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OVERLAPPING STATE AND FEDERAL JURISDICTION UNDER THE FCMA: JUDICIAL INTERPRETATION OF SECTION 306(a) IN *CALIFORNIA v. WEEREN*

I. INTRODUCTION

Since enactment of the Fishery Conservation and Management Act (FCMA)¹ in 1976, questions have arisen regarding the meaning and effect of several of its provisions. One such question is the preemptive effect of § 306 (a)² on state fishery management authority. So far the only courts to grapple with the question have been those of California; the case is *California v. Weeren*.³ As a result of the interpretation given § 306(a) by the Supreme Court of California, a state's extraterritorial authority over its own vessels under the *Skiriotes* doctrine has been revitalized. Determining the ultimate effect of the section, however, must await further developments.

¹16 U.S.C. §§ 1801-1882 (1976).

²§ 306(a) reads: Except as provided in subsection (b) of this section nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

³607 P.2d 1279 (Cal. 1980).

On September 28, 1977, California Department of Fish and Game officials boarded the *Comanche*, a nineteen ton fishing vessel, and seized two broadbill swordfish. The *Comanche* was federally documented and was also licensed by the California Fish and Game Department for commercial swordfishing. Weeren and Jennings, the operators of the *Comanche*, were both residents of California. They were arrested for violations of 14 California Administrative Code § 107 and § 2000 of the Fish and Game Code which together prohibit the use of spotter plane assistance for swordfishing.⁴ The jury found the defendants guilty of a misdemeanor and they were fined and placed on probation.

⁴The California Fish and Game Code, Section 2000 provides: "It is unlawful to take any . . . fish . . . except as provided in this code or regulations made pursuant thereto." 14 Cal. Admin. Code § 107(g) (2) prohibits the use of aircraft to directly assist any person to take any species of fish while operating under a swordfish permit.

Weeren and Jennings appealed their convictions to the California Court of Appeals.⁵ They argued that the acts for which they were arrested took place beyond California's seaward boundaries and, therefore, California had no jurisdiction to prosecute them for those acts. California argued that the acts took place within its territorial waters, claiming the Santa Barbara Channel as "inland waters." In addition, California based its claim to jurisdiction on the *Skiriotes* doctrine. In *Skiriotes v. Florida*⁶, the United States Supreme Court upheld the right of a state, in matters affecting its legitimate interests, to regulate the conduct of its citizens on the high seas where no conflict with federal law is presented. California made this alternative claim in case the court were to find that the acts took place beyond state boundaries.

The appeals court did find that the acts took place beyond state boundaries and reversed the defendants' convictions. The court held that *Skiriotes* jurisdiction was inappropriate in this situation because section 306(a) of the FCMA had preempted California from regulating the

Comanche except while operating within California state waters. This decision was based on a narrow reading of the exception clause of § 306(a): "No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." The court concluded that the *Comanche*, as a United States documented vessel, was exempt from California registration and, therefore, was not registered under the laws of such State.⁷

On appeal by the State in March, 1980, the California Supreme Court interpreted § 306(a) more broadly and reinstated the defendants' convictions. The higher court's opinion revived the *Skiriotes* doctrine as a basis for state jurisdiction and began to answer some of the questions concerning the preemptive effect of the FCMA upon state fisheries management authority. In order to understand the meaning of the court's decision it is first necessary to understand the extent of state extraterritorial fisheries management authority prior to enactment of the FCMA.

II. STATE EXTRATERRITORIAL JURISDICTION AND THE FCMA

In order to conserve valuable marine resources, states have for some time sought to exert management authority beyond their seaward boundaries. Traditionally, this exercise of extraterritorial jurisdiction has been accomplished by two principal methods, the use of landing laws and the regulation of a state's own citizens upon the high seas under the *Skiriotes* doctrine. Just prior to passage of the FCMA, the Alaska courts recognized an additional basis for the exercise of extraterritorial state authority. Referred to as "objective

⁵People v. Weeren, 155 Cal. Rptr. 789 (App. 1979); vacated, 165 Cal. Rptr. 308, 607 P.2d 1279.

⁶313 U.S. 69 (1941).

