

The National Sea Grant Law Center is pleased to offer the January *Ocean and Coastal Case Alert*. The *Case Alert*

is a monthly listserv highlighting recent court decisions impacting ocean and coastal resource management. Each Case Alert will briefly summarize the cases and provide a link to the opinion. Please feel free to pass it on to anyone who may be interested. If you are a first-time reader and would like to subscribe, just send an email to [waurene@olemiss.edu](mailto:waurene@olemiss.edu) with "Case Alert" on the subject line. MASGC 06-003-02

## ~ ~ February 15, 2006 ~ ~

United States Army Corps of Engineers (Corps), by its construction and maintenance of certain jetties in St. Joseph Harbor, has effected a physical taking of plaintiffs' shoreline property. In an opinion addressing only the Corps' potential liability, the Court of Federal Claims held that, to the extent that plaintiffs can establish at trial that the jetties in St. Joseph Harbor caused their erosion damage and that plaintiffs' revetments were constructed to address erosion damage so caused, the erosion damage caused by the revetments would not be merely consequential but rather a "direct, natural, or probable result" of the activities of the Corps compensable as part of plaintiffs' taking claim. Interestingly, the court refused to take judicial notice of the Michigan Supreme Court's decision in *Glass v. Goeckel*, because the Glass decision does not address the scope of the federal navigational servitude, which the Court of Federal Claims already determined "defines the boundaries within which the government may supersede private ownership interests to improve navigation."

### COURT OF FEDERAL CLAIMS

*Amber Resources Co. v. U.S.*, 2005 U.S. Claims LEXIS 347 (Fed. Cl. Nov. 15, 2005).

The court held that the 1990 amendments to the Coastal Zone Management Act breached 36 oil and gas leases off the California coast and the plaintiffs were therefore entitled to obtain restitution of \$1.2 billion in bonus payments.

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cousin testified that he never intended to possess or operate the sailboat, the insured said that he owned the sailboat, owing his cousin the purchase price, and it was not clear why that arrangement affected the insurance company's risk assessment.

Opinion available at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=1st&navby=case&no=051734>.

*Montijo-Reyes v. U.S.*, 2006 U.S. App. LEXIS 1667 (1st Cir. Jan. 24, 2006).

The Corps dredged a navigation channel and deposited the dredged material directly on a beach across from the owners' properties. The owners alleged damages from sand and dust carried from the Corps' disposal site caused by either negligent disposal site selection or negligent maintenance of the disposal site. In affirming the district court's grant of summary judgment in favor of the government, the court held that the discretionary function exception to the FTCA, 28 U.S.C.S. § 2680(a), applied to bar subject matter jurisdiction because there was no causal link between a violation of any law and the harm. The court held that the Corps made a discretionary decision to select the beach as a disposal site and made discretionary decisions to build the beach to a specific height and to protect nearby private property by installing a concrete wall and a silt fence.

Opinion available at <http://laws.lp.findlaw.com/1st/051353.html>.

### THIRD CIRCUIT

*Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., Ltd.*, 2006 U.S. App. LEXIS 2902 (3rd Cir. Feb. 7, 2006).

Appellant shipper sought review of an order from the United States District Court for the Eastern District of Pennsylvania, which dismissed the shipper's fraudulent misrepresentation action against appellee, a Chinese purchaser of steel coils. Prior to the ship's arrival in China, the purchaser of the coils petitioned a Chinese court for detention of the vessel based on its allegation that the shipper had fraudulently backdated the bill of lading. The shipper then filed this action alleging that the purchaser fraudulently misrepresented the shipper's conduct with respect to the bill of lading. The district court determined that it had subject matter jurisdiction over the action pursuant to 28 U.S.C.S. § 1333, but dismissed the case on the basis of *forum non conveniens* (inconvenient forum). On review, the court agreed that subject matter jurisdiction was present because the injury resulting from the purchaser's alleged misrepresentations occurred on navigable waters and because the activity giving rise to the shipper's claim had the requisite connection with maritime activity. However, the court went on to hold that the district court should have ascertained personal jurisdiction before engaging in a *forum non conveniens* analysis.

Opinion available at <http://caselaw.lp.findlaw.com/data2/circs/3rd/041816p.pdf>.

### FOURTH CIRCUIT

*R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2006 U.S. App. LEXIS 2321 (4th Cir. Jan. 31, 2006).

