For Dockets See 05-36126 , 05-35834 , 05-35802

United States Court of Appeals,

Ninth Circuit.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff/Appellee/Cross-appellant, The Lummi Nation, Intervenor/Respondents-Appellees,

v.

Keith E. MILNER and Shirley A. Milner, et al., Defendants/Appellants/Cross-appellees.

Nos. 05-35802, 05-35834, 05-36126.

December 29, 2006.

United States District Court, Western District of Washington at Seattle, No. C01-0809RBL

Appellants' Revised Opening Brief

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JURISDICTION

The District Court had jurisdiction under (1) 28 U.S.C. § 1331, actions arising under federal law (*i.e.* Rivers and Harbors Act ("RHA") and Clean Water Act ("CWA"), (2) 28 U.S.C.§ 1345, United States as plaintiff, and (3) 28 U.S.C. § 1355, proceedings regarding fines imposed under federal law (*i.e.* CWA). Dkt.1.

This Court has jurisdiction because the District Court entered judgment per FRCP 54(b) on September 20, 2005, Dkt.376, and Homeowners appealed November 18, 2005, Dkt.350, 396.

ISSUES

1. Whether Presidential expansion of an Indian reservation to include submerged lands, without congressional approval, precluded State ownership of said lands upon statehood.

2. Whether shoreline property owners may lawfully erect shore defense structures to prevent erosion and associated property boundary shifts.

3. Whether liability subsequently arises under the RHA for erecting shore defense structures without a permit, when original construction did not require one.

4. Whether summary judgment against the Nicholsons on the CWA claim was erroneous given disputed evidence of discharges below mean higher high water ("MHHW").

5. Whether the CWA requires a permit for shore defense structures erected above MHHW or landward of its intersection with lawful improvements.

6. Whether Government's prosecution of CWA violations against four defendants, without evidence of unlawful discharges, was "substantially justified."

STATEMENT OF THE CASE

The Government filed this action against owners of six shoreline properties at Sandy Point, an area within the Lummi Indian Reservation in Whatcom County, Washington. Appellants are Keith & Shirley Milner ("Milners"), Mary Sharp, Brent & Mary Nicholson ("Nicholsons"), and Ian Bennett & Marcia Boyd ("Bennett/Boyd") (collectively "Homeowners").

The complaints alleged trespass by Homeowners' "shore defense structure[s]" on tidelands held in trust for the Lummi Indian Nation ("Lummi"). The complaints also alleged violations of the RHA, 33 U.S.C. §§ 401 *et. seq.* and the CWA, 33 U.S.C. §§ 1251 *et. seq.*, Dkt.1 at 2:12, and sought injunctive relief, *id.* at 3-5. The Lummi subsequently intervened, alleging only claims for trespass.

In a far-reaching decision, the Court ruled that Homeowners violated (1) the RHA's permitting requirements, even though original construction of their shoreline defense structures did not require one, and (2) the CWA, even though Homeowners and Army Corps of Engineers ("Corps") interpreted the jurisdictional boundary identically. This appeal seeks a return to common sense interpretations of relevant constitutional, statutory, and common law provisions.

The Court resolved most of these issues in a series of summary judgment motions. The Court rejected Homeowners' argument that the tidelands were owned by the State of Washington and not the federal Government, Dkt. 156, and that Homeowners could construct shore defense structures on their own uplands to prevent erosion and any associated property boundary shifts, Dkt.218. The Court also ruled on partial summary judgment that Homeowners shore defense structures trespassed and violated the RHA. Dkt.261.

Similarly, the Court granted summary judgment against the Nicholsons on the CWA claim. Dkt.253. The Government subsequently sought injunctive relief and $100,000 in penalties against them. Dkt.326. After a weeklong evidentiary hearing, the Court imposed $1,500 in penalties and ordered Nicholsons to either obtain an "after the fact" permit or remove improvements below MHHW. *Id.* at 16.

To resolve the CWA claims asserted against the remaining defendants (*i.e.* Milners, Bennett/Boyd and Sharps), Homeowners filed for summary judgment. Dkt.351. In response, the Government voluntarily dismissed the claims. Dkt.362. Milners and Bennett/Boyd subsequently moved for an award of fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which the Court denied. Dkt.393. This appeal follows.

I.

FACTS

A. Tidelands Ownership

In 1855, the Government executed the Treaty of Point Elliott ("Treaty") with several Western Washington tribes, including the Lummi. Dkt.98, at 4. The Treaty expressly relinquished all aboriginal title the tribes or their individual members had in any of the lands they occupied. *Id.* at 1. The Treaty also established special reservations for the tribes, *id.* at 5, and provided for the possibility of relocating all tribes to a general reservation, *id.*

The Lummi's special reservation comprised only of the "island of Chah-choo-sen" in the Lummi River, which does not include Sandy Point. Dkt.98, at 34. In 1873, President Grant, by Executive Order, expanded the reservation to include Sandy Point and extended all reservation boundaries to "low water." Dkt.98, at 23. "Low water" has been interpreted to include tidelands. Notably, Congress never ratified President Grant's action prior to

Washington statehood. At issue in this case is whether the President was authorized to, and/or intended to, permanently reserve Sandy Point tidelands, thereby defeating the presumptive transfer of tidelands upon statehood.

The Government's policy from the Jefferson administration through the late 1800s was to "civilize" the tribes by providing established residences, Dkt.101, at 23-26, and eliminating communal resources via "allotments" to individual tribe members. Consistent with this policy, the Treaty created a temporary reservation "for the present use and occupation of the said [Lummi]...." Dkt.98 at 5, Art. 2. The Treaty contemplated individual allotments until the special reservation had been wholly allotted, thereby rendering the reservation itself unnecessary. Dkt.98, at 6, Art. 7; Dkt.101, at 19-22. The Lummi's own pleading before the U.S. Court of Claims confirms the temporary nature of the reservation. Dkt.98, at 19 ("the reservations reserved...were but temporary resting places for their then present use."). Although the policy of allotment is now disfavored, it was the policy during execution of the Treaty. *See* 25 U.S.C. § 461 (1982); Cohen's Handbook of Federal Indian Law 136-144, 170-75 (3d ed. 1982).

B. Homeowners' Shore Defense Structures

Homeowners' own property on Sandy Point, with chains of title deriving from individual Lummi who received fee patents in the early 1900's. At the time of their respective purchases, Homeowners' residences were protected against storm surges and erosion by shore defense structures. These structures include wooden or concrete bulkheads buttressed by large rock, also known as riprap, between the bulkhead and the water. The riprap adds stability to the bulkhead and dissipates the force of waves during storm surges.

Adjudication of this case requires an understanding of tidal elevations. All tidal elevations referenced herein are based upon the point of mean lower low water (MLLW), representing zero on the measurement scale. MLLW is an average of the single lowest tide each day over an 18.6 year period. *See* Bruce S. Flushman, Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal or Navigable Waters, 117 (2002). Unlike the East Coast, which each day has two nearly equivalent high and low tides, respectively, the West Coast does not. Mean high water (MHW) is an elevation above MLLW based on an average of the two daily high tides over an 18.6 year period and mean higher high water (MHHW) is the average of the single highest daily tide over the same period. Inasmuch as tides fluctuate, these averages vary. While this matter was pending, MHHW and MHW were 9.1 feet and 8.25 feet above MLLW, respectively. Dkt.231.

Bennett/Boyd purchased their Sandy Point property in 1994. Dkt.99. At that time, their shore defense structure was a concrete bulkhead, approximately 3 to 4 feet high, with riprap located waterward of the bulkhead. *Id.* Inasmuch as the bulkhead was leaning waterward, Bennett/Boyd reinforced the wall with concrete on its landward side. Bennett/Boyd never added or moved any riprap, other than to retrieve occasional displaced rocks. *Id.*

Milners purchased their Sandy Point property in 1999. Dkt.79, 237, 351. At that time, their shore defense structure was a wooden bulkhead, with riprap waterward of the bulkhead. Before purchasing, Milners learned that the Corps had expressed concerns regarding the location of some of the riprap. Accordingly, Milners contacted the Corps to identify the offending rocks to better facilitate their potential removal. However, the Corps expressly prohibited removal of any rocks. *Id.* Milners still completed the purchase, believing that a dispute regarding rock placement was something that reasonable people could resolve quickly and easily. Remarkably, the Government sued Milners for trespassing rocks, the same rocks they were prohibited from moving. Milners never placed any rocks or any other material on the tidelands in front of their Sandy Point home. *Id.*

Nicholsons purchased their property in 1988. Dkt.240. Their immediate predecessor, Dennis Beeman, built a

concrete bulkhead in 1982. The bulkhead was damaged in December of that same year, leaving approximately the bottom half of the bulkhead intact. Beeman subsequently placed large riprap waterward of the failed bulkhead. Dkt.97. None of the riprap was placed below MHHW. *Id.*

In 1997, Nicholsons repaired the bulkhead by increasing its height and base width. Dkt.240. To facilitate access for the repair, Nicholsons removed the landward portion of the riprap adjacent to the bulkhead. The remaining rock revetment, which extended higher than MHHW (9.1 feet), and is situated waterward of the bulkhead, was left undisturbed due to the size of its constituent rocks. The presence of this revetment prevented work from being conducted landward out of the water and beyond the reach of MHHW. Once the bulkhead was rebuilt, the removed riprap was restored, being placed landward of the existing rock revetment above MHHW. *Id.*

No evidence was ever presented to the Court that, at the time any of the shore defense structures were built or repaired, any material was placed waterward of the intersection of MHW and the beach. Thus, the only evidence presented on the summary judgment motion as to the location of MHW at the time of the respective improvements was that they were placed landward of MHW. Dkt.326, at 5-6; 240-42. Homeowners also presented evidence that the beach was eroding due to the interruption of the flow of littoral drift caused by two pier aprons, one owned by ConocoPhillips and the other by Intalco, an aluminum company. Because the uplands between the Homeowners' shore defense structures and the tideland boundary of MHW have eroded away, the elevation of MHW now intersects Homeowners' riprap. Dkt.98, at 57; Dkts. 99, 100, 102.

