WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Volume 34, Number 2 June 2014

Alabama Adopts New Shellfish Aquaculture Rule

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Cover photograph of oysters in Bon Secour, Alabama; courtesy of Kellie Caliso.

Contents photograph of fishermen on Guntersville Lake in Alabama; courtesy of Nicole Castle.

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Alabama Adopts New Shellfish Aquaculture Rule

Stephen Price

Photograph of a home on Lake Martin in Alabama; courtesy of John Coley.

In May 2013, the Alabama Legislature created a seven-member Shellfish Aquaculture Review Board (Board) with the purpose of "developing a shellfish aquaculture policy and implementing a sustainable program for leasing land in the coastal waters of Alabama for oyster aquaculture."[1] The efforts of the Board resulted in the Alabama Department of Conservation and Natural Resources (DCNR) proposing a new shellfish aquaculture rule in February 2014 to provide for the granting of easements of state owned submerged lands to encourage this new practice. The rule was adopted on April 7, 2014.

Previous Regime

Previously, there was no explicit rule addressing shellfish aquaculture in Alabama. Under Alabama law, the owners of land fronting on rivers, bayous, lagoons, lakes, bays, sounds and inlets where oysters may be grown have the right to plant and gather oysters in the waters in front of their land. That right is subject to regulation by the state. Yet the only regulations for leasing submerged lands related to marinas and contained a catch-all provision that requires evidence of a sufficient upland interest in the riparian lands and a riparian easement for any revenue generation/income related activities.[2] The fee for riparian easements under that section is a base fee of 12.5 cents per square foot of riparian easement area per year with a minimum annual fee of $500.

Role of the Shellfish Aquaculture Review Board

The Board was tasked with recommending to the DCNR rules that would create a program for leasing submerged lands for oyster aquaculture. Guidelines for the program included not adversely impacting wild stocks of fish or infringing on oyster riparian rights of riparian owners.[3] Further, the Legislature directed the Board that leasing must consider conflicts with traditional uses of coastal waters (navigation, commercial fishing and recreation) and prohibit the propagation of nonnative species. The Board was finally directed that fees should be such that they encourage the economic viability of oyster aquaculture.[4]

The Board held three meetings where federal and state agencies were consulted. There was input by the Public Health Department, the State Lands Division, the Department of Environmental Management, the U.S. Army Corps of Engineers and the U.S. Coast Guard.[5] Major topics discussed included submerged aquatic vegetation, the Corps' Nationwide Permit 48 (for shellfish aquaculture) and the Coast Guard's marking and lighting requirements.

New Rule Adopted: Ala. Admin. Code r. 220-4-.17 Shellfish Aquaculture Easements

The new rule contains all of the directives of the Legislature. Shellfish is restricted to species native to Alabama, with an added provision prohibiting non-indigenous animals; riparian and non-riparian easements are defined by statute, with numerous additional provisions to protect existing riparian rights.[6] Further, aquaculture easements must be 100 feet from navigation channels, be sufficiently marked and fall within size requirements. The term of the lease is a maximum of five years, with a right to renew for the same period. The lease is restricted to use of the bottom and the water column, as well as to activities associated with related on-shore facilities; docks for purposes immediately associated are allowed (with a private use exception) and subject to provisions of Alabama Administrative Code Regulation 220-4-.09, but are exempt from the associated fees.

The costs of the easements are annual and to be for a fixed rate determined by DCNR (or by competitive bidding under certain circumstances), but in no case are they to be less than $250 per acre, and public agencies and institutions may be exempt. Finally, receipt of all required permits and approvals from Federal, state and local agencies is a prerequisite for issuance by DCNR of a Notice to Proceed; no activities are allowed to commence prior to then.

Stephen Price is a 2014 graduate of The University of Mississippi School of Law and a research associate with the Mississippi-Alabama Sea Grant Legal Program.

