No. _____ 09-820 JAN 7- 2010

In The
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

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

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As a matter of federal law, the boundary on navigable waters between uplands and tidelands is ambulatory in nature. Upland owners have a common law right to build shore defense structures on their property to protect against erosion.

Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." It also makes it unlawful to "build or commence the building of any . . . structures in", or "to excavate or fill, or in any manner to alter or modify," navigable waters of the United States without a permit from the Army Corps of Engineers.

Submerged lands underlying navigable waters within territories of the United States are presumed to be held by the United States in trust for future states, which generally acquire such lands by virtue of their sovereignty upon achieving statehood. Nevertheless, Congress may withhold specific submerged lands from a future state by using plain language demonstrating intent to withhold them.

The questions presented are:

1. As a matter of federal law, when owners of real property abutting navigable waters lawfully erect a shore defense structure on their own uplands, does the shore defense structure constitute a trespass

QUESTIONS PRESENTED FOR REVIEW – Continued

against the tideland owner if subsequent erosion causes the mean high water line to contact the seaward face of that shore defense structure?

2. As a matter of federal law, does an owner of tidelands underlying navigable waters have a vested right to the unabated erosion of abutting uplands as they would exist in their natural state – a right that is superior to the upland owner's right to erect shore defense structures?

3. Is an owner of upland property strictly liable under Section 10 of the RHA for erecting a shore defense structure without a federal permit when, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States?

4. Is injunctive relief under the RHA exempt from the general requirement that courts balance competing equitable interests before issuing an injunction?

5. Is the general disclaimer in the Washington Enabling Act that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" sufficient to demonstrate the requisite Congressional intent to overcome the presumption that tidelands are held in trust for the State of Washington?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties in the Court below include Keith and Shirley A. Milner, Ian Bennett and Marcia Boyd, Brent and Mary K. Nicholson, Harry Case, Donald and Gloria Walker and petitioner here, Mary D. Sharp.

Respondents, the United States and the Lummi Indian Nation, were plaintiff and intervenor-plaintiff, respectively, in the proceeding below.

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OPINIONS BELOW

The opinion below was issued by the United States Court of Appeals for the Ninth Circuit. It is reported as *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009) and is reprinted beginning at Appendix (App.) 1. The panel upheld a series of unreported summary judgment orders of the United States District Court for the Western District of Washington that were entered on various dates, and are reprinted beginning at App. 46.

JURISDICTION

The Court of Appeals' decision was issued on October 9, 2009. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case concerns the interpretation and application of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 *et seq.* (RHA). Relevant provisions of the RHA are reprinted beginning at App. 109.

INTRODUCTION

This petition presents issues of enormous importance regarding property ownership along the Nations' navigable waters that call for resolution by this Court. Petitioner Mary D. Sharp owns waterfront property within the Lummi Indian Reservation in Whatcom County, Washington. She and her husband (Homeowners)[1] own a home with a typical shore defense structure to protect against erosion, specifically a wooden bulkhead and riprap. The federal government joined with the Lummi Indian Nation to sue her for trespass because, even though the shore defense structure was originally erected on her own land, the beach between her structure and the tideland boundary subsequently eroded away. Instead of intersecting the beach, that boundary, the mean high water line, now intermittently intersects a portion of her shore defense structure.

The Ninth Circuit Court of Appeals ruled against Homeowners on three issues affecting owners of properties adjoining navigable waters, all of which create significant uncertainties unless resolved by this Court.

First, the Ninth Circuit ruled as a matter of federal property law that the owner of tidelands underlying navigable waters has a vested right to the

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[1] To provide consistency with the Ninth Circuit's reference to "Homeowners" this petition will refer to Mrs. Sharp and her husband as "Homeowners," even though she is the sole owner.

erosion of abutting uplands as they would exist in their natural state, and that this vested right supercedes the upland owner's right to erect shore defense structures to protect against erosion. This ruling places every owner of our Nation's waterfront developments at risk of future disputes with the owner of the adjacent submerged lands.

Second, the Ninth Circuit rearranged the text of Section 10 of the RHA to create an equally disruptive regulatory rule – that owners of property abutting navigable waters can be liable for erecting a shore defense structure without a federal permit even though, **at the time of its construction**, the shore defense structure was erected entirely out of navigable waters, and therefore, did not require a federal permit. The Ninth and Third Circuits are divided on the question whether Section 10 of the RHA imposes strict liability in light of its potential criminal penalties. Given the far-reaching scope of the RHA, this Court should resolve these issues.

Similarly, the Ninth Circuit held that courts should not balance the equities in deciding whether an injunction should issue under the RHA. The injunction here compels Homeowners to perpetually remove any part of their shore defense structure that intersects the boundary of the navigable water. Although this Court announced a contrary rule regarding injunctions under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA) in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court has not addressed the issue in the context of the RHA. Given

the similarly vast reach of regulatory power under the RHA, this Court should resolve this issue.

In light of the historic and widespread occurrence of shore defense structures, increasing trends in the general prevalence of erosion, and the prospects of rising sea levels, the Court should resolve these specific questions affecting the respective rights and responsibilities of owners of property abutting navigable waters and regulation under the RHA.

The pervasive impact of the Ninth Circuit's decision has not gone unnoticed. *See* David M. Ivester, *The Boundary of Navigable Waters and the Tidelands May Extend Behind Lawfully Built Shore Defense Structures as if They Do Not Exist*, 19 CALIFORNIA LAND USE REPORTER 99 (2010). This petition respectfully requests the Court to resolve the questions presented so as to avoid the widespread consequences of the Ninth Circuit's opinion – uncertainty on issues as significant as property ownership and the regulatory mandates of the RHA. *Id.* at 103.

