

Case: State (Washington) v. Longshore (WA 2000) J. Sanders.

Facts:

- On October 6, 1997, at 4:30 am, Ms. Nancy Nelson, a neighbor of William Mackelwich, reported suspected illegal clam harvesting on the waterfront lot on Hammersley Inlet in Mason county, owned by Mackelwich. The individuals in question departed in a silver pickup truck, followed by the return of a tan sedan with two individuals who departed with clams hidden in the bushes. Sergeant DeMiero and fish and wildlife officer Matthew Nixon stopped the sedan and arrested the driver Floyd Irvin and defendant Longshore with 300 pounds of sacked clams and certification tags in the vehicle's trunk. The seized clams came from an uncertified beach with a prohibited shellfish harvesting zone due to the potential fecal coliform bacterial contamination. Irvin and Longshore sold uncertified harvested clams to Skipper John's in Hoodspport for \$1.50 per pound. Sergeant DeMiero and intertidal division manager for a commercial shellfish company, David Robertson, testified the presence of a "gray" market for uncertified clams and determined the market value for uncertified clams to be between \$1.15 and \$1.50 per pound, constituting a total value that exceeds \$250. On behalf of the state, Irvin testified their intent to harvest and sell clams and was granted transactional immunity. Mackelwich testified that he did not grant permission to harvest clams from his beach.

Procedural History:

- On October 8, 1997, the state charged Longshore with one count of second-degree theft. The defense motioned for a directed verdict arguing the state's failure to prove prima facie of second-degree theft. The trial court denied the motion for a directed verdict, and the case was submitted to the jury, which found Longshore guilty of second-degree theft. Longshore moved to arrest the trial court's judgment, which was ultimately denied. Longshore appealed to the Court of Appeals, Division Two, which affirmed the trial court's judgment.

Issue:

- Do naturally occurring clam beds on privately owned tidelands account as "property of another" within theft statutes, and did the state prove sufficient evidence on the market value of uncertified clams to constitute second-degree theft?

Existing Rule:

- "Property of Another" implies that a person has no authority to exert control over the property or services without the consent of the person in possession of the property or services in question.
- Washington's common law on "Animals Ferae Naturae" holds that naturally occurring clams on private tidelands are the exclusive property of the tideland owner.
- In accordance with the "Public Trust Doctrine," the state has the power to dispose of and invest individuals with ownership of tidelands and shorelands.
- Valuation is established by the market value of the property or services at the time (such as retail price) and in the approximate area of the criminal act within theft statutes.

Court's Application of Rule to Facts:

- The court affirmed that clams in naturally occurring beds in state-owned tidelands are not any individual's personal property. However, once the tidelands are sold to an individual, title to the clams passes to the private property of the owner and hence does not reserve ownership of the natural clam beds to the general public.
- The general rule states that "clams and oysters cannot be subject of theft or larceny unless artificially planted or cultivated in the beds from the beds which they were taken." However, the Washington common law does not distinguish between naturally occurring and planted clams whereby the sedentary shellfish on private tidelands constitute the exclusive property of tideland owner. In recognition of the Washington common law, the legislature has specifically exempted shellfish from wildlife designation, which undermines the defendant's argument that clams are animals ferae naturae and constitute the general public's property. Hence, the private tideland owner has the right to exercise ownership of shellfish upon his land, and the removal constitutes "a legally recognized interest in the property."
- Since the court affirmed the exemption of shellfish under animals ferae naturae under the Washington common law, "violation of the public trust doctrine" does not hold. States have the ability to set limits and recognize private rights associated with the land. Hence, in accordance with the Washington law, the public trust doctrine does not hold to gather clams from naturally occurring beds on private property as retrieval of clams occurs by digging down into the

soil which is in contact with the land itself. In contrast, the common law rights of navigation and fishing remain in waters above the land.

- The court sought experts' objective opinion on knowledge of wholesale market values for shellfish to establish value. Since the value of the uncertified clams were established at a nearby place (Skipper John's in Hoodspport) and experts testified the presence of a "gray" market for uncertified clams at a value of \$1.50, evidence of value holds which is not hypothetical or subjective to an individual.

