparian and groundwater users and that Nestlé's proposed withdrawal of groundwater for its bottling operations was unreasonable.

Background

In December 2000, the defendant's predecessor, Great Spring Waters of America, a subsidiary of Perrier Group of America, began taking steps to construct a bottling plant in Mecosta County, Michigan. Their first step was to purchase groundwater rights to property located north of the Osprey Lake impoundment known as Sanctuary Springs. Osprey Lake impoundment is a man-made body of water that was originally created by the damming of Dead Stream in 1953 and expanded in 1980. Four wells were installed on the Sanctuary Springs site in 2001 to extract groundwater. The defendants obtained permits from the Michigan Department of Environmental Quality (DEQ)

See Nestlé, page 16

California Court Trashes Plan to Reduce Litter in the Los Angeles River

City of Arcadia v. State Water Res. Control Bd., 38 Cal. Rptr. 3d 373 (Cal. Ct. App. 2006).

Jim Farrell, 2L, University of Mississippi School of Law

The Los Angeles River has been steadily accumulating trash over the past several years, but surrounding cities, if a recent court case is any indication, are not overly concerned. Several months ago, these cities successfully challenged a new California plan with an aggressive approach to eliminating trash, forcing state water boards to continue fighting the river's persistent trash problem with an inadequate plan.

Applicable Law

The Clean Water Act encourages states to regulate water quality within their borders. In 1969, California responded by passing the Porter-Cologne Act, which created a regulatory framework consisting of nine regional boards under the supervision of a state board. Each regional board is responsible for water quality within its respective region and typically relies on the National Pollutant Discharge Elimination System (NPDES) permit process to

See California, page 14

Table of Contents

Knauss Program Accepts Three Law Students

The John A. Knauss Marine Policy Fellowship Program has been providing graduate students with unique educational opportunities in the executive and legislative branches of the federal government since 1979. The Law Center was pleased to learn that three attorneys were selected as part of the Class of 2006. The work and experiences of these Fellows will be featured in upcoming issues of *The SandBar* and we have provided them with this opportunity to introduce themselves and their placements to you, our readers, in their own words.

Jessica Barkas, J.D., Seattle University School of Law, Washington Sea Grant

I started my educational career with the idea that I would be a marine scientist. As my studies progressed, however, I became increasingly concerned that the relatively slow pace of natural science and the general public's lack of understanding of the scientific process were contributing to a situation in which natural resource conservation and environmental protection policies are not able to dynamically reflect present scientific understanding or a precautionary approach to exploitation of resources. I saw that this problem is at least partly due to poor communication between science and law. It is my hope that as a scientist who has studied the law and a lawyer that has studied science, I might contribute to the translation of scientific understanding into effective and conservative environmental and natural resource protections.

I found, however, that I was missing an important link in understanding how to improve environmental laws: how government policy is made. This was my principle attraction to the Knauss Fellowship program. I have been assigned to the National Observer Program, which is within the NOAA Fisheries Office of

Science and Technology. The program, in which the observers are essentially neutral third parties, is used to assess fishing impact on protected species, to assess the proportion of the catch that is discarded for economic or regulatory reasons, and in some cases, to perform in-season regulation of that year's fishing effort. A big part of my job will be helping to coordinate the production of a national bycatch report. Observer data will be obtained from each of the six NMFS regions and science centers and compiled into a comprehensive report on what our nation's fishers are catching and what they are throwing away.

Meredith Mendelson, J.D., University of Maine, Maine Sea Grant

After interviewing with an amazing array of incredible host offices at Placement Week, I was thrilled to end up at the Office of Ocean and Coastal Resource Management. OCRM's primary responsibilities revolve around supporting the National Estuarine Research Reserve Program and the Coastal Management Programs of the coastal states and territories. In my first couple months here, I have had the opportunity to be involved with the Coastal and Estuarine Land Conservation Program, which provides federal funding for states that develop a comprehensive conservation strategy for their coastal regions and participate in the North Carolina Coastal Management Program 312 Evaluation mandated by the Coastal Zone Management Act.

Due to my interests in community development and working waterfronts, I consider myself quite lucky to be working primarily on the Portfields Initiative. Portfields is a federal interagency effort focused on environmentally and economically sustainable port redevelopment. Currently, we are implementing a new regional project in Southern Louisiana. I have already had the opportunity to meet many of the local, state, regional, and federal partners and have been buoyed by the level of enthusiasm they share for this program.

It is certainly timely to be promoting economic development and habitat restoration in the Gulf region, and this program brings together many different interests for a common goal. As NOAA and many other federal agencies turn their heads toward the Gulf Coast and confront new questions about climate change, coastal hazards and relief efforts, it is a fascinating time to be involved in the marine policy field.

Thomas Street, Ph.D. Candidate, University of Delaware, Delaware Sea Grant

I have been placed in the Office of the Assistant Administrator of the National Ocean Service. Our office manages all the legal and policy issues relating to the oceans and coastal zone falling under the jurisdiction of NOAA. In my present position, I serve as a legal and policy assistant to the Assistant Administrator and Deputy Assistant Administrator. These individuals manage the policy issues relating to the National Ocean Service and the organizations that fall under it.

My job in the Office of the Assistant Administrator is varied. I deal with many different legal and policy issues related to the National Marine Sanctuaries Act, National Environmental Policy Act, Coastal Zone Management Act, Magnuson-Stevens Fishery Conservation and Management Act, Submerged Lands Act, and Outer Continental Shelf Lands Act. I greatly enjoy working with a wide variety of issues and every day is different.

My background is in both law and policy. After graduating from the Catholic University Law School in 2000, I joined the United States Navy, serving on active-duty for three years as a Judge Advocate. In the Navy, I defended Naval officers and sailors in courts-martial, worked on general legal issues for service members and dependents, and served as the Navy Claims Officer for the Southeastern United States. After my discharge, I decided to go back to graduate school to study oceans and coastal law and policy. I first earned a M.A. in Marine Affairs at the Rosenstiel School of Marine and Atmospheric Science at the University of Miami and am presently a Ph.D. Candidate in Marine Policy at the University of Delaware.

First Circuit Finds CWA Jurisdiction over Cranberry Farm

United States v. Johnson, 437 F.3d 157 (1st Cir. 2006).

Jonathan Lew, 2L, Roger Williams School of Law
Stephanie Showalter

The First Circuit Court of Appeals recently upheld a district court ruling that U.S. Army Corps of Engineers' (Corps) jurisdiction under the Clean Water Act (CWA) extends to cranberry bogs with a surface water connection to navigable waters.

Background

Between 1979 and 1999, Charles Johnson used earth-moving equipment to construct, expand, and maintain his cranberry bogs. In 1999, the EPA found that Johnson had destroyed fifty acres of wetlands over the years and violated the CWA by not securing a § 404 dredge and fill permit from the Corps for his activities. On February 16, 2005, a U.S. district judge fined Johnson $75,000 and ordered him to restore twenty-five acres of wetlands at an estimated cost of $1.1 million.[1]

The Clean Water Act prohibits the discharge of dredged and fill material into the waters of the U.S. without a § 404 permit from the Corps. Johnson consistently argued that he was not required to secure CWA permits because he did not discharge material into the "waters of the U.S." EPA and Corps regulations define "waters of the U.S." to include, among others, navigable waters, tributaries of navigable waters, and wetlands adjacent to navigable waters.[2]

Johnson's cranberry bogs are located on parcels of land the EPA claims are hydrologically connected to navigable waters. For example, the EPA's expert described the connection for one of the sites, Bog A, as follows:

> The 1977 map shows a stream connecting the area of Bog A to the Log Swamp Reservoir. The 1977 USGS map shows that from the Log Swamp Reservoir, water flows south through another bog system, into a stream that travels through a wetland and into a pond. Water from this pond drains into another bog system, and becomes Rocky Meadow Brook.[3]

Rocky Meadow Brook, in turn, flows into the navigable Weweantic River. Johnson's other cranberry bogs have similar surface water connections to the Weweantic River. The district court found that these hydrological connections were sufficient to support the exercise of CWA jurisdiction. Johnson appealed.

