No. 09-820

In the Supreme Court of the United States

MARY D. SHARP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
JOHN L. SMELTZER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Blank Page

QUESTIONS PRESENTED

The boundary between petitioner's upland property and the tidelands is the mean high water line (MHWL), which moves over time. That line is also where the navigable waters of the United States begin. See 33 C.F.R. 329.12(a). Petitioner maintains shore defense structures that are seaward of the MHWL. The questions presented are as follows:

1. Whether, in an action for trespass brought against petitioner by the United States on behalf of the Lummi Nation, petitioner may escape liability on the ground that the State of Washington owns the tidelands.

2. Whether the court of appeals correctly concluded that petitioner's maintenance of shore defense structures seaward of the MHWL constitutes a trespass.

3. Whether the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (33 U.S.C. 403), and the Army Corps of Engineers' implementing regulations prohibit maintenance of structures within the navigable waters of the United States without authorization from the Corps.

4. Whether the court of appeals correctly upheld the district court's injunction requiring the removal of shore defense structures seaward of the MHWL.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Treaty, statutes and regulations:

In the Supreme Court of the United States

No. 09-820

MARY D. SHARP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 583 F.3d 1174. The orders of the district court (Pet. App. 46-47, 48-49, 50-63, 64-71, 72-75, 76-83, 84-92, 93-101, 102-108) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2009. The petition for a writ of certiorari was filed on January 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit to obtain injunctive relief against petitioner and neighboring coastal homeowners (collectively the Homeowners) who maintain shore defense structures encroaching onto tidelands—lands be-

low the mean high water line (MHWL)—that are owned by the United States and held in trust for the Lummi Nation. The district court held that the Homeowners are liable for common-law trespass and for maintaining obstructions within navigable waters of the United States, in violation of Section 10 of the Rivers and Harbors Appropriation Act of 1899 (1899 RHA), ch. 425, 30 Stat. 1151 (33 U.S.C. 403). Pet. App. 52-62. The court ordered the Homeowners to "remove all rock, riprap, and other shore defense structures that are located seaward of MHW[L]" as determined by a 2002 survey. *Id.* at 62. The court of appeals affirmed in relevant part. *Id.* at 1-45.

1. In 1855, the United States and several Indian Tribes signed the Treaty Between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (Treaty of Point Elliot). Under that treaty the Tribes relinquished claims to lands within the Territory of Washington in exchange for, *inter alia*, specified tribal reservations, including a reservation for the Lummi Nation on an "island" in a river delta. Pet. App. 4. Article VII of the Treaty gave the President discretion to "remove" the Tribes to "other suitable place[s] within [the] Territory." Art. VII, 12 Stat. 929; Pet. App. 16. In 1873, President Grant issued an Executive Order expanding the Lummi Indian Reservation to adjoining areas, including Sandy Point, a peninsula that extends into the Strait of Georgia, which connects to the Pacific Ocean. *Id.* at 5. The President's order described the additional reserved lands as extending to "the low-water mark on the shore of the Gulf of Georgia," *ibid.*, reflecting the Lummi's historic use of tidelands for fishing and harvesting shellfish. *Id.* at 18.

After the reservation was created, upland areas on Sandy Point were divided into lots and patented to individual tribal members. Pet. App. 5. The tidelands, however, were never allotted or conveyed. In 1963, the Lummi Nation, with approval of the Bureau of Indian Affairs (an agency within the United States Department of the Interior), leased the tidelands surrounding Sandy Point to the Sandy Point Improvement Company to facilitate development of the uplands. *Id.* at 6, 15; see 25 U.S.C. 415(a) (governing leasing of Indian lands). The lease expired in 1988, when the lessee declined to exercise an option for renewal. Pet. App. 6.

The Homeowners own parcels derived from the original upland patents. Pet. App. 5. Over the years, the Homeowners have sought to protect their homes from storm surges and beach erosion by erecting and maintaining shore defense structures consisting of sea walls and riprap (large boulders placed seaward of the sea walls to dissipate the force of the waves). When petitioner purchased her home in 1980, there was an existing wooden bulkhead on the property. Pet. 5-6. Petitioner placed riprap seaward of the bulkhead in 1983 and 1993, without conducting a survey to determine the MHWL and tideland boundary. *Ibid.*; Appellee's Supp. E.R. Doc. 102 (Decl. of James Sharp).

2. Congress enacted the 1899 RHA to regulate navigable waters, which "are to be deemed the 'public property of the nation.'" *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967) (citation omitted). Section 10 of the 1899 RHA provides:

> 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 it shall not be lawful to build or commence the

> building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and 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.

The Army Corps of Engineers (Corps) has promulgated regulations to implement its authority under this provision. Those regulations require a permit for any "structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. 322.3. The term "[n]avigable waters" encompasses, *inter alia*, "those waters that are subject to the ebb and flow of the tide." 33 C.F.R. 329.4. In coastal waters such as those at issue in this case, the "[s]horeward limit" of the Corps' Section 403 jurisdiction "extends to the line on the shore reached by the plane of the mean * * * high water." 33 C.F.R. 329.12(a)(2). The Corps' regulations also define "structure" to include a "breakwater, bulkhead * * * [or] riprap." 33 C.F.R. 322.2(b).

