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Panel Discussion

Brock Bernstein Moderator

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PANEL DISCUSSION⁷⁵

Moderator, Brock Bernstein

As you heard during the presentations, there is a really wide variety of opinion among these folks, and so I am sitting here in the middle to make sure it does not get too contentious. What we would like to do right off the bat is see if there are any questions from the audience that people want to throw out to get this started with. Otherwise, I have some questions that I can seed the conversation with and some of the panelists also have their own questions as well.

Question

This has been a very interesting series of presentations here—food for thought. I wonder if I could pose a hypothesis to the panel and get the reactions of the individuals on the panel. It goes back to something Mr. Shelley said in his presentation about needing to look at the current pulse of litigation as part of the evolution of fisheries management in the United States and NMFS. My hypothesis is, when I look at the current pulse of litigation, I have the tremendous sense of *déjà vu*. Fifteen or twenty years ago, what the land management agencies, including the Forest Service and the BLM, were perceived as being captive to the industries that they were in charge of regulating: the timber industry, grazing industry, and mining industry. The environmental community came in and looked at all the problems and the mismanagement that was going on and treated those land management agencies to a similar pulse of litigation to compel them to live up to their statutory mandates with respect to some of the same statutes that we are seeing NMFS litigating under today.

I wonder if that pulse of litigation was a necessary part of the evolution of those land management agencies bringing them into the modern world and getting them to recognize that their stakeholders went beyond the industries that they regulate? I wonder if we are seeing the same thing develop today with NMFS? Is the pulse of litigation a temporary phenomena that will subside as soon as the agency recognizes that its stakeholder community is broader than it has been, and therefore, starts to comply with federal statutes like NEPA? I wonder if this trend in litigation is not something that we can, as Mr. Shelley suggested, see as a necessary part of the evolution of this agency into the modern world?

75. Thane Tienison, Brad Warren, Susan Hanna, Bonnie McCay, Brock Bernstein (moderator), Mariam McCall, Suzanne Iudicello, and Peter Shelley each participated in a panel discussion following their individual presentations. Questions were taken from audience members.

Peter Shelley

I guess my quick answer is that you are right. The one issue that I think Mr. Warren raised and that I could not agree with more is the issue of whether or not we are evolving or whether we are simply going back and ignoring all the lessons that came out of those early pulses of litigation in other resource agencies. What we learned there was that litigation can never be anything more than a tool to get to some larger objective that can withstand the scrutiny of the general politic and of the public interest. Even when you "win," it will be a short-term win unless the program after the lawsuit is actually moving toward the right result. I think the current litigation trend is a pulse phenomenon and what I am hoping is that the people who are providing the energy to that pulse are going to use it as a tool to get into some of these more sustainable problem-solving modes that I think really will have durable results.

Thane Tienison

For me, this is a little bit of a rhetorical question. I think inevitably the answer to the question is yes. Having said that, I think it bears repetition that there are unanswered questions in these laws still, and that is one of the reasons that we are necessarily going to see litigation. For example, Mr. Warren talked about the Steller sea lion case. One thing that was interesting to me, and I think to others too who looked at it from a distance, was that you saw a judge who was clearly unfamiliar with the application of the ESA to fisheries management and questioned why the principles that he had seen applied in the context of land management, that is to say programmatic environmental impact statements and biological opinions dealing with cumulative impacts, were not applicable in the fisheries management context.

What I saw Judge Zilly do in the Steller sea lion case⁷⁶ was basically engraft these land resource management principles that he had seen in the Forest Service and the ESA applications there onto the Magnuson Act, and he insisted that there be a programmatic EIS. Judge Zilly did not buy NMFS's argument that these were policies and plans that did not require these land resource management principles. To me, if we accept that argument, you will never have any assessment of the cumulative impacts. You will never have an environmental impact statement. You will never have a biological opinion.

I believe the litigation results in forcing NMFS to better understand that they have to do more in the context of fisheries management than they currently are doing. I believe the same goes with the Regulatory Flexibility

76. *Greenpeace v. NMFS*, 106 F. Supp.2d 1066 (W.D. Wash. 2000).

