



Landon Blake is currently project manager and project surveyor for a small civil engineering and land surveying company in California's Central Valley. Licensed in California and Nevada, his many activities include speaking and teaching at group conferences around the state.

United States v. Milner

The 2009 case of *United States v. Milner* demonstrates important common law principles related to tidal boundaries. It also offers interesting insights into the law and the balance courts try to strike in deciding the law. The struggle for balance as it relates to private property rights and the rights of society as a whole are clearly demonstrated in this case.

Several events led to the court's decision as indicated in this timeline:

1855 The United States federal government executes the Treaty of Point Elliot with several Native American tribes.

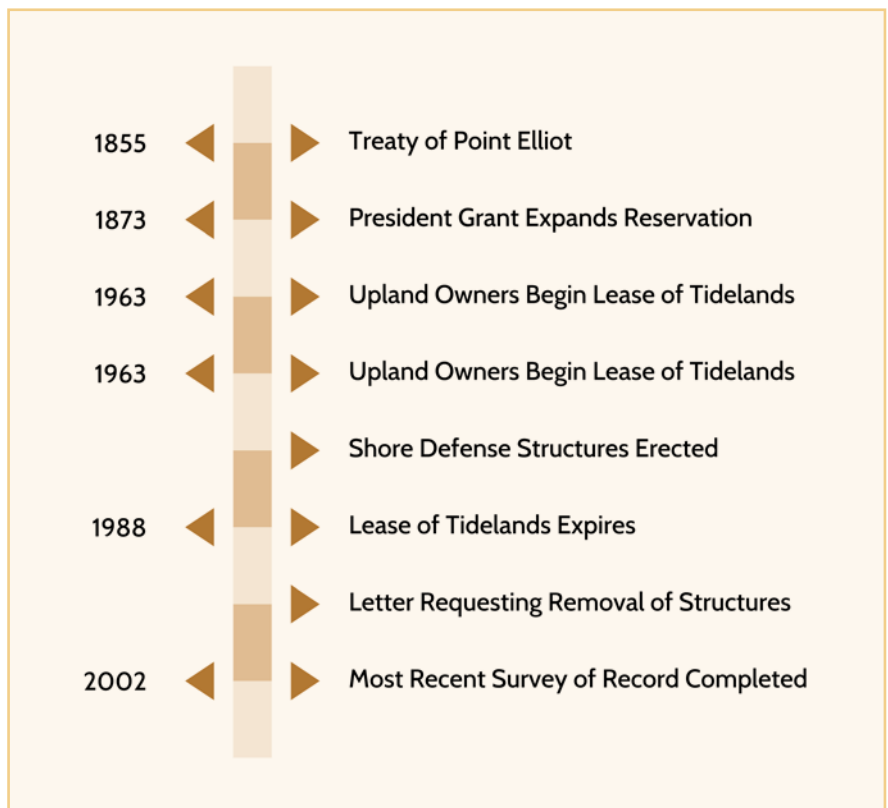
1873 President Grant expands the reservation of the Lummi Nation to include portions of the Washington State mainland, including a sandy spit know as Sandy Point, in what is now Whatcom County. (Previously the reservation was limited to an island.)

The coastal properties, or uplands, are subsequently sold to the predecessors of the defendants in this case. The court does not comment on when the transfer to private ownership occurred.

1963 The upland owners began to lease the tidelands adjacent to their homes from the Lummi Nation.

1988 The lease of the tidelands by the upland owners expires. The upland owners decline to renew the lease.

2002 The most recent survey of record is completed. It shows the current location of the tidal boundary between the tidelands and the upland owners.



At some point between 1963 and 1988, while the tidelands are being leased, the owners of the coastal properties erect “shore defense structures” to prevent coastal erosion of their properties. After the lease expires, the United States Army Corps of Engineers sends a letter to each upland owner requesting the removal of these shore defense structures. The court does not comment on the exact date of these two events, but we do know that the tidal boundary had eroded inland of the shore defense structures when the United States federal government requested their removal.

Questions Raised

This case raises legal questions that should be of interest to land surveyors, land planners, and land use professionals: 1) Who owns the tidelands? and 2) If the Lummi Nation owns the tidelands, could the upland property owners be found guilty of trespass when the tidal boundary moved past their shore defense structures, placing them within the tidelands?

The upland owners argue that the tidelands adjacent to their properties are owned by the State of Washington,

not the Lummi Nation. If this is true, the federal government would not have a right to assert trespass because of the encroaching shore defense structures. (The federal government holds the reservation lands in trust for the Lummi Nation and represents the nation in this legal matter.) Without ownership, the federal government loses its legal standing, and the true owner of the tidelands would need to bring the trespass charges.