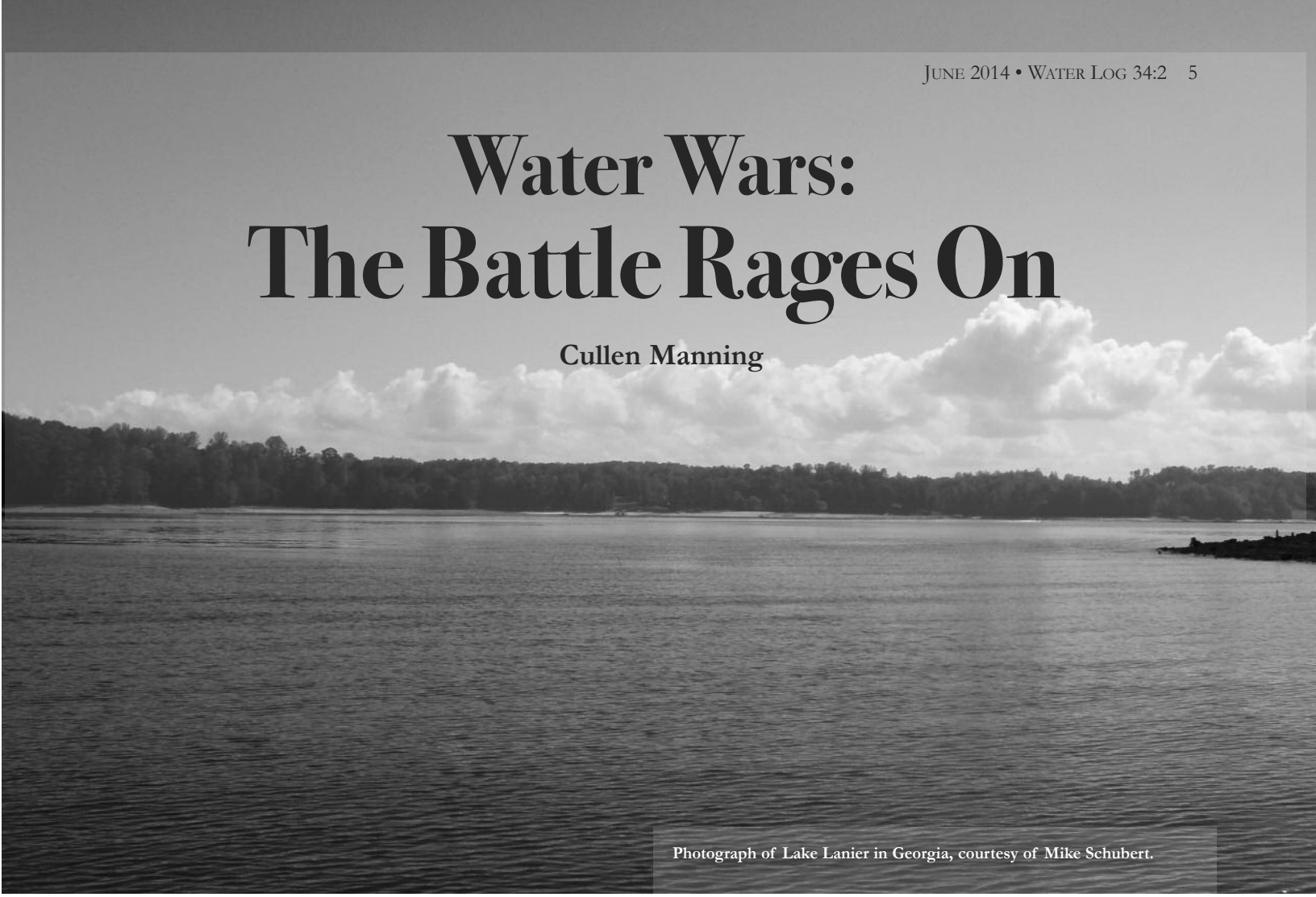
Endnotes

1. ALA. CODE § 9-2-150(b).
2. ALA. ADMIN. CODE r. 220-4-.09.
3. ALA. CODE § 9-2-150.
4. ALA. CODE § 9-2-151.
5. Alabama Open Meetings Act, available at www.openmeetings.alabama.gov/generalpublic/display_notice_details.aspx?agencyname=Shellfish Aquaculture Review Board.
6. ALA. ADMIN. CODE r. 220-4-.17.

Photograph of an oyster reef at the mouth of Dog River in Mobile, Alabama; courtesy of Cesar Harada.

Water Wars: The Battle Rages On

Cullen Manning



Photograph of Lake Lanier in Georgia, courtesy of Mike Schubert.

Water is life. We use it to bathe, brush our teeth, rehydrate after a hard days work, and . . . well live. It comes as no surprise that increased demand for water gives rise to disputes in many states and countries around the world. For example, India's rapidly growing population has caused a spike in demand for water, but the country's infrastructure is not equipped to handle the increased demand.[1] Similarly, the World Health Organization estimates that 884 million people worldwide lack access to drinking water supplies demonstrating how the demand for water is increasing, with access failing to keep pace.[2]

Fighting for Commerce, Industry, and a Way of Life

The United States might have a better water infrastructure than many countries in the world, but it still suffers from the inability to keep up with the water demand in some states. In the U.S., Alabama, Georgia, and Florida have been battling over water for years.[3] The roots of this heated confrontation can be traced to the 1950's when the U.S. Army Corps of Engineers (Corps) built the Buford Dam to supply northern Georgia with an increased supply of water by creating a reservoir now know as Lake Lanier. Three surrounding rivers feed the lake: the Apalachicola, Chattahoochee, and Flint. These rivers are a major water source for all three states. At the time, the dam had little effect on the downstream water supply, but as the population has increased, primarily in the Atlanta area, the upstream demand is now significantly reducing the water communities downstream depend on.