Act. I mean we saw Judge Merrydays's opinion, which required more economic analysis and investigation of the socio-economic impacts.⁷⁷ We will not see any more litigation on that issue. Inevitably it is an evolutionary process.

Mariam McCall

That is true, however, I do not know if it is a pulse of litigation. On some days it feels like a Mount St. Helen's of litigation. I am going to respond to the question posed and then ask a follow-up question to the answers I just heard, and which I may have misunderstood.

Yes, I think if a law student were to go back and do an assessment of some of our recent NEPA cases and certainly some of the earlier NEPA cases against the Fish and Wildlife Service, Forest Service, and National Park Service, they would certainly find similarities. We do not have the large number of cases that these agencies had, but we have all recognized those similarities without really going back and studying them. We also had the leadership meeting, where the office directors and the regional administrators of NMFS consulted with some of the people from the Forest Service and the National Park Service, as people who have gone through the battles themselves, in order to attempt to learn a bit from their experience. These agencies told us about their litigation growing pains, that they recognized that they needed to turn the tide and to better manage their resources, and that they needed to be able to focus on the resources instead of on the litigation. They shared with us their experiences.

One interesting thing we learned was that some thought the litigation was successful. It cost a lot of money, and it took a number of years, however, it resulted in a change in the agency's procedures, training, and the way they involved people in training who were actually people in the field. Ultimately, it really did produce great benefits and changes. These agencies turned their win-loss ratio from losing eighty percent of their cases to winning eighty percent of their cases. All the lawyers in the room, with me included, did not think that still losing twenty percent of their cases sounded too great. I think if you look at our cases, at least in fisheries management, we have won over the years a lot more than eighty percent but, of course, our recent losses have been quite "spectacular."

Mr. Tienson, just a question on what you asked earlier. Were you implying that Judge Zilly was incorrect when he was applying the case law which dealt with these land-based management plans to fishery management?

77. S. Offshore Fishing Ass'n, v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998).

Thane Tienison

No, I was pointing out that it was the first time that that kind of thinking had been applied, and it really kind of set the tone. I think it changed the way that NMFS did business and will prevent some further litigation because of it.

Audience Comment

The current lawsuits are definitely part of an evolutionary process and part of the whole public input process. One of the earlier presentations argued that the problem with litigation is that it takes the public out of the decision-making process. My argument is that the public input process is, in fact, causing most of these problems, and to expect that getting the same people around the table and asking them to solve the various problems that they are creating is a futile effort.

To use the summer flounder case as an example, most of the people on the Mid-Atlantic Council still believe that an eighty percent probability of failure is acceptable, and at their very last meeting a couple months ago, the council reaffirmed this posture. They still do not see eighty percent probability as a problem, and they are the public input process. While you would say that what we need to do is to get more public input and that the litigation is truncating this effort, I would say quite the opposite that litigation is forcing the issue, to correct the problem underlying the public input process.

Moderator, Brock Bernstein

Okay, Professor Hanna, you had mentioned that one of the costs of litigating is the truncation of public input. Do you want to respond to that?

Susan Hanna

Yes, I think it is important to remember that under the U.S. regional council system, we have eight regional councils. The performance of those councils and the style and structure of public input is very different in the eight regions, and it was designed to be that way.

I can offer a counter example to this suggestion that there are benefits in truncating public input. The Pacific Council has historically relied on using groups, including gear groups, industry, and environmental groups, to work out implementation strategies for regulations. For example, once these groups decide on a quota, they will typically call together a group of the various interests, including environmental organizations, and devise the best way to implement the chosen quota. These groups are not modifying the quota. They are deciding on the allocation possibilities, how to best implement the quota over seasons, and the various enforcement implica-

tions. That process worked very well as long as there were possibilities for those negotiations to be conducted in good faith. It was also essential that there exist results that people could live with. While these solutions may not be defined as “win-win,” they were at least “okay-okay” solutions.

We then crossed a threshold point at which the tone changed, and the atmosphere became very much “win-lose” or “score at all costs,” the ability to use that mechanism as sort of an arm-of-the-council to get the best out of public input, and to obtain a solution that made operational sense, was really diminished. People lost the sense that negotiations were conducted in good-faith. People began to consider what was going to be done with the information discussed in the meeting room. They began to consider whether it was going to show up in a press release. There was a lot of “flaming” going on and other events that destroyed the effectiveness of the public input process. It was not to erode conservation goals with short-term interest arguments. It was to use the on the ground operational knowledge to do some effective implementation of policy.

