Reeling in Commercial Fishing: Federal Jurisdiction and the San Francisco Bay Herring Population

INTRODUCTION

Pacific herring are a major part of the economy, culture, and natural environment of the San Francisco Bay and Northern California Coast.[1] They are integral to both commercial fishing and recreational fishing, as well as being a major part of the ecosystem.[2] Stakeholders hold differing views on how to maintain the population of herring within the San Francisco Bay, and with the herring population trending downward, determining the correct path to conservation is increasingly important.[3]

Tensions between two stakeholders, commercial herring fisheries and government regulators, boiled over when the National Park Service (NPS) began regulation of the Golden Gate National Recreation Area (GGNRA) in 2007. In response to regulations, the San Francisco Herring Association (plaintiff) brought a suit against the U.S. Department of the Interior, NPS, and the Superintendent of the GGNRA (collectively, Park Service).[4] The plaintiff, a nonprofit group of small-business commercial fishers, filed suit to prevent the Park Service from enforcing in the GGNRA the general commercial fishing prohibition applied across national park lands. [5,6] However, the court held that the Park Service had authority to administer the waters within the boundary of the GGNRA.

Federal jurisdiction over these navigable waters is critical for effective land management and conservation of both the herring population and, more broadly, the ecosystem of the San Francisco Bay. The Ninth Circuit's holding correctly reflects that federal regulation of the waters in the GGNRA is consistent with the goals of the GGNRA and Organic Acts for three reasons. First, the language and

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1. *See* CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN 4-1, 4-16 to 4-22 (Oct. 2019).
2. *Id*.
3. *See*, *e.g.*, Jerome D. Spratt, *The Evolution of California's Herring Roe Fishery*, 78 CAL. FISH & GAME 20, 44 (1992) (discussing the various management methods, which although "controversial . . . have proven effective in solving socioeconomic conflicts in a congested fishery").
4. San Francisco Herring Ass'n v. U.S. Dep't of the Interior, 33 F.4th 1146, 1146 (9th Cir. 2022).
5. *Id.*
6. *Id*. at 1151.

goals of the GGNRA Act are distinguishable from the Alaska National Interest Lands Conservation Act (ANILCA) which administers waters differently; second, any other reading of the statute would lead to impossible outcomes; and third, the federal government is better resourced and better able to support conservation interests.

I. BACKGROUND

A. Federal Management of The Golden Gate National Recreation Area

Congress passed the Golden Gate National Recreation Area (GGNRA) Act in 1972.[7] The GGNRA covers lands and waters in the San Francisco Bay that "possess[] outstanding natural, historic, scenic and recreational values," with the goal to "protect [them] from development and uses which would destroy the scenic beauty and natural character of the area[s]."[8] Congress designated the management of the GGNRA to the Department of the Interior (DOI), granting the Park Service the ability to administer the land within its borders.[9] The designated area was drawn to "extend one-quarter mile offshore from Sausalito to Bolinas Bay in Marin County, around Alcatraz Island, and from Fort Mason to below Ocean Beach in San Francisco County and the navigable waters one-quarter mile offshore."[10] Upon the DOI gaining authority to protect and manage GGNRA, both federal and state law applied to herring conservation in the area.

In addition to the GGNRA Act, Congress passed the National Park Service Organic Act (the Organic Act) in 1916 "to conserve the scenery, natural and historic objects, and wildlife" in national parks.[11] The Organic Act sought to allow people to enjoy the parks in a way that "will leave them unimpaired for the enjoyment of future generations."[12] The Organic Act authorized the Park Service, under the supervision of DOI, to administrate and regulate public lands.[13] The Park Service has regulated waterways within the national park system for decades.[14] Under the Organic Act, the Park Service "is authorized to regulate within park boundaries without regard to ownership of the lands or waters."[15] In 1976, the Organic Act was amended to emphasize the Park Service's role in regulating "boating and other activities on or relating to water" within national parks and under federal jurisdiction.[16]

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7. 16 U.S.C. § 460bb.
8. *Id*.
9. *See id*. (entrusting management to the Secretary of the Interior).
10. *San Francisco Herring Ass'n*, 33 F.4th at 1149.
11. 54 U.S.C. § 100101.
12. *Id.*
13. *Id*.
14. Reply Brief to Plaintiff-Appellant San Francisco at 5, *San Francisco Herring Ass'n*, 33 F.4th 1146 (2021) (No. 20-17412) 2021 WL 6280259 (dating the authority of the Park Service in this area to 1970).
15. *San Francisco Herring Ass'n*, 33 F.4th at 1155.
16. *Id.* at 1153.

