FISHERIES CO-MANAGEMENT IN THE UNITED STATES: INCENTIVES, NOT LEGAL CHANGES, KEY

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The Emmett Environmental Law and Policy Clinic at Harvard Law School is directed by Wendy B. Jacobs and is dedicated to addressing major environmental issues in the United States and abroad and to providing its students an opportunity to do meaningful, hands-on environmental legal and policy work. Students and clinic staff work on issues such as climate change, pollution reduction, water protection, and smart growth. The Clinic acknowledges the following individuals, who contributed to the research, analysis, and preparation of this report: Lucia Bizikova, clinical student; and Shaun A. Goho, Senior Clinical Instructor and Staff Attorney.

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INTRODUCTION

In the same article in which he coined the famous phrase "tragedy of the commons," American ecologist Garrett Hardin wrote that: "The population problem has no technical solution, it requires a fundamental extension in morality."[1] Fish lawyers don't often speak in terms of morality, but a review of legal barriers to co-management leads to the somewhat uncomfortable conclusion that considerations like morality and cooperation may be more central to promoting co-management than statutory or regulatory changes.

Unregulated fisheries represent a classic example of what Hardin considered a commons; they therefore face a constant risk of overexploitation due to every fisherman's willingness to maximize his own gains. In order to address the tragedy of the commons in the context of fisheries, we need to establish alternative strategies capable of promoting fisheries while at the same time guaranteeing their sustainable use.

Science-based limits on fishing mortality and accountability for staying within those limits have taken us a long way towards sustainable management in the United States.[2] But as many fish stocks remain overfished, there is still room for improvement. Over the last few decades, fisheries around the world have been pursuing a new model of governance in which the management would be shared between the government and local stakeholders. This participatory model differs from the usual adversarial and top-down strategies because it seeks to stimulate cooperation between different parties involved in fisheries management.[3] Arguably, broadening the participation of different actors in management will help reconcile conflicting interests and promote environmental sustainability and community well-being.[4] This paper concludes that legal or regulatory barriers to this potentially beneficial approach of co-management are largely non-existent or relatively easily navigated where stakeholder support for a co-management approach exists.

1 Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1243 (1968).

2 *See, e.g.*, NOAA Fisheries, *Status of Stocks 2014 Annual Report to Congress on the Status of U.S. Fisheries*, at 3 (April 2015), *available at* http://www.nmfs.noaa.gov/sfa/fisheries_eco/status_of_fisheries/archive/2014/2014_status_of_stocks_final_web.pdf; S.A. Murawski, *Rebuilding Depleted Fish Stocks: The Good, the Bad, and, Mostly, the Ugly*, 67 ICES J. Marine Sci. 1830-1840 (2010).

3 R.M. Fujita, et al., *Cooperative Strategies in Fisheries Management: Integrating Across Scales*, 86 Bull. Marine Sci. 251, 252 (2010). These parties include fishermen, researchers, scientists, environmental organizations, managers, local authorities, Government, NGOs, etc.

4 *Id.*

As an initial matter, in order to sensibly discuss barriers to co-management we need a working definition of the term, but "[n]o single standardized definition is used for fisheries or other natural resource sectors."[5] The FAO defines co-management as "a partnership arrangement between government and the local community of resource users, sometimes also connected with agents such as NGOs and research institutions, and other resource stakeholders, to share the responsibility and authority for management of a resource."[6] It is a dynamic and interactive process expressed through various combinations of government and stakeholders' control in managing the fishery.[7] Co-management is much more than a mere incentive or imposition of rules from above; instead, co-management actually changes the nature of the relationships in the fishery through sharing of authority and decision making in management processes.[8] The extent of stakeholders' responsibility, however, varies.

This general definition of co-management does not include the notion of property rights. Some argue that "the foundation of a strong bundle of property rights is necessary for the development of a co-management regime."[9] New Zealand, with strong property rights and a generally successful fishery management program, has been cited as a specific example of this phenomenon. Yet even there, some observers have emphasized that multiple factors, of which individual transferable quotas (ITQs) are only one part, have been necessary for co-management to develop.[10] In addition, the collaboration of fishermen and academics in a portion of the New England scallop fishery that lacks ITQs[11] illustrates that such systems are not required for co-management to exist.

5 National Oceanic and Atmospheric Administration (NOAA) Cooperative research and cooperative management working group, Cooperative research and cooperative management: A review with recommendations, NOAA Technical Memorandum NMFS-F/SPO-156 (2015), at 5.

6 Food and Agriculture Organization Fisheries & Aquaculture, Small-scale Fisheries – Co-management, http://www.fao.org/fishery/topic/16625/en (last visited March 9, 2016); *see also* Tracy Yandle, *The Challenge of Building Successful Stakeholder Organizations: New Zealand's Experience in Developing a Fisheries Co-management Regime*, 27 Marine Pol'y 179, 180 (2003) (defining co-management as "a spectrum of institutional arrangements in which management responsibilities are shared between users (who may or may not be community-based) and government").

7 W. Dubbink and V.M. van Vliet, *Market regulation versus co-management?: Two perspectives on regulating fisheries compared*, 20 Marine Policy 499-516 (1996).

8 *Id.*

9 Yandle, *supra* note 6, at 181.

10 M. Harte, *Assessing the Road Towards Self-Governance in New Zealand's Commercial Fisheries*, *in* Case Studies in Fisheries Self-Governance 323, 332 (FAO Fisheries Technical Paper 504, R. Townsend, et al., eds. 2008) (citing "an ethos of transparency, efficiency and accountability" in public services, "strong policy and operational capabilities" in government agencies, and the development of "effective commercial stakeholder organizations").

