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Editor's Foreword

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SYMPOSIUM ON THE COSTS AND BENEFITS OF LITIGATION IN FISHERY MANAGEMENT: EDITOR'S FOREWORD

Recently, the National Marine Fisheries Service has had an unprecedented number of lawsuits filed against it by various interest groups, ranging from environmental organizations to the fishing community. This litigation is the result of a widespread sense of frustration and concern for the present state of fisheries and fishery management. Increasingly, courts are being called on to further interpret various statutes that govern the fishery management process, including but not limited to, the Magnuson-Stevens Fishery Conservation and Management Act, the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, and the Regulatory Flexibility Act. To some observers, courts are becoming too engrossed in the fishery management process and in making management decisions, which should be left to the specialized and technical expertise of the fishery management agencies. Agency decision-making has been tainted by a general fear of litigation. Others see the current litigation trend as a more natural phenomenon that has been experienced by other resource agencies in the past and that is a necessary step in educating the involved agencies about the meaning of the laws and their legal duties in managing these marine resources. This Symposium seeks to highlight the opposing views of stakeholders directly involved in the fishery management process and to provide our readers with a better appreciation of the practical realities that are faced by all the parties involved.

On August 22, 2001, the National Fisheries Conservation Center, with funding from the David and Lucille Packard Foundation, sponsored a discussion at the 131st Annual Meeting of the American Fisheries Society in Phoenix, Arizona. This Symposium is a compilation of the individual presentations from the conference. The Symposium examines, from the points of view of interested stakeholders, the costs and benefits associated with resolving fishery conflicts within the federal court system, whether litigation has been an effective tool, and whether litigation is being overused.

The Symposium features seven presentations and a panel discussion that followed the individual presentations at the 131st Annual Meeting of

the American Fishery Society. The first presentation, entitled *He Said, She Said: The Effects of Litigation on Stakeholders*, was given by Dr. Bonnie McCay, an anthropologist and Professor of Human Ecology at Cook College of Rutgers the State University of New Jersey. Dr. McCay examines the effects litigation has had on social science and fishery management. In particular, she reviews the extent to which competing goals and objectives within the statutes that govern fishery management must be balanced. Dr. McCay argues that litigation has increased awareness of the need to balance the various competing interests within the fishery management equation, particularly fishery dependent communities.

The second presentation, entitled *More Than Meets The Eye: The Transaction Costs of Litigation*, was contributed by Dr. Susan Hanna, Professor of Marine Economics in the Department of Agricultural and Resource Economics at Oregon State University. Dr. Hanna discusses the various transactional costs that litigation has imposed on the fishery management system. She argues that litigation costs are increasing the overall costs on an already overburdened and underfunded fishery management system. Dr. Hanna also notes that litigation costs the system by taking personnel away from the routine functions of fishery management. Many of these costs are eroding the legitimate, participatory process that has evolved within the fishery management system. Dr. Hanna points to a final cost to the fishery management system that she feels is critical to the analysis—the general erosion of morale among scientists within the fishery management system.

The third presentation, entitled *Ten Years 'After The Fall': Litigation and Groundfish Recovery in New England*, was given by Mr. Peter Shelley, an attorney and a Vice President of the Conservation Law Foundation. Mr. Shelley notes the importance of litigation in ensuring that agencies charged with implementing and enforcing a statute actually do what Congress has intended for them to do under a given law. Mr. Shelley candidly asserts that litigating against NMFS may weaken the agency in the short-term, however, he argues that the long-term goals of developing better, more sustainable management plans that have been drafted and implemented in accordance with those statutes governing fishery management far outweigh any potential costs that are incurred as a result of litigation. Mr. Shelley further argues that litigation creates greater power parity among interested stakeholders, allows for a proper interpretation of the law, fosters the creation of more legitimate relationships between stakeholders, and provides an opportunity to educate the public about the state of marine resources in oceans by creating a newsworthy event.

In the fourth feature presentation, entitled *Carrots and Sticks: How Litigation Can Promote Negotiation And Other Settlement Solutions*, Mr.