Jurisdiction

The First Circuit was faced with the question of whether the CWA "extends jurisdiction to distant, non-navigable tributaries of navigable-in-fact waters, and wetlands adjacent to those tributaries."[4] The regulation at issue, 40 C.F.R. § 230.3(s), defines "waters of the United States" to include tributaries of navigable waters[5] and "wetlands adjacent to waters (other than waters that are themselves wetlands) identified [in other subsections]."[6] Johnson argued that the EPA was wrong to interpret this regulation as reaching "any nonnavigable water with any hydrologic connection to a navigable[-in-fact] water, no matter how distant or infrequent the connection and regardless of the number of intervening, nonnavigable waters."[7]

The parties did not dispute that the Weweantic River is a navigable water covered by § 230.3(s)(1). The EPA asserted jurisdiction over Johnson's property under § 230.3(s)(7) because it contains wetlands adjacent to tributaries of the Weweantic River covered by § 230.3(s)(5). EPA and the Corps interpret "tributaries" to mean "tributary system" or "all of the streams whose water eventually flows into navigable waters."[8]

The First Circuit concluded that the agencies' interpretation of tributaries to include any body of water hydrologically connected to a navigable water was reasonable. The First Circuit explicitly stated that this interpretation complied with Supreme Court precedent in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[9] In *SWANCC*, the Supreme Court stated that there must be a "significant nexus" between regulated wetlands and the navigable water. The First Circuit found that the exercise of jurisdiction in the present case was appropriate because "there is a 'significant nexus' between a navigable-in-fact water and the tributary system that drains into it."[10] "Given this connection and Congress' broad delegation of authority under the CWA, the government has reasonably and permissibly interpreted the CWA to extend jurisdiction over the entire tributary system – and wetlands adjacent to that tributary system – of a navigable-in-fact water."[11]

In SWANCC*, the Supreme Court stated that there must be a "significant nexus" between regulated wetlands and the navigable water.*

Conclusion

In light of the undisputed evidence that the Johnsons' land is hydrologically connected to the Weweantic River, the First Circuit concluded that the EPA reasonably interpreted the CWA to extend jurisdiction over Johnson's land.

Endnotes

1. Robert Knox, *Ruling Backs EPA in Clash over Wetlands*, THE BOSTON GLOBE (Feb. 27, 2005).
2. 40 C.F.R. § 230.3.
3. *U.S. v. Johnson*, 437 F.3d 157, 163 (1st Cir. 2006).
4. *Id.* at 177.
5. 40 C.F.R. § 230.3(s)(5).
6. *Id.* § 230.3(s)(7).
7. *Johnson*, 437 F.3d at 178.
8. *Id.* at 179, citing *U.S. v. Deaton,* 332 F.3d 698, 710-11 (4th Cir. 2003).
9. 531 U.S. 159 (2001).
10. *Johnson*, 437 F.3d at 180.
11. *Id.* at 181.

Photograph of cranberry harvest courtesy of the USDA.

Titanic Not Subject to the Law of Finds

R.M.S. Titanic v. The Wrecked and Abandoned Vessel et al., 435 F.3d 521 (4th Cir. 2006).

Marjorie Cameron, 2L, University of Mississippi School of Law

On January 31, 2006, the United States Court of Appeals for the Fourth Circuit held that R.M.S. *Titanic*, Inc. ("RMST") should not be granted title, based on the maritime law of finds, to artifacts it has recovered from the wreck of the *Titanic*. The court concluded that the law of salvage should apply to historic wrecks such as the *Titanic* and remanded the case to the district court for further proceedings.

Background

RMST has served as salvor-in-possession of the wreckage of the *Titanic* for more than ten years. RMST is a private company whose stated purpose is "to preserve the memory of the *Titanic* and of all who sailed with her, and to promote that memory with respect and regard for the ship's historical and maritime significance."[1] Instead of selling the artifacts it recovers, RMST has kept them together and brings them to the public through exhibitions it hosts throughout the country. Through its efforts over the years, 5,900 *Titanic* artifacts have been salvaged.

In 1993 the French Maritime Affairs Administration transferred title to 1,800 artifacts (1987 artifacts) recovered during joint French-American expeditions that occurred prior to RMST being awarded exclusive salvage rights. RMST, in a later proceeding, then asked the Eastern District Court of Virginia to recognize France's grant of title to the 1987 artifacts. It also requested an award of title to the remaining artifacts under the "law of finds," or in the alternative, a salvage award. The district court refused to recognize the French administrator's decision and rejected RMST's claim of title to the remaining artifacts based on the law of finds.[2]

Jurisdiction

As an initial matter the Fourth Circuit held that the district court did not have *in rem* jurisdiction to issue a declaratory judgment relating to the 1987 artifacts. *In rem* jurisdiction refers to "a court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it."[3] The artifacts from the 1987 expeditions are located in France, outside the jurisdiction of U.S. courts. The Fourth Circuit stated that "RMST cannot come to a court in the United States and simply assert that the court should declare rights against the world as to property located in a foreign country."[4] The Fourth Circuit vacated the portion of the district court's order related to the 1987 artifacts.

Salvage versus Finds

For more than ten years, RMST has been recognized as the exclusive salvor-in-possession of the wreck of the *Titanic*. As such, RMST is entitled to certain benefits under maritime law. As an incentive for promoting salvage efforts, admiralty courts may grant a salvor the exclusive right to carry on salvage operations and receive a salvage award. Although the true owner is not divested of title, a maritime lien attaches to the salved property to insure payment of the salvage award. These benefits do not come without strings, however. The salvor-in-possession is expected to act as a trustee for the owner of the salved property until the owner can retake possession of the property.

RMST caused a bit of a stir when it attempted to present evidence to the district court that it was entitled to the artifacts under the law of finds, rather than the law of salvage. The role of a "finder" is significantly different from that of a "salvor." In general, courts look upon the law of finds with disfavor because it is viewed as


THE NEW YORK HERALD.

THE TITANIC SINKS WITH 1,800 ON BOARD; ONLY 675, MOSTLY WOMEN AND CHILDREN, SAVED

MOST APPALLING DISASTER IN MARINE HISTORY OCCURS WHEN WORLD'S LARGEST STEAMSHIP STRIKES GIGANTIC ICEBERG AT NIGHT

Historic newspaper page courtesy of The Library of Congress American Treasures collection.

being in direct conflict with the principles of mutual aid underlying salvage law. Under the law of finds, the first person to reduce unowned or abandoned property to possession gains title to it. "A free finders-keepers policy is but a short step from active piracy and pillaging."[5] To change RMST's role from salvor to finder would be momentous, according to the Fourth Circuit, because RMST would no longer be the trustee of the property that has been salvaged, but rather the owner.

RMST has consistently, in its actions as salvor in possession, stated that its purpose in recovering the artifacts is to preserve the property either for the owners or for the historic and cultural interests of the public.[6] Because RMST was acting in the public interest, the court granted the company exclusive rights to salvage the wreck. The Fourth Circuit noted that there is no precedence in the courts for changing a salvor's role to that of finder after it has acted as a salvor for years under the supervision of the courts. Furthermore, the Fourth Circuit explicitly held that the law of salvage, rather than the law of finds "is much better suited to supervise the salvage of a historic wreck."[7] Formalizing this treatment, the court believes, will encourage district courts to more readily award exclusive salvor-in-possession status and supervise salvage proceedings that are in the public interest.[8]

Conclusion

The Court of Appeals for the Fourth Circuit affirmed the district court's decision not to apply the law of finds to the wreck of the *Titanic*.