Further complicating the situation is the fact that the beach rises and falls on a seasonal and, to a lesser degree, daily basis due to the tidal deposition of coarser beach material during the summer months and erosion during the winter months. Dkt.240, at 2-3. As a result, the MHW currently intersects Homeowners' riprap during some periods and not others. *Id.*

C. CWA Claim Against Nicholsons

The Government moved for summary judgment on the CWA claim against Nicholsons. The motion primarily involved two legal issues regarding the CWA jurisdictional boundary.

First, the Government contended that the “high tide line” as used as the jurisdictional boundary in 33 C.F.R. § 328.3(d) was at any place where the tide had ever flowed. In contrast, the Nicholsons contended that the jurisdictional boundary was MHHW, as the Seattle Division of the Corps had repeatedly represented to the public as a matter of formal policy.

Second, with what does the “high tide line” intersect to form the jurisdictional boundary? Nicholsons contended that the boundary is where MHHW intersected either the natural landform or any lawfully placed improvement (*i.e.* -unlawful improvements could not alter the location of the jurisdictional boundary). The Government argued, and the Court agreed, that the jurisdictional boundary was where it would intersect the shoreline if it remained in its natural state. Dkt.253, at 8.

In addition to these legal issues, Nicholsons contended that summary judgment was improper based upon disputed factual evidence.

1. Facts Relevant to Legal Issue of CWA Jurisdictional Boundary

With respect whether MHHW is the jurisdictional boundary, the following facts are important. Thomas Mueller,

the Chief of the Regulatory Branch of the Seattle District of the Corps explained in deposition:
Q. Is there a technical way that you determine high tide line for purposes of the Clean Water Act?
A. In our district, we've stopped at the line of mean higher high water unless there's adjacent wetlands.
...
Q. You testified, I thought, that the regulatory reach under the Clean Water Act was the high tide line, according to regulations?
A. Right.
Q. And in this district, that means in all circumstances, the way you interpret it, to be the line of mean higher high water; is that correct?
MR. KIPNIS: I'll object that that misstates his testimony.
Go ahead and answer.
A. I said it's a branch policy to stop at the line of mean higher high water for Section 404 of the Clean Water Act.

Dkt.235, at 114-116. Mueller subsequently confirmed the foregoing as a written policy. *Id.* at 116.

Similarly, the Corps' Permit Application states:
Section 404 Permit from the Corps of Engineer under 33 USC § 1344 is required if your project includes:
Placement of dredged or fill material waterward of the ordinary high water mark, or the mean higher high tide line in tidal areas, in waters of the United States, including wetlands.

Dkt.236, at 9 (emphasis added). Additionally, an information paper created by the Corps for potential applicants confirms the same use of MHHW as the jurisdictional boundary. Dkt.288, at 9. Nicholsons' expert coastal engineer also confirmed the use of MHHW as the jurisdictional boundary based upon his extensive experience with the Corps permitting process. Dkt.236.

2. Facts Relevant to CWA Claim Against Nicholsons

The summary judgment motion on the CWA claim also raised factual issues. The Government submitted preconstruction sketches for the Nicholsons' bulkhead showing a conceptual design suggesting the lowest affected elevation at 0.0 MLLW. Dkt.229, 87-90. The Government argued that “the footing of the new bulkhead would be poured at approximately 0.0 MLLW.” Dkt.228, at 9 n. 9. Therefore, the Government surmised that the bulkhead extended below MHHW, which is 9.1 feet above 0.0 MLLW. Dkt.231, at 1. The sketches also showed the top of the proposed bulkhead at over 17 feet MLLW.

However, the only evidence about these drawings is that they do not show what was actually built. Dkt.229, at 32; Dkt.258. Moreover, the sketch was not intended to show the depth of the bulkhead. It specifically disclaims that “embedment depth to be determined in the field by the engineer.” Dkt.229, at 90.

Additionally, other drawings by Nicholsons' structural engineer show the footing of the bulkhead to be 24 inches thick and the stem of the bulkhead to be 5.5 feet high. Dkt.245, at Ex. 175, at 6-7. These drawings show the bulkhead to be only 7.5 feet high. Dkt.258.

The Government's own survey places the highest point of Nicholsons' bulkhead at 17.771 feet, with a slight variation at one point to 17.821. Dkt.231, at 69. Since Nicholsons' bulkhead work only descended 7.5 feet from that point, the Court had evidence that the lowest elevation at which work was conducted was clearly higher than MHHW at 9.1 feet.

The “Plan View” sketch shows the Ordinary High Water Mark (OHWM)[FN1] bisecting the riprap on Nicholsons' property in a straight line. Dkt.229, at 88. Similarly, this sketch was for conceptual purposes. It was not a surveyor's determination of the actual location of the line. Dkt.24 1. Moreover, the drafter of these sketches was aware of the Corps' permit requirement for construction waterward of MHHW. Accordingly, the proposed project left undisturbed everything waterward of MHHW. Dkt.24 1, at 2-3.

> FN1. OHWM is used in some state law waterfront permitting. It is not a statistical mean of tidal elevations as is MHHW.

Additionally, the Government's own survey supports the conclusion that work was conducted landward of where MHHW would intersect the natural beach. Dkt.231, at 69. For Nicholsons, it shows MHHW as being substantially waterward of the bulkhead. *Id.* The Government's surveyor stated he was attempting to determine MHHW as it intersected the natural beach under the riprap and not the riprap itself. Dkt.231, at 14.

The Government also offered tide records to show that there was a 10.3 foot tide on September 17, 1997, during the construction period. Dkt.229, at 211. The Government offered this to show that this 30 day project must have been done in tide waters. However, the undisputed testimony is that “the work was never conducted in any water.” Dkt.242.

Despite this evidence, the Court ruled on summary judgment that Nicholsons violated the CWA. Dkt.253. In March of 2004 a bench trial was held to determine penalties and the scope of any injunctive relief.

After the hearing, Judge Leighton issued extensive findings of fact. Dkt.326. Although the Government sought a $100,000 penalty and complete removal and restoration of the beach to its natural state, the court issued a “penalty of $1,500.00 for their previously adjudicated violation” and ordered the Nicholsons to either obtain an “after the fact” permit or remove improvements below MHHW. Dkt.326, at 16: 15-20.

Although Nicholsons contended that the earlier order granting summary judgment was in error, Judge Leighton declined to revisit the issue. He did, however, issue a finding that neither Nicholsons, nor their predecessor, Beeman, worked within the Corps' jurisdiction during construction.

The Beeman/Nicholson defense structure was not within the jurisdiction of the Army Corps of Engineers, as exercised by the Seattle Division, at the time it was built (in 1982, 1983 and 1997). Over time the beach continued to erode, eventually leading to portions of the revetment being intersected by MHWL and MHHWL. This occurrence results in a violation of Section 404 of the Clean Water Act as to that portion of the revetment waterward of MHHWL...

Id. at 11-12.

SUMMARY OF ARGUMENT

First, the trespass claims against Homeowners must fail because the Government does not own the tidelands. Under the Equal Footing Doctrine, the State of Washington acquired the Sandy Point tidelands upon statehood. The Executive Order could not reserve these tidelands without Congressional approval.

Second, Homeowners cannot be liable for trespass because their shore defense structures were originally constructed upon their own uplands. Although the boundary between uplands and tidelands may move, Homeowners may construct improvements on their upland property to prevent such movement.

Third, summary judgment against Homeowners was improper on the trespass claims because the elements of intent, and even causation, do not exist as a matter of law. The Court assumed that Homeowners constructed on their own uplands and that the property boundary subsequently moved (through erosion) to intersect the improvements. Inasmuch as the cause of the erosion is the interruption of the flow of littoral drift from two industrial pier aprons north of Sandy Point, the trespass claims must fail.

Fourth, summary judgment against Homeowners was improper on the RHA claim. Dkt.261. The RHA prohibits the intentional creation of obstructions within RHA jurisdiction without the requisite permission. The Court erroneously interpreted the RHA to conclude that liability could attach in the absence of(1) any intent and (2) a requirement for a permit at the time of construction.

Fifth, the Court erred in ruling that an injunction should issue without a balancing of the equities and relative hardships. Homeowners should not be required to constantly move riprap as the beach fluctuates on a seasonal basis.

Sixth, the Court erred in granting summary judgment against Nicholsons for a violation of the CWA. Dkt.253. The Court failed to interpret the line of jurisdiction as MHHW and failed to recognize that the jurisdictional boundary stops at the face of lawfully placed improvements. Additionally, summary judgment cannot be based solely upon conceptual, pre-construction sketches to determine that an existing bulkhead is below MHHW.