Each state has unique reasons for why it needs greater access to the water than the other. As the upstream state, Georgia's growing metropolis of Atlanta consumes more water every year. Georgia wants to maintain its control over the water system in order to meet the growing demand in its budding cities. The downstream users have significantly different needs. Alabama needs the water to meet not only its own populace's growing demand, but also to generate power and maintain fisheries. Florida needs more water to reach the Apalachicola Bay, which houses the state's multi-million dollar shellfish industry.

Photograph of a sunset over Lake Lanier; courtesy of Gecko's Georgia.

Battling in the Courts

In 2009, a variety of lawsuits filed by Florida and Alabama against Georgia and the Corps were consolidated and assigned to a Florida district court.[4] The district court made two major rulings in the case. First, it held that the Corps exceeded its authority by reallocating and increasing the amount of water Lake Lanier could supply municipalities. Second, the court held the Corps violated the Water Supply Act by making the primary purpose of the reservoir to provide water instead of generate electricity. As a result of the court's holdings, Georgia's water supply would decrease and it would no longer be able to provide cheap water rates to its cities.

Disappointed at the outcome of the Florida district court case, Georgia appealed to the Eleventh Circuit. The Eleventh Circuit held that the Corps was authorized to allocate water in Lake Lanier for water supply. Because the Corps had such authority, the Eleventh Circuit also held that the Corps erred in denying Georgia's request for increased water withdrawals on the basis of insufficient authority. The Eleventh Circuit found that the Corps had misinterpreted its authority under the Rivers and Harbors Act. The Eleventh Circuit remanded the matter to the Corps for reconsideration in light of the court's opinion. The Eleventh Circuit refused to re-hear the case. Subsequent attempts to argue the case before the U.S. Supreme Court have also been denied.[5]

New Focus

Though the litigation has stalled, the matter is far from resolved. The Corps is left trying to find a way to allocate the water among the multiple needs of the region that include hydropower, drinking water, and oyster habitat. Recently, Senator Jeff Sessions from Alabama has taken a new approach to the problem. Senator Sessions voiced

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concerns that the reduced water flow into Alabama is reducing the capacity of the state's hydroelectric facilities, ultimately raising electricity rates for Alabama citizens.[6]

Meanwhile, Florida has requested permission to file a new case of original jurisdiction before the U.S. Supreme Court asking the high court to ultimately resolve the water disputes between the states. In March, the Supreme Court requested the U.S. Solicitor General file a brief in the case outlining the position of the United States in this ongoing dispute.[7]

Cullen Manning is a 2014 graduate of The University of Mississippi School of Law and a research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Somini Sengupta, *In Teeming India, Water Crisis Means Dry Pipes and Foul Sludge*, N.Y. Times (Sept. 29, 2006), http://www.nytimes.com/2006/09/29/world/asia/29water.html?ref=thirstygiant.
2. Erica Gies, *Water's Scarcity Spells Opportunity for Entrepreneurs*, N.Y. Times (Mar. 21, 2011), http://www.nytimes.com/2011/03/22/business/energy-environment/22iht-rbog-innovation-22.html?pagewanted=all&_r=0.
3. *Tri-State Water Wars (AL, GA, FL): Advocating for the Long-Term Health of the Two Major River Basins* (last visited Mar. 19, 2014 at 5:08), http://www.southernenvironment.org/cases/tri_state_water_wars_al_ga_fl/.
4. Nicholas Lund, *Georgia Battles Back in Tri-State Water Wars*, 31:3 WATER LOG 3 (2011).
5. Florida v. Georgia, 133 S.Ct. 25 (2012); Alabama v. Florida, 133 S.Ct. 25 (2012); Southeastern Federal Power Customers v. Georgia, 133 S.Ct. 25 (2012).
6. Mary Orndorff Troyan, *Hydropower new weapon in Alabama-Florida-Georgia water wars*, Montgomery Advertiser (Feb. 11, 2014), http://www.montgomeryadvertiser.com/article/20140211/NEWS02/302110004/Hydropower-new-weapon-Alabama-Florida-Georgia-water-wars.
7. Florida v. Georgia, 134 S.Ct. 1509 (2014).

Deepwater Horizon Update: A Snapshot of Recent Rulings

Cullen Manning

Photograph of an oiled pelican in Grande Isle, Louisiana; courtesy of the Louisiana Governor's Office of Homeland Security and Emergency Preparedness.