11 Catherine E. O'Keefe & Gregory R. DeCelles, *Forming a Partnership to Avoid Bycatch*, 38 Fisheries 434 (2013).

A substantial literature has been devoted to the idea of co-management of fisheries as a sustainable solution to marine conservation issues. The aim of this paper is not to summarize the ideas already formulated by other researchers. Instead, by identifying any legal or regulatory barriers to co-management, we seek to help determine the main factors impeding the full development of cooperative management of fisheries in the United States.

We begin by reviewing the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and its implementing regulations, finding that they present no serious barriers to co-management. Next, we review other federal laws, including the Federal Advisory Committee Act (FACA) and the Miscellaneous Receipts Act, that could present problems for some of the institutional arrangements associated with co-management. Here too we find no insurmountable barriers. We then examine fisheries in New Zealand and the British Columbia groundfish fishery in Canada as the leading examples of extensive co-management for a comparative analysis. By identifying the similarities as well as divergences between these three systems (New Zealand, British Columbia, and the United States), we show that engagement of willing partners in the fishing industry, academia, government, and other institutions, rather than specific legal or regulatory structures, are the most important building blocks for successful co-management, although explicit catch limits, accountability, and, to some extent, rights-based management, materially encourage co-management.

THE MAGNUSON-STEVENS ACT AND IMPLEMENTING REGULATIONS FACILITATE AND EXPLICITLY CALL FOR CO-MANAGEMENT

A. The regional council structure and the national standards and their implementing guidelines support co-management

In the United States, the MSA is the primary federal fisheries statute, providing for the conservation and management of the fishery resources within the U.S. exclusive economic zone (EEZ).[12] Originally enacted in 1976 and subsequently subject to major revisions in 1997 and 2006, it gives the Secretary of Commerce authority for exploring, exploiting, conserving, and managing fisheries nationwide.[13] The Act establishes eight regional fishery management councils, which are responsible for the preparation and, upon review and approval by the Secretary, implementation of fishery management plans (FMPs).[14] Regional councils are comprised of stakeholders including participants in commercial and recreational fisheries and representatives of the states in the region.[15] Given that these non-federal actors play a material role in the development of regulations that govern fishing in their areas, the councils themselves can be considered a type of co-management.

Central to the functioning of the U.S. fishery management system are the national standards with which every FMP must comply.[16] These standards require, among other things, preventing overfishing while achieving optimum yield and using the best scientific information available.[17] The MSA requires the National Oceanic and Atmospheric Administration's fisheries service (NOAA Fisheries) to develop guidelines for each national standard.[18] Because these guidelines apply to all fisheries, any parts of them that are inconsistent with co-management could present significant barriers to the development of co-management in the United States. A review of the guidelines identified no such barriers, however, and even found some provisions that support co-management.

12 16 U.S.C. § 1801(b)(1).

13 Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331.

14 16 U.S.C. §§ 1852, 1854.

15 *Id.* § 1852(b).

16 *Id.* §§ 1851(a); 1853(a)(1)(C).

17 *Id.* § 1851(a)(1), (2).

18 *Id.* § 1851(b); *see also* 50 C.F.R. § 600.310 et seq. (guidelines).

With respect to developing and evaluating the best scientific information for FMPs, the guidelines require consideration of three factors: information from the relevant range of scientific disciplines, alternative scientific points of view, and relevant local and traditional knowledge.[19] The last requirement explicitly calls for consideration of "fishermen's empirical knowledge about the behavior and distribution of fish stocks."[20] Including fishermen in developing the best scientific information encourages co-management.

Similarly, the guidelines for National Standard 7 recognize the importance of industry self-regulation.[21] In particular, the guidelines provide that the adoption of FMPs is not required for fisheries that are not overfished,[22] both allowing the industry to self-regulate in such fisheries and creating an incentive to avoid overfishing for fishermen who want to avoid regulation that would be required if the fishery became overfished.

In sum, neither the MSA's central requirements nor the guidelines implementing those requirements impose any real obstacles to co-management. To the contrary, these authorities leave enough space for individual actors to develop their own approaches, which would fit the characteristics of each fishery.

B. Section 318 explicitly calls for cooperative research and management

One provision in the MSA goes further and explicitly calls for co-management. Section 318 of the MSA directly urges co-management by providing that "[t]he Secretary of Commerce, in consultation with the Councils, shall establish a cooperative research and management program to address needs identified under this Act and under any other marine resource laws enforced by the Secretary."[23] This section further specifies that this co-management program should be implemented on a regional basis while being developed and conducted through partnerships among different stakeholders, including fishermen, environmental organizations, scientists, educational institutions, and federal, state and tribal managers.[24] Thus, section 318 explicitly supports using co-management to implement the substantive standards found elsewhere in the MSA.

19 50 C.F.R. § 600.315(a)(6)(ii)(A)-(C).

20 *Id.* § 600.315(a)(6)(ii)(C).

21 *Id.* § 600.340(b)(1).

22 *Id.*

23 16 U.S.C. § 1867(a).

24 *Id.*

C. Fishery-specific regulations may impact co-management solutions but are easier to modify as management approaches change

As discussed above, the MSA creates eight regional fishery management councils responsible for developing management measures in their regions.[25] Encouraging the councils to develop cooperative management is a logical extension of the cooperative approach embedded in the council system. For the purpose of analyzing regulatory barriers (or incentives) to the implementation of cooperative management at the local level, we examined an example from the Pacific.

