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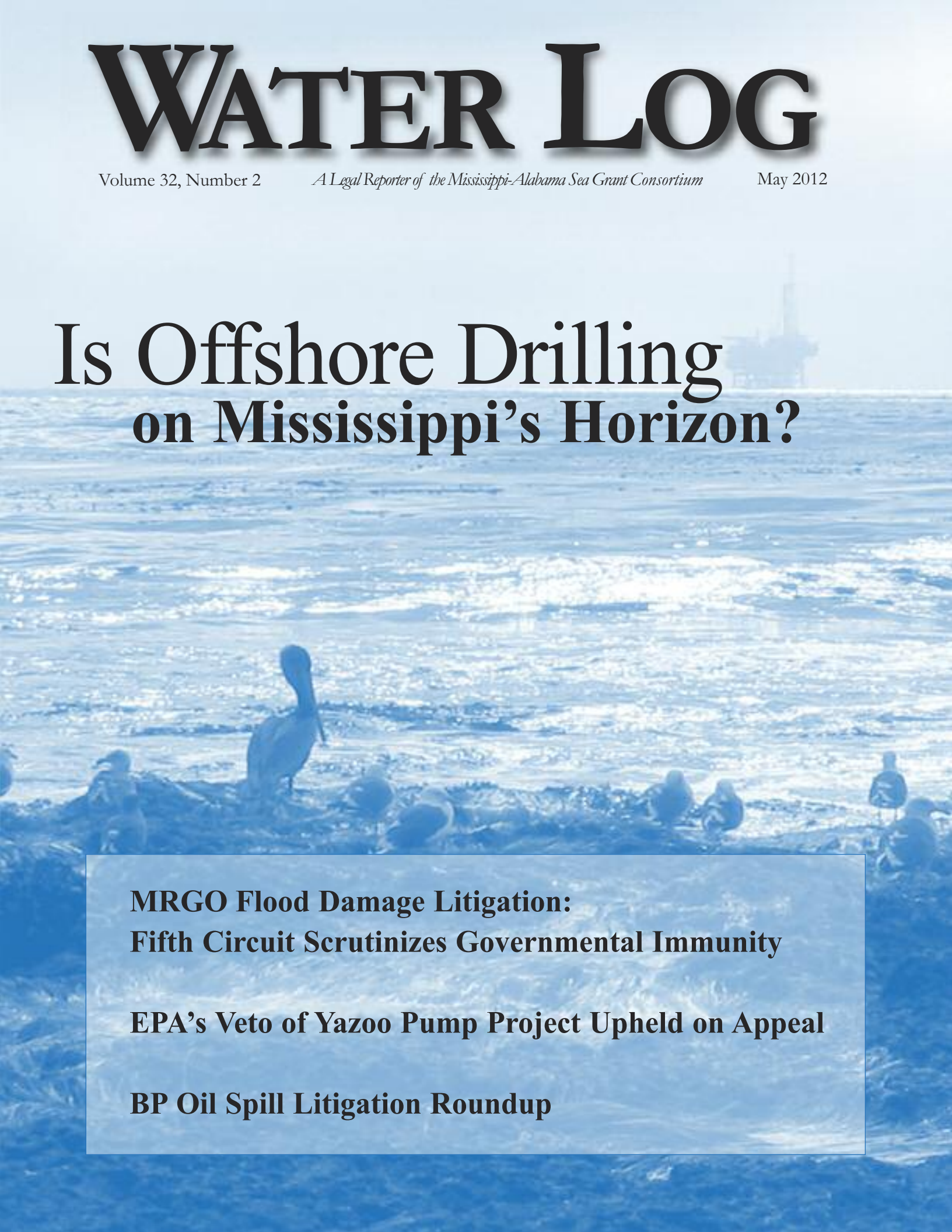
Is Offshore Drilling on Mississippi's Horizon?



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The Coastal Society Conference

June 3-6, 2012
Miami, Florida

Coastal Development Strategies Conference

November 7-8, 2012
Biloxi, MS

Bays & Bayous Symposium 2012

November 14-15, 2012
Biloxi, MS

Is Offshore Drilling on Mississippi's Horizon?

By April Killcreas[1]

This spring the Mississippi Development Authority (MDA) released new rules related to offshore mineral exploration in state waters, including the Mississippi Sound. The new rules raise concerns with local environmental groups, prompting two groups to challenge the rules' validity in court. On March 14th, the Mississippi Sierra Club and the Gulf Restoration Network sued the MDA seeking to set aside recent regulations concerning seismic testing and leasing for oil and gas in state waters. Opponents of the new rules contend that drilling efforts occurring so close to the barrier islands located off of the Mississippi coast could pose significant environmental harm, not only to the islands but also to aquatic and marine life found in the surrounding waters.

New Regulations

The new regulations include two sections – one dealing with exploration (Part 6) and another addressing leasing for production (Part 7). Under current law, most waters in the Mississippi Sound are off limits to offshore drilling operations, although offshore oil and gas exploration is not excluded.[2] Under the new rules, seismic exploration for oil and gas will be allowed in all state-owned marine waters within MDA's jurisdiction. State-owned marine waters are defined as "all marine waters and submerged lands … subject to the ebb and flow of the tide … below the … mean high tide;" publicly owned accretions are also included.[3]

The new exploration rules include provisions intended to provide protections for wildlife. For instance, entities proposing exploration in "any marine waters, wildlife refuge, wildlife management area, game or fish preserve, oyster lease or reef, state park, coastal preserve system" or other similar areas must give notice to the appropriate agency and may be required to reschedule for more favorable conditions.[4] Likewise, no seismic activities may take place in the Gulf Islands National Seashore without permission from the National Park Service.[5] Additional provisions restrict explosive discharges within 300 feet of structures including piers, docks, and causeways.[6] The rules also include a chapter addressing the protection of marine resources and wildlife management areas. This section places limits on exploration during the first two weeks of shrimp season, requires best industry practices to prevent destruction of fish and other aquatic life, and prohibits exploration in any "estuarine research reserve, coastal preserve, or public oyster reef" without permission from the Mississippi Department of Marine Resources.[7]