Finally, the Ninth Circuit ruled that a commonplace generic disclaimer in the Washington Enabling Act, Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" precluded the State of Washington from acquiring title to specific tidelands upon statehood. No court has ever so ruled. This issue presents a fundamental question regarding the respective powers of two branches of federal government and the presumed

right of a state to ownership of tidelands upon statehood.

STATEMENT OF THE CASE

A. Overview

This case arises from the existence of a "shore defense structure," which protects Homeowners' residence from erosion. Here, the term "shore defense structure" refers to a bulkhead and riprap (essentially, large boulders), although in other contexts, similar structures are often referred to as seawalls, revetments, dikes, levees or embankments, among others.

Homeowners' property borders the Strait of Georgia, connected to Puget Sound and the Pacific Ocean through the Strait of Juan de Fuca. The property lies in an area known as Sandy Point, located within the boundaries of the Lummi Indian Reservation in Whatcom County, Washington.

Mrs. Sharp purchased their Sandy Point home in 1980. In 1977, her predecessor in interest built a wooden retaining wall to level the building site and protect against erosion, that functions as a bulkhead. The wall is embedded into the ground to provide stability.

After a major storm in 1982, Homeowners added riprap, essentially boulders ranging from one to four feet in diameter, to the seaward side of the wooden

retaining wall. Riprap provides additional stability to the bulkhead and the jagged face of the riprap dissipates the force of waves during storm surges and reflects waves in an asymmetrical manner, thereby reducing the erosion of sand and gravel on the seaward side of the structure. In 1993, Homeowners added riprap on top of the existing riprap.

The bulkhead, riprap, and additions thereto were originally erected entirely on the uplands, that is, landward of where the Mean High Water (MHW) line intersects the beach. The line where the elevation of MHW intersects the land is the property boundary between upland and tidelands. App. 98-100. However, the beach that existed at the time of construction between Homeowners' structure and the MHW line has eroded to some extent. Now, the MHW elevation, at times, intersects the riprap instead of the beach.

It should be understood that the beach rises and falls on a seasonal and daily basis due to the tidal deposition of sand and gravel during the summer months and erosion of the same during the winter months. *See generally* App. 7, n.3. As a result, MHW intersects Homeowners' riprap during some periods and not during others.

The Lummi Indian Nation (Lummi Nation) claims beneficial ownership of the tidelands. It asserts that, if MHW intersects a shore defense structure, the property line permeates or projects through the structure instead of stopping at the seaward face of the structure. The federal government agrees, and

instituted this action against the Homeowners on behalf of the Lummi Nation.[2]

The federal government's complaint alleged trespass by Homeowners' "shore defense structure" on tidelands held in trust for the Lummi Nation. The complaint also alleged violations of the RHA and the CWA and sought injunctive relief. The Lummi subsequently intervened, alleging only claims for trespass.

Homeowners contend that they cannot be liable for trespass against the United States or the Lummi Nation because their shore defense structure was originally built on their own land. Specifically, Homeowners assert that they cannot be in violation of the RHA for failing to obtain a federal permit because, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States, thereby obviating the need for a federal permit. Finally, Homeowners contend they are not liable for trespass because, under the equal footing doctrine, the State of Washington is the owner of the tidelands.

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[2] Before filing suit, the U.S. Attorney contacted seven sets of landowners about allegations of trespass on the Lummi Nation's tidelands. The suit was brought against the owners of six properties – the one which was not sued was then acting as the CEO of the Lummi Nation.

B. Facts Regarding Tideland Ownership

In 1855, the Government executed the Treaty of Point Elliott[3] (Treaty) with several Western Washington tribes, including the Lummi. The Treaty expressly relinquished all aboriginal title to land. The Treaty also established special reservations for the tribes, and provided for the possibility of relocating all tribes to a general reservation.

The reservation at which the Lummi were located comprised only of the "island of Chah-choo-sen" in the Lummi River, which does not include Sandy Point. In 1873, President Grant, by Executive Order, expanded the reservation to include Sandy Point and extended all reservation boundaries to "low water." "Low water" has been interpreted to include tidelands. At issue in this case is whether the President was authorized to, and intended to, permanently reserve Sandy Point tidelands, thereby defeating the presumptive transfer of tidelands to Washington upon statehood.

The only action of Congress referenced by the Ninth Circuit is the Washington Enabling Act, 25 Stat. at 677, which required the new State of Washington to disclaim title to all "lands lying within [the state] owned or held by any Indian or Indian tribes." *Id.* Homeowners contend that this is

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[3] Treaty Between the United States and the Duwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (1859).

insufficient to constitute the requisite Congressional intent to defeat presumptive state title to tidelands upon statehood.

C. The District Court Decisions

District Court Judge Barbara Rothstein resolved all of the 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. App. 78-79. Similarly, the Court rejected Homeowners' position that they could construct shore defense structures on their own uplands to prevent erosion and thereby keep the MHW line from moving landward. App. 64, *et seq.*

The Court also ruled on partial summary judgment that Homeowners' shore defense structure trespassed, App. 52-56, and violated the RHA's permitting requirements, even though it is undisputed that no permit was required at the time the structure was originally built or enlarged. App. 56-58.