⁷155 Cal. Rptr. 789, at 794-95.

"territorial jurisdiction," this doctrine allows a state to regulate harmful activities of non-citizens beyond its boundaries in order to protect inshore resources. Because all three of these approaches either directly or indirectly regulate fishing activities beyond the boundaries of a state, they all are affected by § 306(a).⁸

Landing laws enable a state to protect its resources from depletion by fishermen who might otherwise evade state regulation by claiming catches were made beyond the state's boundaries. These laws usually require that all fish landed at state ports conform to state size and catch limitations. In the leading case in the area, *Bayside Fish Flour Co. v. Gentry*,⁹ the United States Supreme Court upheld a California landing law on three grounds: first, the central purpose of the regulation was the conservation of a primary food source, secondly, there had been no Congressional preemption over this area of regulation, and thirdly, the effect of the regulation on interstate commerce was "incidental, indirect, and beyond the purpose of the legislation."¹⁰

The *Skiriotes* doctrine is related to the principle of international law which allows countries to retain control over the activities of their citizens wherever they may be found. The Supreme Court recognized an analogous domestic situation in *Skiriotes v. Florida*. The Court upheld the state conviction of a Florida citizen for acts occurring outside the

⁸For a full discussion of extraterritorial jurisdiction over marine resources, see, *The Fishery Conservation and Management Act of 1976: State Regulation of Fishing Beyond the Territorial Sea*, 31 Me. L. Rev. 303 (1980).

⁹*Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936).

¹⁰*Id.* at 426.

state's boundaries stating, "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."¹¹

The doctrine of "objective territorial jurisdiction" allows a sovereign to assert jurisdiction over the activities of a non-citizen when those activities have a detrimental effect within the boundaries of the state. Although usually applied in an international context, the Supreme Court of Alaska upheld the doctrine as applied by a state in *Alaska v. Bundrandt*.¹² Alaska had closed to both residents and non-residents certain king crab fishing areas in waters beyond three miles from the shore. The court recognized that the risk of depletion of the inshore crab fishery called for effective management through uniform regulation of all areas. However, the court held that the management of the resource was not within the province of the federal commerce power because king crab was an object of primarily local concern; therefore, Alaska's extraterritorial regulation was appropriate.¹³

Section 306(a) of the FCMA expressly preempts every state from directly or indirectly regulating fishing beyond state boundaries unless the fishing is conducted by a vessel which is "registered under the laws of such State." The provision appears to be an adaptation of the right of a

¹¹313 U.S. at 77.

¹²*Alaska v. Bundrandt*, 546 P.2d 530 (Alaska, 1976), *Appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1975)

¹³546 P.2d at 541.

state to regulate its own citizens' fishing activities under the *Skiriotes* doctrine. However, because the phrase "registered under the laws of such State" is not defined in the Act, the courts have an opportunity to determine the precise effect of § 306(a). If the phrase is given a broad interpretation, much of a state's ability to exercise extraterritorial jurisdiction may remain intact. If the phrase is narrowly read, extraterritorial jurisdiction will be severely curtailed. This difference in effect, depending on the different judicial readings of the phrase, can be demonstrated by comparing the opinions of the California Court of Appeals and the California Supreme Court in the *Weeren* case.

The California Court of Appeals based its opinion on a narrow reading of § 306(a) and § 9850 of the California Vehicle Code. The California statute requires the numbering of every undocumented vessel using the waters of the state.¹⁴ The *Comanche* was federally documented. A California Fish and Game Department witness testified at trial that the *Comanche* could have been registered under the Vehicle Code as well, but that it would have carried a "CF" number in that case. The *Comanche* had no "CF" number; therefore, the court reasoned, the vessel was of United States and not of California registry.¹⁵

The *Comanche* did carry a number issued by the Department of Fish and Game as a license to fish commercially for swordfish. The court of appeals, however, found that this number was not controlling on the issue of registration. In its words, the state

¹⁴Cal. Veh. Code § 9850 (West) begins, "Every undocumented vessel using the waters or on the waters of this state shall be currently numbered."