The leasing rules address oil and gas production and extraction in state-owned marine waters. As previously mentioned, offshore drilling is currently restricted primarily to areas south of the barrier islands. However,

Photograph courtesy of Andrew Schmidt.

these rules would also apply to areas in the Mississippi Sound if the legislature lifted the current restriction. These provisions primarily relate to the advertising, bidding, and leasing process.[8]

Legal Challenges

The Sierra Club and Gulf Restoration Network argue that the new rules are procedurally flawed and fail to comply with state law.[9] In support, they point to MDA's failure to complete an economic impact study and alleged failure to respond to public comments. The two groups also contend that MDA violated the public trust by issuing the regulations. The groups claim the new rules permit the development of public resources for private financial benefit without having fully considered the public's interest. Under the Public Trust Doctrine, the state holds title to submerged lands in trust for the public; the state may only allow public lands to be privately developed if such development is in the best interest of the public. The primary concern cited by the environmental groups is that the state may be making public resources available for oil and gas exploration without adequately considering how these operations will affect the economy or the coastal environment.

> **"Despite the revisions, public concern has steadily grown regarding the speed with which MDA has implemented these new regulations."**

Although MDA made the rules available for public comment, the agency did not respond to multiple requests for an extended public comment period, leading many opponents to argue that MDA failed to consider a substantial number of the comments opposing the new rules. For instance, the superintendent of the Gulf Islands National Seashore expressed concern that MDA did not adequately consider her concerns that oil and gas operations within one mile of the barrier islands could lead to diminished air and water quality and, more importantly, that subsidence may occur as the result of the drilling process, causing portions of the islands to gradually sink.[10] Overall, MDA received over 180 comments and made approximately 35 changes to the proposed regulations.[11] Despite the revisions, public concern has steadily grown regarding the speed with which MDA has implemented these new regulations.

Impacts to Tourism

Members of the tourism industry have also expressed doubts that allowing drilling operations will provide any significant benefit to the state. The tourism industry is one of the state's largest employers, and members of the Harrison County Board of Supervisors and the 12 Miles South Coalition – an advocacy group comprised of coastal business and community officials dedicated to limiting drilling activities in state-owned waters – have indicated that the MDA should have given more consideration to the potential impacts that drilling could have on coastal tourism.[12] Casinos located along the Mississippi Gulf Coast also submitted their concerns to MDA that opening up the Sound to drilling would overrun the area with industrial equipment and decrease the aesthetic appeal of the Coast.

Conclusion

Those in favor of the drilling regulations include Governor Phil Bryant, who has indicated that offshore drilling in Mississippi waters is necessary to prevent neighboring states from recovering the oil or gas that may be present and reaping the economic benefits.[13] Additionally, many coastal residents have expressed approval of offshore drilling in state waters, citing benefits to the economy and the coastal job market that drilling rigs can bring to the area. The Sierra Club and the Gulf Restoration Network maintain that MDA's new regulations were adopted without sufficient consideration of the potential consequences for the coastal environment.

Endnotes

1. J.D. 2012, Univ. of Miss. School of Law.
2. "No mineral lease of offshore lands shall allow offshore drilling operations north of the coastal barrier islands, except in Blocks 40, 41, 42, 43, 63, 64 and 66 through 98, inclusive. Further, surface offshore drilling operations will not be allowed within one (1) mile of Cat Island." Miss. Code Ann. § 29-7-3.
3. Miss. Admin. Code 6-2-6:1.2(A.A) (to be codified).
4. Miss. Admin. Code 6-2-6:6.1.B (to be codified).
5. Miss. Admin. Code 6-2-6:6.2.A (to be codified).
6. Miss. Admin. Code 6-2-6:6.2.A (to be codified).
7. Miss. Admin. Code 6-2-6:6.2.A (to be codified).
8. Miss. Admin. Code 6-2-7 (to be codified).
9. Appeal of Rulemaking by Miss. Dev. Auth., Sierra Club v. Miss. Dev. Auth., No. G2012-440T4 (Hinds County Chancery Court Mar. 14, 2012).
10. Rhonda Miller, *Revised Seismic Testing and Drilling Rules Sent to Secretary of State*, Miss. Pub. Broad. (Feb. 17, 2012).
11. *Id.*
12. Rhonda Miller, *Opposition to Drilling in State Waters Strengthens as Leasing for Rig Sites Nears*, Miss Pub. Broad. (Feb. 13, 2012).
13. Rhonda Miller, *Sierra Club Takes Mississippi Development Authority to Court to Block Drilling Regulations*, Miss. Pub. Broad. (March 15, 2012).

MRGO Flood Damage Litigation: Fifth Circuit Scrutinizes Governmental Immunity

By Niki L. Pace[1]

In March, the U.S. Court of Appeals for the Fifth Circuit considered flood damage claims brought by New Orleans residents following Hurricane Katrina. The lawsuits brought against the U.S. government alleged that government operation of the Mississippi River Gulf Outlet and a series of levees caused or exacerbated the flooding.[2] The government, however, claimed immunity from the damages. After considering an array of claims, the Fifth Circuit found the government was not immune from claims brought by certain St. Bernard Parish residents injured by operations of MRGO.