Court's Holding:

- The appellate court affirmed the trial court, holding that clams on naturally occurring beds on private property act as "property of another" within Washington's theft statutes. The appellate court also affirmed that the state presented sufficient evidence to establish the value of clams to be greater than \$250 and accounts for a second-degree theft conviction.

Your Evaluation:

- Based on the facts presented in the case, the court's arguments were sound in applying state statutes to the evidence. In this case, the tidelands are private property, so Longshore was trespassing on the owner's land. Since the clams were harvested from a prohibited zone on an uncertified beach, the clams were destroyed for potential contamination and toxicity. While the distinction between natural and artificially planted beds seems important in the case of *State v. Van Vlack*; these beds are part of the realty based on facts of the case as animals *ferae naturae* common law is inapplicable to shellfish in the state of Washington since the statute supersedes the common law doctrine by omitting shellfish in the definition of wildlife. In addition to this, the value of the stolen clams was established at \$250, constituting larceny in the second degree, which is a more serious charge than third-degree theft at the time. Although not addressed in the evidence of the case, it may be valuable to address the extent of the intertidal zone that constitutes coastal landowners' property in a tideland property. In addition to this, if Longshore thought the clams were public property, his actions (digging the land at night, hidden clams, and escaping before dawn) do not fit his claim, which further undermines his argument.

Importance of the Case:

- The case highlights the rising conflict of resources such as the commons and the lack of equilibrium between its economic value and intangible values associated with the society. This is especially applicable to states like Washington that house First Nations tribal communities. The protection of property rights applies to the protection of tribal lands and their dependence on shellfish for cultural and subsistence purposes. As the effects of climate change impose threats to coastal communities and resources, it becomes increasingly important to revise limits on land bordering properties by the water over time. This case also raises important questions on legal implications of goods sold in the "gray" market within the United States, variability in liability of different goods, and how to minimize the corruption of the industry. It is evident that rules as to what constitutes ownership are subject to change over time socially as some cases cite the intent of pursuit to be ownership while others cite actual possession; hence to what extent is the legal definition of possession applicable to the type of resource in question or intent of pursuit such as commercial versus private uses and how does the legal system protect rights of the owner of the land, those coastal communities or commercial industries dependent on these resources, and resources itself. Lastly, this case calls for improving regulations on prohibited harvesting zones, certification of products, and possession limits and how the seafood industry can minimize "gray" market goods to improve food security and health outcomes of consumers.

Case: SURFRIDER FOUNDATION v. MARTINS BEACH 1, LLC; MARTINS BEACH 2, LLC

Facts:

Martins Beach 1, LLC and Martins Beach 2, LLC (defendants) purchased the Martins Beach “private property” for \$32.5 million in June 2008 and permitted public access at the time of the purchase upon payment of a parking fee (in accordance with public access permitted by preceding property owners). Two years later, the defendants closed off public access to the coast at the site through changes to pre-existing signs along Martins Beach Road from Highway 1 and by appointing security guards at the closed entrance. The Surfrider Foundation, a non-profit organization (plaintiff) dedicated to the protection of public access and coastal resources filed a lawsuit against the defendant for “alleged unpermitted development of their property” under the California Coastal Act (hereinafter referred to as Coastal Act).

Procedural History:

The case was presented for a bench trial on May 8, 12-15, and July 16, 2014 in Department 22 under the presiding of Honorable Barbara J. Mallach. On June 30, 2014, the defendants and plaintiff submitted closing trial briefs and on July 16, 2014, their closing arguments were presented.

Issue:

The Court identifies three issues on trial, the first an issue of constitutional rights, the second in violation of the Coastal Act, and third an issue of “civil liability”: “[1] do the defendants have the constitutional right to exclude the public from their private property? [2] have the defendants’ actions changed the intensity of use of Martins beach by the public; is the complete closure and methods used to restrain public access in violation under the Coastal Act permitting process, and, if so, [3] do the defendants’ actions make them liable to pay a penalty/fine for unpermitted development under the Coastal Act?¹

Existing Rule:

“Development” under the Coastal Act not only includes “physical change or alteration to the land” but also “indirect or direct” and “physical or nonphysical” restrictions to access.² Properties situated at the boundaries that encompass the coastal zone are subject to jurisdiction of the County and Coastal Commission under the Coastal Act. and development or change to public access requires a coastal development permit (CDP).³”

Court’s Holding:

Defendants’ actions to change public access and use of the coast at Martins Beach constitutes as “development” under the Coastal Act and requires a CDP prior to the development and supersedes the constitutional right to restrict public access on a private property governed by the Coastal Act. Furthermore, the defendants’ changes to public access without CDP is a violation of the Coastal Act. Defendants’ are ordered to cease preventing public access until resolution on the CDP application is reached by the County/Coastal Commission. The court thus ruled in favor of the plaintiff under declaratory and injunctive relief and rejected causes of actions under the defendants. However, penalties and fines are not justified and the court rules in favor of defendants as “conduct was in good faith” and are not justified.

Court’s Reasoning:

1. Defendants claimed “access is not development” under the Coastal Act and have a constitutional right to exclude the public from their private property. The court affirmed in accordance with the law that “development” can encompass both indirect or direct and physical or nonphysical effects on access to the coast under the Coastal Act.⁴ Furthermore, the defendants’ actions to block public access through permanent closures of gate, changes to signs/messages on billboards, and hiring of security guards at Martins Beach or roads to the beach is evidence of “changing the intensity of use or public’s access to the water” and constitutes as development.⁵
2. Defendants claimed that “waiting for enforcement action instead of applying for a CDP” is complying with the Coastal Act and that the Coastal Commission would have not approved their action to block public access to Martins Beach. In accordance, with the Coastal Act, property located on boundaries of a state’s coastal zone are subject to jurisdiction of the County and Coastal Commission and therefore requires a CDP. Since the defendants engaged in “development” on property

¹ *Surfrider Foundation v. Martins Beach 1, LLC; Martins Beach 2, LLC*, 2014 CA, Case No. CIV520336.

² The California Code in question is Public Resources Code § 30106 under the Coastal Act.

³ The California Code in question is Public Resources Code § 30600 under the Coastal Act.

⁴ Public Resources Code § 30106, The Court cites a second case – *Gualala Festivals Committee v. California Coastal Com.* (2010) 183 Cal.App.4th60, 67 – as standing for the proposition that development goes well beyond “what is commonly regarded as development of real property.”

⁵ Public Resources Code § 30106, The Court cites a second case – *LT-WR, LLC v. California Coastal Commission* (2007) Cal. App.4th 770, 804-805 whereby the trial court erred as matter of law in ruling gates and signs are not “development” within the meaning of the Coastal Act.

at the coast without a permit, they are in direct violation of the act.⁶ In general, the need for a permit has not always been in accordance with the law and is subject to circumstances such as prior access permitted and the extent to which the defendants actions changed the intensity of use of the coast, and compliance with administrative process of the Coastal Act. Since the defendants engaged in activity without the CDP, they are in violation under the Coastal Act and the court affirms the Coastal Commission's resolution of the application to balance both interests of the public and private property owners.⁷ 3. As to the Plaintiff's claims to impose "civil liability" through penalties or fines on the defendants, the court finds the defendants to have acted "in good faith" based on testimony of the manager of the LLCs, Steve Baugher and their reliance on information provided by the County management staff. In addition to this, factors that determine amount of civil liability are not justified and the defendants' violation can be easily rectified by applying for a CDP and trusted review by the Coastal Commission.⁸

Your Evaluation:

From the perspective of the trial court, the state has clearly established the precedent recognizing the broad definition of "development" under the Coastal Act which encompasses physical/nonphysical and direct/indirect impediments to public access of the coast, and that engaging in such activity without a CDP is in violation of the act. The court also recognizes the provisions under the Coastal Act that assure permit decisions to emphasize the protection of both the public's right to access and use of the coast as well as the protection of private property owners on the coast.