3. The Seattle District of the Corps sent letters to the Homeowners requesting removal of shore defense

structures determined to be seaward of the MHWL and on Lummi tidelands. Pet. App. 7. The United States Attorney subsequently sent similar letters. *Ibid.* After the Homeowners refused to remove the structures, the United States initiated the present action for injunctive relief under federal common law (for trespass) and under the 1899 RHA. *Ibid.* In 2002, the United States commissioned a topographic survey to establish the MHWL on the relevant properties. The survey demonstrated that the Homeowners' shore defense structures are all located at least in part seaward of the MHWL. *Id.* at 6, 11.

4. The district court resolved the trespass and 1899 RHA claims through a series of orders on summary judgment. In one order, the district court determined that the United States held title to the tidelands as trustee for the Lummi Nation (rejecting the Homeowners' contention that the State of Washington held title) and that the property boundary was the MHWL. Pet. App. 93-101. In another order, the court held that petitioner and the other Homeowners were liable for trespass onto the Lummi tidelands. *Id.* at 52-56. The court based that conclusion on the undisputed evidence that the shore defense structures are located, in part, on the tidelands, and on the Homeowners' undisputed refusal to remove the encroachments in response to the United States' demand. See *ibid.*

For purposes of summary judgment, the district court assumed that the structures were landward of the MHWL at the time of their construction. Pet. App. 65. The court determined, however, that this fact, if proved, would not relieve the Homeowners of liability, given the structures' present location seaward of the MHWL. *Id.* at 54-56. The court similarly concluded that the Homeowners were liable under the 1899 RHA for maintaining

structures within the navigable waters of the United States without a permit from the Corps. *Id.* at 56-58.

After finding liability, the district court determined that injunctive relief was available for "both the trespass and the [1899] RHA violation[s]." Pet. App. 59. The court directed petitioner and the other Homeowners to: (1) "promptly remove all rock, riprap, and other shore defense structures that are located seaward of MHW[L] as that line is determined on the * * * 2002 survey" and (2) at "the request of the government," to "promptly * * * remove all rock, riprap, and other shore defense structures that become located seaward of MHW[L]," "[a]s MHW[L] moves up and down the shore," and "as * * * determined by subsequent surveys." *Id.* at 62.

6. The court of appeals affirmed in relevant part. Pet. App. 1-45. The court concluded that the Homeowners were not prohibited from asserting the State of Washington's purported title in the tidelands as a defense to the trespass action. *Id.* at 12 n.7. It rejected that defense on the merits, however, concluding that the 1873 Executive Order's reservation of lands "to the low-water mark" was sufficient to rebut the presumption of state title under the "equal footing" doctrine. *Id.* at 15-18.

The court of appeals concluded that, as a matter of federal common law, the boundary between tidelands and uplands is "ambulatory," and that the Homeowners had no right to "fix the property boundary" or to utilize the United States' property (held in trust for the Lummi Nation) to protect their own. Pet. App. 20; *id.* at 19-28. The court stated that upland and tideland owners possess their respective properties under a "reciprocal" arrangement, whereby "any loss experienced by one" as a result of accretion or erosion "is a gain made by the other." *Id.* at 22-23. The court concluded that it would be "inher-

ently unfair to the tideland owner to privilege the forces of accretion over those of erosion." *Id.* at 23.

The court of appeals also concluded that the Homeowners' maintenance of unpermitted shore defense structures seaward of the MHWL violated the 1899 RHA, even assuming those structures were originally built on uplands and came to encroach upon "navigable waters" as a result of "the movement of the tidal boundary." Pet. App. 32; see *id.* at 30-36. The court observed that the Homeowners' shore defense structures "obviously qualify as a 'breakwater, bulkhead, . . . or other structure'" under the second clause of 33 U.S.C. 403, Pet. App. 33, and that they "modify the course, location, condition, and capacity of the Strait [of Georgia] under clause three" because they "prevent[] the Strait from advancing landward." *Id.* at 33, 35. The court also observed that interpreting Section 403 to apply to structures maintained within navigable waters was consistent with the Corps' longstanding interpretation and furthered the statute's purpose of "insuring that navigable waterways remain free of obstruction." *Id.* at 31. Having affirmed the district court's conclusion that the Homeowners' maintenance of shore defense structures seaward of the MHWL effected both a trespass and a violation of the 1899 RHA, the court of appeals affirmed the injunction directing the structures' removal. *Id.* at 36.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the courts below found that the only relief ordered against petitioner—an injunction directing removal of her shore defense structures seaward of the MHWL—was an appropriate remedy for both the

trespass and the 1899 RHA violation. To prevail, petitioner therefore must demonstrate that the United States was not entitled to an injunction on either basis. Petitioner cannot surmount either hurdle, much less both.

1. Petitioner argues (Pet. 33-40) that she should not have been held liable for trespass in this action because the State of Washington, not the United States, has proper title to the tidelands. This case is an unsuitable vehicle to decide the question of ownership, and petitioner's contention lacks merit in any event.

a. It would be inappropriate for the Court to decide the question of ownership in this case because the State of Washington is not a party. In fact, Washington previously declined petitioner's invitation to join this litigation on the ground that its chance of establishing title in the tidelands was "remote at best." Appellees' Supp. E.R. Doc. 133, at 27. The State, not a single landowner in Washington, is the appropriate party to advance its sovereign interests in this Court.

b. Washington's absence from the case also results in a threshold legal defect. In a trespass action, "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person." 75 Am. Jur. 2d *Trespass* § 62 (2007). Because petitioner does not claim to be in privity with the State of Washington, she may not assert its title to the tidelands as a defense here.