Question

Why not make an effort to change the law if the law is resulting in a burdensome litigation process?

Peter Shelley

First, changing laws does not necessarily reduce litigation. It just shifts the litigation to another set of language interpretation goals. More importantly, it is not clear to me that the law is wrong. It is not clear that the law is poorly written at least in New England. The problem is that the law is being interpreted and applied improperly. Every time Congress has been asked that question with Magnuson amendments and is actually briefed on the status of marine stocks, Congress concludes that federal fisheries laws need to be made stronger and more aggressive from a conservation perspective.

So, I think there is nostalgia for the way things used to be in fisheries management and a certain amount of whining about all this litigation is now occurring. In New England, the way things used to be was producing great economic decline in the community fisheries. The old way of doing business was devastating the ecosystem and the litigation was the one thing that changed all that. So I would not advocate for changing laws.

One of the law changes we made to try and get toward Mr. Warren’s utopia was to draft and support a provision in the Magnuson Act that allowed negotiated rulemaking, which is a device that is used in all other agencies to try and deal with contentious issues. The provision was enacted, but it has never been exercised in New England.

Suzanne Iudicello

I just wanted to make a short comment about changing the law. We have got a lot of laws in play here. Ms. McCay put up the list and it is way too long to go through. One of the ones that seems to be causing people a lot of heartburn is NEPA. It has been around for a very long time in resource management, in particular in fisheries management, and both the Park Service and the Forest Service learned a lesson litigating under NEPA. I think it is time for the National Marine Fisheries Service to learn that lesson.

If you are doing business, you would not go and put up a new store and sell a new product without looking at the neighborhood, the market, and your product. One would attempt to get a sense of what is going on out there before you made a decision. A lot of what these laws are asking fishery managers to do is figure out what is going on by talking to interested parties, by looking at the environment, and by learning to better understand what the consequences of the agency's actions are going to be before they act. This is really not burdensome or onerous in my view.

For managers to ask to change the law, because they are not able to comply with the law, and are thus getting sued, is like saying that we should raise the speed limit, because speeding arrests are just clogging the system. I think we need to take our foot off the gas a little bit, slow down, and figure out what these fishery management decisions are about. We need to look at how we are making these decisions and what the consequences of these decisions are.

Thane Tienison

An additional issue needs to be pointed out and that is that when you are talking about the law and that includes regulations, the reality is that NMFS is an agency to me that has evolved dramatically over the last ten years. The agency's sheer growth necessarily means that there is going to be an accompanying growth in the regulatory body of law that accompanies the agency. This growth in law will continue, and we also know that there are efforts underway in Congress to further amend the Magnuson Act.

Changes in the law, and specifically creating greater accountability for bycatch, need to be made. Right now I defy anyone to tell me how much fish we really do catch in our ocean fisheries. First, we need to find an accurate way to determine bycatch. The bycatch issue needs to be properly addressed. Second, I do think there needs to be some recognition in the law that there is a necessary cyclical variation in stock sizes, and the Magnuson Act does not yet fully appreciate and recognize the need for long-term sustainable catches to reflect the cyclical variations in stock.

Question

I represent an organization and commercial fishing industry that has sued NMFS and other litigants quite a number of times in order to help NMFS implement some of these protective policies that we are talking about today. We are playing both sides of the fence. There does seem to be two kinds of litigation. There is the sexier, media-worthy NEPA cases, and there is a number of cases that are simply fights over missed deadlines. For example, all of the ESA cases on Pacific salmon are because of missed deadlines by mainly NMFS.

The question arises as to whether NMFS has the resources to meet those deadlines. If NMFS does not have the resources to meet those deadlines, the fault has to lie with Congress for repeatedly failing to give them the necessary resources. Our view is that this creates a natural constituency. The very people who are suing NMFS for missed deadlines should be out there lobbying for an increased allocation of money to NMFS for them to properly execute their statutory duty. I would like to hear comments by anyone on the panel concerning NMFS lacking of funding and the role this plays in their inability to meet statutory deadlines.

