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# YOU WIN SOME, YOU LOSE SOME: THE COSTS AND BENEFITS OF LITIGATION IN FISHERY MANAGEMENT\*

*He Said, She Said: The Effects of Litigation on Stakeholders*

Dr. Bonnie McCay<sup>1</sup>

When I was first asked to talk about the effects of fishery litigation on stakeholders, I responded negatively, partly because I did not have a clue what the answer was. First, who do we define as the stakeholders? Second, what do we know about these parties? Given the lack of systematic research on the communities and other stakeholders involved in fisheries, what little I could say would be based on a few personal anecdotes. So instead, I will focus on the effects that litigation has had on social science and fishery management, or on our ability to answer questions like the one posed to me: “what are the effects of litigation on stakeholders?”

There is a very strong implication that the fishing industry is the major stakeholder in the fishery management process. In the Magnuson-Stevens Fishery Conservation and Management Act<sup>2</sup> (Magnuson-Stevens Act), the nation’s law covering fisheries between three and two hundred nautical miles off-shore, one of the National Standards refers to optimum yield and the fact that we should be managing our nation’s fisheries for the U.S.

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\* This symposium was sponsored by the National Fisheries Conservation Center and hosted by the 131<sup>st</sup> Annual Meeting of the American Fisheries Society in Phoenix, Arizona on August 22, 2001. The symposium was moderated by Dr. Brock Bernstein, President of the National Fisheries Conservation Center, a non-profit organization devoted to finding collaborative solutions to fisheries management problems. Additional information on the National Fisheries Conservation Center is available at <http://www.nfcc-fisheries.org>. The transcript of this symposium was initially edited on October 12, 2001, by Heather Blough. Further editing took place by the *Ocean & Coastal Law Journal* staff during Winter 2001 and Spring 2002.

1. Professor of Human Ecology, Cook College, Rutgers the State University of New Jersey.

2. 16 U.S.C. §§ 1801–82 (West 1994 & Supp. 2000).

fishing industry.<sup>3</sup> However, we also know that there are many other stakeholders involved in the fishery management process. The Magnuson-Stevens Act refers to some of these additional interested parties, including recreational fishers, fishery-dependent businesses and communities, the states, federal and local agencies, and non-governmental organizations (NGOs), who have fish conservation mandates. These parties are all stakeholders, and they have become increasingly active in the management process. Consumers and taxpayers are also stakeholders, although usually in a more diffuse and less actively involved way.

There are competing views of fishery management. To a large extent, the government agencies involved, and other organizations such as the regional management councils, have taken a biocentric view of fishery management, focusing on fishing mortality and the effects of the mortality on fish populations. Other organizations have taken a broader view, which encompasses the more social and human ecological perspective. These organizations think of fisheries not only as complexes of natural resources and ecological processes, but also in terms of human activities; social institutions and actors; and the communities that participate in harvesting, processing, and utilizing fish and shellfish. There are competing views and objectives, including competing objectives in the statutes that govern the way we manage fisheries. The issue of balancing competing objectives is the crux of recent fisheries cases. For example, the *Natural Resources Defense Council (NRDC) vs. Daley*<sup>4</sup> case was about the level of the allowable catch for summer flounder. The NRDC objected that the level was too high, because it only had an eighteen percent chance of reaching its objectives. The judge determined that the level of allowable catch was permissible, because the agency had to deal with these competing interests. The judge referred to this as a balancing issue. A higher court later overturned the decision in favor of the NRDC. The appeals court ruled that a quota must have at least a fifty percent chance of meeting the target fishing mortality rate necessary to rebuild the stock. It also found that there was no conflict between the Act's commitments to conservation and to mitigating adverse economic impacts and that NMFS must give priority to conservation measures. "It is only when two different plans achieve similar conservation measures that the Service takes into consideration adverse economic consequences. Despite this ruling, the question of balance remains in the minds of some stakeholders."<sup>5</sup>

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3. *Id.* § 1851(a)(1).

