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First Circuit Interprets Rapanos to Determine Which Test to Apply

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First Circuit Interprets *Rapanos* to Determine Which Test to Apply

United States v. Johnson, 2006 U.S. App. LEXIS 27042 (1st Cir. 2006).

Jonathan Lew, 3L, Roger Williams University School of Law

The United States filed a civil action against the Johnsons for allegedly discharging pollutants into federally-regulated waters without a permit in violation of the Clean Water Act (CWA).¹ The Johnsons are the owners of three parcels of land that contain wetlands which are connected to the Weweantic River through various streams, ponds, channels, and ditches. Between 1979 and 1999, the Johnsons have discharged dredged

and fill material at these sites in order to construct, expand, and maintain their cranberry bogs. The district court held that there was a sufficient basis for the United States to exercise jurisdiction over the Johnsons' cranberry farms and the Johnsons appealed to the First Circuit. The First Circuit held the appeal in abeyance pending the Supreme Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

In *Rapanos*, the Supreme Court issued a split decision vacating the Sixth Circuit's decision which attempted to interpret the phrase "waters of the United States" as found in the CWA. The plurality, which consists of Justices Scalia, Thomas, Alito, and Chief Justice Roberts,

See Rapanos, page 18

Alaska Supreme Court Upholds Fishermen's Class Action Suit



International Seafoods of Alaska, Inc. v. Bissonette, 2006 Alas. LEXIS 127 (Alaska Sept. 1, 2006).

Britta Hinrichsen, 3L, Vermont Law School

In *International Seafoods of Alaska v. Bissonette*, the Alaska Supreme Court addressed a breach of contract claim by commercial salmon fishers from Bristol Bay against a seafood company for paying a price lower than promised. On whole, the court determined that the fishers met the requirements to file a class action, the trial court properly sanctioned fishers who did not respond to discovery requests, one jury verdict

could be given for the entire class, jury instruction was proper, and the lower court did not abuse its discretion for increasing the award for attorney's fees.

Background

Buyers of red salmon in Bristol Bay usually pay a "posted price" when salmon are delivered, while big buyers, such as Trident, Peter Pan, or Icicle, pay a higher "bay price" later in the season.¹ It is accepted practice for smaller Bristol Bay buyers to pay a "retro" bonus at the end of the season to adjust for the difference between the posted

Fishermen's Class Action, page 8




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Coast Guard Withdraws Live-Fire Training Proposal in Great Lakes



Safety Zones; U.S. Coast Guard Water Training Areas, Great Lakes, 72 Fed. Reg. 520 (Jan. 5, 2007).

Terra Bowling, J.D.

On January 5, the Coast Guard (CG) withdrew its notice of proposed rulemaking (NPRM) involving the establishment of safety zones throughout the Great Lakes and the restriction of vessels during live fire gun exercises. Although the Coast Guard is authorized to conduct such training exercises in, on, and over the waters of the United States, public concerns over the exercises prompted withdrawal of the notice.

Public Comment

On August 1, 2006, the Coast Guard issued the NPRM, which outlined thirty-four safety zones located three nautical miles from the shoreline of the Great Lakes. The proposal included permanent safety zones “to provide the public with more notice and predictability when conducting infrequent periodic training exercises of brief duration ...”

The NPRM provided a period for public comment until August 31; however, due to strong public interest, the Coast Guard extended the opportunity for public comment. Comments came from a variety of sources,

See Great Lakes, page 19



2006 Knauss Fellow Reflections



Meredith Mendelson

In my year as a Knauss Sea Grant Fellow in the Office of Ocean and Coastal Resource Management (OCRM) at NOAA, I have had several wonderful experiences. I work with incredibly bright, passionate people who take creative approaches to solving traditional management problems. Under the authority of the Coastal Zone Management Act, our office works in partnership with the state coastal programs and National Estuarine Research Reserves. That cooperative aspect really sets OCRM apart from other offices and requires us to be responsive and flexible to the needs and interests of our partners. The greatest challenge, for me, has been to understand the complexity of the interactions between the various levels of government, and to learn to respond to the needs of local and state governments while maintaining a national perspective. I consider myself especially lucky to have had the opportunity to participate in several truly innovative, locally-driven projects.

My work has focused on the Portfields Initiative, a federal port revitalization program focusing on environmentally and economically sustainable redevelopment, recently implemented on a regional scale for the first time in southeastern Louisiana. The importance of the Lower Mississippi River ports to our national security and economy cannot be underestimated. We held a large kickoff meeting in New Orleans in May, 2006, with eleven federal and six state agencies represented, several local partners and the six participating ports.

See Mendelson, page 10

Jessica Barkas

For the past year, I've been part of the National Observer Program (NOP), a part of the Office of Science and Technology at NMFS. Fisheries observers are required in several United States commercial fisheries. They sample catch and bycatch and record interactions with protected species, such as sea turtles, marine mammals, and seabirds. The NOP facilitates communication and cooperation between the fisheries observer programs in each of the six NMFS regions and coordinates the resolution of issues and problems that affect the observer program on a national scale.

A major project during my time with the NOP has been initiating work on the National Bycatch Report. The definition of bycatch has several technical variations, but in short, it is that proportion of the catch that is typically "thrown back," including fish that are of little market value due to size or species, and other species that may not be retained, such as sea turtles, marine mammals, or sea birds. Catch of non-target species is undesirable because it wastes marine resources and injures and kills protected species. The report will bring together bycatch data on finfish, marine mammals, sea turtles, and seabirds from each of the NMFS regions to produce national estimates of commercial fisheries bycatch and serve as a yardstick to help measure NMFS's success over time at reducing bycatch. Much of my work on the report has been drafting some of the introductory sections and helping to assemble data and other information in support of

See Barkas, page 10



Tort Claims Against Ocean City Drown on Appeal

Bilyeu v. Ocean City, 2006 U.S. App LEXIS 24881 (3rd Cir. Oct. 2, 2006).

Madeline Bush, 2L, Vermont Law School

On September 11, 1999, Jeffrey Bilyeu drowned off the coast of Ocean City, New Jersey's 30th Street Beach. Danette Bilyeu, Jeffrey's wife, brought claims against the city for the wrongful death of her husband. The Third Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the city, finding that it was immune from suit under the New Jersey Tort Claims Act (NJTCA).

