Fishers Lose Challenge to Herring Fishery Observer Rule

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Our Staff

Editor:
Terra Bowling

Production & Design:
Barry Barnes

Contributors:
Samantha Hamilton
Gabriela Martinez
Lourdes Carreras-Ortiz
Matthew Sheffield
Samuel Stewart

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Cover page photograph of fishing vessels, courtesy of Jill Marnee.

Contents page photograph of a Herring Gull, courtesy of Michael Klotz.
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Fishers Lose Challenge to Herring Fishery Observer Rule

Matthew Sheffield

In March, the U.S. Court of Appeals for the First Circuit handed herring fishers another defeat in their challenge to a rule requiring some owners of vessels to host and pay for fishery observers during their trips. The rule was recommended by the New England Fishery Management Council (the Council) and promulgated by NOAA Fisheries under the Magnuson-Stevens Fishery and Conservation Act (MSA). The fishers challenged the rule as arbitrary and capricious in violation of the Administrative Procedure Act (APA), not authorized by the MSA, and in violation of the Regulatory Flexibility Act (RFA) and the Commerce Clause. The U.S. District Court for Rhode Island granted summary judgment in favor of the government, and on appeal, the First Circuit agreed with the district court’s ruling.
Background
The MSA created eight regional fishery management councils tasked with developing the management plans governing fishing practices for species of particular importance or conservation concern. The rules for the Northeast Region are drafted by the Council, then submitted to NOAA Fisheries, which publishes them for notice and comment while checking them for consistency with the national standards of the MSA and “any other applicable law.” In 2017, the Council approved an Omnibus Amendment that provided a general framework for the Northeast Region to institute industry-funded monitoring to monitor the fishery and its bycatch with the Standard Bycatch Reporting Methodology (SBRM) program. This rule explicitly required owners of herring vessels to pay for some of the monitors (also known as observers) contracted on board their vessels. This omnibus amendment was approved by NOAA Fisheries in 2018 and the final rule was published in 2020.

The observer rule requires herring fishers to carry monitors on board their vessels if they do not meet certain exceptions. The exceptions to the observer rule are a critical component of the case. The rule only exempts two narrow groups of herring fishers from potentially having to carry an observer: 1) those on vessels carrying fishing gear that do not intend to carry fish or 2) those intending to catch less than 50 metric tons of herring. Though the costs of hosting a fisheries observer on board a vessel vary, the Council acknowledges that the cost is a burden for those required to pay for it and “result[s] from reductions in returns-to-owner.”

The observer rule requires herring fishers to carry monitors on board their vessels if they do not meet certain exceptions.

It is important to note that the rule does not require the fishers to fund observers on all their vessels’ trips, but instead sets a monitoring target of 50% of all herring trips. Funding provided through the SBRM program pays for a certain percentage of this monitoring but can vary depending on budgetary changes. The difference between the 50% target and what is provided by governmentally funded monitoring is then made up by the industry members paying for their on-board observers themselves. The herring fishers challenging the rule operated vessels that caught and froze more than 50 tons of herring on board during each trip. As such, they did not qualify for an exemption, which led to their challenge of the rule.

Herring Fishers’ Claims
At the heart of the herring fishers’ case was their claim that NOAA Fisheries did not have the authority under the MSA to adopt the rule. Under §1853(b) of the MSA, fishery management plans such as the one proposed by the Council may “require that one or more observers be carried on board a vessel of the U.S. engaged in fishing for species subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery.” The herring fishers claimed that because the industry-funded monitoring rule used the term “at-sea monitors” rather than “observers,” it fell outside the scope of authorization granted by §1853(b).

The First Circuit Court of Appeals did not agree with this argument. First, the court found that NOAA Fisheries was entitled to Chevron deference, a legal principle that states that when an agency is interpreting the meaning of provisions of its organic act, that interpretation is entitled to judicial respect. The court also stated that the statutory definition of “at-sea monitors” was sufficiently broad enough to include both monitors or observers provided by the government and those paid for by the industry. The court further explained that specific authorization of industry funding for observers was unnecessary as industry-funded compliance is the norm for nearly all regulations of industry practices.

