



WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Alabama Loses Fight for Gas Reserve Compensation

State of Alabama v. U.S. Department of Interior, 84 F.3d 410 (11th cir. 1996).

By John A. Duff, J.D., LL.M.

The Eleventh Circuit Court of Appeals recently held that an amendment to the Outer Continental Shelf Lands Act (OCSLA) does not require compensation to be paid by the federal government to a state for drainage of oil and gas reserves that straddle the federal-state boundary. The ruling also allows the Department of Interior (DOI) to authorize production on straddling reserves if DOI has

made good faith efforts to reach a cooperative development agreement with a state.

In the Gulf of Mexico there are approximately 150 known oil and gas reserves that lie partially under federal submerged lands and partially under state submerged lands. Disputes have arisen over the years regarding the manner in which the federal government should develop these reserves and to what extent adjoining coastal states should be compensated. The OCSLA

governs the manner in which the federal government leases most offshore lands for oil and gas extraction. Congress has amended the OCSLA from time to time in an attempt to reduce conflicts between the federal and state governments.

The Rule of Capture

Under the common law "rule of capture" the owner of land has a right to capture all the resources lying thereunder, including those resources that

See ALABAMA - page 2.

Artificial Reefs: Creating Habitat in the Gulf of Mexico

By Chris Harrison

Introduction

In 1984 Congress enacted the National Fishing Enhancement Act (hereinafter "NFEA"). The NFEA consolidated several decades of localized laws in response to overfishing and to maximize the potential benefits of artificial reefs. Under the NFEA, the federal government is responsible for

issuing permits, providing overall guidance, and providing information on artificial reefs. Federal guidance is further set out in the National Artificial Reef Plan (hereinafter "Plan"), a supplement to the NFEA. State governments are responsible for carrying out the goals of the NFEA in both state and federal waters by

See REEFS - page 4.

Contents

Alabama Loses Fight for Gas Reserve Compensation	1
Artificial Reefs: Creating Habitat in the Gulf of Mexico	1
Water Management District Immune from Suit	8
Lagniappe	11

ALABAMA from page 1.

migrate there from beneath another's land.

The rule leads to inefficient uses of oil and gas reserves that cross property lines since developers on both sides are motivated to drain these straddling reserves as quickly as possible to gain the greatest economic benefit. As a result, long-term recovery of the reserve is jeopardized. Most states have abandoned the "rule of capture" by enacting conservation mechanisms such as well spacing rules and production regulations.¹

Noting the particular problem with the federal and state submerged land areas and the resources that lie beneath them, Congress amended Section 5(j) of the OCSLA² in 1990, effectively qualifying the rule of capture regarding federal oil and gas reserves that straddle state-federal boundaries. Congress called on the Secretary of the Interior to:

"prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary."³

Congress did not specify the methods to effect such "cooperative development." The Eleventh Circuit ruling came in a case of first impression on the interpretation of Section 5(j).

Alabama v. DOI

The Department of Interior authorized Mobil Oil to extract natural gas from a federal lease tract over a reserve straddling the Alabama-Federal border. Mobil produces natural gas from four wells that tap into the reserve.

Alabama brought an action in federal district court seeking compensation for drainage of the reserve and requested the court to hold any royalties paid by Mobil to the federal government until a cooperative development agreement was reached.

Alabama argued that Section 5(j) mandated compensation for drainage of the straddling reserve and that the provision prohibited DOI from authorizing production from the reserve absent an agreement between the governments.

The district court did not read Section 5(j) to require royalties to be paid as compensation for drainage, but the district court did interpret the provision to require a cooperative development

agreement between the federal and state governments as a prerequisite to federal authorization to produce in the area. Accordingly the district court ordered federal royalties held until such an agreement was constructed. Both parties appealed.

Since this was a case of first impression regarding the interpretation of Section 5(j), the Court of Appeals ordered a full review of the legal issues. The Appeals Court addressed two questions: 1) whether Section 5(j) required compensation be paid to states for drainage of oil and gas reserves straddling federal and state submerged lands; and, 2) whether Section 5(j) mandated a cooperative agreement as a prerequisite to DOI authorization of oil and gas production on federal lands over straddling reserves.

