

March 2013

Vandevere v. Lloyd

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Recommended Citation

Baltes, Heather (2013) "Vandevere v. Lloyd," *Public Land & Resources Law Review*: Vol. 0 , Article 18.
Available at: <https://scholarworks.umt.edu/plrlr/vol0/iss2/18>

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***Vandevere v. Lloyd*, 644 F.3d 957 (9th Cir. 2011).**

Heather Baltes

I. INTRODUCTION

In *Vandevere v. Lloyd*,¹ the Ninth Circuit Court of Appeals affirmed the U.S. District Court for the District of Alaska in favor of the Alaska Commissioner of Fisheries.² The court held: (1) plaintiffs' entry permits to commercially harvest salmon were state licenses;³ (2) plaintiffs' entry permits were not a constitutionally protected property interest;⁴ (3) plaintiffs waived their right to challenge state regulation of shore fishery leases by signing their lease agreements;⁵ and (4) state regulation did not violate plaintiffs' substantive due process rights.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

The Alaska Constitution prohibits the creation of a special privilege or exclusive right in a state fishery and permits the limitation of entry into a fishery to promote resource conservation and prevent economic hardship for commercial, recreational, and private uses.⁷ The Alaska Board of Fisheries (Board) has the authority to regulate any harvest of fish and has the exclusive right to regulate fish harvests in Alaska's waters.⁸ From 1996 to 2002, the Board promulgated a series of regulations significantly amending the 1978 Upper Cook Inlet Salmon Management Plan to emphasize salmon conservation rather than commercial fishing.⁹ In response to conservation problems, the Board shortened drift gill net and set gill net seasons, and restricted

¹ *Vandevere v. Lloyd*, 644 F.3d 957 (9th Cir. 2011).

² *Id.* at 957–59.

³ *Id.* at 964–66.

⁴ *Id.* at 966–67.

⁵ *Id.* at 968–69.

⁶ *Id.* at 969.

⁷ *Vandevere*, 644 F.3d at 959–60 (referring to Alaska Const. art. VIII, § 15 (1956)).

⁸ *Id.* at 959–60 (citing Alaska Const. art. VIII, § 2 and Alaska Stat. §§ 16.05.221, 251(a)(2), (a)(3), (a)(12), (d) (2010)).

⁹ *Id.* at 961–62.

commercial fishing in certain areas of the Cook Inlet.¹⁰ The Board sought proposals to amend regulations, made the proposals available to the public, and held public meetings for comment on the proposed regulations bi-annually.¹¹

Pursuant to restrictions imposed by the Alaska Constitution, the Board did not create an exclusive right or special privilege in the entry permit holder, or an interest in the fish or water above the leased tidal or submerged land.¹² All entry permits and permit holders are subject to regulations promulgated by the Board and the Board may modify or revoke the permits without just compensation.¹³ The Alaska Department of Natural Resources grants lease of tidal or submerged land in the fishery to allow the use of set gill nets.¹⁴ The lease does not convey an interest “in the water above the land or in the fish in the water.”¹⁵ The lease merely allows fishermen to set gill nets or shore gill nets to harvest fish.¹⁶

The plaintiffs held entry permits to use drift gill nets and leases to submerged lands in Cook Inlet to set gill nets.¹⁷ In May 2007, the plaintiffs sued the Commissioner of Fisheries in the U.S. District Court for the District of Alaska seeking declaratory and injunctive relief to revoke regulations that curtailed commercial harvest of salmon in specific areas of the Cook Inlet.¹⁸ The suit alleged the regulatory changes since 1996 constituted a regulatory taking of

¹⁰ *Id.* at 962.

¹¹ *Id.* at 961 (discussing Alaska Admin. Code tit. 5, § 96.625(b)–(c) (2011)).

¹² *Vandevere*, 644 F.3d at 959–60 (referring to Alaska Const. art. VIII, § 15, which prohibits the state from creating an “exclusive right or special privilege of fishery . . . in the natural waters of the State.” The same provision allows the state to “limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.”).

¹³ *Id.* (citing Alaska Stat. §§ 16.43.950, 16.43.150(e). *See also* Alaska Stat. §§ 16.43.100(a)(1), (9), which states that the Alaska Legislature created the Alaska Commercial Fisheries Entry Commission to regulate the number of entry permits issued for the state commercial fisheries.).

¹⁴ *Id.* (referring to Alaska Stat. § 38.50.082(a)).

