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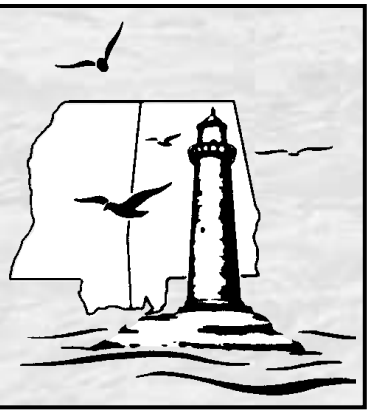
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Supreme Court Determines Wetlands Landowner Development Rights

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001).

Roy A. Nowell, Jr., 3L

In late June, the United States Supreme Court issued a ruling in the case of *Palazzolo v. Rhode Island*, in which the Court rejected Anthony Palazzolo's claim that his land was taken in violation of the Fifth Amendment. The Court addressed three issues in the case: first, whether the case was ripe for adjudication; second, whether Palazzolo had the right to sue based on his successive ownership of the property; and third, whether the Rhode Island Resources Management Council's (Council) rejection of Palazzolo's development proposal constituted an illegal taking under the Fifth Amendment.

Background

Anthony Palazzolo owns waterfront property in Rhode Island which the law of the state designates as wetlands. The saga behind his ownership of the property in question dates back to 1959, when he and associates formed Shore Gardens, Inc. (SGI) and purchased the property. Eventually, Palazzolo purchased

See Palazzolo, page 9

Beach Access Protected by the First Amendment

Leydon v. Town of Greenwich, 257 Conn. 318 (2001).

David N. Harris, Jr., 3L

The third round of the highly publicized legal battle over public access to Connecticut beaches has been decided in favor of the public. The Connecticut Supreme Court affirmed the Connecticut Appellate Court decision that a Greenwich ordinance restricting access to a municipally owned park was unenforceable. The challenged ordinance allowed only town residents access to beach-park areas. But, unlike the Appellate decision which relied heavily on the citizens' right to use the beach under the Public Trust Doctrine, the Connecticut Supreme Court affirmed the decision on the federal and state constitutional principles of the First Amendment.

In This Issue . . .

"Deep Ripping" in Wetlands Prohibited by the Clean Water Act

Borden Ranch Partnership v. U.S. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001).

John Treadwell, 3L

In a 2-1 decision, the United States Court of Appeals for the Ninth Circuit held that deep ripping, a process in which metal prongs are dragged by a tractor through the soil so water can drain from the area, falls under the authority of the Clean Water Act (CWA).The court also concluded that the tractors employed during the deep ripping process constitute a point source and that such activity requires a CWA § 404 permit.

Background

In June of 1993, Angelo Tsakapoulos acquired Borden Ranch, an 8,400 acre tract used predominantly for cattle grazing, with the intentions of converting the area into a vineyard and orchard. There are vernal pools, swales and intermittent drainage areas located on the property that depend upon a hard layer of soil called "clay pan" which prevents water from seeping into the ground.[1] Because vineyards and orchards require deep root systems, Tsakapoulos had to break up the clay pan using "deep ripping," a process in which metal prongs are thrust into the soil and dragged away by heavy machinery. In the fall of 1993, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) asserted jurisdiction, informing Tsakapoulos that he could not continue deep ripping activities in these wetland areas without a § 404 permit. Tsakapoulos filed suit challenging the government's authority to regulate this activity.

Deep Ripping and the Normal Farming Exception

Tsakapoulos maintained that deep ripping is merely another form of plowing and should fall into the CWA's exemption for normal farming activities. This assertion was summarily rejected. According to the court, the CWA's "recapture provision" does not exempt any normal farming process, including plowing, that damages water flow. When Congress enacted the CWA, one of its intentions was to "prevent conversion of wetlands to dry lands."[2] As a result, activities that damage a wetland's normal hydrological functions are not exempt. Relying on evidence that when Tsakapoulos penetrated the clay pan, the water flow was harmed, the district court determined that the EPA and the Corps properly exercised authority over the deep ripping conducted by Tsakapoulos.

The maximum civil penalties for violating the CWA is $25,000 per day for each violation.[3] In this case, the district court counted each pass through the wetland slopes as a separate violation. Because this calculated into 348 separate violations, the court could have imposed a maximum penalty of over $8.9 million dollars, however, Tsakapoulos was ordered to pay a $1.5 million dollar fine or a $500,000 fine and if four acres of wetlands were restored.

The Ninth Circuit's Decision

On appeal, the Ninth Circuit upheld the lower court's decision as it related to deep ripping in the drainage areas. Tsakapoulos argued that the CWA should not regulate deep ripping because the process does not involve any addition of a pollutant. According to Tsakapoulos, deep ripping only "churns up soil that is already there" and "[places] it back basically where it came from." The Corps responded that Tsakapoulos added a pollutant when he punched holes in the wetland so the water could drain. The court agreed, not-

Sea Grant

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

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 518 Law Center, University, MS, 38677, phone: (662) 915-7775, or contact us via e-mail at: waterlog@olemiss.edu . We welcome suggestions for topics you would like to see covered in WATER LOG.

Editors:
Tammy L. Shaw, J.D.
Kristen Fletcher, J.D., LL.M.