Authorized in 1956, MRGO was created to give New Orleans better access to the Gulf of Mexico for both military and economic purposes. During its construction, the Corps also initiated the LPV project which included construction of a series of levees throughout the New Orleans area. Upon completion of MRGO in 1968, the Corps did not reinforce the channel banks. The banks easily eroded, allowing MRGO to grow from its original 500 feet width to a width of 1970 feet before the Corps finally reinforced the banks in the 1980s. If the banks had not been eroded, they would have provided nearby

Photograph courtesy of David Helvarg, Blue Frontier Campaign/Marine Photobank.

Background

In the wake of Hurricane Katrina, thousands of property owners suffered damages to their homes due to the breach of various levees in and around New Orleans. Many sued the federal government for flood damages. The resulting lawsuits were consolidated before a federal judge in New Orleans. This litigation centers around levee breaches associated with two U.S. Army Corps of Engineers projects: the Mississippi River Gulf Outlet (MRGO) and the Lake Pontchartrain and Vicinity Hurricane Protection Plan (LPV).

Chalmette levees with greater protection from storm surge and levee topping, such as the storm surge experienced during Hurricane Katrina.[3]

Because the outlet had grown, the storm surge associated with Hurricane Katrina was able to reach the St. Bernard polder, a low lying area where some of the property owners lived. In late 2009, the trial court found in favor of these St. Bernard residents while at the same time dismissing claims brought by residents of other parts of the New Orleans area. Numerous parties,

including the U.S. government, appealed that decision to the Fifth Circuit. The government argued that it was immune from liability for flood damages under both the Flood Control Act of 1928 and the discretionary function exception of the Federal Tort Claims Act.

Flood Control Act Immunity

The Flood Control Act of 1928 (FCA) immunizes the government from floodwater damages resulting from a flood control activity or associated negligence.[4] A central issue in this litigation is whether this provision of immunity extends to flood damage resulting from MRGO during Hurricane Katrina. MRGO was constructed and operated as a navigational channel rather than a flood control activity. The U.S. government argued that FCA immunity should apply in this case because MRGO was entwined with the LPV and other flood control activities.

The Fifth Circuit, relying on a U.S. Supreme Court decision, rejected the government's position. As explained by the court, waters related to government flood control activity give the government immunity from damages; unrelated waters do not. For instance, the government is immune where the flooding is caused by the opening of flood control gates as part of a flood control effort. But where the government opened flood control gates to generate hydroelectric power, the government was not immune from liability for flood damages.[5] However, the court noted that immunity would apply to "any flood-control activity engaged in by the government" even if the project "was not primarily or substantially related to flood control."[6]

Applying this standard to the facts of the current case, the Fifth Circuit found that the government did not qualify for FCA immunity from the claims brought by the St. Bernard Parish plaintiffs because Corps' dredging of MRGO was unrelated to flood control. Rather, the Corps dredged MRGO "to keep it navigable rather than to implement costlier foreshore protection" that would have promoted both navigability and flood protection.[7] However, the government was immune from liability in cases where the flood damage resulted from levee breaches related to the LPV project.

Discretionary Function Exception

In addition to Flood Control Act immunity, the government also argued that the discretionary function exception (DFE) of the Federal Tort Claims Act (FTCA) immunized the government from lawsuit. The FTCA allows individuals to sue the federal government in certain circumstances. However, the DFE is a limitation on that ability to sue. The DFE bars claims based on government actions that are a discretionary (rather than mandatory) function of the government. To qualify for the DFE, the government action must: (1) involve "an element of judgment or choice", and (2) be "based on considerations of public policy."[8]

With regard to the government's operation of MRGO, the plaintiffs gave three reasons why the government's actions were not discretionary: (1) a legal mandate under the National Environmental Policy Act (NEPA); (2) project authorizations created a non-discretionary duty to armor the banks of MRGO; and (3) the decision to armor was a scientific decision not a public policy decision. The court found that neither NEPA nor the project authorizations negated the DFE, meaning these two items did not destroy the government's immunity.

As to the third claim, however, the court found that the Corps' decision to delay armoring MRGO was indeed based on science rather than policy. Under the second prong of the DFE analysis, the government decision that only entails the application of scientific principals, rather than policy considerations, is not immune from liability. Here, the court found sufficient evidence that the government based its decisions related to MRGO on faulty scientific knowledge, noting the Corps "determined that MRGO played no role in major hurricane events" and thus took no steps to address MRGO's dangers.[9] Consequently, the DFE did not prevent flooded property owners damaged by the government's delay in armoring MRGO from brining their lawsuits.

Conclusion

Although the ruling allows certain plaintiffs to recover damages from the government, the ruling is limited in the context of overall flood damage claims following Hurricane Katrina. The ruling affirms government immunity in cases where the flood resulted from government flood control actions, such as levee breaches. Only flood damage claims directly tied to the government's operation of MRGO overcome government immunity in these cases.

Endnotes

1. Research assistance provided by Benjamin Sloan, J.D. Candidate 2014, Univ. of Miss. School of Law.
2. *In re* Katrina Canal Breaches Litig., 673 F.3d 381 (5th Cir. 2012).
3. *Id.* at 386.
4. *Id.* at 387.
5. *Id.* at 388.
6. *Id.* at 390.
7. *Id.* at 390.
8. *Id.* at 392.
9. *Id.* at 395.

EPA's Veto of Yazoo Pump Project Upheld on Appeal

By Barton Norfleet[1]

On March 6, 2012, the decades old project known as the Yazoo Backwater Project, or Yazoo Pump Project, reached another dead end. The U.S. Court of Appeals for the Fifth Circuit upheld the 2011 ruling of a Mississippi district court, affirming the EPA's right to veto the Project under § 404(c) of the Clean Water Act (CWA). In reaching its ruling, the court disagreed with the Board of Mississippi Levee Commissioners' (Levee Board) argument that the Project should be exempt from the EPA's veto power under § 404(r) of the CWA.

Photograph courtesy of the USFWS.

