The SandBar

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Legal Reporter for the National Sea Grant College Program

Fishing Permit Proper for Aquaculture Operations

Also,

Atlantic Sturgeon Listed as Endangered, Management Challenges Ahead

Exemption Not Allowed for Developers along Waterfront Property

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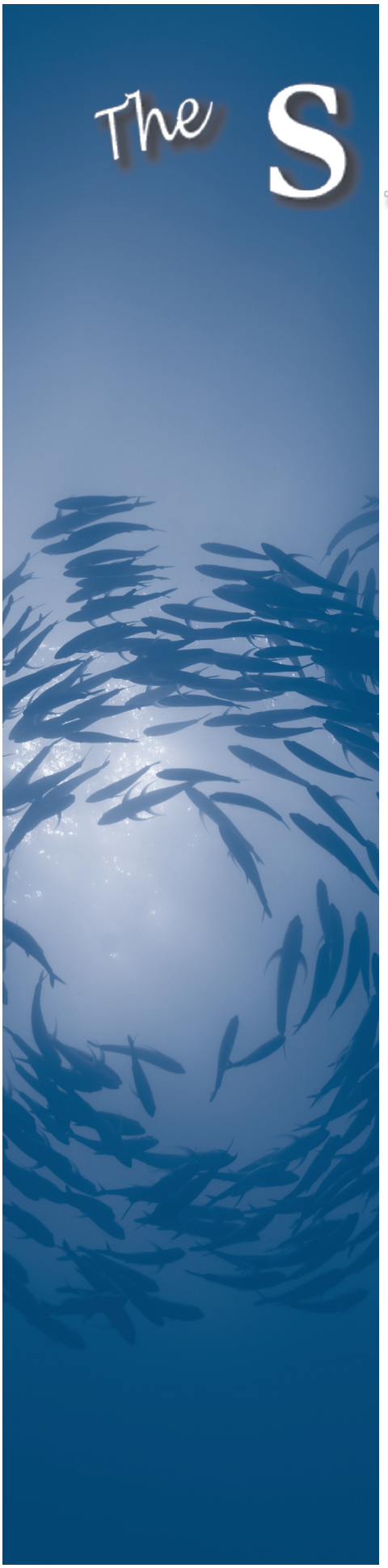

The SandBar

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Fishing Permit Proper for Aquaculture Operations

Bailey Smith[1]

According to the United Nations Food and Agriculture Organization (FAO), aquaculture is predicted to provide over half of all fish for consumption this year. In fact, the FAO reports that aquaculture is the most rapidly growing source for providing animal protein, and the industry has grown more than 60% between 2000 and 2008 with no signs of slowing down.[2] As a result, new methods of aquaculture, including the use of mobile aquaculture cages, are being used to increase crop yields. However, the use of new methods brings new legal challenges.

Recently, an environmental group filed suit objecting to a fishing permit issued to an aquaculture farm using one of these new methods. The suit alleged that the aquaculture operations, which involved towing cages behind vessels, were ineligible for a fishing permit under the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

Background

The use of "CuPod gear" is at the heart of the challenge. The CuPod is essentially a mesh cage submerged at a certain depth and continuously towed behind a vessel. Fish from a hatchery are kept inside and allowed to attain adulthood while being towed inside the cage.[3] In 2010, Kona Blue Water Farms (Kona) applied for a one-year fishing permit under the MSA which would allow them to "'stock, culture and harvest' almaco jack fish using 'CuPod gear' in federal waters off the coast of [Hawaii]."[4] The National Marine Fisheries Service (NMFS) granted a coral reef ecosystem fishing permit on July 6, 2011.

KAHEA, a Hawaiian environmental alliance, brought suit against NMFS stating that the agency should not have issued a fishing permit under the MSA because Kona was engaging in aquaculture, not fishing. Second, KAHEA claimed that the issuance of the permit violated the Administrative Procedure Act (APA) by defining fishing to include aquaculture. Third, KAHEA claimed that NMFS violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement. Both the plaintiff, KAHEA, and the defendant, NMFS, filed motions for summary judgment. KAHEA requested a court order requiring that the permit be suspended, rescinded, or revoked.

Is Aquaculture "Fishing"?

The court first addressed whether the issuance of the permit was outside the authority conferred by law. The MSA authorizes NMFS to issue the permit in question for fishing, but KAHEA argued that Kona was engaging in aquaculture and not fishing as defined by the MSA. Fishing is defined by the MSA to include harvesting. NOAA's interpretation of harvesting includes removal of fish from aquaculture pens.