Publication Design: Waurene Roberson

Research Associates:
David Harris, 3L
Roy A. Nowell, Jr., 3L
Craig J. Pake, 3L
Yoshiyuki Takamatsu, 3L
John Treadwell, 3L

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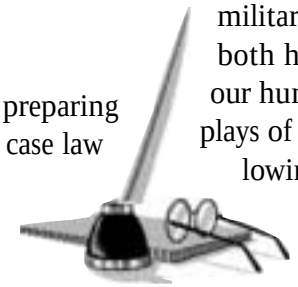
http://www.olemiss.edu/orgs/masglp

From the Editors' Desks



On September 10, the *Water Log* staff was preparing for this issue, reviewing ocean and coastal case law and marine policy changes, editing students' articles, and arranging the issue layout. We were concentrating on priority issues: the debates surrounding fisheries management techniques, inconsistent implementation of wetland laws, and the effort to increase the focus of the nation and world to the conservation of fragile marine resources. A day later, we were left in awe after the attacks in Washington and New York City. At first, even the most active environmental listserves were quiet except for the words of support sent here to the United States from all across the world.

Slowly, people returned to their jobs, to their lives, to the work that lies in front of us as managers and advocates of the marine world. For we are, after all, more than a nation of skyscrapers, more than a financial and military strength. . . we are a nation of resources - both human and environmental. We have proven our human resources for years but saw amazing displays of strength and leadership in rescue efforts following 9/11. And, no matter what our individual reaction is to the attacks of September 11th, we will continue to be leaders at a local, national, and international level to protect our human and environmental resources. The staff at *Water Log* recognizes you, our subscribers, as part of that group of people that are dedicated to leading the way through management, care, and conservation of our marine resources.

Along with the bravery of the rescuers, both at the World Trade Center and at the Pentagon, we salute your work in this "new world" that we face following September 11th.

Sincerely,
Tammy L. Shaw *Kristen M. Fletcher*

I have been with the Mississippi-Alabama Sea Grant Legal Program since the summer of 1998, first as a law student research associate and later as Research Counsel. Last year, I took over as the editor of *Water Log*. My work here has been rewarding and fulfilling and the knowledge and experience that I have gained is invaluable. This issue of *Water Log* marks my last as editor and this week, my last as Research Counsel. I have accepted a position with a law firm in Mobile, Alabama, where I will be near my family and many friends. I know that *Water Log* will continue to be an important and useful source for information on coastal and ocean law and policy, and I am proud to have been a part of the Mississippi-Alabama Sea Grant Legal Program.

Sincerely,
Tammy L. Shaw

(Editors' note: Tammy can be reached by Email at: tlshaw61@cs.com)

In this somber and uncertain time in our nation, the attorneys and staff of Water Log would like to extend our condolences to the families of those men, women and children who were lost in the tragedy of September 11th.

National Sea Grant Law Center Awarded to The University of Mississippi

Center Begins Service February 1, 2002

Kristen M. Fletcher, J.D., LL.M.

The National Sea Grant Office and National Oceanic and Atmospheric Administration recently announced that the Agency's first National Sea Grant Law Center will be housed at The University of Mississippi. The Sea Grant Law Center is being established to "coordinate and enhance Sea Grant's activities in legal scholarship and outreach related to coastal and ocean law issues."

In recent years, as the development of marine resources has evolved and received greater attention, the importance of addressing the legal issues that pertain to marine resources has become more evident. As a result, the National Sea Grant Office proposed the creation of a Sea Grant Law Center to disseminate information about ocean and coastal laws and policies, coordinate ocean and coastal law researchers, and provide Sea Grant College Programs a source of critical analysis of proposed laws and policies.

At The University of Mississippi, the Sea Grant Law Center will integrate the efforts of ocean and coastal law research centers nationwide and provide outreach and advisory services to the National Sea Grant College Program and its constituents. The Law Center's objectives are to:

- enable existing Sea Grant Legal Programs, Sea Grant-funded marine policy researchers, and marine law institutes across the country to coordinate and combine research and outreach efforts;
- establish an on-line marine law digest, quarterly legal reporter, and Internet site;
- conduct research on legal issues affecting the nation's oceans and coasts and disseminate research results through publications, presentations, and on-line resources; and,
- answer law and policy questions of the National Sea Grant Office, OAR, NOAA, and the thirty state Sea Grant College Programs.

The Sea Grant Law Center will be operated in conjunction with the Mississippi-Alabama Sea Grant Legal Program, enhancing its outreach and research elements. However, the Mississippi-Alabama Program will continue to offer its traditional services including the legal advisory service, outreach efforts, and the *Water Log Legal Reporter*. We look forward to expanding the Legal Program's efforts of the last thirty years to a national scope but remain committed to the constituents who have helped to develop the expertise of the Legal Program in Mississippi, Alabama, and the Gulf of Mexico region.

The Sea Grant Law Center will officially begin offering its services on February 1, 2002. Until then, we will be preparing for its establishment by constructing the website and conducting interviews for a Center Research Counsel (see page 5). We will also be moving offices across campus to Kinard Hall to incorporate both the Legal Program and the Sea Grant Law Center. We welcome your visits, comments and questions.

Access our web site at
http://www.olemiss.edu/orgs/SGLC
or e-mail us at sealaw@olemiss.edu .

POSITION ANNOUNCEMENT

Research Counsel, Mississippi-Alabama Sea Grant Legal Program

Starting Date: January 2, 2002 *Position open until filled or until adequate applicant pool is obtained.*

Duties: Conduct research on ocean, coastal, natural resource, and environmental legal issues; prepare reports and articles for publication; provide assistance to governmental agencies regarding statutes, regulations, and case law; assist in the preparation and publication of *WATER LOG*; travel to conferences to present research papers; supervise law student research associates; pursue funding through the writing of grant proposals; and travel to the Gulf Coast to provide advisory service to state and local agencies.

Qualifications: Bachelor's Degree; Law Degree by starting date; strong law school academic record; relevant course work and/or work experience and enthusiasm in one or more of the following: ocean/coastal, natural resources, environmental law; demonstrated ability to conduct research and writing; and, membership in or commitment to acquire membership in the Mississippi Bar.

Send résumé of experience and education, copy of law school transcript, 3-5 page research and writing sample, 3 references and other pertinent information to: University Employment Office, Paul B. Johnson Commons, University of Mississippi, P.O. Box 1848, University, MS 38677-1848.

