



Ocean Law Memo

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THE PORPOISE-TUNA CONTROVERSY

For centuries seafarers have considered the appearance of porpoise an omen of good luck. In recent years, however, commercial fishermen have been especially pleased with the sighting of porpoise because it often signals the presence of yellowfin tuna. Capitalizing on this relationship and using modern purse seine gear, the domestic tuna fleet has been able to greatly increase its yields. In the process, however, hundreds of thousands of porpoise have been killed, a result which Congress sought to minimize in the stringent Marine Mammal Protection Act of 1972. During 1976 Committee for Humane Legislation, Inc., v. Richardson, the first major lawsuit brought under that statute, was decided. The decision, for a time, threatened to stop or seriously curtail purse seining for tuna. Although subsequent events have lessened the chance of such drastic consequences, the decision remains an important interpretation of a unique statute and a vivid illustration of growing conflicts between environmental goals and commercial needs.

Porpoise and Tuna

Porpoise and dolphins are small-toothed whales of the order cetacea. Like all mammals, they are warm-blooded, air-breathing animals which bear and nurse live young. They are also extremely intelligent and highly social creatures. Some scientists, in fact, feel they may be man's closest intellectual counterparts on earth.

For reasons that remain unknown, yellowfin tuna tend to congregate under schools of porpoise. Baitboat fishermen, employing hooks and lines, recognized this relationship and used the visible, surface-dwelling mammals to lead them to schools of tuna for decades. In 1960, however, the development of advanced purse seine gear enabled a greater use to be made of this association between fish and mammal. Under modern procedures, speedboats are used to herd porpoise into the encircling seine--a large bottomless net up to half a mile in length--while the tuna follow below. The bottom of the net is then "pursed" shut with a drawstring, trapping both tuna and porpoise inside. The critical point for the mammals is when the net is hauled close to the ship so the tuna can be loaded on board. During this operation, porpoise often become entangled in the netting and drown or die from shock and injuries. The extent of mortality can be enormous. In 1969 it is estimated that 529,000 died as a direct result of purse seine activities.

Several techniques have been adopted in an

effort to reduce this unwanted killing. Two of the most successful have been the Medina Panel, an insert of finer mesh net which allows more porpoise to slip out over the edge of the net without entangling their flippers and snouts, and "backing down", a process where the ship attempts to pull the net out from under them. These procedures and others have helped reduce the killing; still, it is estimated that between 80,000 to 120,000 porpoise were still killed in 1976, even though an injunction effectively prevented purse seining during the last two months of the season.

The Marine Mammal Protection Act

In 1972, responding to widespread public outcry over the killing of many marine mammals such as whales, seals and porpoise, Congress enacted the Marine Mammal Protection Act (MMPA). The Act's approach is straight-forward: a moratorium of indefinite duration is placed on the "taking" or importation of all marine mammals. "Taking" is defined broadly to include not only killing but also mere harassment. There are, however, four exceptions to the moratorium: (1) taking for scientific research and public display, (2) taking by Alaska natives, (3) a general waiver provision for any marine mammal if the government makes certain determinations, and (4) taking incidental to commercial fishing. This last exception was specifically tailored to the porpoise-tuna problem, although it applies equally well to the incidental take of all marine mammals, such as sea lions or seals, during fishing operations. The commercial fishing exception, however, is not an open license. Before any such taking is allowed a permit must first be obtained, and before permits may be issued the government must formulate regulations to govern the taking. But even prior to the issuance of regulations the government must publish a statement of the population level of the particular marine mammal involved along with a statement of the effect of the taking on that species' "optimum sustainable population." It is also the goal of the Act to reduce all commercial killing to "insignificant levels." It was the attempted compliance with these provisions which formed the basis of the Humane Legislation lawsuit.

The MMPA also provides civil and criminal penalties for violations of its provisions, restricts imports, and creates the Marine Mammal Commission, an advisory body which supervises marine mammal research.