Given petitioner's lack of privity with the State, the court of appeals erred in considering petitioner's Washington-title defense on the merits. The court found the issue to be properly before it on the ground that "the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the

tidelands." Pet. App. 13 n.7. The court of appeals was mistaken.

First, when tidelands are owned by the government apart from adjoining uplands, they generally cannot be "possess[ed]" in the same manner as the uplands. Although the United States and Lummis have not built structures or improvements on the tidelands, "the tidelands within the Lummi Reservation have * * * never been alienated," and the United States "continuously has held the tidelands in trust for the Lummi Nation." Pet. App. 6. The Lummi Nation, in turn, has used the tidelands for "access to fishing and shellfish." *Id.* at 18. Moreover, the United States has in the past instituted quiet-title actions on the Lummi's behalf and has previously authorized the Lummi's lease of the tidelands to facilitate upland development. *Id.* at 6, 13. These circumstances are sufficient to make the United States and the Lummis parties in possession for purposes of a trespass or ejectment action.

Even if petitioner were otherwise entitled to assert Washington's ownership of the tidelands, she would face a second dispositive obstacle: preclusion. More than 70 years ago, the United States obtained a judgment quieting title to the Lummi tidelands against private landowners who claimed title through the State of Washington and who were represented by the Washington Attorney General. *United States* v. *Stotts*, 49 F.2d 619, 620-621 (W.D. Wash. 1930). Although not formally a party in *Stotts*, the State assumed control of that litigation and is bound by the result. *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979) (estoppel applies against government where government assumed control over litigation by private contractor). The court of appeals rejected application of the preclusion bar on the ground that "the prior

cases that the government relies on do not involve [petitioner] and the [petitioner is] not subject to the binding effect of the prior judgments." Pet. App. 13 n.7. The salient fact, however, is that the State of Washington controlled the litigation in *Stotts*; the State is therefore "subject to [its] binding effect," *ibid.*, and petitioner may not litigate on Washington's behalf a legal issue that the State could not litigate on its own. Cf. *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2173 (2008) ("[A] party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.").

c. In any event, even if petitioner could assert Washington's purported title in the tidelands, the court of appeals correctly rejected that defense on the merits. See Pet. App. 12-18.

It has long been settled in the federal courts within the Ninth Circuit that the United States, not Washington, owns the tidelands contiguous to the Lummi Reservation. See *United States* v. *Romaine*, 255 F. 253, 259-260 (1919) (Land extending to the "low-water mark on the shore of the Gulf of Georgia" was reserved for the Lummi Nation, and Washington upon statehood "forever disclaim[ed] all right and title" to lands reserved for Indians.); *Stotts*, 49 F.2d at 620-621 (confirming in quiet title action that United States, not Washington, owned the Lummi tidelands); see also *United States* v. *Washington*, 969 F.2d 752, 756-757 (9th Cir. 1992), cert. denied, 507 U.S. 1051 (1993). And as this Court long ago explained, "[w]here questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co.* v. *National Co.*, 70 U.S. (3 Wall.) 332, 334

(1866); see *Arizona* v. *California*, 460 U.S. 605, 620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open."). In this case, for example, parties in the area have ordered their affairs in recognition of the United States' long-recognized ownership of the tidelands on behalf of the Lummi Nation. See Pet. App. 6, 15 (explaining that a Sandy Point homeowners' association leased tidelands from the Lummi Nation between 1963 and 1988).

Finally, petitioner's assertion of Washington's purported title to the tidelands would fail even without consideration of the *stare decisis* effect of prior decisions on that question. Although the equal footing doctrine establishes a "strong presumption" that the title to submerged lands passed to newly admitted States upon their admission to statehood, *Idaho* v. *United States*, 533 U.S. 262, 272-273 (2001), that presumption can be rebutted when, prior to statehood (1) the Executive clearly reserved submerged lands for another purpose, and (2) in the statehood act, Congress "recognizes the reservation in a way that demonstrates an intent to defeat state title." *Id.* at 273; see *Alaska* v. *United States (Glacier Bay)*, 545 U.S. 75, 100-111 (2005); *United States* v. *Alaska (Arctic Coast)*, 521 U.S. 1, 36-46, 50-61 (1997).

Petitioner does not dispute that the tidelands adjacent to her property were clearly reserved for the Lummi Nation in President Grant's 1873 Executive Order. She contends (Pet. 36-40), however, that Washington's statehood statute did not affirm that tideland reservation and therefore did not prevent title from passing to the State. The court of appeals correctly rejected that argument. Pet. App. 17-18.

In 1889, Congress admitted Washington to statehood on condition that the

> people inhabiting said proposed State[] do agree and declare that they forever disclaim all right and title to * * * all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.

Act of Feb. 22, 1889, ch. 180, 25 Stat. 677. Although petitioner characterizes that language as a "boilerplate disclaimer" insufficient to defeat state title (Pet. 37-40), this Court affirmed federal title to submerged lands within the Arctic National Wildlife Refuge and the Glacier Bay National Monument on facts materially indistinguishable from those in this case. *Alaska (Glacier Bay)*, 545 U.S. at 100-111; *Alaska (Arctic Coast)*, 521 U.S. at 50-61.