In 1987, approximately 1,800 artifacts were taken from the wreck of the Titanic to France for conservation and restoration. In 1993, a French administrator awarded title to the salvor-in-possession. The salvor-in-possession filed a motion for salvage and/or finds award. The appellate court found that it could not exercise *in rem* jurisdiction over the 1987 artifacts, and therefore it vacated the district court's order insofar as it sought to exercise that jurisdiction. The appellate court affirmed the district court's order denying the salvor-in-possession's request to seek to change its role from that of salvor-in-possession to that of a finder. The court remanded the case to the district court with the recognition that it may apply the principles of traditional salvage law to the wreck of the Titanic in a manner that served either the owner or, absent an owner, the public interest and at the same time provided an appropriate award to the salvor.

Opinion available at <http://caselaw.lp.findlaw.com/data2/circs/4th/041933p.pdf>.

### FIFTH CIRCUIT

#### Louisiana

*Giorgio v. Alliance Operating Corp.*, 2006 La. LEXIS 152 (La. Jan. 19, 2006).

The plaintiffs sued the Louisiana Department of Natural Resources for property damage and injuries the men sustained when their boat allided with an unlit, unmarked "orphaned" oilfield production platform in the Breton Sound area of the Gulf of Mexico, alleging the State's failure to light the platform in question was the proximate cause of the allision. The district court found the State 100 percent liable for the harm occasioned by the structure. The court of appeal affirmed. The Supreme Court of Louisiana held in the absence of either ownership or custody of the structure, the State had no duty to light the structure and, therefore, no liability for the harm occasioned by the unlit structure.

Opinion available at <http://www.lasc.org/opinions/2006/05C0002.pdf>.

### EIGHTH CIRCUIT

#### Minnesota

*Magnuson v. Cossette*, 707 N.W. 2d 738 (Minn. 2006).

An RV park owner claimed he had riparian rights because the courses and distances language in his deed created a boundary that extended into the marina bay. The court held that the trial court properly determined that the park owner had no riparian rights because physical landmarks prevailed over courses and distances in a deed's legal description. The court also found that the trial court had properly concluded that the marina owners had an easement implied by necessity because the haul road was used by the grantor of the two parcels beginning in 1982 and was apparent and obvious, and intended to be permanent at the time of severance. However, the court held that the trial court erred in finding that the marina owners had a prescriptive easement because they had not met the 15-year time requirement.

Opinion available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=mn&vol=apppub%5C0601%5Copa050377-0117&invol=1>.

### NINTH CIRCUIT

#### Alaska

*Brandal v. State*, 2006 Alas. LEXIS 16 (Alaska Feb. 3, 2006).

Brandal appealed from the Commercial Fisheries Entry Commission (CFEC) denial of his application for a limited entry permit to fish in the Chignik purse seine fishery. Brandal initially applied for a permit in 1977 and received a recommended decision denying his application in 1982. His application, however, was not officially denied for another 22 years. Brandal had continued to fish for the intervening 22 years on a temporary permit and he argued that his right to due process was violated by the delay. The Supreme Court of Alaska held that no conceivable burden could justify sitting on a simple permit application for over two decades. However, Brandal had not sought an order compelling the CFEC to reach a decision. The Court found that CFEC's handling of the case was inexcusable, and Brandal might have experienced significant harm, but the CFEC's delay was not the reason for his difficulties. He had ample notice that the CFEC was likely to reject his claim.

Opinion available at <http://www.state.ak.us/courts/ops/sp-5982.pdf>.

#### California

*City of Arcadia v. State Water Resources Control Board*, 2006 Cal. App. LEXIS 92 (Cal. Ct. App. Jan. 26, 2006).

Regional and state water quality boards sought to ameliorate the problem of litter discharged from municipal storm drains into a river through the adoption and approval of a planning document. Several cities alleged that the boards violated the Clean Water Act by setting the levels of permissible pollution, known as total maximum daily loads (TMDLs), at zero. The cities agreed that trash pollution had to be remedied but opposed the target of zero as unattainable and inordinately expensive. The trial court partially granted the cities' petition for writ of mandate. The Court of Appeal affirmed as to the trial court's finding that the TMDL violated the California Environmental Quality Act and as to the cities' appeal. The judgment was reversed insofar as it was based on the TMDL's lack of an assimilative capacity study, inclusion on the impaired water body list, and consideration of economic factors, and also insofar as it granted declaratory relief regarding the purported inclusion of non-navigable waters in the TMDL.

Opinion available at <http://caselaw.lp.findlaw.com/data2/californiastatecases/d043877.doc>.

*Dunn v. County of Santa Barbara*, 2006 Cal. App. LEXIS 74 (Cal. Ct. App. Jan. 25, 2006).

Property owner challenged the county's denial of owner's application to subdivide the property upon a finding that the property contained wetlands and environmentally sensitive areas. The court upheld the wetland classification because the property contained a freshwater marsh that supported several species of wetland wildlife.

Opinion available at <http://caselaw.lp.findlaw.com/data2/californiastatecases/b175149.doc>.

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