The MSA authorizes NMFS to issue the permit in question for fishing, but KAHEA argued that Kona was engaging in aquaculture and not fishing as defined by the MSA

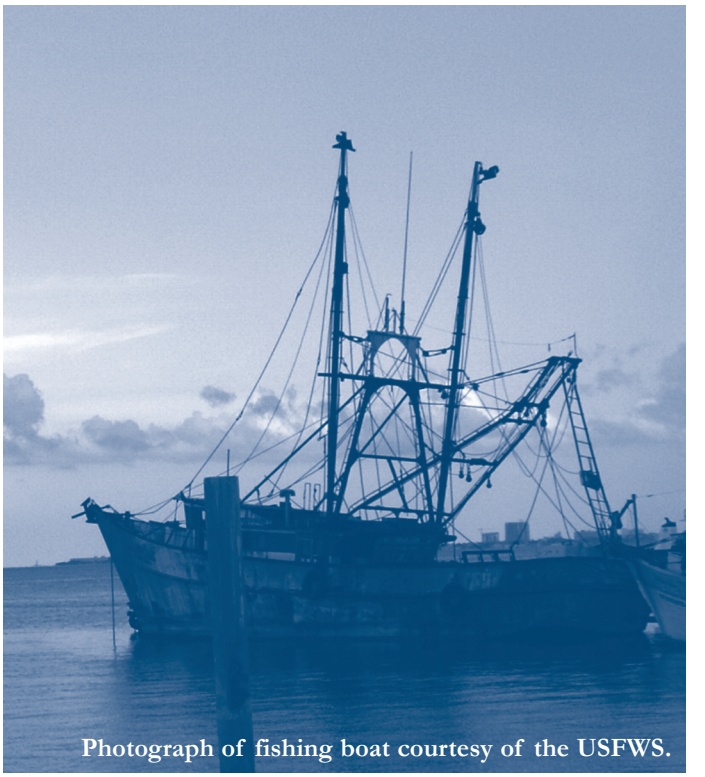
The APA establishes how courts may review agency decisions. The court may set aside a decision "only if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[5] In reviewing an agency decision, a court must consider if there is a rational reason for the decision the agency made based on the facts and if that decision frustrates Congressional intent or policies. The court may not simply substitute its own judgment because it disagrees with the agency.

Relying on dictionary definitions of "harvest" and "crops," the court found that the agency did not make an arbitrary or capricious decision. To harvest means "the act or process of gathering in a crop," and crop is defined as "a plant or animal ... that can be grown and harvested extensively for profit or subsistence."[6] The court said that defining these words in such a way did not negate legislative intent. The court stated their duty is to "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."[7]

Next, KAHEA claimed that when NMFS issued the permit to Kona to "stock, culture, and harvest" almaco jack, the agency created a de facto rule defining aquaculture as a type of fishing. An agency promulgates a rule when a statement is issued by that agency that could affect future implementation, interpretation, or prescribe law or policy. The court noted that a rule is created by agency action when the action affects the rights of broad classes of unspecified individuals. The court determined that the single permit issued to Kona did not create a rule which could be influential in the future or affect the rights of any individuals. The permit did not expressly authorize aquaculture or define fishing to include aquaculture. Even if Kona's activities conducted under the permit were considered aquaculture, the issuance of the permit did not establish a rule that all requests for aquaculture permits will be granted. Each application must still be assessed individually with regard to whether those actions involve the catching, taking, or harvesting of fish.

NEPA Claim

NEPA requires federal agencies to consider the effect their decisions will have on the environment. The court did not rule on the merits of KAHEA's NEPA claim because it determined the claim is moot. The issue no longer exists because Kona ceased to operate the CuPod and has no intention of taking any further action under the permit issued. If no action is being taken under the permit, no relief can be given other than termination of the permit—which has already occurred. KAHEA also sought relief to avoid "further irreparable harm."[8] However, KAHEA has not identified any past harm or continuing harm that the court is able to mitigate.



Photograph of fishing boat courtesy of the USFWS.

Conclusion

Although Kona is no longer using the CuPod, the legal issues raised by the case are likely to be litigated in the future. For example, the Gulf of Mexico Fishery Management Council proposed a Fishery Management Plan (FMP) for commercial offshore aquaculture. Advocacy groups challenged the plan, making many of the same arguments as KAHEA did in this instance; however, the court dismissed the case finding that the lawsuit could not proceed since the plan had not yet been implemented.[9]

Endnotes

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Atlantic Sturgeon Listed as Endangered, Management Challenges Ahead

Rachel White[1]

Following years of population decline due to overharvesting and habitat destruction, the National Marine Fisheries Service (NMFS) listed five Distinct Population Segments (DPS) of the Atlantic sturgeon as either "endangered" or "threatened" under the Endangered Species Act (ESA); the listing became effective on April 6, 2012.[2] Although it has been clear to regulators and the scientific community that the Atlantic sturgeon has been in trouble for some time, there is no consensus on how best to restore the fish population. The sturgeon's migration between the Atlantic Ocean and dozens of rivers along the East Coast presents unique management challenges because of the immense geographic area at issue and researchers' ability to monitor and report on changes to the population.