B. Leadup to the Case

Herring are exceptionally important to the Bay Area ecosystem, supporting crabs and fish that eat herring roe (eggs), various species of birds that rely on them as winter prey, and other marine life including seals and whales that eat adult herring.[17] Several factors, including "high sea surface temperatures and depressed productivity in the central California Current Ecosystem as well as low freshwater outflow in the San Francisco Estuary" have significantly reduced the herring population in the Bay, resulting in a complete lack of commercial fishing in the area during the 2018−19 season.[18] Fears of a diminishing population of herring have increased tensions between environmentalists and commercial fishers in debates surrounding commercial fishing in the San Francisco Bay. In response to growing concerns about the depletion of pacific herring, the California Fish and Game Commission has enacted policies that prevent overfishing by restricting the catch in each season to a maximum of 10 percent of the estimated herring population.[19]

In 1983, in accordance with the Organic Act, the Park Service issued a ban on commercial fishing in national parks under penalty of a fine and up to six months in jail.[20] In the late nineties, the California Department of Fish and Wildlife (CDFW) disputed the Park Service's jurisdiction to regulate the waters within the GGNRA, and in 2003, refused to include the Park Service's notice of the commercial fishing ban in the CDFW's information packet.[21] The dispute lasted until 2006, when CDFW recognized the Park Service's exclusive jurisdiction of the waters, and in 2007, CDFW included their recognition of the Park Service's authority in their yearly information packet.[22] Following this, California officials began warning fishermen of federal bans, and in 2011, the Park Service began enforcing its ban on commercial fishing in the GGNRA.[23] The ban represented a major disruption to herring fisheries because roe are found primarily on shorelines.[24] As a result, commercial fisheries focused on roe were unable to move their operations more than a quarter-mile offshore to comply with the Park Service regulation.

17. CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN, 3-1, 3-8 (Oct. 2019).

18. *See* CAL. DEP'T FISH & WILDLIFE, 2018-19 SUMMARY OF THE PACIFIC HERRING SPAWNING POPULATION AND COMMERCIAL FISHERIES IN SAN FRANCISCO BAY, 10 (2019); Phillip S. Levin et al, *Thirty-two Essential Questions for Understanding the Social-ecological System of Forage Fish: The Case of Pacific Herring*, 2(4) ECOSYSTEM HEALTH AND SUSTAIN'Y 1, 1 (2017).

19. CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN, 5-5 (Oct. 2019).

20. *Cf.* 36 C.F.R. § 2.3(d)(4) (1987) (prohibiting "[c]ommercial fishing, except where specifically authorized by Federal statutory law").

21. Appellees' Answering Brief at 17, *San Francisco Herring Ass'n* (No. 20-17412).

22. *Id.* at 18.

23. *Id.* at 19, 56.

24. California Department of Fish and Wildlife, *State Managed California Commercial Pacific Herring Fishery*, https://wildlife.ca.gov/Fishing/Commercial/Herring.

II. *SF HERRING ASSOCIATION V. U.S. DEPARTMENT OF INTERIOR*

A. The District Court Case

In 2013, the plaintiff filed a lawsuit challenging the Park Service's authority to prohibit commercial fishing and regulate the waters of the GGNRA.[25] The case centered on whether the Park Service had the authority under the Organic Act and the GGNRA Act to administer navigable waters within the GGNRA without first formally acquiring them.