Finally, the Court erred in denying fees and costs to four Homeowners under the EAJA for defending against the Government's CWA claims. The Government's position was not “substantially justified” because it never had any evidence of a CWA violation.

ARGUMENT

II

THE TRESPASS CLAIMS MUST FAIL BECAUSE THE GOVERNMENT DOES NOT OWN THESE TIDELANDS

The Court erred in granting summary judgment against Homeowners on the trespass claim because the Government does not own the tidelands.[FN2] President Grant's Executive Order, Dkt.98, at 23, which purports to reserve tidelands for the Lummi, did not effect a permanent reservation under the Equal Footing Doctrine. Congress never acted or otherwise evidenced an intent to defeat the presumptive transfer of tidelands to the State of Washington upon statehood in 1889.

> FN2. A party accused of trespass may argue that a non-party State actually owns the property. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255-56 (9th Cir. 1983).

This Court reviews a district court's grant of summary judgment *de novo* and “view[s] the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Mt. St. Helens Mining & Recovery Ltd. P'Ship v. U.S.*, 384 F.3d 721, 727 (9th Cir. 2004).

A. Affirmative Congressional Intention is Required to Reverse the Presumption that Tidelands are Held in Trust for Future States

In *United States v. Holt State Bank,* 270 U.S. 49 (1926), the Court considered its first of several cases regarding Indian claims of ownership to navigable waters. The *Holt* Court held that submerged lands in the territories are "held for the ultimate benefit of future States," and that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *Id.* at 55. The Court has subsequently indicated that ownership of submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to [a new state] upon admission [to the Union]." *United States v. Louisiana,* 363 U.S. 1, 16 (1960). The Court has reiterated this doctrine by stating that the courts must "begin with a strong presumption against conveyance" that would defeat the future state's title. *Montana v. United States,* 450 U.S. 544, 552 (1981).

Under the Equal Footing Doctrine, new states enter the Union on an "equal footing" with existing States. *See Utah Division of State Lands v. United States,* 482 U.S. 193, 195-198 (1987) (citing *Pollard v. Hagan,* 44 U.S. 212, 222-23 (1845) and *Shively,* 152 U.S. at 49). The *Utah Division* Court clarified the earlier *Montana* decision by stating that Congress defeats the strong presumption of state title "only in the most unusual circumstances." *Id.* at 197. The Court established a two-part test:

that Congress clearly intended to include land under navigable waters within the federal reservation; [and] that Congress affirmatively intended to defeat the future State's title to such land.

Id. at 202. Accordingly, mere inclusion of the submerged lands in a reservation is inadequate. Rather, the Government must also establish that Congress "affirmatively intended" to defeat the future state's sovereign right to title in the submerged lands. *Id.*

The Supreme Court most recently applied this test to the Coeur d'Alene tribe's claim to submerged lands. *See Idaho v. United States,* 533 U.S. 262 (2001). The Court reasoned that the second part of the test was satisfied because a Congressional act ratifying the executive order was clearly intended to defeat state title. In support of its decision, the Court noted Congress' extensive involvement in settling with the Tribe, including three prior congressional acts, Congress' knowledge of the submerged lands issues and its desire to avoid potential hostilities. Importantly, the Court's finding of affirmative Congressional intent was based primarily upon the fact that one month prior to statehood, the Senate passed a bill ratifying the Executive Order. An identical bill was only approved by the House eight months after statehood. The Court reasoned that there was no:

hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho .... There is no evidence that the Act confirming the reservation was delayed for any reason but comparison of the respective House and Senate bills, to assure that they were identical prior to the House's passage of the Senate version.

Id. at 278. Based on the extensive evidence, the Court concluded that Congressional intent to defeat state title was "very plain," thus overcoming the strong presumption. *Id.* at 281 (quoting *Holt,* 270 U.S. at 55 (1926)).

Two recent and related Supreme Court cases also involve reservations by the Executive, but do not involve Indian claims. The Supreme Court found in both cases that Congress confirmed earlier Executive reservations due to unique and specific provisions of the Alaska Statehood Act. In each case, the Supreme Court required an Act of Congress expressly confirming the Executive Order reservations. *See Alaska v. United States,* 521 U.S. 1 (1997) and *Alaska v. United States,* 545 U.S. 75 (2005).

In summary, these persuasive Supreme Court precedents require affirmative Congressional intent to reserve navigable waters in the reservation and to defeat the State's presumptive title upon statehood. The Court has re-

quired an Act of Congress ratifying an Executive Order, with the *Idaho* case as the only one allowing the mere finalization of acts of Congress after statehood based on a uniquely extensive congressional record demonstrating intent to ratify.

Here, the Court averted this precedent in its entirety by ruling that under *United States v. Romaine*, 255 F. 253 (9th Cir. 1919) and *United States v. Stotts*, *49* F.2d 619 (W.D. Wash. 1930), Government ownership of Sandy Point tidelands was *stare decisis*. Both *Romaine* and *Stotts* are distinguishable.

B. *Romaine* Is Not Controlling Because It Does Not Address Executive Order Reservations

The Court ruled that *Romaine* confirms as *stare decisis* that the Government owns the Sandy Point tidelands for the benefit of the Lummi. Dkt. 156, at 4. However, *Romaine* involved only land within the original 1855 Treaty reservation, and not the subsequent 1873 Executive Order expansion. Although Congress ratified the Treaty, it did not ratify the Executive Order or express any intention to defeat the State's title.

The *Romaine* court defined a portion of the Island of Cha-choo-sen as part of the original Treaty reservation. The primary issue considered was whether low ground or small islands in the river delta that were subject to tidal flow (and hence were tidelands) could be conveyed to private parties by the State. The maps reprinted in the case show the river delta at issue. The Court ruled that the tidelands connected to the Island of Cha-choo-sen were part of the original reservation. The Court reasoned that the Lummi had the right to the low-water mark on the island as a matter of aboriginal law, *i.e.* that the Treaty reservation was not a grant of rights from the Government, but rather a reservation by the Tribe of its rights. *Id.* at 260. Thus, *Romaine* turns on the fact that the tidelands at issue were part of the original Treaty reservation.

Romaine is clearly distinguishable from this case. The Sandy Point tidelands were not part of the original Treaty reservation or the Island of Cha-choo-sen. Land not reserved in the Treaty, such as the tidelands at Sandy Point, were not reserved aboriginal title because the Tribe explicitly ceded those rights to Government in the Treaty. Dkt.98, at 4-5. The tidelands at issue in *Romaine* were part of the reservation created by the Treaty, not tidelands added later solely through Executive Order. Congress approved the Treaty; Congress did not ratify the Executive Order.

Even if *Romaine* applied to Executive Order tidelands, *Romaine* should be reevaluated in light of subsequent Supreme Court precedents.[FN3] At most, *Romaine* can only be read to say that the Executive Order was intended to include navigable waters tidelands within the Lummi reservation. However, under the two-part test from *Utah Division,* "mere reservation" is insufficient. Rather, Congress must have "affirmatively intended" to defeat state title. *Utah Division*, 482 U.S. at 202.

> FN3. Moreover, inasmuch as *Romaine* was not decided with the benefit of recent Supreme Court guidance, a panel of this Court may reevaluate this prior circuit precedent, the reasoning of which has been undercut by the Supreme Court. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

Importantly, this Court in *United States v. Idaho,* 210 F.3d 1067 (9th Cir. 2000) applied the Supreme Court precedents on Executive Order reservations and no longer applied its earlier and different three-part test. *See Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251, 1257-59 (9th Cir. 1983) (applying three-part test); *Muckleshoot Indian Tribe v. Trans-Canada Enters, Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983) (same); *U.S. v. Aam*, 887 F.2d 190 (9th Cir. 1989) (same).

C. *Stotts* Is Not Controlling Because It Does Not Address Congressional Approval

The District Court was constrained by its ruling in *United States v. Stotts,* 49 F.2d 619 (W.D. Wash. 1930) that the Government owns Executive Order tidelands for the benefit of the Lummi. *See* Order at 4. Not only does *Stotts* fail to address the need for Congressional intent to preclude state ownership, but as a decision of a District Court, it is not controlling authority. *See* Cal. Prac. Guide Fed. 9th Cir. Civ. App. Prac. Ch. 8-C, para. 8:202 ("District court decisions are of no precedential value in the Ninth Circuit...").

D. Congress Did Not Act to Defeat State Title to the Tidelands

Inasmuch as *Romaine* is not controlling, this Court must determine whether Congress affirmatively intended to reserve the Sandy Point Executive Order tidelands in such a manner as to defeat state title.

It is undisputed that Congress never acted on President Grant's Executive Order; no Act of Congress, no individual bills passed. Remarkably, however, it was precisely that inaction that the District Court determined was sufficient to demonstrate the requisite "affirmative[] inten[t]" to overcome the presumption of future state title. This determination was clear error, and is reviewed *de novo.*

The only evidence cited by the Court was a single congressional report by the Secretary of the Interior confirming the Executive expansion. Dkt.156, at 5. The Court reasoned that, based on this report alone, Congress "was aware" that the Executive had expanded the reservation, and therefore, "Congress intended to defeat state title" because Congress "did not rescind the reservation of the tidelands." Dkt. 156, at 5 and 6. This conclusion is not supported by Supreme Court precedent. The *Idaho* case is as far as the Supreme Court has ever gone in finding congressional intent to ratify an Executive Order reservation of submerged lands, and even in that case an Act of Congress was passed to ratify the Executive Order, though finalized shortly after Statehood. In *Idaho,* Congress had extensive affirmative involvement with the subject tribe, including prior relevant Acts of Congress and had bills prepared to ratify the Executive Order. Passivity by Congress in relation to the Report falls far short of the *Idaho* standard. "Congressional silence does not delegate the right to create, or acquiesce in the creation of, permanent rights." *Karuk Tribe of California v. Ammon,* 209 F.3d 1366, 1374 (Fed. Cir. 2000).