The Pacific Fishery Management Council has jurisdiction over the 317,690 square mile EEZ of Washington, Oregon, and California.[26] It manages approximately 119 species of salmon, groundfish, coastal pelagics, and highly migratory species. It is also active internationally because it manages fish that migrate through its area of jurisdiction. It is composed of 14 voting members, many advisory bodies, and 16 staff members who are based in different parts of the region. The council reflects the diversity of the fisheries it manages, and the members represent the interests of multiple stakeholders, including tribal and state wildlife agencies and commercial and recreational fishing. While many examples of co-management exist in the region, some regulatory provisions might have a deterrent effect on the implementation of co-management.

The Pacific whiting (Merluccius productus) fishery is one of the largest fisheries in the United States and the Pacific whiting is the most abundant commercial fish species on the west coast of the United States south of Alaska.[27] This fishery is the largest part of the Pacific groundfish fishery. The Pacific Coast Groundfish Management Plan divides the whiting fishery into three components: (1) catcher vessels that deliver to shorebased processing plants; (2) catcher vessels that deliver to motherships at sea and (3) at-sea catcher-processors.[28] Each component has its own season.[29] Broadly speaking, in the Whiting Mothership Cooperative information is shared among participating fishermen in order to avoid bycatch. Cooperative members report bycatch data to a third party (Sea State), which collects and analyzes it and sends it back to the fleet members so they can avoid bycatch.[30] The cooperative has also established a detailed bycatch agreement providing

25 *Id.* § 1852(a).

26 Pacific Fishery Management Council, *Who We Are and What We Do,* http://www.pcouncil.org (last visited March 9, 2016).

27 NOAA Fisheries, *Fishwatch: Pacific Whiting*, http://www.fishwatch.gov/profiles/pacific-whiting (last visited March 9, 2016).

28 50 C.F.R. § 660.131(a).

29 *Id.* § 660.131(b).

30 Pacific Whiting Conservation Cooperative, *Amendment 20 Catcher/Processor Cooperative Final Annual Report*

rules for bycatch avoidance and penalties for non-compliance.[31] Overall, the system is very effective at avoiding bycatch, eliminating derby fishing, and enabling cooperative members to land target species.[32]

In some cases, however, overly prescriptive regulations can be counterproductive to co-management. The Pacific groundfish fishery regulations contain at least three examples of such impediments to co-management. First, whiting motherships are not allowed to process south of 42 degrees north latitude. This limitation constrains the ability of cooperative vessels that fish for the motherships to avoid bycatch.[33]

Second, in all three components of the Pacific whiting fishery (as well as other parts of the Pacific groundfish fishery), vessels must carry at least one human observer at all times.[34] "Observers collect biological samples and fishery-dependent information on total catch and interaction with protected species," which are used to monitor quotas, manage catch, minimize bycatch, carry out stock assessments, and ultimately manage the fishery.[35] It is therefore clear that observers perform important functions in ensuring that a fishery is sustainably managed. Nevertheless, the experience in other fisheries, including the British Columbia groundfish fleet, suggests that electronic monitoring is a more cost- and time-effective method of data collection. Electronic monitoring can also make it easier to share information among participants in the fishery, thereby promoting co-management. Electronic monitoring is now being used in some Pacific fisheries to monitor catch.[36] As support

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2013, at 3 (2014), *available at* http://www.pcouncil.org/wp-content/uploads/IR2_2013_Final_PWCC_Am20_AnnualRpt_JUNE2014BB.pdf.

31 Whiting Mothership Cooperative, *An Amendment 20 Mothership Catcher Vessel Cooperative: Preliminary Report on the 2012 Pacific Whiting Fishery* 1, 4-6 (2012), *available at* http://www.pcouncil.org/wp-content/uploads/INFO_SUP_RPT5_WMC_STATUS_NOV2012BB.pdf.

32 *See* Gil Sylvia, Chris Cusack & Josh Swanson, *Fishery Cooperatives and the Pacific Whiting Conservation Cooperative: Lessons and Application to Non-industrial Fisheries in the Western Pacific*, 44 Marine Pol'y 65, 67-68 (2014). For another example of a U.S.-based fishery in which data sharing among a cooperative has successfully reduced bycatch, see O'Keefe & DeCelles, *supra* note 11 (describing a cooperative bycatch avoidance program in the New England sea scallop fishery).

33 50 C.F.R. § 660.131(e).

34 *Id.* § 660.140(h) (observer requirements for shorebased IFQ program); *id.* § 660.150(j) (observer requirements for mothership collective); *id.* § 660.160(j) (observer requirements for catcher/processors); *id.* § 660.16 (general observer requirements).

35 NOAA Fisheries, *Summary of the North Pacific Groundfish and Halibut Observer Program* 4 (2014), *available at* http://alaskafisheries.noaa.gov/sustainablefisheries/observers/overview.pdf; *see also* 50 C.F.R. § 660.16(b) (summarizing purpose of observer program).

36 *See* Pacific States Marine Fisheries Commission, *Electronic Monitoring Program*, http://www.psmfc.org/program/electronic-monitoring-program (last visited March 9, 2016), and NOAA Fisheries, *Electronic Reporting*, https://alaskafisheries.noaa.gov/fisheries/electronic-reporting (last visited March 9, 2016).

grows, it becomes more likely that the Pacific Council will amend the regulations requiring human observers.

Third, all segments of the Pacific groundfish fishery must comply with very specific, detailed gear restrictions.[37] These detailed, top-down requirements are inconsistent with the more flexible, bottom-up approach to regulation characteristic of co-management. In addition, they limit the flexibility of fishery participants to self-regulate.

Despite these limitations, the Pacific whiting fishery is a promising example of the introduction of elements of cooperative management into U.S. fisheries. Moreover, because the barriers identified above are part of the regional FMP rather than the MSA itself or any nationwide regulations, they can be removed relatively easily through the FMP amendment process.