Moderator, Brock Bernstein

Well, we will start with Ms. McCall, but you have to remember that whatever she says is her opinion as an individual and not as a representative of NOAA.

Mariam McCall

Well, I would rather address Ms. Iudicello's comment about getting rid of the laws. I am from Montana and we do not have a speed limit there, or at least used to not have one. It is a good thing, but moving ahead, as far as the deadlines, it certainly is a resource issue. The U.S. Fish and Wildlife Service has basically stopped a number of its actions indicating that they are so far behind that they just cannot move forward. They are currently "under the gun." The main resource issue is funding. We do what we can do with what we have.

Audience Comment

I did a little calculation based on some budget numbers and the average per capita investment in this country's budget for the ESA is less than one dollar per person per year. That is not a lot.

Peter Shelley

I am not an economist, but as far as I know this is the only public resource area where there are no resource rents being extracted at all for

anything. I do not think you are going to get more general funds even if there were some available that everyone might agree should go to NMFS. It is way overdue to start thinking about some taxes on landings and other ways of generating income for the regulation of this industry.

Bonnie McCay

I just want to say that in doing the research that I did for my remarks this morning, I did learn that at least quite a few agency people are giving credit to their recent leaders. For example, Penny Dalton⁷⁸ and now Bill Hogarth⁷⁹ have gone to Congress and gotten more money to address the need for their agencies to have access to more economic and social information. I think that some of the people in their respective agencies are doing their best in that regard.

Audience Comment

There is a new way of doing business, which I think is very refreshing. For example, NMFS's Pacific region, having realized that they could not meet all the ESA listing deadlines, called up all the potential people who were likely to sue them, brought them together, went over the NMFS schedule, worked out an alternative schedule, and indicated to these interested parties that if they decided to sue that NMFS would have to spend all its time defending cases rather than managing resources. That saved a minimum of fifteen lawsuits. This is the way to do business.

Audience Comment

Well I have one comment. First, I think it has been a very good forum. However, I do not see anyone at the table who is an advocate for the commercial fishing industry.

Moderator, Brock Bernstein

We do have Mr. Warren, who is the editor of *Pacific Fishing*.

Thane Tienison

I have also represented the commercial fishing industry quite a bit in the past and still do.

78. Former Assistant Administrator of NOAA Fisheries.

79. Current Assistant Administrator of NOAA Fisheries.

Audience Comment

I could just see a commercial fishermen walking into this room, looking at the banner and thinking that this is a biased forum. If there were to be a follow-up conference, I would like to see a little more give and take from the other side. One other comment is that often it is raw power. Often it comes down to the judge who is selected, no matter what laws are involved. There are certain judges that will find for certain groups and certain people, and that is not a good way to manage fisheries.

Question

I would like to address again the public participation issue. I have some experience in Alaska with the Steller sea lion business. The lawsuit involving Steller sea lions was generally about procedure, which goes back to the scope of the documents under both the ESA and NEPA. We lost those for pretty good resource reasons, but one of the results of the loss in the Steller sea lion case is that we find ourselves in settlement negotiations with the plaintiffs and, in some cases, without the defendants or interveners who are perhaps on the other side. In those settlement discussions, a number of important policy decisions about resource management and the general posture of NMFS come under discussion, which I think from my perspective are not necessarily the subject of a given case. There is considerable pressure from my point of view based on some of our representatives to find a way to settle. One of my misgivings about this process that has developed is that it does, in fact, force the agency that is supposed to defend the public input process to work in a closed door exercise that goes nowhere. While there are no real outcomes to point to, this does result in discussion outside the scope of a case or the goals of the plaintiffs. I wondered if someone cared to comment on this situation.

Susan Hanna

The general question is whether we are achieving gains through litigation. Are we going to get to an endpoint that has improved the effectiveness of the management system? It seems to me like a real balancing act right now. We are dealing with some of these larger issues through litigation at higher levels and taking top-down approaches to either negotiated or court-decided solutions. Balanced against this is the high cost this approach is imposing on the day-to-day management system. The question centers on whether or not we are improving the effectiveness of the ongoing, year-by-year requirements of the management system through this litigation, while we are dealing with these other issues.