Compensation for Drainage

Alabama argued that Section 5(j), in calling on DOI to enter into cooperative development agreements with states, effectively requires DOI to construct a compensation arrangement for the drainage of straddling reserves. The Department of Interior responded that compensation for drainage of these areas was governed

cont.

ALABAMA from page 2.
exclusively by another
provision of the OCSLA,
namely Section 8(g).⁴

Section 8(g) requires DOI
to pay adjoining coastal states
27 % of the royalties it
receives from any federal lease
located in the "8(g) zone."
The zone includes a three mile
band of federal submerged
lands extending seaward from
the state's submerged lands
boundary. This share is
required even where a federal
lessee does not drain oil or gas
from state submerged lands.

The Appeals Court
reviewed the legislative
history of Section 5(j) and in
light of that provision's
purposeful omission regarding
compensation, ruled that
Section 8(g) was intended as
the exclusive method of
compensating states for
drainage of reserves near or
straddling the federal-state
border. The Court then turned

to the "cooperative develop-
ment" requirement under
Section 5(j).

Cooperative Development

At the district court level,
Alabama had successfully
argued that Section 5(j)
mandated a "cooperative
development agreement" as a
prerequisite to federal
authorization to produce from
the federal side of a straddling
oil or gas reserve.

On appeal, DOI argued that
it had entered into good faith
efforts to construct such an
agreement with the state, but
that it had been rebuffed by
the state. DOI argued that if
Section 5(j) were to be read as
Alabama contended, states
would effectively be able to
hold production of oil and gas
on straddling reserves hostage
since DOI would be under an
obligation to enter into a
cooperative agreement but
states would not. This would

effectively create an in-
equitable negotiating process,
argued DOI, something that
Congress had not intended.

The Court of Appeals
agreed and reversed the
district court on this issue.
The Appeals Court noted that
while Section 5(j) calls for a
cooperative agreement, the
provision "is not susceptible to
a literal reading because it is
simply impossible to order two
parties to enter into an
agreement if they do not
agree."⁵

Endnotes

¹ Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 403 (1995).

² Section 5(j) of the OCSLA is codified at 43 U.S.C. 1334 (j).

³ Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 § (j)(2).

⁴ Section 8(g) of the OCSLA is codified at 43 U.S.C. 1337 (g).

⁵ 84 F.d. 410, 417 (adopting the analysis of the *Tenth Circuit in Ponca Tribe v. State of Oklahoma*, 37 F.d. 1422, 1435 (10th Cir. 1994)).

Marr Named Associate Director for Programs

Dr. John C. A. Marr will assume the position of associate director of programs for the Mississippi-Alabama Sea Grant Consortium on November 1, 1996. An environmental toxicologist, Marr comes to MASGC from Hagler Bailly, Inc., an environmental science and natural resource consulting firm in Boulder, Colo.

As associate director of programs for MASGC, the 32-year-old native of Memphis, Tenn., will help lead the consortium's efforts in developing and managing university-based programs in marine research, education, and advisory services in Mississippi and Alabama.

"Dr. Marr is a very capable scientist and manager who has great potential for growth and development in our consortium. He will indeed be an asset to the entire consortium and to the mission of Sea Grant," Dr. Jesus Tupaz, executive director, said.

The editorial and research staff of **WATER LOG** welcome Dr. Marr and his family to the Sea Grant community.

REEFS from page 1.

funding artificial reefs, promoting their development, and maintaining existing reef sites.

This article outlines the national standards for artificial reef development, embodied by the NFEA and the Plan. It also describes the artificial reef program of each state bordering the Gulf of Mexico and examines methods of constructing artificial reefs. The final section analyzes the benefits and drawbacks of these reefs.