Background

The Yazoo Pump Project (Project) came about in 1941 after Congress passed the Flood Control Act of 1928 to ease flooding through levee construction. Utilizing this Act, the Mississippi River Commission of 1941 prepared a report suggesting the construction of a levee along the west bank of the Yazoo River in order to prevent flooding in the Yazoo Backwater Area (Backwater Area).[2] The Backwater Area is located in the Mississippi Delta between the Mississippi and Yazoo Rivers and consists of 630,000 acres of wetlands, farmlands, and forests.[3] The project went through several modifications, and its final layout focused on a hydraulic pumping station for the purpose of pumping any potential flood water from the Mississippi River out of the Backwater Area. The project also included plans for 60,000 acres of land to be set aside for agriculture and hardwood growth. However, the case at hand focuses only on the construction of the hydraulic pump station.[4]

The project stalled several times along the way. In 1959, the U.S. Army Corps of Engineers (Corps) took a renewed interest in the plan, but decided that it was no longer necessary. However, the plan was again analyzed in 1979, at which time the Corps issued a modified version. Some levee construction began in 1986, but the re-evaluated plan soon became lost in the opaque maze of administrative procedure. In 2008, the EPA exercised its veto authority under §404(c) of the Clean Water Act and vetoed the project on grounds that it would destroy wetlands, water quality, and habitat for threatened

species.[5] The Levee Board appealed the veto on March 28, 2011, claiming that the Project was exempt from the EPA's veto power. The lower court sided with EPA, finding that the Project did not meet the necessary requirements for exemption. The Levee Board appealed, bringing us to the case at hand.

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Clean Water Act § 404(r)

The Levee Board maintained that CWA § 404(r) exempted the project from EPA veto authority. Section 404(r) exempts congressionally authorized federal projects from § 404 regulation so long the implementing agency conducts an adequate Environmental Impact Statement (as required by the National Environmental Policy Act) and submits the EIS to Congress before the project begins and before funding for the project is authorized.[6] According to the Levee Board, the Yazoo Project met these requirements and was therefore exempt from EPA's veto authority.

On review, the Fifth Circuit disagreed, finding that no final EIS was submitted to Congress. The Levee Board cited two 1983 letters of Representative James J. Howard and Senator Robert T. Stafford as evidence that the EIS was submitted, claiming that the EIS was attached to these letters. The court analyzed the letters for evidence of the EIS and noted that a "final EIS" was mentioned that could have been in relation to the Project; however, the court found this vague mention of an EIS insufficient to qualify for § 404(r) exemption. The Fifth Circuit also agreed with the lower court's decision that, if indeed the EIS attachment had been found, it was highly unlikely that it would be the final EIS, and that there was no evidence showing that it would have been in compliance with the current Clean Water Act guidelines. Because the Project failed to meet this requirement, the court saw no need to rule on the Levee Board's other claims.

Photograph courtesy of John and Karen Hollingsworth.

Conclusion

The Yazoo Pump Project may have finally run its course. The Fifth Circuit decision leaves EPA's veto of the project in place. It is unclear at this time what alternative flood control measures the Levee Board may choose to pursue for the Yazoo Backwater Area.

Endnotes

1. 2012 J.D. Candidate, University of Miss. School of Law.
2. Bd. of Mississippi Levee Com'rs v. U.S. E.P.A., 11-60302, 2012 WL 695844 (5th Cir. Mar. 6, 2012).
3. Mary McKenna, *EPA's Veto of the Yazoo Pump Project Upheld*, 31:2 WATER LOG 3 (2011).
4. *Id.*
5. *Controversial Yazoo Pumps back in the courtroom*, Associated Press (Jan. 4, 2012), *available at* http://msbusiness.com/2012/01/controversial-yazoo-pumps-back-in-the-courtroom/.
6. 33 U.S.C. § 1344(r).

BP Oil Spill Litigation Roundup

By Niki Pace & Christopher Motta-Wurst[1]

Photograph courtesy of Eileen Romero/Marine Photobank.

This spring has seen a flurry of activity in the on-going litigation surrounding the Deepwater Horizon Oil Spill of 2010. Along with partial settlements and new trial dates, the first arrest has been made and new lawsuits have also been filed. This article gives a short overview of recent events.

Partial Settlement Reached

On May 2, 2012, a federal judge granted preliminary approval of a proposed settlement addressing two classes of claims: economic loss claims and medical claims.[2] The Economic and Property Damages Settlement applies to numerous categories of claims including: subsistence loss, seafood compensation, individual and business economic loss, wetlands property damage, coastal property damage, and vessels of opportunity damages. The settlement extends to impacted persons living or working in Alabama, Mississippi, Louisiana, and certain coastal counties of Texas and Florida. The settlement specifically excludes claims related to the moratoria and others.

The Medical Benefits Settlement includes all oil spill clean-up workers and residents who resided in specified beachfront or wetland coastal areas for certain lengths of time. Claimants may be eligible for medical coverage (including reimbursement for medical treatment) for certain medical conditions as well as a 21-year medical monitoring program. In addition, the Settlement establishes a $105 million Gulf Region Health Outreach Program for all Gulf coast residents. The Program aims to strengthen healthcare capacity in the region and improve health literacy amongst Gulf residents.

The settlement program will be court supervised and is set to begin in June. An official court-authorized website has been created where additional information is available, including claims forms and maps: DeepwaterHorizonSettlements.com. Information is available in English, Spanish, and Vietnamese.

Criminal Arrests

The first criminal arrest related to the spill took place this spring. In May, the FBI indicted former BP engineer Kurt Mix on obstruction of justice charges for deleting text messages related to the oil spill flow rate and other items. Mix disputes the charges, arguing that confidential evidence would exonerate him. If convicted, Mix faces up to 20 years in prison.

Photograph courtesy of Eileen Romero/Marine Photobank.