37 *See* 50 C.F.R. § 660.130(b) (gear restrictions for trawl fisheries, including the Pacific whiting fishery); *id.* § 660.230(b) (gear restrictions for the fixed-gear fishery); *id.* § 660.330(b) (gear restrictions for the open access fishery).

OTHER FEDERAL LAWS MUST BE CONSIDERED WHEN DESIGNING CO-MANAGEMENT INSTITUTIONS

A. FACA presents a potential burden for co-management groups

One potential statutory barrier to co-management is presented by the Federal Advisory Committee Act ("FACA").[38] FACA was enacted in 1972 to deal with the large number of different committees, boards, commissions, and councils established to provide advice to the executive branch. At that time, Congress believed that, "on the one hand, that there were too many 'inactive, meaningless, obsolete and redundant committees,' . . . and on the other hand, that many committees were so powerful that they, in effect, constituted 'a fifth arm of the government' on top of the legislative, executive, judicial and regulatory or administrative branches."[39] To address these problems, the statute was intended "to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about the membership and the activities of the committees."[40]

FACA requires that advisory committees subject to the Act comply with a number of requirements, including that the committee be formed according to a written charter,[41] provide public notice of its meetings,[42] make the meetings open to the public,[43] and keep detailed minutes of its meetings.[44] FACA committee memberships must also be balanced "in terms of the points of view represented and the functions to be performed."[45]

A determination that fisheries co-management groups were advisory committees subject to FACA would present a potentially troublesome barrier to co-management. For one thing, there is the time and expense involved in becoming chartered and complying with the procedural requirements described in the previous paragraph.

More fundamentally, becoming a FACA committee requires, as two commentators have

38 Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. 2 §§ 1-16).

39 Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 Admin. L. Rev. 1, 10 (1981) (quoting *Hearings on S. 1637, S. 1964 and S. 2064 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 92d Cong. 12 (1971)).

40 *Id.*; *see also* 5 U.S.C. app. 2§ 2 ("Findings and purpose").

41 5 U.S.C. app. 2§ 9(c).

42 *Id.* § 10(a)(2).

43 *Id.* § 10(a)(1).

44 *Id.* § 10(c).

45 *Id.* § 5(b)(2), *see also id.* § 5(c).

put it, "trading in a bottom-up ethos for one which is decidedly top-down."[46] An agency must formally determine that the establishment of the committee is in the public interest and approve the committee's charter;[47] all committee meetings must be approved by and take place in the presence of an agency official, who can adjourn the meeting "whenever he determines it to be in the public interest;"[48] and the agency retains discretion to terminate the committee at any time.[49] Thus, while designation of a fisheries co-management group as a FACA advisory committee would not be an absolute barrier to co-management, it would impose a significant burden.

Determining whether a particular group is a FACA advisory committee is a fact-specific question. A review of the statutory text, implementing regulations, and caselaw, however, provides some guidance for designing these groups in ways that are likely to avoid the need to comply with FACA.

The statute defines a FACA committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, . . . which is— . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ."[50] Thus the key terms in the statute for determining whether a group is subject to FACA are "established or utilized" and "advice or recommendations." "Established" is relatively straightforward—"[i]t generally means created directly by a statute, the President, or a federal agency."[51] Therefore, as long as a fisheries co-management group was not directly created by an agency, it would not trigger FACA under this term.[52]

The application of "utilized" is more complicated. The General Services Administration ("GSA"), which has been assigned the responsibility of prescribing "administrative guidelines and management controls applicable to advisory committees,"[53] defines "utilized" to mean that "a

46 Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 Envtl. L. Rep. News & Analysis 10,399, 10,403 (1999).

47 5 U.S.C. app. 2 § 9(a), (c).

48 *Id.* § 10(e), (f).

49 *Id.* § 14.

50 *Id.* § 3(2).

51 United States Government Accountability Office, Principles of Federal Appropriations Law ch. 15, s. 4, at *8 (3rd ed. 2008).

52 Note, however, that fishery management councils are not "agencies" for purposes of FACA, *see* text accompanying notes 67-68, *infra*, and therefore would be free to establish a co-management group under this provision.

53 5 U.S.C. app. 2§ 7(c).

committee that is not established by the Federal Government is utilized within the meaning of the Act when the President or a Federal office or agency exercises actual management or control over its operation."[54] To the same effect, another provision in the regulations provides that "[a]ny committee or group created by non-Federal entities such as a contractor or private organization" is "not covered by the Act . . . provided that these committees or groups are not actually managed or controlled by the executive branch."[55]

Unfortunately, one cannot rely too much on the regulations, because courts afford them little, if any, deference. In particular, the Supreme Court held that they are entitled to "diminished deference,"[56] while the D.C. Circuit has said that it does not defer at all to one agency's interpretation of a statute, such as FACA, that is "applicable to all agencies."[57]

With regard to the definition of "utilized," however, the GSA has stated that it intended that the regulation "conform to governing case law."[58] In the preamble to the 2001 revisions to the regulations, the GSA cited *Washington Legal Foundation v. U.S. Sentencing Commission*,[59] in which the D.C. Circuit stated that:

> The word "utilized" in FACA . . . is a stringent standard, denoting something along the lines of actual management or control of the advisory committee. This court, interpreting a recent decision of the Supreme Court, has held that "'utilized' encompasses a group . . . so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'"[60]

Washington Legal Foundation relied on the Supreme Court's 1989 decision in *Public Citizen v. United States Department of Justice*.[61] In that case, the Court observed that "'[u]tilize' is a woolly verb, its contours left undefined by the statute itself."[62] The Court was concerned that if read in its

54 41 C.F.R. § 102-3.25.