Even if Congress had considered the Report, nothing shows that Congress would have thought anything different than the Executive's clear understanding of such Proclamations--a temporary reservation until passage to the future state. Moreover, at that time, the "purpose of the allotment policy was the ultimate destruction of tribal government." *Montana,* 450 U.S. at 559, n.9. It defies common sense that Congress or the President would intend that the tidelands, a strip of land surrounding the allotted lands, would remain in tribal control, when the policy at the time was to destroy tribal government.

President Grant's mere reservation in the Executive Order was intended to be temporary. That Congress may have been aware is no substitute for evidence of congressional ratification of the Executive Order expansion. Absolutely nothing suggests a "very plain," *Holt,* 270 U.S. at 55 or "affirmative," *Utah Division,* 482 U.S. at 202, congressional intention necessary to defeat the future state's presumptive title to submerged lands. Therefore, this Court must find that the Sandy Point tidelands are owned by the State of Washington.

III

HOMEOWNERS DID NOT TRESPASS

In addition to disputing ownership of the tidelands, Homeowners argued that they had not trespassed. The Court correctly recognized that the federal law of trespass applied here because all parties derived their ownership interests from the federal Government.[FN4] Dkt.261, at 3. The Government relied on a survey it commissioned, completed in January 2002, showing various rocks located waterward of the survey's depiction of MHW. Dkt.231, at 68-71. Homeowners opposed the motion on several grounds.

FN4. *See California ex. Rel. State Lands Comm'n v. United States*, 457 U.S. 273, 288 (1982).

First, the survey did not depict the location of MHW at the time of the motion because the beach changes on daily and seasonal bases. Dkt.237, at 3, 238, 240. Second, at the time of construction, the shore defense structures were located entirely on Homeowners' respective uplands; it was the tideland boundary that subsequently moved. The Court concluded that Homeowners are liable in trespass because they, or their predecessors, should have known that "entry of portions of the structures onto the tidelands" would result. Dkt.261, at 5. Third, Homeowners argued that they lacked the intent to commit a trespass. The Court concluded that Homeowners are liable because they failed to remove the structure after being asked to do so. *Id.* at 6.

A. Homeowners Built on Their Own Uplands--The Property Boundary Must Take into Account Lawful Man Made Improvements

Homeowners and the Government agree that the boundary is MHW. Thus, the Court was asked to determine how that elevation created a tidelands boundary on the surface of the earth. Homeowners contended that the boundary is the intersection of the MHW elevation with either the face of the beach or the face of lawfully placed improvements. The Court ruled that the boundary was where MHW would intersect the beach if it remained in its natural state.

1. The Law Does not Distinguish Between Filling Authorized by a Permit and Filling Which Required No Permit

This case presents the undisputed fact that the beach changes, thereby causing the tidal property boundary (MHW) to intersect the shore in different locations depending on numerous factors. Here, the tidal boundary has crept landward, into Homeowners' properties, over the last 20-30 years due to major storms and a lack of sand replenishment from the north. Common to all Homeowners is the key, undisputed fact that the shore defense structures were all originally constructed and maintained landward of the MHW (and also above MHHW). Homeowners' engineering expert, Jeffrey Layton, described the berm formed by natural accretion which was the first point where MHW intersected the shore. That berm has been diminished over the years. Dkt.98, at 45.

The Government's 2002 survey shows that, at that time, MHW intersected portions of Homeowners' riprap, rather than the beach. Dkt.231, at 68-71. This is true, except for Milners and Bennett/Boyd where only separated rocks lying individually on the beach were intersected by MHW, rather than the piled riprap in front of their bulkhead. This represents a dramatic change in the beach whereby over thirty feet of *uplands* have been lost.

Prior to summary judgment, the parties requested a ruling from the Court on whether the MHW boundary would be where that elevation intersected the beach in its natural state or intersected lawfully constructed improvements. The Court recognized authorities holding that property owners have the right to construct improvements to protect their property from erosion, but then failed to apply those authorities. Dkt.218, at 4-5.

The decision was based on the assumption that:

... the bulkheads and riprap fronting Defendants' properties were initially placed *above* mean high water such that they were originally located wholly on Defendants' properties.

Id., at 2. The Court concluded that Homeowners could not improve their uplands to prevent erosion.

The Court relied upon *Crawford v. Rambo*, 7 N.E. 429 (Ohio 1886); *Carr v. Kidd*, 540 S.E.2d 884 (Va. 2001); and *Strom v. Sheldon*, 527 P.2d 1382 (Wash.App. 1975). *Crawford* espouses the narrow minority view of the common enemy doctrine, and *Strom* merely recites the rule that a property owner cannot divert a stream from the border of his property to be entirely on his own property and then claim ownership of the entire waterbody.

Carr requires a closer look. In Virginia, a riparian property owner has the right to use the tidelands in front of his property and that includes a right to erect wharves, piers and bulkheads. 540 S.E.2d at 890. That right is conditioned upon not obstructing navigation or injuring another's rights. *Id.* In *Carr*, the property owner built a bulkhead perpendicular to a straight side property line, even though the shoreline was concave, and filled in the land behind it. *Id.* at 891. Because the shoreline curved concavely and the bulkhead was placed as if there were no curve, the bulkhead blocked a neighbor's competing riparian rights. *Id.* at 890-91. The sketch in the Court's opinion shows how the bulkhead interfered with the neighbor's property. *Id.* at 893.

Clearly, *Carr* is not analogous to the present case. Homeowners have not built in a manner which has extended out and blocked off access of a neighboring property as indicated in the *Carr* sketch.

The Court even recognized that “it can not be disputed that where authorized filling has occurred, the tidal boundary is marked at the face of the authorized fill.” Dkt.218, at 2 n. 1 (citing 91 A.L.R.2d 857 §2[b] (1963)). However, in the same opinion the Court ruled that “fill” placed above MHW which needed no permit could not, as a matter of law, stop the movement of an otherwise ambulatory boundary. *Id.* In other words, the property boundary must ignore, instead of stop “at the face of,” improvements in situations -- like this one -- where no permit is required. The Court must have assumed a distinction between fill authorized by permit, and fill which requires no permit. However, no legal authority supports this distinction.

The only evidence here is that filling occurred on the uplands--above MHW--on Homeowners' own property, not on the tidelands. The common law rule that lawful filling creates upland legalizes both filling former tidelands and embankments to prevent flooding throughout the country, like Boston's Back Bay, New Orleans, San Francisco Bay and the shore of Elliott Bay in Seattle.

The Court relied on *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978), which does not apply here because the artificial filling in the present case occurred lawfully above MHW. *United States v. Stoeco Homes, Inc*, 498 F.2d 597 (3d Cir. 1974), essentially followed the A.L.R.2d annotation cited by the Court below in finding that authorized filling of tidelands creates vested property rights in the upland owner. *Stoeco* more closely parallels the present case because the *Stoeco* court ruled that no permit was necessary for filling the tidal marshes prior to 1970, and therefore, the navigational servitude was surrendered. *Id.* at 610-611. Artificial land filling by the upland owner establishes fee ownership if a permit is granted or if no permit is necessary. Therefore, the property boundary of MHW is where that elevation intersects with material, whether naturally or artificially placed. Only illegal improvements must be ignored under *Leslie Salt.*

2. Upland Property Owners Have a Right to Protect their Property

Undisputed evidence demonstrates Homeowners' respective shore defense structures were constructed on *up-*

land, above MHW, and that any filling was authorized by governing state and local law. As a result, these improvements effectively stop movement of the property boundary by becoming part of the shoreline. Such improvements are recognized as part of Homeowners' rights under the common enemy doctrine. "A man may raise an embankment *on his own property* to prevent the encroachments of the sea, although the fact of his doing so may be to cause the water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses." *Revell v. People,* 52 N.E. 1052 (Ill. 1898) (emphasis added) (quoting *Wood on Nuisances,* section 494 and citing *Gould on Waters,* section 160)); *see also Miller v. Letzerich,* 49 S.W.2d 404 (Tex. 1932); *Lamb v. Reclamation Dist. No. 108,* 14 P. 625 (Cal. 1887).[FN5] The same is true here because the shore defense structures were constructed on *Homeowners' property,* not on the tidelands.

> FN5. The Washington Supreme Court recently decided that the common enemy doctrine does not apply to seawater, without any discussion of any authorities. *Grundy v. Thurston County,* 117 P.3d 1089 (Wash. 2005). It is the only court to so rule. Washington's curiously narrow view of the doctrine is without significance here because Homeowners' rights are a matter of federal, not state, law. *California ex rel. State Lands Comm'n,* 457 U.S. at 288.

Homeowners contend that the authorities cited all stand for the proposition that a person may place an artificial structure on his land, in the same way that every American city that fronts the ocean has built protective barriers, and that structure is the point in which MHW stops moving landward. The property line does not move past these structures simply because MHW might so move if the area were not protected.

