8156 Literary

HENRY MCMASTER
ATTORNEY GENERAL

May 4, 2006

The Honorable Vida O. Miller
Member, House of Representatives
P.O. Box 3157
Pawleys Island, South Carolina 29585

Dear Representative Miller:

We received your letter requesting an opinion as to an issue raised in a letter you received from Frank Blum, Executive Director of the South Carolina Shrimpers Association. In Mr. Blum's letter, he inquired as to the constitutionality of sections 50-13-1610 and 50-5-1700 of the South Carolina Code. Mr. Blum states: "The following two laws restrict the South Carolina seafood industry and are in violation of the United States Constitution, the Commerce Clause, and are probably preempted by federal law governing fish in the Exclusive Economic Zone (EEZ)." Furthermore, Mr. Blum adds: "Dealers in South Carolina want to sell striped bass and other fish legally caught in other states and feel that the above statutes, which prohibit this sell, are unconstitutional."

Based on the South Carolina District Court's decision in United States v. Earp, 307 F.Supp.2d 760 (D.S.C. 2003), we find section 50-13-1610 of the South Carolina Code violates the Commerce Clause of the United States Constitution. Additionally, by employing the District Court's analysis in Earp to section 50-5-1700, we find a court most likely would view this statute in violation of the Commerce Clause. Furthermore, because of we believe Congress intended to regulate fishery management within the exclusive economic zone by its enactment of Magnuson-Stevens Fishery Conservation and Management Act and because we found provisions of this act and the regulations thereunder conflict with sections 50-13-1610 and 50-5-1700, we conclude a court would also find these statutes preempted by federal law.

Law/Analysis

Constitutionality of Sections 50-13-1610 and 50-5-1700 of the South Carolina Code

Initially, we note, only a court may deem a statute unconstitutional. Op. S.C. Atty. Gen., February 24, 2006. Thus, sections 50-13-1610 and 50-5-1700 of the South Carolina Code remain

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

Clarissa S. Watts

valid until a court finds otherwise. In reviewing the constitutionality of a statute if possible, courts will construe the statute to render it valid. Joytime Distrib. & Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." State v. Curtis, 356 S.C. 622, 629, 591 S.E.2d 600, 603 (2004).

Section 50-13-1610 of the South Carolina Code (Supp. 2005) provides:

> It is unlawful to sell, offer for sale, barter, traffic in, or purchase any fish classified as a game fish under the provisions of this title except as allowed by this title regardless of where caught. A person violating this section is guilty of a misdemeanor and, upon conviction, must be punished as follows:
>
> (1) for a first offense, by a fine of not more than five hundred dollars or imprisonment for not more than thirty days;
>
> (2) for a second offense within three years of a first offense, by a fine of not less than three hundred dollars nor more than five hundred dollars or imprisonment for not more than thirty days;
>
> (3) for a third or subsequent offense within three years of a second or subsequent offense, by a fine of not more than one thousand dollars or imprisonment for not more than thirty days;
>
> (4) for a fourth and subsequent offense within five years of the date of conviction for the first offense must be punished as provided for a third offense.

As referenced in Mr. Blum's letter, the United States District Court for the District of South Carolina examined the constitutionality of this statute in United States v. Earp, 307 F.Supp.2d 760 (D.S.C. 2003). The case arose under a motion to dismiss criminal charges for distributing white bass in violation this statute and the Lacy Act under federal law. Id. In analyzing whether section 50-13-1610 violates the Commerce Clause of the United States Constitution, the Court first determined this statute

> only indirectly discriminates against interstate commerce. A plain reading of the statute indicates that it applies equally to all entities and individuals regardless of whether they are in the State or outside

> the State. The statute is a blanket ban that prohibits the sale of white bass regardless of where the fish were originally caught or purchased. In short, under this statute, no one is permitted to sell white bass in South Carolina. In addition, there is no evidence in the record to suggest the statute's purpose is discriminatory or that the statute affirmatively discriminates in its practical effect.

