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The SandBar

Legal Reporter for the National Sea Grant College Program

Judge Says No Offshore Lease Sale—Need More Environmental Impact Analysis First

Also in this issue

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Cover page photograph of a view of the Gulf of Mexico, courtesy of Captain Tom Photography.

Contents page photograph of a heron on Lido Key Beach in Sarasota, Florida, courtesy of Thomas Cizauskas.

The SandBar

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Judge Says No Offshore Lease Sale—Need More Environmental Impact Analysis First

Caroline Heavey[1]

View of the Gulf of Mexico in Waveland, MS, courtesy of Barry Goble.

On January 27th, the U.S. District Court for the District of Columbia voided Lease Sale 257, the largest oil and gas lease sale in U.S. history.[2] Lease Sale 257 was the eighth in a series of lease sales offering federal lands on the Outer Continental Shelf as part of the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program (Leasing Program).[3] The court determined that before the lease sale can go forward, the government must first conduct a more in-depth environmental analysis.

Lease Sale 257

Lease Sale 257 offered approximately 80.8 million acres of federal lands in the Gulf of Mexico available for lease for oil and gas production. The government predicted that Lease Sale 257 could produce up to 1.1 billion barrels of oil and 4.42 trillion cubic feet of natural gas. Due to the potential for lucrative oil and gas production and devastating environmental impacts, Lease Sale 257 quickly caught the attention of both those in the oil and gas industry and those in the environmental advocacy realm. One organization forecasted that Lease Sale 257 could support more than 340,000 jobs and aid in recovery of the areas damaged by Hurricane Ida.[4] However, another group anticipated that Lease Sale 257 could emit up to 723 million metric tons of carbon dioxide into the atmosphere over its fifty-year-estimated lifetime.[5]

Leasing Program

Lease Sale 257 was authorized in the last days of the Trump administration. The Leasing Program was part of the administration's plan to increase both domestic oil and gas development and production as well as American jobs. Upon taking office in January 2021, President Biden announced a plan to aggressively combat climate change by reducing fossil fuels and promoting green energy alternatives. As part of this initiative, President Biden issued an Executive Order entitled *Tackling the Climate Crisis at Home and Abroad* that temporarily paused all new lease sales on federal lands and waters while it conducted a full-scale, comprehensive review of the program.[6] Interior Secretary Deb Haaland had described the federal lease sale program as "fundamentally broken."[7] The pause implemented by President Biden stopped all new, but not pre-existing, offshore oil and gas lease sales, including Lease Sale 257.

Shortly after the Biden administration announced the pause, several states that receive oil-and-gas royalties—namely, Louisiana, Montana, Texas, Utah, and West Virginia—sued in federal court, challenging the pause and calling for the leases to immediately resume or restart. In June 2021, a Louisiana federal district court issued a preliminary injunction, blocking the Biden Administration's pause on the lease sales.[8] The court found that the states challenging the pause showed a substantial threat of irreparable harm. The court further determined that the pause was unsupported by reasoning in violation of the Administrative Procedure Act (APA), and that the pause effectively amended the Outer Continental Shelf Leasing Act (OCSLA) and Mineral Leasing Act (MLA), which only Congress, and not the administration, had authority to do.[9]

Following the decision, the White House suggested that it was legally obligated to comply with the preliminary injunction even though it planned to appeal the ruling. This meant that the preliminary injunction effectively ordered the administration to move forward with the lease sales, including Lease Sale 257. Nevertheless, the Biden administration maintained that it would continue with the comprehensive review of the program and planned to provide recommendations to Congress on how to best use the public land resources. Several environmental advocacy groups then sued to stop the lease sales. The State of Louisiana and American Petroleum Institute intervened in support of the lease sales.

Environmental Groups Challenge Lease Sale 257

Pursuant to OCSLA, the Bureau of Ocean and Energy Management (BOEM), a division of the U.S. Department of the Interior (Interior), may lease areas of the Outer Continental Shelf. Under OCSLA, BOEM must prepare a Five-Year Program that consists of proposed lease sale information. After the Five-Year Program is approved, BOEM must conduct a thorough environmental review and allow for public notice and comment.

Friends of the Earth, Healthy Gulf, Sierra Club, and the Center for Biological Diversity challenged Lease Sale 257, alleging that the U.S. government violated the National Environmental Policy Act (NEPA) and the APA in conducting the lease sale. Specifically, the environmental advocacy groups argued that BOEM violated NEPA and the APA because the agency excluded foreign greenhouse gas emissions in its quantitative calculation, and because it failed to conduct a supplemental Environmental Impact Statement (EIS) for later-stage lease sales, including Lease Sale 257. An initial EIS had been completed for the entire program.

National Environmental Policy Act

To ensure that agencies do not make a cursory environmental analysis, NEPA prescribes procedures that require that agencies detail the environmental consequences of agency actions in the decision-making process.[10] NEPA requires that federal agencies conduct an EIS for any "major federal action significantly affecting the quality of the human environment."[11] NEPA specifically requires that BOEM prepare EIS for leases in the Gulf of Mexico.[12] With respect to Lease Sale 257, BOEM conducted an environmental impact analysis prior to holding the lease sale and at each stage of the process, issued multiple EISs, and published a Determination of NEPA Adequacy.

NEPA requires that federal agencies conduct an EIS for any "major federal action significantly affecting the quality of the human environment."