4. 62 F. Supp. 2d 102 (D.D.C. 1999).

5. NRDC, Inc. v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000). See *infra* note 52 and accompanying text.

The balancing question is essentially whether we are talking about managing fish or managing fisheries. Two of the National Standards of the Magnuson-Stevens Act conflict in ways that reflect this “managing fish” or “managing fisheries” question. National Standard 1, strengthened through the Sustainable Fisheries Act of 1996<sup>6</sup> (“Sustainable Fisheries Act”), which reauthorized the Magnuson-Stevens Act, focuses on managing stocks toward optimum yield and restoring overfished stocks.<sup>7</sup> National Standard 8, also from the Sustainable Fisheries Act of 1996, calls for consideration of the needs of fishery-dependent human communities.<sup>8</sup> The larger questions and concerns become whether we are achieving harmony, whether we have any kind of balance, or whether we have more serious problems in fishery management.

National Standard 8 is the one that we anthropologists are particularly interested in. As part of the Sustainable Fisheries Act, it is relatively new. Many of the court cases that beleaguer the National Marine Fisheries Service (NMFS) concern National Standard 1, and these suits are brought by marine conservation groups, who are concerned about holding the agency’s feet to the fire of their conservationist goals. Some of these suits are also about Standard 8, the fishing communities standard. One suit in particular that is worth mentioning from the east coast is a summer flounder case heard by Federal Judge Robert Doumar in Virginia. In his decision, Judge Doumar talks about the importance of balancing conservation interests against the economic rights of commercial fishermen and fishing communities.<sup>9</sup> National Standard 8 requires that conservation and management measures shall be consistent with the conservation requirements of the Magnuson-Stevens Act. This is accomplished by taking into account the importance of fishery resources to fishing communities, in order to provide for the sustained participation of such communities, and to the extent practicable, to minimize adverse economic impacts on such communities.<sup>10</sup>

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6. Pub. L. No. 104-297, 110 Stat. 3559 (1996).

7. 16 U.S.C. § 1851(a)(1) (“Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United State fishing industry.”).

8. *Id.* at § 1851(a)(8) (“Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities. . . .”).

9. *N.C. Fisheries Ass’n v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997); *N.C. Fisheries Ass’n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

10. 16 U.S.C. § 1851(a)(8).

This is only part of a long series of statutory mandates that require looking at the human side of things, namely looking at both the stakeholders and the dependent communities. First among these statutory mandates is the National Environmental Policy Act<sup>11</sup> (NEPA), which requires looking at the human environment, as well as the natural environment, when conducting environmental assessments and environmental impact statements.<sup>12</sup> Second, is the Magnuson-Stevens Act's fishery impact statement requirement of 1990.<sup>13</sup> Third, is National Standard 8 on sustaining fishing communities, which includes an older long-standing requirement for showing the cultural, historical, and ecological aspects of limited access programs.<sup>14</sup> Third, is the Regulatory Flexibility Act<sup>15</sup> ("RFA"), which is concerned about the impact of regulations on small entities, whether they are businesses, governments, or other organizations.<sup>16</sup> Finally, the Executive Order on Environmental Justice<sup>17</sup> (EOEJ) and the Administrative Procedure Act<sup>18</sup> (APA) are also implicated in discussions about fishery management.

As Peter Fricke, the social scientist at NMFS headquarters, has pointed out many times when going around to regional councils and giving workshops on the role of social science in fisheries management, all of the above-mentioned statutory and executive mandates are relevant to the balancing question. The interest of time precludes going into this in detail, however, one example is the requirement to show in-depth consideration of socio-cultural factors, historical and present participation, and dependence on the fishery for participants and fishing communities whenever limited access is involved. In addition, the National Standards require fair and equitable allocation of fishery resources among user groups.