Id. at 762-63. Finding the statute merely indirectly discriminatory, the Court next analyzed the statute under the United States Supreme Court's analysis in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970): "whether the statute serves a legitimate local purpose and, if so, whether alternative means could promote this local purpose as well as the current statute without discriminating against interstate commerce." Id. at 763. The Court, relying on the defendants' failure to object to the asserted legitimate local purpose of "preserving the State's population of white bass, a game fish," moved on to the issue of "whether there are equally effective alternative means of preserving the white bass population that do not discriminate against interstate commerce." Id. Ultimately, the Court agreed with the federal Magistrate's determination that "a statute prohibiting the sale of native white bass would be just as effective as the current statute, if not more effective, in terms of protecting the native white bass population." Id. at 764. Thus, the District Court ruled the Magistrate was correct in dismissing the action against the defendants due to the unconstitutionality of section 50-13-1610. Relying on the District Court's decision in Earp, section 50-13-1610 appears to violate the Commerce Clause of the United States Constitution, thus rendering it unconstitutional.

Next, we address the constitutionality of section 50-5-1700 of the South Carolina Code (Supp. 2005). This statute reads:

> (A) It is unlawful to sell, purchase, trade, or barter or attempt to sell, purchase, trade, or barter saltwater gamefish in this State regardless of where taken except as provided in this chapter.
>
> (B) It is unlawful to take or attempt to take saltwater gamefish in the waters of this State, except by:
>
> > (1) hand-held hook and line which includes rod and reel and pole; or
> >
> > (2) gigging during legal periods.
>
> Any saltwater gamefish taken by any other means must be returned immediately to the water.

> (C) It is unlawful for a person to have in possession a saltwater gamefish while fishing or transporting a seine or a gill net or other commercial fishing equipment. A saltwater gamefish caught in the net or commercial fishing equipment must be returned to the water immediately.
>
> (D) A wholesale or retail seafood dealer or other business may import red drum or spotted seatrout from another state or country where the taking and sale of the fish is lawful. A copy of the bill of sale, bill of lading, or other proof of origin for each lot or shipment of the fish must accompany any fish resold and must be in the possession of the person or business offering imported red drum or spotted seatrout for sale until it is sold to the ultimate consumer and must be retained by any seller for a period of one year.

To our knowledge, a court has yet to address the constitutionality of section 50-5-1700 with regard to the Commerce Clause. However, we presume a court would employ an analysis similar to that employed by the District Court in Earp. As discussed in Earp, a court must first consider whether the statute is facially discriminatory. Earp, 307 F.Supp.2d at 762. Here, identical to Earp, section 50-5-1700 applies equally to all entities and individuals regardless of whether they are located in the State or not. Additionally, like Earp, with the exception of the situations explained in section 50-5-1700(D), the statute prohibits "sell purchase, trade, or barter or attempt to sell, purchase, trade, or barter saltwater gamefish" regardless of where the fish were caught or purchased. S.C. Code Ann. § 50-5-1700(A). The statute establishes a blanket ban on the sale of saltwater gamefish. Thus, absent an indication otherwise, we believe a court would find section 50-5-1700 to merely indirectly or incidentally burdensome on interstate transactions.

Like the District Court in Earp, finding the statute not facially discriminatory, we employ the Pike analysis and consider whether the statute serves a legitimate local purpose. Because the determination of a legitimate local purpose would require an extremely fact intensive endeavor, which as we noted on many occasions is beyond the scope of this Office, we must decline to undertake such an endeavor. Op. S.C. Atty. Gen., August 19, 2005 ("[A]n opinion of the Attorney General cannot determine facts or resolve factual issues."). However, presuming the local interest offered is similar to that offered in Earp, preserving the State's population of the saltwater game fish, although a court may find this to be a legitimate local purpose, it may as in Earp, find an equally effective alternative means of preserving the saltwater gamefish that do not discriminate against interstate commerce. For example, the Court may conclude a statute prohibiting the sale of native saltwater gamefish would be equally effective, but less discriminatory. If such were the case, we hypothesize a court likely would find this statute unconstitutional as violating the Commerce Clause. However, because we are not apprised as to the legitimate local purpose that may be offered and because only a court may make a final determination as to the constitutionality of a statute, we defer to the courts to analyze the offered purpose of the statute and make a definitive determination as to

its constitutionality. Until then, we must regard section 50-5-1700 as constitutional until a court finds otherwise.

