San Francisco Herring Ass'n v. U.S. Department of Interior—National Park Service has authority to prohibit commercial herring fishing within Golden Gate National Recreation Area

Congress has established the Golden Gate National Recreation Area as part of the National Park System. Pub. L. 92-589, 86 Stat. 1299 (1972), *codified as amended at* 16 U.S.C. §§ 460bb to 460bb-5. The Area's initial geographical footprint "comprise[d] the lands, waters, and submerged lands generally depicted on the map entitled: 'Revised Boundary Map, Golden Gate National Recreation Area', numbered NRA-GG-80,003-K and dated October 1978, plus those areas depicted on the map entitled 'Point Reyes and GGNRA Amendments and dated October 25, 1979'." 16 U.S.C. § 460bb-1(a). It currently extends, inter alia, 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. The Secretary of the Interior must "administer the lands, waters and interests therein acquired for the recreation area in accordance with the provisions of the Act of August 25, 1916 ... [i.e., the Organic Act], as amended and supplemented, and the Secretary may utilize such statutory authority available to him for the conservation and management of wildlife and natural resources as he deems appropriate to carry out the purposes of this subchapter." *Id.* § 460bb-3(a).

In 1983, the Secretary adopted pursuant to Organic Act authority a regulation prohibiting "[c]ommercial fishing, except where specifically authorized by Federal statutory law" in national park units. 36 C.F.R. § 2.3(d)(4). Although the California Department of Fish and Wildlife regulated herring roe fishing within the GGNRA beginning with its creation, by 2007 the state agency had recognized that the NPS had exclusive jurisdiction over all navigable waters with the Area. Six years later, an association of commercial herring fishers filed suit challenging the Secretary's regulatory authority. The district court, after two intervening Ninth Circuit decisions, granted summary judgment to the federal defendants.

The Ninth Circuit affirmed the district court in the third appeal. *San Francisco Herring Ass'n v. U.S. Dep't of Interior*, No. 20-17412, 2022 WL 1464461 (9th Cir. May 10, 2022). The Association's principal argument was "that for the Park Service to be able to 'administer' the waters in question, it must first have 'acquired' a formal property interest in them. Any such interest, the Association contends, is held by the State of California based on its alleged ownership of the submerged lands beneath the waters." The panel was not persuaded:

> It is not disputed that the navigable waters at issue here are already within the jurisdiction of the United States, i.e., subject to federal regulation. ... And the Organic Act specifically gives the Secretary authority to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." ... As the Supreme Court has explained, the Organic Act's "statutory grants of power make no distinctions based on the ownership of either lands or waters (or lands beneath waters)" within park boundaries. ... The Park Service's general rules and regulations apply unless a park-specific law is "in conflict" with the Organic Act.

Here, no conflict existed because "Congress in the GGNRA Act squarely placed the navigable waters at issue here within the boundary lines of the Recreation Area" in § 460bb-(1)(a) and "directed the Secretary to 'utilize such statutory authority available to him for the conservation

and management of wildlife and natural resources as he deems appropriate to carry out the purposes of this subchapter'" in § 460bb-3(a). Given these provisions, "[t]here was quite clearly a transfer of authority over these waters to the Park Service[,]" and, therefore, "there was no requirement for the Park Service to further 'acquire' some formal property interest in navigable waters that are already subject to the jurisdiction of the United States"—waters "that are specifically delineated as part of the GGNRA; and that cannot even be 'owned' in the traditional sense."

The panel also rejected the Association's reliance on *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). That decision, which held that the Park Service could not enforce a hovercraft ban on lands not owned by the federal government by virtue of the Alaska National Interest Lands Conservation Act, was deemed inapposite "because of statutory language unique to ANILCA" that limited the Secretary's regulatory authority to public lands, which included "'lands, *waters*, and interests therein[,]'" on to those in which the United States possessed title. "In short," the panel reasoned, "*Sturgeon* shows that when Congress wants to disallow the Park Service from exercising its usual authority over navigable waters falling within the drawn boundaries of a national park system unit, Congress makes that intention clear."

In a footnote, the panel observed that it "need not resolve the complex dispute between the parties over who owns the submerged lands under the waters at issue here. Resolution of that disagreement would not answer the ultimate question of whether Congress specified that the Secretary had to further acquire a formal property interest in the navigable waters of San Francisco Bay before it could regulate them"—a question that the opinion answered in the negative.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/10/20-17412.pdf