For complete job announcement or more information, e-mail Kristen Fletcher at kfletch@olemiss.edu or visit: http://www.olemiss.edu/orgs/masglp/

The University of Mississippi is an EEO/Title VI/Title IX/Section 504/ADA/ADEA employer.

POSITION ANNOUNCEMENT

Research Counsel, National Sea Grant Law Center

Starting Date: February 1, 2002 *Position open until filled or until adequate applicant pool is obtained.*

Duties: Assist in establishment of National Sea Grant Law Center; organize and develop national Marine Law and Policy Network; conduct research on ocean, coastal, natural resource, and related environmental legal issues; prepare reports and articles for publication; provide assistance to governmental agencies and Sea Grant College Programs regarding statutes, regulations, and case law; assist in the preparation and publication of the Sea Grant Legal Reporter and a biannual Legal Digest; aid in maintenance of web-based resources; travel to conferences to present research papers; supervise law student research associates; and pursue funding through grant proposals.

Qualifications: Bachelor's Degree; Law Degree by starting date; strong law school academic record; relevant course work and/or work experience and enthusiasm in one or more of the following: ocean/coastal, natural resources, environmental law; demonstrated ability to conduct research and writing; and, membership in or commitment to acquire membership in a state bar.

Send résumé of experience and education, copy of law school transcript, 3-5 page research and writing sample, 3 references and other pertinent information to: University Employment Office, Paul B. Johnson Commons, University of Mississippi, P.O. Box 1848, University, MS 38677-1848.

For complete job announcement or more information, e-mail Kristen Fletcher at kfletch@olemiss.edu or visit: http://www.olemiss.edu/orgs/SGLC/

The University of Mississippi is an EEO/Title VI/Title IX/Section 504/ADA/ADEA employer.

Fifth Circuit Vacates Referral to Special Master

Sierra Club v. Clifford, 257 F.3d 444 (5th Cir. 2001).

Yoshiyuki Takamatsu, 3L

In July, the United States Court of Appeals for the Fifth Circuit vacated a district court's decision to refer an environmental lawsuit to a special master. The Sierra Club and Louisiana Environmental Action Network, Inc. (Sierra Club) brought an action challenging Louisiana's and the Environmental Protection Agency's (EPA) failure to comply with the Clean Water Act. The Act imposes on the EPA a duty to identify and establish total maximum daily loads (TMDLs) of pollutants for impaired waters. Before trial, the District Court for the Eastern District of Louisiana appointed a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure.

A court may appoint a special master to assist it in specific judicial duties, such as difficult computation of damages or when some "exceptional condition" requires the reference. (See page 8 for details on special masters.) The district court cited its congested docket and unfamiliarity with the issues presented as necessitating the referral to the master. On appeal, the Fifth Circuit held that the decisions to refer were improper and vacated the final judgment, remanding the case for further proceedings.

Background

Under the Clean Water Act, states are required to identify, establish and submit to the EPA TMDLs of pollutants for states' impaired waters.[1] Louisiana had failed to comply with the Act for 13 years yet continued to receive federal funding for TMDL implementation. When the State finally submitted a TMDL, the EPA failed to either approve or disapprove the submission within the 30 day deadline imposed by the Act. The Sierra Club challenged the EPA's failure to exercise its mandatory duty, in light of the State's protracted inaction, to identify and establish such TMDLs and to establish a schedule by which TMDLs would be implemented. Faced with the parties' summary judgment motions, the district court referred the motions to a special master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure.[2] The district court stated that the exceptional condition requirement was met because the case had been pending for two years, the filings were voluminous and contained highly technical documents and declarations, and the issues concerned compliance with complex state and federal regulations. The special master initially conducted two hearings and issued a report recommending that the district court order the EPA to file the administrative record and a schedule for establishing and implementing TMDLs in Louisiana.

The district court adopted the report as its opinion and, again, referred the case to the special master for review. According to the order, the EPA submitted the administrative record and a 12-year schedule to establish and implement TMDLs. The special master held a hearing and a one-week trial and issued a second report rejecting the EPA's 12-year schedule and instead setting a 10-year schedule. The district court entered a judgment against the EPA essentially adopting the special master's second report without conducting its own review. The EPA appealed and challenged, among other things, the district court's decisions to refer the case to the special master. On appeal, the Fifth Circuit limited its discussion to the district court's decisions to refer the case to a special master.

Appointment of Special Master and La Buy

A district court may appoint a special master to aid it in the performance of specific judicial duties, but a special master may not displace the court.[3] Under Rule 53(b), reference to a special master shall be the exception and not the rule and shall be made only upon a showing that some exceptional condition requires it.[4] In *La Buy v. Howes Leather Co.*, the United States Supreme Court held that a congested docket, the complexity of issues, and the extensive amount of time required for a trial did not, either individually or as a whole, constitute an exceptional condition.[5] In an earlier decision, the Fifth Circuit applied *La Buy* holding that a crowded docket and the plaintiff's filing of sixteen different lawsuits in the same court did not constitute an exceptional condition.[6]

For the TMDL dispute, the Fifth Circuit found that the district court's stated reasons did not support a conclusion that an exceptional condition existed: the fact that a case had been pending for two years was not so exceptional; the voluminous filings containing high

Fifth Circuit, from page 6

ly technical documents and declarations were considered the norm for modern federal litigation; and a significant number of cases in federal courts concern compliance with state and federal regulations. The Fifth Circuit noted that the district court's unfamiliarity with the subject matter could hardly excuse the court's obligation to carry out its judicial function. The Court noted that if the district court's reasons were sufficient to constitute an exceptional condition under Rule 53(b), references to special masters would be the rule rather than the exception.