National Fishing Enhancement Act

The NFEA provides a foundation for the creation of a national artificial reef program. It establishes standards to:

- enhance fishery resources;
- facilitate access for recreational and commercial fishing;
- lessen conflicts between competing users;
- minimize environmental risks;
- follow principles of international law;
- prevent unreasonable obstructions to navigation; and,
- promote consistency with the Artificial Reef Plan.¹

National Artificial Reef Plan

The NFEA mandated the creation of a National Artificial Reef Plan.² The Plan, available from the National Marine Fisheries Service, serves three major functions. First, it provides guidance to individuals, organizations, and government agencies on technical aspects of

What is an Artificial Reef?

An artificial reef is defined under federal law as:

"a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities."

50 F.R. 30479 (July 26, 1985) amending 33 C.F.R. § 322.2(g).

artificial reef planning, design, siting, construction, and management for effective artificial reef development.³ Second, it serves as a reference for Federal and State agencies involved in artificial reef permitting and ensures that the national standards and objectives established by the NFEA are met.⁴ For example, the Secretary of the Army must consider the environment, human health, and property when issuing an artificial reef permit.⁵ Third, the Plan provides a framework for more localized reef plans and encourages additional development.⁶

While the NFEA contains general guidance, the Plan provides more specific information on developing artificial reefs. The Plan includes criteria for siting artificial reefs,

design criteria, permit compliance information, management methods, and ideas for increasing artificial reef development.⁷ Additionally, the Plan calls for continuing research into artificial reef technology and management.⁸

State Artificial Reef Plans

State governments develop artificial reef programs on the local level.⁹ Although the federal government provides guidance and oversight, each state develops its own methods for developing, promoting, maintaining, and monitoring individual reef sites. States have authority over state waters and play a major role in Federal artificial reef development.¹⁰ Additionally, each state must provide the funding for its reef program.

Alabama

Alabama has one of the most extensive artificial reef building programs in the nation. The program, the first of its kind in the Gulf of Mexico, began in 1954 with the sinking of 250 car bodies.¹¹ Alabama's program has since grown to include several thousand individual reefs. The Marine Resources Division of the Alabama Department of Conservation and Natural Resources administers the state's artificial reef program. A regional permit issued by the Corps of Engineers under Section 10 of the Rivers and Harbors Act

cont.

designates three ocean areas for reef development. This regional permit approves certain areas that are suitable for artificial reef development. These areas, located in federal water off Alabama's coast, consist of the Don Kelly North Reef, the Don Kelly South Reef, and the Hugh Swingle Reef.¹²

Natural reefs and their accompanying array of species were virtually nonexistent in Alabama waters. The terrain under the nearshore waters of the Gulf of Mexico is relatively flat, and therefore inhospitable as fish habitat. Artificial reefs attract large numbers of fish.¹³ As a result, Alabama has been dubbed the "Red Snapper Capital of the World," providing the highest catch rate of red snapper in the Gulf of Mexico despite its relatively small coastline.¹⁴

Texas

In 1989, the Texas legislature formally adopted an artificial reef program.¹⁵ The Texas program sets out general standards for artificial reef permitting, as well as reiterating standards similar to those found in the national Act.¹⁶ The legislature also directed the Texas Department of Wildlife and Parks to create a state artificial reef plan, which provides more specific artificial reef guidelines.¹⁷

The Texas Parks and Wildlife Department has created over twenty artificial reefs in the Gulf of Mexico. These range in size from small clusters to large groups of several abandoned oil

STEPS IN THE PERMITTING PROCESS

1. Proponent submits permit application to the Army Corps of Engineers, along with description, drawings of the reef, its location, and its elevation.
2. Proponent submits permit to State and/or local government (if required).
3. Corps evaluates the permit in light of the NFEA and Artificial Reef Plan, § 404 of the CWA, § 10 of the Rivers and Harbors Act, the Coast Guard navigational regulations, the National Environmental Protection Act and other applicable federal laws.
4. Public comment period of 15 to 30 days.
5. Process is expedited if project falls under a general permit (an area pre-approved by the federal government for artificial reef building and which is the case for much of the Gulf of Mexico)
6. Corps either approves or denies the permit.

rigs. Texas uses ships, oil rigs, concrete, automobiles, and other materials to create their reefs. Oil companies can donate their abandoned rigs to the state for use as artificial reefs after paying one half the savings realized by not having to dispose of the platform on land. Artificial reefs in Texas attract numerous recreational divers, marine scientists who study reef organisms, and recreational and commercial fishermen.

