WATER LOG

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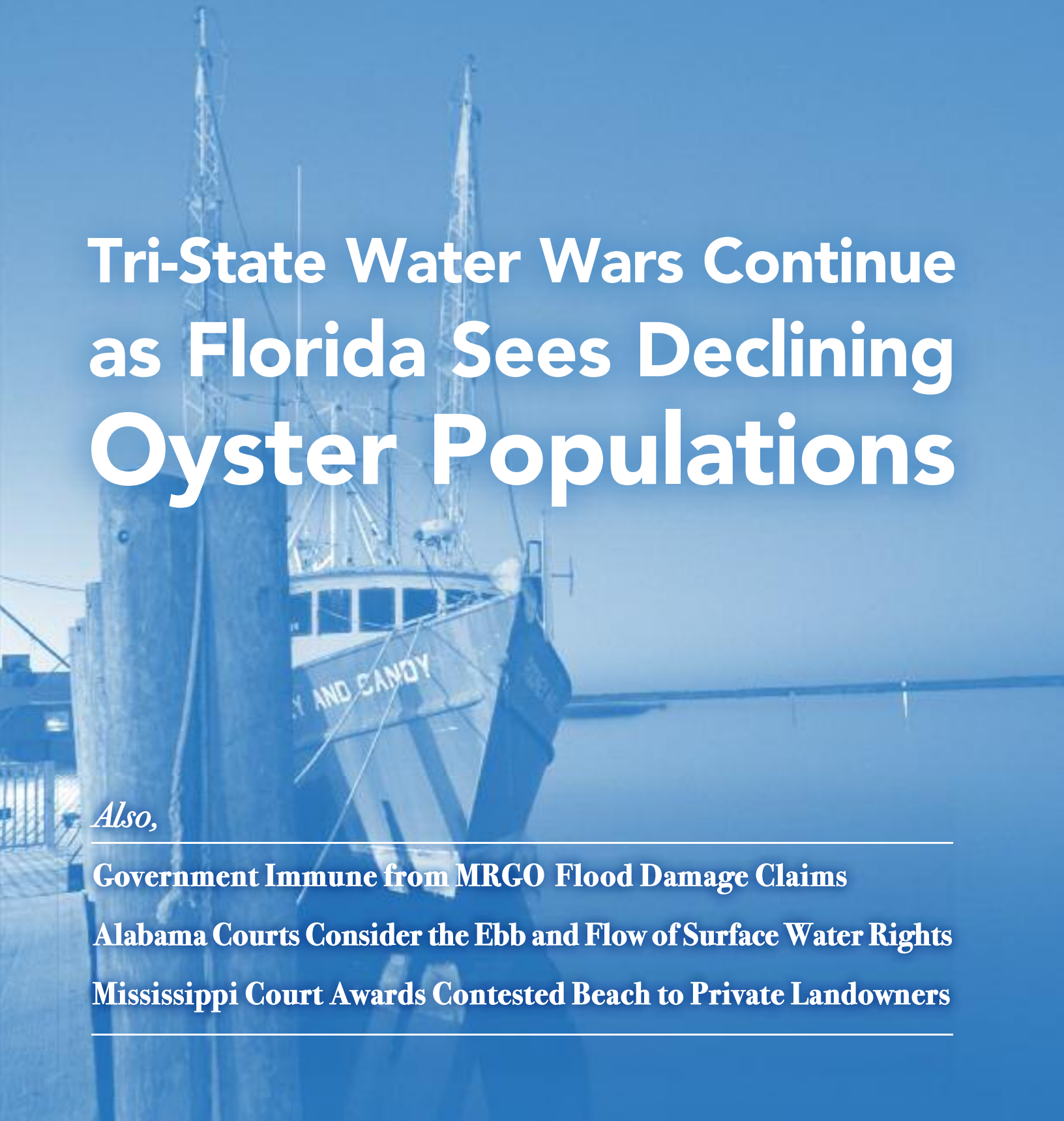

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www.bit.ly/aquaculture2013

National Working Waterfronts & Waterways Symposium

March 25-28, 2013
Tacoma, WA
www.wateraccessus.com

National Adaptation Forum

April 2-4, 2013
Denver, CO
www.nationaladaptationforum.org

Cover photograph of a boat on Apalachicola Bay courtesy of Ben Patchattack.

Contents photograph of a sunset in Ocean Springs courtesy of Whit Andrews

Tri-State Water Wars Continue as Florida Sees Declining Oyster Populations

Catherine M. Janasie[1]

Although oystermen harvested over two million pounds of oyster meat from Florida's Apalachicola Bay last year, during this year's harvest season it became apparent that Florida's oyster industry was in serious danger. Florida officials believe that commercial harvesting levels are unlikely to be sustained, severely impacting those who rely on the oyster industry in the region.[2] While there may be multiple causes for the decline of oysters in the area, Florida agricultural officials believe that drought is a contributing factor. In response to this, Florida Governor Rick Scott has stated that Apalachicola Bay needs more freshwater from Georgia and has asked federal officials to increase the amount of water flowing downstream from Lake Lanier, a lake created by the completion of Buford Dam. Both the lake and the dam have caused years of lawsuits among Florida, Georgia and Alabama, which have come to be known at the Tri-State Water Wars.[3]

Photograph of Apalachicola Bay oystering courtesy of the FWC.