Current Litigation

Upon review of Lease Sale 257, the court determined that the government underestimated the climate impact of the leases and failed to meet NEPA requirements. The court found that the model BOEM used to exclude foreign consumption from the greenhouse gas emissions calculation in the EIS was arbitrary and capricious in violation of the APA. The court reasoned that BOEM should have given a quantitative estimate of the downstream greenhouse emissions that would result from the reduced foreign consumption or explained more specifically why it could not have done so. Further, the court stated that BOEM could not rely on a Determination of NEPA Adequacy as a substitute for an EIS to determine whether an existing analysis was sufficient without first providing an opportunity for public comment. In sum, the court determined that the environmental analysis was insufficient to proceed with the

lease sale. The court also concluded that further analysis would not unjustly harm the companies seeking the leases because the leases had not yet become effective. Consequently, the court vacated Lease Sale 257 and remanded to BOEM, allowing the agency an opportunity to remedy its NEPA errors.

Conclusion

Environmental advocacy groups supported the ruling and the additional environmental analysis.[13] However, industry groups continue to urge the Biden administration to develop and strengthen offshore leasing to support job and infrastructure development.[14] The agency must now conduct the lengthy environmental review and leasing process, and it is unclear whether the leases will be developed for oil and gas production.

Endnotes

1 NSGLC Research Associate. 2022 J.D. Candidate, University of Mississippi School of Law.

2 Friends of the Earth v. Haaland, No. CV 21-2317 (RC), 2022 WL 254526 (D.D.C. Jan. 27, 2022).

3 Record of Decision for the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000, 82 Fed. Reg. 6643-02 (Jan. 19, 2017).

4 Maxine Joselow, *U.S. to Hold Historic Oil and Gas Lease Sale Days After COP26*, WASH. POST (Nov. 17, 2021).

5 *Id.*

6 Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

7 *See* Joshua Partlow & Juliet Eilperin *Louisiana Judge Blocks Biden Administration's Oil and Gas Leasing Pause*, WASH. POST (June 15, 2021).

8 Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021).

9 The Mineral Leasing Act (MLA) regulates the leasing of federal lands for the development of several mineral resources, including, but not limited to, oil and natural gas. 30 U.S.C. § 181.

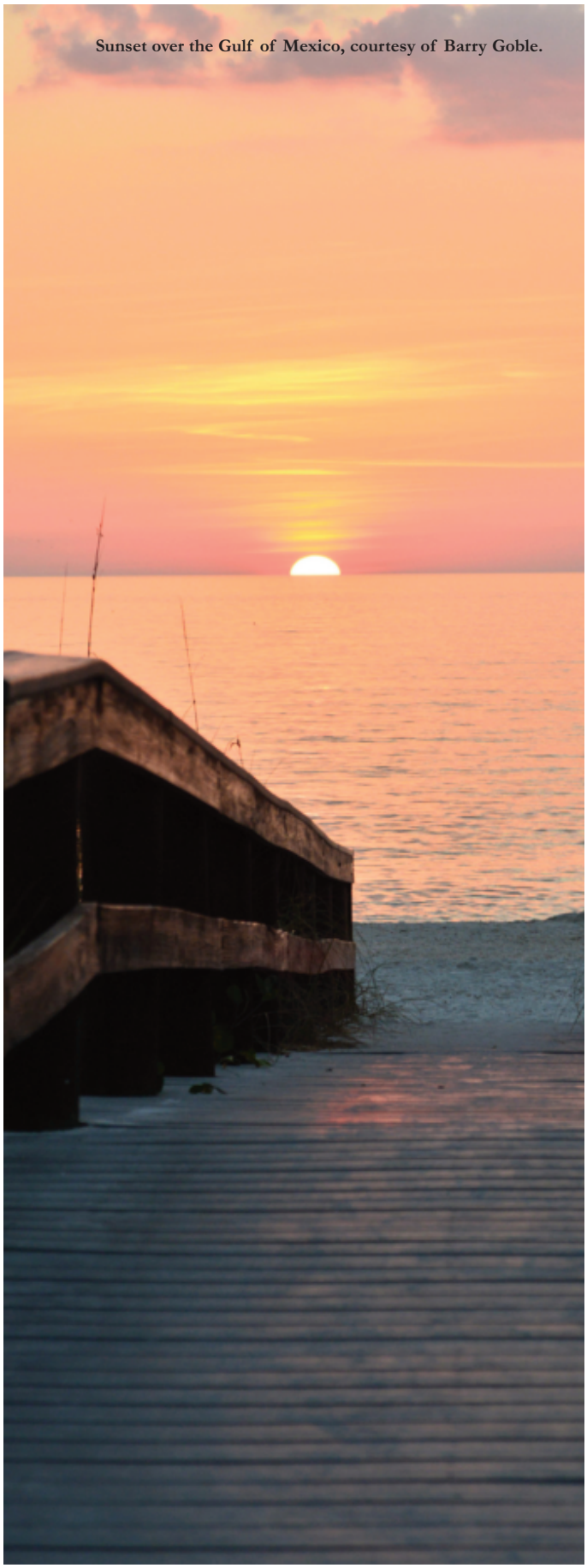
10 40 C.F.R. § 1500.1(a).

11 *Id.* § 1502.3.

12 *Friends of the Earth*, 2022 WL 254526, at *18.

13 Rachel Frazin, *Court Nixes Offshore Drilling Leases Auctioned by Biden Administration*, THE HILL (Jan. 28, 2022).

14 *Id. See also* Valerie Volcovici & Nichola Groom, *U.S. Judge Annuls Gulf of Mexico Oil Auction Over Climate Impact*, REUTERS (Jan. 28, 2022).



Sunset over the Gulf of Mexico, courtesy of Barry Goble.