B. Homeowners Obtained Rights to Use the Tidelands to Protect Their Property With Riprap.

In the alternative, if the Court agrees that property boundary determinations must ignore lawfully constructed improvements, Homeowners have a right of encroachment. Under federal law, it is irrelevant who owns the tidelands; an upland owner has a right to use the tidelands for purposes of access, wharfage, and protection of the uplands. *See United States v. River Rouge Improvement Co.,* 269 U.S. 411,418 (1926); *Confed. Salish & Kootenai Tribes v. Namen,* 534 F.2d 1376 (9th Cir. 1976). Even if Homeowners' riprap is on federal land held in trust for the Lummi, Homeowners have a right to encroach on the tidelands based on their federal common law riparian rights.

C. There was No Intent to Encroach

Although some states have relaxed the intent requirement for trespass, federal law specifically considers trespass to be an intentional tort. *Nat'l Tel. Coop. Ass'n v. Exxon Corp.,* 38 F.Supp.2d 1 (D.D.C. 1998). Involuntary entry onto another's property is not a trespass. *Baltimore Gas & Elec. Co. v. Flippo,* 684 A.2d 456, 461 (Md.App. 1996); *see also Burke v. Briggs,* 571 A.2d 296 (N.J. 1990). Here, there is no evidence that Homeowners intended the rocks in front of their bulkheads to be on federal property.

The Restatement of Torts establishes three ways of showing intent to trespass. The first is a straightforward intent to encroach on the land of another, which is no longer asserted by the Government and Lummi.

The second is an intentional failure to remove something that was tortiously placed on the land of another. Restatement (Second) of Torts §158 (1965). As Comment f to Section 158 makes clear, tort liability is never imposed upon one who has neither performed an act nor failed to perform a duty. Therefore, one whose presence is not caused by his own act or by his failure to perform a duty is not a trespasser.

In fact, the Restatement gives an example of no liability in discussing the lawful placement of logs later moved by water. Restatement (Second) of Torts § 166, Ill.#3. Like the example, Homeowners placed rocks on their own land. Some of the rocks are, at times, on the Government's land due to causes beyond Homeowners' control. However, there is absolutely no evidence that Homeowners placed rocks on the Government's land tortiously.

The Court rejected this analogy and ruled that Homeowners were more analogous to "one who so piles sand close to his boundary that by force of gravity alone it slides down on to his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands." Dkt.261, at 5-6 (quoting Restatement (Second) of Torts § 158 cmt. 1). However, this comment suggests more than mere foreseeability of encroachment is required to find liability, but rather certainty of encroachment -- as through "gravity" or "ordinary rainfalls," natural occurrences which are certain to occur.

The problem with application of this principle here is the lack of evidence to support such certainty. No evidence demonstrates that when Homeowners or predecessors placed riprap on their property they should have been certain that the beach would so erode as to cause their riprap to "encroach." The law is not clear that intervening erosion of a beach causes a trespass; the fact that MHW would move to intersect the riprap was not certain when the riprap was placed either.

The Court relied on Restatement Section 158 for imposing liability when a person intentionally "fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158. However, the Court's assumption that Homeowners have a duty to remove simply because the Government demands that they do so is unsupported.

The Institute expresses no opinion as to whether there is a duty to remove from another's land a structure, chattel, or other thing in the possession of the actor which was carried or forced on the land without the actor's fault.

Restatement (Second) of Torts § 160.

Since the Restatement was written, courts discussing the federal law of trespass have addressed non-trespassory intrusions on to the land of another. In *Cannon v. Dunn*, 700 P.2d 502 (Ariz. 1985), plaintiff argued that, under Restatement Section 159, defendant had a duty to remove tree roots which invaded her property. The court noted that liability attached only if there was a duty to remove and Section 158(c) simply begged the question. *Id.* at 503. Instead, the court found the rule applicable to nuisances more appropriate and that liability attached only if there was "substantial damage." *Id.* at 504. Here, there are no substantial damages given that the Government and the Lummi waived their damage claims.

In a case involving damming one's property to protect it from overflowing waters, the California Supreme Court ruled:

[T]respass never lies when the act is lawful in itself, and injurious only in its consequences.... It is therefore no dispossession, no ouster, nor even a trespass, to flow water backwards on another person's land.

Hicks v. Drew, 49 P. 189, 190-191 (Cal. 1897); *see also Schulze v. Monsanto Co.*, 782 S.W.2d 419 (Mo.App. 1989) (no trespass for installation of riprap along river to protect property boundary); G. Van Ingen, *Right of Riparian Owner to Construct Dikes, Embankments, or other Structures*, 23 A.L.R.2d 750 (2006).

The Court held these cases inapplicable because none "sanction an actual physical encroachment but rather only consider a 'constructive' trespass whereby affects and consequences cause injury to land." Dkt.261, at 6 n.6. The Court's reasoning is not entirely clear, but suggests a distinction between rocks that "encroach" on the Govern-

ment's land and water that "encroaches." Both, however, involve invasions of physical objects, rather than injuries without encroachment, *i.e.*, injuries caused by sound, odor, light or vibration. There is no authority justifying a different rule for different, allegedly trespassory invasions.

D. Homeowners did not Cause any Encroachment

When Homeowners added riprap, the riprap was placed landward of MHW and within Homeowners' property. *See* Dkt.79, 99, 100, 102. If any of the rocks ever "encroached" on the Government's property, it is because the MHW line has moved landward beyond some of these rocks. Homeowners have not caused that movement or caused the trespass to occur. Instead, the piers north of Sandy Point have blocked the flow of sediment drift to Sandy Point and caused the beaches there to recede, causing the MHW line to move landward. Dkt.98, at 36. Accordingly, the United States and the Lummi have sued the wrong parties.

The Court plainly erred in concluding that the cause of the property movement is irrelevant and ruling that Homeowners were liable despite evidence showing they were not the cause. Dkt.261. The Court's grant of summary judgment on the trespass claim was erroneous.

IV

THE TRIAL COURT ERRED IN RULING THAT HOMEOWNERS VIOLATED THE RHA

The Government filed a motion for partial summary judgment for a ruling that Homeowners violated Section 10 of the RHA, 33 U.S.C. § 403. The Court granted the Government's motion. Dkt.261. The Court ruled that Section 10 makes "unlawful the maintenance of structures restricted by the Act." *Id.* at 7. The Court concluded that Homeowners are liable under the RHA for "those parts of the structures that are below MHW." *Id.* at 8.

The work engaged in by Homeowners at all times was landward of the MHW line. The Court stated that "it is irrelevant whether the riprap was originally placed above MHW for the purposes of the Government's RHA claim. The presence of these obstructions below MHW at this time is sufficient to trigger federal jurisdiction." Dkt.87.

The Government's case is based on 33 U.S.C. § 403. That statute contains three clauses, creating three different types of violations. Only the first two are potentially at issue here.

> [1] The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and [2] it shall not be lawful to build or commence the building of any ... bulkhead, jetty, or other structures in any ... water of the United States, ... except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

33 U.S.C. § 403 (numbering and emphasis added). The first prohibition is to the "creation of any obstruction" to the "navigable capacity ... of the waters of the United States." A creation of such an obstruction cannot be approved by the Corps--it can only be approved by Congress. The second prohibition, which may be permitted by the Corps, is on building or commencing the building of a structure in waters of the United States. This Court has recognized the distinct clauses in the RHA. *See, e.g., Sierra Club v. Andrus,* 610 F.2d 581, 594 (9th Cir. 1979), *rev'd on other grounds,* 451 U.S. 287 (1981).

The Court noted that the RHA makes it illegal "to build" without a permit and claimed that the RHA "make[s] unlawful the maintenance of structures restricted by the Act." Dkt.26 1, at 7. While maintaining structures which were "unlawfully built" may be unlawful, this Court should not assume that maintaining a structure is simply be-

cause it later came within RHA jurisdiction.

A. Homeowners Have not Created an Obstruction to Navigable Capacity

The Government's motion for summary judgment claimed a first clause violation. The Government claimed that it only needed to prove the current presence of these obstructions below MHW. The Court apparently agreed. Dkt.261.

To find liability under the first clause of 33 U.S.C. § 403, the Government must show that the obstruction is not merely in navigable waters, but rather is an obstruction to the navigable capacity of the waterway. Such an obstruction cannot be authorized by the Corps, but only by Congress.
The creation of any such obstruction may be enjoined ....[I]t becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream.

United States. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 729 (1899) (emphasis added).

Here, Homeowners presented evidence that their structures did not impact navigation. Dkt.236, at 8. The Court erred in finding a violation of the RHA in light of this evidence.

The case on which the Court below relied, *U.S. v. Alameda Gateway Ltd.,* 213 F.3d 1161 (9th Cir. 2000), involved the first clause of Section 403. It demonstrates the necessity of interfering with navigation to find a violation. The focus of this Court was on the interference with the pier to the navigable capacity of the harbor. *Id.* (“Gateway's piers prevented the creation of a turning basin that could safely accommodate larger vessels entering the Harbor.”). Importantly, Congress had passed legislation declaring that Gateway's pier in particular was an obstruction to navigation. *Id.* at 1164. This Court easily found a violation of the first clause of the RHA.