The herring fishers also argued that because sections of the MSA expressly authorize other fees, citing the North Pacific Council’s authority to prepare a “fisheries research plan” and the Limited Access Privilege Program, but did not do so with the observer provision in §1853(b)(8), the cost of the observer could not be passed onto the industry. The court rebutted this claim by explaining that the funds gained from those fees are used for more purposes than solely funding observers. Thus, that construction of the statute does not support the contention that observers funded by the industry must be specifically authorized.

The fishers also contended that the Rule violated several national standards of the MSA, specifically Standards One, Two, Six, Seven and Eight. The MSAs national standards have been set forth by Congress as guiding principles that must be adhered to in the creation of all fishery management plans (FMPs). The standards help to create a baseline for sustainability of fished species while ensuring that the FMPs are practical and achievable for those they regulate.

The court dealt with the complaints about Standards One and Two in short order. They decided that the Rule allowed better calibration of catch limits to scientific data required by Standard One, and that Standard Two was not violated because the fishers presented no scientific evidence which contradicted the implementation of the Rule as written.

The herring fishers argued that the rule violated National Standard Six, which requires that the Agency consider “variations among and contingencies in, fisheries, fishery resource,
and catches,” because their method of fishing which involves staying at sea for multiple days and freezing their catch to increase yields was not accounted for and resulted in disproportionate and detrimental effects to their vessel owners. The court stated that nothing in the rule required elimination of differential impacts to every vessel fishing in a region. Rather, National Standard Six merely requires “flexibility on the part of fishery managers,” and emphatically explained that it is inevitable that differing effects will occur as a result of rulemaking and that it is impossible to specifically tailor each rule to each type of ship in a fishery.

Finally, the court concurrently dismissed the claim that the Rule violated Standards Seven and Eight. Standard Seven requires plans to avoid unnecessary economic impact where practicable, and Standard Eight requires NOAA Fisheries to minimize costs were practicable.” The court explained that although the Rule does impose greater costs on certain members of the herring fishery, it correctly balances those costs with offsetting methods. The offsetting methods include the monitoring target of only 50% of all trips and the exemption for the smaller boats with less capability to absorb the cost.

The fishers also contended that the regulation was arbitrary and capricious in violation of the APA because it unfairly applied only to larger vessels placing them at an economic disadvantage with smaller vessels who qualified for an exemption. The fishers had raised this same objection during the notice and comment period for the rule, and their concerns were explicitly rejected by the agency. This rejection was quoted by the court as part of its reasoning for rejecting the arbitrary and capricious challenge. The court held that the agency had not acted in an arbitrary and capricious manner by distinguishing among the vessel types. “The rationale given by the [agency] – ‘that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring’ does not strike us as ‘so implausible that it cannot be attributed to a difference in view or ... agency expertise.’”

Next, the court rebuffed the fishers’ claim that the Rule violated the RFA, which requires agencies to consider the effects of their rules on small businesses through responding to comments throughout the rulemaking process. Specifically, they claimed that NOAA Fisheries did not adequately consider the effect of the regulation on fishers who freeze catch at sea. In the court’s opinion, the 50% monitoring threshold, and specific responses to the complaints lodged by the fishers throughout the rulemaking process was more than adequate to satisfy the threshold required by the RFA.

Finally, the court dismissed the claim that the Rule unconstitutionally forced the fishers to participate in the market for at sea monitors. The court rejected the argument because the Rule simply applies stipulations to harvesting a public natural resource for their own financial profit. The history of regulation in this area is longstanding and by voluntarily participating in commercial fishing, they must also be subject to the regulations which accompany that activity.

Conclusion

While this case represents a win for NOAA Fisheries, and the authority granted to it by the MSA, plaintiffs have already petitioned the U.S. Supreme Court to hear their appeal. They are hoping to follow the example set by another case concerning industry-funded fishery observers which has already been granted review by the Court. Relentless Inc., the plaintiffs in Relentless assert that the MSA does not authorize NOAA Fisheries and the regional councils to impose industry-funded monitoring requirements. Unlike the Relentless plaintiffs, however, the Laper-Bright plaintiffs have focused their litigation on the Chevron deference NOAA Fisheries was shown by the D.C. Circuit and are seeking to overturn the nearly forty-year-old precedent through their lawsuit. The Laper-Bright plaintiffs are seeking to capitalize on a growing trend by the current Supreme Court to weaken the power of the administrative state. Removing the judicial deference granted administrative agencies under Chevron would have far-reaching implications on not just fisheries management, but all of administrative law and those that are governed by it.