Background

Atlantic sturgeon are large, highly-migratory, late-maturing, long-lived fish that hatch and spawn in fresh water but spend the majority of their adult lives in the marine environment. Sturgeon are an ancient fish species, often described as "dinosaur[s] with fins."[3] Americans have long fished for sturgeon.[4] Notably, sturgeon helped save Jamestown colonists during the winter of 1607 when the James River nearly froze and the colonists survived by eating frozen sturgeon. Over time, a global market developed for sturgeon caviar and flesh, and demand eventually outpaced reproduction. The fishery collapsed in 1901, after landings peaked only ten years earlier. The sturgeon population never recovered; today, Atlantic sturgeon are believed to be absent from at least fourteen of the thirty-eight rivers in which they historically spawned.[5] In the Delaware River alone, it is estimated that the sturgeon population declined 99.8% from its historic peak.[6] The Atlantic sturgeon has been entirely wiped out in the northeast save for two rivers in Maine.[7]

Sturgeon has not been commercially fished on the Atlantic coast since 1997 when the Atlantic States Marine Fisheries Commission imposed a coastwide fishing moratorium. However, the moratorium eventually proved insufficient to address the harms posed by bycatch and habitat degradation, and, according to NMFS, the Chesapeake Bay, New York Bight, Carolina and South Atlantic DPSs are endangered, and the Gulf of Maine DPS is threatened.

ESA Petition

In 2009, the Natural Resources Defense Council (NRDC) petitioned NOAA to list the Atlantic sturgeon species as endangered. The group argued that the sturgeon is in danger of extinction throughout a significant portion of its American range, and that the extinction of the Atlantic sturgeon exposes the species as a whole to increased risk of extinction. NRDC cited impacts from bycatch, habitat destruction, pollution and climate change that proved too challenging for the sturgeon population.[8] A number of organizations commented on NOAA's ESA listing proposal issued in response to NRDC's petition and cited various concerns ranging from the cost of gear modifications, potential closure of fisheries with high bycatch rates, to the possible delay or denial of permits for dredging projects. NOAA considered the comments and ultimately listed the species.

Impact of ESA Listing

Enacted in 1973, the ESA is devised to protect plant and animal species from extinction as a "consequence of economic growth and development untempered by adequate concern and conservation" and to recover and maintain the species populations by minimizing threats to their existence.[9] To qualify for "endangered" status, a species must be in danger of extinction throughout all or a significant portion of its range.[10] A species is "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.[11]

Section 7 of the ESA requires federal agencies seeking to authorize, fund or carry out activities that may interfere with the species to consult with U.S. Fish & Wildlife Service or NOAA in order to determine whether their actions are

likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat of the species. Because bycatch is considered a threat to the Atlantic sturgeon, some regional Fisheries Management Councils will need to complete consultations on relevant Fisheries Management Plans in order to reduce bycatch. Local projects that require federal permits or receive federal funding are also subject to Section 7.[12] The U.S. Army Corps of Engineers, responsible for overseeing harbor deepening projects in both the Savannah and Delaware rivers, has already issued conference opinions considering the potential effect of the projects on the Atlantic sturgeon.

Section 9 of the ESA makes it illegal for anyone to "take" an endangered species, meaning that a person may not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[13] A "take" of an endangered species may be lawful if that taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[14] Applicants for incidental take permits must submit a conservation plan addressing the impact of the incidental taking, the steps the applicant will take to minimize the impact, and all alternatives considered and reasons why the alternatives were not implemented. Some researchers have voiced concerns about getting incidental take permit applications for Atlantic sturgeon approved in a timely fashion. Currently, there are a few non-federal incidental take permit applications for sturgeon in NMFS' approval pipeline, but no one has fully approved permits. However, NOAA put an advanced permitting process into place with the Atlantic sturgeon listing, and all known research involving direct takes of sturgeon has been permitted.

When a species is listed, the agencies must also designate critical habitat. Critical habitats are areas within the geographic area occupied by the species that contain physical and biological features essential to the conservation of the species, and areas outside the geographic area that require special management considerations or protection.[15] Regulations also interpret "harm" to the species' critical habitat to encompass "significant habitat modification or degradation."[16] NOAA has not yet designated critical habitat for the Atlantic sturgeon; this process is underway, but is likely going to be challenging given the expansive range of the fish.

Conclusion

At present, Connecticut is the only state to approve measures to address the Atlantic sturgeon's endangered status. In an effort to balance protecting the sturgeon with commercial fishing interests, Connecticut announced that commercial fishermen will not be able to use either trawl gear or anchored gill nets in two areas of Long Island Sound, because trawl gear and nets can injure the sturgeon.[17] Additionally, Connecticut is restricting the amount of time that gill nets - used by commercial shad fishermen in the Connecticut River - can be left in the water based on water temperature.[18]

No "silver bullet" is going to remove all obstacles to the Atlantic sturgeon's recovery, but reducing bycatch through gear modifications – as Connecticut is doing – appears to hold much promise, as it is believed that bycatch is the leading cause of sturgeon mortality. Although most agree that some level of protection is needed to help restore the Atlantic sturgeon population, the endangered listing does trigger extensive legal procedural requirements, and there is concern that those are going to unnecessarily impose extra costs on fisheries or delay dam and dredging projects. If, however, the sturgeon's survival depends on such requirements, then this is an appropriate exercise of the authority under the ESA.