Second, the Fifth Circuit addressed the Sierra Club's argument that the Court should only reverse the decision if it found that the special master's decision was erroneous. The Court did not decide the issue but noted that absent the district court's own findings and conclusions, it could not perform a meaningful review of the judgment, especially because the case involved complex factual and legal issues.

Finally, the Fifth Circuit rejected the Sierra Club's contention that cases evaluating massive, long-term government programs were particularly suited for the appointment of a special master. While agreeing with the contention, the Court found that whether or not references were valid must always turn on their compliance with Rule 53(b).

Conclusion

Recognizing that this decision will add to the delay and expense already suffered by the Sierra Club and the citizens of Louisiana, the Fifth Circuit vacated the orders to refer the case to the special master, the orders adopting the special master's recommendations, and the final judgment. The case was remanded to the district court to make its own determinations.

ENDNOTES

1. 33 U.S.C. § 1313(d) (2001).
2. Summary judgment is a procedural device available for prompt and expeditious disposition of controversy without trial when there is no genuine issue of material fact. Black's Law Dictionary, 1449 (7th ed. 1999).
3. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).
4. Fed. R. Civ. P. 53(b).
5. 352 U.S. at 258-59.
6. *Piper v. Hauck*, 532 F.2d 1016, 1019 (5th Cir. 1976).

Ripping, from page 2

ing that activities which damage the ecological integrity of a wetland can be regulated without the discharge of a new material. As a result, the court held that the CWA regulates deep ripping when employed to drain a wetland.

The court also rejected Tsakapoulos' argument that a plow is not a point source regulated under the CWA. According to the court, the CWA broadly defines a point source as "any discernible, confined, and discreet conveyance."[4] The court reasoned that the statutory definition of a point source was met because tractors and bulldozers were utilized to drag the deep ripping prongs through the soil.

Finally, Tsakapoulos argued that the district court erred by counting each pass through the wetlands with the deep ripper as a separate violation, claiming the maximum penalty should be $25,000 for every day the deep ripper was used. The court rejected his interpretation because the statute clearly provides for a "maximum penalty 'per day for each violation' "[5] noting that it would encourage violators to commit all their infractions in one day.

While the court upheld the government's authority over deep ripping in the drainage areas, citing a recent U.S. Supreme Court case, the court decided that the Corps does not have jurisdiction over isolated, vernal pools.[6] Therefore, the district court's ruling with regard to these isolated wetlands was reversed.

ENDNOTES

1. *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001). Vernal pools generally form during the rainy season. However, they usually dry out during the summer. Because swales are essentially sloped wetlands, aquatic plant and wildlife can move freely through the area. These wetlands act as a filter by removing sedimentation from the flowing waters. Swales also assist in curtailing erosion. Intermittent drainages are streams that form so stormwater can be carried away.
2. *Borden Ranch Partnership*, No. 00-15700 at 10957 (*citing United States v. Akers*, 785 F. 2d 814, 822 (9th Cir. 1986)).
3. 33 U.S.C. § 1319 (d) (2001).
4. 33 U.S.C. § 1362 (14).
5. *Borden Ranch Partnership*, No. 00-15700 at 10959. (quoting 33 U.S.C. § 1319 (d)).
6. *Solid Waste Agency of Northern Cook Co .v. Army Corps of Engineers*, 531 U.S. 139 (2001).

Special Masters Play Vital Role in Environmental Suits

Roy A. Nowell, Jr., 3L

The Federal Rules of Civil Procedure provide for the appointment of a "special master" in cases in which the issues are extremely difficult, the computation of damages is complicated, or when there are exceptional circumstances associated with a case. Circumstances sometimes demand the expertise of a special master in the environmental law setting.

A "special master" is a representative of the court appointed to hear a case involving difficult or specialized issues. The role of a special master in a lawsuit is similar to that of a judge, in that she hears from both parties, examines evidence, is presented with witness testimony, and makes recommendations to the court on the resolution of the case. In non-jury trials, the court must accept the master's findings of fact unless they are clearly erroneous. In cases tried by a jury, the master's findings are admissible as evidence and may be submitted to the jury. While environmental cases seem especially suited for the appointment of a special master because of the complexity of the issues and the variety of environmental regulations and statutes, the appointment of a special master must meet stringent standards. Appellate courts have consistently held that the appointment of a special master should be reserved for unique and special situations, and can deem that appointment inappropriate. Most recently, the Fifth Circuit made this determination in *Sierra Club v. Clifford* regarding the setting of Total Maximum Daily Loads, or TMDLs, for Louisiana. (See page 6 for the case analysis).

Appointment of a Special Master

The authority for the appointment of a special master is provided by Rule 53 of the Federal Rules of Civil Procedure.[1] The rule states that the designation of a special master to a case should not be a common occurrence, but rather is an exception to the typical resolution of a case. Any court may appoint a special master if the circumstances of the case meet the requirements of Rule 53, but the consensus among courts clearly indicates that these requirements are stringent.

In a jury case, appointment of a special master should only be made if the issues are complicated, and in cases to be tried without a jury, the designation of a special master should only be made if the computation of damages is difficult. If the computation of damages is not difficult, deference to a special master requires a showing of an "exceptional condition." This requirement has resulted in the most scrutiny by appellate courts; although not entirely impossible, a showing of an exceptional condition has proven to be a difficult burden for many courts to meet.

Case Law and Special Masters

The leading case regarding special masters is *La Buy v. Howes Leather Company*.[2] *La Buy* was an anti-trust lawsuit, which was appointed to a special master by a district court judge. The appellate court, and subsequently, the U.S. Supreme Court, analyzed Rule 53 in great detail and specifically addressed the kinds of circumstances that constitute an exceptional condition under Rule 53. The court held that congestion of the court docket, general complexity of a field of law, and extended length of time for a trial were *not* sufficient to constitute exceptional conditions.

