



Sea Level Rise and Coastal Boundary Lines – Consequences of Climate Change

12.17.2009

Coastal property owners take note – a number of current developments could threaten your property rights. As climate change and other factors result in sea level rise, coastal boundary lines are anticipated to come under increasing scrutiny and dispute. The California State Lands Commission currently estimates that sea level rise will surpass the one foot mark before 2050. The newly issued report citing that figure is set to be discussed at its December 17th meeting. In addition to sea level rise, two major judicial developments also threaten the real property rights of coastal landowners. The United States Supreme Court is currently in the process of deciding a case impacting the littoral rights of beachfront property owners in Florida, while the Ninth Circuit Court of Appeals recently issued a decision adverse to landowners who had built coastal protection structures on their own land. All of this could spell trouble for coastal property owners.

The week of December 7th, the California State Lands Commission issued its Report on Sea Level Rise Preparedness. The purpose of the Report is to present recommendations to the Commission "to better assess the impacts of sea level rise on existing facilities and future development proposals for lands under its jurisdiction." The Report begins by noting that "the effects of changes to the atmosphere, including climate change and sea level rise, will have global consequences for the world and the United States." The Report estimates in this regard that the sea level is projected to rise 16 inches by 2050 and 55 inches by 2100. "As sea level continues to rise, it will have an impact on California's sovereign lands and shoreline boundaries." As such, the boundaries of sovereign ownership will move landward, replacing private ownership with sovereign ownership of the lands lost to sea level rise. The Report points out that "coastal boundaries and the State's sovereign ownership should continue to move with ever shifting sands and seas."

By coincidence, the Report was issued just after two major judicial developments occurred. First was the hearing before the United States Supreme Court in *Stop the Beach Renourishment v. Florida*, a Florida

Supreme Court decision, which upheld a State of Florida statute providing for unilateral setting of new boundary lines. In that case, the private homeowners lost a portion of their sandy beach as a result of a hurricane. Thereafter, a governmental sand replenishment project resulted in the reclamation of the property from the sea and the loss in ownership of the property by the private homeowners. The underlying issue has yet to be decided as the United States Supreme Court has taken the case under submission and no decision has yet been rendered.

The Ninth Circuit Court of Appeals' decision in *United States v. Milner* is even more chilling. There, the coastal landowners built coastal protection structures on their own lands, but were thereafter liable for trespass! The Court of Appeals' rationale was that the coastal protection structures were no longer located on landowner property since the property line should be measured from where the mean high tide line should have been but for the coastal protective structures. Hopefully, the unique facts of the case, Indian tribe-owned tidelands and the application of Federal law will severely restrict the applicability of *Milner* in most other situations.

The juxtaposition of the California State Lands Commission Report regarding sea level rise and change in ownership with the *Milner* decision and the hearing before the United States Supreme Court in the Florida case raise the scary specter of private landowners adjoining the coast losing their real property rights and, more importantly, being unable to protect such property rights.

The State Lands Commission Report references Emperor Justinian's codification of the dictum that by the law of nature, the sea, and consequently the shore of the sea, are common to mankind. What was left unsaid was that under the ancient "common enemy doctrine," the coastal homeowner has the right to protect itself from the intrusion of tidal waters. Unhappily, the *Milner* case specifically said the ambulatory nature of a tidal boundary does not make it a common enemy. If *Milner* were the law in Holland, large chunks of that country would have been lost regardless of any finger in the dike. However, *Milner* did not focus on the need for protection from sea level rise. Moreover, *Milner* does not persuade on this point in its discussion since tidal waters was one of the bases for the common enemy doctrine.

Another issue left unaddressed by the State Lands Commission Report was the right under ancient common law for the coastal landowner to reclaim lands lost to tidal waters. Although the State may argue that such right, to the extent it exists, only is applied to avulsive events, this loses sight of the fact that with the Coastal Commission, the United States Army Corps of Engineers and other regulatory agencies, permission to build protective structures may be denied or the approval process unduly prolonged, during which time homeowner property is lost as the sea level rises.

What all this means is that coastal property owners need to recognize the ramifications of sea level rise before it is upon them, in order to have the time to apply for and, if necessary, to litigate the right to build the required protective structures. Otherwise, such homeowners will find both their lands and rights lost to erosion.

Howard Coleman has over 35 years of legal experience representing public and private project owners, developers, investors and institutional lenders with respect to all types of real estate transactions. His practice focuses on issues relating to oil and gas, and tideland and coastal matters. He can be reached at 213.612.7821 or hcoleman@nossaman.com.