Background

On the day of the accident, Jeffrey had been swimming in shallow waters with the Bilyeus' son, Matthew, when a powerful rip current washed the child from shore. Jeffrey made an effort to save his son; however, Jeffrey became trapped in the strong current. Danette was able to pull Matthew from the dangerous waters, but was unable to reach her husband. No lifeguards were on duty, so by the time lifeguards from a nearby beach reached Jeffrey, he could not be resuscitated. Danette filed suit, alleging that Ocean City's "negligent supervision" and "failure to warn" were the cause of her husband's death.

Immunity from Suit

Prior to the Bilyeu family's misfortune, Ocean City had implemented a beach nourishment program that dredged millions of cubic yards of sediment from the ocean and repositioned it closer to shore. The NJTCA gives immunity to public entities for "an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."¹

Immunity from such suits is an essential protective measure not only for the public entity, but also for the general public. Besides the costs associated with defending claims arising from injury on unimproved property, establishing safe unimproved property would be far too demanding for a public entity to manage. Without the immunity claim, the public may not have access to unimproved public property like Ocean City's 30th Street Beach.

*. . . the court noted that
a natural condition
physically modified to
"duplicate models
common to nature"
is generally still found
to be in its
"natural condition"
under NJTCA.*

In light of these policy considerations, the New Jersey Supreme Court liberally interprets the term "unimproved." The court determined that a property is improved if it undergoes a "substantial physical modification from its natural state," and if the physical modification creates a hazard that "did not *previously* exist and which requires management by the public entity."² The court concluded that if all of the facts supported that the beach is unimproved property, then the district court's grant of summary judgment in favor of Ocean City should

be upheld. If the facts alleged demonstrated that there is a “genuine issue of material fact,” then the district court erred in granting the summary judgment.³

An oceanography expert testified that “Ocean City’s beach nourishment program substantially modified the natural state of the beach,” producing sandbars that are more favorable to rip current formation.⁴ The expert also reported that the “dangerous condition” of the rip current on the 30th Street Beach was a result of the nourishment program.⁵ However, he also testified that the sandbars resulting from the nourishment program were “likely” present at the 30th Street Beach before it eroded.⁶

The court concluded that the beach qualified as unimproved property. First, the court noted that a natural condition physically modified to “duplicate models common to nature” is generally still found to be in its “natural condition” under NJTCA. The oceanography expert stated that sandbars are natural features of the beach that would be present before the nourishment program became effective. The court reasoned that the nourishment program is only duplicating a natural process and thus could not be a physical modification from its natural state. Further, even if a physical modification existed, the court found no evidence that the nourishment program created a hazard that was not already in existence at the 30th Street Beach. Hence, the risk

was *previously* present. The expert testimony only offered the mere possibility the risk was not present, not a probability.

Conclusion

After examining the application of NJTCA to the wrongful death claim and holding that the property was “unimproved,” the court of appeals affirmed the district court’s decision to grant a summary judgment in favor of Ocean City.☺

Endnotes

1. *Bilyeu v. Ocean City*, 2006 U.S. App LEXIS 24881 at *5 (3rd Cir. Oct. 2, 2006).
2. *Id.* at *6-7 (citations omitted).
3. *Id.* at *3.
4. *Id.* at *8.
5. *Id.* at *9.
6. *Id.*

Photograph of beach and sand dunes courtesy of ©Nova Development Corp.





Hawaii Supreme Court Reaffirms Definition of Shoreline

Diamond v. State, 2006 Haw. LEXIS 559 (Haw. Oct. 24, 2006).

Terra Bowling, J.D.

Two Hawaiian residents contested a property owner's shoreline certification that had been based on artificially introduced vegetation and resulted in the shoreline moving closer to the ocean, possibly restricting public access and contributing to beach erosion. In October, the Supreme Court of Hawaii ruled in favor of the residents, confirming the correct definition of "shoreline" for construction setback purposes.

Background

In 1999, Carl Stephens purchased an oceanfront lot in a subdivision on the island of Kauai. Shortly after buying the property, Stephens replaced large false kamani trees along the shoreline with spider lilies and naupaka and had an irrigation line installed to water the vegetation.

Before beginning new construction on beachfront property in Hawaii, the Department of Land and Natural Resources (DLNR) must approve a shoreline certification, which county zoning boards then use to determine the construction setback. Stephens obtained a shoreline certification from the DLNR placing the shoreline along the high-water mark; however, the certification expired before Stephens could begin construction.

In a second survey, state inspector Randall Hashimoto placed the shoreline at the vegetation line Stephens had planted despite rejecting the naupaka as a shoreline marker in the first survey. The new certification placed the shoreline more than ten feet seaward at some points.

After the shoreline was certified by the DLNR, Harold Diamond and Caren Bronstein filed an administrative appeal with the Board of Land and Natural Resources (BLNR), which was denied. Diamond and Bronstein appealed

the BLNR's denial of appeal to the Fifth Circuit Court of Hawaii. The court affirmed the BLNR's order noting that the BLNR had revised its definition of "shoreline" to reflect the legislature's definition.

Mootness

Prior to June 2006, the Board of Land and Natural Resources (BLNR) definition of shoreline contrasted with the Hawaii State Legislature's definition of shoreline. The legislature defines shoreline as "the upper reaches of the wash of the waves ... usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."¹ The BLNR defined shoreline as "the upper reaches of the wash of the waves ... usually evidenced by the edge of vegetation growth, or where there is no vegetation in the immediate vicinity, the upper limit of debris left by the wash of the waves."² The BLNR definition seemed to give a preference for using the vegetation line for shoreline certification.

Amid much controversy, the BLNR revised its definition of shoreline to reflect the wording used by the legislature. The Hawaii Supreme Court agreed that the issue of shoreline delineation was moot, as there were no longer conflicting definitions and the court could not provide an effective remedy. The court noted, however, that it would decide moot issues in "cases involving questions that affect the public interest and are 'capable of repetition yet evading review.'"³ In this instance, the court concluded that the definition of shoreline was "a matter of vast public importance" and that future shoreline certification challenges were likely; therefore, it would rule on the claim despite its mootness.

Defining Shoreline

The court found that a previous Hawaii Supreme Court decision, *County of Hawaii v. Somatura*, supported the proposition that "the

shoreline should be certified at the highest reach of the highest wash of the waves.”⁴ In *Somatura*, the court held that public policy supported “extending to public use and ownership as much of Hawaii’s shoreline as is reasonably possible.”⁵ The court also examined legislative history of HRS § 205A-1 and found that it favored shoreline certification at the highest reach of the highest wash of the waves.

In examining whether to use the vegetation line or the debris line when determining the upper reaches of the wash of the waves, the court examined both the language and the legislative history of the statute. The court held that there is no preference for which line to use when determining the highest reach of the waves, so long as the line used is the one farthest inland.