¹⁵ *Id.* (quoting Alaska Stat. § 38.05.082(e)).

¹⁶ *Vandevere*, 644 F.3d at 961.

¹⁷ *Id.*

¹⁸ *Id.*

property for which the plaintiffs were entitled to compensation.¹⁹ After the Alaska Supreme Court issued a decision in a similar case,²⁰ the district court denied relief and granted summary judgment in favor of the Commissioner of Fisheries.²¹ The district court held that plaintiffs lacked a constitutionally protected property interest in their entry permit, waived any right to compensation, and had not suffered a violation of their substantive due process rights.²²

III. ANALYSIS

A. Entry permits to harvest salmon in Cook Inlet were state licenses.

The Ninth Circuit relied on state law to determine what type of interest an entry permit conveyed to a fisherman.²³ The court differentiated between “old property interests” owned solely by the holder and “new property interests” that are limited by the government.²⁴ The court concluded that entry permits are state licenses that constitute “new property interests” and therefore state law determines the nature of the plaintiffs’ property interest in the entry permits at-issue.²⁵

B. Plaintiffs’ entry permits were not a constitutionally protected property interest.

The court reviewed the Alaska Supreme Court’s decision and analysis in *Vanek* to determine whether the plaintiffs’ entry permits created a constitutionally property interest under state law.²⁶ The Alaska Supreme Court relied on state statutes, constitutional provisions, and case law in holding that commercial entry permits to harvest salmon in the Cook Inlet were not a compensable property interest even when their value decreased due to regulation.²⁷ In

¹⁹ *Id.* at 962.

²⁰ *Id.* at 962 (referring to *Vanek v. Alaska*, 193 P.3d 283 (Alaska 2008)).

²¹ *Id.* at 959.

²² *Vandevere*, 644 F.3d at 962–63.

²³ *Id.* at 964–65.

²⁴ *Id.* at 964–65.

²⁵ *Id.*

²⁶ *Vandevere*, 644 F.3d at 966 (citing *Vanek*, 193 P.3d at 283).

²⁷ *Id.* at 966–67 (discussing *Vanek*, 193 P.3d at 293–94).

accordance with the Alaska Supreme Court's holding, the Ninth Circuit held the plaintiffs' entry permits were not a constitutionally protected property interest.²⁸

C. Plaintiffs waived any takings challenge to state regulations when they signed the shore fishery leases.

The court determined the plaintiffs waived any compensation for a taking of property by signing the shore fishery lease agreements.²⁹ A provision of the shore fishery lease agreements explicitly reserved the right of the state to adopt regulations that impacted the activities of the lessee.³⁰ The lease further required the lessee comply with all existing and future regulations.³¹ The lease did preserve the lessee's right to compensation for a taking of the physical area of their leasehold, but not a regulatory taking that limited the quantity of fish the lessee could harvest.³² The court reasoned that provisions of the shore fishery lease indicated the plaintiffs waived their right to challenge the regulations upon signing the lease agreements.³³

D. State regulation of entry permit and shore fishery lease systems did not violate substantive due process.

The court recognized that state law simultaneously created and demarcated the entry permit system and shore fishery leases, and thus it was not a violation of the plaintiffs' substantive due process rights to declare that entry permits are not constitutionally protected property interests.³⁴ The state did not need to establish a system that created commercial harvest licenses, or use permits, that conveyed constitutionally protected property interests.

²⁸ *Id.* at 967.

²⁹ *Id.* at 967–68.

³⁰ *Vandevere*, 644 F.3d at 968.

³¹ *Id.*

³² *Id.* at 968–69.

³³ *Id.* at 968–69.

³⁴ *Vandevere*, 644 F.3d at 969.

Subsequently, the state's entry permit and shore fishery lease systems were not unreasonable, arbitrary, or capricious.³⁵

IV. CONCLUSION

Vandevere v. Lloyd upholds Alaska's ability to regulate commercial fishing by issuing entry permits and leases to commercially harvest salmon that are subject to modification, limitation, and additional regulation. The court evaluated whether a permit to harvest fish and a lease to use submerged tidelands constituted a constitutionally protected property interest. The court reasoned the entry permits and shore fishery leases are state licenses governed by state regulation, and the licenses do not convey a protected and compensable property interest. The court held that the plaintiffs waived their right to challenge the state's regulation of shore fishery leases by signing the lease agreements. Finally, the court held the state did not violate substantive due process in the adoption of new regulations.

³⁵ *Id.*