Preemption of section 50-13-1610 and 50-5-1700 by Federal Law

In Mr. Blum's letter, he alludes to his belief that federal law governing fish in the Exclusive Economic Zone preempts sections 50-13-1610 and 50-5-1700. By Mr. Blum's reference to federal law governing the Exclusive Economic Zone, we presume he is referring to Congress' enactment of the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson Act"), which regulates fishery management within the Exclusive Economic Zone (the "EEZ"). Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, Apr. 13, 1976, 90 Stat. 331 (codified as amended at 18 U.S.C. A. §§ 1801 et seq.). Thus, we will analyze whether the Magnuson Act preempts sections 50-13-1610 and 50-5-1700.

"Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law." Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 509 (1989). "[I]ntent to preempt state law must be the clear and manifest purpose of Congress." Nye v. CSX Transp., Inc., 437 F.3d 556, 560 (6th Cir. 2006) (quotations omitted).

> Federal law may pre-empt a state law as follows: (1) Congress may explicitly define the extent to which it intends to pre-empt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may pre-empt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose.

State v. 192 Coin-Operated Video Game Mach., 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000). See also, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

The Magnuson Act "established a regulatory program conserving and managing the fishery resources of the United States." Vietnamese Fishermen Ass'n of Am. v. California Dep't of Fish and Game, 816 F.Supp. 1468, 1470 (N.D. Cal. 1993). The provisions under the Magnuson Act call for the creation of eight regional fishery councils, which operate according to their own Fishery Management Plans. 16 U.S.C.A. §§ 1852 & 1853. Additionally, the Magnuson Act expresses Congress' intent to "exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C.A. § 1811(a). The "exclusive economic zone" referred to in the act begins at the state's seaward boundary (three miles seaward from the state's coastline) and extends 200 nautical miles. Proclamation No. Number 5030, 48 Fed. Reg. 10,605 (March 10, 1983).

Several courts, at both the state and federal level, have considered whether various state statutes and regulations are preempted by the Magnuson Act and the federal regulations promulgated thereunder. In Louisiana Seafood Management Council, Inc. v. Foster, 917 F.Supp. 439 (E.D. La. 1996), the United States District Court for the Eastern District of Louisiana addressed the impact of the Magnuson Act on the Louisiana Marine Resources Conservation Act. The Court stated: "While the Magnuson Act expresses Congress' plan to occupy regulation of the EEZ, complete preemption of state authority is not intended." Id. at 443. In making this determination, the Court relied on section 1856(a)(3) of the Magnuson Act, which allows a state to "regulate a fishing vessel outside the boundaries of the State [if] . . . The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating." 16 U.S.C.A. § 1856(a)(3). Furthermore, the Court found the Louisiana Marine Resources Conservation Act, which prohibited "possession of certain finfish within the territorial waters of Louisiana and does not seek enforcement within the EEZ [but] only attempts to regulate activity and possession of finfish in the state." Id. at 444. Thus, the Court determined the Magnuson Act did not preempt the Louisiana Marine Resources Conservation Act.