Washington Supreme Court Upholds Trout Aquaculture Permit

Terra Bowling

Steelhead trout, courtesy of Dan Brekke.

In a 9-0 decision, the Washington Supreme Court upheld an aquaculture permit issued by the Washington Department of Fish and Wildlife (WDFW) authorizing Cooke Aquaculture to switch from farming Atlantic salmon to steelhead trout.[1] The company sought to make the change after the Washington State Legislature suspended nonnative fish farming in state waters. An environmental group, Wild Fish Conservancy (WFC), alleged that WDFW should have prepared an environmental impact statement (EIS) before issuing the new permit. The court's ruling is the latest in legal developments after the company's 2017 net pen failure in Puget Sound.

Background

Cooke Aquaculture's net pens near Cypress Island collapsed in August 2017, releasing more than 260,000 aquaculture salmon into Puget Sound. State regulators determined that Cooke's negligence led to the collapse, citing the company's failure to clean and maintain the nets and mooring mechanisms that caused biofouling and increased drag on the system.[2] WFC filed a Clean Water Act lawsuit under the citizen suit provision. The parties eventually reached a $2.75 million settlement agreement, under which Cooke paid WFC's legal fees and agreed to contribute to Puget Sound restoration projects.

In 2018, the Washington state legislature passed a law that phased out all nonnative marine finfish aquaculture statewide.[3] The law prohibits any new lease or use authorization, extension of an existing lease, or issuance of new NPDES permits for marine net pen aquaculture of nonnative marine finfish.

Changing Course

Cooke sought a permit from WDFW to farm all female, sterile steelhead trout in existing marine aquaculture net pen facilities. WDFW performed an environmental assessment, as required by the Washington State Environmental Policy Act (SEPA). When performing these assessments, the WDFW must ask whether the proposal would have a "probable, significant adverse" impact on the environment. If the agency believes it will not, it may issue a determination of nonsignificance. If the agency concludes otherwise, it has two options. WDFW may prepare an environmental impact statement (EIS) to analyze the impacts and alternatives. In the alternative, WDFW may issue a mitigated determination of nonsignificance (MDNS), indicating that with the imposition of specific mitigation measures a project's environmental impacts will be at an acceptable level under SEPA. In this instance, WDFW issued an MDNS and a five-year permit.

WFC sought to reverse the permit approval, claiming that the agency erroneously concluded that an EIS was not required and violated SEPA by failing to consider appropriate alternatives to the proposal under Wash. Rev. Code § 43.21C.030(2)(e). A Washington state trial court held that WDFW's SEPA analysis was not clearly erroneous and the steelhead permit application did not trigger an alternatives review. The Washington Supreme Court agreed.

State Supreme Court

According to the Washington Supreme Court, the permit did not trigger a conflict that required an alternatives review. Wash. Rev. Code § 43.21C.030(2)(e) requires state agencies to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The court applied the Washington Pollution Control Hearings Board's (PCHB) interpretation of the provision, concluding "an alternatives analysis is appropriate when a proposal involves a competition over the use of a resource whereby selecting one manner of using the resource will preclude all other uses."[4] In this instance, the permit doesn't require a choice between uses where one option blocks the other.

Further, the state supreme court held that WDFW analyzed the relevant environmental factors under SEPA. WFC claimed that WDFW's MDNS determination incorrectly measured the impacts of steelhead farming against the impacts of continuing Atlantic salmon farming, relying on a "fictitious" environmental baseline. The court rejected this reasoning, noting that nothing in SEPA's statute, regulations, or cases requires a "no action" baseline analysis in arriving at a threshold determination. After reviewing the record, WDFW's justification report, mitigating provision requirements, and concerns raised by the WFC, the agency evaluated the relevant environmental factors sufficiently to constitute compliance with SEPA.

The law prohibits any new lease or use authorization, extension of an existing lease, or issuance of new NPDES permits for marine net pen aquaculture of nonnative marine finfish.

Conclusion

For now, Cooke Aquaculture's plan to farm steelhead trout where it used to farm salmon is a go. However, the company has other hurdles in its path. This year, the state Department of Natural Resources will undertake an evaluation of whether to renew leases for the tidelands under the pens. This review will look at everything from tribal treaty rights to endangered species.[5]

Endnotes

1 Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife, 502 P.3d 359 (Wash. 2022).

2 Wash. Dep't of Nat. Res., 2017 Cypress Island Atlantic Salmon Net Pen Failure: An Investigation and Review (Jan 20, 2018).

