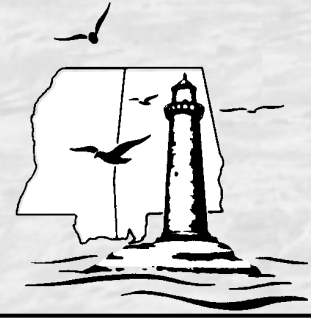


WATER LOG

A Legal Reporter of the Mississippi-Alabama
Sea Grant Consortium



State Trust Lands Not Limited by Tidelands Act

Stewart v. Hoover, 815 So.2d 1157 (Miss. 2002).

S. Beth Windham, 3L

In its most recent review of the Mississippi Tidelands Act, the Supreme Court of Mississippi declared that tidelands were public trust lands, even though the State failed to include the lands on maps designating state property and did not place the landowner on notice. The court reaffirmed that an adjacent landowner who was granted a permit to build a pier over public trust lands had littoral rights and could build the pier

as long as he followed the restrictions noted in the permit.

The Pier in Question

James and Sandra Hoover wanted to construct a T-shaped pier extending across their property and ending in Heron Bay and were granted the requisite permits by the applicable state agencies.¹ Their neighbor, Stewart, claimed that the pier extended onto his property and promptly brought suit against the Hoovers seeking removal

See Tidelands, page 10

Damages Recoverable Under Park System Resources Protection Act

Tug Allie-B, Inc. v. United States of America, 273 F.3d 936 (11th Cir. 2001).

Sarah Elizabeth Gardner, 3L

In its first case addressing damages that are recoverable by the United States under the Park System Resources Protection Act, the Eleventh Circuit ruled that a vessel owner could not limit his liability to the value of the vessel and its cargo by relying on another statute, the Limitation Act. The court reasoned that considering the Resource Protection Act's history, language, and purpose, the Limitation Act could not be applied to exonerate or limit a defendant's liability for damages.

See Tug Allie-B, page 6

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Fifth Circuit Rejects Endangered Species Act Challenge

Shields v. Norton, 289 F.3d 832 (5th Cir. 2002).

Jason Dare, 3L

In April, the Fifth Circuit rejected a landowner's challenge to the Endangered Species Act by determining that individuals cannot anticipate litigation and judicially establish their rights under the statute unless they received specific and concrete threats of litigation. Even though Hunter Schuehle anticipated litigation from the Sierra Club, the court found that the Sierra Club never directly gave him notice of a suit against him, removing the option to seek judicial resolution and court approval of his actions in the Edwards Aquifer.

Background

The Edwards Aquifer is a 175-mile long underground waterway that supplies thousands of residents of Central Texas with water for irrigation and other uses. The aquifer is also the only known

habitat for many species. The "Edwards Species" at issue in this case are rare fish, amphibian, and plant species found only in the San Marcos and Comal Springs area of Texas. Because of the delicate balance between the needs of farmers and other waters users and endangered species, the Edwards Aquifer Authority was formed to regulate pumping from the aquifer. Hunter Schuehle was a member of both the Aquifer Authority and an Edwards Aquifer water pumper.

In 1990, 1994 and 1998, the Sierra Club sent letters to various entities associated with pumping the aquifer, threatening to bring citizen suits against them for harming the endangered Edwards Species, pursuant to the Endangered Species Act (ESA). Under the section known as the "Take Provision," the ESA forbids the "taking" of designated species including harassment, harm, or the hunting or pursuit of a member of a listed species.¹ To "harm" is defined by regulation to mean "an act which actually kills or injures wildlife" and can include significant habitat modification.² The Sierra Club claimed that by pumping water from the aquifer, the pumpers were harming the Edwards Species in violation of the ESA.

See Endangered, page 11



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.

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ERRATA:

Regarding the article on page 4 of Volume 21:4, 2001, entitled "Latest Challenge to NMFS Summer Flounder Quota Fails," the case was decided by District Court Judge Jerome B. Friedman, not Judge Doumar. Thanks are due to the several readers who caught the error and e-mailed us. Judge Doumar had decided a companion case months earlier, in which the plaintiffs sought enforcement of an earlier order to publish the final adjusted specifications within a reasonable time period. ✓

Tribute

In Memory of Brian Perkins

by Richard Wallace, Auburn University Marine Extension and Research Center



Brian Perkins cutting mullet roe in an Alabama processing plant.

--Photo Courtesy of Richard Wallace

Alabama seafood lovers and the Gulf seafood industry lost a good friend and ardent supporter when Brian Perkins passed away on March 16 of this year. Brian was the Extension Seafood Technologist at the Auburn University Marine Extension and Research Center/Sea Grant Extension Program for the past 17 years, and previously held a similar position with Georgia Sea Grant for eight years.

Brian provided technical assistance to seafood processors on a variety of important issues including product quality, waste management and regulatory compliance. Most recently, Brian provided HACCP training to virtually every seafood processor in Alabama and was involved in HACCP training throughout the Gulf region. As a result of these efforts, a majority of seafood processors enjoyed a relatively smooth transition to the new inspection system.