The plaintiff claimed that the Park Service was not authorized to regulate the waters of the GGNRA because the Park Service had not first acquired a formal property interest in them, which the plaintiff interpreted as a requirement of the Organic Act. The plaintiff relied upon the portion of the text of the GGNRA which states that "the Secretary shall administer the lands, waters, and submerged lands therein acquired." The plaintiff interpreted the presence of the word "acquired" to require formal acquisition of all lands, waters, and submerged lands, whether they were included in the boundaries of the GGNRA or not. The plaintiff also argued that the Supreme Court's decision in *Sturgeon v. Frost*, which held that the Park Service had no authority to apply its regulation banning hovercrafts to the navigable waters in Alaska because the United States did not own them, should apply to the navigable waters of the San Francisco Bay.[26] Though the plaintiff did not dispute that the land in the GGNRA was under federal jurisdiction, it argued that the Park Service was not authorized to regulate the waters because DOI had not formally "acquired" them in accordance with the Organic Act and the GGNRA Act.[27]

The plaintiff claimed that prohibiting commercial fishing in the GGNRA would require fisheries to extend their season and to collect younger herring earlier than they normally would.[28] The plaintiff contended that this would frustrate conservation efforts and ultimately diminish the population of herring more significantly than would allowing commercial fishing in the GGRNA.[29]

The Park Service argued that the Organic Act and the GGNRA Act authorized the Park Service to administer the waters without first formally acquiring them. It reasoned that navigable waters cannot be owned, so there was no possible way to acquire them.[30] The Park Service noted that the plain language of the GGNRA shows that the boundaries of the GGNRA were drawn to include waters one-quarter mile offshore, which placed them under the purview of Park Service regulation.[31] Furthermore, the section on acquisitions made no mention of acquiring waters, which the Park Service argued was

25. Appellees' Answering Brief at 19, *San Francisco Herring Ass'n* (No. 20-17412).
26. *See generally id.* (referring to Sturgeon v. Frost, 587 U.S. 28 (2019)); 36 C.F.R. § 2.17(e).
27. *San Francisco Herring Ass'n*, 33 F.4th at 1148.
28. Plaintiff-Appellant's Opening Brief at 8, *San Francisco Herring Ass'n* (No. 20-17412).
29. *Id*.
30. Appellees' Answering Brief at 21, *San Francisco Herring Ass'n* (No. 20-17412).
31. *Id.* at 52.

because it was implied that the navigable waters were already within the jurisdiction of the United States.[32] Therefore, the Park Service did not have to "acquire" them or the land beneath them for purposes of regulating boating, fishing, or other activities conducted on the water.[33] Finally, the Park Service argued that most of the submerged lands within the GGNRA were already federally owned, so it would not need to gain a further interest in the waters in order to regulate them, unlike *Sturgeon*, where the federal government did not have title to the submerged lands in Alaska.[34] The lower court granted summary judgement to the Park Service in agreement that the Park Service has the requisite statutory authority to regulate lands and waters within the GGNRA.

B. The Ninth Circuit Case

The plaintiff appealed to the Ninth Circuit and again challenged the Park Service's authority to regulate the navigable waters within the GGNRA without acquiring a formal property interest in the submerged lands in the bay.[35] The Ninth Circuit held that Congress had jurisdiction over navigable waters regardless of whether a state owns any part of the submerged lands beneath the waters, as California did.[36] Because running waters cannot be owned, to acquire the waters for purposes of administering them the Secretary only had to have control over them.[37] In this case, the Secretary already controlled the waters because they were designated as part of the GGNRA.[38]

The outcome of the case turned on the Court's statutory interpretation of the Organic Act and the GGNRA Act. The GGNRA Act states that "the Secretary shall administer the lands, waters, and interests therein acquired for the recreation area."[39] That process allowed the Secretary of the Department of the Interior to acquire California lands only through donation.[40] This further complicated the plaintiff's argument because the California Constitution prevents the state from donating or selling lands in the public trust for fishing and navigation purposes.[41] According to the court, Congress would have been aware that the California Constitution prohibited land transfers and would not have intended the statute to

