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State v. Bundrant: The Long Arm Reaches Seaward

A casual glance at the principles of federal exclusivity and pre-emption would create the impression that the high seas are no place for a state to thrust its jurisdiction. Nevertheless, there are times when the state can assert its police power over American citizens on the high seas while treaties simultaneously govern the conduct of foreign nationals. In *State v. Bundrant*,[1] the Alaska Supreme Court reversed a lower court decision and upheld the power of that state to reach beyond the traditional three-mile limit of state jurisdiction into the Bering Sea to regulate crabbing by Americans regardless of whether they were residents of Alaska or of another state. Nor did it matter whether they were arrested within the three-mile limit or on the high seas. This power to regulate crabbing was held to be unaffected by the existence of treaties regulating commercial fishing in the same area by foreign nationals.[2]

Crabs are creatures who seem to be unbothered by concepts such as "jurisdiction," "exclusitivity," and "pre-emption." Thus, they migrate irreverently back and forth across the three-mile state territorial limit, periodically moving inland to mate and molt before moving seaward again. Because of this migration, there are times when they are deemed to be state property under the Submerged Lands Act (SLA),[3] while at other times their "ownership" is questionable. This presents a dilemma for the state. It has a proprietary interest in protecting a resource of unquestionable value to the state; at the same time its regulations would be useless if fishermen could merely wait until the crabs moved beyond the three-mile limit to the state's jurisdiction and then catch them with impunity.

To avoid depletion of the king crab population so vital to the survival of the Alaska fisheries industry,[4] the Alaska Board of Fish and Game (hereinafter referred to as the Board) began efforts to regulate

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[1]546 P.2d 530 (Alaska 1976).

[2]Of the eleven treaties relating to North Pacific fisheries, the most important ones in light of this case include, Agreement Between the United States and the Soviet Union Relating to Fishing for King Crab. Feb. 2, 1965, art. 1, 16 U.S.T.24, T.I.A.S. No. 5752; Agreement Between the United States and Soviet Union Relating to Fishing for King and Tanner Crab, Feb. 21, 1973 art.1, 24 U.S.T. 603, T.I.A.S. No. 7571 (Extension: Dec. 31, 1974, 25 U.S.T. 3162, T.I.A.S. No. 7981); and Agreement Between the United States and Japan Relating to Fishing for King and Tanner Crab, Dec. 20, 1972, 23 U.S.T. 3775, T.I.A.S. No. 7527. Although the Soviets are not currently exercising their rights to a limited crabbing season east of the United States-Russia Convention Line of 1867, the Japanese are. 546 P.2d at 537.

[3]43 U.S.C. §§1301-1315 (1970).

[4]The dissent in Hjelle v. Brooks, 377 F. Supp. 430 (D.C. Alaska 1975), said:
The Bering Sea king crab population data obtained by the National Marine Fisheries Service establishes that the present capacity for commercial fishermen to take king crab far exceeds the estimated maximum sustained yield of the Bering

crabbing in the Bering Sea in 1969.[5] In 1973, the Board established a maximum quota of 23 million pounds of crab for this area for the 1973-74 season[6] and prohibited the possession of crab taken in violation of the Board's rules and regulations.[7] This quota was met on September 9, 1973, and the area was ordered closed until June 15, 1974.[8]

In December 1973, several crab fishermen brought suit in federal court for a preliminary injunction against enforcement of the Board's regulations.[9] In *Hjelle v. Brooks*, a three judge district court issued the requested injunction.[10] The Board subsequently repealed the enjoined regulations and on June 15, 1974, issued a new set of emergency regulations.[11] Under these regulations, "statistical areas" were created with different restrictions applying to each area. The area in which the facts giving rise to *Bundrant* occurred was "Statistical Area Q," in an "adjacent seaward biological influence zone" from sixteen to sixty miles off the Alaska coast.[12]

Three individual cases were joined for trial in *State v. Bundrant*. Bundrant was prosecuted for possession within Alaskan waters of crab taken in a high seas area that had been closed to crabbing.[13] Bundrant was a legal resident of Washington, but the court noted his several contacts with Alaska, including maintenance of warehouses for processing his catch.[14] Defendant Kaldestad was charged with possessing crabs under the same statute, as well as with violating provisions of the June 15 emergency regulations which prohibited the taking of king

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Sea Shellfish area. Biologists generally agree that productivity of this fishery cannot be sustained absent a regulatory scheme such as the plaintiffs presently attack . . .

