

Ocean and Coastal Law Memo

OCEAN AND COASTAL LAW CENTER • SCHOOL OF LAW • UNIVERSITY OF OREGON • EUGENE 97403

Issue 35 July 1990

Recent Developments in Ocean and Coastal Law, 1989

I. Oil Spill Legislation

A. Compensation funds

H.R. 3394, a composite oil spill bill introduced in October 1989, would substantially increase federal liability limits for oil spills and create a federal compensation fund offering \$1 billion per incident for cleanup and resource damage costs not paid for by the spiller.

It is unclear exactly how the \$1 billion compensation fund will be financed. Under the 1986 Budget Reconciliation Act, passage of oil spill legislation would trigger a 1.3 cent per barrel tax, activating a \$300 million compensation fund. Sponsors of H.R. 3394 are seeking support for a 5 cent per barrel tax to finance the compensation fund.

The House bill limits preemption of state laws. State compensation funds, state taxes to finance those funds, and state laws regarding personal injury or wrongful death actions are not affected. H.R. 3394 directs that

except as allowed in its provisions, "no action arising out of a discharge of oil may be brought in any [state court]." The Senate version does not preempt state law.

In addition, H.R. 3394 sets forth how the 1984 International Maritime Organization protocols will be implemented, preparing for U.S. participation in the international liability and compensation system.

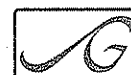
Title III of H.R. 3394 states that "during any period in which the Civil Liability Convention and Fund Convention are in force with respect to the United States" the international liability limits would govern incidents to which the Convention applies. To meet compensation requirements arising under domestic law that exceed the international liability limits, the International Fund would automatically "indemnify and defend" the shipowner responsible for the spill. H.R. 3394 recognizes the International Fund as a legal person under U.S. law.

The 1984 protocols quadrupled both the 1969 international liability limit under the International Convention on Civil Liability for Oil Pollution Damage and the 1971 compensation fund under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

In discussions of oil spill legislation, federal officials are expected to consider whether double bottoms or double hulls would prevent disasters like the Exxon Valdez spill in Alaska.

B. Preemption

In November, the U.S. House of Representatives voted not to preempt state oil spill laws, reversing its historical stand and removing an obstacle that blocked enactment of comprehensive oil spill liability and compensation legislation. The House approved its comprehensive oil spill bill, H.R. 1465. The Senate earlier approved a similar bill, S. 686. The bills then went into conference.



II. Wetlands

A. *Memorandum of Agreement recognizes no net loss goal*

A February 7, 1990, Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of the Army concerns the level of mitigation necessary to comply with the Section 404(b)(1) Guidelines of the Clean Water Act. The February MOA modifies a November 15, 1989 agreement. 55 Fed. Reg. 5510 (1990). Section 404 and the MOA recognize the federal government's goal of no net loss of wetlands but do not establish a no net loss policy. The MOA expressly recognizes that no net loss may not be achieved in every permit approved and compensatory mitigation may not be required if it is not practicable (as defined by Section 230.3(q) of the Section 404(b)(1) guidelines), feasible, or would result in only inconsequential environmental benefits. For example, in areas where wetlands are prevalent, minor wetland losses may not require offsite compensatory mitigation. Factors in determining whether to require compensatory mitigation include: the nature of the wetlands, cumulative effects on the watershed or ecosystem, and whether wetlands in the contiguous area are protected through public ownership or permanent easement. The MOA does not change existing Section 404(b)(1) requirements or establish new ones. It is intended to guide agency personnel on the type of mitigation required to comply with the Clean Water Act and must be adhered to when considering mitigation requirements for standard permit applications.

In addition, the President charged the Domestic Policy Council, through its Inter-Agency Task Force on Wetlands, with recommending ways to attain no net loss. The task force will hold public meetings around the country to solicit views on how to achieve no net loss of wetlands. The MOA will then be reconsidered after a comprehensive no net loss policy is developed.

Under the modified MOA, the determination of what type of mitigation is "appropriate" must be based solely on the values and functions of the affected aquatic resource.

On January 19, 1989, the EPA and Army issued a MOA concerning the geographic jurisdiction of the Section 404 program. Under the MOA, the Corps will continue to perform the majority of the geographic jurisdictional determinations and determine applicability of Section 404(f) exemptions.