¹⁵155 Cal. Rptr. at 794.

number "in no way altered the *Comanche*'s status as a vessel of the United States."¹⁶

Even though the court implied that a vessel could be simultaneously state registered and federally documented, its reliance on the Vehicle Code number as evidence of state registration would have detracted from the future exercise of state extraterritorial jurisdiction under § 306(a). Many states have statutes similar to California's law.¹⁷ Because federal documentation serves the purpose of identification and record-keeping, these states apparently have determined that duplicative state numbers for documented vessels are unnecessary. The decision of the court of appeals, if followed in these states, would have required a change in state law. Duplicative state numbering would be necessary in those states wishing to continue to exercise extraterritorial authority over state citizens on federally documented vessels.

The court of appeals' decision stressed the form of the law to the detriment of its substance. The California Supreme Court stated that to interpret the requirements of § 306(a) state registration as the court of appeals did would have rendered the provision meaningless by limiting state extraterritorial jurisdiction "to pleasure boats and those few commercial fishing vessels lighter than five net tons."¹⁸ The supreme court rested its opinion on a more practical reading of "registered under the laws of such State."

¹⁶*Id.* at 795.

¹⁷See, e.g., Mass. Gen. Laws Ann. ch. 90B § 2(6) (West). New Hampshire appears not to require state registration of any vessel using the tidal waters of the state (*see*, 2-D N.H. Rev. Stat. Ann. § 270:3), relying instead on the federal enrollment and licensing requirements.

¹⁸607 P.2d at 1286.

The supreme court found that state registration of the *Comanche* was not precluded by its federal documentation. As it pointed out, federal "registration" is a term of art, "reserved solely for ships which are engaged in foreign trade." Because the *Comanche* was not federally "registered", the court was free to look at the substance of § 306(a) and to interpret the state registration requirements more broadly. It found the source of California's authority to regulate the *Comanche*'s activities on the high seas in its "registration" of the vessel for commercial swordfishing. The supreme court's opinion stressed the substance of the law when it said:

We think our broader interpretation of the term "registration" in FCMA prevents the anomalous result which would follow if the state's extra-territorial jurisdiction over commercial fishing was preserved as to those boats in which the state had asserted only a limited identification and record-keeping interest, but was precluded as to vessels like the *Comanche* which it has specifically licensed to engage in the activity of swordfishing.²⁰

Borrowing from *Skiriotes*, the supreme court revitalized the doctrine, saying:

§ 306(a), fairly read, is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which

are regulated by it and operated from ports under its authority.²¹

In reinstating the defendants' convictions, the court also found significance in the lack of federal regulation of swordfish under a fishery management plan (FMP). Because no plan for swordfish existed, the court said:

The exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibility of substantial or, indeed, total depletion of an important natural resource. Had Congress intended by its successive enactments such a drastic curtailment of the states' *Skiriotes* jurisdiction, it would have said so.²²

III. CONCLUSION

If the California Supreme Court had found that the *Comanche* was not registered under California law, then California would have been expressly preempted by § 306(a) from regulating the vessel's activities except while within California waters. This result was avoided by the court's broad reading of "registration", and a finding that there was no conflict between the state regulation and the FCMA. In this case, there was no federal fishery management plan (FMP) for swordfish. Had there been such a plan, the court's finding of state registration would not have been a sufficient basis for upholding defendants' convictions. The court would have been compelled to determine whether the state regulation conflicted with the federal plan. If such a conflict had been found, the

¹⁹*Id.*

²⁰*Id.* at 1287.

²¹*Id.*

²²*Id.* at 1286.

state regulation would have had to give way to the federal management scheme under supremacy clause analysis.

The court's holding was an affirmation of broad and practical interpretations of what is state "registration" for § 306(a) purposes, and also of the continued validity of the *Skiriotes* doctrine. Because no FMP for swordfish existed, there was no need to determine whether the state regulation of the same species presented a conflict with federal regulation. Therefore, the criteria for determining whether such conflicts exist remain to be established by subsequent judicial opinion. Also remaining to be answered by the courts is whether state landing laws, which arguably are "indirect regulations of fishing beyond state boundaries," continue to be valid under § 306(a). In a situation where landing laws are applied to non-resident vessels landing catches made outside a state's seaward boundaries, the courts may be called upon to reexamine the concept of state registration.