Id. at 444 (dissenting opinion).

[5]The "Bering Sea Shellfish Area" was created by the Alaska Board of Fish and Game in 5 A.A.C. 07.100, described as ". . . all waters of the Bering Sea . . . north of 54° 36' N. lat., . . . south of 60° N. lat., and east of the U.S.-Russia Convention Line of 1867."

[6]5 A.A.C. 07.760.

[7]5 A.A.C. 36.040.

[8]546 P.2d at 533.

[9]*Id.*

[10]377 F. Supp. 430.

[11]546 P.2d at 533, 534.

[12]*Id.* at 534, 558.

[13]The applicable statute, ALASKA STAT. § 16.10. 200 (Supp. 1975), is Alaska's "landing law." It provides:

It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the Board of Fisheries or in violation of the regulations promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in the designated areas to possess, sell, offer to sell, barter, give, or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

[14]546 P.2d at 534, 535.

crab,[15] their possession,[16] and the possession of crabbing equipment[17] during a closed season in an area subject to state regulation.[18] Fourteen additional defendants, *et al.*, were charged with counts similar to Kaldestad. All but one of the fourteen were residents of Alaska. Whether the state could legally prosecute these offenses depended upon the constitutionality of the state's action in the Bering Sea, when measured against a tangled history of judicial decisions, legislation, and treaties.

At one time it was taken for granted that a coastal state could assert jurisdiction over the waters within three miles of its shoreline. In 1947, however, this assumption was reversed in *United States v. California (First California)* in favor of a three mile area of "territorial sea" with exclusive federal jurisdiction.[19] Reacting to this decision, Congress in 1953 reversed the result with the SLA, which gave title to all lands and resources (including crabs) within three miles of the coast to the states.[20] Thus, the boundaries of the coastal states were for all intents and purposes moved three miles seaward. At about the same time, Congress passed the Outer Continental Shelf Lands Act (OCSLA), which gave jurisdiction and control of the subsoil and seabed of the continental shelf beyond the three-mile state limit to the federal government.[21] In 1970, Congress passed the Bartlett Act, which declared the United States' rights to control marine resources on the continental shelf and prohibited the taking of these resources by foreign nationals except by international agreement.[22] It was in this context that the United States, Japan, and the U.S.S.R. signed treaties to regulate crabbing in the Bering Sea.[23]

The Constitution grants the federal government authority to regulate interstate commerce and to manage foreign relations.[24] That the regulations involved in *Bundrant* affected interstate commerce was unquestioned, but the Alaska Supreme Court turned to the touchstone

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[15] 5 A.A.C. 34.910.

[16] 5 A.A.C. 34.090(c).

[17] 5 A.A.C. 34.095.

[18] 546 P.2d at 558.

[19] 332 U.S. 19 (1946).

[20] 43 U.S.C. §§1301-15 (1970). The Statehood Act, 48 U.S.C. Prec. §21 (1970), made the Submerged Lands Act applicable to Alaska.

[21] 43 U.S.C. §§1331-43 (1970). §1332 provides:

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

[22] 16 U.S.C. §§1081-86 (1970).

[23] *See* discussion *supra* note 2.

[24] U.S. CONST. art. I, §8; art. II, §1; art. VI.

in *Cooley v. Board of Wardens*[25] to determine whether the interest involved was predominantly local or national. They then weighed the competing state and national interests, using the balancing test prescribed in *Southern Pacific Co. v. Arizona.*[26] By this process, the court found that crabbing was not an appropriate activity for national uniform regulation.[27] Neither was there any likelihood of retaliation by sister states, nor any direct and significant effect on more than one state.[28] There is, as the court found, "a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it . . . ."[29] Because depletion of the state's crab population would have an adverse effect on the state's already critical employment situation and deplete a vital local food source, the court found a legitimate state interest in the promulgation of the regulations.[30]