The ramifications of the Deepwater Horizon disaster continue to be the focus of litigation in federal court. After the oil spill, numerous victims from the disaster ranging from large businesses to citizens within local communities went to court in an effort to regain the financial and personal losses that they amassed as a result of the disaster. Since the disaster affected so many people and businesses, the federal court system has been overwhelmed coming up with a way to efficiently process litigation against British Petroleum (BP) and fairly oversee settlement agreements. The U.S. Court of Appeals for the Fifth Circuit recently resolved two cases demonstrating the complexity of such issues.

Louisiana Parishes vs. BP

The Fifth Circuit considered whether state law claims brought in relation to the spill were preempted by federal laws governing oil spills. In the case, eleven Louisiana coastal parishes (Parishes) filed suit against BP under Louisiana state law to recover damages that they incurred from the oil spill. Unlike other plaintiffs, the Parishes filed their claims solely under the Louisiana Wildlife Protection Statute (Wildlife Statute), a Louisiana state law, rather than bringing their lawsuit under applicable federal laws. The Louisiana law provides that the injured parties can "recover penalties . . . for pollution-related loss of aquatic life and wildlife."[1] The district court ruled that the federal law preempted the state law claims. The Parishes appealed this decision, arguing that Louisiana state law should still apply.

The main issue before the Court of Appeals was whether federal law preempted the state law claims under the Wildlife Statute. Although many in the state of Louisiana suffered the brunt of the damages from the event, the oil spill occurred many miles off the coast in federal waters. Federal courts have exclusive jurisdiction in admiralty cases such as the BP litigation, although they may opt to use state law when it is not inconsistent with federal law.[2]

The Parishes argued that because they were suing to receive compensation for damages to wildlife exclusively within the borders of Louisiana, state law should apply to their claims. They also argued that the Clean Water Act (CWA) and the Oil Pollution Act (OPA), had "savings clauses," which arguably preserved the state's right to file suit under its own laws, allowing them to levy fines under the Wildlife Statute despite similar federal regulations.[3]

The Fifth Circuit disagreed with the Parishes. In support of its conclusion, the court cited the holding in *Ouellette v. Int'l Paper Co.*, a case dealing with the migration of interstate pollution. In *Ouellette*, the U.S. Supreme Court held that the "CWA precludes a court from applying the law of an affected State against an out-of-state source."[4] Using this case as a backdrop, the court determined that federal law preempted the state law claims as the source of the pollution was outside Louisiana. The court also reasoned that the effect of the CWA and OPA savings clauses was to preserve state claims, not to create new ones.

In *Ouellette*, the U.S. Supreme Court held that the "CWA precludes a court from applying the law of an affected State against an out-of-state source."

Settling Business and Economic Loss Claims

Another issue the court recently addressed was how to evaluate claims for business losses, in light of the settlement agreement agreed to by the parties.[5] In an effort to save itself from prolonged litigation, BP settled a large portion of its claims with businesses along the coast, which was approved by the court overseeing the claims process. Following the settlement, BP objected to the Claims Administrator's interpretation of the settlement agreement.

Exhibit 4B of the settlement agreement addresses causation for business loss claims. Under the agreement, parties within certain geographic areas and industries are allowed to submit proof of loss without submitting trial-type evidence that the loss was caused by the Deepwater Horizon spill. Instead, using a methodology prescribed by the settlement agreement, parties can submit proof of loss by submitting pre-spill revenues and post-spill revenues. Essentially the loss will be determined by comparing the pre- and post- revenue evidence.

BP argued that the Claims Administrator's interpretation of the settlement violated its rights under the agreement, by not requiring business loss claimants to submit trial-type evidence of causation. The Fifth Circuit disagreed, noting that the parties "specifically contracted [in the settlement agreement] that traceability … would be satisfied at the proof stage, that is, in the submission of the claim."[6] The court went on to relate that the Business Economic Loss Claim form, agreed to by BP and plaintiffs, requires claimants to attest that the loss was caused by the spill and cautions against fraudulent claims. All business claimants must sign this form attesting to the truth and validity of their claim and acknowledging that false claims could lead to imprisonment. In the court's estimation, BP bargained for the terms of the contract and it was not unreasonable because BP now regretted the terms.

Conclusion

The Deepwater Horizon oil spill was a disaster of size and complexity never seen before in this country. The spill spanned numerous states and caused impacts in a variety of jurisdictions. Unsurprisingly, the complexity of this event and shear number of parties impacted has resulted in a broad array of legal claims for the judicial system to evaluate. These two rulings clear the way for progress towards resolving these the claims.