I also thought it would be important to provide evidence of boundary limits of the state's coastal zone and owner's private property line in order to balance both interests of the public and private ownership and establish if there are other access points available to the public that do not construe private property. With respect to the Public Trust Doctrine, I think it would have been vital to know what factors under the Coastal Act permitted the prior owners to impose a parking fee on the public's access to Martins Beach (Were they deprived of all economically viable use and the fee administered as compensation?). Since the previous owners also allowed public access on the private property, was there an earlier CDP filed to allow this access and development? And if so, does that address the terms and conditions of the current access, as well as caveats that exclude access, and does this in turn violate the broader idea behind the Public Trust Doctrine. Did climate change influence any of the factors relevant to this case and the decisions that followed? Does the Coastal Act have any provisions accounting for the effects of climate change vis-a-vis protection of public rights and private ownership? And finally, the court's rationale to trust the County and Coastal Commission to protect public and private rights to the coast is not sufficiently addressed through evidence. The court rejected the plaintiff's claim of "civil liability" through penalties, when the defendants "permissibly relied on "unwritten" information provided by the County management stage who also have Coastal Commission experience", in my opinion, it would be necessary to address this to unpack the judgement on permit decisions.

Importance of the Case:

This case is of great importance as it addresses issues of maximizing interests of the public through access and recreational use of coastal resources alongside conservation principles and protection of private property rights. In addition to this, it serves to emphasize the power of states in administering provisions under the Coastal Act and to what extent the state's equal footing doctrine holds with the public trust of resources and constitutional protection of citizen property rights and ownership, emphasizing the uncertainty of this relationship.

⁶ Public Resources Code § 30600; The Court cites a second case – *Pacific Palisades*, 55 Cal.4th at 794 – as standing for the proposition that "Any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit."

⁷ Public Resources Code § 30010

⁸ Public Resources Code § 30010; Other factors that justify no imposition of penalties include no loss of sensitive resource as a result of not applying for a CDP, people continued using the beach notwithstanding the posted notices, there was no cost to the state as the case was brought on by Surfrider Foundation, and there is no prior history of violations on the property

Case: Asbestos Disease Awareness Organization, et al. v. Andrew Wheeler, et al.

Case No. 19-cv-00871-EMC

Court Name and Location: United States District Court, Northern District of California, San Francisco

Procedural Posture:

The case was presented for a motion hearing on September 5th, 2019 in the 9th Circuit United States District Court under the presiding of Honorable Edward M. Chen.

Facts:

In May 2017, Asbestos Disease Awareness Organization (ADAO), a nonprofit public health and environmental organization dedicated to promoting awareness on the health risks associated with asbestos (lead plaintiff) notified the Environmental Protection Agency (EPA, defendants) about a violation of the Chemical Data Reporting (CDR) rule through reporting failure of asbestos imports of “several hundred tons” by Occidental Chemical Corporation. On July 28th, 2017, the EPA replied, informing the Corporation that its imports were not subject to reporting under the CDR as asbestos is a “naturally occurring chemical substance.” On September 25th, 2018, the plaintiffs filed a petition under section 21 of the Toxic Substance Control Act (TSCA) seeking the EPA to initiate rulemaking which was denied by the EPA. Plaintiffs challenged the denial of the petition through a civil action suit requesting claims for relief under section 21 of TSCA and section 706 of the Administrative Procedure Act (APA). The EPA seeks motion to dismiss the APA claim for “lack of subject matter jurisdiction” alongside the scope of claim under section 21 of TSCA.

Issue:

The Court identifies four issues on trial, the first an issue of interpretation of the term “adequate”, the second in terms of “adequate remedy”, the third being the EPA’s rationale for denial of the petition, and fourth an issue of violation and scope of the CDR: [1] how does one construe “adequate”? [2] is the plaintiff entitled to both review under the APA and section 21 of TSCA as “adequate remedy”? [3] whether the denial of petition by EPA was “arbitrary and capricious” under claims of the APA? [4] do the defendants’ CDR procedure prevent viable information (such as risk assessment) retained on asbestos and were the defendants in violation of the rule?⁹