Diamond and Bronstein also raised the issue of whether a vegetation line that had been planted and irrigated by property owners could be used to determine the shoreline. The BLNR defines vegetation growth as “any plant, tree, shrub, grass or groups, clusters, or patches of the same, naturally rooted and growing.”⁶ The court found that, although the agency’s interpretation of its rule should be given weight, it “encourages private landowners to plant and promote salt-tolerant vegetation to extend their land [farther seaward]” and did not comply with the legislative purpose of extending public use and ownership of the shoreline.⁷

Conclusion

The Hawaii Supreme Court reversed the cir-

cuit court’s ruling and clarified the shoreline certification process; however, the court’s decision will not have an effect on Stephens’ property. Prior to the ruling, Stephens sold the property and the current owner began construction using the now-defunct shoreline certification.⁸ ❧

Endnotes

1. HAW. REV. STAT. § 205A-1.
2. HAW. CODE R. § 13-222-2.
3. *Diamond v. State*, 2006 Haw. LEXIS 559 at *29 (Hawaii Oct. 24, 2006).
4. *Id.* at *34.
5. *Id.*
6. HAW. CODE R. § 13-222-2.
7. *Diamond*, 2006 Haw. LEXIS 559 at *43.
8. <http://the.honoluluadvertiser.com/article/2006/Oct/26/1n/FP610260344.html> .

Photograph of Hawaiian shoreline ©Nova Development Corp.



price and the bay price. International Seafoods of Alaska, Inc. (ISA) followed this practice by matching the competitive “bay price” set by the big buyers or by paying “retros.”²²

In 1999, ISA leased a competitor’s fishing facilities on Egegik beach. To alleviate the fishers’ concerns about ISA’s control of the fishery in the area, ISA sent a letter to fishers stating that ISA has “always done things according to our own costs and sales and . . . to keep your business we must be competitive with our price”²³ Fishers interpreted this language as assurance that ISA would pay the competitive bay price for salmon in relation to the other buyers in Bristol Bay. ISA viewed the language narrowly by only considering its “own costs and sales” without regard to other competitors. In 2000, ISA lost money and did not pay Egegik fishers retro payment above the posted price. Fishers then filed a class

action against ISA for failing to pay the competitive bay price.

Lower Court

Six fishers filed the breach of contract claim against ISA, which had to be certified as a class action. The Alaska Superior Court certified the class, which totaled 110 members, as “[a]ll fishers, who in the year 2000, took salmon from the Egegik District and sold these salmon to International Seafoods of Alaska, Inc.”²⁴ ISA objected to the certification and requested that the claims of fishers who did not respond to discovery be dismissed. The court maintained the certification and held that only evidence provided in discovery could be used at trial, thereby limiting witnesses at trial to those plaintiffs who had responded to discovery requests.²⁵ ISA also contested the single jury verdict form used for the entire class, which the court found

Photograph of Alaskan salmon fishermen courtesy of NOAA's Photo Library, Fisheries Collection.



appropriate since “that’s the whole point of a class action.”⁶ Ultimately, the jury awarded the fishers an additional \$0.17 per pound for salmon ISA bought in 2000 plus attorney’s fees.

Alaska Supreme Court

Class Certification

As per Civil Rule 23, plaintiffs may be certified as a class if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.⁷

The Alaska Supreme Court found that the fishers met these requirements. First, the class was numerous (110 members) and joinder would be impractical because the members were “so geographically dispersed.”⁸ Second, commonality exists if “the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.”⁹ All plaintiffs of the class claimed a breach of contract by ISA and sought monetary damages for the difference between the competitive bay price and what ISA paid. Likewise, plaintiffs also satisfied the third requirement of typicality—all plaintiffs had the same claim arising from ISA’s alleged breach of contract. Finally, the representatives of the class adequately protected the interests of the class because all shared the same interests and damages. Additionally, the court noted that policy considerations favored a class action suit to ensure fair, efficient, and consistent adjudication of each of the fisher’s claims.

Discovery

The supreme court also found that the trial court did not abuse its discretion when it refused to severely sanction absent class members who did not participate in discovery. Discovery against absent class members is permissible through interrogation when “the dis-

covery sought was relevant to the decision of common questions and may have been known only to absent class members.”¹⁰ In such circumstances, the court can compel compliance with discovery requests by imposing sanctions. However, the court found that dismissal of the absent class members’ claims, as ISA requested, was too severe a sanction. The trial court has “broad discretion to choose whether to impose any sanctions at all on the non-responding class members.”¹¹ The Alaska Supreme Court upheld the lower court’s decision to exclude testimony from trial that was not produced during discovery, because ISA failed to demonstrate that the trial court abused its broad discretion.

Jury Verdict Form

The court also found that a single jury verdict form was appropriate for this class action. ISA contended that it created individual contracts with each fisher and should have independent adjudications for each. To take ISA’s position, however, would result in multiple duplicative suits.¹² Once a court certifies a class, the “class of plaintiffs is entitled to the same verdict” and therefore should be given a single verdict form.¹³

*Given all of the evidence,
the jury determined that
ISA promised to pay
the competitive bay price.*

Jury Instruction

The Alaska Supreme Court held that the jury instruction regarding salmon purchase price properly allowed the jury to determine what price ISA promised to pay each fisher. The instruction stated that “[ISA] maintains that it promised to pay all plaintiffs the same price” and that it was up to the jury to “decide whether a promise to pay a particular price was made as

See Fishermen’s Class Action, page 22

Two days were spent identifying priority projects and applicable financial and technical assistance opportunities. In recent months, the ports have applied for many grants with agencies ranging from NOAA and EPA to the Economic Development Administration and the Department of Homeland Security.

The first major success came in September when five ports received a grant of \$11.4 million from DHS for layered port security improvements.

Portfields represents the federal level approach to port revitalization, and even though it requires a great deal of initiative on the ports' part, there are some fascinating community-based efforts underway as well.

I recently attended a Special Area Management Plan (SAMP) Neighborhood Plan implementation workshop in Wilmington,

Delaware. The Delaware coastal program has been working closely with the community to bring jobs, better housing and mixed-use development back to the area. They are also seeking to provide public access to the waterfront and restore several wetlands in the area.