Brian also produced a number of informational pamphlets for seafood consumers, wrote a newspaper column that usually featured seafood or seafood recipes and answered numerous consumer questions about seafood preparation and safety.

Brian's professionalism, expertise and abilities will be sorely missed by his colleagues, the seafood industry and seafood consumers.

A Note from Kristen Fletcher, Editor

Since my arrival at the Legal Program in 1997, some of the most rewarding work has been as a result of Sea Grant Extension Agents' advisory and research requests. I met Brian on a trip to Mobile in my first year as a staff attorney — during which he and Rick Wallace treated me to an excellent Alabama seafood lunch. These lunches with Brian and Rick became a highlight when I traveled to Mobile, hearing about both work and families. In the five years of working with Brian, he gave me some of the most challenging and interesting requests. Each time he would call on the Legal Program, I knew that I was going to learn something new from him and that my research would take us on a journey to assist his seafood constituents in understanding the law. As all of his colleagues have expressed since his passing, it was an honor to work with Brian and his Sea Grant family misses him tremendously. ~

Corporation's Lease of U.S. Government Easement Affirmed

Canova v. Shell Pipeline, 290 F.3d 753 (5th Cir. 2002).

Jason Dare, 3L

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

When the U.S. Government acquires property for public use through its Takings Clause powers and reserves the right to assign the property, the government may legally lease the property to a private entity for commercial purposes. Hence, the Fifth Circuit ruled that the Department of Energy was permitted to lease a pipeline easement it acquired for Strategic Petroleum Reserve purposes to Equilon, a private oil company.

The Bayou Choctaw Pipeline

In 1979, the U.S. Department of Energy acquired a 50 foot by 37 mile pipeline easement and right-of-way, known as the "Bayou Choctaw Pipeline," from Louisiana property owners, including plaintiff-appellant Carlo Canova, pursuant to its eminent domain powers. Under the Takings Clause of the Fifth Amendment, the federal government may obtain or condemn private property for public use, provided just compensation is given to the property owners. The Department of Energy's public use for the property was to connect two oil facilities in Louisiana to improve the Strategic Petroleum Reserve (SPR) pursuant to the Energy Policy and Conservation Act. According to the Declaration of Taking filed in the Middle District of Louisiana, the takings were "[a] perpetual and assignable easement and right-of-way" designed to create and maintain the Bayou Choctaw Pipeline; "reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with. . . the rights and easements hereby acquired."¹

The Strategic Petroleum Reserve Management Office decided to lease the Bayou Choctaw Pipeline to defendant Equilon Pipeline Company in May 1997, citing a need to reduce costs and

increase revenue from the area. Despite the government reserving a priority right to use the property and a right to conduct annual tests on the pipeline, Equilon was free to conduct its profitable commercial oil transportation through the pipes. Equilon's only obligations were to make regular lease payments to the Department of Energy and perform necessary maintenance work.

Furious that a private company could use his land for its own corporate gain, Canova originally filed the claim as a class action in state court, not wanting to include the U.S. Government as a party. The claim, however, was removed to U.S. District Court for the Middle District of Louisiana, with the U.S. being classified as a necessary party. The district court granted the defendants' motion for summary judgment and dismissed the case, "holding that the easement taken by the [U.S. was] not restricted in scope to uses furthering the [SPR], and that the lease with Equilon in any case serve[d] the [SPR] purposes."² Canova appealed that decision to the Fifth Circuit.

Scope of the Easement

According to the Fifth Circuit, federal common law controls in this case because the interest the government took was an "easement," which does not appear in Louisiana civil law.³ Specifically, the court determined that the interest taken by the U.S. government was an easement in gross, meaning that the easement benefits an identifiable person instead of a particular piece of property. Easements in gross are traditionally non-transferable, except for commercial purposes such as "for a pipeline, telegraph and telephone line, or railroad right of way."⁴

Canova argued that because the government mentioned the SPR in its Declaration of Taking, the easement was limited in scope to SPR purposes and that leasing the pipeline to Equilon for pri-

vate gain was beyond that scope. The United States responded that the reference to the Strategic Petroleum Reserve was a recitation of the legitimate public purpose of the taking, but was not a limitation on the permissible scope of the easement's use.

The Fifth Circuit held for the government finding that the word "assignable" in the Declaration of Taking phrase "perpetual and assignable easement and right-of-way" meant transferable from one person to another. Because only the government can use the easement for SPR purposes, the Fifth Circuit held that the word "assignable" would have no meaning if the government could not transfer the easement to another entity.⁵

Second, the court noted another explanation for the inclusion of the language referring to the SPR. The federal Declaration of Takings Act requires "a statement of the authority under which and the public use for which said lands are taken."⁶ The reference to the SPR, therefore, followed by a citation to the Energy Policy and Conservation Act, was consistent with the statutorily mandated recitation of purpose. The government also included other public uses for the condemned land including "for such other uses as may be authorized by Congress or by Executive Order," which the court found to be "strong if not conclusive evidence" that the property right created was not itself limited in scope to SPR purposes.⁷

Finally, because Equilon's intended use of the easement was the same as the government's (oil transportation), there was no additional burden

placed on Canova's underlying fee simple estate. The court noted that an additional burden might be found when the "commercial enterprise or public utility use is no longer the same, for example where a railroad easement is used or leased for the construction of telephone lines, or where an agricultural easement holder uses the easement for recreation."⁸ For these reasons, the Fifth Circuit held that the easement was not limited in scope to SPR purposes.