Cullen Manning is a 2014 graduate of The University of Mississippi School of Law and a research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. *In re Deepwater Horizon*, 12-30012, 2014 WL 700065, 1 (5th Cir. Feb. 24, 2014).
2. *Id.*
3. *Id.* at 15.
4. *Id.* at 11.
5. *In re Deepwater Horizon*, No. 13-30315, 744 F.3d. 370 (5th Cir. 2014).
6. *Id.* at 376.

In The Dark:

Goods Lost in Transit under the Carmack Amendment to the Interstate Commerce Act

Stephen Price

Photograph of a Long Beach Harbor shipping port in Los Angeles, California; courtesy of Rennett Stowe.

As our world becomes increasingly globally interconnected, especially with regards to commerce, goods are shipped to and from all corners of the globe. Markets seemingly know no bounds. Necessarily, miles and miles need be traversed, and goods come into the possession of numerous different entities en route to their final destination. Naturally, this changing of hands across borders produces situations of lost, misplaced or damaged goods, and questions of liability become frustratingly muddied. On the final days of 2013, the U.S. Court of Appeals for the Fifth Circuit addressed the issue of goods lost in transit and what it takes for shippers to recover for them under the Carmack Amendment to the Interstate Commerce Act. In particular, the court weighed in on whether the shipper's goods were delivered in good condition to the carrier.

Background

In October of 2008, shipper Distribuidora Mari Jose, S.A. de C.V. (Mari Jose) bought 11,490 boxes of Christmas lights from a Chinese manufacturing company. The lights were shipped to Lazaro Cardenas, a port city on the Western coast of Mexico. Mari Jose originally planned to transport the lights from the port to the interior of Mexico, but was unable, and so the saga begins. Mari Jose chose alternatively to ship the lights by sea to Long Beach, California, then by automobiles to Laredo, Texas, and from there to import the lights by truck into Mexico. Mari Jose enlisted Compania Chilena de Navagacion Interoccania S.A. (Chilena) to ship the lights to Long Beach, and hired carrier Transmaritime Inc. (Transmaritime) to receive the lights at Long Beach, transport them to Laredo and then to their final destination in Mexico.

Mari Jose originally planned to transport the lights from the port to the interior of Mexico, but was unable, and so the saga begins.

Chilena issued bills of lading, which acknowledge receipt of goods and act as a contract to ship the same to a final destination, for all 11,490 boxes to be shipped in 15 ocean containers to Long Beach. Chilena's obligations terminated upon delivery to Transmaritime. When the lights arrived in Long Beach, they were held by U.S. Customs and Border Protection (Customs). In order to secure their release, Transmaritime submitted several copies of the requisite Customs Forms, which included a description of the cargo to be released and indicated Transmaritime would receive 11,490 boxes of lights. Transmaritime did not issue its own bills of lading. Customs released the lights to Transmaritime who then hired a separate company to transfer the 15 ocean freight containers to a container freight station.

All but one of the containers received had seals intact and unbroken at the time they were received in Long Beach. Eight days after the submission of the Customs Forms, the lights arrived at the freight station where they were unsealed, inventoried, loaded, and resealed for truck transport to Laredo. After completing the inventory, Transmaritime discovered a discrepancy between the number of boxes it was supposed to receive and the actual number of boxes it counted at the freight station. Only 9,578 boxes were counted; 1,912 boxes were missing. Without notifying Mari Jose of the shortage, Transmaritime continued shipment of the lights to Laredo using multiple different motor carriers, each of which issued its own separate bills of lading totaling 9,578 boxes.

In early February of 2009 Mari Jose was notified of the shortage and sued Transmaritime for the lost 1,912 boxes in December of 2010. The district court ruled in favor of Mari Jose and Transmaritime appealed, which lead to this decision.

The Carmack Amendment to the Interstate Commerce Act

The Carmack Amendment (Amendment) establishes the standard for imposing liability on a motor carrier for lost or damaged goods transported across borders.[1] The Amendment allows a shipper to recover from a carrier for lost or damage goods, regardless of fault, thereby relieving them of the tough task of pinpointing a single careless carrier from amongst the often multitude of carriers a shipment of interstate goods goes through.[2]

In order to recover under the Carmack Amendment, "a shipper must prove negligence by showing: (1) the delivery of goods in good condition to the carrier; (2) receipt by the shipper of less goods or damaged goods; and (3) the amount of damages."[3] Once this burden is met, the carrier is presumed negligent and can only overcome such presumption by showing that it was free of blame *and* that the damage was due to (a) the inherent nature of the goods, or (b) attributable to an act of God, public enemy, the shipper, or public authority.[4] Lastly, "failure to issue a receipt or bill of lading does not affect the liability of a carrier."[5]