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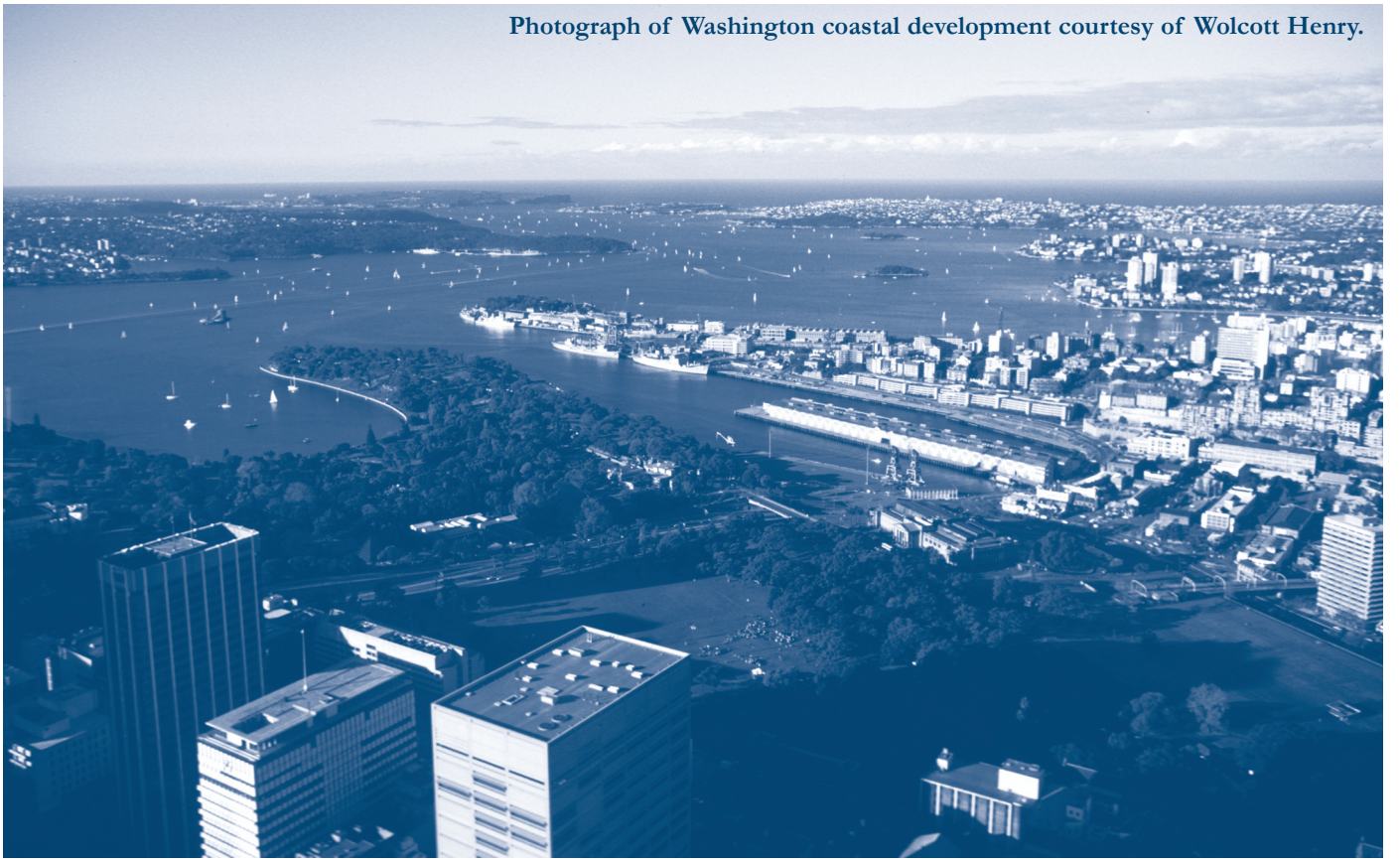
Exemption Not Allowed for Developers along Waterfront Property

Cullen Manning[1]



Photograph of Washington coastal development courtesy of Wolcott Henry.

In the 1978 classic Superman, Lex Luthor stated, "people will always need land and people will pay through the nose to get it." Real estate development is a potentially lucrative business, especially rare waterfront real estate, but developing such land can harm the surrounding ecosystem. *Dept. of Ecology v. City of Spokane Valley* is a case that grapples with the tension between environmental protection and property rights.[2]

Background

In Spokane, Washington, real estate investors formed the organization Coyote Rock to develop a residential neighborhood alongside the Spokane River. The future neighborhood, Coyote Rock Acres, consisted of thirty waterfront lots in which the developers wished to install docks, presumably to increase the value of the property.

Like most construction, the developers had a number of hoops to jump through before starting their project. City, state, and federal laws regulate building upon shorelines and a variety of administrative agencies coordinate to ensure that environmental impact is minimal. One body of law regulating shoreline construction in Washington is the Shoreline Management Act of 1971 (SMA), which grants municipalities the power to regulate their shores. This act also establishes various state and local requirements that must be met in order to build on waterfront property in Washington and includes a provision that requires "anyone undertaking a substantial development" to apply for a permit.[3] There is an exception, however, "[C]onstruction of a dock…designed for pleasure

craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single and multiple family residences" which is under $10,000 does not have to file for this additional permit.[4]

As Coyote Rock prepared to build its first dock, it applied for the dock exemption. The city granted the exemption upon the condition that the developers meet with the city planning division, the Department of Ecology, and the Department of Fish and Wildlife to show detailed plans demonstrating efforts to decrease the environmental impact from dock construction. Officials were concerned that if the docks were not built appropriately, they would serve as a hotbed for predators of Redband trout.[5]

After several months and without having met the condition of the first exemption, Coyote Rock filed for a second exemption to build a second spec dock. Assuming that the developers already built their first spec dock, Ecology brought suit against Spokane and Coyote Rock claiming that Spokane wrongfully issued the exemption and Coyote Rock built an "illegal dock."