Canova also argued that the lease to Equilon was not authorized by an act of Congress. He reasoned that should the government stop using any SPR property, then the property must remain unoccupied until the same government entity begins using it again. The Fifth Circuit ruled that this argument was adverse to the specific language of the Energy Policy and Conservation Act that "the Secretary may use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired. . . ."⁹ Therefore, the Fifth Circuit upheld the district court's ruling in favor of Equilon and the federal government. ✓

ENDNOTES

1. *Canova v. Shell Pipeline*, 290 F.3d 753 (5th Cir. 2002).
2. 290 F.3d at 755.
3. Federal common law uses the term "easement," while Louisiana civil law uses the terms "predial and personal servitude" when classifying such lands.
4. 290 F.3d at 757 (*citing* 25 AM. JUR. 2D *Easements and Licenses in Real Property* § 102 (1996)).
5. 290 F.3d at 758.
6. 40 U.S.C. § 258(a)(1) (2002).
7. 290 F.3d at 758-59.
8. *Id.* at 759.
9. 42 U.S.C. § 6239(f)(1)(D) (2002).

WATER LOG VOLUME 22 NOTICE:

As you may know, the Sea Grant Legal Program experienced several staff vacancies in the last ten months with the departure of a staff attorney and the addition of the National Sea Grant Law Center. As a result, the Legal Program will publish three issues of Water Log this year rather than four. We appreciate your understanding and look forward to introducing you to our new staff in the next issue. ✓

Tug Allie-B, from page 1

Background

The Limitation Act was passed in 1851 to facilitate shipbuilding by encouraging investors to invest in the shipping industry. The Act limits a vessel owner's liability for any damages arising from a maritime accident to the value of the owner's interest in the vessel and the value of its pending freight after the accident.¹

The Park System Resources Protection Act (PSRPA) was enacted in 1990 to protect and preserve the resources of the United States. The PSRPA authorized the Secretary of the Interior (the Secretary) to hold liable any person or vessel that caused damage to or destroyed any living or non-living part of the National Park System. The person or vessel is responsible for response costs and damages,² which the Secretary may use for resource restoration.³

On July 20, 1998, the commercial tug, *ALLIE-B*, and its barge, collided with and grounded on coral reefs near Ledbury Reef in Biscayne National Park off the coast of Florida. When the tug finally freed itself from the reef, it had caused a "crater-like blow hole in the ocean floor," in addition to "destroying extensive tracts of coral reef, including hard and soft corals and reef framework."⁴ The tug owner and the employer of the tug driver (together known as "Tug Allie") filed a petition to limit liability for any damages caused by the tugboat and barge. Tug Allie claimed the Limitation Act limited their liability to the post-accident value of the tug and freight, which was approximately \$1.2 million. The U.S. and Allied, the barge owner, joined together and responded to Tug Allie's limitation claim with their own claim under the PSRPA for damages amounting to \$3 million.⁵

After comparing the goals of the two statutes and finding them to be in direct conflict, the District Court found the Government's claims under the PSRPA were not subject to limitation and that they could recover the full damages if proven.⁶ Tug Allie appealed to the Court of Appeals for the Eleventh Circuit claiming that the

two statutes could be read harmoniously because the Limitation Act only limited damages recoverable under the PSRPA in relation to damages caused by a vessel. The government countered that the statutory language and the underlying intent created an irreconcilable conflict between the two laws. The government also claimed that because the PSRPA was the newer and more specific statute, the conflict must be resolved by applying the PSRPA and not the Limitation Act. In addressing the issue of harmony, the court reviewed the language of the two statutes and found three main conflicts existed.

Statutory Conflicts

According to the Eleventh Circuit, the first conflict between the two statutes concerned the amount of damages recoverable. Looking first at the PSRPA, the court noted nothing in its language suggests that damages awarded under this statute should be in any way limited or capped. The court found that the terms "response costs and damages" expressly allowed the government to recover all of its losses.⁷ In finding no language to the contrary, the court concluded, "Congress contemplated that the Government could seek full recovery . . . [for] injury to park lands."⁸ The court then looked to the language of the Limitation Act and found that if it applied to the PSRPA, and a vessel destroyed park land, the government's recoverable damages would be limited or not recoverable. This put the two statutes in direct conflict and therefore, the court concluded they could not be read harmoniously.