Tri-State Water Wars Background

Located north of Atlanta, the U.S. Army Corps of Engineers (the Corps) built Buford Dam across the Chattahoochee River and created Lake Lanier. North Georgia uses the dam and reservoir in many ways, such as for water storage, flood control, hydropower production and recreation. At the time of the dam's completion in 1957, municipal water supply was not considered to be a main use of the dam. However, as the populations of Atlanta and north Georgia grew, the Corps and Georgia began to increase their withdrawals from Lake Lanier through a series of contracts under the authority of the Water Supply Act (WSA). Most of these contracts expired in 1990, but the Corps continued to permit these water withdrawals from Lake Lanier.[4]

These increased withdrawals have led to years of negotiations and lawsuits between Georgia, Alabama and Florida, which have come to be known as the Tri-State Water Wars. In 2009, the U.S. District Court for the Middle District of Florida ruled against Georgia's attempts to increase its withdrawals from Lake Lanier, holding that the Corps exceeded its authority by considering the reallocation of 22% of Lake Lanier's conservation storage to municipal withdrawals.[5] The court concluded that such a shift would require congressional approval as a "major operational change" under the WSA and that increased municipal withdrawals would seriously affect the primary authorized purpose of the dam: hydropower generation. The court gave Georgia, Alabama and Florida three years to find a solution to their disagreement over water withdrawals from Lake Lanier. If they could not reach an agreement during this time period, Atlanta would be limited to its withdrawal amounts from the 1970s, which could be catastrophic for the area.[6]

Both the Corps and Georgia appealed the 2009 district court opinion, and in 2011 the Eleventh Circuit reversed the lower court's decision.[7] The Eleventh Circuit found that documents from the development of Buford Dam and the Apalachicola-Chattahoochee-Flint (ACF) River Basin supported using the dam for municipal water withdrawal, as well as increasing those withdrawals to serve a growing population.[8] The court disagreed with the lower court's decision that municipal water withdrawal was not an authorized purpose of the dam. The court ordered the Corps to decide how to balance its responsibility between using the reservoir for hydroelectric power and water storage, reconsider Georgia's 2000 request for increased water withdrawals and finalize allocation plans for the ACF River Basin within one year.[9]

Recent Legal Developments

In 2011, the Eleventh Circuit denied a request to rehear the case, which prompted Alabama, Georgia and Southeastern Federal Power Customers, Inc. to petition the Supreme Court of the United States to hear the case.[10] This past summer, the Court denied each of these petitions.[11] In addition, in June, the Office of the Chief Counsel of the Corps issued a legal memorandum on the Corps' authority to provide for municipal and industrial water supply from Lake Lanier and Buford Dam. In this memorandum, the Office of the Chief Counsel reversed its previous position and concluded that the Corps had the legal authority to decide whether to exercise its discretion to alter its operation of Buford Dam to accommodate Georgia's request concerning water supply withdrawals and return flows.[12] The memorandum also emphasizes that any decision by the Corps to exercise this discretion will occur in the future, as the memorandum does not speak to whether "the Corps must, should, or will exercise its discretion."[13] Finally, in October, the Corps announced that it had reopened public scoping on the proposed update of the ACF River Basin's Master Water Control Manual.[14]

Effects on Oysters

Because the outlook for Florida's oyster harvest this year is bleak, officials in the state are looking for solutions to the oyster crisis. Florida Governor Rick Scott has suggested that a solution could be to increase the amount of water released from Lake Lanier. While there may be multiple causes for the decline of oysters in the area, Florida agricultural officials believe drought is a contributing factor. Oysters need the correct mixture of salt and fresh water to survive, and changes to the water level of an area, including drought, affect the salinity of the water and may adversely affect oyster populations. The decline of oysters in Apalachicola Bay will have a large impact on the surrounding region, as the oyster industry direct or indirectly effects up to 2,500 jobs in the area.[15] Because of this, Florida Governor Rick Scott has asked the U.S. Department of Commerce for federal disaster assistance to help members of Florida's seafood industry.

In addition, Governor Scott has discussed with the Corps the possibility of releasing additional water from Lake Lanier. Starting in November, the Corps began to release more water from the lake's reservoir to help downstream areas hit hard by the drought, including Apalachicola Bay, but these increased releases may not help the critically low Apalachicola River.[16] Through the proposed manual update for the Buford Dam, the public has the opportunity to express its concerns with the effect of the dam's operation on fish and wildlife, including its effects on oysters. As part of the manual update process, the Corps will look at a rage of water supply alternatives and each of the dam's authorized purposes, including navigation, fish and wildlife, recreation and water quality, and the Corps has encouraged the public to provide comments on these areas.[17]

Conclusion

With the United States Supreme Court's denial of Southeastern Federal Power Customers, Inc., Alabama and Florida's petitions for certiorari to the Court, this current round of Tri-State Water Wars litigation has concluded. However, the Corps is actively considering how to manage the dam and balance using the dam for hydropower generation and water supply. These upcoming decisions by the Corps will likely face opposition from at least one party involved in the Tri-State Water Wars, most likely leading to more disagreement, negotiations and litigation among the concerned parties. Finally, the Eleventh Circuit vacated an injunction this November that will allow Shady Springs and Fulton County to negotiate a water service delivery agreement with Atlanta, a proceeding that will be covered in more depth in the next *Water Log*.

Endnotes

1. Ocean & Coastal Law Fellow, 2012-13, Mississippi-Alabama Sea Grant Legal Program.
2. Gary Fineout, *Fla. Gov. Says State Needs More Water From Georgia*, The Westerly Sun, October 4, 2012.
3. *Id.*
4. Nicholas Lund, *Georgia Battles Back in Tri-State Water Wars*, 31.3 Water Log 3-4 (2011).
5. *In re* Tri-State Water Rights Litigation, 639 F.Supp.2d 1308 (M.D.Fla. 2009).
6. *Id.* at 1355.
7. Florida v. United States Army Corps Eng'r (*In re* MDL-1824 Tri-State Water Rights Litig.), 644 F.3d 1160 (11th Cir. 2011).
8. *Id.* at 1186.
9. *Id.* at 1200-01. The Corps had previously denied Georgia's request because it thought municipal water supplies were not an authorized use of the dam.
10. *In re* MDL-1824 Tri-State Water Rights Litigation, 451 Fed.Appx. 908 (11th Cir. 2011).
11. Alabama v. Georgia, 133 S. Ct. 25 (2012); Southeastern Fed. Power Customers, Inc. v. State of Georgia, 133 S. Ct. 25 (2012); Florida v. Georgia, 133 S. Ct. 25 (2012).
12. Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia, Office of the Chief Legal Counsel, U.S. Army Corps of Engineers (June 25, 2012), *at* http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf.
13. *Id.* at 2.
14. Corps to Reopen Public Scoping for Updating Water Control Plans and Manuals for the Apalachicola-Chattahoochee-Flint River Basin Water Control Manual (October 2012), at http://www.sam.usace.army.mil/DistrictHomePage/Lastest%20News/12-29%20USACE%20rescoping.pdf.
15. Fineout, *supra* note 2.
16. Jennifer Portman, *Water Releases Not Enough for River*, Tallahassee Democrat, Nov. 16, 2012.
17. Corps to Reopen Public Scoping for Updating Water Control Plans and Manuals for the Apalachicola-Chattahoochee-Flint River Basin Water Control Manual, *supra* note 14. The public must submit its comments by December 12, 2012.