Judge Rothstein ordered Homeowners to remove the portion of their structure that subsequently intersected MHW, as it would have existed in its natural state but for the shore defense structure and to perpetually move such structures if MHW continues to shift further landward. App. 62-63. The CWA claim was voluntarily dismissed by the federal Government.

D. The Ninth Circuit Decision

Homeowners' appeal to the Ninth Circuit provided no relief. The Court concluded that the State of Washington did not obtain the tidelands upon statehood, App. 18, that the Homeowners' shore defense structure constituted a trespass because the Lummi Nation had a vested right to the erosion of Homeowners' property, App. 22, and that Homeowners violated the RHA because their shore defense structure currently existed in navigable waters without a federal permit, even though the structure was originally constructed entirely out of navigable waters, thereby obviating the need for a federal permit. App. 36.

In several places of its opinion, the Ninth Circuit criticizes the Homeowners for failing to reach a settlement with the Lummi Nation, a criticism that should have no bearing on judicial resolution of any dispute.[4] App. 44; *see also* App. 28.

This outrageous criticism of Homeowners is based on an inaccurate assumption of an unwillingness to settle. Homeowners have always been willing

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[4] The Ninth Circuit also noted that an organization of homeowners agreed to lease the tidelands pursuant to a 25-year lease that ended in 1988. App. 6, 15. Although the Ninth Circuit's opinion might lead one to conclude otherwise, this association did not include Homeowners in this case. Rather, its members owned properties located elsewhere at Sandy Point, but not bordering the tidelands adjoining Homeowners' properties.

to settle, just not on the unreasonable terms demanded by the Lummi Nation, which uses the full litigation and regulatory power of the federal government and the potential destruction of Homeowners' residence as leverage.[5]

Finally, the Ninth Circuit recognized that the Government's RHA claim was not really based on the purposes of the RHA in protecting navigation in the Nation's waters.

> [T]he United States indicated that its concerns would be satisfied if the Homeowners entered into agreements with the Lummi.

App. 44. In essence, the federal government's RHA claim is simply to pressure the Homeowners to succumb to the demands of the Lummi Nation.

Homeowners find themselves in the most unenviable position – defending themselves against the federal government which has joined with a separate entity claiming sovereign nation status, defending on issues pertaining to state and national sovereignty, the nation's waters, and the regulatory power of the

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[5] If there is a trespass, Homeowners have always been willing to pay the tideland owner for the fair market rental value of any land upon which they might be trespassing. Potential settlement with the Lummi Nation, however, is necessarily limited by its demands. Homeowners' willingness to pay the tideland owners the fair market rental value underlies their argument that the State is the owner of the tidelands. Washington State has a well-established system for leasing tidelands based on fair market value. *See* Wash. Rev. Code § 79.125.400.

federal government. Homeowners urge the Court to grant the petition in this case for the reasons addressed below.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit has decided an important question of federal property law which has not been, but should be, settled by this Court regarding property ownership with waterfront boundaries.

The Ninth Circuit decided that the Homeowners are trespassing because a portion of their shore defense structure is located in an area where the tideland boundary intersects the structure.[6] Rather than accepting the Homeowners' argument that the boundary between uplands and tidelands is where the elevation of MHW intersects the beach or any

[6] The Ninth Circuit decided these were matters of federal law because this was an action for trespass on lands owned by Indians. App. 10. Because one of the questions in this case is whether the tidelands are in fact owned for the Lummi Nation, a more accurate conclusion is that federal law applies because federal law is the proper choice when ruling upon competing rights between the United States and others on navigable waters. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 280, 283 (1982).

Federal law is also the applicable law when dealing with the competing rights of a citizen and his own state on land bordered by navigable waters. *See Hughes v. State of Washington*, 389 U.S. 290 (1967).

lawfully placed structure, the Ninth Circuit ruled that structures designed to prevent erosion cannot stop the property line from moving.

This is a remarkable ruling that will have dramatic impacts along the coastline. Under the Ninth Circuit's new rule that tideland owners have a right to future erosion (App. 26-27), waterfront property boundaries must be where MHW would otherwise intersect the ground if the ground or beach were left in its natural state. Lawfully built structures on one's own land, essentially fixtures to the land itself,[7] must be ignored and the boundary line will be relocated to wherever the MHW elevation would have intersected the shore if legal, shore defense structures had never been built, but the shore had been left in its natural state. This ruling alters waterfront ownerships for innumerable individual property owners, cities, ports and businesses – virtually any waterfront owner who has erected a bulkhead or other structure to prevent erosion.

As noted by an *amicus curiae* before the Ninth Circuit, 930 miles of the 1100 miles of coastline in California alone is actively eroding. B. Benumof, G. Griggs & L. Moore, *Coastal Erosion: The State of the Problem and the Problem of the State*, *in* 1 CALIFORNIA

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[7] Structures which are permanently attached to land are considered part of the land itself. *See* 8 RICHARD R. POWELL, POWELL ON REAL PROPERTY, ¶¶ 57.02, 57.05 (M.A. Wolf ed., 2000); 5 AMERICAN LAW OF PROPERTY, § 19.1-19.4.