B. *San Francisco Bay*

The Ninth Circuit recently held that the Army Corps of Engineers' jurisdiction under Section 404 of the Clean Water Act extended to wetlands created, in part, by state and federal action. The court held that the Corps' jurisdiction does not depend on how the property at issue became water of the United States. The Corps had the authority to require Leslie Salt, the owner of 153 acres south of San Francisco, to obtain a permit before draining and filling the wetlands even though they were created artificially by third persons. The court stated that if the Corps' regulatory activities under the Clean Water Act harm a landowner, the appropriate

remedy is to seek damages through inverse condemnation proceedings. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. Feb. 6, 1990).

C. *Filling wetlands for a golf course*

A citizen's challenge to filling 11 acres of wetlands for a golf course was denied recently in Sylvester v. Army Corps of Engineers, 882 F.2d 407 (9th Cir. 1989). The court said the Army Corps of Engineers properly evaluated the golf course's benefits and sufficiently considered possible alternative sites.

In addition to the golf course, the planned development includes a ski run and resort village. The court said the developer's plan to build the golf course in a meadow with wetlands did not turn the entire resort complex into a major federal action.

D. *Restoration orders and penalties*

The federal district court for the Southern District of Florida said it would cancel a \$250,000 fine imposed on a developer who illegally filled wetlands if the developer deeded its two-acre pond to a charitable organization which would maintain the wetlands.

Following a successful civil enforcement action by the United States against the developer, Key West Towers, the parties agreed to a plan to return the wetlands to their natural state by restoring historic elevations, replanting mangrove or buttonwood trees, and taking other actions.

From 1984 to 1987, Key West Towers filled wetlands

without a permit from the U.S. Army Corps of Engineers. Although the Clean Water Act provides for a penalty of up to \$10,000 per day for each violation of 33 U.S.C. Section 1311 before February 4, 1987 and up to \$25,000 per day for each violation after that date, the United States only sought a \$250,000 fine. Because of the parties' primary concern with protecting the pond and providing a habitat for birds and other wildlife, the court gave the developer the option of deeding the pond and a 50-foot buffer zone around it to a charity in fee simple absolute. U.S. v. Key West Towers, 720 F. Supp. 963 (S.D. Fla., Aug. 10, 1989).

E. Property takings in wetlands protection

The United States Claims Court recently found that plaintiff's action against the federal government for taking property without compensation was ripe after the U.S. Army Corps of Engineers clearly indicated it would deny plaintiff's Section 404 dredge and fill permit application regardless of whether the state approved the application. Ciampetti v. U.S., 18 Cl. Ct. 548 (1989).

In March, 1983, plaintiff Robert Ciampetti began dredging and filling wetlands on his Diamond Beach, New Jersey, property without applying for state or federal permits. He claimed, in a subsequent state quiet title action, that a 1907 riparian grant gave him the absolute right to dredge and fill without permits. Of the 573 lots Ciampetti wanted to develop, approximately 206 were federal wetlands and 167 of those 206 were also state wetlands.

After Ciampetti filed for a federal permit, the Corps told him his project must be consistent with the state's Coastal Zone Management Program (CZMP). Under its regulations, the Corp must deny permit applications where independent state authorization is still required. The state then rejected Ciampetti's plan as inconsistent with the CZMP. The Corps wrote Ciampetti a letter indicating it would deny the federal permit application and Ciampetti filed suit, claiming the Corps' denial was a taking.

In denying the United States' motion to dismiss Ciampetti's action, the court stated that the Corps' letter was based on the merits of Ciampetti's proposal independent of New Jersey's permit denial, because the Corps made it clear it would deny the permit regardless of whether the plaintiff had the necessary state approvals.

In rejecting the government's argument that serious health effects that would result from plaintiff's project triggered the "nuisance exception" to the Fifth Amendment, the court cited two cases that suggest the nuisance argument does not apply in Section 404 takings. In Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), the Federal Circuit weighed public and private interests and found the private interest deserved compensation. The Claims Court, in Love-ladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 389 (1988), found the Corps' denial of a 404 permit application rendered housing development on the land unacceptable per se and found the public interest in preserving

wetlands did not outweigh the private interest in developing housing.

In another case, the Court of Claims permitted review of plaintiffs' claim that the Corps denial of their 404 permit application deprived them of all reasonable beneficial use and enjoyment of their property. Plaintiff claimed the denial constituted a fifth amendment taking. Plaintiffs owned 112 acres, approximately 100 acres of which were wetlands. They applied for a Section 404 permit under the Clean Water Act to fill wetlands on their property and build an access road and develop lots. Formanek v. United States, 18 Cl. Ct. 785 (1989).