Louisiana

The Louisiana Fishing Enhancement Act of 1986 governs Louisiana's artificial reef program.¹⁸ That program, like most other state programs, mirrors the national Act and calls for the development of a state artificial reef plan. The Louisiana law also establishes an artificial reef development fund which holds all grants, donations,

and other money to be used for artificial reefs. Louisiana's fishing industry benefits tremendously from artificial reefs. In fact, over 70% of all recreational salt-water fishing excursions travel to artificial reefs or standing oil rigs.

Florida

Florida established an artificial reef program in 1990.¹⁹ The state's Department of Environmental Protection administers the program, which provides grant money to local coastal governments for construction of artificial reefs. Coastal counties have built hundreds of artificial reefs all along Florida's coastline. Local dive clubs and fishing organizations also help fund and build artificial reefs. Many reefs in Florida are made from concrete balls that are specially

See REEFS page 6.

REEFS from page 5.

formulated to encourage biological development.²⁰ Reef developers also use tanks, ships, barges, retired planes, and concrete construction rubble.

Mississippi

There is no formal artificial reef program in Mississippi. However, the Army Corps of Engineers, the Mississippi Department of Environmental Quality, and the Mississippi Department of Marine Resources oversee individual reef projects. Proponents wishing to create artificial reefs must apply to the Army Corps of Engineers for an individual permit. A company called Mississippi Gulf Fishing Banks, Inc., has placed nearly twenty artificial reefs around Mississippi's coast.²¹

Types of Artificial Reefs

Reef designs vary as much as the ecosystems in which they are built. Reef builders must take into account the function of the reef, the compatibility with the proposed site, the durability of the reef, and the availability of reef materials. Sometimes a combination of different reef materials and designs provide the best alternative.

Artificial reef developers use many different materials to build reefs. Durability, availability, and cost are key factors. Ships provide a readily available source of reef material. Hatches must be welded open and holes must be cut in enclosed spaces for

circulation and safety. Cars, schoolbuses, and other vehicles comprise a substantial source of reef material.

The U.S. Army has established a program called "Reef-Ex" which places obsolete military tanks in the Gulf. Vehicles must have all oil and fluids drained and all electrical components removed. Used tires are another cheap and durable source of artificial reef material, but they must be filled with ballast and tied together. Some states, such as California and Washington, have banned the use of tires as reef material. Concrete such as construction rubble, formed concrete shapes, and culverts also create durable and stable artificial reefs.

Abandoned offshore oil and gas platforms provide another source of artificial reef material. Although some conservationists argue that the explosives used to remove these rigs harm endangered or threatened species, the National Marine Fisheries Service has authorized the incidental take of some species in removing oil and gas platforms.²²

Regardless of the material used, reef designs should allow adequate water circulation to avoid stagnant water and allow refuge for organisms. Larger spaces will correspondingly allow room for larger creatures. Profile, or the height of the reef, determines what species will be attracted to the reef. Low profile reefs attract bass, snappers, groupers, and certain shellfish. High profile reefs attract jacks,

mackerel, and barracuda. The footprint, or area the reef covers, depends upon what type of material is being used, the amount of material available, and the target species.

