Ocean and Coastal Case Alert

~ ~ November 16, 2010 ~ ~

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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. NSGLC-10-03-11

FOURTH CIRCUIT

W. Va. Highlands Conservancy, Inc. v. Huffman, 2010 U.S. App. LEXIS 23170 (4th Cir. Nov. 8, 2010).
The Fourth Circuit Court of Appeals upheld an injunction requiring the West Virginia Department of Environmental Protection (WVDEP) to obtain National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA) for reclamation efforts at abandoned coal mining sites. The WVDEP argued that it should not be required to obtain the permits, since the mining companies created the pollution. The court found that under the CWA and EPA's corresponding regulations, the permit requirements apply to anyone who discharges pollutants into the waters of the United States, and it is of no significance that a mining company may have created the conditions that called for reclamation. The court noted that the CWA contained no exceptions for state agencies engaging in reclamation efforts, but explicitly included them within its scope.
http://pacer.ca4.uscourts.gov/opinion.pdf/091474.P.pdf

North Carolina

Newcomb v. County of Carteret, 2010 N.C. App. LEXIS 2011 (N.C. Ct. App. Nov. 2, 2010).
A North Carolina appellate court has ruled that landowners along man-made Marshallberg Harbor have riparian rights, subject to easements granted when the harbor was created. The harbor was created over 50 years ago by the U.S. Army Corps of Engineers. In 2005, several landowners filed a complaint asserting their riparian rights. The trial court granted summary judgment with regard to riparian rights. On appeal, the court upheld the trial court's rulings as to riparian rights and the county's easement, but dismissed the plaintiffs' appeal of the trial court's decision as to the prescriptive easement issue. The ruling means that upland owners may wharf out into the harbor and that existing wharfs, docks, boat slips constructed by others in the community may be removed.
http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091254-1.pdf

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Virginia

United States v. Hasan, 2010 U.S. Dist. LEXIS 115746 (E.D. Va. Oct. 29, 2010).
A U.S. district court denied several defendants' motion to dismiss one count of piracy in violation of 18 U.S.C. § 1651. The defendants were taken into custody after firing at a U.S. Navy Frigate last spring. The defendants claimed that because the definition of piracy required a "taking" of property and the defendants never boarded or stole anything from the ship, they did not commit the crime of piracy. The court reviewed the international law of piracy and concluded that the crime of piracy only required acts of violence, not the actual taking of property. This is in contrast to another recent U.S. district court ruling finding that six Somali nationals who had fired on the *USS Ashland* in the Gulf of Aden did not commit piracy because the men did not rob the ship or its crew.
https://ecf.vaed.uscourts.gov/doc1/18913115577

FIFTH CIRCUIT

Mississippi

Paw Paw Island Land Co. v. Issaquena & Warren Counties Land Co., LLC, 2010 Miss. LEXIS 589 (Miss. Nov. 10, 2010).
In a claim of a prescriptive easement over land providing access to Paw Paw Island, the Mississippi Supreme Court upheld the appellate court's findings. The court agreed that the company asserting ownership was not entitled to a presumption of hostility, a required element for the prescriptive easement. Further, the court held that the disputed portion of the road was private.
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO66914.pdf

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Texas

Severance v. Patterson, 2010 Tex. LEXIS 854 (Tex. Nov. 5, 2010).
The Texas Supreme Court recently ruled on several certified questions from the U.S. Court of Appeals for the Fifth Circuit on a case regarding the enforcement of a beachfront access easement under the Texas Open Beaches Act. A property owner had challenged the state's enforcement of the easement, and the district court dismissed the case as deficient on the merits, finding that the property was subject to a rolling easement under Texas property law. On appeal, the Fifth Circuit determined that the property owner's Fifth Amendment takings claim was not ripe, but certified unsettled questions of state law to the court in order to rule on a Fourth Amendment unreasonable seizure claim. The state supreme court ruled that "Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beach Act or the common law."
http://www.supreme.courts.state.tx.us/historical/2010/nov/090387.htm

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NINTH CIRCUIT

Cook Inletkeeper v. EPA, 2010 U.S. App. LEXIS 21727 (9th Cir. Oct. 21, 2010).
The Ninth Circuit granted the Environmental Protection Agency's (EPA's) motion for a voluntary partial remand of a National Pollution Discharge Elimination System (NPDES) permit authorizing operations at natural gas and oil extraction facilities in Cook Inlet. The court granted the remand. The court agreed that the antidegradation finding was flawed because of a lack of meaningful opportunity for public comment and the public-notice requirement for NPDES permits was subject to evaluation by a federal standard.
http://www.ca9.uscourts.gov/datastore/memoranda/2010/10/21/07-72420.pdf