In both those cases, the Court relied on Section 6(e) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 340, which reserved from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska (Glacier Bay)*, 545 U.S. at 104-105 (citation omitted); *Alaska (Arctic Coast)*, 521 U.S. at 55. Like the proviso in the present case, which encompasses "lands * * * owned or held by any Indian or Indian tribes," Pet. App. 13, Section 6(e) did not mention the subject reservations by name or specifically refer to submerged lands on the reservations. See *Alaska (Glacier Bay)*, 545 U.S. at 104-105 (discussing Section 6(e)). Nevertheless, this Court held that the general proviso was sufficient to defeat state title to submerged lands because the reservations in question were plainly within the scope of the proviso and because the

executive orders creating the reservations clearly included submerged lands. *Id.* at 100-101, 104-106; *Alaska (Arctic Coast)*, 521 U.S. at 55-57. The court of appeals correctly followed those precedents. Pet. App. 17-18.

The court of appeals' ruling is also consistent with this Court's decision in *Idaho*, *supra*. Like the present case, *Idaho* involved a pre-statehood Executive Order that reserved submerged lands for a tribe (the Coeur d'Alene Tribe), and a statehood act in which the State "forever disclaim[ed] all right and title to * * * lands * * * owned or held by any Indians or Indian tribes." 533 U.S. at 270, 274 (brackets in original) (citation omitted). The Court found the reservation of submerged lands effective because "Congress [had] recognize[d] the reservation in a way that demonstrates an intent to defeat state title." *Id.* at 273. The court stated that the dispositive factors were whether "Congress was on notice that the Executive reservation included submerged lands * * * and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Id.* at 273-274. Here, Congress was "aware that the President's executive order added the tidelands to the reservation," Pet. App. 17, and the purpose of the reservation would have been compromised by ceding the tidelands to the State because "the Lummi and other Pacific Northwest tribes have depended heavily on fishing and digging for shellfish as a means of subsistence," *id.* at 18.

2. Petitioner also contends that she could not properly be held liable for trespass even if the United States holds title to the tidelands. See Pet. 12-19. The court of appeals' trespass holding correctly applies settled law to the facts of this case and does not conflict with any decision of this Court or any other court of appeals.

a. As petitioner acknowledges (Pet. 18), it is a long-settled rule of the common law that a boundary marked by a body of water is "ambulatory; that is, it changes when the water body shifts course or changes in volume." Pet. App. 20. Although the upland owner "gains when land is gradually added through accretion," she "loses title in favor of the tideland owner—often the state—when land is lost to the sea by erosion or submergence." *Ibid.*; accord *Oklahoma* v. *Texas*, 268 U.S. 252, 256 (1925) ("These changes all resulted from the natural and gradual processes of accretion and erosion[.] * * * Where, as here, a boundary bank is changed by these processes the boundary, whether private or public, follows the change."); *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 69 (1874) ("The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.").

The court of appeals' decision was a straightforward application of this longstanding rule. The court affirmed the district court's injunction requiring petitioner to "remove all rock, riprap, and other shore defense structures that are located seaward" of the MHWL. Pet. App. 62; see *id.* at 28 ("It is undisputed that as of the 2002 survey, some of the Homeowners' shore defense structures sat seaward of the MHW[L]."). Because the line between petitioner's property and the tidelands is the MHWL, structures seaward of that line are not on petitioner's property, and their maintenance effects a trespass. See *id.* at 29.

Petitioner argues that the court of appeals' decision "ignores that the placement of a structure on one's own land becomes part of the land and the MHW[L] * * * stops at the face of that structure." Pet. 16. Petitioner

cites no authority suggesting that an upland property owner may unilaterally and permanently fix the ambulatory boundary between her property and that of the tideland owner.[1] Her argument also ignores the "largely undisputed evidence" that her structures cause environmental damage to the tidelands. Pet. App. 61. Petitioner's approach would also disrupt the symmetry in the longstanding common law rule, since that rule does not permit "[t]he Lummi * * * [to] erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the Homeowners." *Id.* at 27.

In any event, even if petitioner were entitled to prevent the movement of the MHWL by placing structures on her upland property, the disposition of this case would not be affected. The district court's injunction requires petitioner to remove all structures "seaward of [the] MHW[L] as that line is determined on the government's January 2002 survey." Pet. App. 62. The 2002 survey establishes the MHWL in relation to the existing shoreline as improved, Appellants' E.R. Doc. 231, at 1-14, which is petitioner's preferred way of establishing the line. Petitioner has thus been enjoined not for attempting to prevent the MHWL from moving, or for maintaining structures seaward of the MHWL that would have existed in the structures' absence, but only for maintaining structures seaward of the MHWL on the shore as it presently exists.

---

[1] Petitioner's reliance (17 n.11) on *Save Oregon's Cape Kiwanda Organization* v. *Tillamook County*, 34 P.3d 745 (Or. App. 2001), is misplaced. That case involved review of an administrative board's zoning decision; it had nothing to do with the property line between upland and tideland owners.

Petitioner further contends (Pet. 15-16) that the court of appeals improperly disregarded the "common enemy doctrine," which "applies as a defense to nuisance or trespass actions where a property owner has caused surface waters—the 'common enemy' of all landowners—to invade a neighbor's property." Pet. App. 24-25. As the court of appeals correctly explained, that doctrine has no application to a situation like that presented here. See *id.* at 25-26. The claim in this case is not that petitioner's shore defense structures have indirectly caused water to encroach on a neighbor's land. Instead, the claim is that the structures *themselves* are the encroachment, since they stand on the tidelands owned by the United States in trust for the Lummi Nation.