AND THE WORLD OCEAN '97 505 (O. Magoon, *et al.* eds., 1998). *See also* G.B. Griggs, *The Armoring of California's Coast*, *in* 1 CALIFORNIA AND THE WORLD OCEAN '97 518, 521 (Magoon, *et al.*) (describing investments in protecting California beach properties after El Niño years and noting that 12% of California's entire coastline has been protected with structures). Nevertheless, beach erosion is not only a Pacific Coast phenomenon. The Federal Emergency Management Agency in 2000 estimates 25 percent of homes within 500 feet of the Nation's coastline and shores of the Great Lakes will fall victim to erosion. FEMA, *Significant Losses From Coastal Erosion Anticipated Along U.S. Coastlines*, Release No. HQ-00-095 (June 27, 2000).[8]

Not only are bulkheads or seawalls along the coastline at risk of being claimed by the tideland owner, large areas of reclaimed land are also at risk, such as the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose, and Seattle, to name a few. They are at risk simply because a variety of embankments have stopped the flow of water and prevented, as they were intended, the erosion of the land.

If this decision is allowed to stand, one can expect a flurry of litigation on the location of the boundary line if it must be based on where the MHW line would

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[8] *Available at* http://www.fema.gov/news/newsrelease.fema?id=7708 (retrieved Jan. 5, 2009).

be if left in its natural state. For a multitude of areas where the coastline has not been in its natural state for decades, if not more than a century, there will be battles of experts opining on where the beach would be based on the hypothetical, "what if nothing were built."

In affirming that the Homeowners are trespassing by the presence of shore defense structures on the tidelands, the Ninth Circuit has announced a startling change in the common law that wreaks havoc on the Pacific Coast. **With one hand** it affirms that "the common law also supports the owner's right to build structures upon the land to protect against erosion." App. 19 (citing *Cass v. Dicks*, 44 P. 113, 114 (Wash. 1896)). "The Homeowners rightly note that the common law permits them to erect shore defense structures on their property to prevent erosion." App. 24. **With the other hand**, it undermines this right by dictating that the tideland owner is actually the owner of the very land sought to be protected from the ravages of the sea.

Support for the common law right to protect uplands from the sea lies in the common enemy doctrine. The Court in *Revell v. People*, 52 N.E. 1052 (Ill. 1898) gathered and quoted several authorities relative to the common enemy doctrine and the right to protect one's property from the sea, including WOOD ON NUISANCES § 494 (2d ed., 1883) and GOULD ON WATERS § 160 (2d ed., 1891).

The Ninth Circuit flatly rejects the common enemy doctrine as a rationale for the Homeowners' position that they are not trespassing, App. 26,[9] although it still recognizes the common law right to protect property from erosion generally.

Regardless of the origin of the right to protect property from erosion, the Ninth Circuit's decision has simply eviscerated that right. Additionally, its decision ignores that the placement of a structure on one's own land becomes part of the land and the MHW line stops at the face of that structure. Instead, it assumes that the property line ignores the existing structure and, instead, permeates it and places the boundary as if the structure never existed.[10]

The essence of the Ninth Circuit's decision is this:

> Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do

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[9] Washington has rejected the common enemy doctrine as an absolute defense to injuries sustained as a result of works to prevent the flooding of sea water. *See Grundy v. Thurston County*, 117 P.3d 1089 (Wash.2005).

[10] Although neither the Homeowners, nor their predecessors filled submerged tidelands, the common law recognizes that if one lawfully fills submerged land, the filled lands belong to the upland owner. *Rights to Land Created at Water's Edge by Filling or Dredging*, Annot., 91 A.L.R.2d 857 (1963).

Here, the Homeowners have not even filled submerged land, but merely fortified uplands so that they do not become submerged.

> not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation.

App. 26-27.

Ultimately, the Ninth Circuit rules that the right to protect one's own property is subordinate to a heretofore unrecognized right in the tideland owner to perpetual erosion, a right that cannot be hindered by any lawful structure placed by the upland owner. App. 26-27.

> [W]e conclude that because both the upland and tideland owners have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.

App. 20.[11]

The Ninth Circuit cites numerous authorities for the proposition that the right to accreted land is a natural and vested right associated by the ownership of property bounded by a water body. App. 22-23.

Of course, when an upland owner's property increases through the deposit of alluvion (or reliction),

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[11] *Cf. Save Oregon's Cape Kiwanda Organization v. Tillamook County*, 177 34 P.3d 745, 751 (Or.Ct.App. 2001) (affirmed findings that riprap along the shore would as a practical matter "effectively fix the position of the shoreline").

it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location where they bordered the upland in its former state.

On the other hand, when upland is subject to erosion, the upland owner clearly loses property and, in this case, subjects the home on the property to a complete loss if the erosion is not abated.

The Ninth Circuit twists these well-established principles to create a new doctrine, not supported in law or history, that a property owner cannot as a matter of property law make otherwise lawful efforts on their own property that might minimize the risk of erosion solely because minimizing erosion would infringe on the tideland owners' supposedly vested right to future erosion.

While the Ninth Circuit correctly observes that water boundaries often are regarded to be ambulatory, it incorrectly supposes that property owners therefore have no right to pause or reduce ambulation of the boundary. For the Ninth Circuit's ruling to remain, the result is that every lawfully allowed structure that prevents erosion is trespassing against whomever owns the submerged lands adjacent to the dike, seawall, embankment or bulkhead. Furthermore, the property owners on both sides of the line are in the impossible position having to divine where the line would be if the structure were never built. The serious consequences for areas such as Seattle, Portland, San Francisco, and Los Angeles are obvious. If

this is the federal rule of property, numerous developed areas are also at risk of having the titles uncertain, such as the entire City of New Orleans, Boston's Back Bay, or any reclaimed land. This Court should grant the writ Homeowners seek.

II. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals regarding the scope and requirements of the Rivers and Harbors Act.