I am not sure where this is coming out. It seems to me from inside the regional council system perspective that the costs are being shifted very heavily onto the day-to-day operations of regional management, and it is

hard to see how the effectiveness of management at the council level is being improved by this approach toward litigating the larger issues and clarifying some of the legal issues. This is a real concern. Where is this approach leading us? What is the residue when we come out of this pulse of litigation? Where does that leave the regional system and will it have the resources that it needs to proceed? I am really quite concerned about this approach.

Brad Warren

A question related to the one just asked is, why not change the law? There are people on both sides of the issue who would like to do that. I have not heard her remarks on this point, but Janis Searles⁸⁰ has been arguing to the Pew Ocean Commission that we should have a radical restructuring of the way we manage fisheries. Searles advocates getting rid of the councils and instead creating a national oceans department. I am not sure that she is wrong. I do not know how we should do this.

I personally think that NEPA is in great shape, and that it should not be changed. I think the agency needs to learn how to comply with NEPA. The ESA is a law that I think is probably in need of change, and I think a lot of people on both sides would agree. We need to try to get change that we all can live with, which is almost impossible. In the current Congress, we have some pretty extreme anti-environmental interests that would love to hijack the ESA, and we have some environmental groups that would love to hijack the ESA too. In the middle we have people trying to come up with some sort of centrist, problem-solving approach who are not going to get anywhere, because as long as it is possible to polarize an issue, to win votes, and to win donations, which are factors that drive the political system, the game theory wins. Congress is all about game theory. It is a terrible place to try and solve complex environmental problems.

Thane Tienison

My perspective on this issue is a little different. I think the history of lawmaking demonstrates that it is highly unlikely that you are going to get a wholesale repeal of a law, and in particular, one that has a large local control component. Local control is popular politically. You are not going to get rid of some local control and, thus, the councils are here in some form to stay.

The larger point you raised is one that is always a concern to people involved in a lawsuit and that is that if you are not a government entity or

80. Ms. Searles is an attorney with Earthjustice's Juneau, AK office. She represents the plaintiffs in the Steller sea lion-Alaska groundfish litigation.

an Indian tribe and negotiations are ongoing, there is a perception that you are not at the table, which is very worrisome to some people. Oftentimes what happens is that somebody gets a phone call from some agency person, who anonymously or secretively indicates what is going in settlement discussions. For example, this happened in the Columbia River salmon litigation about two years ago where the tribes and the feds were negotiating a fishing regime that did not involve the states. The states heard about it, went to court, got a rule from the judge that granted them a seat at the table.

The reality is that to some extent this is going to go on, but where it involves potentially broad policy making decisions, I would sure hope that at the very least the agencies are responsible enough where if the process involves rulemaking then the agency would treat it as rulemaking. Rulemaking is negotiated in a public, participatory process. This is an excellent question, and it is always a worry.

Mariam McCall

We cannot settle a case in a way that would be contrary to our statutory obligations, and so we could not settle something in a way that would bind our hands in a rulemaking scenario. We have very strict guidelines from the Attorney General that we have to follow. It is very difficult once we do enter into settlement, because settlement discussions are required to be confidential. We do have to look at all the interests involved, and we have to look at the whole interest of the United States. Our agency goal is to provide for the greatest net benefit to the United States. I do know that we do settle cases that often are troublesome to parties and perhaps certainly to us in a way, because we are not achieving the immediate goal we want.

Often when we lose a case, even if we disagree with the decision, we may not appeal it. Appealing a case is very time consuming, and we might not appeal if we think it is an issue that we can easily overcome or that will not be repeated. Settlements and the decision whether or not to appeal are very troublesome, because I think a lot of people do not fully understand what has been taking place due to their absence in the internal deliberative process.

Question

Many of you have mentioned the desirability and potential benefits of using more collaborative, problem-solving approaches. I was wondering if you could try and articulate what you see as the most significant obstacle that would need to be overcome in order to create a better foundation or opportunity for using those collaborative approaches.