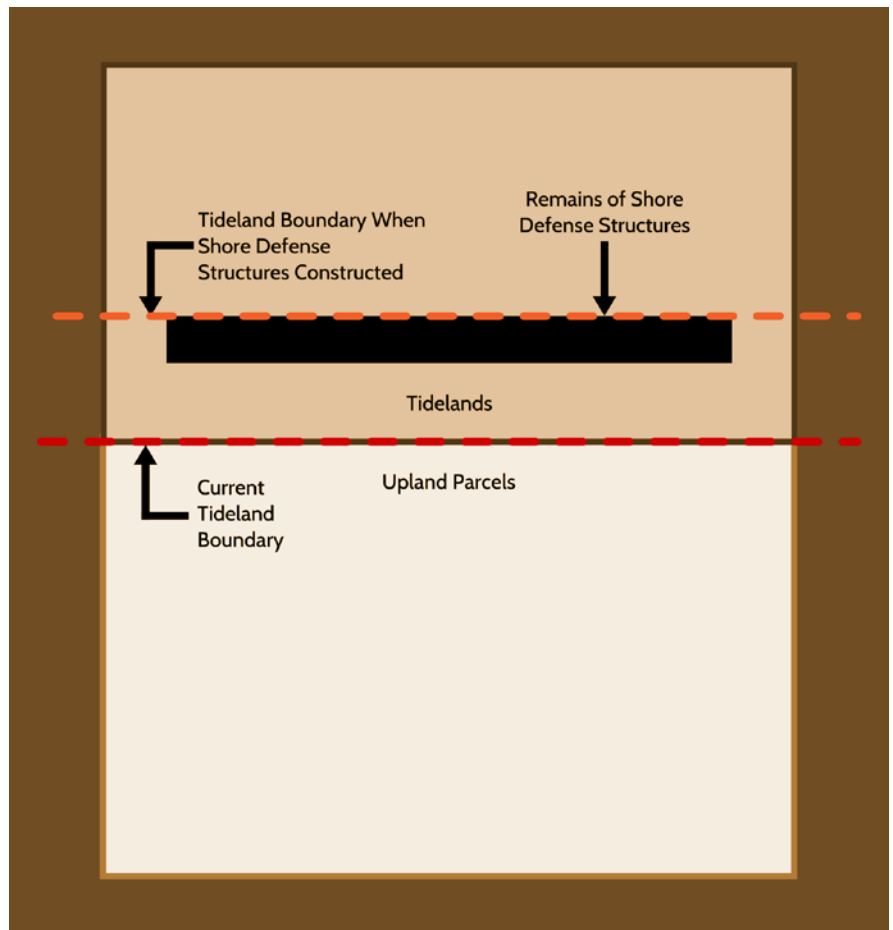
The upland owners rely on the “equal footing” doctrine in their argument about the ownership of the tidelands. The doctrine was meant to put newly admitted states on equal footing with the original Thirteen Colonies that became states. The court says this doctrine “... creates a strong presumption that newly admitted states acquire title to lands under navigable waters upon their admission to statehood.” If this doctrine applies to the tidelands adjacent to the upland owners in this case, then the State of Washington, not the Lummi Nation, is the rightful owner of the tidelands.

The presumption that tideland ownership passed to the states under the equal footing doctrine can be rebutted if two conditions are met. The first is if such lands have been reserved by the United States (the executive branch). The second is if Congress (the legislative branch) recognizes this reservation in a way that shows their intent to rebut the presumption.

In this case, the court relies on previous court decisions to determine the conditions are met for the tidelands in question. As a result the presumption that ownership of the tidelands passed to the State of Washington can be rebutted. The court determines the tidelands are not owned by the State of Washington.

One of these previous cases cited by the court in its decision on tideland ownership was *United States v. Romaine*, in which the same court hearing this case under discussion found the executive order by President Grant “to be decisive” and noted that “when Washington was admitted as a state, it disclaimed any right and title to all lands lying within said limits owned or held by any Indian tribe or tribes.” In *United States v. Romaine*, the court ruled against land owners who had purchased tidelands from the State of Washington.

A second case relied on by the court in its decision was *United States v. Stotts*. This case also involved a dispute over Lummi Nation tidelands sold to private parties by the State of Washington. In this



case, the court focused on specific language in the Treaty of Point Elliot and the executive order by President Grant that expanded the Lummi Nation reservation. The Treaty recognized that possession of the tidelands was an important part of the fishing rights of the Lummi Nation and other Washington tribes.

