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*More Than Meets the Eye:
The Transaction Costs of Litigation*

Dr. Susan Hanna²⁵

I am going to be talking about some of the costs of litigation, and what I am going to be discussing today is not the result of a formal research project or a calculation of costs associated with litigation. What I will present are reflections and perspectives from the point of view of someone who participates in the fishery management system as a scientific adviser. So, it is in part a view from inside the regional management council system and, in part, the perspective of an outsider participating in that system as an adviser to the Pacific Fishery Management Council (PFMC) and to NMFS. The perspective that I have is also the perspective of an economist, who has seen the cost effects of litigation roll through the fishery management system. I interpret litigation as an economist, and I look at the bundle of costs litigation imposes on the fishery management system.

Since the Sustainable Fisheries Act of 1996, we have seen an increase in the amount of litigation challenging fishery management decisions. An article in the June 2001 issue of *National Fisherman* indicated that the number of suits against the National Marine Fisheries Service had more than doubled in the past five years.²⁶ I do not know if this figure is accurate, but that was the order of magnitude cited. The suits are coming from a number of different interests, including commercial fishermen, recreational fishermen, environmental organizations, and tribes, all of whom are challenging a number of different aspects of the fishery management system. Challenges are being made to the quality of the data and analysis, as in the Hawaiian longline turtle case.²⁷ Challenges are being made to the completeness of the analysis, as in the North Pacific Steller sea lion interactions with the cod, pollock and atka mackerel fisheries.²⁸ Challenges are being made to force adherence to the regulatory process, as in the highly migratory species plan.²⁹ Challenges are also being made to the legitimacy of management decisions, as in the reduction of the summer flounder quota.³⁰

25. Professor of Economics, Department of Agricultural and Resource Economics at Oregon State University.

26. Richard Bard, *Full-Court Press*, NAT'L FISHERMAN, June 2001, at 22.

27. *Leatherback Sea Turtle v. NMFS*, Civ. No. 99-00152DAE (D. Haw. 1999).

28. *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

29. *Bluewater Fisherman's Ass'n v. Mineta*, 122 F. Supp. 2d 150 (D.D.C. 2000).

30. *See supra* note 4.

These different groups obviously have different perspectives, but I think it is fair to say that from the perspective of any particular group bringing litigation, the objective is to improve the performance of the fishery management system. Whether the objective is seen as improving performance through better conservation, improving the allocation of fish stocks, the making of more complete assessments of economic and social impacts, or creating an overall more effective management process, depends on the parties involved in the litigation.

As we see these suits increase, we are also seeing a change in where decisions are being made. Litigation is moving many management decisions out of the arena of the fishery management councils and NMFS and into the courts. As more management decisions are made by the courts, we are seeing a movement away from participatory management toward a more command and control kind of decision-making process. This movement has some implications for the costs of management and how these costs are distributed. The relevant question for fishery management is whether or not litigation, as a tool and a strategy, will improve fishery management over the short or long term, or whether it will leave permanent damage in its wake.

One way to look at the question of management performance is to look at the costs associated with management. When we talk about the performance of fishery management, we are talking about the rather restricted notion of cost-effectiveness, because fishery management proceeds according to standards specified by law. The real question is how effectively those standards can be met, and whether they can be met in the most cost effective way. The ideal is to conduct fishery management by the least-costly means possible. Of course, the ideal is not the reality, but the question of how actions create costs within the management system and the overall size of the cost burden is very relevant to the effectiveness of fishery management.

The types of costs most relevant to fishery management are transaction costs. Transaction costs are the costs of arranging everything that contributes to management: gathering information, negotiating among all the different interests, designing the regulations, implementing the regulations, monitoring compliance with the regulations, and enforcing the regulations. Transaction costs are costs that are absorbed by agency staff, council staff, commercial fishermen, recreational fishermen, scientific advisers, and all other participants. The costs of running the fishery management system are borne by all the participants, so the cost burden that you create is very relevant to the system's effectiveness.