A state cannot enter the domain of international affairs without running afoul of the Supremacy Clause of the Constitution, since power over external affairs is vested exclusively in the national government.[31] The court in *Bundrant,* however, declined to adopt the position that any intrusion at all by the state into international affairs was prohibited. Instead, it relied on the analysis in *Zschernig v. Miller,* which held that the statute in question had to have more than some incidental or indirect effect on the affairs of foreign countries, in order to be considered invalid.[32] Therefore, the *Bundrant* court balanced the state's interest in the regulations against those regulations' impact on United States foreign affairs in the same way that local and national interests are balanced in terms of their effect on interstate commerce.[33] Since the Board's regulations were not applied against foreign nation-

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[25]53 U.S.(12 How.) 298 (1852). The balance to be struck in weighing the effect on interstate commerce was thus stated to be: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.* at 319.

[26]325 U.S. 761 (1945).

[27]546 P.2d at 539. This is discussed in T. SUHER & K. HENNESSEE. STATE AND FEDERAL JURISDICTIONAL CONFLICTS IN THE REGULATION OF UNITED STATES COASTAL WATERS 12-14 (1974).

[28]546 P.2d at 539-40; Morgan v. Virginia, 328 U.S. 373 (1946); Buck v. Kuykendall, 267 U.S. 307 (1925).

[29]546 P.2d at 540; 325 U.S. at 761.

[30]546 P.2d at 540-41. An old series of cases examining the commerce clause has shown favor to regulations which protect local food sources. *E.g.,* Rasmussen v. Idaho, 181 U.S. 198 (1901); *But see* Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[31]United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[32]389 U.S. 429, 432-433 (1968). *But see* Gorum v. Fall, 393 U.S. 398 (1968). *See generally* Maier, *The Bases and Range of Federal Common Law on Private International Matters,* 5 VAND. J. TRANSNAT'L L. 133 (1971).

[33]546 P.2d at 542.

als whose crabbing activities are governed solely by treaty, they were not prohibited by the supremacy clause.

The mere fact that federal legislation exists in a particular area is insufficient to pre-empt any state action in the area.[34] On the high seas especially, the courts have asserted the position that although the federal government has paramount authority, their jurisdiction is not exclusive. In the absence of conflicting federal legislation or regulations, the state may regulate fishing in territorial and nonterritorial waters.[35] The question for the court therefore became one of whether state action in the Bering Sea beyond the three-mile limit had been pre-empted in some manner.

Had the term "subsoil and seabed," as used in the OCSLA, included natural resources such as fish and crabs, the federal government would unquestionably have had exclusive jurisdiction of the continental shelf beyond the state's three-mile zone. But by explicating the wording of both the SLA and the OCSLA, the court found that the OCSLA applied only to mineral resources, while the SLA included both mineral and natural resources.[36] In addition, the OCSLA disclaims any effect on fisheries.[37]

None of the events subsequent to the enactment of the OCSLA have pre-empted the states' authority to regulate fisheries on the continental shelf. The 1958 Convention on the Continental Shelf gives "sovereign rights" to coastal nations to exploit natural resources on the continental shelf; by definition of the Convention, "natural resources" includes sedentary species such as crabs. This fact, although indicative of the federal government's authority to regulate crabbing, evidences no intent on the part of Congress to pre-empt the states from exercising this power.[38] Likewise, there is no indication of federal pre-emption in the 1973 Agreement Between the United States and the Soviet Union on king and tanner crabs,[39] which adopted the Convention's definition of natural resources as including crabs.[40] For these reasons, the court found lacking any clear intent to pre-empt state action in regulating crabbing, and it therefore invoked the traditional presumption in favor of constitutionality and validity of acts of its own legislature.[41]

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[34]Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

[35]Toomer v. Witsell, 334 U.S. 385 (1948); Skiriotes v. Florida, 313 U.S. 69 (1941).

[36]546 P.2d at 544-46. As evidence of Congress' intent in enacting the OCSLA, the court noted the remarks of Senator Douglas: "We are not particularly interested in kelp, or shrimp or oysters, those are sideshows. The question is as to oil and gas. (99 CONG. REC. at 2868 (1953))." 546 P.2d at 546 n.66.