F. Shorefront development

Shorefront homeowners are permitted to level the top of a sand dune in front of their homes because the activity is considered "beach nourishment" under the state wetlands protection program. Roberts v. Dep't of Env'tl Qual. Eng., 537 N.E.2d 154 (Mass. 1989).

The Florida Department of Environmental Regulation violated the Warren S. Henderson Wetlands Act by failing to specify what changes the applicant must make to receive a state dredge and fill permit to restore sand to an eroded beach adjacent to their condominium project. 1800 Atlantic Developers v. DER, 551 So. 2d 946 (Fla. Ct. App. 1989).

The government is not estopped from requiring a Section 404 permit for fill and sea wall construction although the landowner relied on an oral misstatement by a Corps official. The court in U.S. v. Boccanfuso,

No. 902 (2d Cir. Aug. 9, 1989) said the landowner's reliance was unreasonable given numerous correct oral and written Corps statements.

G. North American Wetlands Conservation Act

In an effort to encourage public agencies and others to protect, restore, and manage wetlands for migratory birds, fish, and other wildlife, Congress passed the North American Wetlands Conservation Act of 1989, Pub. L. No. 101-233, 103 Stat. 1968.

The Act establishes a nine-member, unpaid North American Wetlands Conservation Council to recommend wetlands conservation projects for federal funding. The council is required each year to submit to the Migratory Bird Conservation Commission, established by the Migratory Bird Conservation Act, descriptions and estimated costs of wetlands conservation projects in order of priority for the conservation commission to approve for federal funding.

Council members will be the director of the U.S. Fish and Wildlife Service, the secretary of the board of the National Fish and Wildlife Foundation, four people appointed by the Secretary of the Interior who are directors of geographically-dispersed state fish and wildlife agencies, and three representatives of nonprofit organizations active in wetlands conservation, appointed by the secretary.

H. Judicial review of cease and desist orders

Two decisions by the federal district court in Virginia denied

judicial review of cease and desist orders under Section 404 of the Clean Water Act. The court held it lacked jurisdiction to hear a challenge by developers to a U.S. Army Corps of Engineers' order requiring them to cease filling wetlands in Fiscella and Fiscella v. U.S., 717 F. Supp. 1143 (E.D. Va. Aug. 10, 1989). In another decision, the same court held it lacked jurisdiction over a developer's challenge to an EPA cease and desist order. Southern Pines Assoc. v. U.S., No. 89-453-N (E.D. Va. Aug. 11, 1989).

III. Fisheries

A. Magnuson Fishery Conservation and Management Act (MFCMA)

A fishing cooperative's challenge to groundfish quotas established by the North Pacific Fishery Management Council was dismissed. The challenge by the cooperative, which harvested Bering Sea groundfish, was barred because the 90-day statute of limitations expired and the cooperative had administrative avenues. Midwater Trawlers Co-op v. Mosbaucher, 727 F. Supp. 12 (D.D.C. 1989).

The Maine Supreme Judicial Court recently interpreted an MFCMA provision that permits states to regulate state "registered" vessels offshore beyond state boundaries under certain circumstances. Maine does not register vessels for purposes of its fisheries laws but issues fisheries licenses to individuals. The Maine court held that "registered" does not include state licensing of individual operators of the vessel. Maine v. Cyrus Lauriat, 561 A.2d 496 (Me. Sup. Ct. July

12, 1989). The court stated that Maine's lobster trawling ban was not preempted by the MFCMA if the fishing vessel is registered under Maine's laws. Because the fishing vessel in the case, F/V Elizabeth, was not literally registered in the state and fisherman Cyrus Lauriat's commercial fishing license did not qualify as a vessel registration under the Act, and because the state did not show that Lauriat had a federal lobster permit, the court held that the MFCMA preempted state law and the state was precluded from enforcing its lobster trawling ban against Lauriat.

B. State limit on fishing vessel length unconstitutional

A New York law limiting the length of fishing vessels to 90 feet violates the U.S. Constitution's Commerce Clause because the law prevents access to New York waters by out-of-state fishermen and New York failed to show the law promoted environmental protection. Atlantic Prince, Ltd. v. Jorling, 710 F. Supp. 893 (E.D.N.Y. 1989).

