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*Ten Years 'After the Fall':
Litigation and Groundfish Recovery in New England*

Peter Shelley³²

I want to ask this audience since we are in Phoenix whether there are any people in the room who have not had any involvement in marine fishery management issues? Okay, there are a couple here. Well, for those newcomers, marine fisheries management is like being Alice in Wonderland, without the pills. So, you are certainly going to hear a lot of different perspectives today.

I do not share a lot of Professor Hanna's conclusions about litigation and fisheries management, at least not with respect to the influence that litigation will have over the long-term. Part of my difference in perspective has to do with the fact that I grew up with a different council system. I did my time in the New England Fishery Management Council (NEFMC), which I think is getting better, but nevertheless, supports a very different perspectives on the role of litigation in fisheries management.

My comments are entitled "After the Fall." I must have been feeling particularly grandiose when I thought of that title, but I wanted to give you a brief context for it. I am an attorney and Vice President of the Conservation Law Foundation (CLF), which is a regional, non-profit environmental advocacy group in New England. The first litigation we ever did as an organization was in 1977 when we fought oil and gas drilling on Georges Bank.³³ Our co-plaintiffs and principal strategic partners in that litigation were the fishermen of New England, particularly the Gloucester fishermen's wives, although others supported us as well.

In that litigation, we had common ground and the fishermen were very important to CLF for two reasons. First, they clearly gave us legal standing to go into court, because of the risk to their economic interests from the proposed drilling. Second, they were important philosophical partners in what CLF was trying to do, which was to define the sustainable, highest, and best use for Georges Bank as a site fish production and fisheries. Fighting to guarantee the real-world economic benefits from the fishery on Georges Bank gave CLF's position a gravity that we could not have brought to bear on our own as an environmental organization.

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33. *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979).

That first litigation had fishermen and conservationists aligned. After that case, we had a decade of continuing partnerships over coastal pollution cases like the Boston Harbor case³⁴ and others where our fishermen allies both provided us legal standing, as well as economic legitimacy for arguing for the substantial public expenditures necessary for pollution control.

Then in 1991, we sued NMFS over fisheries management, and everything changed. I liken that moment in time for CLF as "after the fall," because the management plan that was the subject of that litigation, both at the time and in retrospect, reminds me of that fateful Biblical apple that was offered by Eve. In this case, the offer was by NMFS, and it was a plan that was so admittedly deficient on its own face that if this plan were to be legal, any skullduggery in fisheries management would have been legal. We took the bite on the NMFS apple. It is now ten years later, and I wanted to reflect back on the results of that decision.

First, it is very easy to slip into the habit of taking a snapshot of the fisheries management program at a particular time and extrapolating from that moment to define the state of the problem. I think that is what Professor Hanna has done with respect to her assessment of the role of litigation. I am of the belief that human institutions, like the people who invent them, go through developmental periods. At the point when CLF got into the litigation in 1991, I think at best you could call NMFS an adolescent, a kind of bumbling adolescent.

NMFS had been charged with major resource management responsibilities by Congress in 1976, but other than a few industry lawsuits, the agency and its programs had not met any real adult challenges until 1991, particularly from the conservation side of the table. I think the consequence of turning on the legal lights on NMFS in 1991 was to reveal suspect agency practices, which were startling to a lot of people, including Congress.

Our suit was not the first piece of litigation that involved the Magnuson-Stevens Act. There were other endangered species challenges that had been brought by the Center for Marine Conservation, Greenpeace, and others that focused on endangered species. However, our suit was the first suit that tried to look at the Magnuson-Stevens Act itself and determine which statutory requirements in the Magnuson-Stevens Act actually had teeth.

After the lawsuit, the fishermen in our region hated us, virtually to a person. The state fisheries commissioners who, in our region, are mostly just spokespeople for the commercial fishing interests, also hated us.

34. CLF v. Metro Dist. Comm'n, No. 85-1614-MA, U.S. Dist. LEXIS 18209 (D. Mass. Mar. 27, 1984).

Ironically, the only group that did not hate us, although we certainly did not know it at the time, were the people we sued—NMFS. They loved us. They fully recognized the terrible, declining stock situation in New England. In fact, they had tried to stop overfishing in 1986 by threatening to take over management from the NEFMC. For those of you not in marine fishery management, you have never seen a structure like the council system in any other area of federal resource management. The Magnuson-Stevens Act is a very complex experiment in participatory management, and I think the jury is still way out on whether it is successful.

NMFS was going to take over management from the NEFMC in 1986, whereupon every member of our congressional delegation signed a letter, which stated in so many words that if NMFS took over NEFMC, they would never get through the next budget process intact. NMFS immediately backed off. After that point, NMFS looked for a lightning rod to take the political heat for them, so that they could do what everyone knew had to be done: cut back the fishing effort dramatically. As a result, our suit was very timely from NMFS's perspective. To that extent, litigation serves the very important role in fisheries management of insuring that NMFS does what Congress intended it to do when it wrote the Magnuson-Stevens Act.