In Providence, Rhode Island, the Sea Grant program is also engaging in a SAMP process for the Metro Bay area. As part of that project, Rhode Island Sea Grant is considering possible solutions for redevelopment of the Providence waterfront. Balancing the marine economy with the desire to bring mixed-use development to the waterfront is no small feat, but is a wise approach to making educated re-zoning decisions. It is certainly inspiring to see the states and local governments pursuing long-term strategies for waterfront planning.☺

the NMFS scientists who will be producing the bycatch estimates and transforming regional fisheries observer data, collected for diverse assessment purposes, into a national estimate of bycatch. We've just completed the first year of what is presently scheduled to be an approximately two to three year effort.

I've also been involved in projects related to assuring the quality of the data NMFS disseminates to the public. Under the Data Quality Act, federal agencies must assure that scientific and technical information is thoroughly reviewed before it is released to the public. To this end, NMFS conducts pre-dissemination review on all of its scientific products and peer reviews all of the influential scientific information it produces. For information that is being peer reviewed, agencies are required to make peer review plans available to the public, so that they might be commented upon. The NOAA peer review agenda was recently updated, including many peer review plans from NMFS, and may

be viewed on the website of the NOAA Chief Information Officer: <http://www.cio.noaa.gov/itmanagement/infoq.htm>. As the Acting NMFS Data Quality Act Coordinator, I had the opportunity to coordinate the update of the NMFS peer review plans and to provide my NMFS colleagues with general advice on Data Quality Act compliance.

Finally, in another interesting lesson in federal administrative practice, I had the opportunity to move a draft proposed rule that intended to improve fisheries observer health and safety through the administrative rulemaking process. The average law school administrative law class does not really prepare a person for just how many memos, approvals, assorted analyses, and revisions go into administrative rulemaking, even on a set of relatively minor changes to an existing rule. Nonetheless, the process has been very instructive, and the rule should be published in the Federal Register in the coming weeks.☺



Ninth Circuit Finds Rental Company Had No Duty to Warn

Hodges v. Summer Fun Rentals, Inc., 2006 U.S. App. LEXIS 25443 (9th Cir. Oct. 12, 2006).

Terra Bowling, J.D.

The Ninth Circuit Court of Appeals affirmed a district court ruling that wake jumping and operating a personal watercraft within 200 feet of another vessel is an open and obvious danger and that a personal watercraft rental agency had no duty to warn its customers of the danger.

Background

Two eighteen-year old friends, Matthew McAlpine and Mason Hodges, rented Sea Doo personal watercrafts from Summer Fun Rentals, located on the Columbia River. Before taking

the crafts onto the river, employees of Summer Fun instructed the friends on operating the personal watercrafts, including instructions on the “kill switch,” to stay out of shallow water, and to “stay below 5 miles an hour until they hit the buoy ... [and then to] ‘go ahead and do whatever they wanted to do.’”¹ The employees did not give instructions pertaining to wake jumping.

After about fifty minutes of incident-free riding on the personal watercrafts (PWCs), the friends decided to pass a boat coming toward them and jump in its wake. During the maneuver, Hodges fell off his PWC and McAlpine crashed into him. As a result of the accident, Hodges suffered severe injuries, including the amputation of his leg.

See Rental Company, page 17

Photograph courtesy of Marine Photo Bank, © Wolcott Henry 2005.





Fish and Wildlife Service Must Comply with Endangered Species Act Requirements

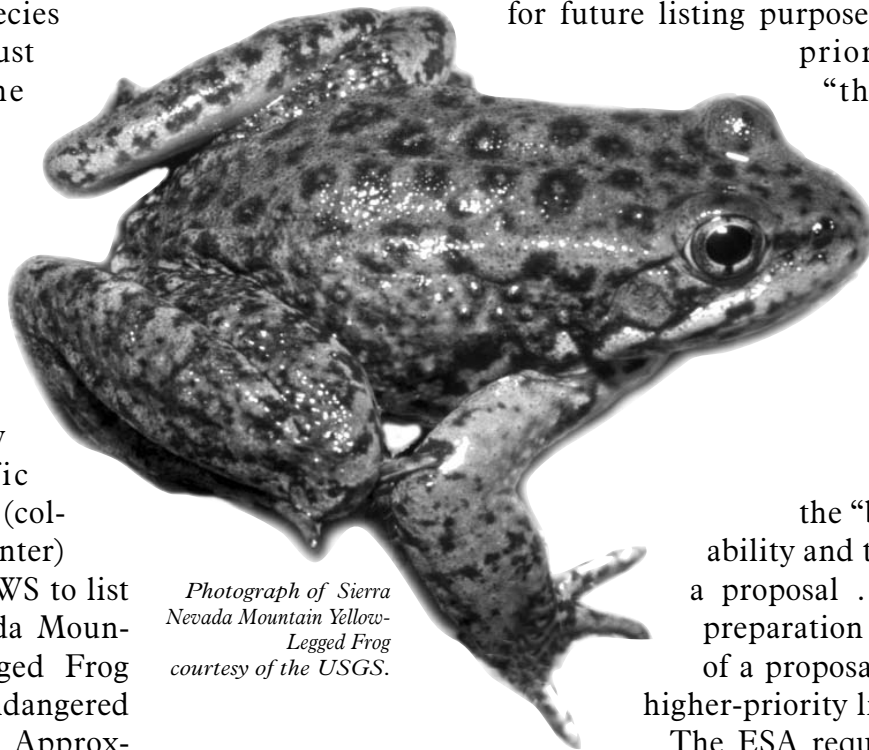
Center for Biological Diversity v. Kempthorne, 466 F.3d 1098 (9th Cir. 2006).

Allyson L. Vaughn, 3L University of Mississippi School of Law

The Ninth Circuit Court of Appeals recently held that when the U.S. Fish and Wildlife Service (FWS) makes a “warranted but precluded” finding under the Endangered Species Act (ESA) it must comply with the explicit requirements provided by the ESA.

Background

On February 8, 2000, the Center for Biological Diversity and the Pacific Rivers Council (collectively, the Center) petitioned the FWS to list the Sierra Nevada Mountain Yellow-Legged Frog (the Frog) as endangered under the ESA. Approximately eight months later, the FWS published an initial finding indicating that the Frog may require listing. After the initial finding, the FWS began a status review to determine the appropriateness of listing. The FWS failed to release its finding within the twelve month period required by the ESA, and the Center filed suit in the Northern District of California. The district court required the FWS to issue its finding.



Photograph of Sierra Nevada Mountain Yellow-Legged Frog courtesy of the USGS.