C. Regulations for U.S. fishing in Soviet waters

The National Marine Fisheries Service (NMFS) under the Department of Commerce recently issued regulations governing U.S. nationals and vessels fishing in the 200-mile Soviet economic zone. The regulations impose U.S. penalties for fishing in Soviet fisheries without a Soviet permit, violating the Soviet permit or Soviet laws or regulations, and harassing, capturing, or killing marine mammals in the Soviet economic zone. 54 Fed. Reg. 29,896 (1989) codified at 50 C.F.R. 299.

D. Chinook salmon in Sacramento River threatened

NMFS listed winter-run chinook salmon as threatened under the Endangered Species Act after the California Department of Fish & Game estimated the 1989 return of winter-run chinook salmon to the Sacramento River at more than 75% below the consistent run size in recent years of 2,000 to 3,000 fish. In addition, the NMFS designated the Sacramento River from Red Bluff Diversion Dam to Kesmick Dam as critical habitat.

E. Driftnets

Commerce Secretary Robert Mosbacher on June 29, 1989, found Taiwan and South Korea violated the 1987 Driftnet Act. The Act imposed a June 29, 1989 deadline for agreement between the United States, Japan, Taiwan, and South Korea on the use of driftnets which can stretch for hundreds of miles and catch not only squid and tuna but U.S. and Canadian-spawned salmon and also drown dolphins and other marine mammals and sea birds. By the deadline, the U.S. State Department reached tentative agreement with Japan but not with Taiwan and South Korea. Under the Packwood-Magnuson and Pelly amendments, the President may embargo the sale of Taiwanese and South Korean fish to the U.S. and impose other sanctions. If the President chooses not to impose an embargo, under the Pelly Amendment he must explain his reasons to Congress. Agreements subsequently were reached with all three nations.

In addition, H.R. 2061, a four-year reauthorization of the

Magnuson Fishery Conservation and Management Act, includes a provision to ban high seas drift-nets in U.S. waters. It passed the House Merchant Marine Committee in October, 1989. The committee also called for international negotiations to end driftnet fishing overseas.

F. State statute prohibiting shrimp fishing in federal waters unconstitutional

A Florida shrimp fisherman successfully challenged the constitutionality of a state statute prohibiting shrimping in an area outside state territorial waters. In Bateman v. Garder, 716 F. Supp. 595 (S.D. Fla. 1989), the court held the statute: 1) violated the Equal Protection Clause because it prohibited Florida shrimpers from fishing in an area where other shrimpers were allowed, and 2) was preempted by a federal law that permitted shrimping in the same area.

In 1957, the Florida legislature prohibited shrimp trawling in the Tortugas Shrimp Beds, an area surrounding the Dry Tortugas off the Florida Keys in the Gulf of Mexico. A large portion of the shrimp beds was beyond Florida's state territorial limit. In 1981, the Secretary of Commerce created the Tortugas Shrimp Sanctuary, an area in the Exclusive Economic Zone (EEZ) outside Florida's territorial limit, and prohibited shrimp fishing there.

The federal shrimp sanctuary and state designated beds overlapped, but a portion of the state beds beyond the territorial limit and within the EEZ was not included in the federal shrimp sanctuary. This was the disputed area where federal law permitted

shrimping while Florida law prohibited it.

G. Treaty fishing rights

A complaint brought by commercial fishermen, who lost their Great Lakes fishing rights because of superior Indian aboriginal rights, was dismissed. The fishermen claimed breach of contract, violation of the equal protection clause, and a property taking without just compensation. A federal district court dismissed the case because a state Department of Natural Resources recommendation to compensate the fishermen was not a contract, the fishermen's rights to fish were inferior to tribal rights, and there was no property taking. Bigelow v. Michigan Dep't of Natural Resources, 727 F. Supp. 346 (W.D. Mich. 1989).

H. Subsistence fishing rights

An Alaskan statute granting a preference to rural residents who take fish and game for subsistence was held unconstitutional because the Alaska Constitution prohibits exclusive or special privileges for the taking of fish and wildlife. McDowell v. State, 785 P.2d 1 (Alaska 1989).