Government Immune from MRGO Flood Damage Claims

Anna Outzen[1]

Photograph of MRGO turning canal basin cranes courtesy of Infrogmation of New Orleans.

After a nineteen-day trial and one appeal, New Orleans flood victims residing in St. Bernard parish hoped that they would receive compensation for property damage suffered during Hurricane Katrina. During the trial process, both the trial court and appellate court found that such flood damage was caused by the government's operation of the Mississippi River Gulf Outlet. This fall, however, the Fifth Circuit reversed its prior ruling and found that the federal government was not liable because government decisions related to operating the Mississippi River Gulf Outlet were discretionary decisions, protected from lawsuit by the Federal Torts Claims Act.

Background

During Hurricane Katrina, various levees were breached in the New Orleans area, causing significant property damage. Various lawsuits arose against the federal government for flood damage based on two government projects connected with the levee breaches: the Mississippi River Gulf Outlet (MRGO) and the Lake Pontchartrain and Vicinity Hurricane Protection Plan (LPV). In 1956, Congress authorized the Army Corps of Engineers (Corps) to construct MRGO as a way to make the Port of New Orleans more accessible for military and economic use.[2] By the time of completion in 1968, MRGO constituted a shorter shipping route from New Orleans to the Gulf of Mexico. Although considered, the designers decided not to armor its banks with foreshore protection, which could have protected the channel from erosion. While designing and constructing MRGO, the Corps was also implementing LPV, which required that the Corps build levees and higher floodwalls in certain outfall canals.

Despite authorization of foreshore protection in 1967, the Corps did not actually armor the channel banks in the St. Bernard area until the late 1990s. The Corps justified this delay by relying on a cost-benefit analysis. They repeatedly reported that foreshore protection would increase the cost of dredging sixfold, and there was a continual need for dredging to maintain the channel's navigability. In the mid-1990s, the Corp realized that foreshore protection was not as costly to implement as they previously reported, but "[this] delay in armoring MRGO allowed wave wash from ships' wakes to erode the channel considerably…thus allow[ing] Hurricane Katrina to generate a peak storm surge capable of breaching the … levee [that] flood[ed] the St. Bernard polder."[3]

Consequently, the district court found in favor of the plaintiffs from St. Bernard, while dismissing plaintiffs from other areas. The U.S. government appealed that decision to the Fifth Circuit, claiming immunity from this lawsuit under the Flood Control Act of 1928 (FCA) and the discretionary function exception of the Federal Tort Claims Act (DFE). On appeal, the Fifth Circuit first held that neither FCA nor DFE granted the government immunity from the St. Bernard residents' claim. The government successfully petitioned the court for a rehearing, which led to the court reversing its previous decision and finding governmental immunity under DFE.

FCA Immunity

The government enjoys immunity under the Flood Control Act when the floodwaters that caused the alleged damage were released as a result of a flood control activity or associated negligence.[4] This test requires courts to look to the character of the waters and the purposes of their release. The court found that the St. Bernard residents' damage was caused by floodwaters released because of the Corps' decision to dredge MRGO for navigability purposes.[5] Dredging to maintain navigability is not considered "flood control activity," therefore the floodwaters were not released because of flood control activity. Accordingly, the St. Bernard plaintiffs' claims were not barred under FCA. Another group of plaintiffs alleged that their flood damage was caused by the negligent dredging of a canal and construction of a levee that were part of the LPV project, not the MRGO project. The court held here, however, that the government was immune from liability because these waters were released as the result of "flood control activity" because the canal at issue was constructed in order to prevent flooding.

Discretionary Function Exception Immunity

The Federal Tort Claims Act's discretionary function exception (DFE) bars claims based on government actions and decisions that are a discretionary function of the government. To be considered discretionary, such government action or decision must involve "an element of judgment or choice" and be based on "considerations of public policy."[6] In its first decision, the Fifth Circuit agreed with the plaintiffs that the Corps' decision to delay armoring of MRGO was based on scientific considerations instead of public policy considerations, meaning the government failed the "discretionary test" and was not immune from liability.[7] Decisions on scientific principles are not enough to warrant governmental immunity, unless they also involve public policy considerations. After revisiting the case in September, the Fifth Circuit found that the government's decision was based on public policy considerations, warranting a reversal of their previous decision.

In March, the Fifth Circuit had found that "policy played no role in the government's decision to delay armoring MRGO."[8] The court reasoned that the Corps operated MRGO with the "mistaken scientific belief that MRGO would *not* increase storm surge risks."[9] The government even explained that they constructed MRGO with no barriers because the channel would not affect "water surface elevations for major storms and hurricanes."[10] The Fifth Circuit found that "[t]his [was] not a situation in which the Corps recognized a risk and chose not to mitigate it out of concern for some other public policy (e.g., navigation or commerce); it flatly failed to gauge the risk."[11]

After reviewing the facts, the Fifth Circuit reversed itself and found that the Corps' decision did involve public policy considerations. Specifically, the court mentions that even though they decided not to implement foreshore protection, the Corps did appreciate the benefits of it. The court also notes that the Corps considered feasibility and reasonable alternatives before deciding whether or not to implement any erosion-control measure. The court concluded that "the Corps's actual reasons for the delay [in armoring the banks] are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations."[12] As a result, the Fifth Circuit ultimately held that the DFE immunity applied and therefore barred the St. Bernard residents' claims against the government.