55 *Id.* § 102-3.40(d).

56 Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 463 n.12 (1989).

57 Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993); *see also* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252 (D.C. Cir. 2003) (citing FACA as an example of "generic statutes that apply to dozens of agencies, and for which no agency can claim any particular expertise").

58 Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,730 (July 19, 2001).

59 17 F.3d 1446 (D.C. Cir. 1994).

60 *Id.* at 1450-51 (quoting Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990), in turn citing Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 457, 461-62 (1989)).

61 491 U.S. 440 (1989).

62 *Id.* at 452.

ordinary sense, "utilize" would extend to cover "any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice."[63] The Court was also concerned that a literal meaning of "utilize" would raise serious constitutional questions in that case, which involved the President's use of the American Bar Association's evaluations of his judicial nominees.[64] The Court therefore delved deeply into the legislative history of FACA before concluding that "[t]he phrase 'or utilized' therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves."[65]

Under existing Supreme Court and D.C. Circuit precedent in addition to the GSA's regulations, therefore, a group is not a FACA advisory committee so long as a federal agency does not have actual management or control of the group. Another possible way of avoiding the strictures of FACA is if the co-management groups have relationships with the fishery management councils ("FMCs") rather than with NMFS itself. The FMCs are not agencies for the purposes of the Administrative Procedure Act.[66] As a result, they are not FACA "agencies," either.[67] It should therefore be possible to structure fisheries co-management groups to avoid FACA, provided that they are sufficiently independent of NMFS.

FACA also creates certain exemptions, including for committees that are specifically exempted in the statute that authorizes them[68] and for "any local civic group whose primary function is that of rendering a public service with respect to a Federal program."[69]

Neither of these exemptions appears to apply here. First, the MSA itself offers an example of a statutory exemption, in that it provides that the "Federal Advisory Committee Act shall not

63 *Id.* The Court elaborated: "A nodding acquaintance with FACA's purposes, as manifested by its legislative history and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the National Association for the Advancement of Colored People (NAACP) before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy." *Id.* at 452-53.

64 *Id.* at 455.

65 *Id.* at 462.

66 *See* Gen. Category Scallop Fishermen v. Sec'y, U.S. Dep't of Commerce, 635 F.3d 106, 112 n.15 (3d Cir. 2011); Anglers Conservation Network v. Pritzker, No. CV 13-1761 (GK), 2014 WL 4977414, at *7 (D.D.C. Sept. 30, 2014); J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1159 (E.D. Va. 1995).

67 5 U.S.C. app. 2 § 3(3).

68 *Id.* § 4(a).

69 *Id.* § 4(c).

apply to the Councils, the Council coordination committee established under subsection (1) [of 16 U.S.C. § 1852] or to the scientific and statistical committees or other committees or advisory panels established under subsection (g)."[70] Because co-management groups would not qualify as these sorts of committees, however, they would not be exempted from FACA under this provision.

Second, a fisheries co-management group likely would not be considered a "local civic group whose primary function is that of rendering a public service with respect to a Federal program." "Local civic group" is not defined in the statute or regulations, nor has the term been discussed in the case law.[71] In other contexts, however, the word "civic" is generally understood as relating to matters involving citizenship or municipalities,[72] which would not apply to management of a federal natural resource as undertaken by a co-management group.

The GSA regulations also contain another exemption for "operational committees," which it defines as:

> Any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy. A committee designated operational may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether a committee is primarily operational. If so, it does not fall under the requirements of the Act and this part.[73]

Relying on this provision, the NMFS regional administrator for Alaska concluded in an opinion letter that the Western Alaska Community Development Quota Administrative Panel ("CDQ Panel"), which administers some aspects of a program under which western Alaska villages receive a designated portion of quotas in Bering Sea and Aleutian Islands fisheries, was not subject to FACA.[74] He reasoned that the CDQ Panel, which was established under section 416(a) of the Coast Guard and

70 16 U.S.C. § 1852(i)(1).

71 One opinion of the Office of Legal Counsel in the Justice Department makes a passing reference to "local civic groups" for purposes of FACA, concluding that Law Enforcement Coordinating Committees—groups organized in each U.S. Attorney's office to coordinate communications among federal, state, and local law enforcement officials—"could not be characterized as 'local civic groups.'" Applicability of the Fed. Advisory Comm. Act to Law Enforcement Coordinating Committees, 5 U.S. Op. Off. Legal Counsel 283, 284 n.5 (1981).

72 *See, e.g.*, Black's Law Dictionary 99 (Pocket ed. 1996, Bryan A. Garner ed.) (defining "civic" as "1. Of or relating to citizenship or a particular citizen <civic responsibilities>. 2. Of or relating to a city <civic center>").

73 41 C.F.R. § 102-3.40.

74 *See* Letter from Robert D. Mecum, Acting Administrator, Alaska Region, NMFS, to CDQ Group Executive Directors, Aug. 22, 2006, *available at* https://alaskafisheries.noaa.gov/sites/default/files/facaltr.pdf.

Maritime Transportation Act of 2006, Pub. L. No. 109-241, "has been established by statute in order to administer activities associated with the implementation of the CDQ Program's objectives" and therefore was an operational committee.[75]

Some potential activities of co-management groups, such as catch monitoring, disseminating bycatch hotspot information among the fleet, and enforcement against violators, would seem to qualify as "operational" and thus exempt from FACA. Even though these groups might be advisory to some extent, they are delegated a policy making power in a sense that the management over the fisheries is supposed to be "shared" among different local actors. Co-management groups are not "passive observers of the situation;" they fully participate (and help to improve) the management of the fisheries on the local level. However, to qualify for this exemption, the groups would need to be "specifically authorized by statute or Presidential directive." Absent direct statutory authorization for their creation, only the President can legitimately create operational committees that are exempt from FACA—an unlikely development in the fisheries context.