Benefits

Artificial reefs provide many environmental benefits. They enhance fish habitat by providing shelter for many types of organisms. Fish feed on these organisms, and larger fish feed on smaller fish. However, the question of whether artificial reefs increase fish population or just divert them from other fishing areas has not been conclusively answered. A 1972 study did show that when an artificial reef was placed near a natural reef, the artificial reef attracted an equal amount of fish as were located on the natural reef, without decreasing the population on the natural reef.²³

Artificial reefs also provide other benefits. The creation of a new reef can mitigate habitat lost to development. Reef construction can also provide a cheaper, more beneficial method of disposal for waste such as concrete construction rubble, used tires and abandoned oil rigs. Rather than filling costly landfill space, the materials can provide helpful reef habitat. In certain states, companies donating materials must pay half its savings to the state to maintain the reef.²⁴ Donors of reef material, as long as they follow the permit requirements, are

cont.

REEFS from page 6.

absolved of any liability resulting from the material. If the permittee deviates from the permit, however, or uses harmful or toxic material, they could still face liability for any harm.

Drawbacks

Not everyone agrees that artificial reefs are beneficial. Shrimp trawlers claim that their nets become entangled in artificial reef material. Proponents of artificial reefs counter by stating that careful selection of materials, placement, and marking of artificial reefs can alleviate this problem. However, some commercial fishermen claim that illegal dumping outside approved waters continues in productive shrimping grounds.²⁵ Illegally created artificial reefs may interfere with other activities such as navigation and trawling, and damage existing natural habitats.²⁶

Another concern is the long term environmental effects of materials used for artificial reefs. Federal and state regulations in the United States require that all pollutants be removed before any objects can be placed as artificial reef material. These regulations require the consideration of environmental impacts in determining whether to allow construction of an artificial reef.²⁷ Although there is some concern over potential environmental harm, there has been no concerted effort to stop the creation of artificial reefs in the Gulf of Mexico.

Conclusion

Based on scientific studies, the increased interest in reef development, and widespread support, the use of artificial reefs seems a positive step towards increasing fishing productivity in the Gulf of Mexico. From Florida to Texas, artificial reefs also attract recreational divers, anglers, and marine scientists. In addition, artificial reef development is a cost-effective way for many companies to dispose of otherwise useless waste in an environmentally beneficial manner. With federal oversight and the development of more comprehensive state programs, artificial reefs are becoming more and more prevalent. Absent evidence that artificial reefs cause harm to the environment, their creation is only likely to increase.

Endnotes

¹ 33 U.S.C. § 2102 (1988).

² 33 U.S.C. § 2103 (1988).

³ National Artificial Reef Plan, compiled by Richard B. Stone (1985), at 5-36 [hereinafter Plan].

⁴ Id. at 2-4, 26-28.

⁵ 33 U.S.C. § 2104(b)(1) (1988).

⁶ Plan at 29-38.

⁷ Plan at 5-36.

⁸ Id. at 36-38.

⁹ Id. at 3.

¹⁰ Plan at 4.

¹¹ Richard B. Stone, History of Artificial Reef Use in the United States, published in *Artificial Reefs: Marine and Freshwater Applications*, edited by Frank M. D'Itri (1985) at 5 [hereinafter

Reef Use].

¹² Department of the Army Permit No. MDOFR91-00557-I (February 5, 1992).

¹³ Bill Schulz, Davey Jones' Junkyard, The Associated Press, May 1, 1995.

¹⁴ John Phillips, Tanks for the Reef, Birmingham Post-Herald, February 22, 1996.

¹⁵ V.T.C.A. Parks and Wildlife Code § 89.001-89.004 (1991).

¹⁶ See V.T.C.A. Parks and Wildlife Code §§ 89.002-89.004, 89.021-89.023 (1991).

¹⁷ V.T.C.A. Parks and Wildlife Code § 89.024.

¹⁸ La. R.S. §§ 56:639.1-56:639.10 (1987).

¹⁹ Fl. St. Ann. § 370.25 (1988).

²⁰ Lane Kelley, Sunken Treasure, Sun-Sentinel Ft. Lauderdale, August 7, 1996.

²¹ Telephone interview with Larry Goodwin, Project Manager (October 15, 1996).

²² See 50 CFR 228 (October 12, 1995).

²³ Reef Use, *supra* at 7.