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32. *Id.* at 21.
33. *Id.*
34. *Id.* at 11; *see generally* Sturgeon v. Frost, 587 U.S. 28.
35. *See San Francisco Herring Ass'n*, 33 F.4th at 1152.
36. *See id.* at 1153.
37. *See id.*
38. *Id.*
39. 16 U.S.C. § 460bb-3.
40. 16 U.S.C. § 460bb-2 ("Any lands, or interests therein, owned by the State of California or any political subdivision thereof, may be acquired only by donation.").
41. CAL. CONST. art. I, § 25 ("[N]o land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon"); art. X, § 4 ("No [entity] claiming or possessing the frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water").

require that the Department of Interior protects the land and waters only after formal acquisition when formal acquisition is impossible.[42]

The Court rejected the plaintiff's interpretation of the statute, determining that the acquisition of waters for the purposes of regulating them did not need to be a formal transfer of property to the Park Service.[43] The court reasoned that the boundary line of the GGNRA deliberately included the waters extending a quarter mile offshore.[44] The court stated that it was also clear Congress would not delegate this responsibility to the Park Service and then prevent the agency from carrying out its duty by not formally acquiring the area if that were required by the Organic Act.[45]

The court distinguished this case from *Sturgeon v. Frost*, a Supreme Court case about the Park Service's authority to regulate the nearly forty-four million acres of Alaskan land designated as a national park. ANILCA designated large swaths of land in Alaska, including that of Native Alaskans and private landowners, as national parks.[46] ANILCA designated federal jurisdiction only to the public lands within the borders of the national park.[47] ANILCA included clear language "borne out of Alaska's unique history and geography" that allowed the Park Service to regulate only what the federal government owned.[48] Because navigable water cannot be owned, the United States government did not have title to it and therefore could not regulate it under the unique statutory language in ANILCA. The Supreme Court held that Congress explicitly carved out non-public lands from federal jurisdiction, and that the Park Service could not regulate the waters above private lands.[49] According to the Ninth Circuit, "*Sturgeon* shows that when Congress wants to disallow NPS from exercising its usual authority over navigable waters falling within the drawn boundaries of a national park system unit, Congress makes that intention clear."[50] In this case, there was nothing to state or imply that Congress intended to exclude the waters of the GGNRA from the authority of the Park Service.[51] Therefore, the court concluded, Congress must have intended the Park Service to regulate the waters.

III. LEGAL ANALYSIS

The Ninth Circuit's ruling in this case was correct for three reasons: first, federal regulation of the designated area is consistent with the GGNRA and the overall goals of the Organic Act which preempt state regulation; second, any other reading of the statute would render the Park Service unable to administer

42. *See San Francisco Herring Ass'n*, 33 F.4th at 1154.
43. *See id.*
44. *Id.*
45. *Id*.
46. *Id*. at 1155.
47. *Id.*
48. *Id.*
49. *Id* at 1156.
50. *Id.*
51. *Id.*

any navigable waters not already over submerged federal land; third, the goal of conservation is better accomplished given that the federal government is better resourced to implement conservation driven regulation and because the Organic Act and GGNRA provide for stricter conservation measures than state laws.

A. Federal Regulation of the Designated Area Is Consistent with the GGNRA and the Overall Goals of the Organic Act

Federal regulation of the designated area is more consistent with the GGNRA and the overall goals of the Organic Act. According to the court, the purpose of the Organic Act was to take this piece of land and water and give it federal resources and management.[52] This becomes clear after distinguishing both the statutory language and the historical circumstances of ANILCA identified in *Sturgeon v. Frost* with that of the GGNRA Act. According to the court, the language in the GGNRA and Organic Act expressly obligate the Park Service to administer the designated area, which was drawn to include land and waters.[53] Conversely, the language in ANILCA states that only public lands (which according to ANILCA itself included water), meaning lands the U.S. government holds title to, could be regulated by the Park Service, expressly prohibiting federal regulation of the waters.[54] The goal of ANILCA was to geographically define lands and waters as part of a conservation unit without giving the Park Service authority over non-federally owned land.[55] The goal of the GGNRA was the opposite – to provide federal funding and management to the designated area.