Background to the Lawsuit

In fall 1974 a report was issued by the National Marine Fisheries Service (NMFS), a branch of the Commerce Department responsible for administering the MMPA, which indicated some porpoise species were in danger of depletion because of purse seine operations. However, over the objections of certain environmental groups, most notably the Committee for Humane Legislation and the Environmental Defense Fund, the agency granted the tuna industry a general permit to take unlimited numbers of porpoise incidental to fishing operations. The only restrictions were certain gear requirements such as the Medina Panel. In protest, several of the environmental groups began legal action against the agency.

During the following summer, another report indicated further reductions in porpoise stocks, and in response the NMFS proposed a quota on the taking of porpoise during the following fishing season. After hearings on the issue, however, the agency unexpectedly granted the tuna industry another general permit without a limitation on porpoise kill. It did say, though, that a quota would later be announced if the season's mortality was projected to exceed 70 percent of the 1975 level. In May, 1976, before such a point had been reached, the lawsuit brought by the environmental groups was decided. In that decision, Judge Charles Richey of the United States District Court in Washington, D.C. prohibited the continued taking of porpoise incidental to tuna purse seine operations.

The Court Decisions

In considering whether the Fisheries Service had acted properly, Judge Richey found that the MMPA required permit applicants to show that any taking will be in line with the purposes of the Act and not to the disadvantage of the marine mammals involved. The tuna industry's application, however, had failed to meet this burden. Second, although the Act requires every permit to specify the number of marine mammals to be taken, the judge held that the industry permit contained no numerical limits. Third, he found that the MMPA requires permits to be consistent with any regulations which have been adopted for the taking of marine mammals. Before such regulations may be prescribed, however, the Secretary must have published (1) a statement of existing population levels, and (2) a statement of the impact of such regulations on the "optimum sustainable population" of each species of marine mammal involved. The NMFS, the judge held, had not adequately made these statements. Based on these violations of the statute, he enjoined the further taking of porpoise during tuna operations until the Act was complied with.

Almost immediately Judge Richey's decision was appealed to the District of Columbia Court of Appeals, which stayed the injunction until it could decide the case. In only three months, however, a very short time for such proceedings, the court delivered an opinion affirming the earlier decision. Its only substantial modification was to stay the injunction until January 1, 1977, allowing the government limited time to conclude ongoing research and to comply with the

Act.

A. The "Optimum Sustainable Population" Question

Possibly the most complex and hotly-debated question in the Humane Legislation lawsuit concerned the agency's duty to publish a statement of the effect of any taking on the porpoise "optimum sustainable populations" (OSP), the population level at which the MMPA seeks to sustain all marine mammals. OSP is a new concept in wildlife management which had no basis in the scientific community when it was enacted into law in the MMPA. As defined by the Act, OSP is "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." However, because the OSP concept was the result of legislative compromise rather than strict population theory, those persons charged with putting it into effect immediately encountered great difficulties. It was this confusion over the meaning of OSP which in large part prevented the agency from publishing the statement required by the Act.

Shortly after the Humane Legislation decisions, the NMFS assembled a workshop of scientists who formulated a working definition of OSP. Under their interpretation, the concept represents a spectrum of population sizes ranging from the maximum number of animals supportable by the environment down to a number which is half of a species' pre-exploitation or virgin population. This definition has sparked some criticism, mainly because it permits a great amount of taking which the legislative history of the MMPA indicates was not intended by its draftsmen. The definition did, however, permit the agency to proceed with issuing statements as required by the Act, and it has been incorporated into new regulations issued on March 1, 1977 which once again permit the taking of porpoise.

B. The Numerical Limits Issue

A second major controversy in the lawsuit involved the Act's requirement that permits state numerical limits on the number of marine mammals that may be taken, a requirement the courts held had not been met. Shortly after the district court decision was announced, however, the NMFS projected that the year's porpoise kill would exceed 70 percent of the 1975 level, and it established a quota which was reached in October of 1976. Similarly, a quota of 59,050 porpoise has been set for 1977 in an attempt to comply with the Act and the courts' decisions.