Brad Warren

I was hoping to throw out a question related to that to the audience, because I think there may be people here who have experience with ways of solving problems that I am not familiar. I am going to start by referring to the Marine Stewardship Council, which Mike Sutton was instrumental in launching. The Marine Stewardship Council is an organization that creates an eco-label for fish that are sustainably produced. They have a complex and pretty well-grounded certification process. Several fisheries have been certified now, and more are forthcoming.

I think we are going to see an interesting test of whether the Marine Stewardship Council is capable of enduring the same onslaught of polarized gaming that we have seen in the other arenas. This is an institution with approximately a 2.6 million pound U.K. annual, global budget. I think you could burn probably ten times that defending it in court once the Marine Stewardship Council heats up. It is going to be very interesting and it will take a substantial public relations effort to really stick in the public's mind that their label is a good symbol of environmental excellence, which indicates that I can eat this fish in good conscious.

If the Marine Stewardship Council can muster the resources, though maybe not from the fishing industry, which does not have the resources, but from conceivably the retail end of the fish business, where the real money is these days, then it should be a success. Highly consolidated corporate grocery chains have driven down the price to producers and allocated the margins to themselves. These groups are really the only players in the fish business that have the margins to be significant donors to this kind of campaign.

Some party is going to have to fund this effort, and the Marine Stewardship Council or some organization is going to have to mobilize the downstream part of the fish market where you move from being worth approximately four billion in U.S. dollars of catch at the ex-vessel level to approximately eighty billion at the consumer level. I have forgotten what the final multiplier is. At any rate, it is at that consumer end where the money is that you need to build the war chest, which in turn builds the public relations campaigns and educates the public about the value of these kinds of initiatives. The funding defends them from the polarizing barbarians, who both come in from the fringes and have never been part of the problem-solving process. If you cannot defend the middle, then those guys will kill you every time.

Suzanne Iudicello

Well, aside from the onslaught of the barbarians as an obstacle to collaborative problem-solving, I think one of the obstacles that I see to it is a lack of incentives. There just are no reasons to try it that way in the

current climate. You know you might say that it was the litigation of the *Kokechik* case⁸¹ and the prospect of a fishery or many fisheries being closed down that was incentive enough to bring people to the table in 1988, again in 1994, and then subsequently in the take reduction teams. Perhaps the eco-label is an increased economic benefit because of the prospects of consuming sustainable fish for consumers is an incentive, but I think we need to start looking at ways to make it more appealing to talk to each other about how to get to where we want to be.

You know, right now the climate is such that the benefits inure to those who swing the club and the denigration inures to those wimps like me who want to sit down and talk it out. So I think the climate is just wrong, and I do not know how we get past that. I guess we just wait for the pulse to ebb.

Moderator, Brock Bernstein

Professor McCay, from an anthropologist's perspective, what would you say about the barbarians?

Bonnie McCay

I have seen the barbarians and "they is us." There is a more general problem about collaborative problem-solving and devolved authority too, which is associated with collaborative problem-solving. The problem is that the devolution of authority is often the obstacle. It is not genuine sometimes for legal reasons, and other times simply because the power players and agencies do not want to give up their authority and power.

I think it is very hard to convince a group of people that they are genuinely being given responsibility, authority, and the power to come up with some consensus-driven solution to problems. It takes time and there has to be a long-term commitment. For people to learn and to finally realize that they really have this opportunity to be involved in collaborative problem-solving is essential. I do not think that in many cases there was sufficient time. It is amazing they did what they did.

There has to be social learning that takes place in these situations. There has to be the good faith that Professor Hanna has talked about, and good faith for negotiation depends on history. This again depends on having sufficient time and opportunity to learn that collaborative problem-solving can work. Cultural problems, different ideologies, different professional and other identities have to be sifted out, which again takes times.

81 . 839 F.2d 795 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

I think that the current climate is an interesting one. If we presume that there exists a more property-rights oriented, right-wing faction fighting the environmentalists this can also mean there are openings for local control, which can translate again into attempts to develop the older forest management type plans. It is a tricky situation, but I think that there are opportunities. However, I do feel that the increased reliance on litigation is certainly weakening the opportunity to do that within the council systems, and it is very much weakening the view of the council as a place for this kind of collaborative decision-making.

