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WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, on  
its own behalf and as trustee  
on behalf of the Lummi Nation,

Plaintiffs,

v.

KEITH E. MILNER and SHIRLEY A.  
MILNER, et al.,

Defendants.

THE LUMMI NATION,

Intervenor-Plaintiff.

NO. C01-809R

ORDER DENYING MOTION FOR  
PARTIAL SUMMARY JUDGMENT RE:  
ARRESTING LANDWARD MOVEMENT  
OF BOUNDARY

I. BACKGROUND

This case involves changes in the beach on Sandy Point in  
Whatcom County, Washington and the alleged trespass of shore  
defense structures onto land held by the United States in trust  
for the Lummi Nation. Defendants own properties that are bounded  
on one side by the sea. When property is bounded by water, that  
boundary is ambulatory, constantly changing location in response  
to erosion and accretion. New Jersey v. New York, 523 U.S. 767,  
784 (1998). In the present case, the court has in fact already  
held that the seaward boundary of Defendants' properties, marked  
by mean high water, has always remained ambulatory. Order

Chl BGR

*[Handwritten signature]*

1 Granting United States' and Lummi Nation's Motion for Partial  
2 Summary Judgment (Jan. 24, 2003); Order Denying Motion for  
3 Reconsideration (Feb. 6, 2003).

4 On January 30, 2003, this court heard argument from the  
5 parties on whether an artificial structure such as a seawall or  
6 bulkhead and riprap can "fix" the landward movement on the shore  
7 of an ambulatory boundary. For the purposes of this ruling, the  
8 court assumes that the bulkheads and riprap fronting Defendants'  
9 properties were initially placed above mean high water such that  
10 they were originally located wholly on Defendants' properties.  
11 Furthermore, the court assumes that erosion alone has caused the  
12 landward creep of the mean high-water mark so that it currently  
13 is located on the face of these structures.<sup>1</sup>

14 The court, having reviewed the pleadings filed by the  
15 parties and having heard oral argument, rules as follows.

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18 <sup>1</sup> Were these assumed facts different, the matter would be  
19 easily resolved. For instance, it cannot be disputed that  
20 artificial structures placed below mean high water do not affect  
21 the location of the mark on the shore. Leslie Salt Co. v.  
22 Froehlke, 578 F.2d 742, 753 (1978) (when obstructions are placed  
23 below MHW, "the MHW line is to be fixed in accordance with its  
24 natural, unobstructed state"). It can also not be disputed that  
25 where authorized filling has occurred, the tidal boundary is  
26 marked at the face of the authorized fill. 91 A.L.R.2d 857 §2[b]  
(1963) (citing cases holding that expressly permitted or  
authorized reclamation and filling of adjacent shore creates  
title in the newly filled land in the riparian proprietor). The  
present facts assume that structures were originally placed above  
MHW and that MHW impacts those structures only as a result of  
erosion.

1 II. DISCUSSION

2 A. Tidelands and the conflict of private rights

3 Tideland ownership is one of the more often contested issue  
4 in American property jurisprudence. Easily filled, tidelands  
5 are often encroached on by adjacent upland owners. Whether the  
6 upland owner fills the tidelands and claims them as his own, or  
7 whether he constructs piers, wharves, or other structures on or  
8 over them, in each case, the upland owner uses the land without  
9 the permission of the tideland owner.

10 Otherwise straightforward and simple trespass and pur-  
11 presture actions are complicated by the fact that the boundary  
12 between tidelands and uplands is ambulatory. Such a boundary  
13 is constantly displaced according to the rules of erosion and  
14 accretion, which give title to accreted land to upland owners  
15 and title to eroded land to tideland owners. 3 Washburn on Real  
16 Property 65 (5th ed. 1887) ("the boundary-line of an owner's  
17 land bordering upon the sea varies with the gradual increase or  
18 diminution of quantity by the addition of alluvion, or by the  
19 wasting away before the action of the water in its encroachments  
20 upon the land, the line of the shore varying accordingly").  
21 Dating back to Roman times,<sup>2</sup> the right established by these rules  
22 "rests in the law of nature . . . the same with that of the owner

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23  
24 <sup>2</sup> See J. Inst, Lib. II, Tit. I, § 20 ("the alluvial soil  
25 added by a river to your land becomes yours by the law of  
26 nations"). The rules of accretion can be found in the Napoleonic  
Code, the law of Spain, and English law. See County of St. Clair  
v. Lovington, 90 U.S. 46, 66-67 & nn.32-39 (1874).

1 of a tree to its fruits and of the owner of flocks and herds to  
2 their natural increase." County of St. Clair v. Lovington, 90  
3 U.S. 46, 69 (1874). Its foundation is the maxim "*qui sentit onus*  
4 *debet sentire commodum*"--he who bears the burden of a thing ought  
5 also to experience the advantage arising from it. Id. In the  
6 present case, then, it is a natural right of both the Lummi  
7 Nation and the Defendants to have an ambulatory boundary.