In addition, the circumstances of ANILCA are different from those of the GGNRA Act. Alaska's land management circumstances are vastly different from those of the GGNRA. ANILCA intentionally excluded lands and waters not owned by the United States in its land management strategy because rather than setting the boundaries of the park to areas with exclusive federal jurisdiction, the national park boundary included forty-four million acres of land owned by the State of Alaska and Alaskan Natives.[56] The boundaries followed topographical features because it was nearly impossible to draw boundaries excluding State and Native Alaskan owned land.[57] On the other hand, the GGNRA Act dedicated a small portion of land, carefully considered by Congress and almost entirely within United States Jurisdiction, to be administered by the federal government, with no carve-out for lands or waters not specifically owned by the United States, because it wanted the Park Service to conserve the natural beauty of the area.[58]

52. *See id.* at 1153.
53. *Id*.
54. Sturgeon v. Frost, 587 U.S. at 49.
55. *Id.* at 48.
56. *Id.* at 37.
57. *Id.*
58. *San Francisco Herring Ass'n*, 33 F.4th at 1156.

B. Requiring the Park Service to Acquire Navigable Waters to Govern Them Would Render Park Service Administration of Navigable Waters Impossible

Despite the widely understood principle that navigable waters cannot be owned,[59] the parties and the court spent significant time discussing the possible "acquisition" of the waters in the San Francisco Bay for the purposes of administering them.[60] While the court's ruling in *SF Herring Association* was narrow in that it implicated only the GGNRA, if the court had ruled in favor of the plaintiff, requiring that the Park Service "acquire" the un-acquirable waters, it would have condemned the Park Service to abiding by a requirement to obtain the land beneath the waters in every effort to administer waters under federal jurisdiction. This would have encumbered the legal system because it would result in extensive litigation across multiple states for control of water within their borders and disrupt countless other established federal regulatory conservation efforts.

C. The Federal Government Is Better Suited to Conservation Efforts than State Governments

Federal regulation of waters is essential because effective public lands management requires balancing the competing interests of the state, including local economies and businesses, tourism, community development, and conservation. Conservation of water and the ecosystem in the San Francisco Bay preserves community and economic interests for future generations. To accomplish this, the Park Service serves as "the ultimate caretaker of America's most valuable natural and cultural resources, while providing for public use and enjoyment of those resources."[61] Contrary to the plaintiff's argument that reduced commercial fishing would ultimately reduce the population of herring, the Park Service's ban on fishing in the GGNRA works in tandem with the CDFW's herring and roe quotas to prevent over-fishing, which will allow the population of herring to increase with conservation efforts.[62] The power of Congress to designate the Park Service to govern public land without formal acquisition is vital to both the continued creation of public land and protection of those lands already designated under the purview of the Park Service. The Park Service's ability to regulate navigable waters within its jurisdiction is essential for conservation efforts.

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59. *Id.* at 1153 (citing *Sturgeon v. Frost*, 587 U.S. 28).

60. *Id.*

61. *Land Resources Division,* NAT'L PARK SERV., https://www.nps.gov/orgs/1860/index.htm (last visited Nov. 20, 2024).

62. *See* California Department of Fish and Wildlife, *State Managed California Commercial Pacific Herring Fishery*, https://wildlife.ca.gov/Fishing/Commercial/Herring; California Audubon Society, *Pacific Herring Conservation Program*, https://ca.audubon.org/pacific-herring-conservation-program.

CONCLUSION

The Ninth Circuit's ruling in *SF Herring Association* was based primarily on statutory interpretation of the GGNRA Act distinguished from ANILCA and therefore was a narrow holding on the Park Service's ability to administer the waters of the San Francisco Bay. However, the ruling has broad implications for conservation efforts in navigable waters and will support the herring population in the San Francisco Bay. Ruling in favor of the government has allowed the Park Service to enforce its ban on commercial fishing in National Parks and conserve the ecosystem of the GGNRA.

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We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.