Finally, given the circumstances in this case, finding Homeowners liable under the first clause of the RHA is nonsensical. The Court's decision is based on the fact that Homeowners did not place anything in RHA jurisdiction at the time it was placed. The law is clear that an obstruction as used in the first clause requires Congressional approval. In other words, even though no permit was needed for the original construction of their shore defense structures, they can be liable based on changes to the shoreline caused by others and their only protection from liability is an “after the fact” permit from Congress. The first clause of the RHA should not be interpreted by this Court to have such a burdensome result to the normal protections applicable to waterfront properties.

B. Homeowners Have Not Built In Navigable Waters

Under the second clause, the law requires the “building” of the structure to occur in waters of the United States. The Court in *People v. Amerada Hess Corp.,* 84 Misc.2d 1036 (1975) explained the significance of this language.
The effect of the enactments cannot be to reproach a landowner from fortifying a boundary on a navigable body of water or waterway. Situations exemplifying the above-mentioned statutes show that they are designed to interdict what occurs when a person or corporation places fill *in* navigable waters *adjacent* to property without first obtaining a permit...
But while a riparian owner who seeks to improve his property must do so without obstructing the navigability of a waterway or without destroying the property of another riparian owner (*Rutz v. City of St. Louis,* 10 F. 338 (8th

Cir. 1882)), he is, nevertheless entitled to build some form of protection to establish his boundary or to prevent the loss of soil by the process of erosion.

Id. at 1039 (bold added; italics in original). Here, Homeowners have not built a structure in navigable waters. They built out of navigable waters, above MHW at the time of construction. Subsequent changes to the beach have caused MHW to reach their riprap. The Court's decision to impose liability under the RHA implicitly assumes the verbs in the statute of creating or building in violation of the law means nothing. To overlook the operative words of the statute means individuals can be liable under the RHA even though they needed no permit or placed nothing on their property, like Milners. This overly broad reading of liability under the RHA should be rejected.

C. Homeowners Are Not Liable Under the RHA Because of the Absence of Intent

Regardless of which clause of the RHA is at issue, a violation of the RHA requires intentional, or at least negligent, conduct. The Court in *United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) made clear that there is no strict liability under 33 U.S.C. § 403 because this statute exposes one to criminal sanctions including imprisonment and criminal statutes. *Id.* at 628. Such statutes are to be construed strictly. *Id.* (citing *United States v. Bigan*, 170 F. Supp. 219, 223 (W.D. Pa. 1959)). *See also United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240, 241 (D. Conn. 1926); *US. v. Alleyne*, 454 F. Supp. 1164, 1171 (S.D. N.Y. 1978); *United States v. Raven*, 500 F.2d 728 (5th Cir. 1974).

Here, there is nothing to prove intentional or negligent conduct by Homeowners. They placed riprap outside of the jurisdictional boundary of the RHA and the boundary moved due to no fault of their own. They should not be held liable for creating an obstruction. *See United States v. Bigan*, 274 F.2d 729 (3d Cir. 1960); *U.S. v. West Indies Transp., Inc.*, 127 F.3d 299, 310 (3d Cir. 1997).

Because there was no intent, no actual obstruction to navigation, and no construction in navigable waters, the Government's motion for summary judgment should have been denied.

D. The District Court erred in Issuing an Injunction under the RHA

The Court issued an injunction under the RHA, rather than the trespass claim. Dkt.261, at 9. Despite the Court's decision, an injunction does not necessarily follow a finding of a RHA violation. An injunction is an "extraordinary remedy." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (denying an injunction despite discharges of pollutants in violation of the CWA).

This Court reviews permanent injunctions under different standards. Legal conclusions are reviewed *de novo. Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Finally, the scope of the injunction is reviewed for an abuse of discretion. *Id.*

1. An Injunction Is Not Mandatory Under The RHA

The Court ruled that there is no need to consider irreparable harm or balancing of interests, but only to consider the nature of the Government's interests, whether there was Government misconduct and the practicality of the injunction. Dkt.261. The enforcement provision of the RHA provides that an injunction is not mandatory, which indicates the normal balancing of interests is appropriate.

As addressed above, Homeowners cannot be liable for failure to obtain a permit under the RHA when no permit

was required when the action was taken. If such is legally possible, the enforcement provision of the RHA (Section 12) does not allow an injunction in these circumstances. It provides for the
removal of any structures or parts of structures erected in violation of the provisions of [sections 401, 403, and 404 of this title or any rule or any regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title] may be enforced by the injunction of any district court ....

33 U.S.C. § 406 (emphasis added). The enforcement power extends only to structures "erected in violation" of the RHA. *Id* (emphasis added). There was no evidence that any part of any of Homeowners' "shore defense structures" were erected in violation of the RHA. They are not within the scope of 33 U.S.C. § 406.

This distinction between these provisions was explained by the Court in *United States v. Bigan,* 274 F.2d 729 (3rd Cir. 1960). In *Bigan,* the property owner had engaged in strip mining on uplands, but earth which had been removed during mining and piled (negligently) near a navigable river washed into the river during a torrential rain. *Id.* at 730. The Government sought injunction to remove the material.

The Third Circuit found that an injunction was inappropriate because of the scope of Section 12 of the RHA. *Id.* at 732. In the same vein, while Homeowners or their predecessor built a structure, they did not "erect it in" violation of the RHA. Section 12 injunctive relief is unavailable.

The Supreme Court concluded that Congress had not prevented the Courts from exercising equitable discretion in the granting or withholding of injunctive relief for violations of the CWA. *Weinberger,* 456 U.S. at 316. The result is no less true for violations of the RHA.

Several courts have so held. In *South Carolina ex rel. Maybank v. South Carolina Elec. & Gas. Co.,* 41 F. Supp. 111 (E.D.S.C. 1941), the court found injunctions to be discretionary because of the "may" language in the statute.
The Congress did not intend that it should be mandatory on the Attorney General to institute injunction proceedings in every case, or that it should be mandatory on the district court to grant an injunction in every suit.

Id. at 119; *see also, U S. v. Bailey,* 467 F.Supp. 925 (E.D. Ark.1979).

The *Bigan* Court recognized that traditional equitable powers of the court may make an injunction inappropriate.
the court carefully considered whether the equities of the situation were such that it should impose upon the defendant the burden and expense of removing the bar which had resulted from its negligence in conjunction with extraordinary rainfall.

274 F.2d at 733. The district court denied the request for the injunction, noting that the bar created some danger to boats, but no more danger than permitted obstructions. The Third Circuit agreed because "the obstruction was in fact only a technical burden and a minimal hazard." *Id.*

Here, the only evidence presented merely confirmed the obvious-that some rocks were not an obstruction at all, let alone any burden or hazard to the navigable capacity of the Strait of Georgia. Dkt.236, at 8. The Government's request for an injunction under the RHA should have been denied.

2. The Weighing of Equitable Factors Demands Denial of an Injunction

Several equitable factors raised to the Court, but not considered, call for reversal of the injunction issued in this case.

Lack of willfulness is a critical factor in determining whether to issue an injunction. *Hirshfield v. Schwartz*, 110 Cal. Rptr. 2d 861, 875 (Cal. Ct. App. 2001). Homeowners' actions were not a willful disregard of the RHA.

Additionally, the injunction ordered by the Court to remove the riprap is impractical. It is impractical to attempt to determine the "intersection of mean high water and the shore as it would be located but for the presence of artificial structures." Dkt.218, at 7-8; Dkt.290. In fact, the Government's surveyor had difficulty predicting where that line would be. *See* Dkt.231, at 13-14.

It is also impractical to remove rock based on the location of MHW when that boundary moves on a daily basis, and to a large degree, on a monthly basis. *See* Dkt.290, at 2-4. Courts have properly recognized that a moving tidal boundary line caused by winter/summer fluctuations is a factor for denying injunctive relief because of uncertainty and constant movement. *People v. William Kent Estate Co.*, 51 Cal. Rptr. 215, 219 (Cal. Dist. Ct. App.1966).

In light of the above, this case calls for the denial of an injunction even more strongly than any of the other RHA cases under consideration.

3. The Injunction is Overly Broad

Homeowners dispute that they violated the RHA and that an injunction is appropriate. However, if some injunction were warranted, the injunction ordered by the Court is overly broad. *See Lewis v. Casey*, 518 U.S. 343 (1996). It requires removal of material placed at a time beyond the statute of limitations and requires Milners, Nicholsons and Bennett/Boyd to remove material placed by someone else.

Courts, which have looked at the question of the statute of limitations for a RHA violation, have applied a three year statute of limitations. *United States v. Central Soya, Inc.*, 697 F.2d 165, 169 n.4 (7th Cir. 1982); *see also Chesapeake Bay Found. v. Bethlehem Steel Corp*, 608 F. Supp. 440 (D. Md. 1985). In *Cope v. Anderson*, 331 U.S. 461, 464 (1947), the Court held that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *Cope* has been more recently applied by this Court to limit an equitable remedy when the legal remedy has a statute of limitations. *Fed. Election Comm n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

Here, the evidence is undisputed the material ordered to be removed was placed by Homeowners or the predecessors longer than the three year statute of limitations period. Bennett/Boyd have added no rock since their purchase in 1994, but only replaced rock which had moved on to the beach. Dkt.99. Milners placed no rock on their property. Ever. Dkt.237. The Court erred in ordering removal of rocks placed beyond the applicable statute of limitations. Similarly, the Court's injunction orders Nicholsons to remove rock which was placed by their predecessor in interest. Dkt.97 and 100. There is no justification for expanding an injunction to require someone to remove something originally placed by someone else.

