

February

15
2023

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 2023 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-23-03-02).

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NINTH CIRCUIT

Alaska

Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034 (9th Cir. 2023).

In 2020, the Alaskan government enacted a statute creating a limited entry program for commercial fishing. The Metlakatla Indian Community (Community) filed suit against Alaskan officials in federal district court, seeking a declaration that Congress' reservation of the Annette Islands Reserve for the Community included the right to fish in adjacent waters beyond the reservation. Additionally, the Community sought an injunction barring the Alaskan government from interfering with the Community's fishing rights. Alaskan officials filed a motion to dismiss the Community's complaint for failure to state a claim, which the district court granted. The Community appealed. The Ninth Circuit considered Congress' intent when it passed the 1891 Act establishing the Community's reservation. The court noted that Congress created the reservation with the expectation that the Community would continue to support itself through fishing for ceremonial, consumption, and commercial purposes. Further, the court stated that Congress contemplated that the Community would fish off-reservation in doing so. Accordingly, the Ninth Circuit reversed the decision of the district court and remanded the case for further proceedings.

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California

Wright v. Costco Wholesale Corp., No. 22-CV-04343, 2023 WL 210936 (N.D. Cal. Jan. 17, 2023).

The U.S. District Court for the Northern District Court of California denied Costco Wholesale Corp.'s (Costco) motion to dismiss a class action that alleged the company's "dolphin safe" representations are false, deceptive, and misleading. Costco argued that the plaintiffs' claims were preempted by the Dolphin Protection Consumer Information Act (DPCIA), which establishes federal guidelines for official dolphin safe labels and situations in which the label may or may not be used. The court noted that plaintiffs' claims do not focus on whether Costco complied with DPCIA's labeling requirements, but instead focus on whether those representations were false and misleading in violation of California law. The court held that the plaintiffs adequately alleged a heightened promise by the wholesale

club that its product is dolphin safe, above what the DPCIA requires. Accordingly, plaintiffs' claims are not federally preempted by the DPCIA. Moreover, the court held that plaintiffs satisfied Rule 9(b)'s heightened pleading requirement for fraud and sufficiently alleged that a reasonable consumer would be deceived by Costco's representations.

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Yurok Tribe v. U.S. Bureau of Reclamation, No. 19-cv-04405, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023).

The U.S. District Court for the Northern District Court of California ruled on the latest set of motions for summary judgment in the *Yurok Tribe* case involving the limited water supply of the Klamath River and the competing interests of the groups who depend on it. The winding Klamath River originates in the Oregon desert, flows through California, through the Yurok Reservation, and into the Pacific Ocean. In 1905, the U.S. Department of the Interior authorized the Klamath Project, which permits the United States Bureau of Reclamation to manage the water levels in the river and distribute water from it. In April 2021, the Oregon Water Resources Department (OWRD) ordered the Bureau to immediately stop the distribution, use, or release of stored water from the river due to critically dry hydrologic conditions. The arguments in each of the parties' motions boil down to a central issue: whether the Bureau must comply with an order from OWRD prohibiting it from releasing stored water from Upper Klamath Lake. The district court ruled that the OWRD order is preempted by the Endangered Species Act (ESA) because it stands as an obstacle to Congress's purpose and objective in enacting the ESA—protecting and restoring endangered species. Accordingly, the Bureau must comply with the ESA in operating the Klamath Project, including when it releases stored water from Upper Klamath Lake.

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Washington

Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife, et al., No. C21-169, 2023 WL 1798280

(W.D. Wash. Feb. 7, 2023).

An environmental group brought suit against the Washington Department of Fish & Wildlife (WDFW) alleging that the Skykomish Program, a fish hatchery program, violates § 9 of the Endangered Species Act (ESA), which prohibits the take of endangered species of fish or wildlife. The group further alleges that WDFW is engaged in a pattern and practice of implementing hatchery programs throughout the State of Washington that violate § 9. WDFW moved to dismiss the claims for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The court held that the claims regarding the Skykomish Program are moot because WDFW has since obtained an exemption from § 9 liability for its operation of the program and any further relief granted by the court would serve no purpose because the plaintiff's core objectives have already been met. To the extent plaintiff's claims allege unlawful take post-exemption, the court held that the group failed to state a claim upon which relief can be granted due to the purely speculative nature of the claims. The court dismissed the group's claims regarding WDFW's operation of the Skykomish Program pre-exemption with prejudice and post-exemption claims without prejudice. The court granted the plaintiff leave to amend and supplement its complaint to include alleged violations of § 9 that occurred after the initial complaint was filed. Accordingly, the group is free to incorporate its post-exemption allegations against the Skykomish Program into its Amended Complaint.