²⁴ Robert Corzine, From Rigs to Reefs, Financial Times, October 20, 1995.

²⁵ Statement of Chris Nelson, vice-president, Bon Secour Fisheries, before the Fisheries, Wildlife and Oceans Subcommittee of the House Resources Committee on the Reauthorization of the Magnuson Fishery Conservation and Management Act, February 23, 1995.

²⁶ Plan at 2.

²⁷ Plan at 26-27.

Waste Management District Immune From Suit

PYCA Industries v. Harrison County Waste Water Management District, 81 F.3d 1412 (5th Cir. 1996).

by **Michael L. McMillan**

Introduction

The Fifth Circuit Court of Appeals recently ruled that the Harrison County Wastewater Management District (Management District) is immune from tort suits. The ruling stems from a breach of contract action and tortious interference action brought against the Management District by an electrical contracting company.

The Mississippi Gulf Coast encompasses three counties and provides an invaluable resource in terms of tourism, economic expansion, and housing development all of which hinge on the availability of clean, safe water.

Despite local efforts to maintain proper wastewater control, the rapid increase in the coastal population and business expansion required a better wastewater management system. While the populated coastal cities were using the Gulf of Mexico for wastewater dispersment, the smaller landlocked communities were developing with inadequate water treatment facilities.

In an effort to prevent the permanent pollution of the surrounding waters, the

Mississippi Legislature passed the Harrison County Wastewater Management Act in 1982¹ to establish an organized and efficient method to protect the water resources of the coastal counties. In creating this efficient Wastewater Management District, the legislature vested the Management District with the authority to collect taxes, enter into contracts, and to sue or be sued. An electrical contractor, PYCA Industries, successfully argued in federal district court that the Management District should not receive absolute immunity from tort claims. The Wastewater Management District appealed and the Fifth Circuit reversed.

Mississippi Sound and Wastewater Management

The Mississippi Legislature created the Harrison County Wastewater Management District to alleviate the increasing water pollution concerns affecting the Mississippi Sound.² Noting that the inadequate collection and treatment of wastewater was creating a critical health hazard to the people of Mississippi, the legislature devised the Management

District as the best method to address the problem, both for planning and financial reasons.³ Besides benefiting the human population, the establishment of the Management District aimed to protect the marine resources of the Mississippi Gulf Coast.⁴

Acting under the authority of the Mississippi Air and Water Pollution Control Law⁵ and the Federal Water Pollution Control Act⁶, the legislature granted the Management District the ability "to plan, acquire, construct, finance, develop, own, operate or maintain wastewater collection and treatment facilities and to apply and contract" for grants and other funds.⁷ In proscribing the parameters of "pollution," the legislature granted wide latitude in its definitions of substances affecting marine and aquatic wildlife and thus gave the Management District broad control over various types of water pollution.⁸

Fifth Circuit Review

The litigation underlying this case rests on breach of contract and tortious interference claims by an electrical contractor company,

PYCA Industries (PYCA). In an effort to save the Management District construction costs on the West Biloxi Wastewater Treatment Facility, PYCA proposed contract changes which provided substantial monetary savings to the Management District.⁹ After initial rejection by the project engineer, the Management District accepted the proposed changes. These changes lessened the monies owed to PYCA by the Management District and it is the amount of this reduction in payment to PYCA that is the underlying basis for this litigation is based.¹⁰

In pursuing its claim against the Management District, PYCA had two crucial elements to prove. First, that the Management District was not an "alter-ego" of the State of Mississippi and thus a party for diversity jurisdiction purposes.¹¹ Second, PYCA had to prove that sovereign immunity did not extend to the Management District.¹² In addressing this claim the court relied on three fundamental Mississippi cases¹³ all of which shaped the doctrine of sovereign immunity over the past fourteen years.

