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FEATURE ARTICLE

THE BOUNDARY OF NAVIGABLE WATERS AND TIDELANDS MAY EXTEND BEHIND LAWFULLY BUILT SHORE DEFENSE STRUCTURES AS IF THEY DO NOT EXIST

By David M. Ivester

The ownership and regulation of thousands of miles and acres of shoreline and low-lying lands have been thrown into question by a ruling of the Ninth Circuit Court of Appeals that the mean high water line, the country's principal waterfront boundary, lies not where it actually is on the ground, but rather where it would be if shore defense structures such as levees and seawalls had never been built and water had been allowed to flow freely onto the land. In *U.S. v. Milner*, ___F.3d___, Case No. 05-35802 (9th Cir. Oct. 9, 2009), the court held several homeowners who had lawfully built seawalls on their properties landward of the mean high water line (MHWL) to be liable for trespass and violation of the Rivers and Harbors Act when, after many years, the tides eroded the intervening beaches and reached their shore defense structures and would have reached further landward had the structures not held them back.

Background

In the mid-1900s, several homeowners on the shore of the Strait of Georgia in Washington built shore defense structures, generally consisting of riprap or bulkheads, on their properties. Their lots are bounded along the shore by the MHWL. The homeowners built the structures above the MHWL and thus on their own properties and outside any "navigable waters" regulated by the U.S. Army Corps of Engineers (Corps), so Corps permits were not needed. Over the years, the beaches fronting the homeowners' properties have eroded, with the result that the MHWL has moved landward until eventually it intersected the shore defense structures. Those structures generally performed as designed, withstood the tides, and halted the progress of erosion at their outer faces. The United States, as trustee for the Lummi Nation of Indians, owns the tidelands adjoining the homeowners' lots. It demanded that the homeowners remove the shore defense structures, claiming they were trespasses on its property and unauthorized under the Rivers and Harbors Act and the Clean Water Act (CWA). The government argued that the water boundary separating tidelands and uplands, as well as navigable waters and uplands, is "ambulatory," meaning that it moves landward or waterward with any gradual erosion or accretion of land along the shore, and that the homeowners should not be allowed to stop the movement of that boundary with shore defense structures. Rather, the government said, the boundary should be located wherever it would lie if the shore defense structures did not exist. The homeowners refused to remove their structures, and the United States sued. The U.S. District Court ruled in favor of the United States, and the homeowners appealed.

The Ninth Circuit's Decision

Trespass

The Ninth Circuit Court of Appeals first addressed the trespass claim noting that while property generally is a matter of state law, "[f]ederal common law governs an action for trespass on Indian lands." Tidelands are lands subject to the ebb and flow of the tides between the ordinary high and low water marks. The upper boundary is the MHWL, which is determined by projecting onto the shore the average elevation

of all high tides over 18.6 years, which is the length of time required for the more important astronomic causes of tidal variations to complete their cycles.

The common law, the court observed, establishes that "the boundary between tidelands and uplands is ambulatory" and "also supports the owner's right to build structures upon the land to protect against erosion." The homeowners argued that under these principles the water boundary moves landward with erosion and then remains fixed when the MHWL intersects the face of their shore defense structures unless and until the MHWL either recedes or overtops the structures and continues moving landward. Rejecting this argument, the court noted that "both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line," and reasoned that "it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion." Both the upland and tideland owners, the court said, "must accept that the property boundary is ambulatory." While ostensibly confirming that the upland owners "have the right to build on their property and to erect structures to defend against erosion and storm damage," the court nonetheless declared that they "cannot use their land in a way that would harm the [tideland owner's] interest in the neighboring tidelands" and concluded that:

> …[a]lthough the shore defense structures may have been legal as they were initially erected, this is not a defense against the trespass action nor does it justify denying the Lummi land that would otherwise accrue to them.

Since the tideland boundary "was not arrested by the [h]omeowners' shore defense structures, so that it lay where the MHW line would be located but for the homeowners' structures," the court held the homeowners liable for trespass, explaining that although the homeowners "did not intend the structures to trespass" and:

> …did not cause the movement of the boundary line, . . .[i]t is enough that [they] caused the structures to be erected and that the structures subsequently rested on the tidelands.

The Rivers and Harbors Act

Congress enacted the Rivers and Harbors Act (RHA) in 1899 to make it unlawful to: (1) create "any obstruction . . . to the navigable capacity of any of waters of the United States," (2) "build or commence the building" of any structure in navigable waters, or (3) "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States," unless the work has been authorized by the Corps. 33 U.S.C. § 403. "Navigable waters," under the RHA, encompass all waters subject to the ebb and flow of the tides; the landward boundary of those waters is the MHWL, the location of which may shift with erosion and accretion or a change in the elevation of the sea or the land.