Further analysis of the two statutes showed that each was based on a different theory of liability. The court, analogizing the PSRPA to the Marine Protection, Research, and Sanctuaries Act, found the PSRPA was a strict liability statute with only three defenses for avoiding liability, none of which Tug Allie could claim.⁹ They also noted that the legislative history suggested that the defenses were intended to be all-inclusive. On the other

hand, the court found the Limitation Act was based on negligence, which allows for many defenses to be used. The court concluded that the two statutes could not be read together because if the Limitation Act was applied to the PSRPA, then all the available defenses to the Limitation Act would necessarily apply to the PSRPA.

The last conflict between the two statutes was the method of determining liability. The PSRPA considered the cause of the injuries in establishing liability and held the person or instrumentality liable for all damages without considering the value of the instrumentality causing the damage. Under the PSRPA, a judgment against a responsible party could be either *in personam* or *in rem* meaning that it applied to the defendant's person or their property.¹⁰

The Limitation Act, however, limits a vessel's liability through showing the unseaworthiness of the vessel or a lack of negligence or lack of knowledge on the owner's part. Under the Limitation Act, no matter if the judgment was against the person (*in personam*) or the vessel (*in rem*), the amount of recoverable damages was limited to the value of the vessel with its cargo, effectively limiting damages to *in rem*.¹¹ Therefore, the court found that the application of the Limitation Act to the PSRPA would render the *in personam* clause of the PSRPA completely meaningless.¹²

Tug Allie next argued that Congress's silence on the applicability of the Limitation Act to the PSRPA proved that Congress intended for it to apply, calling the court's attention to several statutes that specifically stated the Limitation Act was not applicable. Tug Allie reasoned that because the language of the PSRPA did not specify to the contrary, Congress meant for it to apply,

thereby limiting Tug Allie's liability to the value of the vessel. The court rejected Tug Allie's logic, concluding that the Supreme Court has traditionally taken a "restrictive view" of the Limitation Act and finding that Congress' silence alone was not sufficient to determine congressional intent.¹³



Prioritization

After considering all of the elements of statutory construction and finding that the statutes' conflicts render them unharmonious, the Eleventh Circuit considered whether one implicitly overruled the other. In making this determination, the court applied the principle that, "if two statutes conflict, the more recent or more specific

statute controls."¹⁴ Being enacted 140 years after the Limitation Act, it was quite apparent the PSRPA was the more recent statute. In addition, considering the incidents that each statute covered, the PSRPA was found to be more narrowly tailored and the court found that it controlled.

Conclusion

The purpose of the PSRPA was to provide the government with a way to recover for the full restoration of park resources, whether on land or in water, that were damaged by third parties. The Limitation Act's purpose was to provide an exemption from or a limitation on liability in order to encourage shipping. Under the Limitation Act, if a vessel and all its freight were destroyed while damaging or destroying resources in the National Park System, the government could not recover anything. Or if the value of the vessel and its freight were less than the amount of damage caused, then the government's recovery would be limited to its value. Therefore, application of the Limitation Act would frustrate the

See Tug Allie-B, page 9

Alabama Court Upholds Ban on Commercial Advertising in Navigable Waters

Ex Parte Walter, 2002 WL 363718 (Ala. March 8, 2002).

S. Beth Windham, 3L

This Spring, the Alabama Supreme Court affirmed the right of a municipality to prohibit advertising by boats for aesthetic reasons. In allowing municipalities to regulate this form of expression, the court decided this kind of ordinance did not violate the right to free speech under the First Amendment.¹

The *Sign Bote*

The appellant, David Walter, operated a small tugboat, named the *Sign Bote*, in the coastal waters of Alabama.² The boat had an electronic sign affixed and advertised "adult novelties" and "sexy swimwear" for a Gulf Shores store.³ The City of Gulf Shores initially notified Walter that advertising by boat was not permitted in the City's waters, citing general health and safety ordinances. The city recommended that Walter apply for a municipal occupational business license, even though the city had already denied a similar application from another party.⁴ Walter requested the license but was denied in part because of the offensive nature of his advertising.⁵ The City Council then immediately amended a city ordinance to prohibit advertising using a boat on navigable waters. Afterwards, Walter allegedly violated the ordinance eight times and was convicted of five violations.

Advertising and the First Amendment

On appeal of his conviction, Walter claimed the ordinance restricted his commercial speech and violated his Constitutional rights. He argued that the city adopted the ordinance in an unreasonable, arbitrary and capricious manner. He pos-

ituted that the general laws of the State did not allow cities to pass ordinances regulating businesses based on aesthetic reasons alone. The trial court found Gulf Shores' reliance on public welfare concerns was appropriate as it included physical, aesthetic and monetary values.

The Alabama Supreme Court noted that Walter's advertising was commercial speech.⁶ Because commercial speech serves both the purpose of advertising for the speaker and educating the consumer, the government cannot completely prohibit commercial speech. However, an ordinance may ban misleading or unlawful speech if it serves no public function.