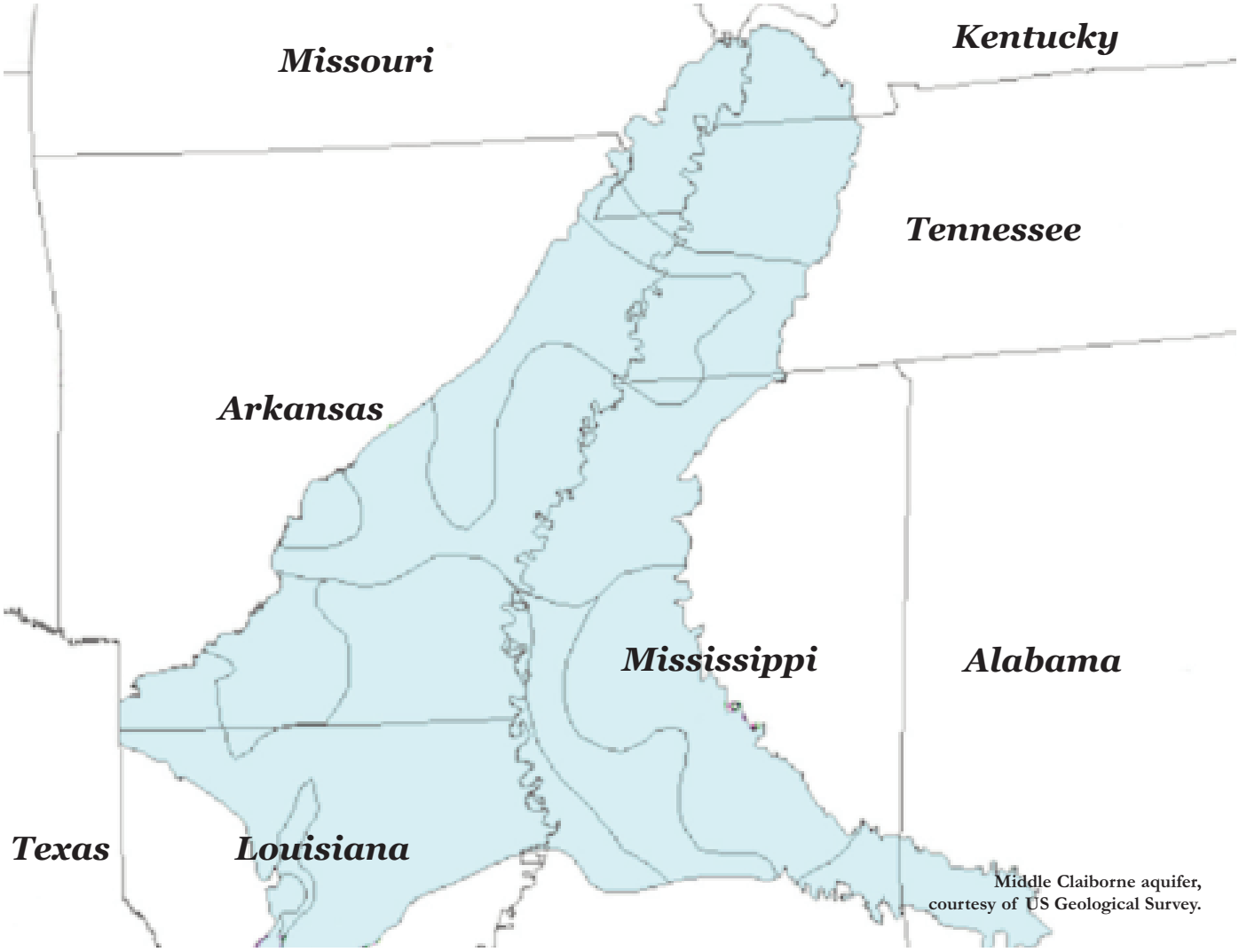
3 Wash. Rev. Code § 79.105.170; 77.125.050.

4 *Wild Fish Conservancy*, 502 P.3d 369.

5 Associated Press, *State Supreme Court OKs Cooke Aquaculture Steelhead Farming*, KNKX Public Radio, Jan. 14, 2022.

Mississippi v. Tennessee Update! Supreme Court Says Aquifer is an Interstate Resource Subject to Equitable Apportionment

Catherine Janasie[1]



Middle Claiborne aquifer, courtesy of US Geological Survey.

In 2014, the State of Mississippi asked the United States Supreme Court to accept its lawsuit against the state of Tennessee concerning the pumping of groundwater by the City of Memphis close to the border between the two states. Pumping large amounts of groundwater changes the flow of water, and Mississippi claims the city's pumping has taken billions of gallons of water out of Mississippi, causing it to flow towards Memphis's wells. The U.S. Supreme Court is the only court that can hear disputes between two or more states. When one state alleges it has suffered a legal harm caused by another state, the complaining state must ask the Court permission to file a case. In 2015, the Supreme Court granted Mississippi's request, allowing the case to go forward. The case was notable because the Court has never heard a case between two states concerning groundwater. In late 2021, the Court issued its landmark decision and ruled against Mississippi.[2]

Wilson Mallory Pumping Station in Memphis, TN, courtesy of Eric Allix Rogers.

The Lawsuit

Mississippi's lawsuit concerns the City of Memphis's use of water from a shared aquifer, the Middle Claiborne. The City's pumps that draw water from the aquifer are all physically within the state of Tennessee. However, when large amounts of groundwater are pumped, the pumping creates a cone of depression that changes the flow of water, causing more water to flow towards the well pumping the water. This is what Mississippi claims is happening with the City's pumps. Tennessee argued that the aquifer underlies multiple states, making it an interstate resource. Thus, the framework the Court has developed for interstate resources, known as equitable apportionment, should apply. Under this framework, neither state has any right to the water until the Court apportions the water. Mississippi argued that the water is state property, claiming it owns the groundwater within the state and the water should not be subject to equitable apportionment. Mississippi asked for at least $615 million in property damages for the water taken by Memphis out of Mississippi and, notably, not an equitable apportionment.

Equitable Apportionment

While the law over how freshwater resources are used is mostly state-law based, the Court has developed equitable apportionment to resolve water disputes between states. Created in the 1907 case *Kansas v. Colorado*, the Court uses the equitable apportionment doctrine to determine the rights of each state to use an interstate water.[3] When determining how to apportion water between states, the Court will consider the laws of the individual states, but it has ruled that those laws are not binding. Further, each state is entitled to "equality of right," but this does not necessarily amount "to an equal division of water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system."[4] The Court has also stated that equitable apportionment is a flexible doctrine, and it will consider all relevant factors of the case, such as the climatic and physical conditions of the waterbody, how the water is consumed, and the damage to the complaining state as compared to the benefit of the other state. Importantly, the Court has never applied equitable apportionment to an interstate aquifer.

