

February

14
2014

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 2014 issue of *Ocean and Coastal Case Alert*.

The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management. (NSGLC-14-03-02).

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FIRST CIRCUIT

Maine

***Almeder v. Town of Kennebunkport*, 2014 ME 12 (Feb. 4, 2014).**

The Maine Supreme Court recently ruled that the public was not entitled to an easement either by prescription or custom for recreational use over wet and dry sand portions of a Maine beach. Beachfront property owners brought the action against the town of Kennebunkport and all others who claimed the right to use portions of the beach abutting their respective property. The trial court ruled in favor of Kennebunkport and interveners, non-beachfront owners and the State of Maine, awarding a public prescriptive easement and easement by custom to engage in recreational activities on the beach. The trial court also held that the public had the right to use the beach's intertidal zone for ocean-based activities pursuant to the public trust doctrine. On appeal, the Maine Supreme Court found that the non-beachfront owners were not entitled to intervene; the town did not meet the element of adversity necessary for the prescriptive easement claim; easement by custom was not recognized as a viable cause of action; and the public trust doctrine claim was premature.

[Opinion here](#)



FOURTH CIRCUIT

South Carolina

***Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 2011-197486, 2014 WL 229894 (S.C. Jan. 22, 2014).**

The South Carolina Supreme Court dismissed a complaint filed by Charleston citizens' groups alleging that Carnival Corporation and its vessel *Fantasy*, which is docked at a terminal in the city's Old and Historic District, posed a public and private nuisance and violated local zoning ordinances and the South Carolina Pollution Control Act. A report commissioned by the trial court concluded that although neither the local ordinances nor the Pollution Control Act applied, the plaintiffs made sufficient allegations on the private and public nuisance claims to proceed. The Supreme Court agreed and dismissed the noise ordinance, sign ordinance, and Pollution Control Act claims. Prior to ruling on the remaining zoning ordinances and nuisance claims, the court granted Carnival's motion to dismiss. The court decided that the plaintiffs lacked standing to bring the claim because the harms alleged by the community groups were not of a particularized or sufficient nature.

[Opinion here](#)



NINTH CIRCUIT

***Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).**

The U.S. Court of Appeals for the Ninth Circuit held that the Bureau of Ocean Energy Management's (BOEM) Environmental Impact Statement (EIS) for proposed oil and gas development leases in the Chukchi Sea off the northwest coast of Alaska violated the National Environmental Policy Act (NEPA). The court found that BOEM's estimate that one billion barrels of oil would be economical to produce from the project was arbitrary and capricious. The court found that BOEM failed to consider all environmental consequences of the proposed leasing as required by NEPA because the one billion estimate represented the low end of the potential production range, the estimate did not take into account variation in oil prices, and the estimate was based only on oil expected to be produced from the first field in the leased area as opposed to the entire field.

[Opinion here](#)

California

***San Francisco Herring Ass'n v. United States Dep't of the Interior*, 13-CV-01750-JST, 2014 WL 172232 (N.D. Cal. Jan. 15, 2014).**

The U.S. District Court for the Northern District of California denied a challenge to a National Park Service (NPS) ban on commercial herring fishing in waters off the shoreline of the Golden Gate National Recreation Area. The San Francisco Herring Association brought the suit, alleging that the NPS did not have authority to regulate the waters in question because the Department of Interior (DOI) had not acquired a property interest in those waters. The court, noting Congress's grant of authority to the NPS to regulate boating in the national park system, found that the

association did not demonstrate that Congress intended to require the DOI to acquire a property interest in the waters. The court ultimately denied the association's motion for a preliminary injunction, finding the balance of hardships did not tip sharply in the association's favor.

[Opinion here](#)

Hawaii

***Diamond v. Dobbin*, SCWC-30573, 2014 WL 285388 (Haw. Jan. 27, 2014).**

The Hawaii Supreme Court recently vacated a Board of Land and Natural Resources (BLNR) shoreline certification. The court found that the BLNR should have considered the historical evidence of the upper reaches of wash of waves when making its decision. Further, the BLNR impermissibly considered salt-tolerant plants planted on the property for purposes of demarcation. The court also found that the BLNR impermissibly disregarded expert testimony submitted by beach users.

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Oregon

***Native Fish Soc. v. Nat'l Marine Fisheries Serv.*, 3:12-CV-00431-HA, 2014 WL 199093 (D. Or. Jan. 16, 2014).**

The U.S. District Court for the District of Oregon ruled that the National Marine Fisheries Service (NMFS) violated the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) in approving hatchery genetic management plans (HGMPs) for a fish hatchery. The court found that NMFS violated NEPA through its decision not to prepare an Environmental Impact Statement and by failing to consider a reasonable range of alternatives. The court found the agency violated the ESA with its finding of no jeopardy to listed species in its biological opinion (BiOp) and its arbitrary and capricious calculation of stray rates in its incidental take statement (ITS).

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D.C. CIRCUIT

***Town of Barnstable, Mass. v. F.A.A.*, 12-1362, 2014 WL 224444 (D.C. Cir. Jan. 22, 2014).**

The U.S. Court of Appeals for the District of Columbia upheld the Federal Aviation Administration's (FAA) determination that a proposed offshore wind farm in Nantucket Sound would not pose a hazard to air navigation. The court found that the FAA's interpretation that an obstruction or an effect on air navigation was required for an analysis of the effect on visual flight aircraft was reasonable. In addition, substantial evidence supported the FAA's no hazard determination on radar systems in Nantucket Sound. Finally, the court ruled that the FAA was not required to perform a National Environment Policy Act analysis following a no hazard determination.

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FEDERAL CIRCUIT

***Banks v. United States*, 2012-5067, 2014 WL 292403 (Fed. Cir. Jan. 28, 2014).**

The U.S. Court of Appeals for the Federal Circuit held that lakeshore property owners' takings claims based on erosion were not barred by a statute of limitations. The property owners originally filed suit in the U.S. Court of Federal Claims in 1999, seeking compensation under the Fifth Amendment due to the gradual taking of their shorefront property through erosion caused by construction and maintenance of jetties on a lake. The court dismissed the case, finding it to be time barred since the project had been completed in 1989 and the statute of limitations for bringing the case was six years. The Federal Circuit disagreed, finding that the statute of limitations did not begin to accrue until effects of the project were apparent to the property owners, which was in 1999 when the U.S. Army Corps of Engineers issued an impact report on the project.

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