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United States Department of the Interior

OFFICE OF THE SOLICITOR
Southeast Regional Office
Richard B. Russell Federal Building
75 Spring Street, S.W., Suite 304
Atlanta, Georgia 30303



August 27, 2009

MEMORANDUM

TO: David Vela, Regional Director, Southeast Region,
National Park Service

FROM: Horace G. Clark, Regional Solicitor, Southeast Region *Horace G. Clark*

SUBJECT: Jurisdiction over the Foreshore within Cape Hatteras National Seashore

You have requested from this office an opinion concerning the United States' ownership of lands between the mean high water line and the mean low water line on the Atlantic side of Cape Hatteras National Seashore (hereafter referred to as the National Seashore) and the jurisdiction of the National Park Service over those lands. For the purposes of this memorandum, the area of land between mean high and mean low water will be referred to as the foreshore. *Carolina Beach Fishing Pier, Inc. v. The Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513, 516 (1970). In order to place in proper context the title and jurisdictional issues arising from ownership of the foreshore, it is first necessary to trace briefly the history surrounding the creation and acquisition of the National Seashore.

Creation and Acquisition of Cape Hatteras National Seashore

After significant advanced planning and negotiation by the National Park Service and the State of North Carolina, Congress passed the Act of August 17, 1937, 16 U.S.C. § 459 *et seq.*, which conditionally established the National Seashore, subject to the acquisition of lands.¹ This legislation provided for the acquisition of lands, waters, and submerged lands by public and private donation, purchase with donated funds, or by condemnation, all within an area to be determined by the Secretary of the Interior. *Id.* §§ 459, 459a.

¹ The history of the creation and acquisition of the National Seashore is fully detailed in *The Creation and Establishment of Cape Hatteras National Seashore* a 2007 publication by the Cultural Resources Division, Southeast Regional Office, National Park Service.

The federal Act soon was followed by an Act of the General Assembly of the State of North Carolina. 1939 N.C. Sess. Laws ch. 257. The State act accomplished a number of purposes. It established the Cape Hatteras Seashore Commission, provided for the acquisition of private lands to be conveyed by the State to the United States for inclusion in the National Seashore, and most importantly for the purposes of your inquiry, authorized the Governor of the State to convey to the United States "all ungranted lands of the State of North Carolina within the boundaries of the Cape Hatteras National Seashore as the same may hereafter be determined in accordance with the Act of Congress. . . ." *Id.* § 6. The State act specified that the conveyances of land to the United States would be "an absolute title in fee simple." *Id.* § 8.

The initial proposed boundaries of Cape Hatteras National Seashore were depicted on a map designated as Drawing No. NRA-CH-7017-B, approved by Secretary of the Interior Oscar L. Chapman, effective October 27, 1952. The first acquisitions of property for the National Seashore began with a series of deeds from the State of North Carolina dated December 22, 1952, conveying in excess of 6,500 acres acquired by the State from private parties. These lands, together with the lands of Pea Island National Wildlife Refuge and the Cape Hatteras Lighthouse Reservation formed the basis of the National Seashore officially established by order of the Secretary of the Interior on January 12, 1953, 18 F.R. 366 (January 15, 1953).

Acquisition of lands on Hatteras Island in the vicinity of the communities of Rodanthe, Waves, Salvo, and Avon (hereafter referred to as the Hatteras Island communities²) proved to be quite controversial. Originally, the Park Service proposed to acquire lands 1,000 feet westward of the mean high water line of the Atlantic Ocean. However, in response to the earnest concerns from these communities, the Park Service pulled this boundary eastward to a north/south line 500 feet westward of the mean high water line of the Atlantic. *The Creation and Establishment of Cape Hatteras National Seashore*, at pp. 89 n. 364, 93, 110, 117. Fronting the Hatteras Island communities on the Atlantic side, the United States acquired a strip of private lands from the mean high water line to the 500 foot line by various condemnation proceedings.

By instrument dated August 7, 1958, the State of North Carolina conveyed to the United States all of its right, title, and interest in lands within the described boundaries of the National Seashore on Hatteras, Bodie, and Ocracoke Islands. This conveyance included State-owned foreshore and submerged lands within the National Seashore's perimeter boundary. Thus, on the Atlantic side of the Hatteras Island communities the National Seashore included lands, waters, and submerged lands from the mean low water line on the east to a stationary line 500 feet westward of the mean high water line of the Atlantic Ocean.