Liability Under CWA and OPA

On February 22, 2012, the federal district court overseeing this litigation ruled on preliminary liability issues under the Oil Pollution Act and the Clean Water Act.[3] The government argued that BP and Anadarko have unlimited liability under the OPA, but the court rejected that argument. The court did rule, however, that since BP and Anadarko are "responsible parties" under the OPA for the subsurface discharge of oil, the Government is entitled to a declaratory judgment, defining the rights of the parties, on this issue. The court said that Transocean is not liable under the OPA for discharge that occurred beneath the surface, but it may be liable for removal costs. Removal costs liability and surface discharge liability were not addressed. The court also ruled that BP and Anadarko are liable for civil penalties under § 311(b)(7) of the CWA, but could not resolve the issue of Transocean at this stage of the litigation.

Unresolved and Emerging Issues

While a settlement has been reached for private claims, the U.S. government's civil penalty claims under the CWA have yet to be determined. CWA fines could double the private economic damage claims estimated at $7.8 billion as CWA fines are based on the amount of oil spilled.[4] On April 11, 2012, the Justice Department agreed to release over 100 scientific documents dealing with the amount of oil that spilled into the Gulf of Mexico from BP's Macondo well. BP claims that the government overestimated the size of the spill at 4.9 million barrels of oil.[5]

BP is also facing a new set of claims from Vietnamese- and Cambodian- Americans. Forty-one named Vietnamese- and Cambodian- Americans have filed a class action suit against BP in New Orleans alleging that BP told companies involved in Vessels of Opportunity oil spill clean-up not to hire Vietnamese- and Cambodian- Americans.[6] The Vessels of Opportunity program was designed to hire fisherman to use their boats for cleanup.

In another new lawsuit, a commercial diver in Texas is suing BP over serious medical conditions allegedly resulting from his work as a diver during the oil spill clean-up efforts. The diver worked on the clean-up efforts for five months and has since suffered a significant deterioration in health which he attributes to exposure to oil and dispersants.[7] The case was filed in Harris County, Texas in May.

Endnotes

1. J.D., Univ. of Miss. School of Law.
2. Notice of Filing of Economic and Property Damages Settlement Agreement, *In re:* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179 (E.D. La. May 3, 2012).
3. *In re:* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, MDL No. 2179, WL 569388, *1, (E.D. La. Feb. 22, 2012).
4. David Hammer, *BP Oil Spill Trial Plan Could Change*, Times-Picayune (April 4, 2012).
5. *BP oil spill scientific documents to be released by U.S. Justice Department*, Associated Press (April 11, 2012).
6. Complaint, Duong v. BP, Case No. 2:12-cv-00814 (E.D. La. March 27, 2012).
7. Complaint, Hogan v. BP, No. 201222995 (Tex. D., Harris Co. 295th Dist. May 2, 2012).

Kemper County Coal Plant: The Mississippi Supreme Court Weighs In

By Niki L. Pace & Barton Norfleet[1]

Early this year, a unanimous Mississippi Supreme Court ordered the Mississippi Public Service Commission to reconsider its prior approval of a new coal-fired power plant in Kemper County, Mississippi. While the Commission has authority to approve such projects, the Commission must set out its reasons for approving the project based on the evidence before the Commission (commonly referred to as "findings of fact"). In this instance, the Commission failed to detail the rationale for approval.

Background

As discussed in previous articles, the new power plant will utilize integrated-gasification combined cycle (IGCC) technology that allows the plant to run more efficiently. The facility will utilize a low energy coal, lignite, as its fuel source. The lignite will be mined nearby, at the headwaters of the Pascagoula watershed. In addition, the plant will have carbon capture and sequestration capabilities with the captured carbon dioxide being used in enhanced oil recovery. However, the new technology comes with a high price tag.

Before a power company may build a new plant, the company must first obtain a Certificate of Convenience and Necessity from the Mississippi Public Service Commission. During this process, the Commission considers whether growing demand and other issues justify building a new power plant and passing those costs on to the utility's customers. If the Commission determines the new power plant is needed, the power company will be issued a Certificate and allowed to pass some or all of the construction costs on to the consumer which often results in a rate-increase.

Initially, the Commission denied MPC's plan for the Kemper plant in April of 2011, stating that the project was too risky for ratepayers unless it met a cost cap of $2.4 billion as well as other financial regulations. However, the Commission had an abrupt change of heart the following month and approved the plant, while also allowing a 20% cost overrun, bumping the cap up to $2.88 billion. The Commission provided no explanation for its changed position. The Sierra Club sued the Commission, claiming that the decision was unsupported by the evidence.

Current Status

The Mississippi Supreme Court heard oral arguments in the matter in December, and in March issued a short one-page opinion requiring the Commission to set out its reasons for the decision. The court cautioned the Commission that its "findings must be 'supported by substantial evidence presented'" to the Commission during proceedings on the matter. Following the ruling, the Commission held a new hearing in April and voted 2-1 to reissue the Certificate. The Commission issued a 133-page Order detailing its reasoning. The Commission denied the Sierra Club's motion to consider new evidence before ruling on the matter. Sierra Club sought to introduce information related to historically low natural gas prices. The new Certificate preserves the $2.88 billion cost cap on costs to Mississippi Power Company ratepayers.

Moving Forward

The Commission's actions prompted a new round of legal challenges by the Sierra Club. The Sierra Club has appealed the Commission's decision to the Mississippi Supreme Court arguing that the decision is unsupported by the evidence. The Sierra Club has additionally requested that the cost of the facility be placed on Mississippi Power Company, rather than ratepayers, while the appeal continues. The courts have not ruled on these issues yet. Meanwhile, construction of the plant is ongoing with the facility expected to go online in 2014. Mississippi Power Company projects customer rates to increase 30% to cover costs of the facility.