Diversity Jurisdiction

The law in this area is clear: a State, thus an alter-ego, is not a "citizen" for diversity jurisdiction purposes.¹⁴ Based on this law, the Management District argued that it was indeed an alter-ego of the State of Mississippi and thus not reachable by PYCA on diversity grounds.¹⁵ To arrive at the alter-ego status, the Fifth Circuit employed a balancing test, first used in 1983, to decide if the Management District achieves such status.¹⁶

In *Tradigrain v. Mississippi State Port Authority*, the court focused on: (1) whether state statutes and case law characterize the agency as an arm of the state; (2) source of the entity's funding; (3) degree of local autonomy; (4) primary concern of the entity being local or statewide; (5) authority to sue and be sued in its own name; and, (6) right to hold and use property.

Upon balancing the Tradigrain factors, the court refused to extend an alter-ego status to the Management District.¹⁷ The Fifth Circuit Court of Appeals held that while the facts in Tradigrain pointed in the favor of such an alter-ego extension, the factors weighed against such an extension in the instant case.¹⁸

Sovereign Immunity

In a separate argument the Management District argued that the Mississippi law of sovereign immunity provided it with a complete shield from lawsuits. In sifting through Mississippi's judicial and legislative tug-of-war over sovereign immunity, the Court began with the landmark 1982 case of *Pruett v. City of Rosedale*.¹⁹ In *Pruett*, the Mississippi Supreme Court struck down the judicial doctrine of sovereign immunity after an analysis of the inherent inequalities between the doctrine and the American principle of equality before the law. The Court elaborated that it would be "[u]njust" to permit the State to say "we are the sovereign king and you do not have a claim for your injuries received through no fault of yours."²⁰ However, because of legislative extensions²¹ and the 1992 case of *Presley v. Mississippi State Highway Comm'n*,²² a rather unique law developed to govern the period after *Pruett* and prior to *Presley*.²³ Under *Presley* the state, or its agencies, are exempt unless such exemption is specifically waived by statute. Although the *Presley* court reaffirmed

its decision in *Pruett*, it held that the period between the two cases, 1982-1992, would be governed by the sovereignty immunity law as it existed before *Pruett*. Accordingly under Enabling Act § 4, enacted in 1982, the Management District was created as a subdivision of the State, and thus exempt from tort suit.²⁴

While recognizing sovereign immunity protection, the Appeals Court noted that the Management District could have waived its immunity to the extent it had purchased insurance to cover potential liability. However, the Management District's insurance did not extend into the areas PYCA Industries sought to explore, and thus the Management District waived none of its immunity for purposes of this lawsuit.²⁵

Conclusion

The Fifth Circuit held that based on the Management District receiving the protection of sovereign immunity and the absence of

any applicable insurance, the Harrison County Wastewater Management District was immune from the present action and accordingly dismissed PYCA's claim for damages.

Endnotes

¹ Senate Bill 2833, Chap. No. 885, Local and Private Laws of the State of Mississippi (1982).

² Senate Bill 2833, Chap. No. 885, Local and Private Laws of the State of Mississippi, § 2 (1982) (hereafter "Enabling Act").

³ Enabling Act § 2; In supporting the decision to use a regional approach, the legislature cited the efficiency of using the encompassing public agencies, result of maximizing the amount of federal aid and assistance and the broad benefit derived from such an approach.

⁴ Enabling Act § 3(h).

⁵ Section 49-17-1 et seq., Mississippi Code of 1972.

⁶ 33 U.S.C. § 1251.

⁷ Enabling Act § 2(3).

⁸ Enabling Act § 3(h).

⁹ 81 F.3d at 1414.

¹⁰ *Id.* at 1415.

¹¹ *Id.* at 1416.

¹² *Id.* at 1417-1419.

¹³ *Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983); *Pruett v. City of Rosedale*, 421 So.2d 1046 (Miss. 1982); and *Presley v. Mississippi State Highway Commission*, 608 So.2d 1288 (Miss. 1992).

¹⁴ *Moor v. County of Alameda*, 411 U.S. 693 (1973).

¹⁵ 18 U.S.C. § 1332.