The definition of optimum yield in the Magnuson-Stevens Act encouraged social research that would justify actually increasing the optimum yield over what is called maximum sustainable yield (MSY). In 1996, the Sustainable Fisheries Act changed that dynamic as optimum yield was redefined so that MSY would be reduced, but not increased by any relevant economic, social, or ecological factors.

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11. 42 U.S.C. §§ 4321-47 (1994).

12. *Id.* at § 4321.

13. 16 U.S.C. § 1853(a)(9).

14. *See* 16 U.S.C. § 1853(b)(6).

15. 5 U.S.C. §§ 601-12 (West 1996 & Supp. 2000).

16. *Id.* at § 601.

17. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

18. 5 U.S.C. §§ 551-559 (1994).

The fishery impact statement is extremely important to what the councils and the agency must do. It is a relatively new requirement. The RFA is also extremely important. It was amended in 1996. The Small Business Act<sup>19</sup> (“SBA”) also authorizes judicial review of the agency’s compliance with specific provisions of the RFA. The U.S. Small Business Administration has become an avid watchdog, assuming an active role in working with the agency to ensure that the requirements of the RFA are observed.

The question becomes what role has the recent spate of litigation played in increasing the amount of effort that goes into looking at the social dimensions of the fisheries? To prepare for this talk, I canvassed all the center directors and others, who are active in the agency on this topic. One of the center directors said very forcefully that it is not just the social and economic research that is being looked at more carefully, but various other inquiries are also taking place. Environmentalist groups brought many, if not most of the cases, rather than groups representing fishing industries or communities. On the other hand, the litigation has added to other pressures to change the composition of the research centers to include more social scientists. Indeed, NMFS commissioned a workshop held by the Ocean Studies Board of the National Academy of Sciences in the summer of 2000 to explore critical needs for highly skilled specialists in both fish population dynamics and fisheries social science. NMFS now has a recruitment and training plan to meet those needs as well as post-doctoral appointments and cooperative agreements with universities.

As of 2000, NMFS had two thousand six hundred seventy employees of whom thirty-four were economists and three were non-economist, social scientists and anthropologists. This number did not include the lawyers, who are engaged in regulatory reviews and defending the agency. There has also been a small number of people who are available to implement the “fishing communities” interests, and otherwise effectuate the balancing components of the legislative mandates for marine fisheries management.

Recently, there has been an increase in budgeting that may, or may not, be related to the litigation. The connection is a matter of dispute, but the figures are impressive: one million dollars a year for various economic studies, a lot of which is earmarked for recreational economics research; five hundred thousand dollars that is now used to obtain employment, demographic and other data for social impact and National Standard 8 analyses; unspecified funds that are to create ten new positions in economics and other social sciences that are supposed to be in the regional

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19. Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 202, 110 Stat. 857 (codified at 5 U.S.C. §§ 601–612).

centers and also in NMFS headquarters; and a large amount of money that has just been allocated to increase the agency's compliance with NEPA. Moreover, NMFS is seeking economists and other social scientists for positions as we speak. Many people, including NMFS center directors, agree that the serious weakness in the socio-economic data that has been available to the agency is one of the long-standing, but newly appreciated, issues exposed through this litigation.

There are several important cases, including the shark cases that were heard by Judge Merryday in Florida in 1998 and 1999;<sup>20</sup> the flounder cases that were heard by Judge Doumar in Norfolk, Virginia in 1998 and 1999;<sup>21</sup> and the companion case to the 1998 and 1999 flounder case handed down in 2001,<sup>22</sup> all of which had an explicit reference to economic and social questions.