It is important to recognize when you look at this question of litigation that we are walking in the path of history. We are not just looking at

litigation independent of everything else that is taking place in management. We have a management system that has become increasingly burdened with transaction costs over time. Twenty-four years of implementation of the Magnuson-Stevens Act has been chronically underfunded in data collection and analysis of regulatory action. Transaction costs have increased over the twenty-four years of implementation with increasing overcapacity, allocation conflicts, and a host of other sources of increasing pressure on the system. New management requirements added through the Sustainable Fisheries Act of 1996 that were also underfunded further increased the cost burden on management. These new requirements were layered over the old requirements and over a human capital base that was already stretched thin. Litigation adds a new layer of required actions and responses that have their own set of costs. The costs of litigation are layered onto what many feel is an overburdened and underfunded system.

Litigation creates new costs, such as the opportunity cost of lost personnel resources. An example of the opportunity cost of lost personnel is the entrainment of scientists in the preparation of material for court cases. Someone in NMFS used the term "insanely complete" to describe the paperwork and record-keeping associated with creating an NMFS administrative record. The paperwork involved diverts personnel from other activities and dedicates them to the preparation of court cases. Chaos can be created in the fishery management council system when everything else comes to a halt in order to prepare for litigation.

*Leatherback Sea Turtle v. National Marine Fisheries Service*³¹ presents one of the most striking cases of the opportunity cost of using scientists to prepare materials for court. In this case, the Honolulu lab of NMFS was asked to prepare the biological opinion for trial. That involved the dedication of the time-equivalent of eight senior scientists for one year in order to prepare the biological opinion. In the meantime, the routine kinds of analysis needed by the fishery management council were not done. The cost of preparing material for litigation was the loss of the routine work of fishery management.

Another cost of litigation can be observed in the polarization of participants. I have observed this in the Pacific fishery management system, where even the threat of litigation causes polarization. Although the PFMC has not yet engaged in active litigation, the threat of litigation is causing extreme polarization among participants. This leads to strategies aimed at undermining other people's decisions and to parties taking actions that are

31. Civ. No. 99-00152DAE (D.Haw. 1999).

damaging to a system based on participation, negotiation, interaction, and communication.

The continued burden of allocation means that the fishery management system dedicates an enormous amount of time to analysis, documentation, and data collection, as a result of the need to divide fishery resources among competing interests. As overcapacity and fishing pressure increases, the amount of time and analysis required to do that has increased. The allocation burden has not gone away. In fact, as both resource scarcity and the potential for litigation have increased, it has become even more exaggerated.

These are some of the more obvious cost outcomes of litigation that result from taking personnel away from tasks that are part of the routine requirements of fishery management. As the threat of litigation becomes more active, there is an increasing unwillingness on the part of the councils to experiment with alternative approaches to management problems for fear of litigation. Management decision-making is not focused on outcomes, but on process. Councils are refraining from action in order to consider how that action will look in terms of possible litigation. This comes at a cost to flexibility in management and to solution-based management approaches.

Another cost outcome of litigation is very high rates of discounting of future benefits. By that I mean that managers do not have the luxury of looking far into the future because the scarcity, allocation battles, and the threat of negative consequences resulting from a particular action are all shortening the time horizon managers operate within. People are trying to stumble through an annual cycle and they are attempting to do as good a job as they can in order to stretch the resources as far as possible. This is not the long-term management for fishery sustainability that is supposed to be our social objective.

There is also an erosion of legitimacy of participatory management, because some of the strategies of engaging and positioning oneself in litigation have to do with undermining the credibility of the science and undermining the credibility of the analysts. The effect of these strategies is to slowly erode the perception that the participatory system is a legitimate system, and that negotiations can proceed in good faith.

The last explicit cost outcome I will discuss seems to me to be a very costly one. It is that in focusing and preparing for litigation, we are missing opportunities to step back and address the root causes of the problems that are leading to litigation, such as overcapacity and fishing pressure. Addressing these root causes of our problems would provide the needed flexibility to find better ways to fish more cleanly and to introduce more stewardship-type behavior into the decision-making process over the long-term.