Many courts have applied the approach taken in *La Buy* and have applied a strict standard for using a special master. One such environmental case, *United States v. State of Washington*, involved a dispute over the rights to shellfish, which was brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[3] A special master was appointed to hear the case, and a petition was presented to revoke the authority of the special master to preside at trial and recommend liability. The court determined that appointment a special master to determine the merits of the case was inappropriate. However, that court held that the master had broad authority to determine pretrial matters, such as discovery and stipulations of fact and, in the case of liability, has the authority to determine the extent of the damages.

Several other courts have also used *La Buy* as a basis for restricting the discretion of lower courts to appoint a special master. In the recent case of *Sierra Club v. Clifford*, the court determined that the district court abused its discretion by appointing a special master in a case involving the Federal Water Pollution Control Act Amendments of 1972.[4] The district

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court listed several reasons for referring the case to a special master, which included the length of the case reaching over two years and the presence of a high number of technical documents. However, the court ruled that these conditions were not sufficient to warrant exceptional conditions. In fact, the court stated that voluminous documents and lengthy trial were the norm for modern federal litigation, rather than exceptional conditions.

Although the standards for the appointment of special masters are rigorous, meeting the requirements is not impossible. The case of *Cronin v. Browner* listed several situations in which referral to a special master is appropriate, including enforcement of a judicial decree, assistance in settlement negotiations, and determining the validity of a preliminary injunction and complex litigation over a technical regulation concerning thousands of industrial facilities.[5]

Finally, in the case of *Active Products Corporation v. Choitz,* the court reaffirmed the position that special masters were appropriate to handle settlement matters in a case involving CERCLA.[6] In addition, the court held that the appointment of a panel of special masters in that case was appropriate because of the large number of parties involved.

Conclusion

The appointment of a special master to a case serves as a valuable tool in complicated situations, but the consensus among the courts is that such appointment should be reserved for exceptional cases. Environmental cases often involve complicated legal scenarios, primarily because of the extensive legislative requirements involved in environmental litigation but the stringent requirements for appointing a special master must be met, or the referral to the master will be deemed inappropriate.

ENDNOTES

1. FED. R. CIV. P. 53.
2. *La Buy v. Howes Leather Company*, 352 U.S. 249 (1957).
3. *United States v. Washington*, 135 F.3d 618 (9th Cir. 1998).
4. *Sierra Club v. Clifford*, 257 F.3d 444 (5th Cir. 2001).
5. *Cronin v. Browner,* 90 F.Supp.2d 364 (S.D.N.Y. 2000).
6. *Active Products v. Choitz*, 163 F.R.D. 274 (1995).

Palazzolo, from page 1

the other associates' interest in the property, thus rendering him the sole owner of the property. Over the next few years, he made several attempts to develop the property, but all proposals were denied by the Rhode Island Department of Natural Resources.

In 1971, the land was deemed coastal wetlands by laws enacted by the Council. In addition, SGI's corporate charter was revoked in 1978 for failure to pay taxes. As a result of the revocation, Palazzolo became the corporation's sole shareholder. In 1983, he resumed his efforts to develop the land, and again, the Council rejected the proposal. Subsequently, Palazzolo brought a takings action against the Council. In 2000, the Rhode Island Supreme Court determined that Palazzolo's takings claim was not ripe, he had no right to bring the claim, and that he had not been deprived of all economically beneficial uses of his property, thus rendering his takings claim ineffective. As a result, Palazzolo chose to continue his fight and appealed the decision to the United States Supreme Court.

Palazzolo's Right to Sue

The owner of an interest in property is deemed to be aware of previously enacted laws regarding that property and cannot later bring a takings claim. In other words, a landowner is considered to have notice of any restrictions or limitations on the property. However, as the Rhode Island Supreme Court noted, the Takings Clause of the Fifth Amendment provides an exception if the government action is "so unreasonable or onerous as to compel compensation," subsequent owners may be allowed to bring a takings claim.[1] In effect, this concept prevents governmental entities from taking action that is normally deemed an unconstitutional taking simply because the ownership of property has changed hands. In this case, the U.S. Supreme Court ruled that Palazzolo held the right to sue even though he was a subsequent owner of the wetland property, finding that unconstitutional state action should not be ignored merely because title to the property passed to another landowner. Instead, the nature of the government action should be determinative of whether a taking has occurred. Therefore, even though Palazzolo was a subsequent owner of the property, he still had the right to sue. The Court did not state that *every* subsequent landowner has the right to sue, but it clearly stated that no blanket rule exists prohibiting a subsequent landowner from bringing suit simpl

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because she was not the owner of the property when the legislation was enacted.[2]

The Ripeness Doctrine

The doctrine of ripeness prevents courts from hearing cases that are too premature for a court to make a ruling. The U.S. Supreme Court has held that a claim is not ripe unless a final decision has been reached by the government agency in charge of enforcing the regulation.[3] The Court determined that the Rhode Island Supreme Court improperly ruled that Palazzolo's claim was not ripe for the Court to make a ruling. The Rhode Island Supreme Court had determined that Palazzolo had not used every possible avenue to seek a use of his property and still had options for development to pursue. The Court held that the state agency had addressed the issues presented concerning Palazzolo's proposal, and by rejecting the proposal, had made a final decision, thereby satisfying the requirements of the ripeness doctrine. In addition, the Council cited no instances in which Palazzolo failed to comply with the requirements of the application process and, as a result, determined that Palazzolo's claim was ripe for adjudication.