Whichever rationale is used to justify creating co-management groups without subjecting them to FACA, the design and operation of these groups can minimize the likelihood of legal challenges to them. For one thing, co-management groups should be as inclusive as possible, so that no stakeholders feel that they have been left out of the process. In addition, to the extent possible, the meetings and actions of the co-management groups should be public and transparent.

B. Explicit authority to accept funding from private parties could assist co-management

In some cases, fishing trade organizations or other private individuals might be willing to fund particular activities in order to improve management. For example, fishermen could believe that a certain fish population is healthier than the government claims and wish to provide funding for a particular form of data collection to provide evidence to support this conclusion.

But pursuant to the Miscellaneous Receipts Act and other authorities, agency activities generally must be funded through appropriations and no other source. As the General Accounting Office has explained:

> [a]s a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is

75 *Id.* at 2.

> telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative.[76]

The bar on augmenting appropriations could limit engagement by certain entities if money changes hands.

Certain statutes authorize specific agencies to accept contributions from states, foundations, or other private entities. The Fish and Wildlife Coordination Act,[77] for example, authorizes the Secretary of the Interior to accept contributions from private parties.[78] Similar provisions apply to the Secretary of Commerce, including section 208 of the MSA, which permits acceptance of private resources but requires distribution to the regional councils rather than use on a specific project, with each council getting at least five percent of the total resources.[79] We are unaware of any use of the authority provided in section 208.[80] Providing the Secretary of Commerce with the authority to accept contributions of private funds for specified projects could facilitate co-management by opening the door to another source of resources for efforts that private entities believe would be helpful but require NOAA Fisheries's participation.

76 3 U.S. Gov't Accountability Office, Principles of Federal Appropriations Law, at 6-162 (3d ed. 2006).

77 16 U.S.C. §§ 661-667e.

78 *Id.* § 661 (authorizing the Secretary of the Interior "to accept donations of land and contributions of funds in furtherance of the purposes" of the statute).

79 *Id.* § 1891b.

80 *See* Letter from John K. Bullard, Regional Administrator, NOAA Fisheries, E.F. "Terry" Stockwell III & Richard B. Robins, Chairs, New England Fishery Management Council, Nov. 13, 2014.

EXAMINING NEW ZEALAND AND BRITISH COLUMBIA REVEALS THE IMPORTANCE OF COOPERATIVE RELATIONSHIPS, NOT LAWS OR REGULATIONS

If we can discern no explicit legislative or generally applicable regulatory barriers to cooperative management and local regulatory barriers can be eliminated as part of the existing council process, is there a role for legislative or regulatory changes to foster cooperative management? To answer this question, we examined the legal structures of two jurisdictions known for their high levels of co-management: New Zealand and British Columbia. New Zealand is widely known and respected for its path-breaking commitment to co-management of fisheries. British Columbia has also made significant strides in implementing co-management, particularly in the Pacific groundfish fishery. This comparison reinforces the importance of bottom-up collaboration between fishing industry participants and the government as opposed to identifying any overarching legal changes that should be made to the U.S. system.

A. New Zealand: Legal changes driven by co-management participants

New Zealand presents a unique situation in comparison to other historically based management regimes because the New Zealand deepwater industry is relatively young.[81] Government regulation of the inshore industry dates back to the 1850s,[82] but most fishing in this area was governed by the indigenous Maori people, who for generations administered fishery resources within specific geographical areas. The Maori's system of fisheries management was well developed for the time. The fishing grounds were treated as the property of a particular *hapu*, or clan, with the *rangatira*, or chief, enforcing restrictions and prohibitions to protect fish stocks.[83] Indigenous people continue to play a significant role in New Zealand's fisheries.

When large foreign vessels began fishing offshore in the late 1950s, the national government increased its involvement.[84] The following decades were marked by the establishment of the 200 nautical mile EEZ and 12 nautical mile territorial sea, which lead to the "New Zealandisation" of the

81 Yandle, *supra* note 6, at 181.

82 Caroline S. Park, *More with Less: Exploring Service Delivery Models for New Zealand Marine Fisheries* 6-7 (Ian Axford (New Zealand) Fellowships in Public Policy 2012).

83 Randall Bess, *New Zealand's Indigenous People and their Claims to Fisheries Resources*, 25 Marine Pol'y 23, 25-26 (2001).

84 Park, *supra* note 83 at 7.

deepwater fisheries.[85]

By the 1980s, one effect of decades of government promotion of domestic fisheries was overcapitalization in the inshore fisheries. To address this problem, the Quota Management System (QMS) was introduced in the Fisheries Amendment Act 1986. QMS is an ITQ system that allocates rights to harvest particular amounts of fish to stakeholders and allows them to be traded.[86] Each year the Minister of Fisheries specifies what quantity of every quota species can be caught. This decision is based on scientific information provided by different stakeholders who have an interest in the fishery. The quantity of the fish that can be caught each year is referred to as Total Allowable Catch (TAC), which covers both the commercial fishing and customary Maori use of fisheries, which remains significant. Consequently, the portion of quota that is available for the QMS allocation is known as Total Allowable Commercial Catch (TACC).[87]

Originally, the aims of the QMS were to promote economic efficiency in commercial fisheries, sustainability of fishery resources, and fair and equitable allocation of access to fish resources.[88] In adopting the QMS, New Zealand shifted the focus of its fishery regulation from input controls (limits on the intensity of fishing effort) to the use of output controls (provided by direct limits on catch and landings).