Endnotes

1 NSGLC Research Associate; 3L Indiana University Maurer School of Law.
3 The Northeast Region includes areas of the Atlantic Ocean off the coasts of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut.
5 Relentless, 62 F.4th at 627.
7 An organic act is a piece of legislation that creates and details the powers of a government agency.
8 Id. §1851(a)(6).
9 Relentless, 62 F.4th at 637.
10 Id. at 621, citing Associated Fisheries of Me. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997).
11 Kirk Moore, Rhode Island Fishermen Ask Supreme Court to Hear Challenge to Observer Fees, NATIONAL FISHERMAN (June 16, 2023).
On May 11th, the U.S. Supreme Court issued an opinion upholding a controversial California animal rights law adopted in 2018. The law, known as Proposition 12, prohibits the sale in California of whole pork products by a seller who knows or should know that the meat came from a breeding pig or their offspring that was “confined in a cruel manner.” Confinement is defined as “cruel” where the breeding pig has less than 24 square feet of space or cannot lie down, stand up, fully extend limbs, and turn around freely. Nearly 63% of California voters voted in favor of Proposition 12, despite “spirited debate” surrounding the costs and benefits of the requirements imposed on pork producers selling in the state.
Following Proposition 12’s adoption, two industry organizations, the National Pork Producers Council and the American Farm Bureau Federation, filed a lawsuit on behalf of their members, claiming Proposition 12 violated the Commerce Clause of the U.S. Constitution. In dismissing the challenges to Proposition 12, the Supreme Court constrained its own authority to strike down as unconstitutional state laws that have broad impacts on out-of-state actors who wish to sell their goods within that state. Although the case centers on the humane treatment of pigs, the court’s reasoning in this opinion may influence state legislation directed at other out-of-state industries in the future.

**National Pork Producers Council v. Ross**

The primary issue in this case was whether Proposition 12 violated the Commerce Clause of the United States Constitution; specifically, the Dormant Commerce Clause. The Dormant Commerce Clause is the negative implication of the Commerce Clause, and acts as a prohibition “against states passing legislation that discriminates against or excessively burdens interstate commerce.” Both the California district court and the Ninth Circuit Court of Appeals dismissed the case, holding that the two organizations failed to state a valid legal claim. The Supreme Court accepted the case and ultimately agreed with the lower courts, affirming the case’s dismissal.

In a fractured 5-4 opinion, Justice Gorsuch rejected the two arguments made by the organizations. Their first argument, according to Justice Gorsuch, interpreted existing case law to create an “extraterritoriality doctrine” in the Commerce Clause which would prohibit enforcement of state laws which are not purposely discriminatory but have the “practical effect of ‘controlling’ extraterritorial commerce.”

In this case, because California imports most of its pork from out-of-state producers, the organizations argued that Proposition 12’s impacts would mostly be felt by entities outside of the state. The Court refused to adopt the organizations’ arguments, concluding it would be an overreach of the Court’s authority to question state laws that touch interstate commerce.

The second argument asked the Court to find Proposition 12 unconstitutional under a balancing test between the costs to pork producers and the benefits to California of adopting Proposition 12. While the justices were fractured as to the reasoning behind rejecting this second argument, they did reject it. Three of the justices believed that the Court was incapable of balancing California’s non-economic interest in eliminating inhumane products from its markets against the economic impacts to out-of-state pork producers forced to comply with Proposition 12 or stop selling pork in California. Four of the justices, a plurality, found that the plaintiffs failed under the balancing test because their allegations were insufficient as a matter of law to demonstrate the substantial burden on interstate commerce required to invalidate Proposition 12. Thus, Proposition 12 was upheld, and California has set an example for other states who may have the political will to pass their own laws mandating humane treatment of animals used for food without worrying about possible Commerce Clause challenges.