Endnotes

1. RMST, Corporate Policy, www.titanic-online.com/index.php4?page=448 .
2. *R.M.S. Titanic v. The Wrecked and Abandoned Vessel et al*., 435 F.3d 521, 525 (4th Cir. 2006).
3. Black's Law Dictionary (Second Pocket ed. 2001).
4. *R.M.S. Titanic*, 435 F.3d at 530.
5. *Id*. at 533.
6. *Id*.
7. *Id*. at 536.
8. *Id*. at 538.

Third Circuit Untangles Complicated Shipping Dispute

Malaysia Int'l Shipping Corp. v. Sinochem Int'l, Inc., 436 F.3d 349 (3d Cir. 2006).

Josh Clemons, Mississippi-Alabama Sea Grant Legal Program

In February the U.S. Court of Appeals for the Third Circuit issued a ruling in a dispute between a Malaysian shipping company and a Chinese manufacturer that involved the scope of the United States' admiralty jurisdiction. The appeals court, using the location and connection analysis, held that admiralty jurisdiction was properly exercised in this case. However, the case was returned to the trial court because the existence of personal jurisdiction remained in question.

Background

In 2003 a Chinese company, Sinochem, contracted with an American company, Triorient, to buy steel coils. The contract between Sinochem and Triorient specified that Chinese law would be used to settle disputes.

Triorient chartered a vessel from Pan Ocean Shipping Co., Ltd., to transport the coils from the U.S. to China, and hired a separate company to load the coils onto the vessel. The coils were loaded, and a bill of lading was issued that listed Triorient as the shipper, Sinochem as the receiver, and Pan Ocean as the carrier. The bill of lading contained a condition that Hague Rules applied to it.

The bill of lading also incorporated by reference yet another document: a contract known as a "charter party" between Malaysia International Shipping Co. (MISC, the company that owned the vessel) and Pan Ocean. Pan Ocean said that disputes under the charter party were to be governed by New York law, with U.S. arbitration.

In May of 2003 Sinochem went to U.S. federal court in Pennsylvania to obtain discovery of "various aspects of the Vessel's loading, the charter party, and the bill of lading for use in an 'imminent foreign proceeding.'"[1] A month later Sinochem filed a petition in an admiralty court in China, claiming that MISC had fraudulently backdated the bill of lading (which triggered payment from Sinochem to Triorient) and asking for the vessel to be seized. The court ordered the seizure. The vessel was released after MISC posted $9 million security.

MISC then sued Sinochem in U.S. federal court in Pennsylvania for a variety of alleged misrepresentations regarding the backdating of the bill of lading, the damages from which MISC sought to be reimbursed. (This is the case being appealed here.)

Sinochem returned to the Chinese admiralty court complaining of damage from the alleged backdating. MISC countered that the Chinese court lacked jurisdiction, arguing that the bill of lading and the charter party required disputes to be settled elsewhere. The admiralty court found that it did indeed have jurisdiction. The Chinese appeals court affirmed, ruling that Chinese jurisdiction was proper regardless of any actions taken in the courts of other sovereign nations.

Meanwhile, back in Pennsylvania, Sinochem moved for dismissal of MISC's suit on the grounds that the court lacked personal and subject matter jurisdiction, as well as for *forum non conveniens* (a doctrine by which a court can dismiss an action over which it has jurisdiction because the convenience of the parties and witnesses would be better served by bringing the action in another court). The court determined that it had admiralty jurisdiction because the fact situation – the seizure of the vessel – had occurred on navigable waters (albeit in China) and there was sufficient connection to traditional maritime activity. Nonetheless, the court dismissed on *forum non conveniens* grounds. MISC appealed to the U.S. Court of Appeals for the Third Circuit.

Admiralty Jurisdiction

The appeals court first considered the lower court's ruling that it had admiralty jurisdiction. Federal admiralty jurisdiction over a tort action is conditioned on two things: location, and connection with maritime activity.

"A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water."[2] The alleged tortious act was Sinochem's misrepresentation that MISC backdated the bill of lading, which, obviously, took place on land. However, the injury arising from the misrepresentation was the seizure of the vessel, which took place on navigable waters. The court followed the "impact analysis" favored in other circuits, whereby "a tort occurs in the place where the injury occurs."[3] Under this analysis the location condition was satisfied.

To satisfy the connection condition, a tortious act must have "the potential to disrupt maritime commerce" and "a substantial relationship to traditional maritime activity."[4] The court had no doubt that the vessel seizure disrupted maritime commerce; establishing that Sinochem's alleged misrepresentation had the necessary "substantial relationship to traditional maritime activity" was slightly more difficult. By the court's reasoning, when Sinochem petitioned the Chinese court for the seizure of the vessel the company was using "a well-established method of granting an admiralty court power to exercise authority over a ship,"[5] so the "significant relationship" condition was met.

Personal Jurisdiction

The trial court dismissed the case on *forum non conveniens* grounds before determining whether personal jurisdiction existed. MISC argued on appeal that the lower court should have established both personal and subject matter jurisdiction before ruling on *forum non conveniens*.[6]

The appeals court agreed. A ruling on *forum non conveniens* depends, the court reasoned, on the existence of jurisdiction because the court could not decline to exercise its jurisdiction if it had none to begin with. To support its ruling, the court noted that the U.S. Supreme Court had suggested that a *forum non conveniens* ruling presupposed jurisdiction, and that other appeals courts had explicitly reached that conclusion.

Conclusion

The appeals court rejected Sinochem's attempt to show that the trial court had adequately addressed personal jurisdiction, and remanded the case to the lower court for more inquiry on that matter. MISC's claim against Sinochem for misrepresentation remains alive.

Endnotes

1. *Malaysia Int'l Shipping Corp. v. Sinochem Int'l, Inc.*, 436 F.3d 349, 351 (3d Cir. 2006).
2. *Id*. at 354 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527, 534 (1995)).
3. *Id*. at 355.
4. *Id*. at 356.
5. *Id*. at 357.
6. In this case the subject matter was admiralty, and admiralty jurisdiction had been established.

Photograph of ocean-going ship courtesy of ©The Nova Development Corp.

Disposal Site Selection is a Discretionary Function

Montijo-Reyes v. United States, 436 F.3d 19 (1st Cir. 2006).

Britta Hinrichsen, 2L, Vermont Law School

The First Circuit recently upheld a District Court of Puerto Rico decision that site selection for disposal of dredged and fill material by the Army Corps of Engineers (Corps) falls within the discretionary function exception to the Federal Tort Claims Act (FTCA).

Background

In 1999, the Corps proposed emergency dredging of a federal navigation channel in Arecibo Harbor, Puerto Rico. The Corps' original disposal site for the dredged material was on land owned by the Port Authority, but the costs to transport the material to the site proved prohibitive. As an alternative, the Corps selected a nearshore site and subsequently completed an Environmental Assessment to document the impacts of depositing dredged material there. Under the Clean Water Act (CWA), the Corps must receive a permit to discharge dredged or fill material into navigable waters. As part of the permitting process, the Corps must also obtain a water quality certification from the State (Puerto Rico is a "state" for purposes of the CWA). In Puerto Rico, the Environmental Quality Board (EQB) issues water quality certificates pursuant to Puerto Rico's Water Quality Standards Regulations (WQSR). The Corps requested an exemption from the water quality certificate requirement, which the EQB granted.