SMA and Public Policy

The legal issues that the court dealt with fell into two categories: interpretation of the relevant SMA regulations and the public policy implications of treating real estate developers as individual homeowners. The court looked at the legislative intent behind the SMA and analyzed the text in light of its purpose. The court found that the law is meant to protect shorelines, a resource that Washington considers to be "among the most valuable and fragile of its natural resources."[6]

The court then focused on whether "the private noncommercial use of the owner" provision of the exemption applied to Coyote Rock as a real estate developer. The court determined that the use of the phrase "the owner" rather than "an owner" was evidence that the final owner of the property, not the developer, qualified for the exemption.

To resolve the case, the court looked at public policy reasons behind the exemption. The policy question is: why treat single homeowners on waterfront property any different than real estate developers? Both entities own the land. Both are allowed to build on it. The distinction between real estate developers running a commercial business on the property they develop or exercising their private property rights is blurry. Wouldn't construction by a developer have the same effects as construction by a homeowner? Hypothetically, the thirty new homeowners could each build a dock. Those thirty docks have the potential to cause environmental harm, especially given that the homeowners are not required to have a permit and individual homeowners are less likely than real estate developers to research regulations and check with appropriate agencies to ensure that they are in compliance.

THE POLICY QUESTION IS: WHY TREAT SINGLE HOMEOWNERS ON WATERFRONT PROPERTY ANY DIFFERENT THAN REAL ESTATE DEVELOPERS?

Despite these concerns, the court found that public policy supported treating homeowners and developers differently. The court reasoned that real estate developers are more harmful in the aggregate than individual homeowners. If an individual homeowner decides he wants to build a dock at all, he builds one dock. On the other hand, when real estate developers decide that building a dock is in their best interest, they build one for every house they can. There is more incentive for the real estate developer to continue to develop the purchased land that they intend to sell and, thus, more need to regulate them.

Conclusion

Ultimately, the court decided that dock building was a "commercial use" of the property and, therefore, Coyote Rock did not qualify for the exemption. Even so, the case demonstrates how powerful the combination of statutory language and policy is in land development.

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Texas Supreme Court Weakens Rolling Easements Doctrine

Josh Loring[1]

Texas is often in the direct path of powerful tropical storms and hurricanes that travel across the Gulf of Mexico, eventually making landfall in Gulf communities. In addition to requiring costly recovery efforts, these storms have the ability to drastically transform coastal land and beaches, blurring the line between those lands held for public use, and those which are privately owned.

In March, the Texas Supreme Court held that when the mean high tide line or vegetation line moves because of a storm or some other avulsive event, and it results in privately owned property becoming part of the dry beach, an easement that previously guaranteed the public's right of access to the beach will not "roll."[2] Instead, the public's previous right of access will be prevented by the private landowner's fundamental property right to exclude. The decision is likely to affect the use of public funds on beach nourishment projects, and many fear it has the potential to put a longstanding public right of access to Texas beaches in serious jeopardy.

Background

In *Luttes v. State*, the Texas Supreme Court established that all land submerged by Gulf tidal waters up to the mean high tide is owned by the State and held in trust for the public.[3] At trial, the State argued that the public trust includes dry beach as far landward as the vegetation line, but was unsuccessful in its efforts, with the court establishing the landward boundary of the public trust to be the mean high tide line.[4] The result is that the State owns the land up to the mean high tide line, leaving the dry beach that extends landward towards the vegetation line to be either held by the State or a private landowner.

In response to the holding in *Luttes*, the Texas legislature enacted the Open Beaches Act (OBA) in an attempt to outline public rights to Texas beaches along the Gulf coast, and to prevent private landowners of dry beach from interfering with those public rights.[5] The OBA grants the public the right to enjoy "public beaches," which has come to include State-owned beaches, as well as private beachfront land that has been encumbered by an easement or continuous right held by the public.

Property owner Carol Severance challenged the OBA after the State attempted to enforce a public access easement. Severance had purchased the property in question, the Kennedy Drive lot, in April of 2005. Located on Galveston Island's West Beach, the lot contained a single rental home, with no easement burdening the property. On the adjacent property seaward of the Kennedy Drive lot, there existed a public easement on a privately owned parcel of dry beach that had granted the public access since 1975. Shortly after Severance purchased the Kennedy Drive lot, Hurricane Rita moved the vegetation line landward and eroded the public beach causing the adjacent property that was burdened by the easement to become part of the public trust. This resulted in the entire house on the Kennedy Drive lot to be located seaward of the vegetation line, and a portion of the property and house to be located on land where the public beachfront easement previously existed.