Yet the quota set by the NMFS has proved to be controversial and has subjected the agency to criticism and legal action from both sides. The Committee for Humane Legislation filed suit in March of 1977, once again claiming that the MMPA allows no marine mammals to be killed and challenging the 1977 regulations that allow purse seining to continue. The tuna industry, on the other hand, filed suit shortly after the 1976 quota was announced, claiming that both the quota and the MMPA were unconstitutional because they allegedly take private property without just compensation. Both suits are still pending, although in

January of this year the San Diego federal judge who is hearing the industry suit issued an order allowing the fishermen to take up to 10,000 porpoise until the NMFS issued its new regulations and resumed granting commercial permits. Nevertheless, when the 1977 regulations were announced in March, the tuna fleet sailed into port in protest of what it considered an unreasonably low quota and a prohibition against setting on schools of eastern spinner dolphins which have been declared "depleted" under the Act and not subject to taking. Although the Administration stated that only intentional violations of the spinner dolphin prohibition would be prosecuted, the fleet remained in port until early May when some Congressional relaxation of the regulations appeared imminent.

The 1977 Regulations

The 1977 regulations seek to overcome the courts' objections in Humane Legislation and will allow limited purse seining to continue. They do, however, impose new restrictions on both foreign and domestic fishermen using porpoise to catch tuna.

In general, the new regulations are more stringent in the required use of porpoise-saving gear. Finer mesh nets, floodlights, rubber rafts, and facemasks are all made mandatory in an effort to reduce mortality. Also, to insure compliance with the gear requirements all vessels must be annually inspected and a "Skipper's Panel" is established to pass on the competency of masters and crews in performing porpoise release operations.

The new regulations also adopt a more stringent stance in enforcing the MMPA against foreign tuna fleets which export tuna to the United States. Imports have been a major source of concern for U.S. fishermen who claim they have been unfairly penalized by the MMPA while foreign fishermen have captured tuna without regard to quotas and expensive, time consuming gear and procedures designed to save marine mammals. Although the MMPA does provide that no tuna may be imported into the United States which has been caught in contravention of the Act, all that was required until now was a certificate from the exporting country stating that the Act had been complied with, a procedure many U.S. fishermen found inadequate.

The new regulations require that all tuna landing in the U.S. must contain a certificate of origin naming the importer and the vessel which caught the tuna, and stating that it was caught in a manner not prohibited to U.S. fishermen. Also, any country seeking a certificate of conformance with U.S. standards must now submit a detailed statement of the fishing technology used in its purse seine operations, a statement of the number of marine mammals killed or injured while catching tuna and the manner in which such information was obtained, a statement of the number of marine mammals which the country will allow to be killed or injured and the impact of such killing on the species involved, procedures such as quotas used to enforce the limit on taking, copies of the laws and regulations used to protect marine mammals, and a list of all vessels involved in purse seine operations and the names of any United States citizens who work on those vessels. The

NMFS may require verification of any statements submitted.

The new regulations thus provide more stringent controls on foreign vessels than existed previously, and they should help protect U.S. fishermen from being unduly handicapped by the MMPA. The new provisions should also discourage domestic fishermen from transferring their registration to foreign flags in an attempt to escape the Act, a step many have threatened and a few have taken. A foreign transfer, however, is a questionable action in any event, since it must be approved by the Department of Commerce, which is responsible for enforcing the MMPA in regard to porpoise, and because it requires the complete severance of all domestic ties.

The porpoise-tuna controversy is far from over, and it may be years before pending lawsuits are finally resolved. Although Committee for Humane Legislation Inc. v. Richardson will not represent the last word on either the controversy or the Marine Mammal Protect Act, it is a major first step in implementing what may be Congress's most ambitious wildlife management scheme.

James J. Armstrong

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