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Sierra Club v. Miss. Pub. Serv. Comm'n, 82 So.3d 618 (Miss. 2012).
3. Corporate Responsibility:Carbon Dioxide Capture and Storage, SOUTHERN COMPANY (2010), available at http://www.southerncompany.com/corporateresponsibility/environment/climateChange.aspx;
4. Mississippi Power Company, Docket No. 2009-UA-014 (Miss. Public Serv. Comm'n April 29, 2010) (Order).
5. Mississippi Power Company, Docket No. 2009-UA-014 (Miss. Public Serv. Comm'n May 26, 2010) (Order).
6. Sierra Club v. Miss. Pub. Serv. Comm'n, 82 So.3d 618 (Miss. 2012).
7. Clay Chandler, Sierra Club Still Against MPC Kemper Coal Plant, MS BUSINESS JOURNAL (April 29, 2012).
8. Mississippi Power Company, Docket No. 2009-UA-014 (Miss. Public Serv. Comm'n April 24, 2012) (Order).
9. Eileen O'Grady, Sierra Club Continues Kemper Coal-Plant Legal Battle, REUTERS (April 30, 2012), http://www.reuters.com/article/2012/04/30/utilities-southern-kemper-idUSL1E8FUCOW20120430.

Groundwater Ownership Rights and the Edwards Aquifer Authority

By King Farris[1] & Niki L. Pace

Beneath the heart of the Texas Hill Country lies the Edwards Aquifer, among the most prolific artesian aquifers in the world. It has helped foster and support the development of south-central Texas, providing water for much of San Antonio, New Braunfels, and San Marcos. However, the very development spurred and maintained by the aquifer is giving rise to disputes concerning the water it contains, and the owners of the land above it.

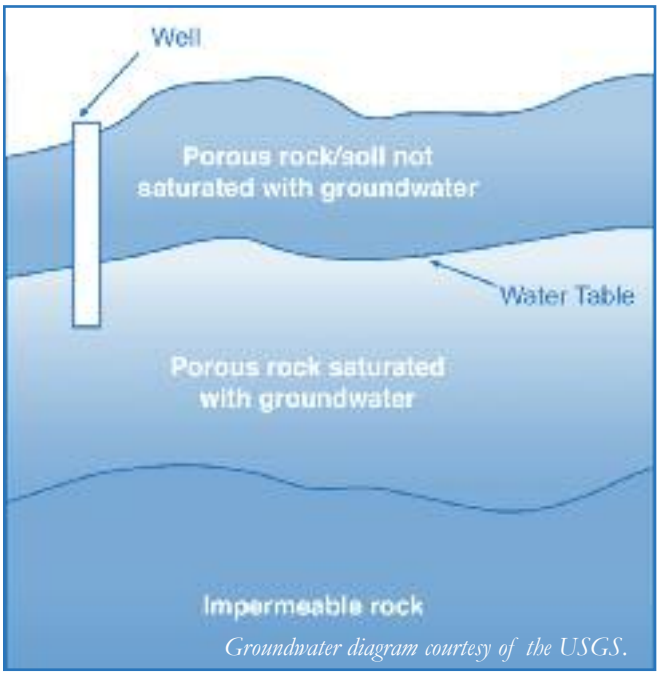
Historically, land ownership rights have been granted from the earth to the heavens above an owner's property; water was simply assumed to be part of the land. In ecologically sensitive areas like the Edwards Aquifer, however, the earth-to-sky understanding of property rights may change when the property (water) is located beneath the ground, rather than on or above the land. The recently decided case of Edwards Aquifer Authority v. Day illustrates Texas property-rights caselaw and that state's position on the issue.[2]

Background

In 1994, R. Burrell Day and Joel McDaniel purchased 381 acres of land for use as oat and peanut farmland and cattle ranchland; however, they would first have to rebuild an old well on the land in order to access water from the Edwards Aquifer, which the land sat atop. To do this, they needed a permit from the Edwards Aquifer Authority (the Authority), created by the Texas Legislature the year before Day purchased the land.

The Edwards Aquifer is the primary source of water for a large area of south-central Texas between Austin and San Antonio. As the state agency in charge of protecting and managing the Aquifer, the Authority has strict rules regarding who can draw water from the Aquifer, when, and for what purpose. Permitting decisions hinge on these requirements. One such rule decreed that "water may not be withdrawn from the aquifer through wells drilled after June 1, 1993."[3] In addition, each permit the Authority issued had to specify the total volume of water a user could draw in a year (June 1 to May 31), an amount capped by the provisions of the Edwards Aquifer Authority Act (EAAA).

In December 1999, the Authority approved Day's application for an Initial Regular Permit (IRP) based on a prior landowner's affidavit confirming use of the well Day sought to rebuild. The Authority reversed itself in November 2000 and denied his application. The Authority claimed that "withdrawals [from the well] were not placed to a beneficial use" because the previous use – to feed a 50-acre lake used primarily for personal recreation – did not meet the Act's beneficial use definition.[4] Day filed a protest of the Authority's action that eventually led to this litigation. On appeal, Day argued that the decision to decline his permit application amounted to the illegal taking of his property (groundwater) without just compensation. Since Day planned to use part of the lake—fed by the Aquifer—for irrigation, the heart of the issue was whether Day or the State of Texas was the owner of the water underneath Day's land.



Groundwater diagram courtesy of the USGS.