Question

This is a narrowly-focused question. I work for the U.S. Fish and Wildlife Service, and I have a question about the role of the Solicitor's Office and the role of General Counsel in decision-making within the U.S. Fish and Wildlife Service. I am concerned about the increase in litigation, and what that might be doing to management decisions. To what extent are we making management decisions with an eye towards future litigation, rather than focusing on what the management decision should be for the resources. I would like to think those two paths are at least parallel, but they are not always parallel. Sometimes you have got to make a decision. Is this a troubling aspect of the litigation, or is it just another thing that the managers have to balance - litigation versus the resources?

Mariam McCall

I think that is a good question. Before I answer it, I would note that a lot of times the agency will be considering something and a representative of a fishing organization will claim that our considerations are affected by our fear of litigation. However, I have not experienced any situation within the agency where a fear of litigation has resulted in our opting to not take a certain action. Similarly, I have never encountered a situation where the agency might prefer to take the easy road by forcing the courts to be the body making a decision that the agency does not want to make itself.

As with the Solicitor, in NOAA, our role as lawyers is to act as advisors, and this relationship is similar to that within a private practice. In society and private practice, if you have a tax question you ask your tax lawyer. Your tax lawyer will provide you with advice, and you as the client make the decision of whether or not you will follow your attorney's advice, or whether instead you will take the risk of getting audited or whatever. Attorneys within NOAA operate in the same fashion in relation to our client. We consider NMFS and NOAA personnel as our clients. The attorney-client relationship attaches within this relationship just as it does in private practice.

It is true that certainly when there has been a court order, the agency lawyer is working under remand, where you have deadlines under court order that must be met, and the attorney has made a commitment to a court to meet these deadlines, and this commitment to the court brings the lawyers into all the decisions that are going within the agency. While a court is retaining jurisdiction over a fishery as in the shark case,⁸² you do not want to step on the court's toes. Agency decisionmakers are very aware of this, and so they do involve their lawyers in a lot of things.

Audience Comment

For the record, regarding Mr. Shelley's comment concerning whether resource rents are being extracted, a significant amount of rent is extracted off the Alaskan coast.⁸³

Moderator, Brock Bernstein

What about this issue of whether decisions are made with an eye on future litigation?

Audience Comment

I would probably disagree with Ms. McCall. I think that the perception that we have on the council is that there is too much decision-making being done by the attorneys regarding fishery management issues? One gets the perception that attorneys play a strong role in agency decision-making. The council often wonders why the agency attorney cannot simply advise the councils on what they can accomplish, rather than focusing on what they cannot do because of the litigation potential. I think that council members want the attorneys to be more constructive.

Question

The first thing that I have learned this morning is that you do not have to be retired very long to become uninformed. Ms. McCall's presentation touched on the issue of unintended consequences. I am currently living in timber harvest country, where the small towns have lost their economic base, because sawmills have been shut down and unemployment has ensued. As a result, there are some antagonists that will probably never come to a meeting with an open mind about how to improve the situation. I suspect that is true for a lot of fishing communities in coastal towns as

82. *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).

83. The commenter is probably referring to fish landing taxes collected by the state of Alaska.

well. Is there any way in the litigation process to leave a little bit of flexibility for the resource managers, so that you do not have to have a complete shut-down of the livelihood within coastal communities similar to the situation that developed in eastern Canada during the codfish wars?

Peter Shelley

That question actually ties in a couple of things people have spoken about, including how people approach the settlement process. In our case, CLF's litigation objective was to get the council system working effectively, so the last thing we wanted to do was agree with the NMFS in settlement discussions to take the management decision-making process away from the council. Our settlement approach was very simple. It just said that within "X" period of years, and we actually extended that period when it ran short, the council needs to develop a management plan that addresses the overfishing problem, and if they do not, NMFS agrees to take over management of the fishery. This approach had a fallback plan and provided maximum flexibility.

One of the things I am hearing right now is that the agency is using litigation as a scapegoat for the agency's continued nonperformance. I believe that the agency is within an adolescent phase of its development. The agency is addressing some situations properly and falling on its face dramatically from time to time.