The Taking Determination

The purpose of the Takings Clause is to prevent the government from requiring individual landowners to bear a burden that should be shared by the entire public.[4] A regulatory taking has occurred if all economically beneficial uses of the property have been stripped by the government action.[5] Courts are split on the issue of whether the deprivation of economic value should be considered in light of the entire property or the specific parcel in dispute. If only the parcel in dispute is used for determination of a taking, it is likely that a court will rule that the property has been rendered valueless, but if the property is viewed as a whole, a court will probably hold that the property still has value.

The Court did not address the issue of whether the prohibition on the property should be viewed in light of the entire property or just the parcel at issue, but found that because he still had $200,000 in development value on his property and could still build a large residence on 18 acres of the land, that Palazzolo still had economic use of a considerable amount of his property. Thus, the Court ruled that the Council's rejection of Palazzolo's development proposal did not constitute a taking because Palazzolo was not deprived of all economically beneficial use of his land.

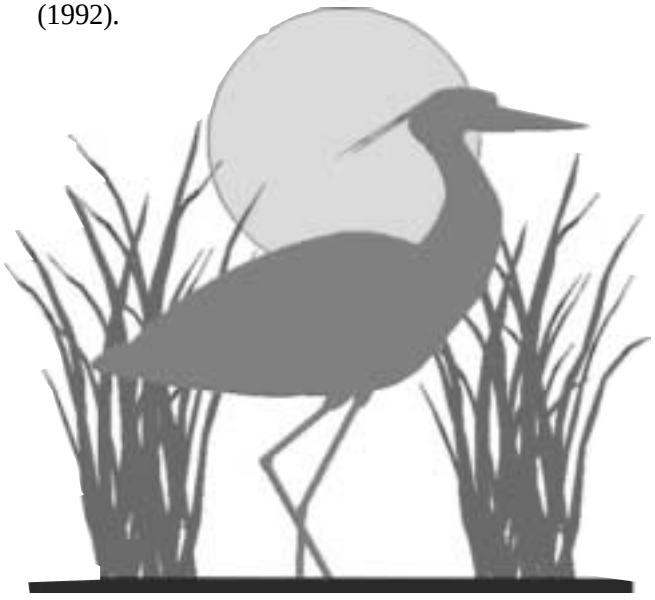
Where a regulation falls short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. The Supreme Court remanded the case for an analysis of these factors.

Conclusion

Although a majority of the Court concluded that the government had not taken all economically beneficial use of Palazzolo's property, the resulting concurrences and dissents exemplified the differing opinions of the Court. For instance, Justices Ginsburg and Breyer dissented arguing that the decision of the Rhode Island Supreme Court should have been affirmed. Regardless of the differences, Palazzolo must now await the determination of the Rhode Island Supreme Court to determine if a taking has occurred on his property.

ENDNOTES

1. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).
2. The question remains, then, whether Palazzolo's claim can be distinguished because of his claim on the property title dating back to 1959.
3. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).
4. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
5. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).



Leydon, from page 1

Background

In 1995, Brenden Leyden, a Connecticut resident, filed suit after being denied access to the municipally-held park known as Greenwich Point. Leyden wanted to jog along the beach area of the park, but was turned away from the park because a town ordinance denied access to nonresidents. Pursuant to the ordinance, a nonresident may only visit the beach when accompanied by a town resident. Leydon subsequently filed suit, arguing that the park and beach were a traditional public forum open to all citizens. He also argued that under the public trust doctrine, the lands were held by the state in trust for use by citizens of the state, not just for use by town residents.

The town argued that Leydon's desire to jog along the beach was not the type of expressive activity protected by the laws regulating a traditional public forum.[1] The town argued further that the Connecticut State Legislature abolished the state common-law doctrine of public trust by a special act in 1919 which allowed the town to "establish, maintain and conduct public parks . . . [and] bathing beaches . . . for the use of the inhabitants of [the] town."[2] The trial court upheld the ordinance in 1998, disagreeing with Leydon's contention that it improperly denied nonresidents access to the beach.[3]

The Connecticut Appellate Court reversed the decision finding that the ordinance violated the public trust doctrine, pursuant to which the state holds lands under tidal and navigable waterways in trust for the use by all state citizens. Relying on over 100 years of case law, the court noted that Connecticut has held its wet sand beach areas open to the public for fishing, recreation, and commerce activities.

The Connecticut Supreme Court agreed with the Appellate Court decision that state residents may have access to the municipal park and beach. However, the Connecticut Supreme Court chose not to address this dispute based on the public trust doctrine but rather focused almost exclusively on the First Amendment argument that the beach was a traditional public forum. The Court decided that nonresident access to the beach was protected by the right of freedom of expression given to all citizens.

Beach Access Protected By Public Forum Law

Under freedom of expression protections provided by the First Amendment and the Connecticut State Constitution, citizens are allowed to freely gather and conduct activities such as political debate and recreation. A "traditional public forum" is a place where the government customarily allows assembly and free debate of ideas, and includes areas such as streets and parks where the government holds title to the land but allows these areas to be used by its citizens.[4] The United States Supreme Court has held that the government may only limit expression in these areas based on time, place, and manner of the expression but not its content. The regulation must not restrict specific types of expression and must be made so specific as to help further an important governmental interest.[5] In other words, the government must have some very important reason, like public safety, in order to limit the use of these public areas.

The Connecticut Supreme Court found Greenwich Point to be a traditional public forum because it had the characteristics of a public park. Several of the characteristics enumerated by the Court were the presence of shelters, ponds, a marina, a parking lot, and picnic areas.[6] The Court found that the ordinance restricting access to only town residents violated the rights of nonresidents to participate in expressive activities, and that the town failed to show why the ordinance protected an important town interest.