Conclusion

The effect of the Fifth Circuit's March ruling was that only those flood damage claims following Hurricane Katrina that were directly related to the government's operation of MRGO could overcome government immunity. Now, the government enjoys immunity from any and all flood damage claims based on the negligent design, construction, and operation of MRGO.

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. *In re* Katrina Canal Breaches Litigation, Nos. 1030249, 1031054, and 1130808, 2012 WL 4343775, at *2 (5th Cir. Sept. 24, 2012).
3. *Id.* at *4.
4. *Id.* at *5.
5. *Id.* at *9.
6. *Id.* at *10.
7. *In re* Katrina Canal Breaches Litigation, 673 F.3d 381, 395 (5th Cir. 2012).
8. *Id.* at 393.
9. *Id.* at 394.
10. *Id.* at 395.
11. *In re* Katrina Canal Breaches Litigation, 2012 WL 43433775, at *10.
12. *Id.* at *13.

Alabama Courts Consider the Ebb and Flow of Surface Water Rights

Cullen Manning[1]

Ownership of surface water has been the subject of legal battles for over 100 years.[2] As America developed and the space between neighbors grew smaller, courts defined surface water rights in an effort to settle disputes. Yet, the courts also recognized that the responsibilities and incentives for granting owners rights were different for property owners in cities and rural areas. In an effort to reduce litigation and promote growth, states began to adopt the "civil law" and "common enemy" rules to determine who was responsible for surface water.

Background

In 2007, Lisa Antoine and her husband Ronald Glenn built a home in Oxmoor Landing, a neighborhood located in Bessemer, Alabama. Antoine decided that she would be the general contractor for the house and, as such, oversaw all the planning and construction. Soon after completion, the couple noticed that there was an unusual amount of flooding in their yard when it rained and that most of the water was flowing down from surrounding properties. In response to the ponding in their yard, they filed a lawsuit against the surrounding property owner, the neighborhood developer, and the engineering company that designed Oxmoor Landing (collectively the Oxmoor Developers). The claim was for trespassing, creating a nuisance, and injuring their real property. In turn, the Oxmoor Developers filed a counterclaim for trespass and negligence against Antoine and Glenn stating that the couple created an obstruction that blocked the natural flow of surface waters from the neighboring lots.

Surface Water Rights

Alabama property law treats the surface water rights of urbanites different from the surface water rights of those living in rural areas. In urban areas, focus on absolute landownership causes courts to treat surface water as a "common enemy" to property owners.[3] Under the common enemy rule, landowners may defend their property from damage due to the natural flow of surface water.[4] Since surface water is considered a nuisance in cities, landowners may protect themselves without worrying that their neighbors might suffer damage.[5]

In rural farmland, the civil law rule applies. The civil law rule maintains that landownership entails ownership of surface water and that "lower landowners may not disrupt the flow of [surface] water to the upper owner's detriment."[6] In many aspects, the civil law rule conforms to natural law giving more legal rights to those further up the natural flow of water.[7] The civil law rule developed in order to promote agricultural growth and respond to the negative consequences of the common enemy rule.[8] Agriculturally, the law allows landowners to consistently rely on the layout of their land by maintaining the natural flow of water. When the natural flow of rainwater is blocked, farmers and surrounding landowners along the path suffer from unexpected complications like ponding. Unlike the common enemy rule, the civil law rule does not allow a property owner to alter the flow of surface water without regard for surrounding neighbors.[9]

In this case, Antoine and Glenn argued that the infringing ponding on their property was the result of the Oxmoor Developers' poor neighborhood planning. The Oxmoor Developers countered by arguing that Antoine and Glenn's negligent construction of their house caused the ponding and violated Oxmoor's property rights under the civil law rule.

At trial, Antoine and Glenn's claims of trespass, nuisance, and negligence failed to persuade the court. Expert testimony revealed that the construction of the couple's home had redistributed dirt from the lot, creating an obstruction to water flow from the surrounding properties down to the Glenn's yard. The expert identified the obstruction as a section of the yard that was raised two feet higher than normal. Since Antoine was the general contractor overseeing the construction of the house, the court determined that it was her negligence that created the obstruction. Applying the civil law rule, Antoine was liable to the "upper owners" for negligently obstructing the flow of surface water.

On appeal, Antoine and Glenn attempted to argue that the trial court mistakenly used the civil law rule rather than the common enemy rule. However, Antoine and Glenn were procedurally prohibited from bringing this new argument on appeal because they had not raised the issue during the trial.[10] Had they properly preserved their argument for appeal, Antoine and Glenn might have persuaded the court to apply the common enemy rule, thus granting them the right to protect their property from surface water at the Oxmoor Developers' expense.

