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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 2020 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-20-03-06).

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FIRST CIRCUIT

New Hampshire

Appeal of New Hampshire, No. 2018-0650, 2020 WL 2601454 (N.H. May 22, 2020).

The Corr family owned property on the shore of Lake Winnepesaukee. They planned to rebuild their partially collapsed boathouse, but after filing permits, they decided to move the structure and increase its height to 27 feet. Because of these changes, the New Hampshire Department of Environmental Services (DES) informed the Corrs that their structure was not compliant with DES regulations. After two conflicting orders from a hearing officer and the New Hampshire Wetlands Council, the Supreme Court of New Hampshire upheld the Wetlands Council's finding that DES did not have the authority to regulate the Corrs' boathouse. The court held that the plain language of the Shoreland Protection Act does not give DES the authority to restrict the height of all accessory structures, rather the law only permits regulation of "small" accessory structures. Because the Corrs' boathouse was not considered a small accessory structure, the DES 12-foot height requirement did not apply to the Corrs' boathouse.

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FOURTH CIRCUIT

Virginia

R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, No. 2:93CV902, 2020 WL 2835826 (E.D. Va. May 18, 2020).

The U.S. District Court for the Eastern District of Virginia granted a motion to modify the court's previous July 28, 2000 order prohibiting a salvage company, R.M.S. Titanic, Inc. (RMST), from cutting into or detaching any portion of the *R.M.S. Titanic* without a court order. RMST argued that new scientific evidence justified their motion to modify the previous order. With testimony from two scientists, RMST explained that the ship is significantly deteriorating around the room housing Marconi artifacts, including the equipment used to send the *Titanic's* final distress calls. The court agreed that while the deterioration is not new, the fact that it is concentrated above the Marconi Suite is a new development that was unknown to the court in 2000. The court agreed with RMST that the extent and speed of

new development that was adjacent to the court in 2007. The court agreed that the extent and speed of deterioration along with the artifact's cultural and educational importance justifies a modification of the July 28, 2000 order. Thus, RMST may minimally cut into the wreck only as necessary to access the Marconi room and retrieve the artifacts found there.

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SIXTH CIRCUIT

In re Flint Water Cases, No. 19-1425, 2020 WL 2611546 (6th Cir. May 22, 2020).

Between the years of 2014 and 2016, the City of Flint, Michigan used the Flint River as an interim water source. Residents brought a claim against the city and state officials of Flint for deprivation of bodily integrity due to illness caused from using Flint River water. The government employees filed a motion to dismiss the claims against them, arguing that they had qualified immunity. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's denial of the motion to dismiss with respect to every defendant except the State Treasurer. The court found that the majority of the defendants individually acted with deliberate indifference towards the plaintiffs, since they knew the substantial risk of harm the water from the Flint River could cause and did nothing to combat that risk. The court has remanded the case to the district court to decide whether the State Treasurer should be dismissed from the suit.

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NINTH CIRCUIT

California

Yurok Tribe v. U.S. Bureau of Reclamation, No. 19-CV-04405-WHO, 2020 WL 2793945 (N.D. Cal. May 29, 2020).

The U.S. District Court for the Northern District of California held that the Yurok Tribe failed to establish that the Bureau of Reclamation (Bureau) violated the parties' terms of the Interim Plan for the Klamath Project, which determines the level, timing, and rate of water flow in certain portions of the Klamath River. The court also denied the Tribe's motion to lift the stay of litigation. The Yurok Tribe claimed that the Bureau was in violation of the Interim Plan because the Bureau did not properly consult with the Tribe and cut off all augmented flows to the Environmental Water Account in late May. The Yurok Tribe and the Bureau had originally agreed to a reduced amount of augmented flows due to the hydrologic conditions forecast in April being above the minimum amount within the Interim Plan. However, the hydrologic forecast was inaccurate and water conditions were drier than anticipated, leaving the Bureau to reduce its augmented flows to the bare minimum. The court held that, under the Interim Plan, the Bureau is required to respond to conditions that may change rapidly (such as water conditions in the Spring) and ultimately has discretion to provide augmentation flows as it sees fit due to the water conditions.

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SLPR, L.L.C. v. San Diego Unified Port Dist., No. D074958, 2020 WL 2614622 (Cal. Ct. App. May 22, 2020).