The court evaluated the advertising using a four-part test set by the U.S. Supreme Court to ascertain whether commercial speech restrictions were unconstitutional.⁷ The test required a determination of whether (1) the expression was protected under the First Amendment, (2) the government asserted a substantial governmental interest, (3) the regulation directly advanced the governmental interest, and (4) a less restrictive regulation could serve the interest.⁸ While acknowledging that commercial speech is protected, the court noted that it does not have the same high level of protections as other forms of Constitutionally protected speech such as speaking in public forums. In analyzing the government's interests, the court recognized a strong interest in aesthetic improvement acknowledging the unique position of a coastal city such as Gulf Shores stating "the aesthetic value of preserving the natural beauty of that coastline for a city heavily dependent on tourism cannot be overstated. Barring waterborne signage to avoid creating a carnival type atmosphere is a permissible exercise of the City's police

power.”⁹ Consequently, the court reasoned that the regulation directly advanced the governmental objective. Finally, failing to find any narrower restriction that would meet the government’s interest, the court granted deference to the level of effectiveness of the measure as determined by the City.

Walter also challenged the lower court’s requirement that he carry the burden of proof to show that his constitutional rights were violated.¹⁰ In particular, Walter relied on a Supreme Court case that stated “the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”¹¹ The Court responded, without analysis, that the City did admit a transcript of the City Council meeting in which the ordinance was passed and found this satisfied the city’s burden.¹² ✓

ENDNOTES

1. The First Amendment states “Congress shall make no law . . . abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

2. *Ex Parte Walter*, 2002 WL 363718, *1 (Ala. March 8, 2002).
3. *Id.* at *2.
4. *Id.* at *1.
5. *Id.* at *2 (while it was undisputed that the vessel did not exhibit lewd or obscene advertising, there was evidence presented that at least one council member voted against the license because he had received complaints that some of the advertising, promoting ‘adult toys,’ was considered offensive by some residents).
6. *Id.* at *3.
7. *Id.* at *7, citing *Central Hudson Gas v. Public Serv. Comm’n.*, 447 U.S. 557 (1980).
8. *Id.*, citing *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528,1530 (11th Cir. 1985).
9. *Id.* at *8.
10. *Id.* at *3.
11. *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993).
12. *Walter* at *4.

Tug Allie-B, from page 7

very purpose the PSRPA was enacted to serve. The court expanded on this limitation to recovery for water damages, noting the application of the Limitation Act would “require assuming that Congress intended to create a statutory scheme that ensured full protection for park resources on land but only partial protection of our marine park resources.”¹⁵

After a lengthy examination of the statutory language, history, and purpose of each act, the court found that the Limitation Act did not apply to the PSRPA. ✓

ENDNOTES

1. 46 U.S.C. app. § 183(a) (2001).
2. 16 U.S.C. § 19jj-1(a), (b), § 19jj(c), (b) (2001).
3. *Tug Allie-B, Inc. v. United States of America*, 273 F.3d 936, 947 (11th Cir. 2001).
4. *Id.* at 939. See also *In re Tug Allie-B, Inc.*, 114 F.Supp.2d 1301, 1302 n.1 (M.D. Fla. 2000).

5. Allied claimed \$1 million in damages and the U.S. originally claimed \$3 million but reduced their claim to \$2 million.
6. *Id.* at 941. See also 16 U.S.C. § 19jj(b), (c) (2001).
7. *Id.* at 942.
8. *Id.*
9. The three defenses to liability are: (1) the destruction, loss of, or injury to the park system resource was caused solely by an act of God or an act of war; (2) such person acted with due care, and the destruction, loss of, or injury to the park system resource was caused solely by an act or omission of a third party, other than an employee or agent of such person; or (3) the destruction, loss, or injury to the park system resource was caused by an activity authorized by Federal or State law. 16 U.S.C. § 19jj(c) (2001).
10. See 16 U.S.C. § 19jj-1(c) (2001).
11. *Tug Allie-B*, 273 F.3d at 944.
12. *Id.*
13. *Id.* at 947.
14. *Id.* at 948.
15. *Id.*

Tidelands, from page 1

of the pier and restoration of his property to its original condition. He also requested damages for trespass, interference with the peaceful enjoyment of his property, destruction of vegetation, and changes in the natural watercourse. The State intervened in the lawsuit claiming that “any portion of the pier which is not located on Mr. Hoover’s property extends over tidally affected wetlands which are below the line of mean high tide, and therefore are public trust tidelands.”²

Ownership of the Tidelands

The court first declared that title to the tidelands belonged to the state. Under existing public trust principles, the title to the lands cannot be transferred without meeting a higher public purpose and the state cannot lose title through laches, limitations or adverse possession.³

The history of the state’s tideland ownership includes the Public Trust Tidelands Act which was adopted in 1989 in response to growing confusion about ownership of submerged lands. This Act put an end to potential conflicts between the state and private landowners by mapping out those lands included in the public trust. It also gave landowners a chance to contest the inclusions of their lands in the state’s public trust by providing written notice to landowners after which they could file suit. If a landowner failed to sue within three years after the map was finalized, the boundary between State and private lands was considered final.

Stewart’s land did not appear on the state’s preliminary or certified map nor did he receive any notice from the Secretary of State that his land was part of the public trust. Relying on this, Stewart argued that public trust lands were limited to those specified on the certified map and as his lands were not on the map, the state had no claim to them.