The United States District Court for the Northern District of Florida came to a similar conclusion in Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (D.C. Fla.1982). This Court also relied on section 1856(a) to support its finding that "Congress' reservation of state authority to regulate fishing indicates it did not intend complete preemption." Id. at 514. Thus, the Court concluded the Magnuson Act did not preempt a state statute prohibiting taking food fish within or without waters of the state with purse seine and possessing food fish with purse seine. Id. Similarly, several state supreme courts reached the same outcome. See State v. Dupier, 118 P.3d 1039 (Alaska 2005) (relying on the fact that the state law does not thwart the goal of the Magnuson Act and the fact that the Magnuson Act contemplates state regulation to determine the Magnuson Act did not preempt a state law requiring a permit from the state prior to landing fish on the state); State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984) (finding state law limiting the catch for king crab is not preempted by the Magnuson Act because pursuant to section 1856(a), Congress expressly or impliedly intend not to completely preempt state law); People v. Weeren, 607 P.2d 1279 (Cal. 1980) (concluding Magnuson Act does not preempt a state regulation prohibiting the use of spotter aircraft to locate fish); Raffield v. State, 565 So.2d 704 (Fla. 1990) (reading the federal regulations as in addition to state law, rather than in place of it, the Court found no preemption of a state law prohibiting the taking of food fish by use of purse seine).

Contrarily, we discovered several federal and state courts finding the Magnuson Act preempts state law. The United States Court of Appeals for the Eleventh Circuit analyzed whether the Magnuson Act preempted a Florida landing law limiting the harvesting of Spanish Mackerel. Se. Fisheries Ass'n, Inc. v. Chiles, 979 F.2d 1504 (11th Cir. 1992). Based on Congress' express intent as provided in section 1811 of the Magnuson Act, as cited above, as well as Congress' stated purposed of the Magnuson Act as outlined in section 1801 of the Magnuson Act, this Court stated:

"We think Congress outlined a fairly complete and pervasive federal scheme in the Magnuson Act, and believe Congress must have intended to occupy the field of fishery management within the EEZ." Id. at 1509. Furthermore the Court added:

> Congress thus established a federal fishery zone; provided the states with an active role in managing the resources of the EEZ through their voting positions on a council; granted the ultimate responsibility for overseeing the program to the Secretary of Commerce; and left nothing pertaining to the EEZ for the states to regulate.

Id. Ultimately, the Court concluded it did not have enough facts to determine whether or not the Magnuson Act preempted the Florida law in question. However, the Court indicated "[i]t would be impossible for the plaintiffs to land their catch in compliance with both state and federal law in this scenario." Id. at 1510.

The Fourth Circuit Court of Appeals addressed the issue of preemption under the Magnuson Act in City Of Charleston, South Carolina v. A Fisherman's Best, Inc., 310 F.3d 155 (4th Cir. 2002). The Court of Appeals reviewed a city resolution banning the use of the city's maritime center by longline vessels to determine whether the Magnuson Act preempts such a resolution. Id. at 173-74. The Court determined this resolution conflicted with regulations promulgated pursuant to the Magnuson Act specifying longline as the only or one of the only types of gear that may be used to catch certain fish. Id. Thus, the Court determined: "The City's resolution . . . attempted to impose standards for longline swordfish vessels and tackle in the area. The resolution conflicted with the above-cited Congressional determinations and therefore is preempted." Id. at 175. Furthermore, the Court added:

> By § 1811(a) the United States claims, and expresses its intention to exercise, sovereign rights and exclusive fishery management authority over all fish within the Exclusive Economic Zone. The City's resolution attempts to exercise authority over fishing vessels that wish to tie up at the City's Maritime Center facilities, which includes the longline swordfish vessels who make over 95 percent of the swordfish catch in the EEZ. This undercuts the claims of the United States under § 1811(a) and the assertion of management authority over fish within the EEZ.