¹⁶ *Tradigrain, Inc. v. Mississippi Port Authority*, 701 F.2d 1131 (5th Cir. 1983).

¹⁷ *PYCA Industries* at 1417.

¹⁸ *PYCA Industries* at 1417.

¹⁹ 421 So.2d 1046 (Miss. 1982) (en banc).

²⁰ *Id.* at 1047.

²¹ Senate Bill No. 2441, Ch. 495, Laws of 1984.

²² 608 So.2d 1288 (Miss. 1992).

²³ *PYCA Industries* at 1418.

³⁴ *Id.* at 1419.

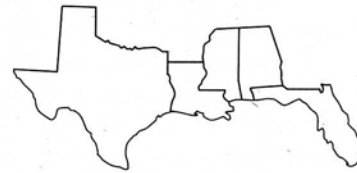
²⁵ *Id.*

Correction:

The paranthetical note on page 13 of **WATER LOG** Volume 16, No. 2 should have read:

(Note: The Corps is the major permitting authority today since dumping of *dredged* materials constitutes most ocean dumping).

Lagniappe *(a little something extra)*



Around the Gulf ...

In October, marine biologists aboard the *R/V GYRE* conducted an advanced survey of whales and dolphins in the Gulf of Mexico using maps of ocean currents produced with satellite gathered data.

On October 8, 1996, the Gulf of Mexico Fishery Management Council held a hearing on proposed regulations requiring shrimpers to use fish excluder or bycatch reduction devices when trawling in federal offshore waters to minimize capture of immature red snapper and other finfish species.

In August, winds forced oxygen-depleted water from the Gulf of Mexico's dead zone off the mouth of the Mississippi River close to shore causing a jubilee along about 20 miles of Louisiana coastline. This condition causes shrimp, crabs, and finfish to crowd close to shore to escape the low-oxygen water where they can be easily caught in large quantities.



Around the Nation and the World ...



In October, Congress passed, and the President signed into law, long awaited amendments to the Magnuson Fishery Conservation and Management Act, Pub. L. 104-297. (This and other ocean and coastal legislation of the 104th Congress will be reviewed in the next issue of **WATER LOG**).

In August, the National Marine Fisheries Service proposed to prohibit all approaches within 500 yards of any North Atlantic right whale to better protect this endangered species by minimizing human contact.

On October 8, 1996, the U.S. Court of International Trade ordered the U.S. to prohibit shrimp imports from nations not certified under P.L. 101-162, appearing to reject the argument that shrimp harvested in aquaculture operations or by methods not harmful to sea turtles should not be embargoed. The Court held that an import ban short of an embargo on shrimp would undermine the incentive for nations to become certified.

In September the United States participated as a contracting party in its first Northwest Atlantic Fisheries Organization (NAFO) meeting in St. Petersburg, Russia.

On August 21, 1996, the United States ratified the Agreement for the Implementation of the Provisions of the United Nations Convention on The Law of the Sea of December 10, 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

In August ministers of the Commission for Environmental Cooperation (under the authority of the North American Free Trade Agreement) agreed to undertake a fact-finding mission to consider a controversial pier for cruise ship near coral reefs off Cozumel, Mexico. This is the first such investigation by this Commission.

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of **WATER LOG** free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677, or contact us via e-mail: waterlog@olemiss.edu. We welcome suggestions for topics you would like to see covered in **WATER LOG**.

This work is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce under Grant Number NA56RG0129, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, and the University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies.

Editor:

John Alton Duff, J.D., LL.M.

Production Assistant:

Niler P. Franklin



Research Associates:

William Harrison, 3L
Michael McMillan, 2L
Peggy Dutton, 3L
Bradley Peacock, 3L

University of Mississippi Law Center - University, MS 38677

The University complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

MASGP-96-002-03

This publication is printed on recycled paper

The University of Mississippi
Mississippi-Alabama Sea Grant Legal Program
University of Mississippi Law Center
University, MS 38677



Non-Profit Org.
U.S. Postage
PAID
Permit No. 6