The court held that the legislature’s goal in the Tidelands Act did not include losing public trust lands due to an oversight in mapping. Because title to tidelands can’t be lost through laches, limitations or adverse possession, the State’s failure to

assert ownership over the land did not result in a loss of public trust land. The court found that “whatever the reason for not including the subject property on the preliminary map or final certified map, the delay of the State in asserting its ownership interest should not be preclusive because such interest was not expressed in the maps.”⁴ The court required that the state include the property as part of the public trust in future mappings of the area.

Stewart’s Riparian Rights

Stewart also argued that the construction of the Hoover pier impaired his riparian rights. The court first determined that Stewart had littoral rights defined as “rights concerning properties abutting an ocean, sea or lake rather than a river or stream (riparian).”⁵ As a littoral landowner, however, Stewart did not obtain littoral rights over state lands. Regarding the pier, the court found that because the Hoovers adhered to the specifications of the permit, the pier was not in violation of Stewart’s littoral rights.

Conclusion

The Court held the property at issue was public trust tidelands even though it was not designated as such on the certified map as required by the Public Trust Tidelands Act and found that the Hoovers’ construction of the pier was within the landowners’ rights. ✓

ENDNOTES

1. *Stewart v. Hoover*, 815 So.2d 1157 (Miss. 2002).
2. *Id.* at 1159.
3. Adverse possession is when property is acquired by non-permissive use of land under certain conditions. Laches occurs when there is an unreasonable delay or negligence in bringing a claim thereby prejudicing the other party. The limitations period is the statutory time in which a lawsuit can be brought in court, after which suit is not allowed. BRYAN A. GARDNER, BLACKS LAW DICTIONARY, 54, 879, 939 (7th Ed. 1999).
4. *Stewart* at 1162.
5. *Stewart* at 1163, quoting *Watts v. Lawrence*, 703 So.2d 236, 238 (Miss. 1997).

Endangered, from page 2

Schuehle brought a declaratory action before the U.S. District Court for the Western District of Texas, which allows the court to resolve legal rights before the beginning of a suit if a potential suit is foreseeable. Schuehle sought to halt the potential Sierra Club suits arguing that Congress had exceeded its powers by adopting the ESA Take Provision.³

Before the court could reach the merits of Schuehle's challenge to the ESA, he first had to show that his action was "ripe" by proving he was



damaged by the threat of litigation. The district court first determined that Schuehle was adequately damaged by his self-regulation of water pumped from the aquifer in response to the Sierra Club's threat of litigation.⁴ The district court then found in favor of the Sierra Club, holding that the ESA's Take Provision was within Congress' power under the Commerce Clause of the Constitution.⁵ Schuehle appealed this ruling to the Fifth Circuit.

Actual Controversy Required For Ripeness

In order for a declaratory action to be ready for a court to hear ("ripe"), an "actual controversy" between the parties must exist.⁶ Threats of litigation are sufficient fuel for an "actual controversy," but only when such threats are "specific and concrete."⁷ In its 1990 letter providing notice of litigation, the Sierra Club listed various entities

pumping water from the Edwards Aquifer, including Schuehle's partnership, but not Schuehle individually. Similarly, neither Schuehle, his partnership, nor the Edwards Aquifer Authority were listed in the Sierra Club's 1994 notice letter. Finally, the 1998 notice of litigation listed only the Aquifer Authority and its members in their official capacities. In order to bring this suit in his individual capacity, Schuehle had to receive a personal threat of litigation.

According to the Fifth Circuit, the only threats that Schuehle received in his individual capacity were from prior suits by the Sierra Club against Edwards Aquifer pumpers and from a quote by a U.S. Fish and Wildlife official in a 1988 newspaper that stated, "Law enforcement is always an option if the Edwards species are harmed."⁸ The court noted that Schuehle's self-regulation of pumping in fear of litigation from the notice letters might have amounted to an actual controversy, had it not been for the years that passed without litigation. In the end, the Fifth Circuit determined that these threats, without more, were insufficient to meet the "specific and concrete" requirements for the suit and Schuehle's claim failed.

The court concluded that "we have some saber rattling, but nothing more, and we are left with the unease that proceeding to the merits is more likely than not the offering of one answer to a hypothesis—a possible but not sufficiently possible injury. This is where [we] must stop."⁹ ✓

ENDNOTES

1. 16 U.S.C. § 1538(a)(1)(B) (2002).
2. 50 C.F.R. § 17.3 (2002).
3. *Shields v. Norton*, 289 F.3d 832, 834 (5th Cir. 2002).
4. *Id.*
5. *Id.* at 834.
6. *Id.* at 835 (*citing* 28 U.S.C. § 2201(a) (2002)).
7. 289 F.3d at 835.
8. *Id.* at 837.
9. *Id.*



2002 Mississippi Legislative Update

Jason Dare, 3L

The following are summaries of coastal, fisheries, marine, and water resources related legislation enacted by the Mississippi Legislature during the 2002 session.

2002 Mississippi Laws 325.

(S.B. 2183)

Approved March 18, 2002.