When the Corps began the dredging, however, it deposited the dredged material in the open ocean rather than near the beach as authorized. To prevent the offshore coral ecosystem from being buried by sediment, the U.S. Fish and Wildlife Service prohibited the Corps from further disposal. As an alternative, the Corps settled on La Marginal Beach. This new disposal site was across the street from plaintiffs' property. The deposit of dredged materials increased the elevation of the beach fifteen feet and although a stone wall and silt fence were constructed to protect the street from beach erosion, sand and dust did migrate from the deposit site. The plaintiffs filed suit against the Corps for damage to their property allegedly caused by the drifting sand and dust. Specifically, the plaintiffs claimed, pursuant to the Federal Tort Claims Act (FTCA), that the Corps violated the CWA and Puerto Rico's WQSR for not receiving a water quality certificate or exemption from the EQB for the La Marginal Beach disposal site.

Under the FTCA, the federal government waives sovereign immunity in limited circumstances such that the government may be held liable for some torts.[1] The plaintiffs claimed that the Army Corps of Engineers (the government) was negligent (a tort) in discharging dredged material on La Marginal Beach without certification as required by the CWA and WQSR and that negligence resulted in damage to their homes. The District Court granted the federal government's motion for summary judgment, determining that the discretionary function exception to the FTCA is applicable because the certification or exemption was only one factor in selecting a disposal site and the plaintiffs failed to show the "necessary causal connection" between the alleged violation of the CWA and the property damage.

Discretionary Function

The issue before the First Circuit was whether the district court properly dismissed the plaintiffs' claim for lack of subject matter jurisdiction under the discretionary function exception to the FTCA. The discretionary function exception protects the federal government from claims "based upon the exercise or performance or the failure to exercise or perform a discre-

tionary function or duty on the part of a federal agency."[2] The purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through a medium of an action in tort."[3]

To determine if the discretionary function exception applies, the court, after identifying the conduct at issue, must decide "(1) Is the conduct itself discretionary? (2) If so, does the exercise of discretion involve (or is it susceptible to) policy-related judgments?"[4] The discretionary function exception does not apply if "a federal statute, regulation, or policy specifically prescribes a course of action."[5] The conduct at issue was the Corps' site selection for disposal of dredged material from Arecibo Harbor. While the plaintiffs conceded that the Corps' disposal site selection was "susceptible to policy related judgments," the plaintiffs asserted that site selection was not discretionary because the CWA mandates conduct prior to disposal—specifically, obtainment of a water quality certificate or exemption. The court disagreed.

Affirming the lower court, the First Circuit held that the discretionary function exception does apply to the Corps' conduct. First, the Corps' site selection was a discretionary decision because the Corps compared multiple locations incorporating "political, economic, and public policy considerations."[6] Second, the discretionary function exception still applies even though a water certificate or exemption is required by law, because the grant of the certificate is "only one of many factors" considered by the Corps.

Furthermore, even if the Corps had applied for an exemption, no specific regulations would have prevented the EQB from issuing an exemption for the water quality certificate. Consequently, the plaintiffs' failed to show a causal link between the Corps' failure to obtain a water quality certificate or exemption and their property damage.

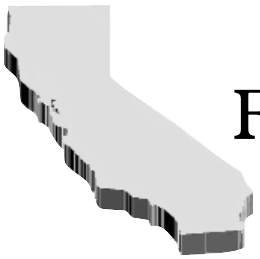
Conclusion

The First Circuit upheld the lower court decision that the discretionary function exception to the FTCA bars subject matter jurisdiction for the plaintiffs' claim.

Photograph of landfill site courtesy of NOAA's ORR photo gallery.

Endnotes

1. 28 U.S.C. § 1346(b) ("[F]or injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").
2. 28 U.S.C. § 2680(a).
3. *Montijo-Reyes v. United States*, 436 F.3d 19, 24 (1st Cir. 2006) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984)).
4. *Id*. (quoting *Muniz-Rivera v. United States*, 326 F.3d 8, 15 (1st Cir. 2003)).
5. *Id*. at 25.
6. *Id*. at 24, n.9.



Florida Sea Grant and University of Florida Law School Partner to Support Public Access Policy Initiatives

Grant Watson and Thomas T. Ankersen

Grant Watson is a recent graduate of the University of Florida College of Law who worked with Florida Sea Grant on public access issues through the UF Law Conservation Clinic.

Thomas T. Ankersen is a Legal Skills Professor at the UF College of Law and directs its Conservation Clinic in the Center for Governmental Responsibility. He also serves as a statewide legal specialist for Florida Sea Grant.

Florida enjoys one of the nation's longest coastlines and a year-round climate conducive to maritime activities. Historically, marine industries have thrived because of an abundance of waterfront property on which to establish water-dependent activities and their support facilities. Commercial waterfront activities have not been the only beneficiaries of Florida's vast coastline and coastal resources. Recreational boaters have also been able to enjoy Florida's coastal waters without concern over access to the water. Today, however, there are more than one million registered boaters in the state and boating access infrastructure, already overtaxed, is facing a wave of waterfront privatization that threatens two Florida traditions, commercial fishing and recreational boating. Competition for once-abundant space on the water has also become increasingly problematic with growing conflict among user groups and with marine resources such as manatees, sea grasses and corals. A unique collaboration between the Florida Sea Grant Boating and Waterway Management Program and faculty and students at the University of Florida College of Law's Center for Governmental Responsibility and Conservation Clinic has been assisting the state and its communities with these issues.

After a fitful beginning, the Florida legislature began to face up to the access problem by passing the 2005 Working Waterfronts Legislation - a multifaceted attempt to stem the tide of waterfront privatization. Key to the legislation is its parcel-based definition. A "working waterfront" can be either recreational or commercial in nature, and is "a parcel of real property that provides access for water-dependent commercial activities or provides access for the public to the navigable waters of the state." Some examples of a "working waterfront" are docks, wharfs, lifts, wet and dry marinas, boat ramps, boat hauling and repair facilities, commercial fishing facilities, boat construction facilities, and other support structures over the water. Thus the term "working waterfront" in Florida has been expanded to include waterfronts that serve the access needs of recreational boaters as well as commercial maritime industries.

The new legislation has provisions that require local governments to address public access through the local government comprehensive planning process. The new legislation also codifies the Waterfronts Florida Partnership Program, a cooperative arrangement between the Florida Department of Environmental Protection (DEP) and the Florida Department of Community Affairs (DCA) that assists certain designated coastal communities with a variety of issues related to their waterfronts, including revitalization and the provision of public access. The new legislation also includes a complex property tax deferral program that local governments may adopt and apply to "working waterfront" property, enabling owners to defer paying skyrocketing waterfront property taxes until there is a change in ownership or use. Finally, the

law directs the Florida Department of Environmental Protection to survey state parks for additional public access capacity.

Even before public access for recreational boating became a hot button political issue, Florida Sea Grant had begun to address recreational use of the State's waters through the creation of a Boating and Waterway Management Program that brought mapping technologies, planning principles and policy analysis to bear on the State's waterways. Focusing first on the waters of Southwest Florida, and the vision of the West Coast Inland Navigation District, Sea Grant and CGR attorneys have been working to develop the conceptual framework for a regional waterway management system focused on the "adaptive reuse" of the federal intracoastal waterway as the artery for a still evolving network of interconnected channels and public access points linking the region to its marine cultural and natural resources. While Sea Grant's planners and geographers mapped the resources and assessed needs, CGR attorneys and law clinic students addressed rights of navigation, created a model local harbor management ordinance and facilitated regional consensus building through a boater-driven initiative known as the Southwest Florida Regional Harbor Board.