In addition to finding the Homeowners liable for trespass, the Ninth Circuit held that Homeowners' shore defense structure violated the Rivers and Harbors Act, even though the structure did not require a permit when built. Indeed, the Ninth Circuit expressly recognized:

> The Homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.

App. 32 (footnote omitted).

The Ninth Circuit's holding on the RHA constitutes a rearranging of the statute's text, blending distinct provisions to create a completely new violation – one where activity that required no permit and creates no obstruction to navigation nonetheless can be held to violate the RHA. Such a wide, sweeping alteration of the RHA's provisions affects every property owner bordering a navigable water of the United

States and places in legal jeopardy every bulkhead, dike, or seawall originally erected out of Corps jurisdiction.

A. The RHA's prohibitions.

Section 10 of the RHA, 33 U.S.C. § 403, contains three clauses, creating three different types of violations:

> [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; and
>
> [3] it shall not be lawful **to excavate or fill**, or in any manner **to alter or modify** the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army **prior to beginning the same**.

33 U.S.C. § 403 (line breaks, numbering and emphasis added), reproduced at App. 109.

The first clause prohibits the "creation of any obstruction" to the "navigable capacity . . . of the waters of the United States." The creation of such an obstruction cannot be approved by the Corps – it can only be approved by Congress. The second clause prohibits building or commencing the building of a structure in waters of the United States without a permit from the Corps of Engineers. The third clause prohibits filling, excavating, modifying or altering navigable waters without a permit from the Corps of Engineers.

The Ninth Circuit's decision goes beyond these prohibitions, claiming that the RHA makes unlawful the mere existence and maintenance of structures in navigable waters – even if originally built entirely outside of navigable waters. This claim is troubling. First, the statute does not include the word "maintain" in the list of prohibited activities. *See* 33 U.S.C. § 403. By its plain terms, the statute is limited to activities, *i.e.*, creating, building, filling and excavating in navigable waters. Courts may not add words to the statute (especially one for which criminal penalties apply), which Congress chose not to include. Rather, this Court has consistently recognized that courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States,* 508 U.S. 200, 208 (1993).

Moreover, it is notable that the Government did not seek to enforce Section 13 of the RHA, 33 U.S.C. § 407, commonly referred to as the Refuse Act.

As explained by this Court in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), this statute contains "two separate offenses", namely the discharge or deposit of refuse into navigable waters and the **deposit of material on the bank** of a navigable waterway that impedes or obstructs navigation. *Id.* at 662. This Court concluded that the first Section 13 offense did not require any effect on navigation – in part because the reference to navigation in the statute was tied to the placement of material on the banks, an element of the second offence. *Id.* at 672 n.23.

In affirming a violation of Section 10 of the RHA here, the Ninth Circuit plainly circumvents the choice by Congress that the placement of material on banks would be governed by Section 13 – which limits liability to deposits that affect navigation.[12]

Not only does the Ninth Circuit's decision have far reaching implications for the owners of waterfront property, but as addressed below, it conflicts in several respects with decisions of other courts.

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[12] Additionally, violations of Section 13 of the RHA (33 U.S.C. § 407) are enforced through 33 U.S.C. § 411, and not through 33 U.S.C. § 406, the statute relied upon by the Government in this case.

B. The Ninth Circuit's decision conflicts with the decisions of this and other courts regarding the first clause of Section 10 of the RHA.

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. More importantly, this Court has held that it is "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." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 729 (1899) (emphasis added).[13] Here, the Government contended that it need not show that Homeowners' structures actually impacted navigation.

In reaching this conclusion, the Ninth Circuit relied on its earlier decision in *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161 (9th Cir. 2000), a case involving the first clause of Section 10. *Id.* at 1165. The *Alameda Gateway* decision demonstrates the necessity of interfering with navigation to find a violation. The focus of the court in that case was the interference the pier at issue posed to the navigable

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[13] This case describes the RHA prior to the 1899 amendment. However, the point of law for which it is cited remains valid (*i.e.*, the determination of whether something constituted an obstruction is a question of fact).

capacity of the harbor. *Id.* ("Gateway's piers prevented the creation of a turning basin that could safely accommodate larger vessels entering the Harbor.").

Here, however, the Ninth Circuit concluded that the "structure" at issue was an "obstruction" for two reasons. First, the Ninth Circuit reasoned that the structure is the result of activities that require a permit under the second clause, **if they were conducted in navigable waters**. But this reasoning is circular in that the Homeowners' activities did not require a permit under the second clause precisely because they were not conducted in navigable waters.

The other reason offered by the Ninth Circuit is that, under its own precedent in *Alameda Gateway,* lawfully built obstructions can still be subject to removal. App. 31 (citing *Alameda Gateway* and *United States v. New York Central R.R.*, 252 F. Supp. 508, 511 (D.Mass. 1965) (finding landward remnants of a previously legal bridge an obstruction), *aff'd per curiam*, 358 F.2d 747 (1st Cir. 1966)). The problem with the Ninth Circuit's reliance on *Alameda Gateway* and *New York Central* is that in both cases there were actual obstructions to navigation present. In *New York Central*, it was a collapsed bridge that "caused additional danger of injury to tankers." 252 F.Supp. at 510. There is no authority for the proposition that structures that do not actually obstruct the navigable capacity of the water – like Homeowners' shore defense structure – can constitute violations of the first clause.