The court premised its analysis on its earlier holding in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) that the RHA extends to "all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state." In that case, addressing structures that had actually been constructed below the MHWL, the court said its holding was "dictated by the principle recognized in [earlier cases] that one who develops below the MHW line does so at his peril." In *Milner*, the court took as a given that the MHWL also is to be fixed in its natural, unobstructed state with respect to structures built above the MHWL.

By projecting the elevation of MHW through the homeowners' structures to a point where it intersects the shore as though the structures did not exist, the court located the MHWL behind or landward of the structures—and thereby rendered the structures "in" navigable waters. According to the court:

> …[t]he homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.

Noting that the RHA's central concern is to ensure that the nation's waters remain navigable and free of obstruction, the court observed that:

> Structures that were previously above the MHW line can become subject to Corps' regulation because the tide line has moved, and if those structures prevent the MHW line from

> achieving its unobstructed, natural state they can pose a serious risk to navigation. A structure should not be exempt from regulation because it so significantly displaces navigable waters that the waters are permanently penned in. Just as one who develops below the MHW line 'does so at his peril,' those who build too close to the MHW line also run the risk that their structures eventually may become obstructions and be subject to regulation by the Corps.

(Footnote omitted.)

Even if one did not locate the MHWL in its unobstructed state, the court continued, the homeowners' structures violate the RHA. As the court explained, a structure need not be located in navigable waters to violate the Act. "[E]ven though the tide line does not extend past the homeowners' shore defense structures because the homeowners have successfully prevented the Strait from advancing landward, the structures 'alter or modify the course, location, condition, or capacity of' the strait, since the flow of the waters is limited by the structures," and thereby violate that provision of the Act.

The Clean Water Act

The CWA, enacted in 1972, generally prohibits the discharge of dredged or fill material into "navigable waters" unless authorized by the Corps. 33 U.S.C. § 1311, 1344. The CWA defines "navigable waters" as "the waters of the United States" (33 U.S.C. § 1362(7)), which courts have interpreted to encompass more than the traditional navigable waters regulated under the RHA. Under the CWA, the Corps' regulatory jurisdiction extends beyond the MHWL to the "high tide line," which the Corps defines as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 C.F.R. § 328.3(d).

Observing that the Corps has long maintained that "it does not intend to assert jurisdiction over lands that once were submerged but which have been transformed into dry land," the court "[found] this approach persuasive."

Any discharge on fast land would not actually be in the waters of the United States, and it would be potentially unfair to occupants of such land to hold them to the strictures of the CWA if the land has long been dry. Even if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect of the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

Accordingly, the court held that land "will not be considered part of the waters of the United States unless the waters actually overtake the land."

Mindful of the apparent incongruity of its holdings under the RHA and CWA, the court explained:

> Although the CWA's jurisdictional reach is generally broader than the [RHA's], the reversal here is explained by the [RHA's] concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other. . . . Under the [RHA], it is appropriate to ignore an obstruction's ability to stop the flow of navigable water, because the purpose of the [RHA] is precisely to prevent or remove obstructions to navigable waters. . . . The Clean Water Act, on the other hand, is designed to restore and maintain the integrity of the nation's waters, which it does by limiting the discharge of pollutants into the waters.

Accordingly, the court held, if the homeowners' shore defense structure:

> …was in place prior to the enactment of the CWA or legally built on dry land after the passage of the CWA, then it must be considered as it actually exists.

Moreover, the court concluded, the structure may have prevented the high tide line from reaching further inland—thereby preventing fill activities behind the structure from discharging into navigable waters—while at the same time obstructing those waters. It is "perfectly consistent" then, said the court, that the homeowners could be liable under the RHA, but not the CWA.

Conclusion and Implications

The court's decision binds federal courts in the geographic area of the Ninth Circuit—California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Hawaii, and Alaska. Rendered by a panel of three judges, the decision may yet be reviewed by a larger *en banc* panel of the Ninth Circuit or by the

U.S. Supreme Court. If not overturned, the decision will have far-reaching consequences, most of which can barely be glimpsed now.

While paying lip service to a littoral landowner's common law "right to build structures upon the land to protect against erosion," the court largely drained it of meaning by holding that those structures may become unlawful when they actually perform the function for which they were intended and designed, *i.e.*, protect against erosion. Underlying the court's opinion is the idea that it is unfair to the tideland owner to allow the upland owner to permanently fix an ambulatory boundary by building and maintaining a physical structure. Under the homeowners' contention, though, the boundary is not permanently fixed by this means, akin to an agreed or adjudicated line; rather the boundary remains ambulatory in nature and merely stops moving as long as the structure physically holds the tidewaters back, whether that is for one year or a hundred. At bottom, the court seems to be telling littoral and tideland owners that they must accept whatever natural erosion or accretion occurs along their mutual boundary unless they agree among themselves whether and how to locate the boundary or otherwise settle their interests—and persuade the Corps to go along.