The QMS evolved over time. For example, in 1990, it switched from fixed quotas to quotas expressed as a percentage of the TACC.[89] Maori rights to fishery resources were recognized in the Treaty of Waitanga (Fisheries Claims) Settlement Act 1992, which allocated to the Maori 10% of the ITQ for species added to the QMS in 1986 and 20% of the ITQ for species to be added to the QMS in the future.[90] The program also expanded from the original 26 species and 156 stocks to 97 species and 632 stocks by 2010.[91] Under the Fisheries Act 1996, certain management responsibilities are delegated to approved service delivery organizations, known as Commercial Stakeholder Organizations (CSOs)

85 *Id.*

86 *Id.* at 8.

87 New Zealand Ministry for Primary Industries, *Quota Management System*, http://fs.fish.govt.nz/Page.aspx?pk=81&tk=400 (last visited March 9, 2016).

88 Peter H. Pearse, *Building on Progress: Fisheries Policy Development in New Zealand: A Report Prepared for the Minister of Fisheries* 3 (1991).

89 Jonathan Peacey & Robin Connor, *Objectives-Based Fisheries Management: Building on 20-Years Experience with Individual Transferable Quotas*, Invited Paper Presented to the 51st Annual Conference of the Australian Agricultural and Resource Economics Society, Queenstown, New Zealand (Feb. 13-16, 2007).

90 Randall Bess, *Expanding New Zealand's Quota Management System*, 29 Marine Pol'y 339, 341 (2005).

91 Pamela Mace, Chief Scientist, New Zealand Ministry of Fisheries, *Characteristics of Successful Fisheries Management Systems: New Zealand and the U.S.* (2010).

and to an industry umbrella organization known as the New Zealand Seafood Industry Council Ltd (SeaFIC). CSOs are authorized to "carry out routine management activities, including research, while the Ministry maintains the role of setting management standards, enforcement and auditing CSO activities."[92]

The system has not been without controversies, particularly as to cost recovery, the incorporation of Maori and recreational fisheries, and delegation of research responsibilities to the industry.[93] Nevertheless, the government and industry have been able to work through these challenges and the fishery management program as a whole is regarded as a success.[94] Despite the multiple statutory amendments that have occurred since 1986, changes to the fisheries law followed the development of co-management, rather than driving that development. After the QMS began, stakeholders stopped thinking about how to bypass the law imposed on fisheries by the government and started focusing on the future impact of their actions. Consequently, the rise of this awareness led to broader participation of the stakeholders in the management of the fishery, sharing their knowledge and ultimately cooperating to manage their activities.

Arguably, it was easier to achieve this switch in stakeholders' mentality in New Zealand because of the small size of the country, which contributes to the creation of strong ties among stakeholders. The small size of the country also facilitates access to public officials, which ultimately creates a self-sustaining network in which people are able to cooperate on different issues. Consequently, as the experience of sharing the responsibility over the management of fisheries in New Zealand suggests, there is a need for a focus on developing a management regime based on people and their mutually beneficial relationships with one another.[95]

B. Canada

The cooperative management of fisheries in Canada developed in response to the problems that arise from governing most public resources. Canadian fisheries were unsustainable and often overfished. As a result, different actors including the industry, scientific community, and the public all called for more effective administration, higher transparency, and ultimately more direct involvement

92 Yandle, *supra* note 6, at 182.

93 *See* Harte, *supra* note 10; Bess, *supra* note 91; Michael Harte, *Funding Commercial Fisheries Management: Lessons from New Zealand*, 31 Marine Pol'y 379 (2007).

94 *See, e.g.*, Pamela M. Mace, Kevin J. Sullivan & Martin Cryer, *The Evolution of New Zealand's Fisheries Science and Management Systems Under ITQs*, 71 ICES J. Marine Sci. 204, 212-14 (2014).

95 Randall Bess, pers. comm., September 2014. A forthcoming paper by Dr. Bess will outline a number of international examples of co-management, including the New Zealand rock lobster fishery.

in the fishery. As they did so, "[g]overnment and the industry have developed a generally pragmatic and adaptive approach to the co-management. Greater industry responsibility is typically developed incrementally, as government gains confidence in the capacity of individual industry groups."[96]

The Fisheries Act governs the management of the fisheries in Canada and gives even more latitude to regulators than the MSA. For example, subsection 7(1) of the Act allows the Minister of Fisheries and Oceans "in his absolute discretion, wherever the exclusive right of fishing does not otherwise exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on." Section 43 also provides that the government "may" develop regulations to address a variety of issues, but does not mandate regulations for any of them. Over time, the Fisheries Act shifted management and responsibility from the Department of Environment to the Department of Fisheries and Oceans (DFO). According to the DFO, the Fisheries Act provides for "consolidating federal management of oceans and coasts" and sets forth "a framework for modern ocean management."[97] But nothing in the act specifically encourages co-management.

The first experiments with co-management in Canada occurred through limited licensing in the late 1960s. This was followed by instituting capacity control, including individual vessel quotas, which are predecessors of ITQs.[98] Cooperative management emerged with the development of a broader governance system.[99] DFO created long-term partnership agreements with certain groups, which were designed to directly participate in the management of the fishery at the local level. These partnerships are known as Joint Project Agreements (JPAs) and they constitute an additional tool for the Minister in setting quotas, permit numbers, permit prices, and other measures. The JPAs also facilitate the communication between the Government and private parties. Moreover, they are negotiated individually, which means that different conditions might apply to different JPAs. Consequently, this model is extremely flexible, allowing the adaptation of the governance structure to current needs.