In the half century after execution of the 1958 deed, the churning of the Atlantic Ocean and its

²Other communities on Hatteras Island include Buxton, Frisco, and Hatteras. The boundary of the National Seashore seaward of these communities was not set at a 500 foot line landward of mean high water. While erosion is a problem near these communities, for the purposes of this memorandum they are not included in the term "Hatteras Island communities".

"sledge-hammering seas . . . the inscrutable tides of God"³ has resulted in significant erosion to portions of Hatteras Island. This erosion in some places has caused the shoreline to move westward of the stationary 500 foot line which marked the western boundary of the National Seashore adjacent to the Hatteras Island communities. Consequently, the lands acquired by the United States between the mean high water line of the Atlantic and the 500 foot line have partially, and in some locations completely, eroded away. In addition, some private lots within the Hatteras Island communities have been completely eroded away and other lots have suffered, and will continue to suffer, substantial erosion.

Questions Presented

The facts of this matter require us to determine the property rights of the United States to lands that were acquired with a movable water boundary on the east (i.e., the line of mean low water on the Atlantic) and a stationary boundary on the west (i.e., the 500 foot line). The determinations we must make are these: 1) the legal effect of the eastern movable boundary migrating through and beyond the stationary western boundary; 2) whether the United States has a property interest in the lands west of the stationary boundary; 3) if so, the location of the new western boundary of the National Seashore in those places where the stationary 500 foot boundary has been obliterated by erosion; and 4) whether the North Carolina public trust doctrine is applicable to any of these lands.

The Law of Tidal Lands

One of the consequences of the Revolutionary War, and the break between the colonies and Great Britain, was the succession of the colonies to the rights of the English sovereign, including ownership of tidal lands and waters. *State of North Carolina v. Rohrer*, 322 N.C. 522, 369 S.E.2d 825, 827 (1988). The original thirteen states did not surrender these ownership rights to the federal government when they ratified the United States Constitution. *Shively v. Bowlby*, 152 U.S. 1 (1894). Any doubts concerning North Carolina's ownership of its tidelands were laid to rest in the Submerged Lands Act, 43 U.S.C. § 1311, which relinquished any property interest of the United States to lands beneath navigable waters within the states' boundaries, including its submerged lands, three geographical miles seaward from the coast of each state. *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881, 885 (1968).

Among the coastal states there is a difference of opinion over the location of the dividing line between the state's sovereign tidal lands and lands subject to private ownership. Some states draw that line at the line of high tide, others at the line of low tide. The North Carolina supreme court described this difference of opinion and affirmed the pertinent rule in North Carolina in the case of *Carolina Beach Fishing Pier, Inc. v. The Town of Carolina Beach*, *supra*, 177 S.E.2d at 516, as follows:

³ *Carolina Beach Fishing Pier, Inc. v. The Town of Carolina Beach*, *supra*, 177 S.E.2d at 517 (quoting from Herman Melville, *Moby Dick*)

The strip of land between high- and low-tide lines is called the foreshore. The high-tide states hold that private property ends at the high-water mark, and that the foreshore is the property of the state. The low-tide states, on the other hand, fix the boundary at the low-water mark, and the foreshore is said to belong to the littoral landowner unless it has been otherwise alienated. Although the North Carolina position is somewhat obscured by the vagaries of ancient cases, North Carolina is a high-tide state. (Quotation marks and references omitted; emphasis added).

The *Carolina Beach Fishing Pier* case noted that the location of the high-tide line is not the extreme height that the water has reached, but is based upon the mean or average high tide. The court's citation to the case of *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), is not an outright endorsement of the 18.6 year lunar cycle used by the Supreme Court to determine the location of the mean high water line. However, there is a clear distinction between the mean high water line and the vegetation line where the presence of occasional salt water kills plant life. There is also a distinction between the mean high water line and the wrack or debris line that is evidence of the maximum height reached by ocean waters. The strip of land between the mean high water and the vegetation line is generally referred to as the "dry sand beach", as distinguished from the "wet sand beach", otherwise known as the foreshore. *Fabrikant v. Currituck County*, 174 N.C. App. 30, 621 S.E.2d 19, 22 (2005). Inasmuch as the mean high water line is derived from an averaging of years of high tides, it is not a line that is readily apparent. For administrative purposes of the State of North Carolina, an actual survey is not required to determine the mean high water line. It is sufficient to locate the line by approximation based upon natural indicators and observation. *Webb v. North Carolina Department of Environment, Health and Natural Resources*, 102 N.C. App. 767, 404 S.E.2d 29, 32 (1991).