Petitioner cites no decision applying the "common enemy doctrine" in this situation. In any event, although "federal law ultimately controls the issue" in a case like this one, "state law should be borrowed as the federal rule of decision" unless there is a "need for a nationally uniform body of law" or "application of state law would frustrate federal policy or functions." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 671-673 (1979); see *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 283 (1982). Petitioner identifies no basis for concluding that a uniform national rule is needed in this context, and she acknowledges (Pet. 16 n.9) that under Washington law "the common enemy doctrine does not apply to seawater." *Grundy* v. *Thurston County*, 117 P.3d 1089, 1094 (Wash. 2005).[2]

---

[2] The court of appeals found it unnecessary to decide whether Washington law provided the rule of decision on this issue because it found the common enemy doctrine inapplicable in any event. Pet. App. 10 n.6. At the same time, the court expressed skepticism that a uniform federal rule would govern, "not[ing] that it would be anomalous for the *Grundy*

b. Petitioner argues that the court of appeals' trespass holding "will have dramatic impacts along the coastline" and that it puts "large areas of reclaimed land" in New Orleans and other cities "at risk of being claimed by the tideland owner." Pet. 13, 14; see Pacific Legal Found. et al. Amicus Br. 9-10. Those concerns are unfounded. As explained above, the court of appeals' decision broke no new ground, but rather applied a rule governing ambulatory property lines that "date[s] back to Roman times." Pet. App. 21. Moreover, this case does not present a situation analogous to one involving "reclaimed" dry land in cities such as New Orleans. Pet. 14. As noted, the court's injunction only requires petitioner to remove her structures that are below the point where the actual MHWL currently lies on the improved shoreline. Pet. App. 62.

The practical significance of the court of appeals' holding is further diminished by the fact that the relationship between upland and tideland owners is typically governed by state rather than federal law. See Pet. App. 27 n.11. The trespass claim in this case arose under federal law because the United States owns the tidelands for the beneficial use of an Indian tribe, which uses the land for fishing and digging for shellfish. *Id.* at 18. This is not the ordinary circumstance of coastal ownership. And as the court of appeals further recognized, where a tideland owner has long acquiesced in the existence of erosion control structures (or entire cities, see Pet. 14) seaward of the MHWL, doctrines such as estoppel and adverse possession may provide a complete defense to any tres-

---

decision to apply to other coastal property owners in Washington, yet not to this small group of homeowners." *Ibid.*

pass action. Pet. App. 34 n.13; see Lummi Br. in Opp. 15.[3]

3. Petitioner also challenges the court of appeals' affirmance of the district court's finding of liability under the 1899 RHA. Pet. 19-28. That issue does not warrant this Court's review.

a. For two independent reasons, this case is an unsuitable vehicle for addressing the scope of the 1899 RHA.

First, unless this Court reviews and reverses the holding of the courts below that petitioner was liable for common-law trespass, the Court's interpretation of the 1899 RHA would have no meaningful practical impact on the disposition of this case. The district court's finding that some of petitioner's shore defense structures constituted a trespass, and its determination that those structures violated the 1899 RHA, were both premised on the fact that the structures were seaward of the MHWL. See Pet. App. 52-53 (trespass); *id.* at 58 (1899 RHA). Likewise, the core remedy for the two claims was the same—removal of the structures. *Id.* at 59 ("Plaintiffs seek an injunction against Defendants to remove any part of the shore defense structures that lie below MHW[L], having waived damages. Such an injunction is available for both

[3] Amici Pacific Legal Found. et al. attempt to introduce a distinct issue into the case by arguing (Br. 8-9) that the court of appeals' ruling will unsettle prior understandings as to the scope of tribal fishing rights. That is incorrect. Under the Treaty of Point Elliot, various Tribes reserved a right to off-reservation fishing at "usual and accustomed" fishing grounds, a right held in common with all citizens. See *United States* v. *Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) (describing treaty). These rights are distinct from the Tribes' exclusive rights to fishing within the area of their reservations. *Id.* at 332 n.12. The court of appeals' decision has no bearing on the scope of off-reservation fishing rights.

the trespass and the [1899] RHA violation."). Although the district court as a formal matter issued the injunction under the 1899 RHA, it noted that a separate injunction for trespass was unnecessary because "the trespass claim is coextensive with the [1899] RHA claim." *Id.* at 61. Indeed, the district court declined to limit the injunction to an order that petitioner obtain an 1899 RHA permit for the structures because "such an injunction would not remedy the trespass." *Id.* at 59.

Second, a grant of certiorari to review the applicability of Section 403 of the 1899 RHA to structures that are maintained in the navigable waters of the United States (but originally built outside those waters) would be unwarranted because of the possible relevance of another statutory provision to that question. In 2005, four years after the United States filed its complaint in this case, the codifiers of the United States Code restored a provision, titled "Creation or continuance of obstruction of navigable waters," that provides:

> The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The *continuance* of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. * * * [I]n the discretion of the court, the creating or *continuing* of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any district court exercising jurisdiction in any district in which such obstruction may be threat-

> ened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

33 U.S.C. 403a (emphases added).

The codifiers explained that the "[t]ext of [this] section," which is from the Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454 (1890 RHA), "was previously omitted from the Code." 33 U.S.C. 403a (Supp. III 2003) (codification note).[4] The codifiers restored it, however, "in view of conflicting court decisions as to whether or not [the] section had been repealed or superseded." *Ibid.*[5]

Now that Section 403a appears in the United States Code, it is "prima facie the law[] of the United States." 1 U.S.C. 204(a). Given the potential relevance of this provision to the question whether the "continuance" of a structure (that is not like a "bridge[], pier[], dock[], [or] whar[f]") in the navigable waters of the United States violates federal law, 33 U.S.C. 403a, the Court should not consider that question in a case where the provision's applicability and continued legal effectiveness have not been litigated.