Case Evaluation

1. From the perspective of the trial court, the term “adequate” corresponds to “what is required and provides sufficient relief or remedy” to the case before the court. The state established the precedent recognizing the defendants’ failure to provide “adequate” information on associated risks of asbestos due to “statutory loopholes” undermining the EPA’s motion to dismiss as unreasonable. The agency claims that “it already captures all reasonably available information” and acquiring any additional information through reports will not result in “unreasonable risks” to human health or the environment. However, the court asserts that EPA cannot make a claim on the irrelevance of additional information gained if it used its full authority to collect information via the CDR rule.
2. With respect to “adequate remedy” in the context of this case, the court aimed to determine the differences in relief offered by section 21 of TSCA and section 706 of the APA brought by the plaintiff. The EPA claims that the APA limits judicial review of action to those for which there is “no other adequate remedy provided in court” and therefore motioned to dismiss while stating that the de novo standard for denial of the petition under section 21 would be more advantageous for the plaintiff.¹⁰ However, the court affirms that since the petition of the plaintiffs seeks to amend existing rules of the CDR rather than initiate rule making (which would result in a de novo proceeding), the court finds the APA review appropriate and adequate.¹¹
3. Under the APA claim for denial of the petition, the EPA argues the risk evaluation for asbestos to be ongoing under the Frank R. Lautenberg Chemical Safety for the 21st Century Act (LCSA) and claims information currently in possession by the EPA is reasonable and disregards the importance of additional information it could have acquired by simply enforcing the CDR in a more stringent manner. The court recognizes the EPA’s denial of the petition to be “arbitrary and capricious” under the APA as there exists no statutory command to employ a particular standard of review for denials of petitions to

⁹ Asbestos Disease Awareness Organization, et al. v. Andrew Wheeler, et al., 2019 CA, Case No. 19-cv-00871-EMC; United States Courts (2019). *Asbestos Disease Awareness Organization, et al. v. U.S. Environmental Protection Agency*. Available at: <https://www.uscourts.gov/cameras-courts/asbestos-disease-awareness-organization-et-al-v-us-environmental-protection-agency> (Accessed: 21 February 2021)

¹⁰ The Court cites case – Environmental Defense Fund v. Reilly. (D.C. Cir. 1990) – as standing for the defendants’ proposition that it is “illogic to [plaintiffs’] contention that a petition denial is simultaneously subject to both de novo and APA review” whereby “Congress did not intend to authorize simultaneous utilization of two remedies.”

¹¹ The Court cites case – Environmental Defense Fund v. Reilly (D.C. Cir. 1990) – as standing for the proposition that under less hospitable treatment of petitions to amend or repeal is warranted...under section 4, 5(e), 6, 8, 21, review is permitted only under the APA; the Court further cites cases of Bowen v. Massachusetts, Brem-Air Disposal v. Cohen to emphasize the theme of “adequate remedy” whereby in the case of no alternate relief, APA review would be made available

amend or repeal existing rules.¹² Hence the plaintiff's claim under the APA stands as section 21 of TSCA does not provide relief on the scope of review available for denied petitions.

4. Lastly, the promulgation of the CDR in 2011 should clearly include the reporting of asbestos which was requested under the LCSA¹³. In addition, the asbestos imports by the Corporation clearly exceeded the amount of 25000 pounds under the CDR. Hence, the court finds the defendants in clear violation of CDR and the viable information it could provide for effective risk evaluations.

Narrative

Personal Evaluation

From the perspective of a viewer watching a courtroom case, I found this assignment to be harder than previous case briefs, as the case did not present background information that would be important in objectively analyzing the oral arguments of the plaintiffs and defendants in question. In addition, I had to view the transcript of the order as the recording ended with the judge indicating that he would take arguments presented into consideration. By both viewing the case live and reading the order, there were clear distinctions on facts and issues presented. In the case recording, the main issues presented were interpretation of the term "adequate" and whether plaintiffs' claim for relief under the TSCA and APA were "adequate" in the context of the case. Words like "adequate", "sufficient", "reasonable" etc. lack definitional clarity and can be morally fraught; how does the court determine these interpretations as it was clear from the viewing that the term is interpreted differently from the perspective of the court and plaintiff. My understanding is the court relies heavily on legislative history to come to this determination. In addition, I find there to be legislative barriers between the EPA regulations and court rulings as the council representing the EPA stated that under the APA claim, adequate remedy may not be more advantageous for the plaintiff as even if the court were to rule in favor of plaintiff for second review of the petition, the EPA is not obligated to change its standing unless the court finds "unreasonable risks" associated with asbestos (which was not provided as evidence in this procedural stage of the trial). With respect to addressing the scope of remedy the court can order in addition to legislative history, I think it would have been useful to review past EPA petition denials that address amendment/repeal and/or rulemaking to determine effectiveness of EPA's current regulatory framework.