[37]*Supra* note 2.

[38]546 P.2d at 546.

[39]*Supra* note 2.

[40]546 P.2d at 546.

[41]*Id.* at 548.

Since neither the doctrines of pre-emption nor that of exclusivity precluded the state's exercise of power beyond the three-mile territorial limit, the issue then became the extent to which the state could stretch its authority seaward. The State proposed, and the court ultimately accepted, a split concept of jurisdiction based on the terms "imperium" and "dominium."[42] Within the three-mile limit, the state has dominium; seaward of that line, the federal government has dominium. But within the area of federal dominium, the state is not precluded from exercising imperium, or political jurisdiction so long as there is a sufficient nexus between the regulations and some legitimate state interest.[43] Prior judicial opinions have dealt extensively with this concept, but none have done so as explicitly as the *Bundrant* court. In *Skiriotes v. Florida*,[44] for example, the Court considered the validity of an arrest by Florida officials of the defendant for illegal sponge diving beyond the three-mile limit. There the Court said:

> "If the United States may control conduct of its citizens on 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."[45]

The court resolved the issue in favor of the state by relying on the Supreme Court's most recent pronouncement on the subject, *United States v. Alaska*.[46] There the Supreme Court marked the difference between the historical exercise of territorial dominium and the state's regulation of fisheries and wildlife:

> Our conclusion that the fact of enforcement of game and fish regulations in Cook Inlet is inadequate, as a matter of law, to establish historic title to the inlet as inland waters is not based on mere technicality. The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. See, e. g., Presidential Proclamation No. 2668, 59 Stat. 885 (1945). This limited circumscription on the traditional freedom of fishing on the high seas is based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea. Convention on Fishing and Conservation of the

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[42]"*Dominium*, a concept that derives from Roman law, denotes ownership and property rights, while *imperium* concerns regulatory power or control over a geographical area without reference to ownership. United States v. California (First California), 332 U.S. 19 (1947) (Frankfurter, J., dissenting)." 546 P.2d at 559 n.1 (dissenting opinion).

[43]546 P.2d at 548.

[44]313 U.S. 69 (1941).

[45]313 U.S. at 77. Subsequent cases have developed and extended *Skiriotes*. The court in People v. Foretich, 92 Cal. Rptr. 481, 487, 14 Cal App. 3d Supp. 6 (1970), held that the exercise of the state's jurisdiction beyond the three-mile limit did not conflict with the 12-mile Contiguous Fisheries Zone Act, 16 U.S.C. §§1091-94 (1970).

[46]422 U.S. 184 (1975).

Living Resources of the High Seas, Art. 6, ¶1, 17 U.S.T. 138, 141, TIAS 5969 (1966).[47]

In one major respect the court in *Bundrant* was explicit in going beyond the reach of the state's police power presented in *Skiriotes* and the cases that have followed it. By relying on a single case from the Maryland Supreme Court, *Jacobson v. Maryland Racing Commission*,[48] the Court was able to broaden the *Skiriotes* concept of "citizen" to include all American nationals.[49] This was accomplished by extracting from *Jacobson* the principle that acts done outside a jurisdiction which produce detrimental effects inside it justify the state in punishing he who caused the harm as if he had been present at the place of its effect.[50]

Conclusion

Jurisdictional conflicts will naturally arise in an area where there are overlapping state, federal, and international interests. With the annual harvest of king crab eclipsing the annual sustained yield of the Bering Sea area, and with the heavy dependence of the local economy upon the crabbing industry, regulation of the Bering Sea by some governmental agency is crucial. Because of the historical deference shown by federal agencies to fisheries regulation by the individual states,[51] the burden of providing a regulatory scheme in this case fell upon the Alaska Board of Fish and Game.[52]

Pervasive throughout the opinion was a fear on the part of the court that Alaska's fishing regulations would be seen as a unilateral extension of sovereignty over coastal fisheries beyond the 12-mile limit recognized in the 12-Mile Contiguous Fisheries Zone Act.[53] In his dissent, Justice Connor expressed concern that the court's holding would disrupt deliberations of the Conference on the Law of the Sea

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[47]*Id.* at 198.