Conclusion

Although the Connecticut Supreme Court did not affirm the Appellate Court's holding based on the public trust doctrine, the end result was to allow access by nonresidents to the municipal park and beach, rendering the town ordinance unenforceable. The town's leaders were advised that because the Connecticut Supreme Court determined the ordinance violated the state constitution, a favorable ruling probably would not be forthcoming and declined to appeal the decision.[7]

ENDNOTES

1. *Leydon v. Greenwich*, 257 Conn. 318, 321 (2001).
2. 18 Spec. Acts 103, No. 124 (1919).
3. *Leydon* at 321.
4. *Hague v. CIO*, 703 U.S. 496, 515 (1939).
5. *Perry Educational Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 45 (1983).
6. *Leydon* at 326.
7. *Greenwich Ends a Battle to Bar Its Beaches*, N.Y. TIMES, Aug. 31, 2001, B2.

U.S. Recovers for Sanctuary Damage in State Waters

United States v. Great Lakes Dredge & Dock Company, 259 F.3d 1300 (11th Cir. 2001).

Craig Pake, 3L

In July, the Eleventh Circuit addressed whether the National Marine Sanctuaries Act (NMSA) authorizes damages to the United States for injuries to state owned seabed property in the Florida Keys National Marine Sanctuary. The court determined that a dredging contractor should be held liable for a subcontractor's actions and that the trial court erred in requiring "no action" for repairing the damaged seabed.

Background

In 1993, Great Lakes Dredge & Dock Company (Great Lakes) hired a subcontractor, Coastal Marine Towing Company (Coastal), to tow 500-foot dredge pipes from Boca Grande to Green Cove. Both Great Lakes and Coastal supplied two tugs each for the project. During the towing operation, one of the pipes was dragged on the sea bottom in the Florida Keys National Marine Sanctuary, leaving a 13-mile scar on the sanctuary floor. A navigational error caused another Coastal tugboat to run aground in shallow water. In freeing the stranded tug, 7,495 square meters of sea bottom, consisting mostly of coral and manatee and turtle grass, was destroyed.

The U.S., on behalf of NOAA and the State of Florida, sued Coastal and Great Lakes. On the first day of trial, Coastal settled its claims with the United States and Florida for $618,484. After this settlement, Florida dropped its claims against Great Lakes but the federal claims remained. After an eight-day trial, the district court ruled that Great Lakes is strictly and vicariously liable for all damages to the sanctuary under the National Marine Sanctuaries Act (NMSA) even though the subcontractor had settled and the damages occurred in state waters.

Legal Action Under the NMSA

The National Marine Sanctuaries Act was passed by Congress in 1990 in order to protect special marine habitats from destruction.[1] The NMSA delegates the responsibilities to govern the management of these federally protected marine areas to the National Oceanic and Atmospheric Administration (NOAA)[2] and imposes civil liability on "any person who destroys, causes the loss of, or injures any sanctuary resource."[3] The U.S. may bring an action against any person who is liable for costs to fix the destroyed area and for damages.[4] "Damages" include, the cost of restoring or obtaining the equivalent of the sanctuary resource and the value of the restoration, damage assessment costs, and reasonable monitoring costs.[5]

The district court entered a judgment against Great Lakes for $368,796.97 which included the government's assessment cost, compensatory and monitoring costs, and supervision costs. The district court also ruled that a plan of "no action" for restoring the damaged seabed was the appropriate remedy because in the months following the damage, natural processes had already begun to repair the seabed.

Great Lakes appealed the decision based on three issues. First, they argued that the United States may not sue because the federal government has no property interest in the seabed owned by the state of Florida. Second, they argued that Great Lakes should not be held vicariously liable for the actions of Coastal because it had acted as an independent party. Finally, Great Lakes argued that the analysis of scientific evidence used to assess damage and restoration cost was improper. The United States filed a cross-claim arguing that the "no action" plan that the district court approved was not an appropriate remedy and that proactive restoration was necessary.

NMSA Authorizes Damages to the U.S.

The Eleventh Circuit rejected Great Lakes' contention that the government has no interest in state-owned property. The express language of the Florida Keys National Marine Sanctuary Act states that the 2,800 nautical miles of coastal waters in the Florida Keys "shall be managed and regulations enforced under all applicable provisions of the NMSA."[6] The federal government is in control of enforcing the NMSA regardless of whether the propert is federal

or state owned. The NMSA clearly states that the U.S. may recover damages for injuries to the sanctuary.[7] Further, the Eleventh Circuit held that the factual findings were not erroneous in finding that Great Lakes was vicariously liable for Coastal's accident and were sufficient to demonstrate causation to impose strict liability on the contractor, Great Lakes. Because Great Lakes was responsible for the venture and for helping Coastal's vessels maneuver the tows, it was liable for Coastal's actions and could not claim any "innocent third party" defenses under the NMSA.

The third issue on appeal focused on whether the Habitat Equivalency Analysis formula, a form of scientific evidence, is appropriate for assessing the size of the area destroyed. Great Lakes argued that the district court erred by not correctly applying a Supreme Court decision on the use of scientific evidence.[8] Under the Federal Rules of Evidence, all scientific evidence must both be relevant and reliable; if the scientific evidence is not relevant and reliable it cannot be introduced at trial. Great Lakes questioned the reliability of the HEA.

A 1993 U.S. Supreme Court case set the standard for analyzing the relevancy and reliability of scientific evidence.[9] Applying this standard to the HEA, the Eleventh Circuit ruled that the district court did not err when it determined that the HEA was appropriate and admissible.

U.S. Cross-Claim

Lastly, the court addressed the United States' cross-claim. During the first trial, the government suggested three plans for restoration of the damaged seafloor. The "no action" plan called for nature to restore the area without any help from human intervention. The second plan was a site-regrading plan, in which the hole would be regraded from the surrounding area. The third plan, which was recommended by the government, called for filling the hole with sand. The district court found that the second and third plans were too risky and would not guarantee recovery, and selected the "no action" plan, relying on evidence that the area would fully recover in 70 years. However, the government argued that the district court did not have enough evidence to choose the "no action" plan. The Eleventh Circuit agreed and remanded this issue for further findings.