Conclusion

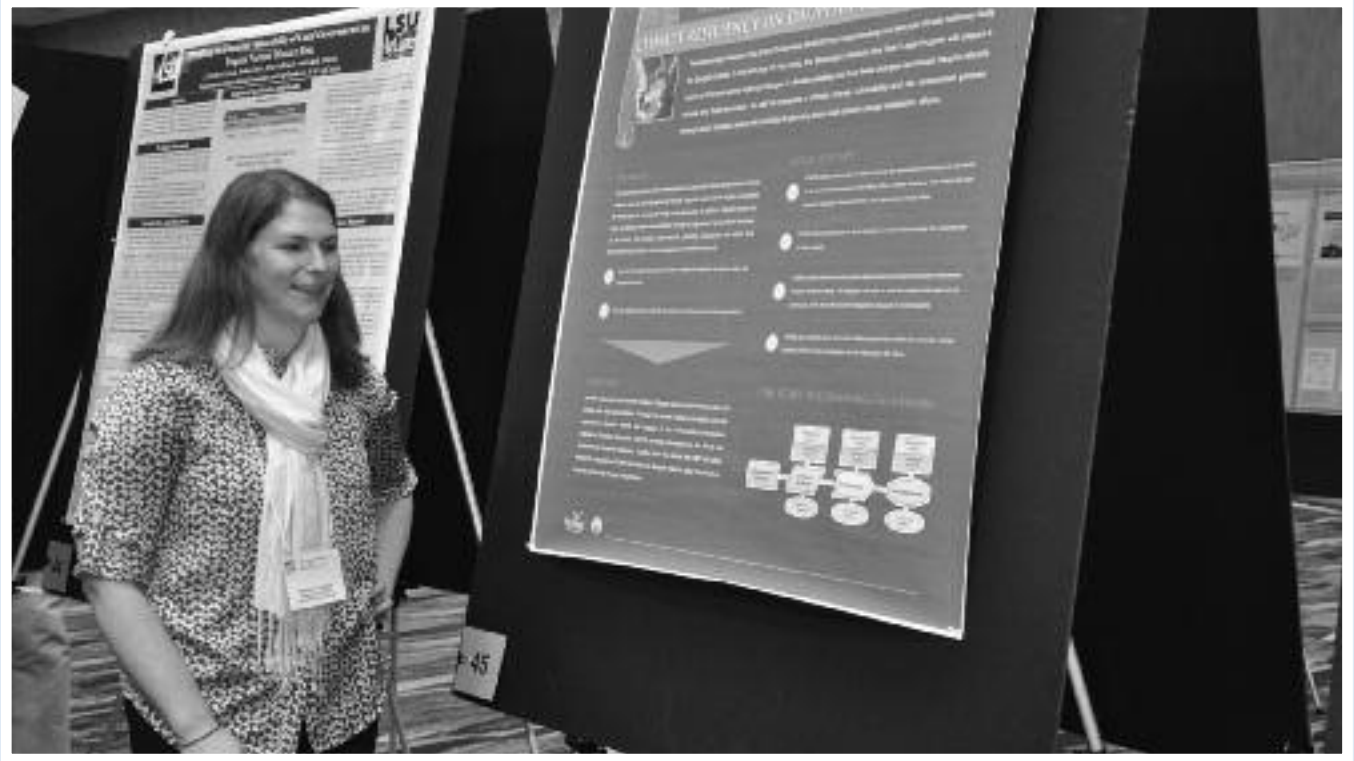
The difference between the common enemy rule and the civil law rule was essential in determining whether Antoine and Glenn were liable for damages or had the right to combat the ponding in their yard. The ability to classify rural and urban areas and determine which rule should be imposed will certainly be a source of litigation in the future if it is not already. The effects of the two rules are still uncertain. Many complain that there is no statistical evidence to support that either rule promotes land development, yet both policies are adopted in part on the premise that they help owners improve land.[11]

Endnotes

1. 2014 J.D. candidate, University of Mississippi School of Law.
2. Nininger v. Norwood, 72 Ala. 277 (1882).
3. Joseph W. Dellapenna, *The Legal Regulation of Diffused Surface Water*, Vill. Envtl. L.J. 285, 294 (1991).
4. *Id.*
5. *Id.*
6. *Antoine*, 2012 WL 2947896 at 5.
7. Dellapenna, *supra* note 4, at 304.
8. *Id.* at 304-05.
9. *Id.*
10. *Antoine,* 2012 WL 2947896 at 6.
11. Dellapenna, *supra* note 4, at 297-98.

Mississippi-Alabama Bays and Bayous Symposium

Catherine Janasie, Ocean and Coastal Law Fellow for the Mississippi-Alabama Sea Grant Legal Program, presents the poster "Climate Resiliency on Dauphin Island, Alabama" during the Mississippi-Alabama Bays and Bayous Symposium on November 14, 2012 in Biloxi, MS.



What's the Damage? Examining the "Pure Stigma Claims" of Gulf Coast Property Owners in *In re Oil Spill by the Oil Rig Deepwater Horizon*

King Farris[1]

"What's the damage?" It's a three-word phrase with multiple meanings. Spoken plainly, it asks for an assessment of what needs to be fixed on an object, such as a car or a house. It can also be a coded way of asking what something will (or has) cost, like dinner with friends. For U.S. District Court Judge Carl J. Barbier of the Eastern District of Louisiana, currently presiding over the case of *In re Oil Spill by the Oil Rig Deepwater Horizon*, it's a question lacking easy answers. The court is facing an unprecedented amount of litigation—so many individual actions sprang up from the spill that the court had to organize the cases into bundles for easier handling—and all sides, from plaintiffs and defendants to local residents and environmental and oil and gas concerns—anxiously await the federal court's decision.

Making the court's job that much harder is that the litigation also involves the standard liability suits between BP and its partners in the Deepwater Horizon oil rig project, which would be a large undertaking in and of itself given the scope of the underwater blowout and oil spill. But the court is facing a type of plaintiff not often seen at any level of court: "pure stigma" claimants seeking damages through links with either the Gulf of Mexico recreationally, the BP brand commercially, or with properties materially damaged by the spilled oil geographically. The uniqueness and intricacy of the "pure stigma claims" make them worthy of deeper examination.

Photograph of Deepwater Horizon oil spill courtesy of SkyTruth.

Background

The BP Deepwater Horizon oil spill of April 20, 2010 despoiled large swaths of the Gulf of Mexico, including the coasts of Mississippi, Alabama, Florida, and Louisiana; two years later, the region, to varying degrees, continues to recover. The case is a multi-district litigation (MDL) case that the District Court consolidated into pleading bundles for easier handling. The bundle concerning Gulf Coast-area property owners' claims for "non-governmental economic loss and property damage" is known as the B1 Bundle.

Photograph of Deepwater Horizon oil spill courtesy of SkyTruth.