IV. Water Pollution

A. Oil discharges

Because Clean Water Act section 1321(f)(1)(10) is causation-based, not fault-based, a shipowner's lack of negligence in connection with oil discharge from his vessel does not preclude him from liability for cleanup costs under the act. United States v. West of Eng. Ship

Owner's Mutual Protection & Indemnification Ass'n, 872 F.2d 1192 (5th Cir. 1989).

B. Nonpoint source pollution

On June 2, 1989, EPA issued a final rule requiring states to identify polluted waters and prepare control strategies for those affected waters. 40 C.F.R. Parts 122, 123, 130.

The California Water Resources Control Board has authority to enforce an erosion control plan for nonpoint sources of water pollution via a waste discharge permit system under the state water code. Tahoe-Sierra Preservation Council v. State Water Resources Control Board, 259 Cal. Rptr. 132 (Cal. App. 1989).

C. Ocean dumping

1. National Environmental Policy Act (NEPA)

The Second Circuit vacated an injunction issued by a federal district court barring the U.S. Army Corps of Engineers from issuing permits for dumping dredged material in Long Island Sound. The court said NEPA violations did not necessarily constitute irreparable injury and remanded the case to the district court to determine whether plaintiff met its burden of establishing actual or threatened environmental injury at the site. Town of Huntington v. Marsh, No. 1196 (2d Cir. Aug. 14, 1989).

2. MARPOL enforcement

The Coast Guard recently revised its rules requiring certain oceangoing U.S. commercial and recreational ships to keep records of garbage discharges, maintain

waste management plans, and post informational placards. 55 Fed. Reg. 18,578 (1990).

3. Port of Oakland

In an action brought by a fishing association to enjoin ocean dumping in Half Moon Bay, the Ninth Circuit Court of Appeals held that the Army Corps of Engineers complied with the NEPA and affirmed the district court's decision to deny the association's request for a preliminary injunction. Half Moon Bay Fisherman's Marketing v. Carlucci, 857 F.2d 505 (9th Cir. 1988). The fishing association and individual fishermen challenged the decision by the Corps and Port of Oakland to deepen Oakland's Inner Harbor Channel by dredging and dumping 500,000 cubic yards of dredged materials from the channel into the ocean off Half Moon Bay. The Ninth Circuit noted that a district court will only set aside agency action if the agency fails to observe NEPA procedures or acts arbitrarily or capriciously.

In this case, the Corps observed proper procedures by incorporating EPA suggestions into its final decision, providing plaintiffs with both notice and opportunity to comment on proposed dumping sites, and did not abuse its discretion, so a preliminary injunction was not warranted. The court also said plaintiffs failed to prove dumping would cause economic loss or harm fish or crab. The court said failing to deepen the Port of Oakland would cause economic loss.

V. Other Federal Statutes

A. NEPA

Two recent United States Supreme Court opinions reduce the usefulness of NEPA in ocean management.

An Environmental Impact Statement (EIS) need not contain a fully-developed plan to mitigate environmental harm or a "worst case" analysis of potential environmental harm if information necessary for such an analysis is unavailable or too expensive. Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989).

In addition, a decision by the Army Corp of Engineers not to prepare a second supplemental EIS concerning the impacts of dam construction on downstream turbidity was held to be not arbitrary or capricious and to be based on careful scientific analysis. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989). Thus, the Supreme Court apparently resolved a split between the circuits over the proper standard of review for NEPA decisions. The First, Second, Fourth, Seventh, and D.C. circuits applied an arbitrary and capricious standard. The Fifth, Eighth, Ninth, Tenth, and Eleventh circuits applied a reasonableness standard. In ruling that the arbitrary and capricious test applies to NEPA decisions, at least those evaluating the narrow question of whether a final EIS needs to be supplemented, Justice Stevens noted that, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic significance."

In another NEPA case, a Washington state federal district court held that the Navy must comply with NEPA before deploying bottlenose dolphins at the Bangor Submarine base in Puget Sound. Progressive Animal Welfare Soc. v. Dep't of the Navy, 725 F. Supp. 475 (W.D. Wash. 1989).

B. Outer Continental Shelf Lands Act

The Ninth Circuit Court of Appeals recently held that the federal government's paramount interest in oil and gas leasing on the Outer Continental Shelf subordinates, but does not extinguish, aboriginal subsistence hunting and fishing rights. People of the Village of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989).