More recently, the UF attorneys, students in the Conservation Clinic and Florida Sea Grant have begun working with the state and local governments on a variety of projects to address public access, surface water zoning and the protection of traditional waterfront uses. Under contract with the Florida Fish and Wildlife Conservation Commission and its marine law enforcement division, CGR attorneys and Sea Grant geographers have launched a challenging effort to identify and map all local marine regulatory zones, effectively creating a "maritime cadastre" for use by planners, resource managers and law enforcement officials. At the same time faculty and students in the law clinic are working with the State's Department of Community Affairs to develop the policy planning tools communities need to ensure public access and retain traditional waterfront community character. Recent local initiatives include assistance to the cities of Bradenton Beach, Punta Gorda and Saint Augustine with proposals for managed mooring fields, and to the City of Crystal River and the panhandle community of Panacea with proposals for water-dependent, thematic resource overlay districts. For inland Alachua County Sea Grant has partnered with several units of the UF campus, including the law school, to develop a "waterways master plan" to address conflicts on rivers, lakes and springs. The Clinic is also evaluating the viability of the 2005 tax deferral legislation, reviewing state submerged lands leasing policies and local land acquisition programs for their ability to contribute to the provision of public access.

Photograph of boats in mooring facility courtesy of ©Nova Development Corp.

Despite these efforts, the challenge presented by the changing character of the Florida waterfront and increasing congestion on the water remains a daunting one. Their success will tell whether "working waterfronts" - both commercial and recreational - will not only have a history in Florida, but also a future.

California, from page 1

regulate the discharge of pollutants into its waters. When the NPDES permit process proves ineffective in achieving established water quality standards, § 303 of the Clean Water Act requires states to document impaired waters on a "303(d) list." States must rank their substandard waters "in order of priority, and based on that ranking, calculate levels of permissible pollution called 'total maximum daily loads' or 'TMDLs.'"[1]

Plan for the Los Angeles River

The Los Angeles River, a concrete-lined flood control channel, carries discharge from storm drains in Los Angeles and surrounding cities a distance of fifty-one miles before emptying into the Pacific Ocean. In 1994, the California Regional Water Quality Control Board, the Los Angeles Region, and the State Water Resources Control Board (Water Boards) recognized the need to address the river's water quality and developed the 1994 Basin Plan, which provided that "'[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses.'"[2] During implementation of the plan, the Water Boards identified significant accumulations of trash along several stretches of the river while assessing the river's water quality in 1996 and 1998.

On September 19, 2001, the Water Boards placed the impaired portions of the river on the state's 303(d) list and adopted a Trash TMDL to supplement the 1994 Basin Plan. Because the Water Boards concluded that "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state,"[3] it set a target of zero trash for the TMDL. The Trash TMDL provided for a reduction in trash over a fourteen-year period, allowed for a reassessment of the zero trash target after the cities had achieved a fifty percent reduction, and suggested various compliance methods available to the cities. Affected cities immediately voiced their objections, but the EPA adopted the TMDL in August 2002.

Trashing the TMDL

Before giving the Water Boards an opportunity to prove the Trash TMDL's effectiveness, cities subject to the new regulation convinced a lower court in San Diego that

> the Water Boards improperly (1) failed to conduct an analysis of the Los Angeles River's assimilative capacity; (2) failed to conduct a cost/benefit analysis or consider economic factors . . .; (3) purported to apply the Trash TMDL to the Estuary even though it is not listed on the state's 1998 303(d) list as impaired; and (4) failed to prepare a required EIR [Environmental Impact Report] or its functional equivalent under CEQA [California Environmental Quality Act].[4]

On appeal, the Water Boards challenged the four grounds used to invalidate the Trash TMDL. First, they questioned the necessity of making trash the subject of an assimilative capacity study since trash, unlike typical pollutants which may be diluted in water to such an extent as to have only a negligible impact on the environment, does not readily decompose. The Water Boards also cited existing studies which indicated that even small amounts of trash could have a discernable impact on the environment. The appellate court agreed that only a TMDL with a target of zero trash could give the state a realistic chance of complying with desired water quality standards.

Second, the Water Boards argued against the necessity of conducting a cost/benefit analysis because a TMDL neither mandates nor prohibits particular actions; rather, it merely defines objectives for states to accomplish through water quality control regulations. The appellate court agreed that a cost/benefit analysis would only be required in conjunction with the implementation of a regulation designed to achieve an established TMDL – not in response to creation of the TMDL itself. The appellate court also found merit in the Water Boards' argument that they had considered economic

factors before implementing the Trash TMDL. In particular, the Water Boards demonstrated that the Trash TMDL included data regarding costs associated with trash collection and disposal in the Los Angeles River and provided estimated costs of compliance measures.

Third, while the Water Boards conceded that they typically placed impaired waters on the state's 303(d) list before establishing TMDLs for those waters, the Clean Water Act "provisions do not prohibit a regional board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate the formal designation on a state's 303(d) list is a prerequisite to a TMDL."[5] Although the appellate court noted that designation of the unlisted Estuary as an impaired water on the 303(d) list could have prevented the cities' challenge, the appellate court held that the Water Boards' failure to do so represented a regrettable but harmless error.

Finally, the Water Boards tried to argue that because the Trash TMDL would cause no environmental impacts, CEQA did not require it to prepare either an EIR or its functional equivalent. According to CEQA, a government agency must "prepare an [EIR] whenever it considers approval of a proposed project that '*may* have a *significant* effect on the environment.'"[6] Even certified regulatory programs, which enjoy an exemption from the traditional CEQA requirement of preparing EIRs, must create the functional equivalent of an EIR by preparing documents that "include 'alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment."[7] Although the court acknowledged that regulatory schemes created by the Water Boards qualified as certified regulatory programs, it concluded that, because the Trash TMDL might have significant environmental effects, the Water Boards should have prepared the functional equivalent of an EIR. Upon this ground alone, the appellate court affirmed the finding of the lower court and invalidated the Trash TMDL.

Conclusion

Despite the Water Boards' understandable disappointment in the overall outcome of the case, they can derive some satisfaction knowing they convinced the appellate court to reverse three of the lower court's four findings. More importantly, the appellate court seemed willing to support the Trash TMDL once the Water Boards submitted the applicable CEQA paperwork. In the meantime, this case, which demonstrated several California cities' satisfaction with an ineffective regulatory regime, guarantees the continued accumulation of trash in the Los Angeles River at least for the near future.

Endnotes

1. *City of Arcadia v. State Water Res. Control Bd.*, 38 Cal. Rptr. 3d 373, 380 (Cal. Ct. App. 2006).
2. *Id.* at 381.
3. *Id.*
4. *Id.* at 382-83.
5. *Id.* at 391.
6. *Id.* at 393.
7. *Id.* at 394.

Photograph of Los Angeles River during construction courtesy of The National Archives.

Nestlé, from page 1
which allowed the defendants to pump at a combined maximum pumping rate of 400 gallons per minute (gpm). The defendants began to construct a bottling plant approximately twelve miles from Sanctuary Springs in the summer of 2001.

In September 2001, MCWC filed a complaint requesting an injunction to bar the defendant from constructing wells, wellhouses, and the water extraction pipeline. MCWC alleged that defendant's withdrawal of water would not be lawful under the common law applicable to riparian water rights and was unreasonable under the applicable groundwater common law. On November 25, 2003, the trial court found that the defendant's actions had harmed and would continue to harm the plaintiff's riparian interests. The court also found that the defendant's water withdrawals violated the Michigan Environmental Protection Act (MEPA) by unlawfully diminishing an inland lake or stream and draining water from a wetland. The trial court granted the plaintiff's requested injunction. The defendants filed an appeal.

Groundwater Claim

The defendant contended that the trial court erred when it determined the pumping unlawfully interfered with the plaintiff's riparian rights based on a hybrid rule of the court's own devising. The Court of Appeals rejected the trial court's hybrid rule and held that Michigan law requires the application of a reasonable use balancing test to disputes between riparian owners and groundwater users.