Delivery of Goods in Good Condition

The district court, in ruling for Mari Jose, found sufficient proof that the full amount of boxes had been delivered.[6] On appeal, the Fifth Circuit disagreed and reversed the district court, ruling in favor of Transmaritime. They found there was not enough evidence to establish that Transmaritime actually received all 11,490 boxes in Long Beach and therefore, Mari Jose failed to prove the first element of its claim.[7]

Because Transmaritime did not issue a bill of lading covering the shipment from Long Beach, the only evidence showing the number of boxes received were the Customs Forms. The only information available to Transmaritime at that time was Chilena's original bills of lading. Further, Transmaritime was unable to inspect the boxes before submitting the Customs Forms, as only one of them was unsealed upon arrival.[8] As a result, the Court of Appeals held that the Customs Forms alone are not equivalent to bills of lading and are not enough to show the full amount of goods were received in good condition.[9]

Port view photograph of Lazaro Cardenas, Mexico; courtesy of Alfredo Guerrero.

Moreover, the court found that even assuming the Customs Forms were equivalent, they had an "apparent good order" clause. A bill with such a clause would suffice as proof of delivery in good condition only for the boxes that were open for inspection at the time of delivery to the carrier.[10] The shipper would need to adduce supplementary evidence to prove that the remaining unopened boxes were actually delivered in good condition.[11] Previous cases have held that testimony of two witnesses to the condition of the cargo at shipment along with evidence of the condition of the cargo at delivery was enough to prove delivery in good condition.[12]

In this case, 14 of the 15 containers had seals intact upon arriving in Long Beach while the inventory done by Transmaritime showed discrepancies in at least 4 of the 15 containers. As a result, Mari Jose needed to present additional evidence to prove that the unopened boxes were actually delivered in good condition. Absent such accompanying evidence, the Court of Appeals found genuine uncertainty as to whether a total of 11,490 boxes were received at the Long Beach port by Transmaritime and that Mari Jose failed to establish the first element of its claim under the Carmack Amendment: delivery of the goods in good condition to the carrier.[13]

Conclusion

The decision by the Court of Appeals for the Fifth Circuit attempts to clarify what steps a shipper must take to show that goods were delivered in good condition. Since goods shipped interstate constantly change hands, shippers need to be diligent in assuring goods are the same when delivered as when they were shipped. As markets increasingly transcend borders and interstate shippers employ numerous different entities, it is inevitable that issues of lost goods will continue to surface. This decision aims to alleviate some of the uncertainties and streamline the recovery process as interstate commerce is crucial to the welfare of many nations.

Stephen Price is a 2014 graduate of the University of Mississippi School of Law and a research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. *See* 49 U.S.C. § 14706(a)(1).
2. Distribuidora Mari Jose S.A. de C.V. v. Transmaritime Inc., 738 F.3d 703, 706 (5th Cir. 2012).
3. *Id.* at *706.
4. *Id.*
5. 49 U.S.C. § 14706(a)(1).
6. *Distribuidora Mari Jose*, at *707.
7. *Id.*
8. *Id.* at *708.
9. *Id.* at *707.
10. *Id.* at *708.
11. *Id.*
12. See Accura Systems, Inc. v. Watkins Motor Lines, Inc., 98 F.3d 874, 876 (5th Cir.1996).
13. *Distribuidora Mari Jose* at *708.

Federal Court Tosses Gulf Red Snapper Rules

***Guindon v. Pritzker*, 2014 WL 1274076 (D.D.C. Mar. 26, 2014)**

Photograph of a Red Snapper caught and released in the Gulf of Mexico; courtesy of Jennifer Cowley.

Commercial fishermen brought a lawsuit against the National Marine Fisheries Service (NMFS) for establishing regulations that set quotas and fishing season lengths for recreational fishing of the red snapper fishery in the Gulf of Mexico. The plaintiffs claimed that NMFS violated Section 407(d) of the Magnuson-Stevens Fisheries Conservation and Management Act (MSA) by approving a 28–day season based on a "flawed projection model," without adequate accountability measures, and by reopening the season in the fall when the recreational quota had already been reached and exceeded. The United States District Court, District of Columbia held that the regulations were arbitrary and capricious and violated the MSA.