Beneficial Use

The EAAA defines "beneficial use" as "the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to

that purpose."[5] Before turning to ownership of the groundwater, the court first considered whether the groundwater feeding a lake remains the property of the landowner once it becomes lake water. Day argued that his predecessor's withdrawals from the lake for irrigation was a beneficial use of the water and should be considered by the Authority in calculating his withdrawal amount. While the court found that in certain instances a lake could be used to store or transport groundwater, in this instance the lake was primarily used for recreation. Since Day's original request included the use of aquifer water for personal use (the lake on the property) rather than irrigation, it failed the test for beneficial use of state water. Because of this recreational use of the lake, the Authority was justified in classifying the lake water as state water (rather than privately held water).[6] On that basis, the Authority was not required to consider previous withdrawals of water from the lake for irrigation in determining the historical use of water on Day's property.

Groundwater Ownership

This case presented a question of first impression for the Texas Supreme Court: Can groundwater be owned in place as is oil and gas? Previous Texas cases had applied the rule of capture to groundwater withdrawals, holding essentially that a landowner had a legal right to all the water he could capture under his land.[7] However, the rule of capture fails to resolve ownership of water that stays in place.

For guidance, the court looked to oil and gas ownership, noting that "ownership of oil and gas in place is the prevailing rule among the states" including Texas.[8] Analogizing oil and gas to groundwater, the court found no reason to treat ownership of oil and gas in place differently from groundwater in place. The prevailing law as to ownership of oil and gas in place is described as follows:

> The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.[9]

The court went on to explicitly apply this rule to groundwater in place. The court also pointed to recent changes to the Texas Water Code as additional support. In 2011, the Texas legislature amended the Water Code to recognize groundwater as real property.[10]

Takings Claim

Day additionally argues that through the EAAA's permitting process, his groundwater has been taken without compensation in violation of the Texas Constitution. Previous Texas caselaw upheld the EAAA as a valid exercise of police power aimed at safeguarding the public welfare.[11] In this case, the court recognized that Texas landowners have a compensable property interest in their groundwater and considered "whether the EAAA's regulatory scheme has resulted in a taking of that interest."[12]

Without deciding whether the EAAA results in a taking in this case, the court acknowledges the possibility of such claims and the need for more information before ruling in this matter. Specifically, the court focuses on the EAAA's practice of basing withdrawal permits solely on historic use: "Under the EAAA, a landowner may be deprived of all use of groundwater other than a small amount for domestic or livestock use, merely because he did not use water during the historical period."[13] In contrast, other groundwater districts operating under the state Water Code consider a variety of factors when considering permit applications. The parties do not explain the more restrictive nature of the EAAA and the court is not persuaded of its necessity. Regardless, the court notes that a landowner cannot be denied all beneficial use of his groundwater simply because he failed to use it during the historical period.

Conclusion

The state of Texas is one of our country's largest land areas, and contains numerous aquifers, river systems, and notable lakes that serve a spectrum of uses from major fishing-tournament sites to irrigation for ranches and farms. The Edwards Aquifer Authority case involved one well; as Texas recovers haltingly from a devastating drought, it remains to be seen how the state's courts will rule in future disputes over ownership of the Lone Star State's most precious natural resource. It would appear that, from Edwards Aquifer Authority v. Day and the cases underpinning the court's holding, ownership of groundwater really does lie in the way that you use it.

Endnotes

1. J.D. Candidate 2013, University of Mississippi School of Law.
2. Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 WL 592729 (Tex. Feb. 24, 2012) (affirming Edwards Aquifer Auth. v. Day, 274 S.W. 3d 742 (2010)).
3. *Id.* at *1.
4. *Id.* at *2.
5. *Id.* at *1.
6. *Id.* at *4.
7. *Id.* at *7.
8. *Id.* at *9.
9. *Id.* at *11.
10. Tex. Water Code § 36.002(a)-(b).
11. See Barshop v. Medina County Underground Water Conservation District, 925 S.W.3d 618 (Tex. 1996).
12. *Edwards Aquifer Auth.*, 2012 WL 592729, at *15.
13. *Id.* at *18.

Texas Supreme Court Restricts Open Beaches Act

By April Hendricks Killcreas[1]

On March 30th, the Texas Supreme Court, for the second time, accepted a property owner's assertion that the government cannot gain title to private beachfront land that becomes part of the dry sand beach following the sudden movement of the vegetation line. Before this ruling, the State of Texas was authorized, under the Open Beaches Act, to "roll" a public access easement onto private land when a storm either washed away the vegetation or forced the vegetation line to move inland; however, according to the Supreme Court, the State may no longer rely on rolling easements to automatically preserve public access to the beach. The Texas Supreme Court has determined that the public beach easements no longer automatically shift inland as the sea encroaches. Rather, the State must show that the public acquired the right to access and use privately owned property as a public beach as the vegetation line moves inland. Balancing the public interest in using and enjoying state-owned beaches against well-established principles of property law, this ruling clearly favors the fundamental right of private property owners to exclude the general public from their land.

Background

The Texas Open Beaches Act (OBA) specifically provides for the public's unrestricted access to not only state-owned beaches but also privately owned beachfront property to which the public has acquired an easement.[2] In Texas, the wet sand beach is owned by the State and is always available for public use, while the dry beach may be either publicly or privately owned. Under the OBA, the public may gain access to these private areas if the public acquires an easement granting the right to use the beach. The public can obtain such an easement on private lands in a variety of ways, the most common being prescription, dedication, or customary use. Therefore, public beaches, as defined under the OBA, include both the state-owned wet sand beach along the Gulf of Mexico and, occasionally, privately owned dry beaches located seaward of the vegetation line on which the public has established an easement.

Texas courts have routinely held that established public easements will shift along with the vegetation line, a concept that has become known as the rolling easement doctrine. Erosion and other natural forces along the shoreline can move the vegetation line either landward or seaward. As the vegetation line moves inland, easements granting public access to the dry sand beach will also move in that direction. Because private property lines do not change when the vegetation line shifts, the rolling easement doctrine permits public beach access to extend into privately owned property. Once the public acquires an easement on privately owned beachfront property, the landowner can no longer exclude beachgoers, and state or local officials may remove structures from the property that interfere with public beach access. To make sure new property buyers are aware of this restriction on their property, affected properties include a detailed notice of the OBA's impact in each property deed.