Effective July 1, 2002.

Amends Miss. Code § 65-1-8 to stop requiring rural water districts, rural water systems, nonprofit water associations and municipal public water systems in towns with 10,000 or fewer residents from paying for removal and relocation of water and sewer lines in right-of-ways of state highways.

2002 Mississippi Laws 340.

(S.B. 2465)

Approved March 18, 2002.

Effective July 1, 2002.

Creates Miss. Code §§ 49-15-201 through 49-15-207. Section 49-15-201 creates procedures for the forfeiture of vessels, outboard motors, boats or trailers seized pursuant to § 59-21-33 or any net or other paraphernalia used to further a marine violation pursuant to § 49-15-21. Section 49-15-203 gives the owner of seized property 30 days to file an answer to the forfeiture proceedings. Section 49-15-207 sets a \$5000 limit on the property that can be forfeited.

2002 Mississippi Laws 341.

(S.B. 2444)

Approved March 18, 2002.

Effective July 1, 2002.

Amends Miss. Code § 53-9-71 to set limits on the suitability of coal mining practices that conform with federal law. Specifically, any party can petition a review commission to have lands designated unsuitable for coal mining operations. Unsuitable operations are determined by effects on: (1) important historic, cultural, scientific and aesthetic values and natural systems; (2) water supply from surface or subsurface sources; and (3) natural hazard lands, including frequently flooded and unstable geological areas.

2002 Mississippi Laws 362.

(S.B. 2776)

Approved March 18, 2002.

Effective March 18, 2002.

Amends Miss. Code § 49-1-15 to eliminate the examination requirement for conservation officers. In order to become a conservation officer, an individual must be at least 21 years old and either complete 64 semester hours at an accredited community college or university or pass the Law Enforcement Academy and have at least five years experience in law enforcement.

2002 Mississippi Laws 368.

(S.B. 2835)

Approved March 18, 2002.

Effective July 1, 2002.

Amends Miss. Code § 51-1-4 to prohibit the use of motorized vehicles in the beds of a public waterway, unless written permission is given by the landowner. The misdemeanor carries a penalty of between \$150 and \$250 for the first offense, and between \$250 to \$500 and/or 10 to 30 days imprisonment for a second offense committed within five years.

2002 Mississippi Laws 376.**(S.B. 2966)***Approved March 18, 2002.**Effective March 18, 2002.*

Amends Miss. Code § 49-15-21 to authorize the executive director of the Department of Marine Resources to oversee the Enforcement Officers' Reserve Unit, comprised of unpaid assistants to marine enforcement officers. Furthermore, this act adds § 49-15-22, which permits retired marine control officers to carry a firearm on their person, should they request to do so.

2002 Mississippi Laws 399.**(H.B. 936)***Approved March 19, 2002.**Effective July 1, 2002.*

Amends Miss. Code § 41-3-16 to make loans and/or grants available to any eligible county, incorporated municipality, district or other water organization for the improvement of that entity's water systems, provided the legislature has allocated the necessary funds.

2002 Mississippi Laws 401.**(H.B. 1077)***Approved March 19, 2002.**Effective July 1, 2002.*

Amends Miss. Code § 49-17-29 to require applicants for permits to discharge wastewater into Mississippi waters from a new source to obtain a Certificate of Public Convenience and Necessity from the Public Service Commission. To do so, the applicant must submit financial and managerial information so that the commission may determine the discharge source's practicability. Without this determination, no permit may be obtained.

2002 Mississippi Laws 430.**(H.B. 1084)***Approved March 20, 2002.**Effective July 1, 2002.*

Amends Miss. Code § 49-15-46 to levy a 15¢ per sack fee on commercial oyster harvesters working in waters within Mississippi's jurisdiction who do not sell their catch to Mississippi dealers. This fee, which is in addition to the regular oyster harvest fee, is to be paid on the day of harvest.

2002 Mississippi Laws 474.**(H.B. 1331)***Approved March 27, 2002.**Effective March 27, 2002.*

Amends Miss. Code § 29-15-9 to authorize the Department of Marine Resources to make separate installment payments to any political subdivision or agency that has completed work on a tidelands project, including but not limited to materials used.

2002 Mississippi Laws 487.**(H.B. 1397)***Approved March 27, 2002.**Effective March 27, 2002.*

Creates Miss. Code § 49-17-44.1, which grants the Commission on Environmental Quality authority to petition the chancery court of the county where any abandoned or grossly inefficient sewage system is located to attach the assets of the sewage system's owner, and give control over the sewage system to a receiver. Parties that have used such a sewage system may intervene. The receiver has authority to operate the system in a manner beneficial to both its users and to the public, until such time that the chancery court determines that it is in these parties' best interest to return authority to the original owner or sell it to a new owner.

See Mississippi Legislative, page 14

Mississippi Legislative, from page 13

2002 Mississippi Laws 489.

(H.B. 1739)

Approved March 27, 2002.

Effective January 1, 2002.