**In this case, because California imports most of its pork from out-of-state producers, the organizations argued that Proposition 12’s impacts would mostly be felt by entities outside of the state.**

**Conclusion**

The National Pork Producers Council v. Ross opinion has impacts beyond the welfare of pork consumed in California. By approving Proposition 12, California voters enshrined minimum humane standards for veal, pork, and eggs sold for food within the state of California, regardless of the seller’s state of business. The case presents a limitation on the Supreme Court’s authority to intervene when state laws may have the effect of regulating out-of-state actors, which may present a foundation for state legislatures to mandate humane treatment of fish and other species if sellers wish to enter the market in states with robust animal welfare laws. With the question of humane treatment of aquacultured animals gaining some traction in the courts, Ross may have an important role to play in the future in states seeking to influence sellers in other states who are not meeting minimally acceptable animal welfare laws.

**Endnotes**

1 National Sea Grant Law Center Ocean and Coastal Law Fellow.
3 CAL. HEALTH & SAFETY CODE ANN. § 25990(b)(2); CAL. CODE REGS. tit. 3 § 1322.1(a).
4 CAL. HEALTH & SAFETY CODE ANN. § 25991(e)(1).
6 Legal Information Institute, Commerce Clause, CORNELL LAW SCHOOL.
7 Nat’l Pork Producers Council, 143 S. Ct. at 1156.
In May, the U.S. District Court for the Western District of Washington struck down portions of NOAA Fisheries’ 2019 Southeast Alaska Biological Opinion (SEAK BiOp) evaluating the impacts of the salmon fishery on threatened and endangered species. The court’s decision directly halted the commercial harvest during the winter and summer seasons of the southeast Alaska troll fisheries. While referred to by many as overdue federal action and a massive win for marine animals and the environment, others consider this ruling a major economic blow for the fishing industry and the families who rely on chinook harvests. The State of Alaska and a commercial fishing group joined NOAA in an immediate appeal. In June, a panel of the U.S. Court of Appeals for the Ninth Circuit issued a last-minute stay of the lower court ruling, allowing the Southeast Alaska troll chinook salmon fishery to open as scheduled on July 1st.
2019 SEAK BiOp

The North Pacific Fishery Management Council (NPFMC) develops the fishery management plan (FMP) for the Southeast Alaska salmon fisheries in federal waters, which is approved and implemented by NOAA Fisheries. The FMP delegates management authority over the region to the State of Alaska, although NOAA Fisheries retains oversight authority.

The Pacific Salmon Treaty (PST) between the United States and Canada establishes the upper harvest limits of chinook salmon. The PST was first ratified in 1985 and most recently ratified in 2019. NOAA Fisheries reinitiated consultation under the Endangered Species Act (ESA) on the State of Alaska salmon fisheries following the 2019 PST. As part of the review, the agency issued the SEAK BiOp. A BiOp is an agency’s opinion on whether its proposed action is likely to harm the existence of a species or critical habitat.

The SEAK BiOp includes an incidental take statement (ITS), authorizing the “take” of Southern Resident Killer Whales (SRKW) and chinook salmon. “ITS” allows for the legal killing of a certain number of protected animals, describes the effect of the taking, and lists reasonably prudent measures required to ensure minimal impacts on the animal. The SRKW landed on the endangered species list under the ESA in 2005 due to a decline in prey abundance and availability—with 80 to 90% of their diet consisting of endangered chinook salmon—as well as other factors like pollution and vessel impacts. 69% of SRKW pregnancies are aborted due to insufficient Chinook salmon.

The SRKW is at a high risk of extinction, with only 73 left and more than 20% of its population currently susceptible to weakened body conditions. The BiOp’s ITS authorized the “take” of the SRKW and four threatened chinook salmon species up to the limits placed in the 2019 PST.