The court's ruling on trespass, predicated on federal common law, governs only certain federal (including Indian) lands. Indeed, the court took pains to downplay the effect of its decision. Rejecting concerns that its ruling "will have dramatically harmful consequences, given the many coastal properties with shore defense structures," the court said "[t]his overestimates the reach of our opinion" because "the states hold title to most of the tidelands" and:

> …[m]ost disputes that arise between the states and littoral property owners over tideland boundaries and the use of tidelands are ultimately a matter for state courts to adjudicate under state law.

Only time will tell whether the court's property-boundary decision will have broader effect than the court supposes. Some states, including California, have shown a historical predilection for embracing the "wisdom" of federal decisions when it is to their liking. In any event, whether landowners face the court's new rule in one or more state courts or only in federal courts, the Ninth Circuit's parting advice is simply to deal with it:

> As with many property disputes, those between tideland holders and littoral property owners will not be easy to resolve and they may simply require the parties to compromise, even if that means not everyone is entirely satisfied with the results.

The court's ruling on the RHA applies more broadly to all lands adjoining navigable waters. Within the area of the Ninth Circuit, thousands of miles of shoreline along navigable waters have been improved with seawalls, levees, and other shore protection structures. Behind these structures are thousands of acres of low-lying lands, some of which have been filled or otherwise improved and some not. Downtown San Francisco, for instance, lies in some measure on former marshland and tidal flats that have been filled and now lie behind seawalls and other shore protection structures. Most of the "islands" of the Sacramento-San Joaquin Delta are comprised of former marshland that for many decades has been diked off from surrounding tidal sloughs and farmed, with the result that the land behind the levees has subsided—much of it below sea level. Much of the City of San Jose and surrounding communities lies below sea level (owing to extraction of groundwater in past decades), separated from San Francisco Bay only by intervening levees and roads that hold the water back.

Questions of whether and how the *Milner* decision affects such lands abound. If a shore protection structure was built before 1899, when the RHA was enacted, will it operate to fix the legal MHWL in the same location as the physical MHWL? Or will a court regard the structure simply to have been legal when it was built, but now subject to regulation under the RHA, just as the homeowners' once-legal structures in *Milner* became obstructions to navigation? Similarly, if the Corps authorized a shore defense structure under the RHA, will that structure operate to fix the location of the MHWL? Or will a court nonetheless project the MHWL through the structure to wherever it would lie if the structure did not exist, such that work behind the structure would be in navigable waters and thus require Corps authorization as well? In projecting the MHWL through shore defense

structures as if they did not exist, what will a court make of fill or other structures behind the shore defense structures? Will the court treat any such fill and structures as the shore upon which the MHWL is to be projected? Will the court pretend that such fill and structures also do not exist and project the MHWL on some "natural" shore? Will it attempt to gauge whether and how such fill and structures would erode away in the absence of the shore defense structures and project the MHWL on that imagined shore?

Questions might arise even in situations not involving shore defense structures. What, for instance, is to be made of landscaping and the like? The court ruled, after all, that both the littoral and tideland owner have a right to an ambulatory boundary and, in fairness, each must accept that their land is "subject to gradual loss or gain depending on the whims of the sea." If the littoral landowner plants vegetation or nurtures naturally growing vegetation to hold the soil along the shoreline and thereby prevent or retard erosion, has he somehow "cheated" the tideland owner of the benefit of erosion that otherwise would have occurred?

Landowners haunted by such questions can take some comfort that the court's MHWL rule arises only in the RHA and not the CWA, since the RHA does not authorize citizen suits, which the CWA has spawned by the thousands. Landowners will at least be spared that fate and will confront RHA claims generally only if and when the United States raises them. The question may nonetheless arise in other contexts. For instance, when filling or building on low-lying lands behind shore protection structures, landowners confront the need to assess whether a Corps permit is required—and their lawyers confront the need to advise them appropriately. Questions of this sort may arise as well when lenders ask about necessary permits for projects along and near shorelines.

The Corps could resolve or reduce some of the difficulties presented by *Milner* by adopting regulations or issuing one or more "general permits" effectively authorizing certain types of existing shore defense structures. Any such relief, though, likely will not arrive soon—if ever.

For the time being, perhaps the most widespread consequence of *Milner* will be uncertainty. Landowners and others potentially regulated under the RHA, as well as the Corps itself, simply will not know in many circumstances how far the Corps' regulatory authority reaches.

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