

Ocean and Coastal Case Alert



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The National Sea Grant Law Center is pleased to offer the **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. 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, send an email to waurene@olemiss.edu with "**Case Alert**" on the subject line. MASGC 09-002-09

SECOND CIRCUIT

Connecticut

Unistar Props., LLC v. Conservation & Inland Wetlands Comm'n of Putnam, 293 Conn. 93 (2009).

The Conservation and Inland Wetlands Commission (Commission) of Putnam, Connecticut rejected a developer's permit application to build a subdivision on property containing wetlands. The Commission rejected the application as incomplete, citing its lack of a detailed wildlife inventory and an analysis of alternatives to the activity. At trial, the developer argued the Commission could not require such information because its expert had determined there would be no adverse impact to the wetlands. The trial court noted that it is solely within the Commission's authority to determine whether a proposed activity would adversely impact a wetland. Additionally, the court held that the Commission had discretion whether to require such information and reject a permit application as incomplete if it does not include requested information. On appeal to the Connecticut Supreme Court, the company argued that there was insufficient evidence for the Commission to conclude there would be an adverse impact and that the trial court improperly dismissed the case. The court noted the commission did not determine whether there would be an adverse impact, only that it did not have enough information make such a determination. Additionally, the court declined to address the question of dismissal since the developer's claim was inadequately briefed.

<http://www.jud.state.ct.us/external/supapp/Cases/AROCr/CR293/293CR123.pdf>

New York

Brookhaven Baymen's Assn., Inc. v. Town of Southampton, 2009 NY Slip Op 51816U (N.Y. Sup. Ct. Aug. 21, 2009).

Five commercial fishermen filed for injunctive relief claiming a town's law requiring a permit for activities that disturb the town's bottomlands was unconstitutional because only town residents were eligible for permits. The fishermen did not live in the town and argued that the regulation violates interstate commerce laws, as well as state environmental laws. The defendants argued a right to control the town's bottomlands, citing charters granted in the Seventeenth Century by representatives of the King of England. The court held that the town did have jurisdiction over its bottomlands and could regulate activity that disturbed its private property. The court granted the town's motion for dismissal.

http://www.nycourts.gov/reporter/3dseries/2009/2009_51816.htm

FIFTH CIRCUIT

Campbell v. Royal Caribbean Cruises, Ltd., 2009 U.S. App. LEXIS 20031 (5th Cir. Sept. 8, 2009).

Lance Campbell was hired to perform as a ballet dancer for Royal Caribbean Cruises. Before he could perform on the cruise ship, he injured his foot during rehearsal and later filed suit under the Jones Act. A federal district court held that Campbell was not a "seaman" under the language of the Act. The Fifth Circuit Court of Appeals affirmed the ruling, relying on a two-part test. The first part of the test requires individuals to contribute to a vessel's mission. Campbell's duties as an entertainer were broadly construed to meet that requirement. However, the court found Campbell did not meet the second part of the test that required him to have a substantial connection in terms of duration and nature to a vessel in navigation. Campbell's connection to the "duration" was inadequate since the vessel never left port. The court held the Jones Act did not extend expectant seaman and affirmed the lower court's ruling.

<http://www.ca5.uscourts.gov/opinions%5Cunpub%5C08/08-41343.0.wpd.pdf>

SIXTH CIRCUIT

State ex rel. Merrill v. State, 2009 Ohio 4256 (Aug. 21, 2009).

An Ohio appellate court ruled that the water's edge—not the ordinary high water mark—is the boundary between lands held in trust by the state and private lakefront property. The ruling prevents the public from enjoying traditional public trust activities above the water's edge on the shores of Lake Erie in Ohio. The case originated when several landowners challenged the Ohio Department of Natural Resources' assertion of trust ownership rights up to the ordinary high water mark. A lower court held that the appropriate boundary was the water's edge. On appeal, the court examined the history of the public trust doctrine in Ohio and relevant state law, ultimately concluding that the proper legal definition of the legal shoreline is the water's edge.

<http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2009/2009-ohio-4256.pdf>

NINTH CIRCUIT

Macdonald v. Kahikolu, 2009 U.S. App. LEXIS 20162 (9th Cir. Sept. 10, 2009).

An employee of a tour boat operator was injured while performing a free dive to retrieve the boat's mooring lines. The employee filed suit under the Jones Act and argued that the employer's failure to comply with Coast Guard regulations requiring a dive manual on certain vessels contributed to his injury. The district court found that the employer was not liable. On appeal, the Ninth Circuit affirmed the district court's judgment. The court found that the regulation requiring the manual applied to scuba diving and not to free dives.

<http://www.ca9.uscourts.gov/datastore/opinions/2009/09/10/08-15239.pdf>

Hawaii

State v. Paaaina, 2009 Haw. App. LEXIS 583 (Haw. Ct. App. Aug. 28, 2009).

Duke Paaaina was convicted and fined for fishing within Waiopae Tidepools Marine Life Conservation District in violation of Hawaiian law. Paaaina appealed the conviction, arguing that there was insufficient evidence to prove he was fishing within the prohibited area. The prosecution relied primarily on testimony by a Department of Land and Natural Resources Officer stating that he witnessed Paaaina using a casting net within the border of the Conservation District. The court found that there was sufficient evidence to uphold the conviction.

<http://www.state.hi.us/jud/opinions/ica/2009/ica29584sdo.htm>

Port of Arlington v. United States Dep't of the Army, 2009 U.S. Dist. LEXIS 78115 (D. Or. Aug. 27, 2009).

In 2005, the Port of Arlington began working with the U.S. Army Corps of Engineers to build a barge docking facility along Willow Creek. The Corps granted the appropriate permits under the Rivers and Harbors Act and Clean Water Act. Subsequently, the Umatilla Tribe requested that the Port stop construction, as the sight was located on a "usual and accustomed" fishing area under an 1855 Treaty. The Port ceased construction, though at the time the \$3 million project was nearly complete. The Corps then revoked the Port's permits. The Port filed suit, arguing that the Corps' revocation was arbitrary and capricious under the Administrative Procedures Act. The Port also requested a preliminary injunction to stop the Corps from removing the project. Additionally, the Corps sought declaratory relief that the fishing grounds were not "usual and accustomed." The district court rejected the Corps' motion to dismiss regarding the "arbitrary and capricious" claim, granted the motion to dismiss the request for the preliminary injunction, and granted the Corps' motion to dismiss the declaratory relief claim.

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