The Special Master

In lawsuits between two or more states, the Court appoints a Special Master to run a trial-like process. The Special Master hears the parties' initial motions, evaluates the evidence, and makes findings of fact, conclusions of law, and recommends a decision for the Court. The Court then holds its own hearing and decides whether or not to follow the Special Master's recommendation.

In November 2015, the Court appointed the Hon. Eugene E. Siler of the U.S. Court of Appeals for the Sixth Circuit as the Special Master for the case. In August 2016, the Special Master issued a Memorandum of Decision that

ordered an initial hearing on whether the aquifer was an interstate resource. The hearing was held for five days from May 20-24, 2019, and after almost a year and a half, the Special Master issued its report on November 5, 2020.[5] The Special Master made two findings. First, Judge Siler found that the aquifer is interstate in nature, relying on expert testimony and evidence showing the aquifer "is part of a single interconnected hydrological unit underneath multiple states."[6] Since the aquifer is interstate in nature, the Special Master next found that equitable apportionment was the appropriate remedy for Mississippi. Judge Siler stated that "[w]hen states fight over interstate water resources, equitable apportionment is the remedy. Mississippi presents no compelling reason to chart a new path for groundwater resources."[7] The Special Master recommended that the Court allow Mississippi to file an amended complaint to seek equitable apportionment.

Supreme Court Decision

A year after the Special Master issued his Report, the Court issued its ruling in the lawsuit, finding that the Middle Claiborne Aquifer is subject to the doctrine of equitable apportionment. The Court determined that the aquifer is "sufficiently similar" to other applications of the equitable apportionment doctrine.[8] The Court reasoned that it has only applied the doctrine to transboundary resources, and the experts in the case agreed that water in the aquifer flows naturally between the two states, making it a transboundary resource. Further, Tennessee's pumping affects the part of the aquifer in Mississippi by reducing groundwater storage and pressure, which the Court noted was a "hallmark" of its equitable apportionment cases.[9]

A year after the Special Master issued his Report, the Court issued its ruling in the lawsuit, findng that the Middle Claiborne Aquifer is subject to the doctrine of equitable apportionment.

The Court was not swayed by Mississippi's argument that water in the aquifer moves significantly slower than water in rivers and streams. The Court noted that it had applied equitable apportionment to streams that run dry. Further, although Mississippi claimed that only an inch or two of water moves between the states each day, the Court reasoned that amount equals 35 million gallons of water a day and over 10 billion gallons per year, a significant amount of water.[10]

Finally, the Court rejected Mississippi's argument that it has sovereign ownership over the groundwater. While noting that "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters"[11], that jurisdiction does not give the state "unfettered 'ownership or control'" of interstate waters.[12] The Court reasoned that Mississippi's sovereign ownership argument would allow one state to cut off water flow to another state, an outcome that goes against the Court's prior equitable apportionment decisions.[13]

Conclusion

In its decision, the Court also rejected the Special Master's recommendation that Mississippi be allowed to amend its complaint to seek equitable apportionment. The Court emphasized that Mississippi repeatedly disavowed equitable apportionment in its complaint. Further, the Court stated that an equitable apportionment claim would require a broader array of evidence and the joinder of the additional states that share the aquifer. Thus, to seek relief Mississippi would have to file a new motion asking the Court to hear an equitable apportionment claim. Should Mississippi filed such a motion, the Court would not be obligated to grant it, since granting these motions is within the Court's discretion. Finally, the Court noted that Mississippi's complaint would have to "prove by clear and convincing evidence some real and substantial injury or damage."[14] Looking forward, this legal standard would apply to any state seeking an apportionment of an interstate aquifer.

Endnotes

1 Sr. Research Counsel, National Sea Grant Law Center.

2 Mississippi v. Tennessee, 142 S.Ct. 31 (2021).

3 Kansas v. Colorado, 206 U.S. 46 (1907).

4 Wyoming v. Colorado, 259 U.S. 419, 465 (1922).

5 Mississippi v. Tennessee, No. 143, Original, Report of the Special Master.

6 *Id.* at 11.

7 *Id.* at 26.

8 *Mississippi*, 142 S.Ct. at 39 (quoting Idaho ex rel. Evans, 462 U.S. 1017, 1024 (1983), which extended equitable apportionment to anadromous fish).

9 *Mississippi*, 142 S.Ct. at 39-40.

10 *Id.* at 40.

11 *Id.* (quoting Kansas v. Colorado, 206 U.S. 46, 93 (1907)).

12 *Id.* (quoting Wyoming v. Colorado, 259 U.S. 419, 464 (1922)).

13 *Id.* at 40-41.

14 *Id.* at 41-42.

Who Owns the Oysters: The Farmer or the State?

Caroline Heavey[1]

Oyster shells, courtesy of Bill Sutton.

In January 2020, several Louisiana oyster lessees sued the United States in the U.S. Court of Federal Claims. The plaintiffs alleged that the opening of the Bonnet Carré Spillway by the U.S. Army Corps of Engineers (Corps) in 2019 deprived them of the use, occupancy, and enjoyment of their oyster stock and oyster beds and reefs in violation of the Fifth Amendment Takings Clause. The government moved to dismiss the case for failure to state a claim, arguing that the oyster lessees did not have a compensable property right in the oysters themselves and that the oyster stock is owned by the State of Louisiana. After oral argument and a series of briefing on various subjects, the court determined that the oyster lessees have compensable property rights in the oyster stock and may proceed with their takings claim.[2] The opinion marks a departure from other court decisions finding that oysters are not compensable property.