On remand, the Ninth Circuit said the district court must decide: first, whether the native villages possess aboriginal subsistence rights in the Outer Continental Shelf; second, if so, whether oil and gas drilling will significantly interfere with those rights; and, third, whether the Outer Continental Shelf Lands Act--which extended federal jurisdiction to the Outer Continental Shelf--extinguishes subsistence rights in the Outer Continental Shelf as a matter of law. The court did not rule out the possibility that Alaskan natives may have aboriginal rights to offshore resources.

Alaskan natives challenged Outer Continental Shelf oil and gas development, claiming it would adversely affect their aboriginal right to subsistence hunting and fishing.

The court found that the United States had exerted sufficient control over the Outer Continental Shelf constituting sovereignty and requiring recognition of aboriginal rights. The court said the Alaska Native Claims Settlement Act, which extinguishes certain aboriginal titles, applies to the geographical boundaries of the state but does not apply to the Outer Continental Shelf.

C. Marine Mammal Protection Act

The National Oceanic and Atmospheric Administration (NOAA) issued an interim rule on May 19, 1989, granting a five-year exception to the rule prohibiting the incidental taking of marine mammals by commercial fishermen. See 50 C.F.R. Parts 216, 229, and 611.

D. Coastal Zone Management Act Funding

In the fiscal year 1990 NOAA budget, Congress approved \$34 million in Section 306 Coastal Zone Management state grants but cut the current level appropriated for interstate grants under Section 309 by more than half. The House-Senate conference on the NOAA budget provided \$400,000 for fiscal year 1990 Section 309 grants, compared to \$942,000 in fiscal year 1989.

Elsewhere in the NOAA budget, the Sea Grant College Program was restored to \$41 million, a \$2 million increase over the fiscal year 1989 level. The National Coastal Resources Research and Development Institute in Newport, Oregon, was funded at about \$1.18 million.

VI. Public Access and Public Trust

A. Recreational use of river defines state ownership

A river used primarily for recreation belongs to the State of Alaska. In State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), the Ninth Circuit Court of Appeals stated that recreational guided fishing and sightseeing trips were commercial activities and, therefore, met the test for navigability which determines public ownership of waters.

In the case, Alaska challenged a 1979 Bureau of Land Management conveyance of 30 miles of the Gulikhana River to a native regional corporation. The state argued that the river was navigable when Alaska became a state in 1959 and, therefore, sovereign title passed to Alaska at that time. The native corporation argued that the river's principal use by small watercraft for recreation did not meet the test of navigability for public ownership requiring that the water be a highway for commerce.

B. Public access not required where water not subject to navigational servitude

The developer-owner of a lagoon was not required to permit public access to the lagoon since it was not subject to a navigational servitude. Boone v. United States, 725 F. Supp. 1509 (D. Ha. 1989).

C. Beach access and property takings

The Oregon Supreme Court recently dealt a blow to public beach access rights in Oregon. In McDonald v. Halvorson, 308

Or. 340 (1989), the court held that the public does not have the right of recreational access to Little Whale Cove south of Depoe Bay. The McDonald court said public access established by Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) provided access to dry sand that is actually adjacent to the mean high tide line. The dry sand area at Little Whale Cove is separated from the ocean by a freshwater tide pool and a flat basalt sill. The mean high tide line lies about 50 feet seaward of the sill and the ocean crosses the sill and enters the tide pool only during unusually high tides. Thornton v. Hay established the public's right of recreational access by unbroken custom to dry sand between the mean high tide line and the visible upland vegetation line. The McDonald court also said that since the cove was not customarily used by the public, the doctrine of custom on which Hay was based didn't apply.

In a spring 1990 lawsuit filed in Oregon, a developer claims Oregon's land use planning goals and public beach access laws take private property without compensation, in violation of state and federal constitutions. Irving Stevens filed suit after Cannon Beach and state officials denied his request to enclose 10,000 square feet of open, dry sand at Cannon Beach. Stevens said the sea wall would enable him to build a motel and increase the value of his property. Stevens also owns adjoining land occupied by the Surfsand Resort Motel. A state official sees Stevens' lawsuit as the most serious challenge to Oregon's Beach Bill since McDonald.

The Texas Ocean Beaches Act requiring landowners to

remove erected obstacles to provide public beach access was held not a taking without compensation because the Act provides for public access acquired through prescription, dedication, and custom. Arrington v. Mattox, 767 S.W.2d 957 (Tex. Ct. App. 1989).