District Court Vacates

The Wild Fish Conservancy (WFC) brought suit contending NOAA Fisheries violated the ESA and National Environmental Policy Act (NEPA) in issuing the SEAK BiOp. The group claimed that pausing the seasonal commercial fishing harvests would increase chinook salmon availability to the SRKW by around 4.8%. Ancillary population modeling predicts that salmon availability needs to increase by around 5% to stop the SRKW decline.
The plaintiffs also moved for an injunction prohibiting the prey increase program—a program designed to increase hatchery chinook salmon abundance—citing concerns about interbreeding and disruptions to the wild chinook salmon populations. Congress created the Hatchery Scientific Review Group (HSRG) to establish the appropriate percentage of hatchery fish on the spawning ground (pHOS). According to the HSRG, pHOS should not exceed 5 to 10%. However, the BiOp allowed for pHOS of up to 30%.

NOAA's compliance with the ESA and NEPA is reviewed under the Administrative Procedure Act (APA). Under the APA, an agency's action will not be upheld if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. WFC argued that NOAA Fisheries violated the APA by relying on uncertain mitigation and failed to conduct necessary evaluations in determining the potential jeopardy its programs would have on the chinook salmon and SRKW. The group also alleged NEPA violations as NOAA enacted the BiOp's ITS without proper analysis and the prey increase program without preparing an environmental impact statement (EIS) or Environmental Assessment (EA).

The court agreed with WFC that the BiOp contained multiple deficiencies with the scientific assessments and vacated the ITS. Eliminating the ITS halted commercial fishing as the court determined that the seriousness of the agency error and its disruptive consequences undermine the congressional objectives of protecting endangered species and the environment. A deficient assessment with unqualified expert testimony serving as the foundation of the ITS does not meet the requirements necessary to take endangered animals. The court declined WFC's motion to vacate the prey increase program on the grounds that hatchery-produced chinook salmon are benefiting the SRKW as they provide immediate support in prey availability. The court concluded that the risks the hatchery poses to the wild salmon population can be mitigated on remand, but a complete interruption would result in greater environmental harm to the SRKW.

### Ninth Circuit Stay
In June, the U.S. Court of Appeals for the Ninth Circuit granted the State of Alaska and the Alaska Trollers Association's motion to stay the district court's judgment. The Ninth Circuit noted that a flawed agency rule does not need to be vacated upon remand when equity demands. The appellate court determined that the parties established a likelihood of demonstrating on appeal that the economic impacts of freezing the fishing season outweigh the alleged environmental threats. The WFC's cross motion to enjoin the prey increase program for injunctive relief was denied as WFC did not prove the district court likely abused its discretion in deciding on the program. The stay will remain and allow the fisheries to operate while the Ninth Circuit considers the case on appeal. If WFC wins on appeal, the fishing season will again be paused.

### Conclusion
The Southeast Alaska troll fishery generates $148 million annually, employs 1,500 fishermen, and is considered a lifeline for its rural communities. For the families that rely on chinook fishing for their livelihoods, the impact of a closure would be financially devastating. On the other hand, expert scientists stand behind the district court's decision and call out the Ninth Circuit in choosing short term economics over endangered animals. One scientist noted that having more fish return to their home waters will increase the SRKW prey availability, improve their chances of birthing healthy calves, and stabilize the population. For now, the troll fishery is open.

### Endnotes
1. Sea Grant Law Diversity Internship Program Intern; 2L Elisabeth Haub School of Law at Pace University.
3. Mary Kauffman, Southeast Alaska’s Chinook troll fishery suspended; Alaska to Appeal on Southeast AK Chinook Fishery by Federal Court in Washington, SIT NEWS (2023).
6. Carli Stewart, Could this be the beginning of the end for the Southeast Alaska troll fishery?, NATIONAL FISHERMAN (May 10, 2023).
The Takings Clause of the Fifth Amendment of the U.S. Constitution states: “[N]or shall private property be taken for public use, without just compensation.”

A regulatory taking may occur when government regulations result in overly burdensome restrictions on private property. In Shands v. City of Marathon, a Florida court recently addressed the role of Transfer of Development Rights (TDRs) in a regulatory takings analysis. TDRs allow property owners to transfer development rights from a regulated piece of land to another area. The key issue in this case is whether TDRs are a relevant factor in determining whether a taking occurred or if TDRs should only be considered in assessing whether the government provided just compensation to remedy the taking.