The 1998 *Southern Offshore Fishing Association* case concerned Atlantic sharks and the dramatic decrease in the quota for large coastal sharks. The agency had said there was no significant impact on a substantial number of small enterprises, in order to meet a legal requirement called certification. Therefore, NMFS did not have to do a full RFA analysis on the effects of this measure on small enterprises in fisheries. The Southern Offshore Fishing Association and others challenged NMFS's determination to pass over a full RFA analysis. The judge agreed that the agency action was improper. For example, the agency seemed to have taken all the individuals who had shark permits, used this figure as all those catching shark, then divided the value of the shark fishery among them, so that one could show that it was not really important to perform a full RFA inquiry. However, in fact, a substantial number of people were very dependent on the large coastal shark, and this information was not factored into NMFS's decision to certify that no impact occurred. NMFS's decision raised other questions. As the judge stated, the refusal of the agency to recognize the economic impacts of its regulations on small businesses also raises serious questions about its efforts to minimize the impacts of less drastic alternatives.

Such decisions are the beginning of a call to look more closely at alternatives and to provide what should be a standard review of a broad set of alternatives in terms of their effects on small businesses and communities. In the 1998 *Southern Offshore Fishing Association* case, the Secretary

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20. *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998); *S. Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

21. *N.C. Fisheries Ass'n. v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997), *N.C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

22. *N.C. Fisheries Ass'n v. Evans*, 152 F. Supp. 2d 870 (E.D. Va. 2001).

of Commerce was ordered to do a full RFA analysis and, in the meantime, to maintain the 1997 quotas. In 1999 there was another follow-up case.<sup>23</sup> There had, in the meantime, been an order creating a special master to look at the situation. The order was set aside, but then reinstated in 1999. By this time, the agency had done an analysis of the economic effects and potential alternatives of reducing the large coastal shark quota. The agency conceded that there was hardship. However, the judge saw that this study was still deeply flawed and went into some of the details as to why their study was deficient. The court in its decision again brought up the question of balance, reminding one and all that Congress had mandated that the agency wisely balance shark interests against human interests. According to Congress, NMFS cannot act to preserve sharks without consideration of the human costs. The case highlights the need for balance and, even more so, the need for more focused analyses of the effects of regulations on stakeholders.

The *North Carolina Fisheries Association* series of cases concerned summer flounder rather than sharks. There were three major cases, and the findings were that the Secretary of Commerce, as overseer of both the National Oceanic and Atmospheric Administration (“NOAA”) and NMFS, acted arbitrarily and capriciously in failing to comply with National Standard 8. The Secretary of Commerce was ordered to do an economic analysis. In reviewing that economic analysis, the court rejected the analysis and objected to a lot of the decisions that had been made in doing the economic analysis. Some of these issues concerned the importance of looking more precisely at communities. Economists involved in the NMFS effort had again improperly calculated data. The flounder litigation led to an understanding of a more discriminating and place-based analysis of the social dimensions of the fisheries. These cases show that when judges use the term economic impacts, they largely refer to social impacts, such as the impacts on particular occupational, ethnic, and local groups.

A result of the litigation over marine fisheries management has been recognition by the government agencies, NMFS, and NGOs of the need to look more closely and systematically at the social and community-based dimensions of fisheries. In addition, this recognition will also contribute to extra-national efforts at regional, trans-national, and global scales, to develop systems of marine resource management and to enhance the expertise, knowledge, and interests of decidedly local people, as well as, those from afar who have adopted new landscapes and experiences as their own.

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23. 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

**Question**

Given your presentation, I wondered if you might be able to comment on the idea of hiring social scientists to address concerns over litigation? Do you as a social scientist feel that social scientists will be able to do what social scientists do while working within the agency versus the agency paying for studies that could address some of these issues?

**Bonnie McCay**

The question as I understand it, is whether hiring social scientists is going to do the job, or whether you should have outside social scientists addressing these issues. That is a very good question, because the Paperwork Reduction Act<sup>24</sup> (PRA) ties the hands of many social scientists, who are working for the agencies. This is an obstacle for anthropologists actually getting out into the field and performing the research that they are expected to perform. These anthropologists are unable to interview more than a few people without having very special provisions. So the PRA is certainly an obstacle.

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24. Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520 (2001).