---

[4] The cited supplement to the United States Code was published in 2005.

[5] The conflicting decisions referenced by the codifiers are *United States* v. *Wishkah Boom Co.*, 136 F. 42 (9th Cir. 1905), and *United States* v. *Wilson*, 235 F.2d 251 (2d Cir. 1956). In *Wishkah Boom Co.*, the United States alleged that the defendant had maintained a boom that obstructed the Wishkah River. 136 F. at 43. The court of appeals held that, separate and apart from any provision of the 1899 RHA, Section 10 of the 1890 RHA (now codified at 33 U.S.C. 403a) plainly covered "the maintenance of * * * obstructions." *Wishkah Boom Co.*, 136 F. at 45. By contrast, the Second Circuit held in *Wilson* that "[Section] 10 of the Rivers and Harbors Act of 1890 was repealed by the Act of 1899." 235 F.2d at 252.

b. In any event, the court of appeals correctly applied the 1899 RHA to the facts of this case, and its holding does not conflict with the decision of any other court.

It is undisputed that petitioner currently maintains shore defense structures in waters covered by the 1899 RHA, and that she has not received a permit to do so from the Corps. Petitioner contends, however, that her conduct does not violate the 1899 RHA because the structures in question were "built entirely outside of navigable waters" at the time they were erected. Pet. 21.[6] That argument lacks merit.

Since 1974, a Corps regulation has required a Section 403 permit for *any* "structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. 322.3; see 33 C.F.R. 209.120(e)(1) (1974) ("Department of the Army authorizations are required under the River and Harbor Act of 1899 * * * for all structures or work in navigable waters of the United States."). As the court of appeals explained, "[t]he Corps' regulations confirm that structures may be obstructions without regard to how the structures came to be in navigable waters." Pet. App. 32 n.12. That administrative construction is entitled to substantial deference. See *United States* v. *Alaska*, 503 U.S. 569, 582 (1992) (deferring to Corps' 1899 RHA regulation adopting "a broad interpretation of agency power" under Section 403); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490 n.5 (1960) (noting that the

[6] Contrary to petitioners' assertion (Pet. 26), the court of appeals did not "acknowledge[]" that petitioner's structure "was built above the MHW[L]." Rather, the court stated only that "[t]he Homeowners' structures may have been legal as initially built." Pet. App. 32. The court's conclusion that Section 403 precludes continued maintenance of those structures to the extent they are now below the MHWL, see *id.* at 32-36, rendered irrelevant any potential factual dispute as to the circumstances under which those structures were built.

Corps' "long-standing administrative construction" of the 1899 RHA was "entitled to 'great weight'") (citation omitted).[7]

The Corps' view that a defendant cannot be permitted to maintain structures in the navigable waters of the United States is reasonable in light of the "broad" language of Section 403, *Alaska*, 503 U.S. at 576, and its purpose of "prevent[ing] obstructions in the Nation's waterways," *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967).[8] Petitioner's contrary interpretation of Section 403 would preclude the Corps from exercising regulatory authority over structures within navigable waters—without regard to their impact on navigation or other relevant factors—in any case where the Corps is unable to establish that the structures were within navigable waters when built. Because it is often

---

[7] It is settled that the 1899 RHA is "read * * * charitably in light of the purpose to be served," *Republic Steel Corp.*, 362 U.S. at 491, even though it can be enforced through both criminal sanctions and, as here, suits for injunctions, 33 U.S.C. 406. Moreover, deference to a long-standing administrative regulation is appropriate even when it construes a statute that is enforced both civilly and criminally. *Babbitt* v. *Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 704 n.18 (1995). The possible interaction between the rule of lenity and principles of administrative deference is one of the issues before the Court in *Barber* v. *Thomas*, No. 09-5201 (argued Mar. 30, 2010). It is not necessary to hold this petition for *Barber*, since this Court has already held that the Corps' regulations interpreting the 1899 RHA are entitled to deference. See *Alaska*, 503 U.S. at 582; *Republic Steel Corp.*, 362 U.S. at 490 n.5.

[8] This Court has observed that the 1899 RHA was intended "to contain 'no essential changes in the existing law'" laid down in the 1890 RHA, and it has therefore construed the later statute against the backdrop of the earlier one. *Republic Steel Corp.*, 362 U.S. at 486 (citation omitted). Whether or not 33 U.S.C. 403a remains in effect (see pp. 19-20, *supra*), the Corps' construction of the 1899 RHA harmonizes it with the 1890 RHA.

difficult (and sometimes impossible) to establish the pre-existing MHWL after a shoreline project is completed, petitioners' interpretation would encourage coastal owners to complete projects in tidal zones without conducting surveys or seeking advance authorization from the Corps.