Conclusion

The National Marine Sanctuaries Act allows for the United States to receive damages from those violators who are found to be vicariously liable of destroying a marine sanctuary. The statutory scheme under the National Marine Sanctuaries Act does authorize damages to the United States for injuries to state owned property.

ENDNOTES

1. S. Rep. No. 100-595, 2d Sess. 1 (1998).
2. 16 U.S.C. §§ 1433, 1434 (2001).
3. 16 U.S.C. § 1443.
4. 16 U.S.C. § 1443 (c).
5. 16 U.S.C. § 1432 (6).
6. 16 U.S.C. § 1443.
7. 42 U.S.C. § 1443 (a)(1)(A) (2001).
8. *Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579, 590 (1993).
9. *Id.* at 592-593.

2001 Alabama Legislative Update

The following is a summary of coastal, wildlife, marine and water resources related legislation enacted by the Alabama Legislature during the 2001 session.

2001 Alabama Laws 634. (H.B. 437)

Approved May 20, 2001. *Effective June 18, 2001.*

Provides for the protection of the black bear, *Ursus americanus*, found in coastal Alabama, by prescribing unlawful activities, such as shooting, trapping and harassing, in connection with the black bear and authorizing the Department of Conservation and Natural Resources to issue permits for certain activities related to the black bear, such as scientific research, zoological exhibition and education.

2001 Alabama Laws 635. (S.B. 5)

Approved May 21, 2001. *Effective May 21, 2001.*

Creates the Alabama Land Recycling and Economic Redevelopment Act which provides a mechanism to implement a voluntary cleanup, assessment and re-use program for contaminated lands and waters of the state. This legislation does not relieve the responsible person or persons from liability imposed by other laws for the illegal disposal of waste or pollution of the land, air and waters of the state. It does encourage the purchase and productive use of otherwise usable properties.

2001 Alabama Laws 695. (S.B. 296)

Approved May 29, 2001. *Effective January 1, 2002.*

Amends § 32-5A-191.3 to create the Alabama Boating Safety Enhancement Act of 2001 to further provide for the offense of operation of a marine vessel under the influence of alcohol or drugs and to further provide for the restriction on issuance of boater certifications and to further restrict the operation of motorized marine vessels by persons who are under the age of 14 years.

2001 Alabama Laws 973. (S.B. 64)

Approved September 28, 2001. *Effective January 1, 2002.*

Provides for the establishment of on-site wastewater management entities, public and private, for managing decentralized wastewater systems in Alabama and to provide public health and environmental protection through permitting these entities and through enforcement of the permits and rules promulgated by the State Board of Health.

Lagniappe *(a little something extra)*

Around the Gulf . . .

In September, the Florida Fish and Wildlife Conservation Commission banned operators of shark diving excursions from using bloody bait to attract sharks. The commissioners noted that, in light of this summer's regular reminders of the potential tragedy when sharks and swimmers collide, to allow "shark baiting" is simply inviting danger.

The Minerals Management Service and Texas A& M University have entered into a cooperative agreement to conduct an archaeological investigation of a 200-year-old shipwreck in the Gulf of Mexico. First discovered last February, the wreck is nearly one half mile beneath the surface of the water, 30 miles off the mouth of the Mississippi River. This will be the first time that a wreck this deep has ever been scientifically excavated in the Gulf of Mexico.

Seven universities, including the University of Florida and Rice University in Texas, will share more than $3.5 million in research grants awarded by the U.S. Environmental Protection Agency to study invasive species. The EPA research grants will help to minimize environmental and economic losses associated with invasive species.

Around the Nation . . .

EPA Administrator Christie Whitman announced the establishment of a task force in charge of helping agencies protect drinking water supplies from terrorist attacks. Among the tools used to help agencies is a notification system, which alerts authorities of possible contamination of drinking water sources.

In August, the Bush Administration promised quick action to protect 29 vanishing plant and animal species by listing them as endangered species. In exchange a coalition of environmental groups agreed not to continue lawsuits involving a few other species. This agreement allows the Fish and Wildlife Service to focus attention and resources back on many plants and animals that are on the verge of extinction.

The Marine Conservation Biology Institute announced the winners of the Mia J. Tegner Memorial Research Grants in Marine Environmental History. The grants are among the first ever awarded to help document the composition and abundance of ocean life before humans altered the marine environment. The results of the studies are crucial to help lawmakers, regulators and managers establish efficient conservation efforts.

The government of the Cook Islands, in the South Pacific, announced that it has established a whale sanctuary throughout its Exclusive Economic Zone. Covering two million kilometers, the sanctuary is believed to be the largest whale sanctuary declared by an individual government.

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California Challenges Federal Oil and Gas Leases

California v. Norton, 150 F.Supp.2d 1046 (N.D. Cal. 2001).

Roy A. Nowell, Jr., 3L

A recent federal court ruling has prevented the suspension of oil and gas leases off the coast of California. The controversy involves a decision by the Mineral Management Service (MMS) to suspend oil and gas leases on California's outer continental shelf that were originally issued between 1968 and 1984. A "suspension" of the leases would effectively extend the lease terms that would otherwise expire. California claimed that the federal government must analyze the environmental impacts of potential oil exploration before approving the suspension. The court ruled that the MMS suspensions meet the definition of "federal activity" as defined by the Coastal Zone Management Act (CZMA) and therefore must meet consistency requirements of California's coastal zone management program. The court's determination effectively halts any possible oil exploration that would have occurred in the lease areas until further environmental studies are completed. The Federal government plans an appeal to the Ninth Circuit Court of Appeals. *Water Log* will report on the appeal in a future issue.

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Lamar Law Center, Room 518
University, MS 38677

University, MS 38677

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