Thane Tienson, a partner at Landyne, Bennett & Blumstein in Portland, Oregon, contends that the litigation trend is a necessary part of the process of fleshing out what fishery management statutes mean and what the American citizenry wants to see these laws accomplish. He argues that litigation has driven the growth in the awareness and general concern for the health of our environment. Mr. Tienson maintains that the current trend of litigation is a natural phenomenon that is reminiscent of the wave of lawsuits previously experienced by many land-based resource agencies and which is necessary to address the larger concerns of the environmental community, namely the overcapitalization within fisheries. Mr. Tienson also shares a number of his practical experiences, which provide insight into the ways he has used litigation and its negotiation and bargaining processes to obtain solutions to management problems that are acceptable to all interested parties.

The fifth presentation, entitled *The View From Ground Zero: Government As Defendant, Courts As Fishery Managers*, was given by Ms. Mariam McCall, an attorney with the Office of General Counsel, National Oceanic and Atmospheric Administration. Ms. McCall poignantly explains the practical realities and immediate consequences that litigation has created for the agency charged with managing fisheries. Ms. McCall notes that litigation places significant time and resource constraints on the National Marine Fisheries Service, takes those issues being litigated out of the realm of public comment, and results in the courts becoming the managers of fisheries rather than the more experienced and specialized agency. Ms. McCall also notes that the end result of litigation, a court order, can cause more confusion than benefit within the management system. Finally, Ms. McCall explains the steps that the agency is undertaking to improve the quality and efficiency of the agency's regulatory decision-making.

Mr. Brad Warren, a former activist with Greenpeace and the current Editor-in-Chief of *Pacific Fishing*, gave the sixth presentation entitled, *Thirty Years Before The Mast: Watching The Evolution Of Environmental Advocacy in Fishery Management*. Mr. Warren examines the birth of the environmental movement and argues that it has grown from a militaristic model, which took absolutist positions, to a more civic model. Mr. Warren asserts that, because litigation is about developing a case that can succeed in court, the entire fishery management process suffers from litigation as the system is designed to undermine the record that each party is attempting to develop. Mr. Warren believes that litigation has marginalized the historic players within the fishery management system. Mr. Warren advocates for the development of a more problem-solving oriented fishery

management process to replace the game theory that he believes permeates the current system.

The final presentation was given by Ms. Suzanne Iudicello, an independent consultant with Junkyard Dogfish Consulting, and is entitled *Where The Rubber Meets The Road: Stakeholders And The Take Reduction Teams Of The Marine Mammal Protection Act*. Ms. Iudicello outlines the role that take reduction teams have played in reducing incidental takes of marine mammals experienced within various fisheries. Ms. Iudicello argues that this participatory management model, which has proven successful in reducing marine mammals taken as bycatch, could also be utilized in broader fishery management programs. Take reduction teams provide stakeholders with an opportunity to express their ideas to their colleagues and adversaries, foster ingenuity within the management process, and are a vehicle for designing more consensus-based management plans.

Since each published presentation is a modified version of the transcript from each individual presentation at the 131st Annual Meeting of the American Fishery Society, limited footnoting has been inserted in each piece. Non-substantive discussions and general banter has been removed for the sake of brevity, however, no substantive content from each presentation has been removed in the editing process. The *Ocean and Coastal Law Journal* has attempted to allow the entire Symposium to read as a more traditional article. We also wanted to ensure that each presentation within the Symposium would remain a useful research tool.

The *Ocean and Coastal Law Journal* wishes to thank Professor Alison Rieser for her guidance and assistance in securing this Symposium for publication and for her many helpful suggestions throughout student-editing process.

In publishing this Symposium, the *Ocean and Coastal Law Journal* seeks to provide readers with a better understanding of the competing interests and views that surround this recent trend in fishery litigation. By publishing individual presentations that have been derived from the actual transcript of the conference presentations, we believe we have accurately captured not only the differing viewpoints as to the effectiveness of litigation in managing fisheries, but have also portrayed the practical realities and externalities that affect decision-making at all phases within the fishery management process. Each presenter has much to add to the debate over the effectiveness of litigation in fishery management. We hope that this Symposium will both spur further dialogue on the costs and benefits of litigation in fishery management and serve as a valuable resource for continuing research in the area of fishery management.