Amends Miss. Code § 27-35-50 to define the true value of aquaculture for tax purposes, which is calculated in the same manner as the true value of row crops. Appraisals are conducted according to the use of the land on January 1 of each year, using State Tax Commission criteria including soil type and productivity of the land.

2002 Mississippi Laws 493.

(H.B. 434)

Approved April 1, 2002.

Effective June 30, 2002.

Reenacts Miss. Code §§ 41-67-1 to 41-67-29, which are collectively known as the “Mississippi Individual On-Site Wastewater Disposal System Law.” This act gives authority over design and construction of on-site wastewater disposal systems to the State Board of Health. The developer of the disposal system must first submit a preliminary design and feasibility study prepared by a professional engineer to the Commission on Environmental Quality, who then determines the feasibility of the project. Next, the developer must submit a notice of intent to construct the disposal system to the Department of Environmental Quality, who in turn gives the developer applicable rules and/or regulations pertaining to the disposal system.

2002 Mississippi Laws 499.

(H.B. 1558)

Approved April 1, 2002.

Effective April 1, 2002.

Provides counties and towns with the authority to create Public Improvement Districts with five-member boards to construct and operate wastewater and sewage control facilities within the district.

2002 Mississippi Laws 506.

(S.B. 2345)

Approved April 1, 2002.

Effective April 1, 2002.

Amends Miss. Code § 69-7-605 to define “catfish” as any species within the family *ictaluridae* and “wholesaler” as anyone selling catfish to a direct retailer. The act also amends § 69-7-607 to prohibit the sale of catfish for human consumption by any processor, distributor, wholesaler or retailer, unless it is specifically marked either farm-raised, river or lake, imported or ocean catfish. The Office of Rural Health, a part of the Health Department, enforces and regulates domestic and imported fish.

2002 Mississippi Laws 522.

(S.B. 2273)

Approved April 1, 2002.

Effective April 1, 2002.

Establishes a fund, known as the “Deer Island Acquisition, Reclamation and Preservation Fund” to acquire, restore and preserve Deer Island as part of the Coastal Preserve System. Bonds issued for this purpose cannot exceed \$10 million.

2002 Mississippi Laws 525.

(S.B. 2553)

Approved April 2, 2002.

Effective July 1, 2002.

Amends Miss. Code § 49-15-84 to authorize the Commission on Marine Resources, with assistance from the Gulf Coast Research Laboratory, to create market size limits and harvest size limits for peeler and soft-shell crabs. The act makes it illegal to possess, have or hold any female sponge crab or any female crab bearing visible eggs, unless the crab was caught unintentionally and is immediately returned to the water. Finally, this act creates § 49-15-84.1, which allows the Commission to open and close seasons for crab trap use in Mississippi’s public waters. ✓

Lagniappe *(a little something extra)*

Around the Gulf . . .



In July, the **Rockwood development**, a controversial plan to build gas stations, shopping centers and offices in a swampy forested area near Gulfport, Mississippi, was approved. Approval had been sought since 1998 but state and federal authorities were concerned about pollution and the effect of building on wetlands. Conditions of the permit include funding an escrow account to purchase and conserve wetlands in the area in the future, building retention ponds, creating oil and water separators and tree-lined buffer zones to filter runoff and building around some existing wetlands, leaving 10 percent, or 8 acres, intact.

A Mississippi state representative has proposed to cut \$8 million from **Mississippi Department of Environmental Quality** funding for federally required programs, hoping that the federal government will step in and pay for those programs. In response to the proposal, the Sierra Club expressed support, hoping that the EPA would take a tougher stance on polluters than does the DEQ.

This summer, three new members were appointed to the **Gulf of Mexico Fishery Management Council**. The appointees for 2002 are for three at-large seats and include: Maumus F. Claverie Jr. (recreational fisherman from New Orleans, LA), James B. Fensom (recreational fisherman from Panama City, FL), and Joseph P. Hendrix Jr. (manager, shrimp aquaculture facility, seafood marketing from Harlingen, TX). Dr. Claverie and Mr. Fensom are reappointments to the Council, while Mr. Hendrix is a new appointee. More information is available on the Council website at <http://www.gulfcouncil.org/index.html>.



Around the Nation . . .



In July, the South Carolina Department of Natural Resources and the Caribbean Conservation Corporation launched an Internet site that monitors the progression of five **loggerhead sea turtles** as their movements are tracked by satellite. To determine dispersal patterns, migratory pathways and foraging habitat use of the sea turtles during the non-nesting period, five satellite tagged sea turtles from Cape Island in Cape Romain National Wildlife Refuge were released. Their movements can be tracked by logging onto <http://www.cccturtle.org>.

Four albatross breeding sites in Australia have been added to the **Register of Critical Habitat**. The sites are the first listings under the Environment Protection and Biodiversity Conservation Act of 1999, which came into effect in 2001. The seabird is considered vulnerable as a result of interactions with longline fisheries and feral animals and habitat disturbance. Environmental groups are pushing for habitat listings for the blue whale and six species of marine turtles. Listing of habitat sites permits the government to impose penalties on those who knowingly cause significant damage to an area. ✓

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