The FWS published its twelve-month finding on January 16, 2003 (the Frog Decision), which found that listing the Frog was necessary but “precluded by other higher priority listing actions.”¹ At the time, the highest priority for the FWS was to comply with court orders and judicially approved settlements, with all remaining funds applied to emergency listings and listings of higher priority species.² The FWS listed the Frog as a “candidate” species for future listing purposes and assigned a

priority ranking of “three” on the 12-

level scale where

“one” constitutes an

emergency. A

candidate is a

species for which the FWS

has sufficient information on

file regarding the “biological vulner-

ability and threats to support a proposal ... but for which

preparation and publication of a proposal is precluded by

higher-priority listing actions.”³

The ESA requires a finding of “warranted but precluded” to be published in the Federal Register and to include “a description and evaluation of the reasons and data on which the finding is based.”⁴ Additionally, the

FWS is required by law to “identify proposals for other listings that preclude listing the [candidate] and to find that procedures are in place

to list qualified species.”⁵ The FWS failed to meet these requirements; however, the district court found for the FWS and upheld the “war-

ranted but precluded” decision because the path of the FWS could be “reasonably discerned.”⁶ The district court based its finding on the descriptions of listing actions that were provided in the 2002 Candidate Notice of Review (CNOR), and the anticipated listed budget for Fiscal Year 2003, neither of which were published with the Frog Decision.

The Court of Appeals

The Ninth Circuit found that the FWS cannot make a “warranted but precluded” finding without publishing a description of its reason-

The court of appeals held that the Frog Decision failed to satisfy the requirements set forth . . . for a “warranted but precluded” finding.

ing and data with the finding.⁷ Furthermore, case law in the Ninth Circuit clearly indicates that the circumstances under which the “warranted but precluded” finding may be issued are “narrowly defined.”⁸ In *Center for Biological Diversity v. Norton*, the court held that the FWS must show that it is “actively working on other listings and delistings and must determine and publish a finding that such work has resulted in pending proposals which actually preclude proposing the petitioned action at that time,” and “must determine and present evidence that [it] is, in fact, making expeditious progress in the process of listing and delisting other species.”⁹ In the Frog Decision, the FWS failed to make a determination regarding the expeditious progress in listing or delisting other species. The decision also failed to describe or evaluate the data or reasons why the Frog was

precluded from listing, despite finding that there are higher priority species precluding the listing of the Frog.

The court found that this was not a situation in which the agency’s path may be reasonably discerned. Requisite determinations cannot be absent from the decision when they are referred to in the administrative record. Such deficiencies in a “warranted but precluded” decision cannot be cured with previous or subsequent findings, regardless of whether they are published, if they are not part of the administrative decision itself or published together with it. The court was not able to review the agency’s decision because the agency failed to publish the documents upon which it relied.

Conclusion

The Ninth Circuit reversed the district court’s decision. The court of appeals held that the Frog Decision failed to satisfy the requirements set forth in 16 U.S.C. § 1533(b)(3)(B) for a “warranted but precluded” finding. Because the Frog Decision failed to satisfy the statutory requirements, the court of appeals refused to consider if the “warranted but precluded” decision was arbitrary and capricious. The court did not order the Frog to be listed, but only remanded for further proceedings.☺

Endnotes

1. 16 U.S.C. § 1533(b)(3)(B)(iii).
2. *Id.*
3. *Review of Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Recycled Petitions; Annual Description of Progress on Listing Actions*, 67 Fed. Reg. 40,657, 40,658 (June 13, 2002).
4. 16 U.S.C. § 1533(b)(3)(B).
5. *Id.* §§ 1533(b)(3)(B)(iii)(I) and (II).
6. *Center for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1099 (9th Cir. 2006).
7. *Id.* at 1102.
8. *Center for Biological Diversity v. Norton*, 254 F.3d 833, 838 (9th Cir. 2001).
9. *Id.* at 838.



Oil Company Cleanup Halted by Injunction

Marrero Hernandez v. Esso Standard Oil Co., 429 F. Supp. 2d 469 (D.P.R. May 2, 2006).

Terra Bowling, J.D.

In April 2006, Esso Oil Company began a remediation project at the site of an old service station in Puerto Rico. When residents filed suit alleging that the project was causing widespread health problems, the United States District Court for the District of Puerto Rico granted a preliminary injunction, forcing the company to stop the project.

Background

The site of the old gas station had been contaminated by underground storage tanks that were leaking in violation of several federal environmental statutes, as well as Puerto Rico nuisance and tort laws. To repair the damage, Esso planned to drill more than thirty holes on the contaminated land and to excavate the soil. The remediation process would have taken approximately four months.

Soon after drilling began, residents of La Vega Ward in Barranquitas, Puerto Rico, began complaining of gasoline odors and reporting dizziness, shortness of breath, nausea, and headaches. An Esso representative was sent to examine the complaints, but the company continued drilling for the next several days, prompting more residents to seek medical care. The residents sought a temporary restraining order, which was converted to a request for a preliminary injunction under Puerto Rico's nuisance statute.

Nuisance Statute

The district court noted that "a plaintiff seeking injunctive relief under the nuisance statute must show that the activities being carried out by the defendant, due to the manner in which they are

being carried out, transcend reasonable limits, and therefore impose a burden that exceed[s] that which he or she need bear."¹ In this case, the court found that the residents presented enough evidence to meet that test.

*. . . the company filed
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Several residents testified about the effect of the odors on themselves and family members, including children and the elderly. The residents were also able to introduce medical records confirming their symptoms. Although Esso claimed that the meter readings taken from the site did not show levels of concern, the court concluded that the company's activities constituted a nuisance, since the odors created "an obnoxious condition which is highly distasteful."² Additionally, the court concluded that since the excavation work would last for four months, the harm to the residents could be irreparable. The court granted the residents'

preliminary injunction, and the company was enjoined from further drilling activities.

Privileged Information

In July, the company filed a motion to have privileged evidence returned that had been inadvertently released to plaintiffs due to an “errant mouse click.”³ The court denied the motion, finding that the Esso waived its confidentiality privilege. The court came to this conclusion by using a “totality of the circumstances” test which “holds that inadvertent disclosure only constitutes a waiver if, in view of the totality of the circumstances, adequate measures were not taken to avoid the disclosure.” After examining factors such as the reasonableness of the precautions taken to prevent inadvertent disclosure, the amount of time it took the producing party to recognize its error, the scope of the production, the extent of the inadvertent disclosure, and the overriding interest of fairness and justice, the court held that the company had waived its confidentiality privilege.