The court cites two Alaskan court cases that clearly show congress was put on notice by the executive order that created the Lummi Nation reservation, and that Congress also recognized the State of Washington didn’t receive ownership of Native American lands when it was admitted as a state.

In an argument of logic, the court next states that the reservation of the tidelands in the executive order preserves the Lummi Nation’s access to fishing and shellfish, which is in harmony with the intent of the original efforts by the government to create the Lummi Nation reservation.

With the question of tideland ownership settled in this case, the court turned its attention to the wandering boundary between the tidelands and the uplands.

If the Lummi Nation owns the tidelands, could the upland property owners be found guilty of trespass?

The court made some interesting admissions in its introduction to the discussion of the tideland boundary location:

1. The problem of riparian and littoral property boundaries is recurring and difficult.
2. Disputes involving tidal lands are especially complicated because the fluctuations in tidal waters are large and because government interests in ocean waters and the land underneath is involved.
3. There are competing common law principles at work in this case. Courts have recognized that an owner of coastal property must accept the tidal property boundary will wander and land will be gained or lost as the sea moves. Courts have also recognized that land owners of coastal properties have a right to erect structures to stop the erosion of their lands, even if this will increase the erosion on the lands of his neighbors.

LESSONS FOR OWNERS OF COASTAL PROPERTY

- 1 Can't fix tidal boundary without permission.
- 2 Can be required to make changes that will allow tidal boundary to flux.
- 3 Upland owner can be forced to remove structures the become enveloped by the tidal boundary.

The court makes a detailed summary of why the tideland boundary should be ambulatory. It summarizes this discussion with the following paragraph in its decision: "...both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege forces of accretion over those of erosion."

The court rejected the idea that dry uplands have more value than submerged tidelands, and the resulting premise that the court should locate the tideland boundary in a way that maximizes the extent of the uplands. (This idea has been embraced by some other courts.) Instead, the court recognizes the tidelands are also inherently valuable, as was recognized in the steps the government took to include them in the Lummi Nation reservation.

A very powerful point, and warning, about the ownership of coastal properties is next made by the court. The court rejects the argument that a common law right to erect shore defense structures means a tideland boundary can be fixed in space when it intersects those structures. On the contrary, the court states: "*Once the shore has eroded so dramatically that the property owner's shore defense structures*

fix the ambulatory boundary, the upland owner cannot expect to permanently maintain the boundary there without paying damages to the tideland owner or working out an agreement with the tideland owner."

Conversely, the tideland owners would be prevented from taking actions that would prevent accretion to the upland properties, fixing the tideland boundary in their favor.

The court acknowledged that upland owners did not intend to become trespassers when their erosion protection structures were built. However, once the federal government asked for the encroaching structures to be removed, and the home owners refused, they became trespassers. The court said: "*Although the home owners did not cause the movement of the boundary line, they can still be liable for the structures...*"

The court's decision on this issue of the tidal boundary and its relation to trespass can be summarized as follows:

1. Coastal property owners can't prevent the erosion of their shore, and the resulting movement of the tidal boundary, without the proper permission of the tideland owner, which in this case is the United States federal government acting in behalf of the Lummi Nation.
2. If the tideland boundary moves against coastal erosion structures, and those structures fix the location of the boundary by restricting further

movement, the tideland's owner can be entitled to damages and may ask that the structures be removed.

3. Once the tidal boundary moves landward of the structures that used to be on the dry side of the tidal boundary, those structures are on the property of tideland owner, despite the fact that they were on the upland owners' property at the time they were constructed.

Lessons and Principles

What can be gleaned from this discussion? The court used the following to determine ownership of the tidelands:

1. Analysis of the historical documents related to the properties involved.
2. Prior court decisions setting forth legal principles that applied to the ownership question.
3. Logic on the intent of the documents creating the tideland property that was the subject of this case.

It can be helpful for land surveyors follow this same pattern when dealing with questions of property ownership.

There are also important lessons for owners of coastal property or for those who deal with land development and land policy issues related to coastal property:

1. Owners of coastal property of a tidal boundary can't fix that boundary without the proper permission from the adjacent tideland owner.
2. If a tidal property boundary has become fixed, the tideland owner can require that coastal property take actions so the tideland boundary can move again.
3. The tideland owner can require that structures that become enveloped in the tidelands because of the movement of the tidal boundary be removed.

In conclusion, it is interesting to note how the court acknowledged a conflict in common law principles; the first principle being the landowner's right to protect his or her property from coastal erosion, and the second being the value of tidelands and the right of tideland owners to additional property acquired through erosion of the uplands. The court then made a decision that subsequently impacted the balance of power between these competing principles. 