Nothing in the text of Section 403 compels that anomalous result. The first clause of Section 403 categorically prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." 33 U.S.C. 403. Whether or not the structures at issue here were below the MHWL when they were built, they are currently located in the "waters of the United States" and their presence there "creat[es]" an "obstruction." *Ibid.*

Petitioner contends that her structures do not fall within the first clause of Section 403 because there was no showing that they "actually impacted navigation." Pet. 23. The prohibition imposed by Section 403's first clause, however, does not depend on proof of such an impact. "[T]he concept of 'obstruction'" as used in the first clause of Section 403 has "a broad sweep." *Republic Steel Corp.*, 362 U.S. at 487 (quoting 33 U.S.C. 403). "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity." *Ibid.* (quoting *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899)). The structures listed in the second clause of Section 403 are "*presumed* to constitute obstructions" for purposes of the first clause. *Sierra Club* v. *Andrus*, 610 F.2d 581, 596 (9th Cir. 1979), rev'd on other grounds *sub nom. California* v. *Sierra Club*, 451 U.S. 287 (1981); accord *Norfolk & W. Co.* v. *United States*, 641 F.2d 1201, 1210 (6th Cir. 1980). Petitioner does not dispute that her rip rap and bulkhead are such

"structures"; she contends only that she did not build them in the navigable waters of the United States. Even if that is sufficient to take them outside the scope of the second clause of Section 403, it does not alter the fundamental nature of the structures or the presumption that they are obstructions to the navigable capacity of the waters of the United States.[9]

b. Petitioner argues (Pet. 21-22) that the court of appeals' finding of liability under Section 403 conflicts with 33 U.S.C. 407. That provision of the 1899 RHA, commonly known as the "Refuse Act," makes it unlawful (1) "to throw, discharge, or deposit * * * any refuse matter of any kind or description * * * into any navigable water" or (2) "to deposit * * * material of any kind * * * on the bank of any navigable water * * * where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods * * * whereby navigation shall or may be impeded or obstructed." *Ibid.* Petitioner argues (Pet. 22)

---

[9] Petitioner further contends that the first clause of Section 403 should be construed narrowly because obstructions covered by that clause "cannot be authorized by the Corps, but only by Congress." Pet. 23. This Court has recognized, however, that the Corps may grant a permit for conduct that would otherwise violate any of Section 403's clauses. In *Republic Steel Corp.*, the Court held that the activity at issue (depositing industrial solids at the bottom of a river) fell within the first clause of Section 403 but not the second or third. See 362 U.S. at 486-489. The Court concluded that the United States was entitled to an injunction, not because Congress had failed to enact site-specific legislation allowing the activity to proceed, but because the defendant had not "first obtain[ed] a permit from the Chief of Engineers of the Army." *Id.* at 483; see *Sanitary Dist.* v. *United States*, 266 U.S. 405, 423, 429 (1925) (Holmes, J.) (Withdrawal of water from Lake Michigan "will * * * create an obstruction to the navigable capacity" of the lake and is thus "prohibited by Congress, except so far as it may be authorized by the Secretary of War.").

that Congress intended the second of those prohibitions to be the exclusive mechanism to control the "placement of material on banks." Petitioner further argues (*ibid.*) that, because that prohibition is limited to conduct that "affect[s] navigation," the Ninth Circuit's ruling in this case—which found petitioner liable under Section 403 without proof of an impact on navigation— "circumvents" Section 407's limitations.

Contrary to petitioners' contention, the plain terms of Sections 407 and 403 make clear that they address two separate issues. Section 407 addresses deposits that are "liable to be washed into" navigable water, 33 U.S.C. 407, while Section 403 covers "structures" such as seawalls or bulkheads, 33 U.S.C. 403. This Court's observation that the second clause of Section 407 is "limited to deposits that shall or may impede or obstruct navigation," *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670 n.23 (1973), is not relevant to Section 403.

c. The court of appeals concluded that, so long as petitioner had "intentionally erected structures that became obstructions," the government was not required to prove that petitioner "intended to violate the [1899] RHA." Pet. App. 36. Contrary to petitioner's contention (Pet. 28-29), that holding does not conflict with the Third Circuit's decision in *United States* v. *Ohio Barge Lines, Inc.*, 607 F.2d 624 (1979). In *Ohio Barge Lines*, the court concluded that Section 403 did not impose "strict liability" by covering conduct, such as the completely "innocent sinking of vessels," over which a defendant had no control. *Id.* at 627-628. That rule would not assist petitioner because she "intentionally erected structures that became obstructions," Pet. App. 36, and "it was reasonably foreseeable that erosion would one day impact the shore defense structures so that they would be located

seaward of MHW[L] and be considered obstructions to navigation," *id.* at 57 n.7.[10]

4. Petitioner contends that the court of appeals erred in two respects in affirming the district court's injunction. She argues that the 1899 RHA did not authorize an injunction because the structures were not in the navigable waters of the United States when "erect[ed]" (Pet. 30), and that the court of appeals improperly failed to balance "competing interests" before issuing the injunction (Pet. 31). This petition is a poor vehicle for addressing those challenges, which lack merit in any event.

a. As noted above, the injunction in this case would be justified by the finding of liability for trespass. See pp. 18-19, *supra*. Because petitioner does not contend that an injunction to halt the trespass was unavailable, any finding of error under the 1899 RHA's injunction provision would not ultimately relieve petitioner of her obligation to remove the encroaching structures.