British Columbia Groundfish Fishery

A successful example of co-management in Canada is the Pacific groundfish fishery in British Columbia. The groundfish sector involves seven main fisheries with combined landings of

96 R. Townsend & R. Shotton, *Fisheries Self-Governance: New Directions in Fisheries Management, in* Case Studies in Fisheries Self-Governance, *supra* note 10, at 4.

97 J. R. Wilson; *The Joint Planning Agreement Experience in Canada, in* Case Studies in Fisheries Self-Governance, *supra* note 10, at 125, 126.

98 *Id.*

99 *Id.*

about $140 million (Canadian) per year and as of 2008 involved approximately 500 vessels.[100] In combination, the result is "one of the most operationally and spatially complex fisheries in the world with over 60 species of marine fish harvested concurrently using three gear types (hook and line, trap, mid-water and bottom trawl)."[101] As in New Zealand, the changes in the administration of the fishery followed the adoption of ITQs in the groundfish fisheries in the 1990s.[102] Participants have become increasingly involved in management. For example, the fisheries are subject to strict quotas; consequently, managers and the industry agreed to increase monitoring, which led to more industry involvement and regular reports from the government on how money collected from industry is spent.[103]

Fishing allocations became a private asset, the value of which changed over time, depending on the overall value of the fishery. These assets were tradable, which also contributed to the popularity of the market-based approach. In response to the development of the market for ITQs, the industry became more and more involved in order to increase the value of the fishery. This involvement translated into a willingness to invest in science, research, and monitoring.

In the late 1990s, the fishery faced serious challenges, including significant rockfish bycatch and a lack of total mortality data for rockfish.[104] To address these problems and more general environmental and economic challenges faced by the fishery, DFO convened a stakeholder process in 2003.[105] The Commercial Industry Caucus that emerged from this process developed a Pilot Integration Proposal for the fishery in 2006, which was subsequently implemented. The elements of this program included expansion of the quota system to cover all species in the fishery; 100% at–sea monitoring coverage, either through observers or electronic monitoring; inter-fleet trading of species allocations to reduce releases of non-directed species; and individual vessel accountability for all catch, whether retained or released.[106]

Throughout the emergence of co-management and these dramatic changes in management of the groundfish fishery in British Columbia, the legal and regulatory system stayed the same. DFO's

100 Neil A. Davis, *Evaluating Collaborative Fisheries Management Planning: A Canadian Case Study*, 32 Marine Pol'y 867, 868 (2008). The seven component fisheries are dogfish, lingcod, inside rockfish, outside rockfish, trawl, halibut, and sablefish. *Id.*

101 DFO Pacific Region, *Evaluation of the Commercial Groundfish Integration Pilot Program* 1 (2009).

102 Davis, *supra* note 101, at 868.

103 Bruce Turris, pers. comm., October 2014.

104 Davis, *supra* note 101, at 869.

105 *Id.*

106 DFO Pacific Region, *supra* note 102, at 2; Davis, *supra* note 101, at 869.

discretion in regulating fisheries was sufficiently broad to accommodate all of these developments without statutory changes. In this regard, British Columbia's experience represents a slight variation from the New Zealand regime, where there have been repeated amendments to fisheries legislation, often initiated by the industry. Nevertheless, in British Columbia (and more generally in Canada as well), as in New Zealand, changes in the actual management of the fisheries arose from the inside through a gradual process helped along by rationalized management and with the support of many actors in the fishery.

CONCLUSION

Because fisheries co-management is still in its infancy in the United States, and because the U.S. fisheries regulatory regime is very detailed and prescriptive compared to some other countries, we reviewed federal law, nationwide regulations, and the fisheries management plans for selected fisheries to look for statutory or regulatory barriers to co-management. In the end, we found no absolute barriers, and the few barriers of any sort can be addressed through the council-based FMP development process.

Turning to jurisdictions where co-management has been more successful, we found that, although the development of cooperative management in Canadian and New Zealand fisheries has differed in some ways, parallels exist. Private parties have played a fundamental role in the adoption and implementation of the cooperative approach to the management of the fisheries. As a result, the moves towards co-management in both countries were fueled by individual actors rather than being imposed by the government through laws or regulations. Accordingly, the most important characteristic of the New Zealand and Canadian regimes consists of their "micro to macro" approach to co-management.

In the United States, creating incentives that will ultimately lead to higher participation of private parties in the administration of fisheries could lead to more flexible, effective, and cost-efficient management. The council structure creates opportunities to move towards co-management as it facilitates the participation of stakeholders. In fact, the MSA already encourages cooperative management by distributing some authority to local actors and by explicitly calling for cooperative research and management in section 318. The New Zealand and British Columbia examples suggest that changes to federal law and regulations are not as important as motivating private parties to take the initiative in administering the fisheries. The stakeholders' shift in mentality identified in both Canada and New Zealand has not yet emerged in the United States to the same extent, which stymies co-management of fisheries from progressing any further.

In sum, our research and analysis suggests that the legal framework is likely to follow the initiation of co-management by stakeholders, not the other way around. Amendments to the MSA may be required as co-management gains momentum, but the reauthorization of the Magnuson-Stevens Act is not going to drive the implementation of cooperative management because the only legal barriers to co-management come from local regulations, which are amended through the council process. As a result, only change from the bottom up has a real potential in producing a new structure.

Such a change is the result of a gradual process, which tends to be slow, as shown in both New Zealand and Canada. Bearing in mind that cooperative management results from a long-term process that relies on the voluntary involvement of diverse stakeholders, U.S. fisheries regulators must provide sufficient motivation so stakeholders perceive that sharing responsibility for management will not only benefit each one of them individually, but also the fishery overall, making it more stable, sustainable, and profitable.

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