Taking issue with these provisions of the OBA, Carol Severance, a private property owner on West Galveston Island, sought to prevent state officials from removing the home located on the Kennedy Drive property after the State determined that the public had acquired an easement on the property. Severance originally purchased three beachfront properties on West Galveston Island, Texas in April 2005. At the time of purchase, notice of the Open Beaches Act and rolling easement was included in her deed. Approximately five months later, Hurricane Rita devastated portions of Galveston Island and Galveston Beach, moving the vegetation and high tide lines inland. As a result, the rental house on Severance's Kennedy Drive property now rests on the dry beach. A public easement had previously been established on the property located between Severance's land and the Gulf of Mexico, and when the vegetation line shifted landward, the rolling easement provision of the OBA indicated that the public easement also shifted landward and onto Severance's private property.

The State, citing the rolling easement doctrine included in Severance's property deed, argued that her property was situated on a public beachfront easement and that the home located on the property interfered with the public's access to the dry sand beach. The State Commissioner informed Severance that the home was subject to removal and offered her $40,000 to remove or relocate the home. Severance filed suit, alleging that the State's attempt to require removal of the house would constitute a compensable taking under the Fifth Amendment as well as an illegal seizure of property under the Fourth Amendment. After a series of federal court proceedings and appeals, the Fifth Circuit certified unsettled questions of state law to the Texas

Supreme Court, which was asked to evaluate the legitimacy of the rolling easement doctrine as outlined in the OBA. The key to resolving this issue required the Texas Supreme Court to weigh the State's alleged right to rolling public easements to use private beachfront property against the right of property owners to exclude others from privately owned land.

Public Beachfront Easements

The Texas Supreme Court first considered whether the state recognized a rolling easement for public beachfront access if the public had not previously acquired the right to access the property. The boundaries of private property typically do not change; however, waterfront property lines are an exception to this rule and regularly shift due to the effect of natural forces on the shoreline. Typically, easement boundaries also cannot move without the consent of the landowner; thus, the court determined that the landowner must consent to the public's access of his or her private property when the public access boundary shifts inland.

When determining whether the State was allowed to roll a public easement on private property after a sudden shift in the vegetation line, the Texas Supreme Court analyzed various common law principles of property ownership. These common law rules indicate that owners of beachfront property can acquire or lose title to land that is gradually added to (accretion) or removed from (erosion) the shoreline. At the same time, however, land that is added to a waterfront property due to sudden changes along the shoreline – known as avulsion – belongs to the state. Beachfront property along the Gulf of Mexico, such as Severance's land, is regularly subject to the daily forces of wind and tidal changes that can contribute to erosion over time; this property also bears the brunt of avulsive forces, including hurricanes and tropical storms, that can immediately affect coastal property lines.

Applying these common law principles to easements, the Texas Supreme Court determined that, just as beachfront property lines must shift to accommodate the changing shoreline, the boundaries of public easements must also move in response to the effects that natural forces may have along the coast. Easement boundaries, however, may only shift when gradual changes alter the location of the vegetation line; if an avulsive event, such as a hurricane, transforms a portion of dry sand beach encumbered by a public easement into a state-owned wet beach, the State is required to re-establish that the public has an easement over the new dry beach. When avulsive events drastically and suddenly alter beachfront property boundaries, a public easement cannot shift upland onto previously unencumbered privately owned properties. The Texas Supreme Court reasoned that, to allow such a result, the State would essentially take away the fundamental right that private property owners have to exclude the public. According to the court, one of the risks of owning coastal property is that portions of the land may be transferred to state ownership if it naturally becomes part of the wet sand beach; however, even if a property owner is on notice that the State may impose a public use on her property at some point in the future, the State must still legally prove that an easement exists or purchase the easement from the landowner.[3]

Dissenting Opinions

While five Texas Supreme Court justices joined the majority opinion invalidating the state's rolling easement policy, three justices delivered dissents contending that the public retains the right to use the dry sand beach despite the rights of private property owners that may be impacted.[4] Justice Medina and Justice Lehrmann both argued that the public could maintain its interest in the dry beach, even if natural forces transformed the land into state-owned wet sand beach and the new dry beach had not been previously impacted by the easement. These justices based their argument on the theory that the public easement actually encumbered the entire parcel of land rather than the portion directly adjacent to the wet beach. Justice Medina additionally argues that, by purchasing the beachfront lot on Kennedy Drive, Severance assumed the risk that the natural forces would change the nature of the property and the location of the beach. Justice Guzman contended that the court should reach a compromise when balancing the interest of the public in accessing the beach against the right of landowners seeking to exclude beachgoers from their private property.[5] The result that she proposed would allow the state to require that property owners allow the public to use their privately owned dry beach, as long as the state agreed not to remove any homes remaining in the dry sand area.

Conclusion

As a result of this ruling, the State of Texas may no longer deem that public easements automatically roll onto private beachfront property when natural forces suddenly wash away the vegetation or move the vegetation line landward. Based on this ruling, the state had no legal claim to Severance's property simply because Hurricane Rita shifted the natural vegetation line. However, slow and gradual shifts in the vegetation line will continue to roll the public easement inland. This holding does not prevent the State of Texas from acquiring a public easement on beachfront properties; however, should the State seek to do so, the State must prove the prior existence of the easement or purchase the easement from property owners.

Endnotes

1. J.D., Univ. of Mississippi School of Law, May 2012.
2. Severance v. Patterson, No. 09–0387, 2012 WL 1059341, *1 (Tex. March 30, 2012).
3. *Id.* at *15.
4. *Id.* at *21.
5. *Id.* at *30.

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