These are some of the more explicit cost outcomes, but I would like to add another that seems to me to be damaging as well. It is the creeping erosion of morale among scientists and technical people participating in the management system, as well as, among the user groups. In the PFMC, for example, there has been an increasing level of disenchantment in recent years that is very troubling, because good faith participation is the basis for the fishery management system.

There is a general erosion of morale, as well as, specific problems with morale. Attacks on the credibility of the science or the quality of the analysis can be taken very personally by some scientists, who get tired of being constantly under attack. One perspective is that there is nothing personal in these attacks, and that they are just a strategy or contrary point of view applied generally to the agency or system as a whole. However, if you are a stock assessment scientist standing up at a stock assessment review meeting, and you are under constant attack, and the kinds of attack become much less professional and more personal over time, then you naturally begin to take these attacks personally. A person's enthusiasm and interest in continuing to participate in the system erodes.

As a university participant of the Scientific and Statistical Committee of the Pacific Council, I have felt that very keenly myself. You feel like you are volunteering time to participate in the system, and whatever you do will be subject to attack both professionally and personally. Those are some of the costs that are harder to measure. These types of costs are harder to get your hands on, but they are very real.

Transaction costs are a necessary part of fishery management. The whole idea is to contain them and to keep them from getting out of hand, so they do not overburden the system or overwhelm the benefits you are getting out of the system. How do we escape these costs associated with litigation? How do we get out of the increasing cost burden placed on the management system? One suggestion is to break the cycle of insufficient funding to collect adequate data, to do the analysis, and to hire additional scientists to do the analysis. NMFS has taken steps to increase the social science component, however, in terms of the requirement to manage for a maximum net national benefit and to analyze human impacts, NMFS's steps are rather small. We have to find some way to get realistic about the amount of funding that this system requires, if we expect it to do what the law requires.

The most important thing is to start addressing the root causes of the problem. Instead of throwing all our resources toward litigation, we should try to fix some of the underlying causes that encourage litigation. As an economist, I see the root causes as the horrible levels of overcapacity and all of the attendant problems associated with overcapacity. These come out

of our failure to specify property rights, responsibilities and expectations for those participating in the fisheries, and a subsequent failure to manage fisheries so that they are economically productive, where participants can actively and profitably participate in sustainable fisheries.

We also need to move our focus away from the regulatory process, where the system is currently focused, and to start looking at performance outcomes. We are not providing incentives for people to achieve certain targeted outcomes. Instead, we are saying that they must follow a particular process. We need to realign those incentives to get the focus on the kinds of sustainability outcomes that we feel are socially desirable and that allow people some flexibility to experiment and work toward those outcomes.

I am sure you can tell from my remarks that I am troubled by the amount of litigation facing the U.S. fishery management system. I see an increasing cost burden on the management system, and from my perspective, the effects of this burden are troubling. I am very concerned about the indirect, erosive kinds of costs that I see working at the legitimacy of the system, and I hope that we can find a way to contain these costs and change the current trend.

Question

I have two related questions. First, in your talk you make one assumption that I want to challenge. Is it necessarily true that, were it not for litigation and the burdens associated with litigation on scientists and managers, they would do a better job of fishery management?

Second, it seems to me that this really ought to be a cost-benefit analysis. You talked a lot about the transaction costs of litigation, but very little about the benefits that are associated with the flow from litigation. I wonder if the real problem or challenge with the legitimacy of the agency's work today stems from their failure to address those root causes that you talked about rather than the effect of litigation?

Susan Hanna

Obviously the benefits of litigation are critical, they just do not happen to be my piece of this panel. The benefits are likely to be long-term, and whether this is the right strategy to get us to those goals is an open question from my perspective. A piece of that question is the cost burden introduced to the system and whether it is keeping the system from getting to the benefits by overwhelming it, or whether it will be the nudge that the system needs. Obviously, that is an open question.

I think your point about the litigation costs and whether or not those are keeping the system from being effectively managed is a fair one. I would not argue that were it not for litigation the system would be clicking along

smoothly. The problems in the system, namely the chronic underfunding and lack of attention paid to the root causes, have been there for some time. From my perspective, in terms of costs, the litigation just happens to be introducing significant new costs to a system that is already staggering ineffectively under its existing cost burden.