b. Petitioner contends that the court had no injunctive authority over the shore defense structures because they were not "erected in violation" of the 1899 RHA. 33 U.S.C. 406; see Pet. 30-31. This Court rejected a similar

---

[10] Amici Bay Planning Coal. et al. contend (at 14) that petitioner's liability under the 1899 RHA means that construction without a permit on "reclaimed land," such as that in downtown San Francisco, also violates the statute. That is incorrect. As the court of appeals explained, "whether navigable waters reach the MHW[L] in its unobstructed state or in its obstructed state is irrelevant here, because [petitioner is] liable either way." Pet. App. 33 (noting that "at least some rip rap from the shore defense structures sits below the MHW line, and that rip rap has not so obstructed the movement of the tide that it is prevented from flowing landward of this scattered rip rap"). In addition, the court of appeals noted that at some point "the government may be estopped from asserting its jurisdiction [under the 1899 RHA] because land has long ago been filled in." *Id.* at 34 n.13.

argument 50 years ago in *United States* v. *Republic Steel Corp.*, *supra*. In that case, the court of appeals had held that even if a violation of 33 U.S.C. 403 had been established, "no relief by injunction is permitted" because 33 U.S.C. 406, "in specifically providing for relief by injunction[,] refers only to the removal of 'structures' erected in violation of the Act." *Republic Steel Corp.*, 362 U.S. at 491 (citing *United States* v. *Bigan*, 274 F.2d 729 (3d Cir. 1960)).[11]

This Court reversed, holding that the courts retained general equitable power—beyond the specific injunction authority of 33 U.S.C. 406—to enjoin violations of the 1899 RHA. *Republic Steel Corp.*, 362 U.S. at 492. "Congress has legislated and made its purpose clear; it has provided enough federal law in [Section 403] from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *Ibid.* Accordingly, if the shore defense structures violated 33 U.S.C. 403, the district court had injunctive authority over them.[12]

---

[11] Petitioner relies (Pet. 30-31) on the *Bigan* court's narrow understanding of the courts' injunctive authority to remedy 1899 RHA violations. As explained in the text, however, this Court in *Republic Steel Corporation* rejected that approach.

[12] In the typical case, a party with an unpermitted structure in the navigable waters of the United States will be required to apply for an after-the-fact permit, see, *e.g.*, 33 C.F.R. 326.3, and then remove the structure only if the permit is denied. As the district court concluded, however, such a remedy would have been inadequate under the unusual circumstances of this case because it "would not remedy the trespass." Pet. App. 59. The district court's statement in dicta that "after-the-fact permits" are generally unavailable, *id.* at 60, was incorrect. See 33 CFR 326.3(e).

c. Petitioner also contends (Pet. 31-32) that the lower courts erred in ordering removal of her shore defense structures without "balancing" her interest in maintaining them against the government's interests in their removal. There is no conflict in the courts of appeals on the standard for determining when an injunction is appropriate to remedy a violation of the 1899 RHA. As petitioner acknowledges (Pet. 31), the only other court of appeals to address the question follows the same approach as the Ninth Circuit in this case. See *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) (dictum), cert. denied, 420 U.S. 927 (1975).

Nor does the court of appeals' analysis of this question conflict with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). There the Court concluded that the Clean Water Act did not divest the courts of their background equitable authority to weigh competing interests before issuing injunctions. See *id.* at 311-319. The Court recognized, however, that certain statutory schemes may effectively "foreclose[] the exercise of the usual discretion possessed by a court of equity," *id.* at 313, and that circumstances may arise in which "only an injunction could vindicate the objectives of the" relevant law, *id.* at 314 (citing *TVA* v. *Hill*, 437 U.S. 153, 173 (1978)).

The 1899 RHA is "an assertion of the sovereign power of the United States" and "was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transp. Co.*, 389 U.S. at 201. Absent a permit issued by the Corps, Section 403 establishes blanket prohibitions on the erection and maintenance of structures in the navigable waters of the United States. To allow parties like petitioner to avoid compliance by attempting to establish that their "interest" in certain unpermitted

structures outweighed the government's interest in keeping the navigable waters clear would defeat the statutory design. In any event, petitioner offers no reason to suppose that the courts below would have declined to order injunctive relief if they had conducted an express balancing of interests. Petitioner's suggestion that equitable factors weighed against an injunction is particularly unpersuasive given (a) the fact that petitioner seeks to maintain structures on tidelands owned by the United States in trust for the Lummi Nation, and (b) the district court's observation that "it is largely undisputed that the shore defense structures have negative environmental consequences." Pet. App. 61.[13]

---

[13] Questions related to the proper standard for issuing an injunction to remedy a violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, are before the Court in *Monsanto Co.* v. *Geertson Seed Farms*, No. 09-475 (oral argument scheduled for Apr. 27, 2010). In that case, the United States contends that "the court of appeals erred in affirming a permanent nationwide injunction based on a legal standard that presumed irreparable harm." Gov't Br. at i, *Monsanto*, *supra*, No. 09-475. It is not necessary to hold this case for *Monsanto*, given that the injunction in this case is independently supportable by the finding of liability for trespass. Moreover, an injunction sought by the United States to remedy a violation of a substantive statute like the 1899 RHA presents issues distinct from the injunction at issue in *Monsanto*, which was premised on a finding that the government had failed to follow NEPA's procedural requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
JOHN L. SMELTZER
Attorney

APRIL 2010