Oyster Farming

Oysters have been cultivated, grown, farmed, and harvested commercially in Louisiana for centuries. In fact, Louisiana has led the United States in oyster landings every year for the past twenty years. The Louisiana oyster industry operates as a public-private partnership in which the state leases the state-owned water bottoms to private individuals (oyster lessees) to develop and maintain oyster farms. The leases usually last for fifteen-year terms at a nominal rate of $3.00 per acre.

Courts have consistently recognized that oyster farming is hard work, demanding of laborious and arduous dedication.[3] Oysters cannot attach to the muddy bottoms, so oyster lessees must construct a substrate on the muddy bottoms, or "cultch," to which oysters can attach. After the cultch is constructed, oyster lessees seed the bottoms. Oysters typically cannot be harvested until four-to-five years after seeding.

Bonnet Carré Spillway

In 1931, the Corps completed construction of the Bonnet Carré Spillway, a flood control structure located in St. Charles, Louisiana, just west of New Orleans. The Spillway is opened when the conditions suggest that the New Orleans levees will experience unacceptable stress from high water and risk breaking, flooding the city and other downstream communities. The Spillway first opened in 1937 and has been opened twelve times since

In 2019, the Corps opened the Spillway in February and again in May, for a total of 123 days, to prevent the flooding of New Orleans and the surrounding area. This was the first time in history in which the Spillway was opened twice in the same year. Opening the Spillway released approximately ten trillion gallons of freshwater from the Mississippi River into the local river basin, which flowed into the Louisiana Gulf. The influx of freshwater reduced the salinity levels of the Louisiana Gulf, destroying the oyster farms and closing oyster-harvest areas. While the opening protected New Orleans from flood damage, it devastated the harvest and livelihood of the Louisiana oyster industry.

Fifth Amendment: The Takings Clause

In the current litigation, the oyster farmers claimed the government's release of freshwater resulted in a permanent taking under the Fifth Amendment of the U.S. Constitution. The Fifth Amendment provides, "… nor shall private property be taken for public use, without just compensation."[4] This has come to be known as the Takings Clause.

Undoubtedly, as both the government and oyster lessees agree, the Bonnet Carré Spillway was opened for a public purpose—to prevent the flooding of New Orleans and the surrounding communities. However, to prevail on a takings claim, the oyster lessees must prove they had a protectable property interest which was taken for that public purpose or use.

Property Rights: A Bundle of Sticks

Property rights are protected under the Fifth Amendment, but they are defined by state law. Louisiana articulates property rights as a bundle of three types of rights: 1) the right to use or possess; 2) the right to abuse or alienate; and 3) the right to the fruits. The right to the fruits incudes the right to receive and enjoy the earnings, profits, rents, and revenues produced by or derived from the property.

The government argued that the oyster lessees did not have a compensable property right in the oyster stock, relying on *Avenal v. State* in which the Louisiana Supreme Court determined that oyster lessees did not have property rights claims against the state for damage to their leases under the Louisiana constitution.[5] The court in the current litigation determined that the government's reliance on *Avenal* was misguided. The court reasoned that the oyster lessees must have some property rights in oysters because, in *Avenal*, the Louisiana Supreme Court applied property principles to oyster beds and profits. Ultimately, because the *Avenal* court repeatedly referred to property rights against the state, the court reasoned that the *Avenal* court limited its holding only to claims against the State of Louisiana. The court emphasized that the claim at issue arises under the U.S. constitution as it relates to property rights in oyster stock.