I want to go through some of the non-economic costs and benefits associated with litigation. A price was paid by litigating, and I will just make some brief points. First, litigation under the Magnuson-Stevens Act can rarely produce the sought-after result directly. Fisheries management is not an arena where the government actually has the capacity to control the people who are out on the water potentially doing the damage or implementing the fishery management plan. As a result, we got a great piece of paper from our litigation that outlined a good conceptual approach to addressing the management problems that came up. This management plan actually addressed the overfishing problem, but it was supported by very little consensus in the regulated community. Those being regulated did not agree that the management measures were necessary or proper. The importance of this credibility problem cannot be overstated, as the fishing community has an enormous capacity to sabotage management plans if they do not believe in them at some fundamental level.

The second aspect of litigation in this area is that fishermen take everything very personally. Unlike the steel industry or some other mature industry, fisheries management is personal, and it is personal to the scientists in NMFS as well. Again, going back to the developmental theory, it is similar to dealing with an adolescent. They take it personally when you try to tell them they cannot do something. A general lack of

sophistication and their extreme reactions to challenges make fisheries groups and NMFS very challenging parties to work with.

From the fisherman's perspective, they "own" the marine resources, and have owned them for hundreds of years. Those are their fish. Again, I am speaking of New England, and I am talking about marine resources. Environmental groups are at best considered poachers in the minds of the fishermen. Environmentalists are taking fish for some illegitimate public purpose that has the effect of removing product from their boat.

The third point I would like to make is that litigation is very uncertain. There are about one hundred and ten fishery management cases. A lot of these cases have been brought by the conservation community, and many have been brought by the fishing community. However, for both interest groups, the Magnuson-Stevens Act is set up in a way that is very difficult to attack. The amount of discretion that is vested in the agency is enormous. The Magnuson-Stevens Act's purposes are contradictory. The language is obscure. The only people who truly love fishery models are the modelers themselves. Trying to get a judge to understand maximum sustainable yield is virtually impossible. The Magnuson-Stevens Act makes Clean Air Act litigation, which is considered to be among the most complicated federal regulatory programs, look like simple nuisance cases. People do not go into Magnuson-Stevens Act litigation lightly. There is a built-in constraint against excessive or casual litigation created by the complexity of the statute itself and the number of barriers that Congress has fused into the statute.

The fourth point is that litigation does not target all the right parties. NMFS does have the responsibility for some of its own fishery management plans, but most of the management plans are developed by the councils, and NMFS has the right to accept or reject those plans. NMFS has the right and responsibility to take management planning over if the council does not manage it appropriately. However, the federal agency is always working with someone else's design and this de-centralized approach is inherently important and fundamental to the structure of the statute. NMFS cannot just do whatever they want to do. They have to work through third parties, the fishery management councils.

Many of those third parties are dominated by people who are inherently oriented toward the resource they are managing as an economic commodity, either the fishermen on the council or the state fishery commissioners, who primarily respond to the fishermen in their respective states. NMFS has a broader public charge than just economic development, but it has to figure out how to accomplish this broader set of objectives through council-initiated plans.

It would be wonderful to take the councils to court directly. Moreover, it would be a very illuminating process for the councils to actually have to do the legal paperwork themselves, to justify their decisions before a judge, and to have to produce the science that supposedly is behind some of the cockamamie management decisions they make. How can an eighteen percent likelihood of success in meeting statutory requirements in summer flounder be an acceptable plan? That is lower than the odds of a coin toss!

In any event, it would be wonderful to be able to drag the councils into court, but the statute is not set up that way. As a result, one of the things all of us on the conservation side have to live with in the short-term is that we may be weakening NMFS by litigating against them. Our strategy in the long-term is worth it in our view, because better plans will be produced and the rule of law will become more familiar in fisheries management. But we know in the short-term we are undermining NMFS, because we have to blame them, as they are the responsible agency that approves the regulations based on the council's planning choices.

What about the litigation volume with one hundred and ten cases currently pending against NMFS? Is that a big or small number? After all, we are talking about an agency that has management authority over one of the largest federal resources in area, covering the federal territorial sea and exclusive economic zone. Maybe we should ask the U.S. Forest Service or the Bureau of Land Management? I would think they would love to have only one hundred and ten cases pending against them.

So what are some of the arguments in favor of litigation? First and foremost in my mind, litigation produces power parity, which is critical in the long run. Fisheries management involves the regulation of the economic development of a publicly-owned resource that has many other public interests attached to it beyond harvesting fish. Getting parity in the decision-making process with respect to the resource means having power. The only way the conservation community has to gain any power in the currently biased system is to go to the courts.