Akiak Native Cmty. v. United States EPA, 2010 U.S. App. LEXIS 23032 (9th Cir. Nov. 4, 2010).
Akiak Native Community and other tribes sought review of the U.S. EPA's decision to transfer authority over portions of the NPDES program to the state of Alaska. The plaintiffs argued that the state of Alaska would not provide the same opportunities for judicial review of permitting decisions and that the state would not have the enforcement tools necessary to stop permit violations. The court disagreed, finding that the state's judicial review would provide for meaningful public participation in the review process and that the state would have adequate enforcement remedies given the opportunity to sue permit violators. Additionally, the court rejected the plaintiffs' argument that the EPA's transfer of the NPDES program to the state of Alaska triggered a subsistence evaluation under Alaskan National Interest Lands Conservation Act (ANILCA), reasoning that the EPA does not have primary jurisdiction over public lands in Alaska.
http://www.ca9.uscourts.gov/datastore/opinions/2010/11/04/08-74872.pdf

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Hawaii

Malama Makua v. Gates, 2010 U.S. Dist. LEXIS 114575 (D. Haw. Oct. 27, 2010).
A U.S. District court ruled on several cross motions for summary judgment in a case regarding the effects of military training with live ammunition at the Makua Military Reservation (MMR) in West Oahu, Hawaii. The court examined whether the Army's subsurface archaeological and marine resources studies complied with two settlement agreements reached in 2001 and 2007. With regard to both issues, summary judgment was granted in part to each party. Summary judgment was granted in favor of the Army with respect to the 2001 settlement agreement and on Malama Makua's claim that the general procedures used in the marine resource survey were deficient. Summary judgment was granted in favor of Malama Makua on its claim that the survey was not meaningful in two respects. On the remaining issues raised by the motions, summary judgment was denied to both parties, given the numerous questions of fact surrounding the Army's obligation to test marine resources on which area residents rely for subsistence.
https://ecf.hid.uscourts.gov/doc1/06111185904

Oregon

Columbia Riverkeeper v. Clatsop County, 2010 Ore. App. LEXIS 1294 (Or. Ct. App. Nov. 3, 2010).
An Oregon appellate court overturned a county ordinance amending a comprehensive plan to allow construction of a liquefied natural gas (LNG) project. The Land Use Board of Appeals (LUBA) had remanded the ordinance to the county. Two companies seeking to build the project challenged LUBA's decision. The court ruled that further findings were needed with regard to the ordinance and held that the county's interpretation of the acreage of development activities, which excluded areas temporarily disturbed by construction activity and an area to be dredged, was inconsistent with the express language of the plan policy under Or. Rev. Stat. § 197.829(1)(a).
http://www.publications.ojd.state.or.us/A145336.htm

Washington

Lummi Indian Nation v. State, 2010 Wash. LEXIS 921 (Wash. Oct. 28, 2010).
The Washington Supreme Court rejected a challenge to 2003 amendments to the state's municipal water law (MWL). Several Indian tribes had alleged that sections of the amendments were unconstitutional. The legislature enacted the amendments in response to a state supreme court opinion, *Department of Ecology v. Theodoratus*. The amendments defined certain nongovernmental water suppliers as municipal and made that definition retroactive. The tribes argued that the legislature's actions violated separation of powers, and a lower court agreed. On appeal, the state supreme court reversed that decision, finding that "the Legislature approached its legislative task both thoughtfully and with deference to the court's construction in *Theodoratus*. It adopted [the] court's holding prospectively." Finally, the court found that the legislature did not overstep its role and adjudicate facts when it made the water right retroactive.
http://www.courts.wa.gov/opinions/pdf/818096.opn.pdf

DC CIRCUIT

In re Polar Bear Endangered Species Act Listing & § 4 Rule Litig., 2010 U.S. Dist. LEXIS 117439 (D.D.C. Nov. 4, 2010).
After the U.S. Fish and Wildlife Service (FWS) issued its final rule listing the polar bear as a "threatened" species under the Endangered Species Act, several groups filed suit challenging the listing rule under the ESA and the APA. Some of the groups argued that the polar bear was not qualified for protection under the Act, while others argued that the polar bear should have been listed as endangered. The court remanded the listing rule to the FWS, noting that the agency failed to acknowledge ambiguities in the definition of an endangered species.
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008mc0764-236