Under the reasonable use doctrine, "a riparian owner may make any and all reasonable uses of the water, as long [as] they do not unreasonably interfere with the other riparian owners' opportunity for reasonable use."[1] What constitutes a reasonable use is determined on a case-by-case basis. A similar doctrine has developed in Michigan regarding groundwater rights. In *Schenk v. City of Ann Arbor*, 163 N.W. 109 (Mich. 1917), the Michigan Supreme Court adopted the "rule of reasonable user" and stated the rule "does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable use of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."[2] Recognizing that a reasonable use standard has developed for both riparian and groundwater uses, the court explicitly adopted the reasonable use balancing test as the law applicable to disputes between riparian and groundwater rights.

Under the reasonable use balancing test, courts must balance a number of factors to determine whether the harm caused was unreasonable. These factors include, but are not limited to, (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, and (6) any other factor that may bear on the reasonableness of the use.[3]

Applying the reasonable use balancing test to the facts of the case, the court found that the MCWC's use of the stream for recreation and aesthetic value was a reasonable use worthy of protection. The defendant's use of the disputed water, however, also serves a beneficial purpose providing employment and water to the general public and is not inherently unreasonable. Examining the location of the use, the court found that Sanctuary Springs is not well suited for high-volume water extractions. The reduction of flow due to the bottling operations would raise the temperature of the stream resulting in the loss of habitat and recreational values. Furthermore, the court found that the defendant could augment its water supply from other sources and thereby reduce the impact on the Dead Stream. Taking all factors into consideration, the court determined that defendant's proposed withdrawal

of 400 gpm would be unreasonable. The court, however, concluded that the facts in the record before it were insufficient to determine a reasonable rate of pumping for the defendant and remanded that issue to the trial court.

Photograph of well being dug courtesy of USGS.

MEPA Claim

The defendant next claimed that the trial court's MEPA holding was fundamentally in error and should be reversed. The court agreed. First, the court found that the plaintiffs lacked standing to bring MEPA claims for some of the waters in question, because "any adverse effect on those areas from defendant's pumping activities does not affect plaintiffs in a manner different from the citizenry at large."[4] The court ruled that because the plaintiffs did not present any evidence that they use Osprey Lake or the three wetlands in question, they had failed to demonstrate that they would suffer "a concrete and particularized injury distinct from that of the public generally."[5]

The court then turned to the trial court's reliance on Inland Lakes and Streams Act (ILSA) and Wetland Protection Act (WPA) violations to establish a prima facie violation of MEPA. To establish a violation under MEPA the plaintiff must show a detailed and specific finding that the defendant's conduct has "polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources" or the court must find that "the defendant has violated an applicable pollution control standard."[6] The court held that neither ILSA nor WPA violations may be used to establish prima facie MEPA violations because those statutes do not contain pollution control standards. Having made this finding, the court declined to consider the defendant's further MEPA claims on appeal, and remanded to the trial court, which "shall determine whether plaintiffs established a prima facie violation of MEPA."[7]

Conclusion

The Michigan Court of Appeals found that under a reasonable use balancing test, the defendants proposed groundwater withdrawal for its bottling operations is unreasonable. In January, MCWC and Nestlé reached a temporary compromise allowing Nestlé to extract 218 gpm from the Sanctuary Springs site this year.[8] MCWC, however, has appealed the Court of Appeals' ruling to the Michigan Supreme Court.

Endnotes

1. *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, 709 N.W. 2d 174, 194-195 (Mich. Ct. App. 2005).
2. *Id.* at 198.
3. *Id.* at 203.
4. *Id.* at 210.
5. *Id.* at 211.
6. *Id.* at 213.
7. *Id.* at 216.
8. Dawson Bell, *Sides Agree in Water Dispute: Nestlé to Continue Pumping*, The Detroit Free Press (Jan. 27, 2006).

Seattle Cannot Impose Additional Safety Standards for Hazardous Pipeline

Olympic Pipe Line Company v. City of Seattle, 437 F.3d 872 (9th Cir. 2006).

Terra Bowling, 3L, University of Mississippi School of Law

In February, the United States Court of Appeals for the Ninth Circuit ruled that the City of Seattle's attempts to impose additional safety requirements on Olympic Pipe Line Company (Olympic Pipe Line) were preempted by the federal Pipeline Safety Act (PSA).

Background

The litigation involved a lateral delivery line, called the "Seattle Lateral," that Olympic Pipe Line has operated under a franchise agreement with the city since 1966. The Seattle Lateral runs near elementary schools and a residential neighborhood, underneath Interstate 5, and next to electricity transmission lines. Seattle sought to regulate the pipeline after a segment exploded in Bellingham, Washington, killing three people and causing extensive environmental damage.

Olympic Pipe Line's contract with the city came up for renewal soon after the Bellingham explosion. Before the city would consider agreeing to a new franchise agreement, it requested Olympic respond to thirty-three of its safety concerns. Among those items was a request that the company perform a hydrostatic test of the pipeline. The Office of Pipeline Safety of the Department of Transportation (DOT) notified Seattle that the tests of the Seattle Lateral were not necessary because the pipeline met federal regulatory standards. Olympic then filed an action in district court against Seattle to stop the city from ordering Olympic to shut down operations.

The district court ruled that the city was preempted from regulating the safety and inspection of the Seattle Lateral by the PSA. Seattle appealed, arguing that the PSA does not entirely preempt the city from regulation. The city also asserted that, even if the PSA does preempt the city's actions, Olympic waived its right to argue preemption when it entered into the franchise and indemnity agreements with the city. Finally, the city asserted that those agreements should be enforced as a matter of public policy.

Preemption

The Ninth Circuit first considered whether the PSA preempted Seattle's attempt to impose safety standards on a hazardous liquid pipeline. The court recognized that the Supremacy Clause of Article VI of the United States Constitution grants Congress the power to preempt state or local law. The court examined the statutory text of the PSA to determine whether it expressly prohibited regulation by local authorities or if it could be reasonably inferred that Congress did not leave room for local regulation.

The PSA has different rules for the regulation of interstate and intrastate pipelines. States and local authorities may exercise limited regulatory authority over *interstate* pipelines through a safety agreement or as an agent of the DOT, but generally they may not enact safety standards.[1] After being certified by DOT, a state authority may regulate *intrastate* pipelines if its standards are consistent with federal pipeline safety standards.[2] The court found that regardless of whether the Seattle Lateral was considered an interstate or intrastate pipeline, the city needed to receive authorization from the DOT to regulate the pipeline.

The state of Washington had received authority from DOT to participate in the pipeline safety program for intrastate lines after the Bellingham incident. The court, however, found that Seattle had neither sought nor been delegated authority to regulate the pipeline.

The court concluded that the PSA expressly preempts the city's attempt to impose safety regulations on the Seattle Lateral.

The court indicated that the city could impose requirements on Olympic Pipe Line, such as safety tests or the purchase of liability insurance, if Seattle is acting as a municipal proprietor rather than as a regulator. The court found, however, that Seattle's interest was not that of a private market participant that owns a pipeline, but that of a regulator seeking to protect the public health and safety. As such, Seattle could not impose safety standards under the market proprietor exception.

Additional Claims

Seattle also claimed that the company had waived its right to use the preemption argument when it entered the franchise and indemnity agreements with the city. The court rejected this argument, holding that preemption is a federal power and not a right a private party can waive.

The court rejected Seattle's argument that a court ruling that the city's safety provisions are unenforceable will encourage other companies to enter into contracts they do not intend to honor. The court noted that the city's policy concern is outweighed by the federal need to maintain uniformity in the establishment and enforcement of hazardous liquid pipeline safety regulations.

Conclusion

The Ninth Circuit affirmed the ruling of the district court that Seattle's attempts to impose additional safety requirements on a hazardous liquid pipeline were preempted by the PSA.