For example, the first time NMFS started to demand a full EIS in New England was when a plan was being developed to close down fishing on an area of juvenile scallop habitat. However, ongoing fishing was continuing to occur on these juveniles, and the regional NMFS attorney advised the council that they could not continue fishing on juveniles. The attorney had to actually advise the council that they could not stop fishing, until the agency had done a full EIS. I think that reflects a sort of juvenile behavior. I also do not believe that NMFS has fully realized its responsibilities under all these statutes. NMFS's staff, while possibly at the headquarters level, but certainly not down at the regional level, does not have the expertise that a lot of other agencies have developed over the decades as to how to do business in a complex regulatory world.

There is no reason that precludes NMFS from developing adaptive management approaches with the exception of the ESA. I agree with Mr. Warren that this is a special case that almost precludes adaptive management or makes it more at risk. The Forest Service engages in adaptive management. The BLM also engages in adaptive management with rangelands where they bring in a lot of stakeholders to come up with range management plans. I think the agency needs to get access to some of the expertise that exists in other resource agencies to tackle these issues.

I think that we are presently in an ugly phase where we really do not have the sophistication within NMFS at the regional level or at the regional councils to figure out how to make these laws work. As a result, we are going to have screw-ups.

Question

As a follow up to Mr. Shelley's comment, I was wondering what the panel thinks about whether they are doing mediation, and whether there have been cases where they have attempted using mediation tools to resolve a conflict prior to litigation?

Thane Tienison

There is a tremendous growth in mediation at all levels of litigation. All federal agencies are encouraged to engage in mediation. I know NMFS frequently engages in mediation. Virtually every federal lawsuit requires that shortly after the lawsuit is filed, the parties must agree at what point mediation will commence and whom the mediator will be. The federal judges themselves are usually very settlement-oriented. They do not like to be cast in the role of fisheries managers any more than we want them to be, so they encourage settlement among the parties. We are seeing mediation all the time. Mediation is very difficult because of the political context, due to the fact that we need long-term solutions. You need a lot of federal money put into the process. You need a phased-in solution, which I think we are seeing more and more, however, sometimes only when we have a crisis. The reality is we are seeing increased mediation. A required mediation component to the whole decision-making process would be a useful addition to the law. Alternative dispute resolution is just booming in every sphere of conflict.

Brad Warren

I just want to respond to this question on mediation. In the Steller sea lion case there was an odd turn of events, which no one seems to fully understand. The judge mandated mediation, and then cut the mediation process short as the parties were on the verge of reaching a settlement. The judge then issued a ruling that essentially gave the case to the plaintiffs. In so doing, the judge cited terrestrial law precedent interpreting the ESA, which I think is problematic. The order basically equated fish to forests. The order stated that in forests, if you harvest an area that is locally depleted, it does not grow back for a long time. The order determined that the same thing occurred in ocean resources. This primitive analogy failed to account for migration habits and currents. There are a lot of factors that really play out in fisheries that population dynamics persons know more about than judges. These analyses involve huge amounts of uncertainty.

No person can say definitively what the extent of localized depletion actually is. The order simply stated that fish are like forests, which was a certain answer that the law demanded. This is what the order gave us irrespective of the science. Given the huge amount of uncertainty in ocean science and the ESA, which is a very black and white law, if you have a judge with any propensity to make the call instead of allowing some kind of negotiation, then it is all over. Whomever can develop a hypothesis, however improbable, can assign fault. That was roughly the extent of evidence presented in the Steller sea lion case. It was a real stretch.

Peter Shelley

One of the things that Canadians do is a lot of public policy and consensus development committee work. Moreover, the Canadians seem to have dealt explicitly with a critical barrier to this alternative and that is the resource question. How do groups get the resources to participate? In Canada, you actually can apply for funding as a process intervener. In other words, the government has elevated its commitment to making consensus development work by making a monetary commitment to the process. This could support conservationists and fishermen alike to participate in a meaningful way. It would cost money, but if people were serious about translating some of the litigation costs into alternative results, this approach may be worth experimenting with.

Moderator, Brock Bernstein

I want to thank the panel for providing us with their diverse perspectives, and thank the audience for a stimulating set of questions, which clearly could have gone on for a lot longer. That is all the time we have, and thanks again for coming.