V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST NICHOLSONS ON THE CWA CLAIM

The Government filed for summary judgment against Nicholsons for rebuilding a concrete bulkhead in 1997. The Court ruled broadly about the extent of the Corps' jurisdiction in two respects. First, it ruled that the CWA

jurisdictional line was not MHHW. *See* Dkt.253, at 5-7.

Second, the Court ruled that even though Nicholsons were working landward of a lawfully-placed, pre-existing revetment above MHHW, the CWA jurisdictional line must be measured against the beach in its "natural, unobstructed state." Dkt.253, at 6 (quoting *Leslie Salt*, 578 F.2d at 753 and citing *United States v. Malibu Beach, Inc.*, 711 F.Supp. 1301, 1311 (D.N.J. 1989)).

After addressing the CWA jurisdictional line, waterward of which one needs a permit to do any construction, the Court addressed the evidence regarding the Nicholsons' bulkhead. The Government submitted pre-construction sketches of the bulkhead (Dkt.229, at 88-90) and the Court ruled that the drawings prove a violation of the CWA. Dkt.253, at 8.

A. CWA Jurisdiction Does Not Extend Further Than MHHW

Jurisdiction under the CWA is the "high tide line." That line is not self-explanatory, but could refer to ordinary high water mark, extreme high tide, highest reported tide, MHW, or MHHW. The Court concluded that "high tide" was somewhere higher than MHHW. Dkt.253.

The Government's argument is completely contrary to how the Seattle District of the Corps interprets its authority under the CWA. The Corps' policy using MHHW as the jurisdictional boundary was confirmed by Thomas Mueller, the Chief of the Regulatory Branch of the Seattle District, other Corps staff, written publications, and the understanding of coastal engineers in the area. Dkt.235, at 112-116; 236, at 4; 288, at 9, 18. Agency interpretation is normally entitled to deference.

Based on that policy, permits are issued and projects are designed to avoid permit requirements. If the Government can bring enforcement proceedings which are contrary to the Corps policy regarding jurisdiction, the result is not only unfair, but potentially jeopardizes numerous projects in this state.

After summary judgment, the matter was assigned to Judge Leighton to determine a remedy. He decided that he would not revisit the prior summary judgment ruling. Dkt.326, at 12. However, he did take issue with the earlier ruling that the boundary of the Corps could be anything higher than MHHW. *Id.* Nevertheless, the summary judgment order finding liability remained.

B. The Court Erred in Disregarding Lawfully Placed Improvements

Nicholsons' alternatively defended by explaining that the reconstruction of their bulkhead was conducted landward of a pre-existing rock revetment placed by their predecessor, Beeman. Later, Judge Leighton issued findings of fact that Beeman's revetment was built above MHHW. Dkt.326, at 11-12. On summary judgment, the Court ruled that the jurisdictional boundary must be viewed (like the property boundary) as if lawful improvements had never been made solely because they are "artificial." As discussed *infra*, reliance on *Leslie Salt* for this position is misplaced.

Stretching *Leslie Salt* from illegally filled tidelands to lawfully built revetments expands Corps' jurisdiction beyond even the Corps' conception of its jurisdiction. Just because diked areas would otherwise be in contact with water at MHHW (for example, New Orleans), does not mean they are within the Corps's CWA jurisdiction. The Court's decision should be reversed.

C. The Court Improperly Placed the Burden of Proving the Jurisdictional Line

The Court chided Nicholsons for challenging the Government's assumptions about the evidence by stating that "the Nicholsons do not present any analysis that demonstrates that the work was conducted landward of MHW and MHHW as they are located in a natural and unobstructed state." Dkt.253, at 8. The manifest error with this conclusion is that the Government produced no evidence regarding the location of Nicholsons' work. Nevertheless, Nicholsons did provide evidence that the work conducted was above MHHW; nothing requires that they create a sophisticated survey map of the hypothetical conditions in 1997. Thus, at best, the issue was disputed; at worst, it was undisputed in Nicholsons' favor.

As the moving party, the Government bore the burden of submitting evidence regarding the scope of the Corps' CWA jurisdiction if the beach were in a natural and unobstructed state.
Where the moving party has the burden--the plaintiff on a claim for relief or the defendant on an affirmative defense--his *showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.*

Schwarzer, Tashima and Wagstaffe, Fed. Civ. Proc. Before Trial at 14-36-14-37 (Rutter Group 2003) (citations omitted).

The Government produced no evidence regarding where MHHW or "high tide" is on Nicholsons' property in its natural and unobstructed state. Given the alteration of the shoreline by residential development and the interruption of the flow of beach-building sediments by the industrial piers north of Sandy Point, it would be difficult identify where the MHHW line would lie on the beach's "natural state."

Nevertheless, the only testimony regarding the beach's natural state was offered by Nicholsons' coastal engineer, Jeffery Layton. Dkt.98, at 37-65. His report explains that the beach in its natural state would extend significantly landward of its current position. *Id.* Clearly, the Court erred in granting summary judgment.

D. Nicholsons Presented Evidence of Disputed Triable Issues of Fact

As addressed in the Statement of Facts, *infra* at 11-14, the Court relied on pre-construction sketches to show that the reconstructed bulkhead was built below MHHW. Nicholsons provided evidence showing these sketches do not reflect what was actually built, Dkt.235, at 46-98; Dkt.240-42, plus evidence that the actual construction was above MHHW. *Cf.* Dkt.245, at Ex. 175, at 6-7 *with* Dkt.258.

In the face of competing evidence, the Court erred in granting summary judgment to the Government. Critically, the finding issued as a result of the penalty trial confirms that the Nicholsons' structure was not below MHHW at the time of construction. Dkt.326, at 11-12.

In conclusion, the Court read far too much into the conceptual drawings (Dkt.229, at 88, 90) and about what the beach might be in its natural state. A respected coastal engineer with 25 years of experience would not draw such conclusions from the drawings. *See* Dkt.259. The Court should not have either.

E. The Court Erred in Denying Nicholsons' Motion for Reconsideration

Nicholsons objected to some of the evidence the Government submitted with its motion. Dkt.239. After the Government filed its reply, it filed a separate response with 238 pages of evidence and argument, Dkt.245, and a request to exclude Nicholsons' evidence. Dkt.246. Nicholsons were unable to respond to this evidence prior to issuance of summary judgment. Dkt.253. Hence, they filed a motion for reconsideration with declarations,

Dkt.257-59, which the Court denied. Dkt.262.

This Court reviews denials of reconsideration issues for an abuse of discretion. *Smith v. Pacific Prop's and Devel. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004). The Court manifestly abused its discretion in granting summary judgment without giving Nicholsons a fair opportunity to rebut.

This Court has held that the district court cannot consider new evidence presented in a reply to a response to a summary judgment motion without giving the non-movant an opportunity to respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996); *see also* Schwarzer, Tashima and Wagstaffe at 12-43, ¶ 12:107.

Hence, Nicholsons were entitled to respond to argument and evidence offered by the Government after its initial summary judgment motion. It was an abuse of discretion to deny the reconsideration motion.

F. The Scope of the Injunction is Inappropriately Broad

The remedy to be awarded the Government was the subject before Judge Leighton. The Court ultimately ruled that Nicholsons were required to seek "after the fact" permits and, if unable to obtain them, to remove all material depicted on the Government's 2002 survey being below MHHW. Dkt.326, at 16, and Dkt.231 at 69. In the event that summary judgment is upheld, the injunction is overly broad because it requires Nicholsons to remove material placed by someone else-their predecessor--beyond the statute of limitations.

1. Nicholsons cannot be liable for rocks placed by someone else

There appears to be only one reported case where the Government attempted to hold a person liable for the conduct of a predecessor in title. In *In re Carsten*, 211 B.R. 719 (Bankr.D.Mont. 1997), Chapter 12 debtors were not liable for CWA violations allegedly committed in conjunction with construction of a pond because they did not own the land when the pond was constructed, nor were involved in the work. The same is true regarding Nicholsons. They had nothing to do with Beeman's placement of rocks in 1983.

Additional cases show that in order for liability to attach, defendant must have some control over the act. For instance, in *Canada Community Improvement Society, Inc. v. City of Michigan City*, 742 F.Supp. 1025 (N.D.Ind. 1990), the Court held that a city could not be liable for alleged CWA violations committed by the Corps on the city's behalf because the city hadn't taken control of the project. *See also Love v. Dep't. of Envtl. Conservation*, 529 F.Supp. 832 (S.D.N.Y. 1981).

2. Nicholsons cannot be fined or ordered to remove rocks placed prior to the statute of limitations

The only Ninth Circuit case involving the statute of limitations under the CWA appears to be *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987), where the Court applied the five-year limit in 28 U.S.C. § 2462. The Court reasoned that "[t]his section clearly applies to enforcement actions brought by the EPA; such actions are by the government and for the enforcement of [a] civil fine." *Id.* at 1521 (internal quotations omitted, brackets in original). *See also Community Ass'n for Restoration of Env't v. Sid Koopman Dairy*, 54 F.Supp.2d 976 (E.D.Wash. 1999).