New Evidence

In September, the oil company filed a motion for reconsideration of the injunction, claiming that the court did not hear evidence at the injunction hearing that was subsequently introduced by the company at another hearing. The evidence included documents with more technical details of the excavation plan. The court did not allow the introduction of the evidence, since the company had the opportunity to introduce the evidence at the preliminary injunction hearing.

The company also argued that the court should not have granted the injunction, since the matter was under the jurisdiction of the Puerto Rico Environmental Quality Board (PREQB). The court rejected that argument, noting that the PREQB

did not take adequate action after residents complained of health problems, there was a lack of coherent state policy for such a situation, and the agency did not object to the court’s proceedings during the evidentiary hearing.

Conclusion

The preliminary injunction enjoining the company from further drilling remains in effect, since the district court denied the oil company’s motions for reconsideration.☺

Endnotes

1. *Marrero Hernandez v. Esso Standard Oil Co.*, 429 F. Supp. 2d 469, 472 (D.P.R. 2006).
2. *Id.* at 472-473.
3. *Marrero Hernandez v. Esso Standard Oil Company*, 2006 U.S. Dist. LEXIS 47738 at *6 (July 11, 2006).

Photograph of clean-up machinery courtesy of ©Nova Development Corp.





Cruise Ship Liable for Minor's Claims

In re Complaint of Royal Caribbean Cruises, Ltd., 2006 U.S. Dist. LEXIS 77643 (D. Fla. Oct. 23, 2006).

Terra Bowling, J.D.

The United States District Court for the Southern District of Florida found that a release signed by a parent on behalf of his son did not exonerate a cruise company from liability stemming from a wave runner accident.

Background

During a cruise aboard the *Sovereign of the Seas*, Keith Howard and his son, Mark, participated in a day trip to Coco Cay, Bahamas. In Coco Cay, the Howards signed up for a guided wave runner tour led by Royal Caribbean Cruise (RCC) employees. Before taking the trip, Keith signed a waiver and release agreement for himself and Mark. The agreement contained language releasing RCC from liability for any injuries resulting from the use of the wave runner. The agreement also contained a provision

that prohibited participants from operating the watercraft within 100 yards of any shoreline.

While touring Coco Cay on the wave runner, the Howards crashed into an island. The Howards and RCC each claimed different causes of the accident. The Howards held the tour leader responsible for the crash, alleging that he led the group too close to the island, while RCC pointed to the Howards' failure to adhere to the tour's course and safety rules. It was unclear whether Keith Howard's failure to wear glasses during the tour contributed to the accident.

After the accident, Royal Caribbean brought a claim for exoneration, citing the release agreements signed by Keith Howard. The Howards filed claims against the cruise line, which then moved for summary judgment.

Waiver and Release

The court found that the release signed by Keith Howard was clear and unambiguous—and therefore enforceable. Keith Howard argued that his release became invalid when the tour

Photograph of cruise ships courtesy of ©Nova Development Corp.



leader took the group within 100 yards of the shore, violating one of the provisions of the release. The court rejected that claim, finding that the release clearly stated the safety rule and that when Howard signed the release, he agreed to abide by its provisions, regardless of the tour guide's actions.

The court held that the release signed on behalf of Mark was unenforceable. RCC cited cases upholding parental releases; however, the court distinguished that those releases involved nonprofit community-based activities, not private for-profit activities.

Liability Claims

Since the court found the waiver and release unenforceable against Mark, it examined his liability claims against RCC. The court rejected the claims Mark brought under the doctrine of unseaworthiness. The court agreed with RCC that the doctrine was limited to seamen and did not extend to a ship's passengers; therefore, Mark's claims of unseaworthiness had to be dis-

missed. The court did note that when examining the merits of Mark's claims in a separate exoneration proceeding, the court will examine whether acts of negligence or conditions of unseaworthiness caused the accident.

The Howards also claimed that a strict liability standard should govern the case, alleging that riding wave runners is an ultra-hazardous activity. The court, however, had already ruled that a negligence standard would govern the case. Mark also brought negligence claims under Florida statutory law, but the court found that Mark could not support those claims, since the suit was governed by substantive general maritime law.

Conclusion

The district court granted summary judgment to RCC with regard to Keith Howard's claims, but denied summary judgment with regard to Mark Howard's claims. The court will examine the merit of Mark's negligence claims in a separate action.✎

Rental Company, from page 11

Duty to warn

After the accident, Hodges filed a negligence action against Summer Fun, alleging that its employees had a duty to warn him of the hazards of wake jumping. The District Court for the Eastern District of Washington granted summary judgment to the company, finding that the dangers of wake jumping and operating a personal watercraft within 200 feet of another vessel are open and obvious dangers and that the company did not have a duty to warn its customers.

The Ninth Circuit first examined whether the dangers were in fact "open and obvious." The court adopted the definition of wake jumping as "crossing a wake at such a speed that the PWC will become airborne."² The court found that no reasonable minds could differ as to whether the dangers were open and obvious, concluding that it should be apparent to a person of ordinary intelligence that "...one might fall off a PWC before, during or after jumping a

wake or collide with another vessel or collide with another vessel while, during, or after jumping a wake."³

Conclusion

The Ninth Circuit affirmed the district court's grant of summary judgment. In a dissenting opinion, Judge Pregerson noted that "some wake jumping is dangerous and some is not" and that the obviousness of the danger depends on the factual circumstances of each case.⁴ He noted that in this case, the details of the events leading up to the crash were unclear; therefore the grant of summary judgment was in error.✎

Endnotes

1. *Hodges v. Summer Fun Rentals, Inc.* 2006 U.S. App. LEXIS 25443 at *6 (9th Cir. Oct. 12, 2006).
2. *Id.* at *3.
3. *Id.* at *4-5.
4. *Id.* at *10.

remanded the case back to the Sixth Circuit to apply a test where “only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right” are “adjacent to” such waters and covered by the CWA.² Justice Kennedy, writing the concurrence, viewed the “significant nexus” test to be the proper test and “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are navigable in fact or could reasonably be so made.”³ While the dissent disagreed with the judgment and would have given deference to the agency’s determination, Justice Stevens noted that “all four justices who have joined this [dissenting] opinion would uphold the Corps’ jurisdiction... in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied...”⁴

When no clear majority exists, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁵ In *United States v. Gerke*,⁶ the Seventh Circuit equated the narrowest opinion with the one least restrictive of federal authority to regulate. But the *Rapanos* plurality deems it just as plausible to conclude that the narrowest ground is the ground most restrictive of government authority “because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause.”⁷ The First Circuit settled on the idea that the narrowest grounds are simply understood as the “less far-reaching-common ground.”⁸ Basically, the less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would.⁹ But this standard is still difficult to apply to the facts of the Johnson case. In most situations, Justice Kennedy’s “significant nexus” test would be the least sweeping opinion. But there may be circumstances when a body of water has a slight “surface connection” to a navigable waterway but no “significant nexus” exists. Thus, Justice Kennedy’s “significant nexus” test would not be met but Justice