8 At present, though, Defendants' ambulatory boundary is an  
9 unsatisfactory one. Much of the beachfront that had previously  
10 stood between winter storms and their homes has been washed away.  
11 Defendants seek to exercise their right to protect their property  
12 from the ravages of the sea, a right which they claim is as  
13 equally fundamental as Plaintiffs' right to an ambulatory bound-  
14 ary. See, e.g., Chesapeake & Ohio Ry. Co. v. Harris Stanley Coal  
15 & Land Co., 56 F. Supp. 849, 851 (D.C. Ky. 1944) ("There is a  
16 fundamental rule of law that an individual has a right to use his  
17 property as he sees fit without interference from his neigh-  
18 bors."); Jubilee Yacht Club v. Gulf Refining Co., 140 N.E. 280,  
19 281 (Mass. 1923) ("The building of fences, walls or other struc-  
20 tures, or making excavations on [one's] own land ordinarily is  
21 within the absolute right of the owner of a fee without reference  
22 to the incidental injury which may thereby be caused to his  
23 neighbor."). Defendants contend that, according to these cases,  
24 they are entitled to construct riprap and sea walls on their own  
25 property with the intent of protecting that property from an  
26 encroaching sea despite the consequences to Plaintiffs. 1 Wood

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1 on Nuisances 675, § 494 (3d ed.) ("Every proprietor of land  
2 exposed to the inroads of the sea may erect on his own land  
3 groins, or other reasonable defenses, for the protection of his  
4 land from the inroads of the sea, although by doing so, he may  
5 cause the sea to flow with greater violence against the land of  
6 his neighbor, and render it necessary for the latter to protect  
7 himself by the erection of similar sea defenses.").

8 Defendants' argument leads to unacceptable consequences in  
9 the present case. Here, Defendants' shore defense structures do  
10 not result merely in incidental injury. Rather these structures  
11 deny the United States and the Lummi Nation land that would  
12 otherwise accrue to them through erosion. As stated above, that  
13 land is a natural right which cannot be abrogated by the Defen-  
14 dants' need to maintain their own property. In purchasing  
15 property on the shore, Defendants accepted certain rules includ-  
16 ing gains through accretion and losses through erosion. Having  
17 played by those rules for many years, Defendants cannot now  
18 change those rules unilaterally in their own favor without  
19 compensating the United States and Lummi Nation for their loss.  
20 By artificially stopping erosion that would otherwise occur,  
21 Defendants injure Plaintiffs, something that Defendants cannot do  
22 free of liability. Turner v. Tuolumne County Water Co., 25 Cal.  
23 397, 403 (Cal. 1864) ("While the defendant had an undoubted right  
24 to ward off from its own property the damaging effects of the  
25 storm, yet in exercising that right it was bound to take care not  
26 to injure that of the plaintiffs."); 1 Wood on Nuisances 675

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1 ("But a man has no right to do more than is necessary for his  
2 defense and to make improvements at the expense of his neigh-  
3 bor."). Inasmuch as it is clear that Defendants are entitled to  
4 construct shore defense structures on their own property, "it is  
5 equally clear that this right to deal with the [sea] and to  
6 control its current must be exercised with a just regard to the  
7 rights of others." Crawford v. Rambo, 7 N.E. 429, 431 (Ohio  
8 1886); see also 1 Wood on Nuisances § 350 ("While it is true that  
9 a riparian owner may erect bulwarks to protect his property from  
10 injury by the stream, yet they can only do this when it can be  
11 done without injury to others, either to an owner upon the  
12 opposite side of, or to those above or below him on the  
13 stream.").

14 This principle, that adjoining property owners cannot  
15 infringe on a neighbor's rights, is demonstrated in various  
16 similar contexts. For example, in the apportionment of riparian  
17 rights,<sup>3</sup> one cannot increase one's rights at the expense of  
18 another. Carr v. Kidd, 540 S.E.2d 884, 891 (Va. 2001) (affirming  
19 rule that apportionment of riparian rights, which is based on the  
20 length of shore each riparian proprietor owns, is based on the  
21 natural shoreline regardless of any perimeter improvements).  
22 Likewise, a riparian owner cannot induce an artificial change in  
23 water boundaries if harm to other interests would occur. Strom

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25 <sup>3</sup> Riparian rights include a riparian owner's right to erect  
26 structures up to the line of navigation.

1 v. Sheldon, 12 Wash. App. 66, 73 (1974). These cases all have in  
2 common the principle that a riparian owner cannot act in such a  
3 way as to cause an injury to a neighbor's rights. As in these  
4 cases, Defendants in the present case cannot abrogate their  
5 neighbors' right to an ambulatory boundary in favor of their own  
6 right to protect their property.<sup>4</sup>

7 In all, the court is persuaded that the mean high-water mark  
8 should be located at the point on the shore where it would be  
9 located but for the presence of Defendants' shore defense struc-  
10 tures. If the mean high water mark were to be located on the  
11 shore defense structures, erosion would be effectively stopped  
12 and a very large benefit would accrue therein to Defendants at  
13 the detriment of the United States and the Lummi Nation. Accord-  
14 ingly, the court holds that artificial structures that are not  
15 otherwise authorized do not arrest the landward movement of an  
16 ambulatory water boundary.

### 17 18 III. CONCLUSION

19 For the foregoing reasons, Defendants' motion for partial  
20 summary judgment [docket no. 161-1] is DENIED. The court holds  
21 that the tideland boundary is marked by the intersection of mean  
22 high water and the shore as it would be located but for the

23 \_\_\_\_\_  
24 <sup>4</sup> The court considers this obligation to avoid injury to be  
25 reciprocal. Inasmuch as Defendants must not act in a way to  
26 infringe Plaintiffs' right to an ambulatory boundary, Plaintiffs  
cannot be unreasonable in the exercise of their rights to the  
detriment of Defendants' rights.

1 presence of artificial structures.

2 DATED at Seattle, Washington this 11<sup>th</sup> day of February,  
3 2003.

4   
5 BARBARA JACOBS ROTHSTEIN  
6 UNITED STATES DISTRICT JUDGE  
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