As addressed *supra* at 45, an injunction should be withheld if the statute of limitations would bar the concurrent legal remedy. *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58-59 (1987) (injunction for past violations in CWA citizen suit inappropriate).

Since the rock placed by Nicholsons' predecessor predates the five-year limitations period by over a decade, the Court should not have ordered them to remove it or pay civil penalties for its existence. Given the extraordinary nature of injunctions, if the Court were to order an injunction, it should exclude this rock from its scope.

VI

THE DISTRICT COURT ERRED IN DENYING THE BENNETT/BOYD AND MILNERS EAJA MOTION

The Government initiated a lawsuit against the Bennett/Boyd and Milners seeking, *inter alia*, penalties for alleged CWA violations. To resolve these CWA claims, they filed for summary judgment. Dkt.351. In response, the Government voluntarily dismissed the claims. Dkt.362.

Bennett/Boyd and Milners subsequently filed a motion for fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, for their defense of only the CWA claim. The Court denied the motion on the basis that the Government's position was "substantially justified" under 28 U.S.C. § 2412(d)(1)(A). Dkt.393. It came to this conclusion because the Government prevailed on two out of the three claims it brought and it viewed the Government's position as one upon which reasonable minds could differ. *Id.* at 3, 5.

The standard of review of a decision under the EAJA is "abuse of discretion" unless the Court is reviewing an interpretation of the EAJA or under law which would call for *de novo* review. *United States v. 87 Skyline Terrace,* 26 F.3d 923,927 (9th Cir. 1994). The trial court erred in denying these Homeowners' motion for attorney fees and costs.

A. The Purpose of the EAJA

The congressional intent underlying the enactment of EAJA was to ensure the vindication of rights and freedoms of citizens who might otherwise be precluded from the adjudicatory process due the prohibitive costs of associated with seeking justice. *See* H.R. REP. No. 96-1418, at 9-10, 12, 18, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987-89, 4991, 4997-98.
The EAJA was intended to prevent the government from initiating or defending a "sure loser", when unwarranted litigation will do no more than to cause its opponent to expend monies in the fight or to "give up" in the name of economy and peace.... It is intended to caution Uncle Sam's agencies to carefully evaluate their cases and not to pursue those which are weak or tenuous just because they have the logistical capacity to do so.

Citizens Bank v. United States, 558 F. Supp. 1301, 1304 (N.D. Ala. 1983).

B. The District Court's Conclusion about Substantial Justification is an Abuse of Discretion

The test of whether or not a Government action is "substantially justified" is essentially one of reasonableness. *League of Women Voters of Cal. v. FCC,* 798 F.2d 125, 1257 (9th Cir. 1986). Each of the Government's claims against these Homeowners must be grounded in a "reasonable basis in both law and fact" individually, and on their own merits. *CEMS, Inc. v. United States,* 65 Fed. Cl. 473, 476 (2005) (emphasis added), *citing Pierce v. Underwood,* 487 U.S. 552, 565 (1988). Congress mandated that a court must review each position of the Government in a given case, on a claim-by-claim basis, through the "EAJA prism" to determine whether individual positions against these Homeowners were substantially justified. *Id.* (citations omitted).

1. Success Under Two Claims Does Not Provide Substantial Justification for the Government's CWA Claim

The Court took the approach that the Government was substantially justified because Milners and Bennett/Boyd lost on two out of three claims. However, the EAJA does not adopt an "all or nothing" approach. Rather, courts have recognized that parties may be entitled to fees under the EAJA for claims on which they prevailed and no fees on claims they did not prevail. *United States v. Jones,* 125 F.3d 1418, 1427 (11th Cir. 1997); *Smith by Smith v. Bowen,* 867 F.2d 731, 734-735 (2d Cir. 1989); *Goldhaber v. Foley,* 698 F.2d 193, 195-98 (3d Cir. 1983). That the Government prevailed on its RHA and trespass claims does not prove that its CWA claim was substantially justified.

Here, there is no evidence that these Homeowners discharged anything below the CWA jurisdictional line. Milners placed no material on the beach, let alone below MHHW. Ever. Dkt.79 and 351. How can they possibly guilty of discharging material into the waters of the United States without a permit? The Government needed to conduct a pre-filing inquiry into the facts and have some evidence that Milners had dumped material into the waters of the United States. *Business Guides, Inc. v. Chromatic Communications Enter's, Inc.,* 498 U.S. 533 (1991). It had none.

The Government's position that Bennett/Boyd discharged material in violation of the CWA is also not substantially justified. They placed no riprap below MHHW, but rather gathered rock that had fallen off their pile of riprap onto the beach and replaced it. Dkt.99. Clearly, there is no evidence that they "discharged" any materials into the waters of the United States as alleged in the complaint against them or that the 7 rocks shown on the Government's 2002 survey (Dkt.231, at 71) were placed by them below MHHW.

The Order also states that "it was previously determined that one may be liable for a discharge even if he did not originally place the offending material (and even if the material was not offending when it was placed)." Dkt.393, at 5. Presumably, the order in which it was "previously determined" that one can be liable for someone else's actions is the order denying Milners' first motion for partial summary judgment. Dkt.87. The Court relied on *Froebel v. Meyer,* 217 F.3d 928 (7th Cir. 2000), for the notion that a person could be liable for the discharge of materials which disperse into waters after the defendant acquired ownership. Dkt.87, at 5-6. *Froebel* does not conclude that a person can be liable for someone else's CWA violations. In fact, the Seventh Circuit dismissed all claims against Waukesha County because the County took no *active participation* in the discharge. *Froebel,* 217 F.3d at 938-39. One cannot be liable "for a 'discharge' by doing absolutely nothing at all." *Id.* at 938.

The parenthetical in the Court's order denying EAJA fees is simply not true in regard to the CWA claim. For the CWA claim, no court has ruled that one could be liable for CWA penalties unless the material was placed into CWA jurisdiction at the time of discharge. Even the Government disclaimed such an expansive view of the scope of the CWA. Dkt.400, at 5-6, 11-12.

2. "Substantial Justification" Cannot Be Founded Upon Successful CWA Claims Against Others

As stated previously, this Court must independently review each distinct claim brought by the Government to determine whether each claim was substantially justifiable. The Court's stated: "[t]he Court found in the Nicholson case that the Nicholsons' seawall did in fact encroach onto the tidelands." Dkt.393, at 4. This ruling in regard to Nicholsons provides no justification for the Government suing Milners or Bennett/Boyd for separate CWA claims. All of Homeowners' shore defense structures, not just Nicholsons, extended into the tidelands (the upper reach of which is MHW) at the time the Court considered the Government's motion for summary judgment on trespass.

But more disconcerting is the Court's next statement: "The remaining defendants' seawalls were similarly con-

structed and maintained, and were in similar locations." Dkt.393, at 4-5. The remaining defendants' defense were all built at different times, made of different construction materials, and placed at different elevations. Dkts 126-128; 237-38. Simply because Nicholsons' substantial bulkhead built in 1997 was found on summary judgment to be constructed in violation of the CWA does not provide substantial justification that other Homeowners with more modest structures built decades earlier violated the CWA too. Guilt by association (solely by being in the same neighborhood) may have been good enough for the U.S. Attorney; it should not receive the approval of this Court.

3. "Substantial Justification" Cannot Be Founded Upon the Difficulty of the Case

Finally, the Court's Order states that the "difficulty" of the subject matter involved in proving a CWA violation provides substantial justification. Dkt.393, at 4. More specifically, the Order concluded that during the Nicholsons trial there were "conflicting expert opinions available as to the location of the mean high water line, the mean higher high water line, the transient nature of these lines and the difficulty in measuring them all, much less establishing them over time." *Id.* The complexity of determining the MHHW line does not give the Government *carte blanche* authority to sue anyone with a shore defense structure in the vicinity of another landowner who is later found liable for a CWA violation relating to his bulkhead.

That there was difficulty in determining jurisdictional lines relative to Nicholsons' rebuilding of the concrete bulkhead because it was within inches of the MHHW line has no bearing on Milners or Bennett/Boyd. The Government had no evidence of where the line was at the time of construction for Milners' property or the Bennett/Boyd property. The lack of any evidence of the jurisdictional line at the relevant time makes the difficulty of making precise measurements irrelevant in the Milners and Bennett/Boyd case. Plainly, there was no basis that CWA claim against Milners and Bennett/Boyd was brought with any substantial justification.[FN6]

> FN6. Tellingly, at closing argument in the Nicholson penalty trial, Mr. Kipnis explained why he was proposing dismissing the claims against Homeowners seeking fees because of the absence of evidence. Dkt.400, at 15.

Fees and costs under the EAJA are appropriate for these Homeowners because the Government never had any evidence that these people took any action in violation of the CWA. This confirms the suit was without any, let alone substantial, justification. If the complete absence of evidence to support an essential element of the claim does not prove lack of substantial justification, then the EAJA is meaningless. These Homeowners are entitled to recovery of the reasonable fees incurred in defending against the Government's meritless CWA claims against them.

CONCLUSION

Appellants urge the Court to reverse the district court decision on one or more of foregoing bases.

Statement of Related Cases

Homeowners know of no related cases pending in this Court.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff/Appellee/Cross-appellant, The Lummi Nation, Intervenor/Respondents-Appellees, v. Keith E. MILNER and Shirley A. Milner, et al., Defendants/Appellants/Cross-appellees.

2006 WL 4055746 (C.A.9) (Appellate Brief)

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