At issue in the B1 Bundle of cases is whether property owners whose properties were in the region affected by the oil spill, but not affected by the oil itself, have claims under the Oil Pollution Liability and Compensation Act (OPA).[2] Covering more than twenty sections of Title 33, Chapter 40 of the U.S. Code, OPA is a piece of federal maritime law with a threefold purpose: define the terms of an oil spill incident; illustrate who the liable and injured/aggrieved parties might be in any litigation arising from a spill; and outline the claims process for recovery in the case of an event, like Deepwater Horizon, that has proven to cause economic harm to property.

Complicating matters for the cases comprising the B1 Bundle is that OPA has a clear intent, which is to give courts a procedure to follow when presented with oil pollution litigation. However, the language leaves almost as many questions in its wake as the spill itself did. It appears properly equipped to guide the tort claims process in cases where there is actual damage from oil pollution events. But attempting to apply OPA to pure stigma claims where damages and liabilities aren't so clear-cut opens the door to stickier questions. For example, what exactly does "economic harm" entail? How is it being defined? How does a court apportion real liability for perceived injury? In other words, "what's the damage?"

Testing Economic Harm to Property

The B1 Bundle pleadings saw BP and other co-defendants involved in the ownership, management, and operations of the Deepwater Horizon rig facing off against three different classes of plaintiffs, each with a unique type of complaint. One plaintiff class brought "recreation" claims; those "by or on behalf of [recreational users of the Gulf] that they have suffered damages… [including] loss of enjoyment of life from the inability to use portions of the Gulf of Mexico for recreation and amusement purposes."[3] A second class consisted of BP dealers claiming economic harm from the loss of value to the "BP" brand resulting from the spill. The third class—the focus of this article—consisted of property owners, mostly property owners, bringing "pure stigma claims" against BP. These claimants complained of economic harm through loss of value of their properties, even though the properties had no oil on or around them. In essence, the pure stigma claims could be understood as "tort-by-association" claims: *"My property is fine, but I suffered harm because it was near properties that were damaged."* This is the first major federal case in which such claims were made.

For the purposes of the B1 Bundle, the district court defined a pure stigma claim as one "alleging a reduction in the value of real property caused by the oil spill or other contaminant even though (1) the property was not physically touched by oil and (2) the property was not sold." It can be inferred from the court's holding that the conditions of such a claim applied a two-part test of economic harm to the plaintiffs. Pure stigma claims are somewhat akin to tort claims, in that a plaintiff must prove that they were actually or materially harmed by the defendant in a measurable way. There is no "third party claimant" status as with intentional infliction of emotional distress claims, for example, which allow recovery for damages caused by witnessing, or being associated with, harm to another.

The court stated that "a significant limitation under general maritime law is [that it]… bars unintentional tort claims for economic losses when they are unaccompanied by physical injury to the plaintiff's proprietary interest."[5] While general maritime law—inclusive of OPA—doesn't completely displace Louisiana law (under which the property owners may have been able to recover for losses due to their properties being in the same area as oil-affected interests), neither it nor common law will allow courts to grant relief for plaintiffs unable to prove economic loss.

On October 1, 2012, the district court granted a motion to dismiss the pure stigma claims on that basis. This had a two-pronged result: (1) it served as the Court's definitive sentiment regarding claims based merely on perception; and (2) it removed the claimants from a subsequent "fairness hearing" (to be held November 8, 2012) on the merits of other claims more closely resembling those OPA intended to cover. In granting the motion, the court discussed the "plausibility standard" from *Ashcroft v. Iqbal*[6]: "To avoid dismissal, a complaint must plead enough facts to 'state a claim to relief that is plausible on its face'… a claim is facially plausible when the factual allegations allow the court to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.'"[7]

Through the use of the plausibility standard, which "asks for more than a sheer possibility that a defendant acted unlawfully,"[8] the court was essentially asking the property owners, "What's the damage?," because their claims of mere perceived damage, or "diminution by association," did not meet the test of plausibility. Without being able to show damage from the oil rig's explosion, there was no way to prove more than a sheer possibility that BP and the other defendants were liable for having "acted unlawfully" by causing the damage to their properties. The court noted that, while OPA is facially generous to plaintiffs proving damage or diminution of value of affected property, a provision within it only allows recovery for "loss of profits" or "impairment of earning capacity," and neither were present in the property owners' pure stigma claims. They had admitted in their claim that their properties were unaffected; and none had, at the time of litigation, sold—or even appraised—their properties. "Before real property is sold, there can be no 'profits' to be lost," the court held. "Furthermore, until property is sold and a loss realized, damages are speculative—it is possible that the value of real property eventually may meet or exceed its pre-spill amount."

Without being able to show damage from the oil rig's explosion, there was no way to prove more than a sheer possibility that BP and the other defendants were liable for having "acted unlawfully" by causing the damage to their properties.

Conclusion

In other words, the court left little doubt that property owners in the area of an oil spill like the Deepwater Horizon incident—or any natural resource-related disaster-seeking to be reimbursed for unrealized, or merely perceived, damages to their property must be able to meet the *Iqbal* plausibility standard. They must have a complaint containing enough facts to state a plausible claim, and that claim must give a court enough room to reasonably infer that the defendant is at fault for some misconduct causing the damage. The court's dismissal of the pure stigma claims in this case should serve as a wake-up call to plaintiffs in future cases of this type: just as with any personal tort claim, a property owner seeking damages from a defendant (for a spill or other incident) should not expect to walk into a federal courtroom with a pure stigma claim in mind, a copy of OPA and pictures of pristine spill-zone property in hand, and think they'll leave with a blank restitution check without providing concrete answers to a simple question: "What's the damage?"

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. 33 U.S.C. § 2701.
3. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179, 2012 WL 4610381 at *23 (E.D. La. Oct. 2, 2012).
4. *Id.* at *4.
5. *Id.* at *5.
6. 556 U.S. 662 (2009).
7. *In re Oil Spill*, 2012 WL 4610381 at *3.
8. *Id.*

Mississippi Court Awards Contested Beach to Private Landowners

Benjamin Sloan[1]

Photograph of a beach in Ocean Springs, Mississippi courtesy of Whit Andrews.