**Background**

The Shands family purchased Shands Key, an island off the Florida Keys, in 1956. When the family purchased the island, they intended to build a private residence. At the time, no state land use regulations existed. From 1956 until 1986, Shands Key was within Monroe County’s jurisdiction and was zoned as General Use. The island’s designation as a General Use zoning district would have allowed the family to build a private residence on Shands Key.

In 1986, Monroe County adopted the State Comprehensive Plan and development regulations. The State Comprehensive Plan changed the zoning for Shands Key from General Use to Conservation Offshore Island. The City of Marathon, which includes Shands Key, was incorporated in 1999. At the time of incorporation, the city adopted the Monroe County comprehensive land use plan. Marathon later adopted the City of Marathon Comprehensive Plan in 2005. The island’s designation as a Conservation Offshore Island remained unchanged.

In 2004, the Shands applied for a dock permit to allow easier access to the island. The City of Marathon zoning authority denied the application which, according to the Shands, prevented the island from being used for any purposes besides beekeeping and personal camping. In response, the family brought suit against the City of Marathon, claiming that the zoning restrictions resulted in a regulatory taking of the land without just compensation as prohibited by the Takings Clause of the Fifth Amendment.

This case was previously before the court on two occasions. Most recently, the court found that the Shands family failed to establish a taking. The Shands appealed, which led to this decision.

**History of Regulatory Takings and TDRs**

The Takings Clause of the Fifth Amendment does not prevent the government from taking property, but it does require that the government take the property for public use and provide just compensation. In a regulatory takings context, the government...
must compensate a property owner if a regulation is overly burdensome on the property owner's interest in the land. There is no clear line to indicate when a regulation becomes overly burdensome, but two U.S. Supreme Court decisions provide frameworks for analyzing regulatory takings: *Penn Central Transportation Co v. City of New York* and *Lucas v. South Carolina Coastal Council*. Penn Central is relevant when assessing partial regulatory takings, or takings that do not deprive the landowner of all economic value of the land.1 *Lucas* applies when analyzing “total” takings, or takings that deprive the landowner of “all economically beneficial uses.”5 A taking like the one in *Lucas* is considered a *per se* regulatory taking.

TDRs allow landowners to transfer the right to develop their property from an area where development is prohibited (the sending zone) to an area where development is encouraged (the receiving zone).6 The purpose of TDRs is to compensate landowners of regulated property for the decrease in property value.7 When a developer wishes to develop in a receiving zone, the developer purchases the right to develop from the landowner of the regulated property.8

TDRs have become a valuable tool for promoting conservation and managing development in environmentally sensitive areas. However, there is a debate among legal experts about how TDRs play into a regulatory takings analysis. Some argue that TDRs are irrelevant to the takings side of the analysis because TDRs do not address the interest in the property taken by the government; TDRs just allow the landowner to transfer the development rights to another piece of property. Others argue that TDRs mitigate the economic burden of the taking by adding value to the property, and therefore TDRs should be considered in determining whether a taking occurred.

The court in *Shands* directly addressed this debate.

**TDRs in a Regulatory Takings Analysis: The Court's Reasoning**

Here, the court referred to two Supreme Court cases to guide their analysis: *Suitum v. Tahoe Regional Planning Agency* and *Horne v. Department of Agriculture*. In a concurrence in *Suitum*, Justice Scalia concluded that TDRs should be limited to the compensation side of the takings analysis.9 He explained that they are not relevant to the use of the affected land and instead provide a new right to develop other land.10 This is a form of compensation rather than a reduction of the taking.11 Justice Scalia compared this to a cash payment and therefore argued that TDRs are only relevant in evaluating just compensation.12 Chief Justice Roberts reinforced this approach in *Horne*, explaining that once there is a taking, any payment from the government should only be considered in determining whether there was just compensation.13

The regulation deprived the Shands of any use of their property besides beekeeping and personal camping. The court concluded that these uses are not economically beneficial because they leave the Shands with only a “token interest” in the land. The availability of TDRs does not negate the taking, because the zoning code prevents the Shands from developing their land. Thus, the court ruled that the regulation protecting Shands Key resulted in a *per se* regulatory taking like the one in *Lucas*.