Severance sued in federal district court claiming that an attempt by the State to enforce a public easement on property not previously burdened by an easement violated her federal constitutional rights. She alleged that it constituted an unreasonable seizure under the Fourth Amendment, an unconstitutional taking under the Fifth and Fourteenth Amendment, and a violation of her substantive due process rights under the Fourteenth Amendment.[6] After being dismissed on the merits at the federal district court level, Severance appealed the Fourth and Fifth Amendment claims. On appeal, the U.S. Court of Appeals for the Fifth Circuit found that the Fifth Amendment takings claim was not ripe, but determined that unsettled questions of state law pertaining to the Fourth Amendment unreasonable seizure claim existed, and certified them to the Texas Supreme Court.

Texas Open Beaches Act

The Texas Supreme Court first looked to the Texas OBA to determine whether or not Severance's property could be considered a "public beach." In order for beachfront property to be subjected to the OBA, which grants the

public access and limits how a private owner can use it, the State must be able to show that the public has acquired a right to the land. The OBA defines a "public beach" as, "any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom."[7] While the definition demonstrates that even a privately owned beach can be open to the public, the State must establish the existence of an easement or continuous right in the public.

The court noted that the Kennedy Drive property was not previously burdened by an easement. The court dispelled the notion that the public has gained a right to Galveston's beachfront land "by virtue of continuous right since time immemorial," meaning time extending beyond the reach of memory, record, or tradition. The court cited that in 1840, the Republic of Texas granted private title to West Beach property in a single land patent known as the "Jones and Hall Grant."[8] After Texas was admitted to the Union, it confirmed the validity of the Jones and Hall Grant by way of State legislation in 1852, and relinquished the title to land up to the public trust without reserving rights to use the property.[9]

Rolling Easements

After determining that no public right to the beach existed under the OBA, the court addressed the certified question of whether Texas recognizes a "rolling" public beachfront easement, which is when the easement migrates solely because of naturally caused changes in the vegetation line. The court began by making a distinction between property boundary changes caused by erosion and changes caused by avulsion.

Generally, easement and property boundaries are static; however, when land borders a body of water, it is unavoidably subjected to gradual changes due to erosion and the wearing-away of land. The result is that littoral property boundaries (land relating to ocean, sea or lake) are considered dynamic, and may move with gradual changes in the mean high tide and vegetation lines. However, if the change is caused by avulsion, a rapid and perceptible change caused by an event such as a tropical storm or hurricane, the boundaries generally remain the same.

Despite the State's contention that there should be no distinction between erosion and avulsion, the court pointed out that the difference has been recognized by English common law and Texas State law for over a century. When boundaries constantly change due to gradual and imperceptible movement, it would be impractical for the State to obtain a new judgment with each change. However, if an avulsive event results in land encumbered by an easement to be lost to the public trust, the State will have to establish another easement on the newly created dry beach. This would disapprove a string of Texas Court of Appeals cases that held otherwise, and decline to recognize a "rolling easement" theory.

While the court recognized the fact that losing property to the public trust is simply a hazard of owning coastal property, it found that it was far less reasonable to hold that a public easement can suddenly encumber a different portion of a landowner's property or a different landowner's property. Allowing the continued public use would deprive a property owner the right to exclude others, which has been long considered "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[10]

Conclusion

By declining to uphold the "rolling easement" theory, the highest court of Texas has made it clear that private property ownership rights are superior to any rights that were previously thought to guarantee the public's enjoyment of the state's beaches. The court pointed out that the State is not powerless when it comes to regulating Texas shorelines, as it may still address nuisances and impose reasonable regulations on coastal property through its police power. However, when coastal boundary lines are drastically changed due to an avulsive and sudden event, the State cannot automatically enforce an easement on an individual's property when no easement on that property has existed in the past. The public easement will need to be re-established by the state.

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9th Circuit Upholds Hawaiian Swordfish Consent Agreement

Benjamin Sloan[1]

Photograph of captured swordfish courtesy of Andre Seale.

On March 14, 2012 the 9th Circuit upheld a consent agreement negotiated by environmental groups and federal agencies regarding the regulation and management of the Hawaiian shallow-set, swordfish longline fishery.[2] The consent agreement lowered the number of interactions that Hawaiian swordfish fisheries could have with loggerhead sea turtles and left the number of interactions with leatherback turtles unchanged. Environmentalists claimed that restricting the number of turtles caught during swordfishing trips would help protect turtles while the fishermen rebutted this claim, arguing that the increased interaction limits are statistically meaningless.

Background

Hawaii's swordfishermen fish mainly in the Western Pacific Ocean in waters surrounding the American territories. Their fishing lines extend a mile-long and branch into lines that can extend up to forty miles out from the main line and are baited with multiple hooks. They target fish between 30 and 90 meters below the surface and often incidentally catch turtles instead of swordfish.

In 2008, National Marine Fisheries Service (NMFS) issued an amendment to the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (Final Rule) increasing the number of allowable interactions between swordfishermen and loggerhead turtles from 17 to 46 per year. The Final Rule was based on a 2008 Biological Opinion (BiOp) issued by NMFS finding that the increase complied with the Endangered Species Act (ESA).