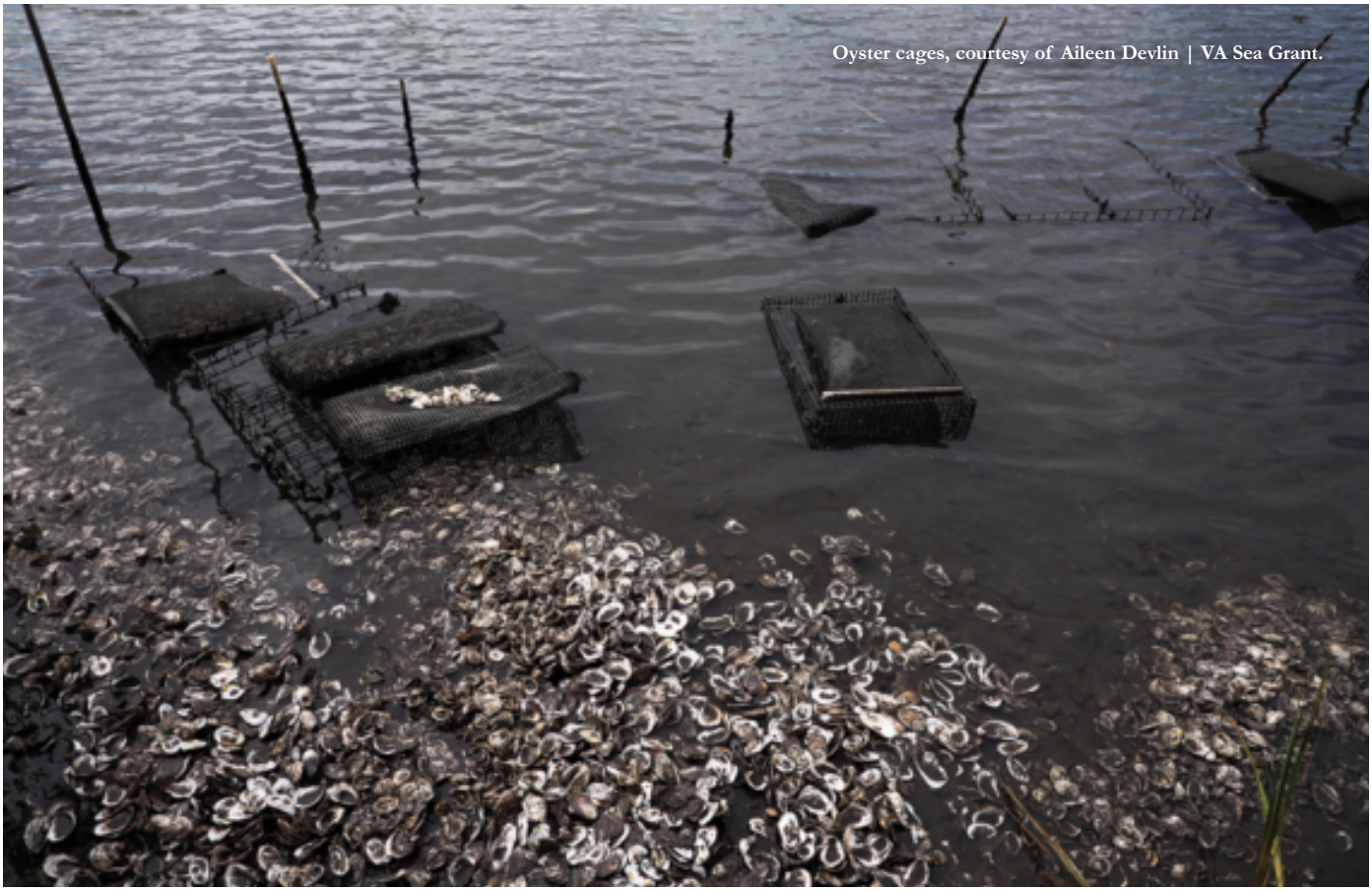
The government claimed that it is the State of Louisiana who owns the oysters, not the farmers, and that the state cannot take its own property. The government relied on La. Rev. Stat. § 56:3(A), which states, "all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state."[6] The court, however, determined that oyster lessees have some property rights in oysters enumerated in the Louisiana Revised Statute Sections 56:423-424, and that oyster lessees may assert such rights against third parties.[7] The government contended that the lease provided only a use right, but it also admitted that oyster lessees had the right to sell oysters, which would be akin to the right to abuse or alienate (transfer of rights in the oysters) and the right to the fruits (profits from sale).

Despite these admissions, the government maintained that the oyster lessees were paid merely for their efforts and labor, not for selling something they owned. The court found this proposition at odds with the Lockean and Madisonian theories of labor and property. Rather, the court found that the Lockean and Madisonian theories provided the foundation for finding that the oyster lessees had property rights in the oysters.[8] The court opened its opinion quoting John Locke: "The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left in it, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."[9] The court reasoned that the mixture of effort necessary to cultivate the oysters and rights in the property was essentially what the Fifth Amendment Takings Clause aimed to protect.

Because oyster lessees have the right to exclude, destroy, use, possess, sue third parties for damages, recover under larceny, alienate, and enjoy the fruits of selling the oysters, the court found that the lessees possessed all three essential elements of the bundle of property rights under Louisiana law. Therefore, the court held that the oyster lessees had a compensable property right in the oyster stock against third parties, such as the U.S. government.[10]

Conclusion

The court made three key findings: 1) the oyster lessees had a compensable property right in the oyster stock against third parties; 2) the Bonnet Carré Spillway was opened by



Oyster cages, courtesy of Aileen Devlin | VA Sea Grant.

the Corps for a public purpose that effectively deprived the oyster lessees of their property rights in the oysters; and 3) the oyster lessees were never compensated for the deprivation of their rights caused by the opening. Based on these findings, the court determined that the oyster lessees could proceed with their Fifth Amendment Takings claim against the United States. Therefore, the court denied the government's motion to dismiss the oyster lessee's claim in the oyster stock.

The court's recognition of the oyster lessees' property rights in the oyster stock is a major decision in the realm of property rights. Other courts have ruled differently in similar cases involving property rights in oysters.[11] For example, in *Johnson v. City of Suffolk*, the Virginia Supreme Court found that the state oyster leases conferred only a limited property right, the use of the state-owned bottoms for oyster cultivation, to oyster lessees and preserved the remaining rights in the public.[12] Therefore, the Virginia Supreme Court held that the oyster lessees did not have the full scope of property rights, meaning that they could not assert a Fifth Amendment Takings claims for city-caused pollution damage to their oyster stock. This case, *Campo v. United States*, is prime for appeal to the Federal Circuit, and maybe eventually the U.S. Supreme Court will weigh in. For now, we shall see how this case concludes as it proceeds in 2022.

Endnotes

1 NSGLC Research Associate. 2022 J.D. Candidate, University of Mississippi School of Law.

2 Campo v. United States, No. 20-44, 2021 WL 6102151 (Fed. Cl. Dec. 23, 2021).

3 *See e.g.*, Avenal v. State, 886 So. 2d 1085, 1110 (La. 2004) (Weimer, J., concurring).

4 U.S. Const. amend. V.

5 886 So. 2d 1085, 1110 (La. 2004).

6 La. Stat. Ann. § 56:3(a).

7 La. Stat. Ann. §§ 56:423-424 (2022). See generally La. Stat. Ann. § 56:432.1.

8 John Locke, Second Treatise on Government (1690).

9 *Campo*, 2021 WL 6102151, at *1.