²³U.S. Const. art. VI, § 2.

WHEN DO STATE FISHERY REGULATIONS CONFLICT WITH FISHERY MANAGEMENT PLANS?

The question left open in *Weeren*, regarding the preemptive effect of an FMP on a state's authority over state-registered vessels beyond its boundaries has been raised in discussions surrounding an Alaska case, *Loomis v. Skoog*, No. 151-80-192-Civ. (Alaska Super. Ct. 1980). In the suit, Alaskan salmon hand trollers are challenging a state law that prohibits the use of hand troll gear in Alaska's coastal waters. The North Pacific Fishery Management Council adopted the Alaska measure (and several others) in

an amendment to its High Seas Salmon Fishery Management Plan. One of the stated purposes of the amendments was to conform the FMP and implementing regulations to State of Alaska regulations to obtain a degree of uniformity within both three-mile territorial sea and the fishery conservation zone (FCZ). The Secretary of Commerce, however, found that the proposed measure "would have prohibited fishing by certain hand trollers who had historically fished in this area, while it would have allowed power trollers without a similar history to continue to fish in the FCZ" (44 Fed. Reg. 29081, May 18, 1979). Because no legitimate conservation or management purpose was served by the distinctions drawn between the two types of fishermen, the Secretary found that the proposed hand trolling ban violated National Standard 4 under § 301 (a) of the FCMA and was required to disapprove it. National Standard 4 reads:

Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The FMP as adopted then, and the emergency regulations promulgated to implement it, directly conflict with the Alaska management measure prohibiting hand trolling.

In a letter dated 4 September 1980 to Terry Leitzell, NOAA's Assistant Administrator for Fisheries, Representative Young from Alaska took the position that § 306 (a) allows a state to regulate its vessels within the FCZ as long as such regulation is

not prohibited by the state constitution and § 306 (b) preemption procedures have not been invoked by the Secretary of Commerce. Mr. Young expressed concern that the National Marine Fisheries Service might intervene on behalf of the hand trollers in the *Loomis* suit. Leitzell's response of 16 September clarified his view of the preemptive effect of § 306. He explained that a state's regulatory authority over its vessels in the FCZ continues only to the extent its regulations do not conflict with federal regulations implementing an FMP. He drew support for his opinion from language of the FCMA and its legislative history, case law applying the doctrine of federal supremacy over state law, and the implication in *California v. Weeren* that had there been federal swordfish policy and regulations in effect the result would have been different. Mr. Leitzell stressed the language of the California Supreme Court in *Weeren* to the effect that § 306 (a):

... is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law ...

When state law is inconsistent with regulations implementing an FMP, its application beyond the state's territorial waters is null and void under the supremacy clause of the U.S. Constitution and the Secretary of Commerce need not invoke the pre-emption procedures of § 306 (b). Those procedures apply when state regulations within the state's territorial waters are inconsistent with FMP regulations and this inconsistency substantially and adversely affects the carrying out of the FMP. In an earlier letter to Mr. Young, Mr. Leitzell voiced his concern that the "potential for conflicting state and federal regulation of fishing in the FCZ could disrupt the carefully planned, region-wide management called for by the FCMA."

The conflict between the Alaska law and the FMP is quite clear in this case because the same measure had been expressly disallowed by the Secretary when he reviewed the Council's proposed FMP for approval. In the future, more difficult cases may arise when defendants in state enforcement actions contend that state measures which have not been incorporated in an FMP and then tested through Secretarial review under § 304 conflict with federal regulations. Courts having the opportunity to decide these questions will need to look beyond any bare allegations of conflict and determine whether substantive conflicts in fact exist. Such decisions could involve critical examinations of the purposes and effectiveness of overlapping state and federal fishery management regulations.

Editor's Note:

This article was prepared by Martha Grant, Research Assistant at the Marine Law Institute and third-year law student at the University of Maine School of Law. The staff of *Territorial Sea* invites its readers to submit information on legal developments in the management of marine fisheries, including legislation, litigation, regulatory activities and policy research. Authors are especially encouraged to submit articles concerning such developments.

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