[48]261 Md. 180, 274 A.2d 102 (1971). In *Jacobson*, the defendant violated a rule of the Maryland Racing Commission by selling three horses within sixty days of a claiming race. His racing license was suspended, and the action was upheld by the courts against Jacobson's defense that the illegal sales had occurred outside the state and therefore were not subject to state regulation.

[49]546 P.2d at 555.

[50]*See also* Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §65 (1971). RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §18 (1965).

[51]*See* Browning, *Some Aspects of State and Federal Jurisdiction in the Marine Environment*, 3 THE LAW OF THE SEA 89 (L. Alexander ed. 1968).

[52]T. SUHER & K. HENNESSEE, *supra* note 27. Pointing to the dilemma faced by the states in conserving their natural marine resources, former Massachusetts Governor Francis Sargent stated, in announcing the state's new 200-mile lobster control act, "I realize also that it raises certain constitutional questions. However, there is no time for delay." *Id.* at 10 n.70.

[53]16 U.S.C. §§ 1091-94. *See* Comment, *Fisheries Jurisdictional Conflicts Beyond the Territorial Sea–With Special Reference to the Policy of the United States*, 44 WASH. L. REV. 307 (1968).

and encourage other coastal nations to follow the examples of Peru, Brazil, and Chile by unilaterally extending their territorial jurisdiction to a 200-mile fishing zone. In this regard, he said: "In terms of international complications, Alaska's assertion of *imperium* cannot be distinguished from the assertion of *dominium* by certain Latin American states."[54] Other states have not been so cautious. Maine, for example, declared its ownership and control over the living resources of the sea within 200 miles, "or to the farthest edge of the Continental Shelf, whichever is the greatest [sic]"[55] Massachusetts and New Hampshire have similar statutes.

Less than three months after the *Bundrant* opinion was issued, however, many of these fears were allayed by the enactment of the Fishery Conservation and Management Act of 1976 on April 13, 1976.[56] This Act will extend the fisheries jurisdiction of the United States from 12 miles, as provided in the superceded 12-Mile Contiguous Fisheries Zone Act, to 200 miles. This will become effective on March 1, 1977, barring any significant developments in the United Nations Conference on the Law of the Sea.[57]

A question that must be addressed is whether the *Bundrant* holding was made moot by enactment of the Fishery Conservation and Management Act. Although analysis of the Act is beyond the scope of this note, this writer suggests that the opinion will remain a vital one. The Act claims for the United States exclusive fishery management authority in the sea area within 200 miles of the coastline.[58] As used in the Act, the term "exclusive authority" seems to mean, primarily, authority exclusive of other nations. The main thrust of the Act is directed at regulation of foreign fishing.[59] Subchapter III of the Act,[60] which provides for the implementation of state fishery management plans, is drafted so loosely that existing management schemes, such as that promulgated by the Alaska Board, may very likely continue without modification.[61] The *Bundrant* opinion will no doubt shape and

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[54]546 P.2d at 562.

[55]904 - L.O. 1192 (June 19, 1973); *See* T. SUHER & K. HENNESSEE, *supra* note 27, 14-15.

[56]16 U.S.C.A. §1801 *et seq.* (1976 Supp 2, Part 1).

[57]*See* 16 U.S.C.A. §1881.

[58]16 U.S.C.A. §1812.

[59]*See* 16 U.S.C.A. §§1821-25, 1881.

[60]16 U.S.C.A. §§1851-61.

[61]*See* 16 U.S.C.A. §1856, which provides that nothing in the Act shall be construed as extending or diminishing the jurisdiction of any state within its boundaries, except as provided in that section. Presumably, the state's plan would have to meet approval by the regional council, but this should present no difficulty since the requirements of the Act are broad enough to accomodate plans already in existence.

be shaped by future implementation and litigation under the Act. In the meantime, the opinion demonstrates a rare example of state police power coexisting with interstate commerce and federal regulation of external affairs, as Alaska ventures into high seas resource management and conservation.

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