The issues presented in the court order focused on whether the EPA was "arbitrary and capricious" in its regulation of asbestos, reporting procedures, and CDR violations. These issues were not presented explicitly in the recording but is relevant from the background information. I particularly found the EPA's argument that it already possesses "sufficient information" is lacking. Again, how does EPA construe "sufficient" or "reasonable" when the substance in question is associated with various types of cancers detrimental to public health and present in commercial products where this information is not always addressed to consumers? Although the EPA claims its use of the best available science in reporting procedures and risk assessments, the scientific community has indicated "there is no safe level of exposure" to asbestos. Chemical interactions with the environment and downstream the economic chain can also result in unique observations whereby the scientific information available is evolving with new evidence brought to light. However, these observations can only be evident if reporting is consistent, enforced, and the EPA aims to make these records public (which was not the case here). This brings to light the importance of transparency of decision making under the Freedom of Information Act's "deliberative process privilege," whereby reports attaining to a final decision in which no further deliberations can be made are exempt from public disclosure.¹⁴ This raises concerns on how the reporting of asbestos was finalized under the EPA, as administrators can avoid public disclosure if the report was considered a final position as the EPA claims it has "sufficient information" to address concerns. In addition, since the chemical interactions of asbestos is a learning process with the availability of new information, should the public have the right to view reports even if they may be effectively final?¹⁵ It would also be important to know what construes as "unreasonable risk of injury" to public health and the environment under the TSCA, and by how much this threshold varies. The TSCA provides the EPA with great regulatory authority in meeting the requirements and standards of the TSCA and subsequently the CDR under it.

The EPA's actions to rely on voluntary reporting, hide behind statutory loopholes, and denial of information gaps makes me question the role of the EPA in the larger context of protection of human and environmental health effectively. This raises the question of the political agendas and cutbacks in funding opportunities operating in the EPA that hinders its ability to achieve its larger goals. The failure of the EPA to meet these standards reflects the ambiguity of political and legal theories and may

¹² 5 U.S.C. § 706

¹³ 40 C.F.R. § 711.8(a), (b); The EPA has designated asbestos as one of the ten chemicals to undergo risk evaluations under Section 6 of the TSCA with LCSA

¹⁴ United States Fish and Wildlife Service et al. v. Sierra Club, Inc., 2020, No. 19-547, Supreme Court of the United States.

¹⁵ Justice Amy Coney Barrett Issues Her First Majority Opinion - The New York Times. 2021. Justice Amy Coney Barrett Issues Her First Majority Opinion - The New York Times. [ONLINE] Available at: https://www.nytimes.com/2021/03/04/us/amy-coney-barrett-supreme-court.html?fbclid=IwAR1bk1KA7ny1MGptV0zPnsJ3NjSbvv9pSoTjQ2MggAmvV_yxTsX5o0Yjro. [Accessed 05 March 2021].

mark the development of capitalist market agency that moves towards industrialism. This is also evident in the conflict of interest of those appointed to the EPA who upon dismissal of their position move into industrial work sectors such as oil, gas, coal etc. This case reflects the antithetical positions that exist between the letter of the law and the spirit of the law in the eyes of the court versus the responsible parties and leads one to question how the scale of justice is ultimately determined in society.

Importance of the Case:

This case is of great importance as it addresses conflicting issues of maximizing political/economic interests alongside conservation and protection of public health and the environment. In addition to this, it serves to emphasize the ambiguity in regulatory framework of agencies (such as the EPA) in administering provisions and to what extent this impacts other relevant laws under this “regulatory floor” such as the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Safe Drinking Water Act, Oil Pollution Act, and Comprehensive Environment Response, Compensation, and Liability Act alongside secondary laws such as the Occupational Safety and Health Administration, Public Health Services Act, Freedom of Information Act etc. in carrying out efficient and equitable outcomes.