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Powers v. United States, No. C21-0517 TSZ, 2023 WL 1468478 (W.D. Wash. Feb. 2, 2023).

Michael Powers brought a negligence action against the United States under the Suits in Admiralty Act (SIAA) after his boat was hit by a rogue wave in navigable waters, causing it to sink. Powers alleges that the United States Coast Guard was negligent by declaring that Powers' vessel was not in distress after mistaking it for a different boat, resulting in a substantial delay in Powers' rescue. The United States filed a motion to dismiss the case for lack of subject matter jurisdiction, arguing that the "discretionary function" exception applies, which vitiates the waiver of sovereign immunity applicable in certain civil admiralty actions under the SIAA. Because the facts available indicate that the Coast Guard's decision to cease search and rescue efforts was due to a boat-matching mistake and was not a policy-based decision, the district court denied the United States' motion to dismiss. Additionally, Powers made a motion for partial summary judgement, requesting that the court conclude that the United States' "discretionary function" exception argument lacks merit. The district court denied Powers' motion, determining that the issue should be litigated at trial where the United States may present more evidence indicating that the Coast Guard's

actions were policy-based.

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Corcoran v. Gervais, No. C21-0001JLR, 2023 WL 316135 (W.D. Wash. Jan. 19, 2023).

Kenny Corcoran, a crew member of a fishing vessel, brought suit against Tim Gervais, the owner of the fishing vessel, for unpaid wages, negligence, and unseaworthiness. Corcoran alleged that he suffered injuries to his feet from being forced to wear wet boots and from jellyfish getting into his boots while he worked. Gervais filed a motion for summary judgment, which the court granted for Corcoran's unpaid wages claim because Corcoran conceded that Gervais had paid him all of the wages to which he was entitled. With respect to Corcoran's negligence claim, the court found that Corcoran was never forced to wear wet boots, a diesel stove was available to help dry the boots, Corcoran had plenty of dry socks, and Corcoran failed to meet his burden in showing that Gervais owed or breached any duty related to the presence of jellyfish and Corcoran's injuries. Accordingly, the court granted summary judgment in favor of Gervais on the negligence claim. Lastly, because Corcoran did not present any evidence that the fishing vessel was not fit for its intended use, the court granted Gervais summary judgment motion on the unseaworthiness claim.

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ELEVENTH CIRCUIT

Florida

Sierra Club v. U.S. Army Corps of Eng'rs, No. 8:20-CV-287-CEH-JSS, 2023 WL 334710 (M.D. Fla. Jan. 20, 2023).

The U.S. Army Corps of Engineers issued a permit to a county and the Florida Department of Transportation pursuant to § 404 of the Clean Water Act (CWA), to construct a roadway to improve mobility and evacuation routes in the county. A portion of the road would be in the Serenova Tract of the Starkey Wilderness Preserve, designated as mitigation for the impacts of the Suncoast Parkway. Environmental groups filed suit, asserting that the Corps' decision to issue the permit was unreasonable, arbitrary and capricious, not in the public interest, and otherwise not in accordance with federal law. The court rejected the plaintiffs' allegations that the permit violated the CWA and the National Environmental Policy Act. The court found that the Corps' decision to rely on a Biological Opinion from the U.S. Fish and Wildlife Service was not arbitrary or capricious. Further, the court held that the Corps' evaluation of the alternative sites' practicability in light of the overall project purpose was reasonable.

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FEDERAL CIRCUIT

Fishermen's Finest, Inc. v. United States, No. 2021-2326, 2023 WL 1807477 (Fed. Cir. Feb. 8, 2023).

The Federal Circuit Court of Appeals recently affirmed the Federal Claims Court's dismissal of several fishing companies' Fifth Amendment takings claim because they did not possess any cognizable property interests in their fishing permits, licenses, and endorsements. Central to the plaintiffs' claims is the Frank LoBiondo Coast Guard Authorization Act (Coast Guard Act), which limits the number of fish that vessels could collectively harvest and process in federally managed areas, such as the United States' Exclusive Economic Zone (EEZ). The plaintiffs alleged that the Coast Guard's limits on the number of fish that their vessels could collectively harvest and process within the EEZ amounted to an unlawful, uncompensated taking that deprived them of the full scope of its rights under its endorsements, licenses, and permits, and devalued its vessels. The court held that because there is no express language or other indication of intent to limit Congress's legislative power to determine licensing privileges under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Coast Guard Act's limitation on the companies' aggregate catch totals did not amount to any taking of compensable property. The court further clarified that fishing permits and licenses issued pursuant to the MSA are revocable privileges, rather than compensable property interests.

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