Beyond this, the Ninth Circuit asserted that structures that violate the second or third clauses are "presumed to be obstructions under the first clause," App. 32, relying on its decisions in *Alameda Gateway*, 213 F.3d at 1165, and *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979). However, this Court reversed the Ninth Circuit's decision in *Andrus* on other grounds. *California v. Sierra Club*, 451 U.S. 287 (1981). Nevertheless, the Ninth Circuit's ruling that structures that violate the second or third clauses also violate the first clause is preposterous given that it necessarily places all actions in navigable waters within the scope of the first clause, and thus within Congress' exclusive permitting authority – thereby rendering the Corps' permitting powers under the second and third clauses superfluous.

Finally, given the circumstances in this case, finding Homeowners liable under the first clause of the RHA is nonsensical. The Court's decision flies in the face of the undisputed fact that Homeowners did not place anything in RHA jurisdiction – that is, seaward of MHW – at the time it was placed. The law is clear that an obstruction within the meaning of the first clause requires Congressional approval. Thus, even though no permit was needed for the original construction of Homeowners' shore defense structures, under the Ninth Circuit's reasoning 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 Ninth

Circuit's interpretation of the first clause of Section 10 of the RHA should be reviewed by this Court to eliminate such a burdensome, unintended result.

C. The Ninth Circuit's decision regarding the second clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

After declaring that all second and third clause violations result in a violation of the first clause, the Ninth Circuit ruled that there is no need for an actual obstruction of navigable capacity of the water body, "since the structures obviously qualify as a 'break-water, bulkhead, . . . or other structure' under clause two." App. 33.

This superficial analysis again ignores the statutory language. To find a violation under the second clause, the Homeowners must have "buil[t]" the structure "in" waters of the United States. As the Ninth Circuit expressly acknowledges, this structure was built above the MHW line and, therefore, out of navigable waters. App. 32.

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 Section 10 of the RHA assumes the verbs in the statute, "to build" or "commence the building of,"

mean nothing. To overlook the operative words of the statute means liability can attach under the RHA even where no permit was needed at the time the work was done. The Court should settle this important issue affecting practically all waterfront property in the Nation.[14]

D. The Ninth Circuit's decision regarding the third clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

The Ninth Circuit held that one can violate the second or third clause "even if the structure or activity is not located in navigable waters." App. 35 (citing *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298 (5th Cir. 1976)). *Sexton Cove*, however, involved excavating the shore to create canals and alter the water body by expanding it. The activity directly and significantly altered the shape and size of the water body. Hence, *Sexton Cove* does not support the Ninth Circuit's conclusion.

Moreover, as with the second clause, the Ninth Circuit's decision ignores the unmistakable operative language in the third clause that one must fill,

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[14] The Ninth Circuit's decision also directly conflicts with the New York court in *People v. Amerada Hess Corp.*, 84 Misc.2d 1036 (1975) in interpreting analogous rules in a case where material was placed on the banks, rather than in the water.

excavate, alter or modify the water body without first having obtained a permit from the Corps. 33 U.S.C. § 403 (App. 109). Homeowners took no actions to alter or modify the water body; rather, they and their predecessors took actions to prevent the water body from destroying their property by building a shore defense structure outside of the water body, above MHW.

As with its ruling on the other clauses of Section 10 of the RHA, the Ninth Circuit's ruling potentially subjects anyone to liability under the RHA who built or owns a shore defense structure above MHW on any navigable waterway in the country. It does so by ignoring the language chosen by Congress to describe violations. This Court should review the Ninth Circuit's decision.

E. The Ninth Circuit's elimination of an intent requirement for a RHA violation conflicts with the decisions of other courts of appeals.

The Ninth Circuit clearly repudiated the need for intent to find a RHA violation, other than the mere intent to do nothing in regard to preexisting bulkheads or riprap. App. 36 (affirming App. 57 n.7). This holding conflicts with decisions from the Court of Appeals for the Third Circuit.

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 it exposes one to criminal sanctions, including

imprisonment. *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), *aff'd*, 274 F.2d 729 (3d Cir. 1960)).

The Ninth Circuit treats Section 10 of the RHA as imposing strict liability, as does the Eleventh Circuit. *See United States v. Baycon Industries, Inc.*, 744 F.2d 1505, 1507 n.6 (11th Cir. 1984). The Third Circuit does not. *Bigan*, 274 F.2d 729; *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 310 (3d Cir. 1997). The Fifth Circuit recognized the split, but declined to decide on which side of the split it would land. *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1113-14 (5th Cir. 1985).

This Court should settle this important issue and decide whether Homeowners can be liable for the placement of riprap outside of the jurisdictional boundary of the RHA simply because the boundary moved toward their riprap through no fault of their own.

F. The Ninth Circuit's decision on the availability of and conditions applicable to injunctive relief under the RHA should be reviewed by this Court.

1. The Ninth Circuit's decision that the enforcement provisions in Section 12 of the RHA apply is an important issue which should be settled by this Court.

If Homeowners are required to get a RHA permit even though they constructed outside of navigable waters, the enforcement provision of the RHA (Section 12) does not allow for an injunction in these circumstances. It provides that "removal of any structures or parts of structures **erected in** violation of the provisions of [the RHA or its implementing regulations] **may** be enforced by the injunction of any district court." 33 U.S.C. § 406 (App. 109) (emphasis added). Thus, by the statute's plain terms, the enforcement power extends only to structures "**erected** in violation" of the RHA. *Id.* (emphasis added). The Homeowners did not erect anything in violation of the RHA. They are accordingly not within the scope of 33 U.S.C. § 406.