10 The Tucker Act confers the U.S. Court of Federal Claims jurisdiction to hear the case. See 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon … the Constitution.").

11 *See e.g.*, Avenal v. State, 886 So. 2d 1085 (La. 2004); Johnson v. City of Suffolk, 851 S.E.2d 478 (Va. 2020).

12 851 S.E.2d 478, 482-83.

Cruise Ship Turned Pirate?
Vessel Absconds to the Bahamas to Escape Seizure

Terra Bowling

In January, passengers aboard the *Crystal Symphony* got more excitement than they bargained for when the cruise ship diverted from Miami to the Bahamas to avoid seizure in the United States. As one passenger put it, "We all feel we were abducted by luxurious pirates!"[1] The last-minute change occurred after a U.S. federal district court signed an order allowing seizure of the ship due to unpaid fuel bills.[2] Though the passengers and crew have ended their stints as pirates, the ship's future remains in limbo. The parent company of the cruise line has now suspended operations, leaving vendors and future passengers in the lurch.

Background

Peninsula Petroleum Far East filed a lawsuit against Crystal Cruises and Star Cruises in Miami alleging the companies owed $4.6 million in unpaid fuel bills. A federal judge signed an arrest warrant for the ship, directing U.S. marshals to "arrest the defendant vessel, her boats, tackle, apparel and furniture, engines and appurtenances, and to detain the same in your custody pending further order of the court."[3] Seeking to evade arrest, the cruise ship sailed to the Bahamas. The cruise ship first stopped in Bimini, allowing passengers to disembark and board a ferry to Miami. The *Crystal Symphony* and its sister ship, the *Crystal Serenity*, were later seized near Freeport.

Maritime Remedies

Maritime law provides unique remedies for those engaged in maritime commerce, including passengers and companies that supply fuel, food, or other goods to ships. These customers and companies can file actions directly against vessels rather than owners for any unpaid debts. This mechanism allows for a secure payment of the debt rather than relying on owners who might be outside the reach of courts.

On February 11, 2022, an attorney for Crystal Cruises filed a "Petition Commencing Assignment for the Benefit of Creditors."[4] An assignment for the benefit of creditors (ABC) is an alternative to formal bankruptcy proceedings and is filed in state courts. The assignee has the ability to liquidate assets and distribute them to claimants.

Not everyone affected by the unplanned detour and seizure of the ship will be able to make a claim under the ABC. Passengers aboard *Crystal Symphony* may be out of luck.

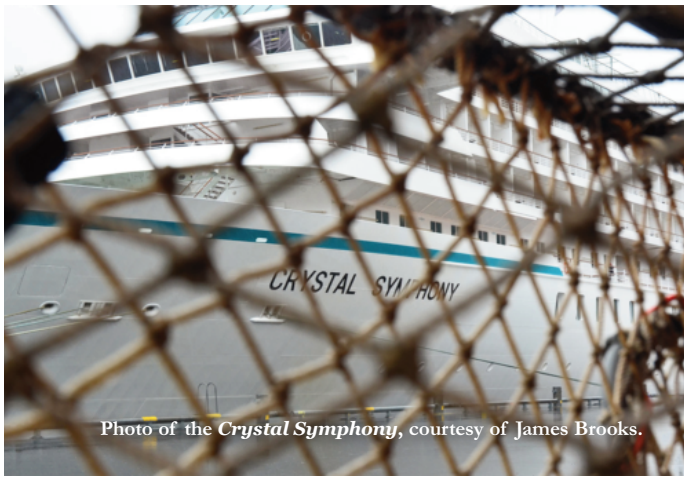


Photo of the ***Crystal Symphony***, courtesy of James Brooks.

In this instance, the cruise tickets have a clause that covers the cruise company for unexpected detours. A section in the ticket agreement titled "Itinerary/Right to Change/Detention" provides that the company reserves the right to change course without liability for damages or refund.[5] Many cruise tickets have similar clauses, making it difficult for passengers to recoup any losses directly from the cruise lines.

Those who can recover under the ABC include Crystal Cruises customers who bought tickets for upcoming cruises, as well as any vendors owed money by the cruise company. The company's website directs consumers and vendors to a website that has claim forms for passengers seeking a refund under the ABC.[6] The form must be submitted by June 11, 2022.

Endnotes

1 Adriana Gomez Licon, *Cruise Ship Changes Course After US Judge Orders Seizure*, ABC News, (Jan. 23, 2022).

2 Peninsula Petroleum Far East Pte. Ltd. v. M/V Crystal Symphony et. al, Warrant In Rem Issued as to M/V Crystal Symphony, No. 1:22-cv-20230 (U.S. Dist. Ct. S. Fla. Jan. 20, 2022).

3 *Id.*

4 In re Crystal Cruises, LLC, Notice of Assignment for the Benefit of Creditors, No. 2022-002742-CA-01 (Miami Dade Cty. Circuit Ct.).

5 Jim Walker, Crystal Cruises Avoids Port of Miami to Evade Seizure, Cruise Law News, Jan. 23, 2022.

6 Crystal Cruise Lines, Assignment for the Benefit of Creditors.

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Littoral Events

Association of State Floodplain Managers

May 15-19, 2022
Orlando, FL

For more information, visit: https://www.floods.org/conference

Capitol Hill Ocean Week 2022

June 7-9, 2022
Washington, D.C. & Virtual

For more information, visit: https://bit.ly/oceanweek22

National Working Waterfront Conference

July 19-21, 2022
Boston, MA

For more information, visit: https://nationalworkingwaterfronts.com/current-conference