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[STATE POLICY BARRING DEVELOPMENT SEAWARD OF MOST LANDWARD EXTENSION OF HISTORICAL MEAN HIGH TIDE LINE INVALID AS UNDERGROUND REGULATION](#)

[Bollay v. Cal. Office of Admin. Law \(Cal. State Lands Commission, Real Party in Interest\) \(March 1, 2011, C063268\) Cal.App.4th](#)

By [Michael Wilmar](#)

“‘In the beginning God created the heaven and the earth.’ With this immortal sentence, the Bible memorialized the first and longest-running boundary dispute.” (Flushman, *Water Boundaries* (1st ed. 2002) p. xvii, quoting Genesis 1.1.) In the meantime, more earthly boundary disputes have also continued to flourish.

In this case, the California Court of Appeal for the Third Appellate District invalidated as an “underground regulation” a policy adopted by the California State Lands Commission by which the Commission was attempting to prohibit development seaward of the most landward historical position of the mean high tide line along the California coastline. The court was careful to note, however, that it was determining only that the Commission had failed to properly promulgate the policy as a regulation under the Administrative Procedure Act (APA), and not whether the Commission had either acted improperly with respect to the plaintiffs’ property or had the power to enact such a regulation if properly promulgated.

Pursuant to the California Constitution, statutes, and decisional law, the State owns all tidelands along the California coast in trust for the public. (Cal. Const., art. X, § 3; *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63.) Those tidelands extend from the low-water mark to the ordinary high-water mark. (Civ. Code, § 670; *Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal.App.4th 218, 235 (*Lechuza Villas West*.) Therefore, the seaward boundary of land bordering coastal tidelands is the ordinary high-water mark, also referred to as the mean high tide line. (Civ. Code, § 830; *Lechuza Villas West, supra*, at p. 235.)

As the mean high tide rises or the shore erodes, the mean high tide line moves landward. As the mean high tide falls or the shore builds up, the mean high tide line moves seaward. Therefore, the mean high tide line may change over time, affecting the seaward boundary of property along the coast.

The Commission is charged with protecting the public's interest in state tidelands. Pursuant to its authority, the Commission in 1999 objected to the issuance of a coastal development permit by Santa Barbara County on beachfront property owned by the Bollays seaward of a railroad right of way because the Commission concluded it was possible the construction would encroach on state owned tidelands. The Bollays tried again in 2003 and submitted a survey showing that the mean high tide line was well seaward of the proposed construction sites. However, based on its own surveys in 1956 and 1964, the Commission concluded that the mean high tide line on the beach had changed substantially over the years and virtually the entire beach seaward of the right of way, including the proposed construction site, had been seaward of the mean high tide line at one time or another.

In 2004, the County began to investigate exercising its power of eminent domain to acquire the Bollays' property and other lots along the beach. The County contracted with the Commission to determine the location of the mean high tide line on the beach. In its report, the Commission merely reiterated its 2003 conclusion that the mean high tide line on the beach extended to the right of way and would continue to fluctuate within its full historical range. The Commission did not attempt to determine the existing mean high tide line.

The Commission's report concluded that:

it seems unlikely that any of [Santa Claus Lane beach] parcels could be developed in a manner that complied with Coastal Act policies or that conformed to the State Land[s] Commission's policy *that new development be sited landward of the most landward location of the mean high tide line.*

(Op. p. 7 [brackets and italics in opinion].)

The Bollays challenged the policy reflected in the italicized part of the report.

The court summarily rejected the Commission's argument that the policy was not a regulation, holding the Commission had not made it in the trial court and raised it only perfunctorily on appeal in a footnote.

The Commission's main argument was that the policy was exempt from promulgation under the APA because it was "the only legally tenable interpretation of a provision of law." (Gov. Code, § 11340.9, subd. (f).) Specifically, its policy was a simple reiteration of existing law to the effect that the state owns tidelands up to the ordinary high water mark as measured by the mean high tide line, and that the California Constitution, the Public Resources Code, and the common law public trust doctrine required that the state retain tidelands for public trust uses.

The court reversed the Office of Administrative Law and the trial court, and concluded that the Commission's policy was an invalid underground regulation. The court found that the policy did not protect the state's ownership of land only to the mean high tide line, but instead to the most landward historical mean high tide line. Thus, the policy was not the only legally tenable interpretation of law because it potentially "protected" the public's interest in land that did not now and might never in the future belong to the state.

The Commission attempted to justify the application of the policy to the Bollays' property on the ground that the Commission had found that the mean high tide line would continue to fluctuate on their property within its full historical range. But the court rejected that argument on the ground that it was an anecdotal case; there was neither argument nor evidence that at all points along the California coast, the mean high tide line would continue to fluctuate within its full historical range.

The court also noted that the policy was potentially *underinclusive* because the mean high tide line could move further inland than it had ever been. Thus, a policy that "protected" only land seaward of the most landward historical mean high tide line would not preserve the public's interest in land that might foreseeably become state tidelands.

In short, the policy as applied along the coast was potentially both overinclusive, prohibiting development on land that did not now and might never in the future belong to the state (even though it might once have); and underinclusive, in failing to prohibit development on land that might become state land in the future. Therefore, the policy was not the only legally tenable interpretation of law because it departed from and embellished upon constitutional, statutory, and decisional law.

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