This distinction between Sections 10 and 12 was explained by the Third Circuit in *Bigan*, 274 F.2d 729. In *Bigan*, the property owner had engaged in strip mining on uplands, but earth which had been removed during mining and negligently piled near a navigable river washed into the river during a torrential rain. *Id.* at 730.

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

The Ninth Circuit's affirmation of the injunction under the RHA does violence to Congressional choice of words in the statute and perpetuates a conflict among the Circuits which should be settled by this Court.

2. The Ninth Circuit's ruling that an injunction is automatic conflicts with decisions from this and other courts.

In affirming the issuance of the district court's injunction, the Ninth Circuit held that there is no need to balance competing interests. App. 36 (citing *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974)). This decision conflicts with decisions from this and other courts.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court made clear that the issuance of an injunction is an extraordinary remedy that involves the balancing of competing interests. In *Weinberger*, an injunction was denied despite discharges of pollutants in violation of the CWA. Although *Weinberger* was specifically briefed by the Homeowners, the Ninth Circuit simply ignored it and instead relied on *Stoeco,* a Third Circuit decision

that pre-dates *Weinberger*, for the proposition that equitable considerations should not be considered in determining whether Homeowners should be enjoined in the circumstances of this case.

Several other courts have explained that injunctions under the RHA are subject to equitable considerations because of the "may" language in the statute. *See South Carolina ex rel. Maybank v. South Carolina Elec. & Gas. Co.*, 41 F.Supp. 111, 119 (E.D.S.C. 1941); *United States v. Bailey*, 467 F.Supp. 925 (E.D.Ark. 1979).

Equitable considerations are especially critical in the present case. The district court's order to remove the riprap is impractical because the Homeowners must keep moving riprap based on constantly changing beach conditions. Courts have properly recognized that a moving tidal boundary line caused by winter/summer fluctuations is a factor that weighs against injunctive relief because of uncertainty and constant movement. *People v. William Kent Estate Co.*, 51 Cal.Rptr. 215, 219 (Cal.Dist.Ct.App. 1966).

The Court should issue the writ to resolve whether injunctive relief under Section 12 of the RHA is subject to the normal equitable balancing of interests indicated by this Court in *Weinberger*.

III. The Ninth Circuit's opinion has decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding the reservation of submerged lands from future states.

Whether the Homeowners are trespassing against the United States and Lummi Nation rests upon the assumption that the Government owns the tidelands. Federal ownership of the tidelands, in turn, hinges on whether the Government retained title to the tidelands upon Washington's admission to the Union in 1889. The answer to this depends upon the "equal footing doctrine," which presumes that new states enter the Union on the same footing as the original thirteen in regard to state ownership of submerged lands. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 195-198 (1987).

This Court has reiterated this doctrine by stating that the courts must "begin with a **strong presumption against**" any action that would defeat a future state's title. *Montana v. United States*, 450 U.S. 544, 552 (1981) (emphasis added). In *Utah Division*, this Court clarified its earlier *Montana* decision by stating that Congress defeats the strong presumption of state title "only in the most unusual circumstances." *Id.* at 197. The Ninth Circuit's decision on ownership of the tidelands contradicts this Court's emphatic language that submerged lands are presumed to have been transferred to a new state.

The Ninth Circuit's rationale for its decision on this issue can be distilled to the following bases:

- First, *stare decisis* dictated the result absent a contrary decision from this Court, insofar as prior decisions had ruled that the Lummi Nation owns some tidelands at Sandy Point. *See United States v. Romaine*, 255 F. 253 (9th Cir. 1919); *United States v. Stotts*, 49 F.2d 619 (W.D.Wash. 1930); *United States v. Washington*, 969 F.2d 752 (9th Cir. 1992).
- Second, the absence of the State of Washington as a party to this case counseled against a conclusion that title resided in the state.
- Third, the tidelands were withheld from the state under this Court's Equal Footing Doctrine jurisprudence.

As to the first basis, "the doctrine of stare decisis does not apply with full force prior to decision in the court of last resort." *Posados v. Warner, Barnes & Co.*, 279 U.S. 340, 345 (1929). Moreover, the cases relied upon do not control the questions presented here.[15]

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[15] *Romaine* involved tidelands in the river delta reserved specifically by the Treaty, which was explicitly approved by Congress, rather than the Sandy Point tidelands which are included only by the Executive Order.

United States v. Washington is even more attenuated because the issue was whether the reservation boundary followed a straight line at one point or followed the shore, not on Sandy

(Continued on following page)

Nor do these cases create a rule of property that cannot be revisited.[16]

In regard to the second basis for the Court's decision, the Ninth Circuit indicated that absence of the State of Washington in this litigation supports its conclusion that the tidelands are not owned by the state. App. 14. This directly conflicts with this Court's seminal decision in *Pollard v. Hagan*, 44 U.S. 212 (1845), involving an ejectment action (similar to

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Point. That the Treaty and the Executive Order were consistent on this issue, 969 F.2d at 755-56, provides no resolution of whether the Executive Order alone was sufficient to prevent tidelands from transferring to the State of Washington.

Similarly, the district court decision in *Stotts* is not controlling because it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone. *Stotts* did not answer the questions raised here.

[16] *Compare Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946) (revisiting issue of tribal ownership of tidal waters) *with Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930).