Stevens and the dissenters in *Rapanos* would uphold jurisdiction because it met the plurality’s test. Essentially, “Justice Kennedy would [be voting] against federal authority only to be outvoted 8-to-1.”⁹

In order to provide for all circumstances that may arise regarding the hydrological connection between a wetland and navigable waters, the First Circuit chose to follow Justice Stevens’ dissent in *Rapanos* and apply either the plurality’s “surface connection” test or Kennedy’s “significant nexus” test. It chose not to follow a sole opinion; but rather, find “common ground” shared by five or more justices. By applying either test, the First Circuit will ensure that federal jurisdiction exists such that all of the *Rapanos* majority would have supported such a finding. Regardless of the test applied, it would have the support of the four dissenters plus the plurality or Justice Kennedy. There will not be a situation where Kennedy’s test is applied and no jurisdiction is found even though a slight surface connection exists and Kennedy would have been outvoted by the plurality plus the dissent.

The First Circuit has remanded the Johnson case to see if either the plurality’s “surface connection” test or Kennedy’s “significant nexus” test can be applied.✎

Endnotes

1. See 33 U.S.C. §§ 1311, 1352.
2. *Rapanos v. United States*, 126 S. Ct. 2208, 2226 (2006).
3. *Id.* at 2236.
4. *Id.* at 2265.
5. *Marks v. United States*, 430 U.S. 188, 193 (1977).
6. 2006 WL 2707971 (7th Cir. 2006).
7. *United States v. Johnson*, 2006 U.S. App. LEXIS 27042, at *19 (1st Cir. 2006).
8. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001).
9. *Johnson*, 2006 U.S. App. LEXIS 27042 at *21.
10. *Id.* at *15.

including members of Congress, state and local government representatives, environmentalists, recreational boaters, local businesses, and members of the general public.

While some of the comments showed strong support for “the Coast Guard’s need to be trained in order to carry out its law enforcement and homeland security missions,” many expressed concerns about the safety, notification, and environmental impacts of the exercises. The comments on public safety included concerns about how far the bullets could travel and whether they might ricochet off the surface of the water. Some comments expressed concern that small crafts and vessels without radio access may not be notified that the live-fire exercises were taking place. Other groups were concerned that lead from the ammunition would make its way into the public water supply. Several remarks also “raised concerns about the number, size, and location of the proposed

safety zones and whether they would impede recreational and commercial activity, including tourism.”

Future Plans

Although the Coast Guard withdrew the NPRM, it left open the possibility of a future notice of proposed action for live fire exercises in the Great Lakes, reasoning “[t]he Coast Guard must be trained to meet all threats and all hazards. In order to be proficient, the Coast Guard must train in the maritime environment in which it operates.”

If the Coast Guard decided to pursue non-emergency training exercises on the Great Lakes it would publish a notice of its proposed action, allow the public an opportunity to comment, and publish a final rule. In the meantime, members of Coast Guard boat crews will complete their training outside of the Great Lakes.☺

Photograph of Lake Superior's North Shore by Dave Hansen, courtesy of Great Lakes EPA.





International Law Update

Below is a summary of the coastal and marine-related international law developments in 2006.

Mexico Bans Marine-Animal Trade

(January 2006)

Mexico has passed a law banning the import and export of marine mammals and primates, such as whales, dolphins, sea lions, seals, and manatees, unless for scientific purposes. The law also bans the import and export of products derived from marine mammals.

New Maritime Labour Convention

(February 2006)

The International Labour Organization has adopted a new charter outlining rights for the nearly 1.2 million seafarers who work for the world's shipping industry. The Convention contains provisions such as conditions of employment, hours of work and rest, accommodation, medical care, and health protection. A maritime labour certificate may now be issued to ships whose flag states guarantee that the ships comply with the Convention.

WTO Weighs in on U.S. Dumping Calculations

(April 2006)

The World Trade Organization (WTO) Appellate Body (AB) issued a report on the case filed by the European Communities, "United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")." The AB affirmed a panel report finding that the zeroing methodology used by the U.S. in original antidumping investigations is inconsistent with Article 2.42 in the WTO Anti-Dumping (AD) Agreement. The AB reversed the panel's finding that the zeroing applications in the administrative review were not inconsistent with the AD agreement. In May, the Dispute Settlement Body adopted the both the Appellate Body report and the amended panel report.

Japan Loses Vote at Annual IWC Meeting

(June 2006)

The International Whaling Commission's annual meeting was held in the Caribbean state of St. Kitts and Nevis. During the convention, Japan failed in its attempt to capture a majority vote on several measures that would replace the current whaling moratorium with more relaxed regulations for commercial whaling.

Anti-Piracy Agreement Reached in Asia

(September 2006)

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia entered into force, signifying the first intergovernmental agreement to encourage cooperation against piracy and armed robbery. The Agreement contains provisions regarding information sharing that will ensure the development of more effective prevention measures.☺

2006 Federal Legislative Update



The following is a summary of federal legislation related to coastal, fisheries, water, and natural resources enacted during 2006 by the 109th Congress.

109 Public Law 226 – Coastal Barrier Resources Reauthorization Act of 2005 (S. 186)

Provides appropriations through the year 2010 for the U.S. Fish and Wildlife Service to carry out the Act. Requires the Secretary of the Interior to provide a report to Congress on the digital mapping pilot project in the John H. Chafee Coastal Barrier Resources System units and other protected areas.

109 Public Law 234 – Michigan Lighthouse and Maritime Heritage Act (S. 1346)

Provides for the creation of federal, state, and local partnerships to repair and preserve Michigan lighthouses. Instructs the Interior Department to locate funding sources that will help communities implement protection measures.

109 Public Law 241 – Coast Guard and Maritime Transportation Act of 2006 (H.R. 889)

Authorizes appropriations for the Coast Guard for fiscal year 2006 and makes changes to other laws administered by the Coast Guard, such as changing the limits of liability for vessels under the Oil Pollution Act of 1990.

109 Public Law 294 – Partners for Fish and Wildlife Act (S. 260)

Authorizes the Department of the Interior, through the Fish and Wildlife Partners Program, to provide technical and financial assistance to private landowners to restore, enhance, and manage private lands to improve fish and wildlife habitats.

