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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 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-20-03-01).

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FIRST CIRCUIT

Portland Pipe Line Corp. v. City of S. Portland, No. 18-2118, 2020 WL 113390 (1st Cir. Jan. 10, 2020).

The Portland Pipe Line Corporation (PPLC) challenged a City of South Portland ordinance (known as the "Clear Skies Ordinance") that prohibited the bulk loading of crude oil onto vessels in the city harbor. The ordinance essentially prevents PPLC from moving oil from Canada to South Portland through a system of underground pipelines. A federal district court dismissed the case. On appeal, appellants argued that state law preempts the ordinance and the ordinance violated federal constitutional law. The U.S. Court of Appeals for the First Circuit noted that the dispute raised important state law preemption and statutory interpretation questions that lacked controlling precedent. The court therefore declined to rule on the federal questions and certified three questions concerning state law to the Maine Supreme Judicial Court.

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NINTH CIRCUIT

Columbia Riverkeeper v. Wheeler, 944 F.3d 1204 (9th Cir. 2019).

Environmental groups brought a Clean Water Act (CWA) suit against the U.S. Environmental Protection Agency (EPA) to require the agency to issue a temperature Total Maximum Daily Load (TMDL) for the Columbia and Snake Rivers. The plaintiffs alleged that inaction by Washington and Oregon resulted in a constructive submission of no temperature TMDL. Under the CWA, when states do not submit a TMDL, the EPA is required to issue its own TMDL. The U.S. District Court for the Western District of Washington granted the plaintiffs' motion in part. On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed that Washington and Oregon made constructive submissions of no temperature TMDL; therefore, the EPA violated the CWA by failing to issue a temperature TMDL for the rivers.

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Muckleshoot Indian Tribe v. Tulalip Tribes, 944 F.3d 1179 (9th Cir. 2019).

In proceedings adjudicating treaty-reserved fishing rights in Washington, the Muckleshoot Indian Tribe sought to acquire additional usual and accustomed fishing grounds and stations (U&As) in the saltwater of Puget Sound. Other tribes involved moved to dismiss the subproceeding. The U.S. District Court for the Western District of Washington found that it lacked subject matter jurisdiction to hear the matter, because the Muckleshoot's U&As in the saltwater of Puget Sound had been established in a previous order. The Ninth Circuit affirmed.

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San Francisco Herring Ass'n v. Dep't of the Interior, No. 18-15443, 2019 WL 7342999 (9th Cir. Dec. 31, 2019).

A Ninth Circuit panel ruled that the San Francisco Herring Association could proceed with a challenge to the National Park Service's (NPS) authority to prohibit commercial fishing in the Golden Gate National Recreation Area. Another Ninth Circuit panel had previously dismissed the association's claim, finding that the NPS had not taken a "final agency action" under the Administrative Procedure Act since the agency had not issued rules against herring fishing in the area. The association appealed with an amended complaint, arguing that the NPS's enforcement of the ban in the area starting in 2013 was a "final agency action" that could be challenged in court. The Ninth Circuit panel agreed and held that the association adequately pled a "final agency action."

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California

Ctr. for Biological Diversity v. Ross, No. 4:19-CV-03135-KAW, 2019 WL 7020195 (N.D. Cal. Dec. 20, 2019).

Two environmental groups challenged the National Marine Fisheries Service's issuance of a permit that would allow two vessels to engage in commercial longline fishing in federal waters off the coast of California. The plaintiffs contended that the permits were issued in violation of the Endangered Species Act and the National Environmental Policy Act and threatened the endangered Pacific leatherback sea turtles and other endangered species. The U.S. District Court for the Northern District of California agreed and vacated the permits, finding that the agency's actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

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Inst. for Fisheries Res. v. Hahn, No. 16-CV-01574-VC, 2019 WL 6907079 (N.D. Cal. Dec. 19, 2019).

Several organizations challenged the U.S. Food and Drug Administration's (FDA's) authority to regulate the genetic engineering of animals, as well as the process by which the agency approved genetically modified salmon. The U.S. District Court for the Northern District of California addressed the broader issue of whether the FDA has authority to regulate the genetic modification of animals. The court noted that the FDA did have the authority to regulate under the plain language of the Food, Drug, and Cosmetic Act. The court will address the process the agency used to authorize the genetically modified salmon in a separate decision.

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ELEVENTH CIRCUIT

Alabama

Ex parte Aladdin Mfg. Corp., No. 18-5353, 2019 WL 7198513 (D.C. Cir. Dec. 27, 2019).

Several local government water works and sewer boards brought suit against carpet and chemical companies, claiming that the companies discharged toxic chemicals into industrial wastewater from their out-of-state plants that consequently contaminated downstream water sources in Alabama. A trial court and appellate court denied the companies' motion to dismiss for lack of personal jurisdiction. The companies sought writs of mandamus from the Alabama Supreme Court. The court held that the trial court did lack personal jurisdiction over several of the defendants; however, personal jurisdiction existed for the remaining defendants.

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D.C. CIRCUIT

Massachusetts Lobstermen's Ass'n v. Ross, No. 18-5353, 2019 WL 7198513 (D.C. Cir. Dec. 27, 2019).

In 2016, President Barack Obama designated the Northeast Canyons and Seamounts Marine National Monument under the Antiquities Act. Several commercial fishing groups challenged the designation on several grounds: the Antiquities Act did not apply to submerged lands; the Monument was not compatible with the National Marine Sanctuaries Act (NMSA); the Exclusive Economic Zone (EEZ) was not controlled by the federal government and therefore the president was not empowered to designate a monument in the EEZ; and the designated area was not the smallest-area compatible with management. The U.S. District Court for the District of Columbia dismissed the action. On appeal, the D.C. Circuit upheld the designation. The court cited U.S. Supreme Court precedent that the Antiquities Act reaches submerged lands. Further, NMSA did not preclude the application of the Antiquities Act. The court also held that the federal government exercised sufficient authority to control the EEZ. Finally, the court rejected the smallest-area claim, as the plaintiffs failed to identify which portion of the Monument lacked the natural resources and ecosystems the President sought to protect.

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FEDERAL CLAIMS

In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, No. 17-9001L, 2019 WL 6873696 (Fed. Cl. Dec. 17, 2019).

The U.S. Court of Federal Claims ruled that the federal government is liable to thirteen private property owners in Houston for flooding from two federal dams following Hurricane Harvey. In ruling on whether the flooding amounted to a taking, the court weighed several factors outlined in a U.S. Supreme Court decision, *Arkansas Game and Fish Commission v. United States*. The court examined the time and duration of the flooding, the severity of the damage, the benefit the government received at the expense of the property owners, the foreseeability or intent of the flooding, and the reasonable investment-backed expectations of the property owners. After looking at each factor, the court concluded that the flooding constituted a taking.

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