The Turtle Island Restoration Network, Center for Biological Diversity and KAHEA: The Hawaiian-Environmental Alliance (collectively, Turtle Island) sued, challenging the Final Rule.[3] The Hawaiian Longline Association (the Longliners) intervened as a defendant.

At the district court level, the Longliners and Turtle Island filed motions for summary judgment, and while these motions were pending, Turtle Island and NMFS filed a consent agreement. The consent agreement vacated the increase in allowable interactions and reinstated the lower, original limit in effect before the 2008 BiOp. The consent agreement also prohibited NMFS from altering the limit in the

future without issuing another BiOp. The district court wrote that the effect of this consent agreement was not to materially alter the Final Rule but simply to limit the number of allowable interactions to its original level (17) until the NMFS issued a new BiOp.

Ninth Circuit Opinion

The Longliners challenged the consent agreement, arguing that the district court abused its discretion when it approved the agreement because it violated procedures in the Magnuson-Stevens Act (MSA) and the Administrative Procedures Act (APA). They also argued that the court abused its discretion in its conclusion that the consent agreement was "fair, reasonable, and equitable" based on an improper finding that the original number of interactions would protect loggerhead turtles better that the newer, higher limit would.

The Longliners argued that under the MSA, the only authorized actions that NMFS may take concerning fisheries regulations is either to approve or reject changes proposed by a Council. Therefore, they argued that entering into the consent agreement was not an authorized course of action. The court found that while it is true that neither NMFS nor the Secretary of Commerce can alter duly promulgated fisheries regulations, the agencies can vacate and reinstate prior regulations while litigation concerning them is proceeding.

The court noted that the consent agreement did not seek to materially alter the Final Rule because it simply compelled action already present in the regulation, that is, that NMFS issue a new BiOp before implementing new limits on allowable interactions. The court concluded that because the law favors settlements, and because the MSA's legislative history did not address the use of consent agreements, the consent agreement did not violate the MSA's rulemaking procedures.

The Longliners also argued that the consent agreement violated the APA by "formulating, amending, or repealing a rule"[5] before allowing a public notice and comment period,[6] something necessary to ensure that the agency could not undo its regulatory work without allowing the public to comment. The court disagreed, noting that because Turtle Island's present actions were motivated by the same reasoning as the initial rulemaking's reasoning, e.g. the protection of turtles, that it would be redundant to allow the public to comment.

Finally, the Longliners contended that the consent agreement required NMFS to issue a new BiOp without justification. They argued that an agency must reconsider legally promulgated regulations only when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered."[7] The court found that the loggerhead turtles' reclassification as endangered while the appeal was pending provided ample justification for requiring a new BiOp.

The Longliners' second allegation of abuse of discretion concerns whether or not the court's finding that a return to the 2004 rule was more protective of loggerhead turtles was clearly erroneous. They argued that the increased allowable interaction, from 17 to 46 interactions per year, was "statistically and biologically insignificant" and that the increased interaction would actually help turtle populations after "market transfer effects." However the court found that lowering the number of interactions fishermen can have with turtles is logically connected to protecting them, and it wrote that an earlier BiOp found "market transfer effects" to be "too speculative to be persuasive."

Conclusion

The court ruled that the consent agreement is valid. The agreement did not materially change the Final Rule, and the Ninth Circuit held that the district court did not abuse its discretion by deciding that lower limits on yearly allowable interactions between swordfishermen and loggerhead turtles were more protective of the turtles than higher limits.

On January 30, 2012, NMFS issued the BiOp called for by the consent agreement. It raised the number of allowable interactions with loggerhead turtles to 34, down from the 46 that the 2008 BiOp allowed but up from the 17 that the 2004 BiOp allowed. It also raised the number of interactions with leatherback turtles to 26 per year, up from 16 as called for in the 2004 BiOp.

Endnotes

1. 2014 J.D. Candidate, Univ. of Mississippi School of Law.
2. Turtle Island Restoration Network v. U.S. Dept. of Commerce, 672 F.3d 1160 (9th Cir. 2012).
3. 50 C.F.R. § 665.813(b), as amended by 76 Fed. Reg. at 13297-02 (March 11, 2011).
5. 5 U.S.C § 551(5).
6. *Id.* § 553(b)-(c).
7. 50 C.F.R. § 402.16(b).

NSGLC Grant Program Update

In 2011, the National Sea Grant Law Center awarded approximately $300,000 in competitive grants for one-year legal research and outreach projects addressing coastal and marine issues relevant to the National Sea Grant Program's mission. The NSGLC funded eleven projects that addressed one or more of Sea Grant's thematic areas: Safe and Sustainable Seafood Supply, Sustainable Coastal Development, Healthy Coastal Ecosystems, and Hazard Resilience in Coastal Communities. Below is a summary of several grant projects that have been completed this year.