Moreover, the Ninth Circuit assumes that the Lummi Nation and homeowners have "long relied on the fact that the Lummi own the tidelands," pointing to an old lease of tidelands at Sandy Point. App. 15. However, the Sharps never had a lease with the Lummi Nation. That a homeowners association representing people from other parts of Sandy Point at one time leased the tidelands is not the kind of long term reliance or burden on existing expectations that creates a rule of property. *See Montana v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 665 F.2d 951 (9th Cir. 1982) (referring to substantial sums flowing to the tribe from leases from a hydroelectric facility). Indeed, instead of longstanding expectations that the federal government owns these tidelands, there has been a longstanding uncertainty over that question.

trespass) where the defendant argued successfully that the plaintiff did not own the property at issue because it consisted of the bed of navigable waters given to the State of Alabama – despite the facts that the state was not a party and the claim of ownership did not derive from the state.[17]

With regard to the third basis, the Ninth Circuit held that even when the Executive Order is viewed in light of this Court's recent equal footing jurisprudence, President Grant's order extending the reservation to include tidelands was sufficient to withhold these tidelands from the state. App. 15. Specifically, the Ninth Circuit claimed the two part test from *Idaho v. United States*, 533 U.S. 262, 273 (2001), was satisfied in this case. App. 15. This test asks "whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands." *Idaho*, 533 U.S. at 273.

The second part of the test is at issue here. The Ninth Circuit's application of the second part of the test is a radical departure from this Court's jurisprudence. The Ninth Circuit concluded that Congress "recognized the validity of the executive order

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[17] It is also contrary to the Ninth Circuit's prior precedent that 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).

reservation by requiring Washington state to 'forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes.'" 25 Stat. at 677, *quoted at* App. 17. Under the precedent set by the Ninth Circuit in this case, this general, boilerplate disclaimer language, common among states admitted in the west, is sufficient to overcome the strong presumption against withholding title to the beds of navigable waters – despite the lack of any specific recognition of what was reserved.[18]

Although the Ninth Circuit purports to rely upon this Court's decision in *United States v. Alaska (Arctic Coast)*, 521 U.S. 1 (1997), its decision is directly contrary to this Court's ruling in that case. In *Arctic Coast,* this Court emphasized that Congress has never given the President authority to defeat state title to land under navigable waters by a general statute. 521 U.S. at 44. Rather, this Court has always viewed the equal footing doctrine to require that the land being withheld from the new state be identified with particularity.

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[18] In *Idaho,* after noting that the disclaimer provision in the Idaho Statehood Act was a boilerplate formulation used with every State admitted between the years 1889 and 1912, including Washington, the four dissenting Justices noted:

> This disclaimer, in any event, simply begs the question whether submerged lands were in fact "owned or held" by the Coeur d'Alene Tribe upon Idaho's admission.

533 U.S. at 285 n.2 (Rehnquist, C.J., dissenting).

The *Arctic Coast* case involved two federal reservations prior to Alaska statehood, one of which was identified **by name**, *id.* at 41-42, and the other was specifically withheld from Alaska. *Id.* at 56-57 (certain statutorily described wildlife refuges transferred to Alaska while retaining federal ownership of all other submerged lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife").

Similarly, in *Alaska v. United States (Glacier Bay)*, 545 U.S. 75 (2005), this Court held that Congress specifically withheld the Glacier Bay National Monument in the Alaska Statehood Act. In both *Arctic Coast* and *Glacier Bay*, this Court required an act of Congress expressly confirming the prior executive order reservations. The boilerplate disclaimer in the Washington Statehood Act is nothing like the specific Congressional references to the tracts at issue in the *Alaska* cases.

The conflict with this Court's analysis in *Idaho v. United States*, 533 U.S. 262, is even more pronounced. There, this Court went to great lengths to address exactly what Congress did in regard to the Coeur d'Alene Indian Tribe.

While the Court referenced the disclaimer in the Idaho Statehood Act, wherein the new state of Idaho disclaimed ownership of lands held by Indians, 533 U.S. at 270, the Court's decision rests upon other, specific indicia of Congressional intent to withhold the submerged lands at issue. For example, the Court

noted that both houses of Congress had approved the treaty with the Coeur d'Alene that included the lake in the reservation prior to Idaho's statehood, though it had not been finalized by the time Idaho became a state. The Court noted 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." *Id.* at 278.

Second, this Court also noted that Congress had extensive involvement with the Coeur d'Alene Tribe. The Ninth Circuit's decision ignores the significance of this point. There is no evidence of Congressional involvement with the Lummi Nation that is remotely similar to that deemed essential in *Idaho*.

The Ninth Circuit's decision in this case directly conflicts with all these authorities confirming that the inclusion of tidelands in a reservation by order of the executive – as opposed to a treaty or statute which specifically references the reserved area – is insufficient to prevent title to the tidelands from passing to a state upon statehood under the equal footing doctrine. If the mere existence of an executive order were sufficient to defeat the strong presumption against withholding submerged lands from future states, this Court's analyses in *Idaho, Arctic Coast* and *Glacier Bay* have been utterly superfluous.

At bottom, this Court should review the Ninth Circuit's re-interpretation of this Court's equal footing precedents that find the requirement of "extraordinary circumstances" met by a very ordinary boilerplate, generalized disclaimer.

CONCLUSION

The implications of the Ninth Circuit's trespass and RHA decisions for waterfront property owners cannot be overstated. The consequences of the Ninth Circuit's opinion will become only more pronounced as erosion increases or sea levels rise.

Additionally, the respective balance of authority between the executive, Congress and the rights of new states is significantly altered by the Ninth Circuit's resolution of the equal footing doctrine case. This Court is urged to grant the writ to resolve the issues raised herein.

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Respectfully submitted,

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