Owners of land adjacent to the San Diego Bay brought suit against the State of California and the San Diego Unified Port District for damages to their properties allegedly caused by multiple dredging projects in the San Diego Bay. At the heart of this dispute was the boundary line between the plaintiffs' private uplands and city's public tidelands. A previous judgment in 1930 determined the Bay's mean high tide line, but plaintiffs alleged that this judgment did not permanently fix that boundary line between public and private property. The trial and appellate courts disagreed with the plaintiffs' argument, finding that the 1930 judgment and extrinsic evidence surrounding that judgment negotiated a permanently fixed boundary to the city's land. Thus, the doctrine of *res judicata* applied. Furthermore, the appellate court found that the plaintiffs failed to timely challenge the state and its involvement with the dredging projects. Therefore, the plaintiffs' claims for damages to their properties were denied.

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Oregon

McCormick v. State by and through Oregon State Parks and Recreation Dep't, 366 Or. 452 (2020).

Oregon's recreational immunity statute limits an owner's liability for injuries on its land if it directly or indirectly permits the public use of land for recreational purposes. In this case, the plaintiff was injured after entering Lake Billy Chinook through one of the state's access points. He argued that the state did not have recreational immunity because the public already had a right to recreate on the land based on the public trust doctrine, and thus, the state was liable for his injuries sustained while on the lake. The Supreme Court of Oregon disagreed, holding that creating access or developing the land for public use — as done on Lake Billy Chinook — may be considered actions taken by the owner to “permit” public use.

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Washington

Robbins v. Mason Cty. Title Ins. Co., 462 P.3d 430 (Wash. 2020).

The Washington Supreme Court held that an insurance company had a duty to defend property owners against a tribal fishing right encumbrance, and, in refusing to defend the property owners, the insurance company breached its duty. The court held that the Squaxin Island Tribe's letter to the property owners, which stated the Tribe's rights to harvest clams on their land, was a demand that the insurance company is obligated to cover. The court stated that the treaty right was a profit and, due to the ambiguity in case law regarding whether a profit is a type of easement, the court held that the insurance company acted in bad faith by giving its own interpretation of the ambiguous law. The court remanded the case to the lower court.

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ELEVENTH CIRCUIT

Florida

St. Johns Riverkeeper, Inc. v. United States Army Corps of Eng'rs, No. 3:17-CV-398-J-34MCR, 2020 WL 2735208 (M.D. Fla. May 26, 2020).

St. Johns Riverkeeper (Riverkeeper), a Florida nonprofit environmental organization, brought suit against the U.S. Army Corps of Engineers (Corps) for a dredge project in the St. Johns River. The nonprofit alleged that the Corps violated the National Environmental Policy Act (NEPA) by failing to adequately consider the environmental impacts of its dredge project. Both parties filed cross-motions for summary judgment, and the U.S. District Court for the Middle District of Florida granted summary judgment to Corps. The court found that Riverkeeper failed to demonstrate that the Corps did not follow proper NEPA procedure. The court further explained that while it agreed with Riverkeeper that the Corps could have provided additional data in parts of its environmental assessments, those deficiencies fall under agency discretion and, ultimately, NEPA procedure does not require maximum detail from agencies.

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Schultz v. Royal Caribbean Cruises, Ltd., No. 18-24023-CIV, 2020 WL 3035233 (S.D. Fla. June 5, 2020).

The U.S. District Court for the Southern District of Florida held that domestic-based employment activities for foreign vessels may be subject to the laws of the United States. The plaintiff was offered a position aboard the *Azamara Journey* as an opera singer, so long as he successfully completed a pre-employment medical examination. After failing his medical examination because of a history of major depression, Royal Caribbean revoked its employment offer. The plaintiff then brought action seeking relief under the Americans with Disabilities Act (ADA) and the Florida Civil Rights Act (FCRA). The court denied Royal Caribbean's motion for summary judgment and granted in part and denied in part Mr. Schultz's motion for summary judgment. The court only granted summary judgment for three of the claims. First, under the center of gravity test, the location of employment was domestic-based, thus, the ADA may apply if the plaintiff meets the law's requirements. Second, Royal Caribbean failed to meet its burden of establishing that the laws of Malta apply to this case instead of the ADA. Third, the plaintiff met his *prima facie* burden to present his ADA and FRCA claims to a jury.

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