Id. Many federal district courts also found the Magnuson Act preempted state statutes and regulations. See Vietnamese Fishermen Ass'n of America v. California Dept. of Fish and Game, 816 F.Supp. 1468 (N.D. Cal. 1993) (finding the Magnuson Act preempted a state regulation forbidding the use of gill or trammel nets to take rockfish off the coast of California due to the fact that the Magnuson Act only prohibited the use of such nets in certain waters); Se. Fisheries Ass'n, Inc. v. Mosbacher, 773 F.Supp. 435 (D.D.C. 1991) (concluding a state regulation requiring all commercial

fisherman landing red drum to comply with the state landing and possession law conflicts with the Magnuson Act and is thereby preempted by the Magnuson Act); Bateman v. Gardner, 716 F.Supp. 595 (S.D. Fla. 1989) (determining the Magnuson Act conflicts with, and therefore preempts, a state statute prohibiting shrimping in a particular area). Additionally, we uncovered a Rhode Island Supreme Court case in which the Court determined the Magnuson Act preempted state law. State v. Sterling, 448 A.2d 785 (R.I. 1982) (finding preemption of a state regulation limiting the landing and possession of fish if the fish are caught outside of Rhode Island's territorial waters).

Given the courts' differences of opinion as to whether Congress intended to completely occupy the field of fishery management in the exclusive economic zone, we find the issue of the Magnuson Act's preemption of state law unclear. While we recognize, as do many courts, that section 1856(a) appears to allow some state regulation within the exclusive economic zone, we find section 1811(a) vesting the "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone" in the United States persuasive in our determination of Congress' intent to preempt state law. 16 U.S.C.A. § 1811(a). Furthermore, in our examination of the Magnuson Act and the regulations promulgated under this act, we identified situations in which sections 50-13-1610 and 50-5-1700 may conflict with federal law.

The Magnuson Act lists acts which are prohibited as unlawful. 16 U.S.C.A. § 1857. Contained in this list is a provision making it unlawful "to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C)." Subparagraph (A) of this provision makes it unlawful to violate any provision of the act, while subparagraph (C) makes it unlawful to violate a provision or regulation under a international fishery agreement. Furthermore, 50 C.F.R. § 600.725 lists general prohibitions for domestic fisheries. This regulation includes a provision making it unlawful to "Possess, have custody or control of, ship, transport, offer for sale, sell, purchase, land, import, or export, any fish or parts thereof taken or retained in violation of the Magnuson-Stevens Act or any other statute administered by NOAA and/or any regulation or permit issued under the Magnuson-Stevens Act." Id. Specifically, with regard to the South Atlantic region, which includes South Carolina, the Secretary of Commerce, in addition to the prohibitions stated in section 600.725, prohibits the sale or purchase of any prohibited species, the sale or purchase of fish in excess of the seasonal harvest limitations, sale or purchase of undersized fish, and the sale or purchase of fish in excess of commercial trip limits. 50 C.F.R. § 622.7(k), (m), (n), & (t). Section 50-13-1610 of the South Carolina Code makes the sale of game fish, "regardless of where caught" illegal in South Carolina. Similarly, section 50-5-1700 makes the sale of saltwater gamefish, "regardless of where taken" unlawful. The prohibitions provided in the Magnuson Act and the associated regulations, appear to conflict with sections 50-13-1610 and 50-5-1700 when applied to the fish taken in the exclusive economic zone. Due to our view that Congress, by enacting the Magnuson Act, intend to regulate all fish within the exclusive economic zone and the apparent conflicts between our State law and the Magnuson Act, we opine sections 50-13-1610 and 50-5-1700 are preempted by the Magnuson Act.

Conclusion

Relying on the District Court's decision in United States v. Earp, 307 F.Supp.2d 760 (D.S.C. 2003), we find section 50-13-1610 is unconstitutional due to its violation of the Commerce Clause. Additionally, following the same analysis as in Earp, we conclude a court would likely find section 50-5-1700 also violates the Commerce Clause. However, as noted previously, only a court may find such a statute unconstitutional. Thus, section 50-5-1700 remains valid until a court shall declare it void. Although we believe sections 50-13-1610 and 50-5-1700 are unconstitutional as violating the Commerce Clause, we also believe these statutes are also preempted by the Magnuson Act when applied to fish taken from the exclusive economic zone.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General