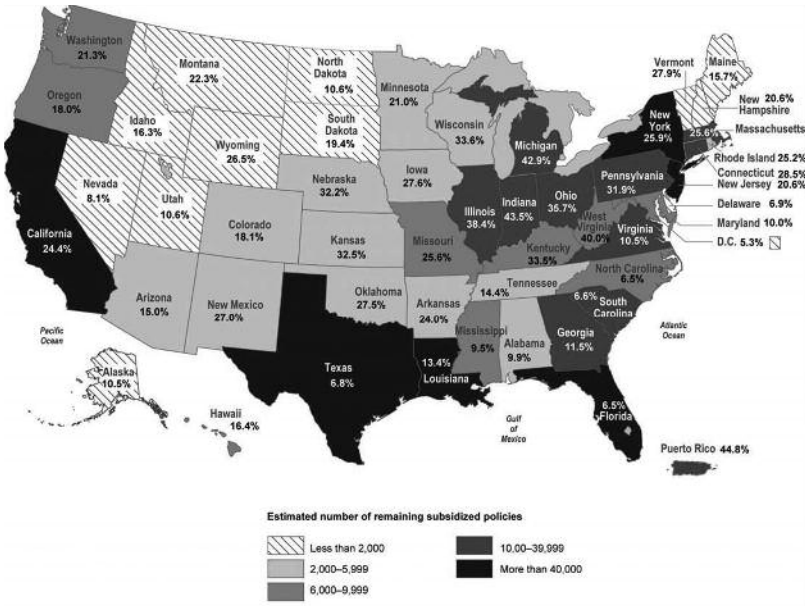
Congress Adopts New Changes to the National Flood Insurance Program

Niki L. Pace

Earlier this spring, Congress passed the Homeowners Flood Insurance Affordability Act of 2014 (HFIAA), which was signed into law by President Obama on March 21, 2014. HFIAA, also being referred to as Grimm-Waters for its Congressional sponsors, alters several provisions of the 2012 flood insurance program reforms adopted as part of the Biggert-Waters Act. The Biggert-Waters Act had made significant changes to the National Flood Insurance Program (NFIP) in efforts to improve the program's financial stability. Those changes included raising rates to full actuarial rates over a five-year period, phasing out subsidies on some properties, and eliminating grandfathered rates over five years.

Upon its passage, many touted HFIAA as repealing the Biggert-Waters NFIP reforms, but this is not entirely accurate. Coastal property owners should be aware that while HFIAA did make significant changes, it did not repeal all aspects of Biggert-Waters. Key changes of interest to homeowners include reforms to new home sales, primary residences, and grandfathering. Under HFIAA, flood insurance rate increases on primary residences are capped at 18% per year. As to grandfathering, properties that are newly mapped into a different flood zone will be allowed to keep their lower rate the first year and subsequent rate increases are generally capped at 18% per year. And buyers of new homes will no longer see their flood insurance rates jump to full actuarial risk. HFIAA allows home sellers to transfer their insurance rate to the new buyer. However, those rates may still increase up to 18% per year if the rate was subsidized.

HFIAA did not change premium increases established under Biggert-Waters for certain classes of properties. Flood insurance rates will continue to increase by 25% per year for the following: (1) vacation homes, (2) businesses, (3) severe repetitive loss properties, and (4) pre-FIRM buildings that have been substantially damaged or improved. Pre-FIRM refers to buildings constructed before December 31, 1974 or before the community's first flood insurance rate map (FIRM) was adopted. HFIAA also added a surcharge to all flood insurance policies that will remain in effect until all pre-FIRM subsidies are eliminated. The surcharge is $25 annually for primary residences and $250 for all other properties. HFIAA included numerous other provisions related to mapping, the affordability study commissioned under Biggert-Waters, and efforts to improve community understanding of the flood insurance mapping process.



Numbers of Estimated Remaining Subsidized Policies and the Percentage of NFIP Policies, by State, They Represent, as of June 2012; courtesy of the U.S. Government Accountability Office.