In August, a local court in Ocean Springs decided a case concerning the dividing line between private and public property on a section of beach in the city.[2] The dispute arose when two private landowners challenged the city's plan to build a sidewalk on part of the beach the private landowners claimed to own. In deciding where the state's lands stopped and where private property started, the court ruled in favor of the private landowners because the state brought no admissible evidence showing that it had in fact filled the tidelands, one of the few ways the state can gain title to lands above the mean high water line, the traditional boundary between state lands and private property.

Background

In 2009, Ocean Springs began planning the construction of a sidewalk on East Beach, and the city received a permit from the Mississippi Department of Marine Resources and a lease from the Secretary of State allowing it to construct a sidewalk along the beach.[3] However, in 2010, upland landowners filed a lawsuit in Hinds County to halt the construction of the sidewalk. The landowners claimed that their deeds showed they owned and paid taxes on 75-100 feet of the beach beyond the seawall, giving them ownership of about 1,000 feet of the proposed 3,470-foot sidewalk.[4] The Jackson County Chancery Court did not declare the lease void, but granted a permanent injunction to the private landowners.[5] The state appealed the injunction to the Mississippi Supreme Court, which reclassified the injunction as a preliminary injunction. If the litigation revealed that the state did in fact own the land, the injunction would have to be lifted.[6] Neither the local court nor the Mississippi Supreme Court decided who owned the beach. That is the subject of the current case.

Mississippi's Ownership of Public Trust Tidelands

Mississippi has always held in trust lands below the mean high water line. State ownership of tidelands is codified through two legislative acts. In 1973, the Mississippi Legislature passed the Coastal Wetlands Protection Act, which disallowed all future development below the mean high water line unless the development is for the public good.[7] Then, in 1989, the state passed the Public Trust Tidelands Act, which regulates development that occurred after July 1, 1973 and stipulates that the boundary between public trust lands and private property is the mean high water line determined on or before July 1, 1973.

In order to create a permanent boundary line, the 1989 law called for the Secretary of State to identify the lands the state claimed above the mean high water line notifying landowners who were violating these claims. The law gave private landowners 3 years to challenge the state's assertions; otherwise, the state would get title to the land it claimed. All land above the mean high water line that was not claimed by the state would go to the upland property owners.[8] If a landowner challenged the state's claims, the state would have to prove that the private landowner's developments or encroachments were not "done pursuant to constitutional legislative enactment and for a higher public purpose."[9] Higher purposes include environmental protection and the building of fishing docks.[10]

Ownership of Tidelands

The dispute in this case revolved around whether or not the state owned the beach above the mean high water line. The state argued that it owned the beach because it filled the lands up to the toe of the seawall, an act that normally gives the state the land above the mean high water line. The private landowners countered that even if this was true, it was irrelevant because they were never given notice of these claims as required by the 1989 law.[11]

Concerning where the mean high water line should be drawn, the state argued that it could prove that the line was above the toe of the sea wall in 1916, claiming that this automatically gave it ownership of the contested land. However, for the sake of practicality, the 1989 law stated that the applicable mean high water line is the one that can be determined immediately before July 1, 1973.[12] The landowners presented a picture showing that the mean high water line was below the seawall in 1958, making the 1916 information irrelevant.[13] Because the state did not alter the beach after this point, the 1958 line as it has naturally moved is the applicable mean high water line.[14]

The state next argued that its publication of a map of the beach as required by the 1989 law gave the landowners notice of its claims to the beach all the way up to the seawall. The state further argued that because the three-year statute of limitations regarding challenges to the claims on this map had passed, the state had title to the beach. However, this argument failed as well because the map was only made to an "approximate" scale, making it difficult for the landowners to ascertain actual property boundaries. The map also did not show the applicable mean high water line, and it did not identify the landowners' violations.[15] The court found that the map did not give the landowners notice, and, therefore, they are the owners of the contested beach.[16]

Conclusion

This ruling is important because it muddies the legality of the city's ability to maintain and develop sections of its beaches. In this case, the state could not prove a crucial element: that the beaches were man-made. If this had been the case, and if the state had properly notified the landowners' of its claims to the beach up to the seawall, it would have been given title to the entire beach. The judge acknowledged that if the case had taken place in adjacent Harrison County, the case might have gone the state's way, as that county allowed private landowners to be put on notice simply by the Secretary of State's issuance of the map. However, this rule does not apply in Jackson County, where this case was decided. The state plans to appeal, and the judge noted that while standing by his opinion, he foresaw that this dispute was likely to continue on to the state Supreme Court because of the conflicting interpretations in Harrison and Jackson counties.

Endnotes

1. J.D. Candidate 2014, Univ. of Mississippi School of Law.
2. Op. on Plaintiff's Motions for Partial Summary Judgment, Harris v. State, No. 2010-0824-CB (Miss. Ch. Jackson Aug. 16, 2012).
3. Sec'y of State v. Gunn, 75 So. 3d 1015, 1018 (Miss. 2011).
4. Harris v. Sec'y of State, No. G2010-40W/4, slip op. at 2 (Miss. Ch. Hinds Apr. 23, 2010).
5. *Id.* at 10.
6. *Gunn,* 75 So. 3d. at 1021.
7. Miss. Code. Ann. § 49-27-3.
8. *Id.* § 29-15-7(4).
9. Bayview Land, Ltd. v. State ex rel. Clark, 950 So.2d 966, 979 (Miss. 2006).
10. *Id.*
11. *Harris,* No. 2010-0824-CB at 5.
12. *Id.* at 2.
13. *Id.* at 8.
14. *Id.* at 20.
15. *Id.* at 14.
16. *Id.* at 25.

Alabama Supreme Court Rules on Riparian Rights

Cullen Manning[1]

Interior photograph of the Heflin-Torbet Judicial Building in Montgomery, AL courtesy of Melinda Shelton.

The beauty and allure of homes along waterfront property make houses on the water popular commodities. People want to watch the majesty of a sunset over the ocean and take walks along the beach seeing nothing but the sea ahead of them. As a result, people are willing to litigate when their neighbors threaten these comforts. Point Clear, Alabama experienced such a neighborly feud that resulted in a series of lawsuits that spanned nearly seven years, one of which went all the way to the Alabama Supreme Court.