Again, thinking about the tragedy of the commons model, successful common property management requires mutual coercion, mutually agreed upon. If there is a power differential between the interest groups, you never can get to a planning process that produces the actual result of healthy fisheries. As an aside to Professor Hanna, litigation may divert some NMFS resources away from the day-to-day business of management, but in New England these resources were not producing any management value anyway, so the fact that they were being diverted into litigation really had a pretty neutral outcome in terms of the fish. Consequently, I did not feel bad about that particular diversion.

There is a second reason to go to the courts, which is to obtain a proper interpretation of the Magnuson-Stevens Act itself. The courts are the legitimate vehicle in the American democratic system for interpreting statutes. Maybe the Constitution that set up this system of checks and balances is not economically cost-effective or maybe there are high transaction costs in the constitutional scheme, but the courts are still the place that you go to have the law interpreted. Although the Magnuson-Stevens Act has been in existence for more than thirty years, many of the fundamental statutory provisions have never been interpreted by the one body that is constitutionally empowered to do so. Courts are inevitably going to be the interpreters of the law.

Third, litigation makes a point that no other approach can make, which is that non-commercial interests have standing, as there are other public interests in the ocean. Before conservation organizations began litigating in New England, we were not welcome at the planning table. Our comments were ignored. Actually, they are still ignored, and most of the discussions center around allocations of fishing effort between groups of fishermen.

We lost friendships because we brought the litigation, but I believe that our relationships with fishermen now, ten years later, are much stronger than they were before. Moreover, the relationships are more legitimate, because they are not tactical alliances developed to fight a particular battle. Now our relationships are more strategic in nature in that they are based on an improved understanding of CLF's institutional common ground, which contemplates sustainable fisheries, as well as pollution control. People now know that they have to deal with us as equal partners in the fisheries discussions. Relationships based on these understandings will produce better results, both in and, preferably, outside of the court system.

The next point is that litigation produces cover for politically weak agencies. NMFS has never successfully developed a political constituency in Congress. Let me give you one example illustrating this fact. Representative Barney Frank (D - Ma.) scores one hundred percent every year on the League of Conservation Voters ballot as an environmentalist. At the same time, to my knowledge, Representative Frank has never supported one single management plan that promoted fishery conservation in New England. He opposes every serious effort to conserve fish. For some reason, he thinks that fishermen, including the scallop fleet, which is a pretty economically well-off group of businesses, are the "little guys" who are getting pushed around by the bad federal agency and the fish-hugging environmentalists. He is vitriolic toward conservationists in the press and, at budget time with NMFS, I am sure he is miserable. Access to the courts

to redress and re-balance injuries to unrepresented or underrepresented interests is an American tradition. I do not feel bad about that.

The fifth reason to litigate is that litigation is newsworthy. Our objective is to build a political constituency for a healthy ocean. That is why the Conservation Law Foundation takes the positions it takes and does the advocacy work it does. That is why foundations support sustainable fishery management support groups like the CLF, and that is why we go to court. We do not go to court *just* to win a motion or a case. We are trying to build a political constituency for the ocean. The only news outlets that cover council meetings are the *Commercial Fisheries News* and the *National Fisherman*. Their coverage is pretty obscure, at a micro-level, and uninteresting to most people. Bringing a lawsuit on the other hand guarantees front page headlines. That placement and exposure gives the conservation community an opportunity to explain to the American people, who are incredibly ignorant about the marine system, about what actually is going on in our oceans. Generating a newsworthy event gives us an opportunity to educate the public.

And the last reason I would give you, and this is a pure ego statement, because there are many other factors and players producing the result, is that litigation works. If I had the chart of the groundfish stock status in New England to reference here, the downward spiral, which was significant for the years proceeding our lawsuit, came to a stop two years after our lawsuit. Now all the stocks that were the subject of our litigation are rebuilding at different biological rates, but they are all on positive inclines. The scallop fishery, which was slowly going bankrupt in New England, because of overharvesting, has reopened and is bringing in millions of dollars of new revenues. This is a direct result of the closures that came from the CLF lawsuit. Litigation works, and I am not one to knock something that works in the world of fishery management that is otherwise so fanciful.³⁵

35. In December, 2001, federal district court Judge Gladys Kessler ruled that the NMFS had violated the overfishing and bycatch provisions of the Sustainable Fisheries Act by failing to implement Amendment 9 to the Northeast Multispecies FMP and to require measures to track bycatch and bycatch mortality in New England groundfish fisheries. *CLF v. Evans*, No. 00-2234 (D.D.C. Dec. 28, 2001).