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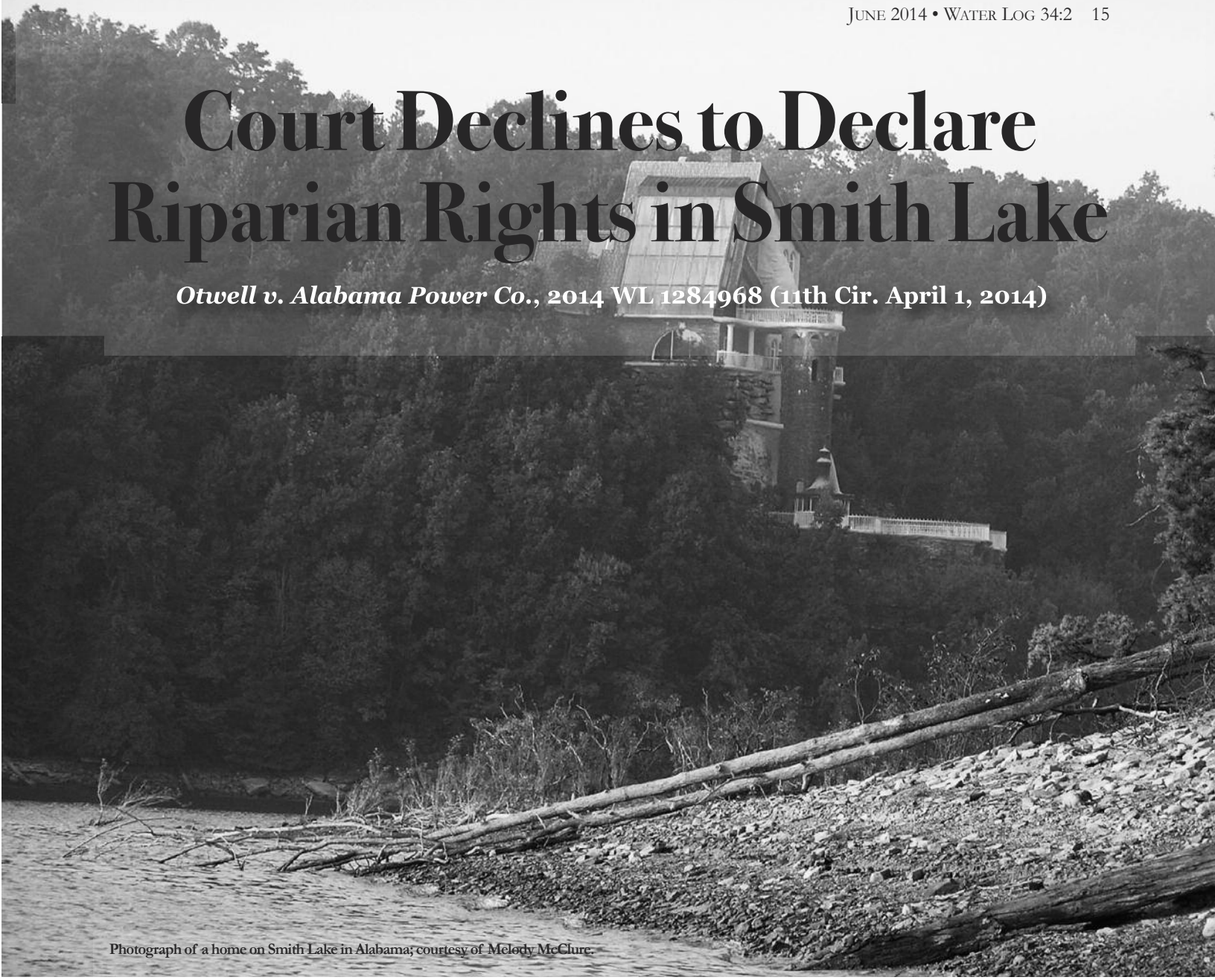
Court Declines to Declare Riparian Rights in Smith Lake

***Otwell v. Alabama Power Co.*, 2014 WL 1284968 (11th Cir. April 1, 2014)**



Photograph of a home on Smith Lake in Alabama; courtesy of Melody McClure.

The Otwells own lakefront property on Smith Lake in Alabama. They recently sued the Alabama Power Company (Alabama Power) over its management of the lake, claiming Alabama Power unreasonably lowered the water levels and thereby damaged their enjoyment of the lake. The court rejected the claims as an impermissible collateral attack to the federal licensing process. In the late 1950s, Alabama Power was given a 50-year license to construct and operate Smith Dam for the dual purposes of hydroelectric power and flood control. The reservoir behind the dam came to be known as Smith Lake. During the relicensing process in 2007, homeowners along the lake challenged Alabama Power's operation of the lake, seeking higher mandatory water levels for the benefit of the homeowners. The permitting agency rejected the homeowners' proposal as not in the overall public interest, a decision affirmed by the courts. On appeal, the Otwells wanted the court to declare that they had riparian rights in Smith Lake, and argued that the lower water levels destroyed their riparian rights to recreational use of Smith Lake. The court refused to rule on the riparian rights claim, finding that such a determination was unnecessary to resolve the case. The Otwells' recreational use of the lake was preempted by the priorities of the Federal Power Act, which prevents state law claims, such as the Otwells' riparian rights claim, from circumventing the federal licensing process.

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WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA10OAR4170078, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, the Mississippi Law Research Institute, and the University of Mississippi Law Center. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Mississippi-Alabama Sea Grant Legal Program, the Mississippi-Alabama Sea Grant Consortium, or the U.S. Department of Commerce. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

Recommended citation: Author's name, *Title of Article,* 34:2 WATER LOG [Page Number] (2014).

MASGP-14-003-02
This publication is printed on recycled paper of 100% post-consumer content.
ISSN 1097-0649 *June 2014*

Sea Grant

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