109 Public Law 304 – Title 46, U.S. Code – Shipping (H.R. 1442)

Codifies the uncodified portion of Title 46, U.S. Code – Shipping, except the portion regarding the Carriage of Goods at Sea Act.

109 Public Law 326 – Great Lakes Fish and Wildlife Restoration Act of 2006 (S. 2430)

Reauthorizes the Great Lakes Fish and Wildlife Restoration Act, which was enacted in 1990 and re-authorized in 1998. Implements recommendations in the Great Lakes Fishery Restoration Study by the United States Fish and Wildlife Service.

See Federal, page 22

109 Public Law 347 – Security and Accountability for Every (SAFE) Port Act of 2006 (H.R. 4954)

Codifies the Customs Trade Partnership Against Terrorism and the Container Security Initiative programs. Modifies the Transportation Worker Identification Credential (TWIC) program to require the timely issuance of TWIC cards to maritime employees.

109 Public Law 360 – National Fish Hatchery System Volunteer Act of 2006 (H.R. 5381)

Authorizes the Secretary of the Interior to accept property, volunteer services, and funds donated by nonfederal agencies for the benefit of the National Fish Hatchery System.

109 Public Law 424 – Tsunami Warning and Education Act (H.R. 1674)

Expands current Pacific Tsunami Warning System through \$159 million over five years. Authorizes NOAA forecasting and warning system.

109 Public Law 449 – Marine Debris Research, Prevention, and Reduction Act (S. 362)

Establishes programs through NOAA to identify, reduce, and prevent marine debris.

109 Public Law 479 – Magnuson-Stevens Fishery Conservation and Management Act (H.R. 5946)

Reauthorizes the Act, includes amendments to improve monitoring and compliance for high seas fisheries or fisheries governed by international fishery management agreements.☺

part of the contract.”¹⁴ Under this instruction, the real issue was whether the price promised to be paid was the competitive bay price or the posted price. Given all of the evidence, the jury determined that ISA promised to pay the competitive bay price.

Attorney’s Fees

Pursuant to Civil Rule 82, the prevailing party is entitled to attorney’s fees.¹⁵ The fee award may be adjusted at the judge’s discretion. Based on the work performed and the benefit to ISA for having a class action rather than the expense of multiple trials, the trial court increased the attorney’s fees by \$15,000. ISA failed to establish that the trial court abused its discretion through this increase, so the trial court’s decision was upheld.

Conclusion

The Alaska Supreme Court affirmed all of the lower court’s rulings. As a result, ISA will be required to pay fishers an additional \$0.17 per

pound for salmon ISA bought in 2000 plus attorney’s fees.☺

Endnotes

1. *International Seafoods of Alaska, Inc. v. Bissonette*, 2006 Alas. LEXIS 127 at *2 (Alaska Sept. 1, 2006).
2. *Id.* at *2-3.
3. *Id.* at *4.
4. *Id.* at *7-8.
5. *Id.* at *9.
6. *Id.* at *10.
7. AK R. Civ. Pro., Rule 23.
8. *International Seafoods of Alaska*, 2006 Alas. Lexis 127 at *18.
9. *Id.* at *19.
10. *Id.* at *24.
11. *Id.* at *26.
12. *Id.* at *32.
13. *Id.* at *32-33.
14. *Id.* at *34-35 (emphasis omitted).
15. AK R. Civ. Pro., Rule 82.

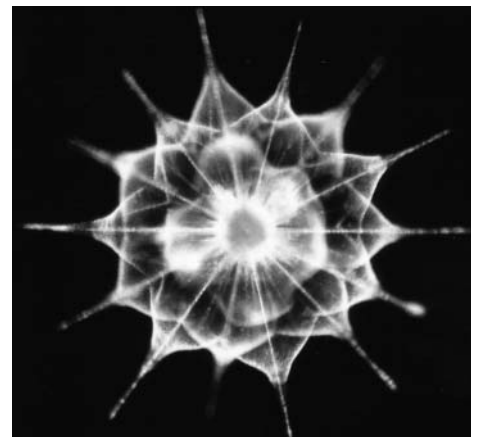
Coast to Coast And Everything In-Between

Although it's estimated that Minnesota has lost more than half of its original wetlands since the mid-1800s, no one knows the exact number of remaining wetlands in the state and the rate at which the wetlands are disappearing each year. To correct the deficiency, the Minnesota Department of Natural Resources has developed a new plan to measure the number, quality, and loss rate of the state's wetlands. The \$1.35 million project calls for mapping 4,990 randomly selected square-mile plots over three years. The plan is intended to provide a comprehensive wetland assessment, monitoring, and mapping strategy to help lawmakers and regulators make decisions regarding the state's wetlands.

A district court judge dismissed an admiralty case filed by a tourist against her travel agent after she was involved in a jet skiing accident in Mexico. The injured woman and her husband alleged that the travel agent had a duty to warn them of the dangers of jet skiing in the waters of Mexico, since it had mailed them a brochure advertising the trip.

When the crew of the *Ybor City* spotted a man aboard the barge it was towing, they assumed that they had a stowaway and called the Coast Guard. Russell Bolton, in fact, was not a stowaway, but had jumped onto the barge after his sail boat collided with the barge. The Coast Guard handcuffed Bolton until they had assessed the situation, but later sent him to Jacksonville, Fla., on a rescue boat.

The Census of Marine Life has released its annual report, which describes new undersea creatures discovered by scientists in 2006. Nearly two-miles deep in the Atlantic, scientists found shrimp living around a vent releasing near-boiling water into the sea. Other surprising findings included the discovery of a type of shrimp that were thought to be extinct, a fish school the size of Manhattan located off the New Jersey shore, a four-pound rock lobster off the coast of Madagascar, and a new "furry" crab discovered near Easter Island. The census is supported by international governments, divisions of the United Nations, and private conservation organizations.



Photograph of single-celled eukaryotic microbe by L. Amarel Zettler courtesy of The Census of Marine Life.

Around the Globe

In November, a homemade submarine carrying three tons of cocaine was seized while sailing 100 miles off the coast of Costa Rica's Cabo Blanco National Park. The sub, which was traveling about six feet beneath the surface, was detected by three plastic pipes moving through the water. The U.S. Coast Guard, U.S. Drug Enforcement Agents FBI, and Columbian officials aided Costa Rican Authorities in capturing the four men in the sub. The 50-foot craft was constructed with wood and fiberglass. Authorities estimated that the submarine probably had not traveled very far.☺



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