Legal Institute of the Great Lakes (University of Toledo School of Law)

Legal Tools and Best Practices for Reducing Harmful Algal Blooms in Lake Erie

This multi-disciplinary legal research and public outreach project focused on harmful algal blooms (HABs) in Lake Erie. Triggered primarily by excess phosphorus, HABs are a nationwide problem that has grown particularly acute in Lake Erie, threatening the region's environment, economy, aquatic life and public health. The project team, which included the Legal Institute of the Great Lakes, the Lake Erie Center, and Ohio Sea Grant, had an overall goal to help minimize the formation of HABs in Lake Erie by facilitating the use of legal tools and best practices to control key sources of phosphorus entering Lake Erie and its tributaries.

The project resulted in several products. A white paper, *Legal Tools for Reducing Harmful Algal Blooms in Lake Erie*, describes current federal and state law applicable to key sources of phosphorus in Ohio and also makes recommendations for using existing law more effectively and for changing the law to help combat the formation of HABs. The paper is available at http://www.law.utoledo.edu/ligl/habs. The project staff put on two public workshops in an effort to increase understanding of the HABs problem and to provide instructions on best practices and

legal tools to control key sources of phosphorus. And, finally, the project resulted in a webpage, http://www.law.utoledo.edu/ligl/habs, which serves as a resource for stakeholders and the public regarding HABs and Lake Erie, including dissemination of the white paper, workshop materials, and other important information.

NH Sea Grant and UNH Cooperative Extension

New Floodplain Maps for a Coastal New Hampshire Watershed and Questions of Legal Authority, Measures, and Consequences

This project explored the legal authority, measures, and possible consequences associated with the use of new 100-year floodplain maps by coastal communities in New Hampshire based on current and projected land use patterns and precipitation amounts. The legal research was carried out by faculty and students at Vermont Law School (VLS) and integrated with an existing project led and coordinated by a multi-disciplinary team at the University of New Hampshire (UNH).

The project resulted in "new" 100-year floodplain maps for the Lamprey River basin, a sub-watershed within New Hampshire's coastal watershed. In addition, the research team produced a White Paper that provides legal research and analysis on how local governments may apply UNH's new flood mapping information in order to plan for current and projected environmental conditions. An Executive Summary with recommendations of how to use the maps was prepared to serve as a stand-alone document for those who do not need the full information provided in the White Paper. The final map and legal research products are available at www.100yearfloods.org.

Environmental Law Institute

Effects of Catch Shares on Fisheries Compliance and Enforcement

This project examined the effects of fishery management decisions – most notably, implementation of catch shares – on compliance and enforcement in the Gulf of Mexico commercial reef fish fishery. The researchers analyzed regulations, fisheries management plans, and academic literature concerning the fishery. In addition, the project staff surveyed all red snapper IFQ allocation-holders and obtained information from NOAA, US Coast Guard, and state fisheries enforcement personnel located both in headquarters and in the Gulf of Mexico.

The project resulted in the development of a paper focused on the effects of fisheries management decisions on enforcement and compliance in the commercial reef fish fishery, which has been accepted for publication in Marine Policy. This project included several forms of outreach, including two pubic seminars on fisheries enforcement, which are now archived on the ELI website. Two additional seminars were held as well. "Designing Effective and Enforceable Catch Share Systems" was part of ELI's ongoing seminar series, and "Fisheries Law Enforcement: Status and Challenges" provided a forum for staff from NOAA, the Atlantic States Marine Fisheries Commission, the fishing community, and academia discussed the compliance and enforcement outcomes associated with recent reforms to OLE processes and personnel, among other issues.

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Littoral Events

American Fisheries Society Conference 2012

St. Paul, Minnesota
Aug. 19-23, 2012

The 2012 AFS Annual Meeting brings professionals together to network and share knowledge in fisheries science and management. Speakers will present a broad range of fisheries topics at the plenary session and forty four technical symposia. In addition, 173 posters will be available for viewing in the Exhibition Hall. Conference attendees will have the opportunity to network with fisheries professionals and students, stay current on the latest in fisheries science, and enjoy the sights and scenes of the Twin Cities and beyond. Please visit http://afs2012.org/ for more information and to register.

Sea Grant Week 2012

Girdwood, Alaska
Sept. 17-21, 2012

Sea Grant Week 2012 promises to provide an invaluable opportunity for members of the Sea Grant community to share experiences and learn from each other in a common pursuit to help citizens better understand, conserve, and use America's coastal resources. Each day will include a mix of presentations, success stories, best management practices (BMPs) from individual programs or regions, breakout and report-back sessions and panel discussions. For those who cannot attend, a blog will provide a variety of information gathered from the week's events. For more information, visit http://seagrant.uaf.edu/national/sea-grant-week-2012/index.php.

APIEL 2012

Knoxville, Tennessee
Oct. 26-28, 2012

The APIEL conference brings together activists, public interest attorneys, scientists, law students, graduate students, funders and media from across the Appalachian region and surrounding states for a dynamic weekend. The conference features a series of workshops with the goal of exchanging information, sharing skills, and fostering collaboration between the grassroots, the bar, and future lawyers and policy-makers. Workshops address the region's most pressing ecological problems, as well as the underlying laws, policies and institutional dynamics that have enabled these issues to occur. For more information, visit https://sites.google.com/site/apielconference/.