Endnotes

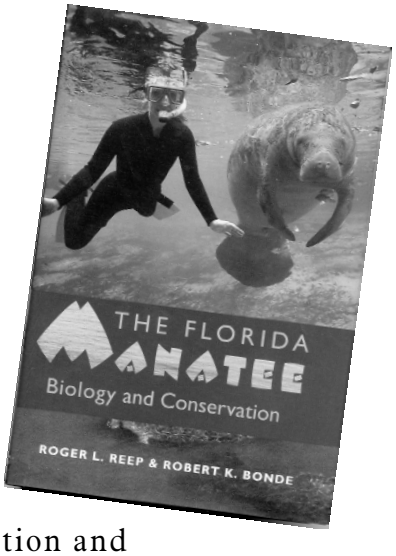
1. 49 U.S.C. §§ 60104(c), 60106(a), 60117(c).
2. *Id.* § 60104(c).

Book Review . . .

Megan Knott, Sophomore, University of Mississippi

The Florida Manatee: Biology and Conservation

Roger Reep and Robert Bonde (University of Florida Press 2006).



Marine biology is a constantly evolving field which heightens our understanding of aquatic life and enhanced conservation efforts to improve the status of many aquatic populations. *The Florida Manatee: Biology and Conservation* by Roger Reep and Robert Bonde provides an insider's look into how science and research has progressed to help people understand and protect one of Florida's most famous mammals. The authors have studied manatees for over twenty years and independently published several research papers on manatee biology and scientific observation.

In *The Florida Manatee* they examine, among other things, manatee anatomy, behavior, life history, and perceptual biology. Reep and Bonde make challenging scientific language easy for the reader to understand. The book's informative tone is enhanced with diagrams and photos illustrating manatee research efforts, propeller injuries, and manatee behavior. A fact sheet on the traits of Florida manatees is also included which highlights key aspects of population and habitat, life history, feeding, anatomy and physiology, and behavior and brain.

The Florida Manatee stresses the importance of manatee survival, encouraging ongoing scientific research so that man and manatee can coexist. "Today we look toward to a future that offers challenges, but also the hope that we may live in harmony with manatees in Florida." Reep and Bonde have drawn on decades of work with manatees to create a valuable source of information promoting conservation and research initiatives to a wide audience.

Alaska Has Jurisdiction over Crime Committed in Canadian Waters

State of Alaska v. Vernon G. Jack, No. S-11051 (Alaska Dec. 12, 2005).

Lynda Lancaster, J.D.
Stephanie Showalter

Last year the Alaska Supreme Court held that the state has jurisdiction to prosecute crimes committed onboard a state ferry while it is in Canadian waters.

Background

The citizens of coastal Alaska depend on the Alaska Marine Highway and its ferries in much the same way as city dwellers rely on a subway system. The ferry system connects coastal communities and Alaska to the lower 48 states. In addition to transporting locals, the ferry system attracts tourists from around the world wishing to experience Alaska's spectacular scenery.

In May 2001, the ferry *Matanuska* was traveling between Seattle, Washington and Ketchikan, Alaska. Vernon Jack allegedly sexually assaulted a sixteen-year old passenger while the ferry was traversing Canadian waters. An off duty Alaska Trooper, who happened to be onboard, investigated the assault and arrested Jack to stand trial in Alaska. The Juneau Superior Court dismissed the indictment on grounds that Alaska did not have jurisdiction in the waters where the assault took place. The Alaska Court of Appeals affirmed, holding that Alaska's criminal jurisdiction did not extend to Canadian territorial waters.[1] The state appealed.

Jurisdiction

To prosecute Jack, Alaska must have jurisdiction. Because the crime happened in foreign waters, the extent of U.S. jurisdiction is also relevant. "United States criminal jurisdiction exists over crimes committed on United States flagged ships, even when they are in foreign territorial water, if the local sovereign has not asserted jurisdiction."[2] Generally a coastal nation is authorized to assert jurisdiction over foreign vessels only if the "peace or dignity of the country or the tranquility of the port" is threatened.[3] Canada had not asserted jurisdiction, so the U.S. could have clearly exercised jurisdiction if it had so desired.

"A state, by statute, may extend its jurisdiction to enforce violations of its substantive criminal law when a person's conduct occurring outside the territorial limits of the state affects an in-state interest."[4] Alaska statutes provide that "the jurisdiction of the state extends to water offshore from the coast of the state [including] the high seas to the extent that jurisdiction is claimed by the United States of America, or to the extent recognized by the usages and customs of international law."[5] The above provision, however, "does not limit or restrict the jurisdiction of the state over a person or subject inside or outside the state that is exercisable by reason of citizenship, residence, or another reason recognized by law."[6]

"Water Offshore From the Coast"

The Alaska Supreme Court concluded that the assault occurred in water offshore the coast of Alaska within the meaning of Alaska Statute § 44.03.010(2). The court first determined that the legislature intended to provide the state with extraterritorial jurisdiction coterminous with that of the United States and, therefore, the terms of § 44.03.010 should be read broadly. The court agreed with the state that "high seas" should be defined as "encompassing all ocean waters beyond the boundaries of the low-water mark" of the state, including the territorial waters of foreign nations.[7] Because the crime occurred in ocean waters beyond the low water mark, it occurred on the high seas and in "water offshore from the coast."

The court's reasoning is interesting. The "high seas" is generally recognized as that area of the ocean that remains beyond the reach of any nation. For instance, the high seas provisions in Article 86 of the U.N. Convention on the Law of the Sea apply only to the "parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State." The "high seas" are "international waters" and are not generally considered to include foreign territorial waters.

Judge Carpeneti's concurring opinion highlights this flaw in the majority's reasoning. "Because the territorial waters of Canada do not appear to be the 'high seas,' I would not base the state's jurisdiction on AS 44.03.010(2)."[8] Justice Carpeneti, however, would have reached the same conclusion albeit under a different section. Under § 44.03.030(1), Alaska may exercise extraterritorial jurisdiction over a person outside the state by reason of citizenship, residence, or "another reason exercisable by law."

The Effects Doctrine

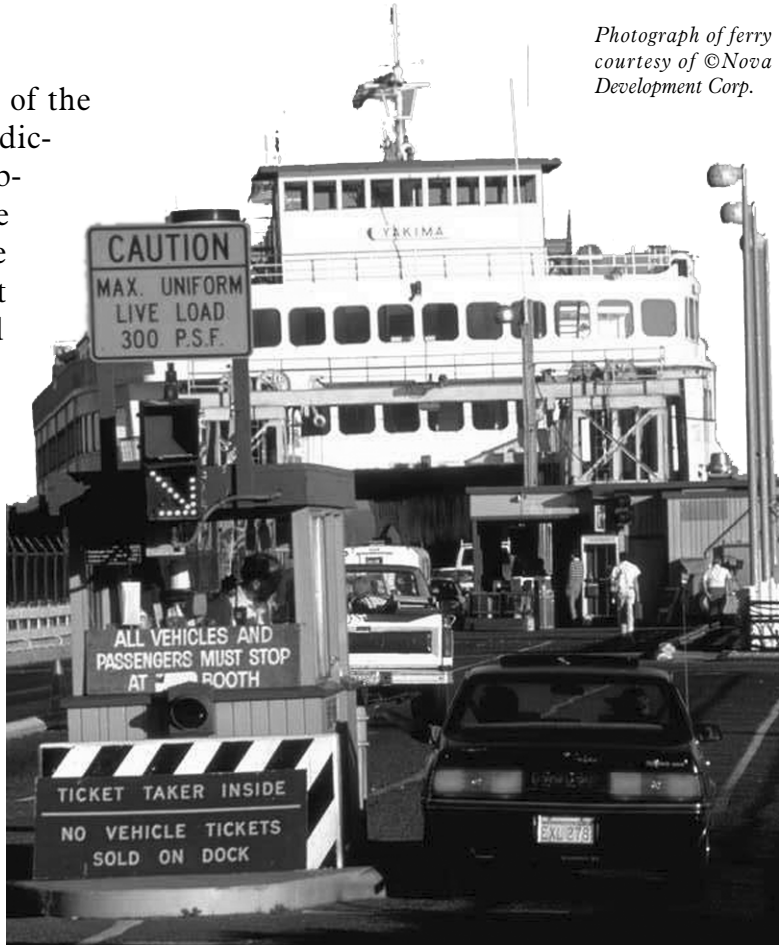
In addition to meeting the prerequisites of the jurisdictional statutes, to exercise jurisdiction over Jack, Alaska must have a substantial interest. "The effects doctrine recognizes that a state may exercise extraterritorial jurisdiction over conduct outside the state that has or is intended to have a substantial effect within the state so long as the exercise of jurisdiction does not conflict with federal law and is otherwise reasonable." In certain situations the effects doctrine can provide an independent basis for the exercise of extraterritorial jurisdiction. The court determined that the state meet the threshold requirements of the effects doctrine in this case. Alaska has a significant interest to ensure passengers and cargo transported on state ferries are safe. There is no conflict with federal law and exercise of jurisdiction is reasonable in light of the importance of the ferry system.