As further justification for their reasoning, the court stated that considering TDRs in determining whether there was a taking would undermine *Lucas*. In *Lucas*, the Supreme Court held that regulatory schemes that require landowners to preserve the land in its natural state are so burdensome that “even the most compelling state interest will not suffice absent just compensation.”14 If TDRs were considered on the takings side of the analysis, local governments could circumvent *Lucas* simply by allocating TDRs to the affected landowners. This is a consequence that the court was unwilling to risk.

Overall, *Shands* addressed the issue of how TDRs affect a regulatory takings analysis. Though the court did not specifically address how to consider the value of TDRs, it held that the provision allocating TDRs is insufficient to invalidate a takings claim. Considering TDRs as an aspect of just compensation preserves the holding of *Lucas* and ensures that landowners are not disadvantaged by decisions to conserve environmentally sensitive areas.

**Endnotes**

1. NSGLC Summer Research Associate; 3L at Pace University Elisabeth Haub School of Law.
2. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Amend. V, U.S. Const.
7. Id.
8. Id.
10. Id.
11. Id.
12. Id.
New Jersey is Allowed to Unilaterally Withdraw from Waterfront Commission Compact

Lourdes Carreras-Ortiz

The U.S. Supreme Court recently issued its opinion in a five-year long dispute as to whether New Jersey may withdraw from a compact with New York that manages the Port of New York and New Jersey. The states had entered into the Waterfront Commission Compact (Compact) during the 1950s in an effort to deter the high crime occurring in the ports of both states. This Compact was viewed as a success for over seven decades, however New Jersey sought to withdraw in 2018. They asserted that the circumstances in the ports had changed and the more modern challenges would be better handled by individual state management of their respective port property. After a decision from a federal district court in favor of New York and then a reversal by the Third Circuit Court of Appeals, New York filed a complaint with the Supreme Court. The case was argued earlier this year and the court issued a decision in April. The Court opined that New Jersey was in its right to withdraw unilaterally from the Compact in April 2023.
Background
The commercial port that extends the border of New York and New Jersey attracted a great deal of corruption and organized crime since its establishment in the 1920s. This is why, according to the historical background provided in the opinion, both states began a joint investigation at the Port of New York and New Jersey in 1951 and enacted legislation that would form the Compact. Upon Congressional approval of the interstate compact in 1953, both states “delegated their sovereign authority to the Commission to conduct regulatory and law enforcement activities at the port.”

In March 2023, the U.S. Supreme Court heard oral arguments. New York remained firm in its position that New Jersey required its consent to withdraw because the Compact is a binding contract that can only be amended through legislation by both states.

The Supreme Court reviewed the intention behind the Compact using principles of contract law and state sovereignty. In essence, they deduced that, neither New York nor New Jersey ever intended for the Waterfront Commission Compact to operate in perpetuity; unlike with other types of interstate compacts—such as those related to water boundaries. As a result, the Court concluded the Waterfront Commission Compact should be interpreted using the “default contract-law rule” in which contracts calling for ongoing and indefinite performance may be terminated by either party. Especially in this case when the contract was silent with regards to either party being able to withdraw unilaterally. The Court also concluded that principles of state sovereignty would not allow for a state to “easily cede its sovereignty” within interstate contracts.

Conclusion
Following New Jersey’s withdrawal from the Compact and the termination of the Commission, New York and New Jersey will independently manage and control activities, like law enforcement functions, on their side of the port. New Jersey Governor Phil Murphy was content to announce how he and his administration “look forward to working with New York to ensure a swift and orderly dissolution of the Commission in a way that ensures security and uninterrupted business at New Jersey’s ports.” Only time will tell how this new arrangement will work out for port operations from now on.

Endnotes
1. NSGLC Ocean and Coastal Law Fellow.
3. Id.
7. Id.
8. Id.
Littoral Events

2023 Floodplain Management Association Annual Conference

September 5-8, 2023
Los Angeles, CA

For more information, visit: https://floodplain.org/page/AnnualConference

Oceans 2023: Gulf Coast

September 25-28, 2023
Biloxi, MS

For more information, visit: https://gulfcoast23.oceansconference.org

State of the Coast: Oregon’s Coastal Conference

November 4, 2023
Newport, OR

For more information, visit: https://seagrant.oregonstate.edu/state-coast