Maine's Public Trust in Intertidal Land Act was held to be an unconstitutional taking of property in Bell v. Town of Wells, 557 A.2d 168 (Me. 1989). For thorough discussion of this significant decision regarding the public trust doctrine and public beach access rights, see Symposium, 42 Maine L. Rev. 1 (1990).

A recreational land use statute did not bar action by a beach goer for injuries sustained on a public beach and didn't apply to recreational activities conducted on the beach. Noel v. Town of Ogunquit, 555 A.2d 1054 (Me. 1989).

D. Public trust

Alaska regulations that created exclusive guide areas where only designated guides could lead hunts was ruled unconstitutional under the state constitution's common use clause. Alaska's constitution includes a codification of the public trust doctrine reserving fish, wildlife, and water in their natural state to the people for common use. Owsich v. Guide Licensing Control Board, 763 P.2d 488 (AK 1988).

The state may convey a fee interest in lands under navigable waters as long as the grantee's contemplated use comports with the best public use and does not

harm the public good. Smith v. New York, 545 N.Y.S.2d 203 (N.Y. App. Div. 1989).

Tanya Gross
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COASTAL SOCIETY CONFERENCE

The Oregon Sea Grant program is cosponsoring four panels on STATE OCEAN ROLES at the Coastal Society's conference October 21-24, 1990 in San Antonio, Texas. A preliminary list of session participants and organization is as follows:

Panels on State Ocean Roles

MONDAY, OCTOBER 22 (after plenary session)

ATLANTIC: Moderator, Robert Knecht, University of Delaware

Maine: Alison Rieser, University of Maine Law School (invited)

Massachusetts: Pat Hughes, Massachusetts Coastal Zone Management Program

North Carolina: Donna Moffitt, North Carolina Office of Marine Affairs

South Carolina: Margaret Davidson, South Carolina Sea Grant Consortium

GULF: Moderator, Lorry King, Texas A & M University

Florida: Paul Johnson, Florida Governor's Office (invited)

Mississippi: Rich McLaughlin, University of Mississippi Marine Law Program

Louisiana: Mike Wascom and Jim Wilkins, Louisiana State University Sea Grant Legal Program

Texas: Sharron Stewart, Representative, State of Texas (invited)

PACIFIC: Moderator, Biliانا Cicin-Sain, University of Delaware

California: Susan Wade, California Office of Environmental Quality

Oregon: Eldon Hout and Robert Bailey, Oregon Ocean Resources Management Program

Washington: Marc Hershman, University of Washington

Alaska: Jon Issacs, Jon Issacs & Associates, Anchorage

Hawaii: Casey Jarman and Kem Lowry, University of Hawaii

TUESDAY A.M., OCTOBER 23 (after plenary session)

Regional, National, and International Perspectives:

Moderators, Dick Hildreth, University of Oregon

Mike Orbach, East Carolina University

International: Jens Sorensen, University of Rhode Island (invited)

Atlantic: Robert Knecht, University of Delaware

Gulf: Lorry King, Texas A & M University

Pacific: Biliانا Cicin-Sain, University of Delaware

Dick Hildreth, University of Oregon, and Mike Orbach, East Carolina University, are co-organizers of these panels. Ocean and Coastal Law Center librarian Andrea Coffman is preparing a comprehensive state ocean roles bibliography to be distributed to all conference attendees. For further information on these panels, contact Nancy Farmer at (503) 346-3845. For more information on the Coastal Society conference's other panels, contact Bill Wise at (516) 632-8656.

Copies are still available of:

Update 2 for Federal Fisheries Management: A Guidebook to the Magnuson Fishery Conservation and Management Act, April 1989.

-ABSTRACT-

A 1989 update to the 1985 edition of Federal Fisheries Management: A Guidebook to the Magnuson Fishery Conservation and Management Act (Jon L. Jacobson, Daniel Conner, and Robert Tozer, editors) is available. The UPDATE covers statutory and regulatory changes to the MFCMA and other important fisheries-related developments. The UPDATE is published as loose-leaf replacement pages to the 1985 Guidebook.

To order a copy of Update 2 (\$4.50) please send a check or money order to:

*Ocean and Coastal Law Center
University of Oregon School of Law
Eugene, OR 97403-1221
(503) 346-3845*

Copies of the Guidebook (\$5.00) and Update 1 (\$2.00) are also available.

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