Conclusion

Although one justice disagreed as to the proper statutory provisions, the Alaska Supreme Court held that the state had jurisdiction to prosecute crimes committed onboard state ferries while in Canadian waters.

Endnotes

1. *State v. Jack*, 67 P.3d 673 (Alaska Ct. App. 2003).
2. *State v. Jack*, No. S-11051, slip op. at 15 (Alaska Dec. 12, 2005).
3. *Id.* at 16.
4. *State v. Jack*, 67 P.3d 673 at 674.
5. ALASKA STAT. § 44.03.010(2).
6. *Id.* § 44.03.030(1).
7. *State v. Jack*, No. S-11051, slip op. at 10.
8. *Id.* at 29.



Photograph of ferry courtesy of ©Nova Development Corp.

Ninth Circuit Dismisses Challenge to Reopening of Swordfish Fishery

Turtle Island Restoration Network v. U.S. Department of Commerce, 438 F.3d 937 (9th Cir. 2006).

Jeffery Schiffman, 3L, Cleveland-Marshall College of Law (Cleveland State University)

In February, the Ninth Circuit Court of Appeals held that Turtle Island Restoration Network's (Turtle Island) challenge to National Marine Fisheries Service (NMFS) regulations reopening the Hawaii longline swordfish fishery was barred by the statute of limitations provisions of the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (Magnuson Act).

In 2002, NMFS closed the Hawaii-based swordfish longline fishery because of adverse impacts on sea turtles and seabirds. Longline fishing involves pulling mainlines of up to sixty miles in length behind a vessel near the surface of the water. These mainlines can hold over one thousand hooks. Longlining for swordfish is especially controversial because the gear used, the shallow depth of lines, and the time of day combine to result in high levels of bycatch, or incidental catch.

In April 2004, however, NMFS promulgated regulations authorizing the reopening of the longline fishery. Five months later, in August 2004, Turtle Island and several other environmental organizations filed suit against NMFS asserting violations of the Migratory Bird Treaty Act, the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act (APA). Turtle Island claimed that NMFS violated the environmental statutes by reopening the fishery without first preparing an Environmental Impact Statement or obtaining the proper permits to allow the taking of migratory birds. Turtle Island's complaint did not mention the Magnuson Act.

The District Court dismissed Turtle Island's complaint for lack of jurisdiction. The court determined that the complaint was barred because Turtle Island had not filed it within thirty days of the promulgation of the regulations. The District Court found that although Turtle Island framed its complaint around violations of environmental statutes and the APA, it was in fact attacking the fishing regulation.

A statute of limitation is a deadline for filing a lawsuit. Statutes of limitation vary depending on the type of action, but all lawsuits must be filed within a certain period of time after the event giving rise to the controversy takes place. The Magnuson Act provides for judicial review of regulations promulgated under the Act, if the petition is filed within thirty days. Turtle Island's complaint, filed five months after NMFS issued the regulations, obviously missed this deadline. Turtle Island, however, claimed that it was not proceeding under the Magnuson Act, but rather under the APA and other environmental statutes. The APA does not contain a specific statute of limitations, but courts have held that a six-year statute of limitation is applicable.[1] Turtle Island met this deadline.

The Ninth Circuit found that Turtle Island's complaint was, in essence, a challenge to the reopening of the longline fishery for swordfish. Turtle Island attempts to avoid the Magnuson Act's statute of limitations by not referring to it. The court held that the Magnuson Act clearly states that a thirty-day time limit applies to any challenge of a regulation promulgated under the Magnuson Act. Turtle Island cannot be allowed to avoid a statute of limitation through the creative manipulation of its complaint. The regulation in question was promulgated under the Magnuson Act and its statute of limitation applies. Turtle Island's claims against the NMFS were therefore time-barred.

Endnote

1. 28 U.S.C. § 2401(a) states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

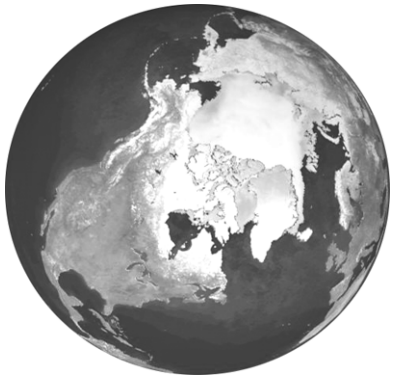
Coast to Coast
And Everything In-Between

Earthjustice recently announced a settlement with the Hawaii Board of Land and Natural Resources (BLNR) in a lawsuit challenging the agency's definition of shoreline. As reported in our October 2005 issue, Earthjustice was asking the court to invalidate the agency's definition as contrary to the Hawaii Coastal Zone Management Act because it created a preference for the "vegetation line" over the "debris line." According to the terms of the settlement, Earthjustice agreed to drop the lawsuit in exchange for BLNR's initiating of a process to amend the definition in its shoreline certification rules.

The city of Homer, Alaska recently passed an ordinance banning the practice of deliberate feeding of eagles, ravens, crows, and gulls beginning next winter. Apparently the sight of majestic bald eagles waiting around for handouts was a little too much for the City Council, which acted only after the Alaska Board of Game declined to regulate the activity. Critics oppose feeding as it is unnatural, unhealthy, and results in crowding. There is an exception, however, for Jean Keene, the "Eagle Lady," who has been feeding eagles in town for twenty-five years. Her program may continue for now, but must be phased out by 2010.

Photograph of gull courtesy of ©Nova Development Corp.

In February, a federal judge in Cleveland, Ohio granted the U.S. Army Corps of Engineers' motion to dismiss in a dispute between Lake Erie shorefront property owners and the Ohio Department of Natural Resources (ODNR). The Ohio Lakefront Group filed suit against the ODNR in 2004 alleging that ODNR is unlawfully asserting ownership over its members' private property by requiring them to obtain submerged land leases to use land below the high water mark. ODNR attempted to remove the case to federal court last year by asserting a claim against the Corps under the federal Quiet Title Act (QTA). Judge Oliver found that the federal government does not hold title to the land in question and has not waived sovereign immunity under the QTA. The case was remanded to state court.



Photograph of Artic Ocean courtesy of NASA.

Around the Globe

Denmark and Norway have delineated the maritime boundary between Greenland and Svalbard in the Arctic Ocean, divvying up important fishing grounds and oil deposits. After years of negotiations, the two countries agreed to draw the boundary line right down the middle. The Danish-Norwegian conflict is just one of many in the Artic Ocean. There are disputes between Russia and Norway regarding their boundary in the Barents Sea and between Canada and Denmark over Hans Island near Greenland.

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