Background

In March 2005, the Spottswood family purchased property along Mobile Bay. One section of the property that was sorely in need of renovation was the pier, which had been built in the 1950's and damaged during Hurricane Ivan, and the Spottswoods decided they would rebuild the pier. When their neighbors the Reimers found out about the proposed renovations, they became concerned that the new pier would obstruct their view of the sunset and, in response, hired a land surveyor to determine the boundary between the Spottswood's property and their own. The boundary line between the properties determines the water frontage that the Spottswoods owned, which would ultimately be used to calculate how far the pier could extend into the bay. When the Reimer's surveyor claimed that the boundary line he discovered significantly decreased the proposed length of the pier, the Reimers filed a lawsuit attempting to establish this boundary line. Schramm, their neighbor to the north, also filed suit seeking a judgment declaring the boundary lines between his lot and the Spottswoods' lot.

The Original Lawsuit

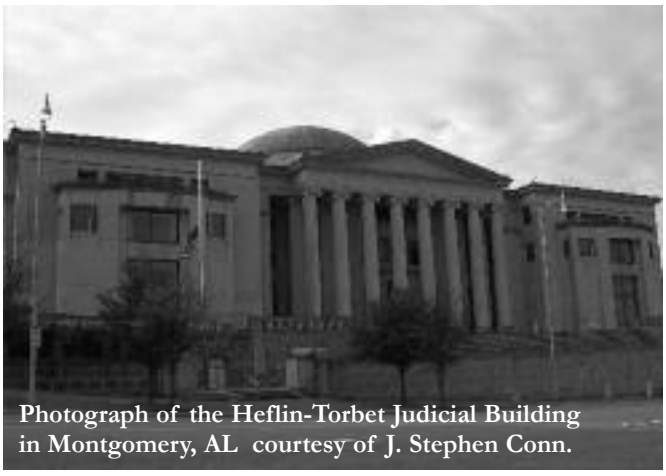
Given all the different property boundaries being proposed, the trial court trial used equitable principles and decided that the boundary line proposed by the Spottswoods was the proper border between their lot and the Reimers' lot.[2] Also, the court determined that a 1956 agreement by the previous property owners previously defined the boundary between the Schramm lot and the Spottswood lot.[3] Finally, the court decided that that the Spottswoods would have to build their new pier in the footprint of the old pier.[4]

Both parties appealed the decision of the trial court contending that the trial court erred in its assessment of the boundary line and dock restriction. The Alabama Court of Civil Appeals upheld the trial court's decision concerning the boundary lines, but reversed the decision requiring the Spottswoods to build the pier in the footprint of the old pier.[5]

After the initial lawsuit, the Spottswoods applied for and obtained permits from the Alabama Department of Conservation and Natural Resources (DCNR) to build their dock. The Schramms and the Reimers immediately filed a lawsuit against the Spottswoods contending that the dock violated the 10-foot setback rule required by DCNR.

DCNR and Riparian Rights

DCNR issued the Spottswoods a permit to build their dock despite Alabama Administrative Code Rule 220-4-09(4)(c)(4) which maintains that "all structures . . . must be set back a minimum of 10 feet inside the applicant's riparian rights lines" unless they fall under an exception.[6] Since the Spottswoods' dock did not qualify for an exception, the dock technically violated the rule and, therefore, DCNR should have denied their request for a permit. However, DCNR is authorized to decline to enforce a rule if doing so would "unreasonably infringe upon the traditional, common-law riparian rights of upland property owners adjacent to state-owned submerged lands."[7]



Photograph of the Heflin-Torbet Judicial Building in Montgomery, AL courtesy of J. Stephen Conn.

DCNR argued that that they issued the Spottswoods their permit because enforcing the setback rule would have deprived them of their ability to "wharf out" or extend their pier to reasonable navigable depths.[8] "Wharfing out" is a common-law riparian right that a majority of Alabama jurisdictions maintain.[9] Respecting the Spottswoods right to wharf out, DCNR's decision to issue the permit was valid and fully warranted by administrative law.

The Schramms argued that there was no proof offered to show that disregarding the setback rule actually allowed the Spottswoods to practice their right to wharf out. Therefore, the Schramms maintained that the DCNR's decision to issue the permit was arbitrary and capricious.

The Alabama Supreme Court decided that the feuding families received a fair remedy and that the issuance of the permit to the Spottswoods was valid.

Alabama Supreme Court's Decision

The Alabama Supreme Court decided that the feuding families received a fair remedy from both the trial and appellate court in the original lawsuit and that the issuance of the permit to the Spottswoods was valid. Since the old dock violated the setback rule, the court determined that DCNR's decision to issue the permit for the new dock was reasonable and not arbitrary or capricious.[10] The court also decided that any attempt to redefine the boundaries established in the original lawsuit failed because the original litigation settled the issue.[11]

Conclusion

Courts typically grant governmental agencies a great deal of discretion in performing their daily functions. Agencies, like the DCNR, work with people who apply for permits everyday and the agency itself is in the best position to determine whether a person meets its requirements. The Alabama Supreme Court recognized that DCNR granted the permit to the Spottswoods for a valid reason; to respect their common law riparian rights. This decision recognizes the need to reach an equitable balance between the neighboring riparian owners.

Endnotes

1. J.D. Candidate, University of Mississippi School of Law, 2014.
2. Schramm v. Spottswood, 2012 Ala. LEXIS 140, 4-5 (Ala. Oct. 19, 2012).
3. *Id.*
4. *Id.*
5. Spottswood v. Reimer, 41 So. 3d 787, 796-98 (Ala. Civ. App. 2009).
6. *Schramm,* 2012 Ala. LEXIS 140, 16-17.
7. *Id.*
8. *Id.* at 17.
9. *Id.* at 19-21.
10. *Id.* at 22-23.

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