A debate raged in North Carolina for many years concerning the authority of the State to convey its sovereign submerged lands seaward of the mean high water line. See Monica Kivel Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C.L. Rev. 565 (1986). In the 1995 case of *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1995), the North Carolina supreme court resolved two centuries of confusion on this point. It held that the State legislature does indeed possess the authority to convey its public lands beneath navigable waters, but if it intends do so, it must be done expressly by a special grant.

Thus, in the usual situation, the boundary between the State's foreshore property and upland private property is the mean high water line. A water boundary is not fixed. It moves in accordance with the forces of nature by means of accretion and erosion. The *Carolina Beach Fishing Pier* case restated the rule in North Carolina regarding the movement of the mean high water line boundary. When it is

gradually and imperceptibly changed or shifted by accretion, reliction or erosion,

the margin or bed of the stream or body [of water], as so changed remains the boundary line of the tract, which is extended or restricted accordingly. The owner of the riparian land thus loses title to such portions as are so worn or washed away or encroached upon by the water.

177 S.E.2d at 517.

When erosion causes a parcel of land to be completely lost to the sea by erosion, it is lost forever and cannot be recaptured by subsequent accretion. WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 16-8 (2008) ("While enjoying the possible benefits of the doctrines of accretion and reliction, a riparian or littoral owner may lose part or all of his property by erosion."). Rather, the mean high water line becomes the boundary of the next parcel landward of the parcel that was lost. Where a movable water line is the boundary between two properties, no matter how it shifts it always remains the boundary. *State of North Carolina v. Johnson*, 278 N.C. 126; 179 S.E.2d 371, 385-86 (1971).

Location of the Eastern Boundary of Cape Hatteras National Seashore

Applying these concepts to Cape Hatteras National Seashore, it is clear that the forces of erosion have caused the United States to lose title to significant amounts of land fronting the Hatteras Island communities on the Atlantic. In places the private lands acquired between mean high water and the 500 foot line have eroded away, and the 500 foot line which once was the western boundary of the National Seashore has been engulfed by the waters of the Atlantic Ocean. Moreover, erosion has taken in whole or in part a number of private lots that in 1958 were west of the 500 foot line. This Atlantic-side erosion has caused the foreshore lands acquired from the State in 1958 to move westward. Nevertheless, the line of mean low water continues to be the eastern boundary of the National Seashore even where it has migrated westward of the 500 foot line.

Ownership of Lands West of the 500 Foot Line

When the State conveyed to the United States all of its ungranted lands within the designated boundary of the National Seashore, it parted with its title to the foreshore pursuant to the authority of the General Assembly of the State. This was the type of express grant that the State supreme court spoke of in *Gwathmey v. State of North Carolina*, *supra*, as required for the outright conveyance of state submerged lands. Migration of the foreshore does not affect the United States' title to lands between the lines of mean low and mean high water. This process of erosion merely creates a new shifting boundary between the foreshore and the uplands. Thus, even where the foreshore has migrated westward of the 500 foot line, the lands between mean low and mean high water continue to be owned by the United States by virtue of the 1958 deed from the State of North Carolina.

Location of the Western Boundary of Cape Hatteras National Seashore

Where the stationary 500 foot boundary line westward of the 1958 line of mean high water remains, unlike the water boundary, it does not move but continues to be the western boundary of the National Seashore. However, where erosion has caused the mean low water line to move westward of the 500 foot line, that obliterated line is no longer the western boundary of the National Seashore. The new western boundary in those locations is fixed at the limit of the United States' ownership landward of mean low water. Therefore, where the 500 foot line has eroded away, the new western boundary line of Cape Hatteras National Seashore fronting the Hatteras Island communities is the line of mean high water.

We understand this conclusion is not without controversy. The movement of the foreshore westward has left a number of private dwellings stranded in the wet beach, which is owned by the United States. Those dwellings on stilts may eventually be taken by the Atlantic Ocean, but at the present are habitable. This memorandum will not address the legal status of these dwellings. However, inasmuch as they are located on lands owned by the United States and administered as part of the National Seashore, they are subject to the authority of the Park Service as expressed in laws and regulations applicable to the National Park System.

Landward of the United States owned foreshore is the dry sand beach, between the line of mean high water and the dune or vegetation line. Where the 500 foot line is still intact, this portion of the beach is owned by the United States and remains within the National Seashore to the extent that those lands are seaward of the 1958 500 foot line. If the 500 foot line has been entirely obliterated by erosion, the dry sand beach is not owned by the United States and is not within the boundaries of the National Seashore.

North Carolina Public Trust Doctrine

The westward movement of the Hatteras Island foreshore due to erosion, the consequent movement of the eastern boundary, and in some places the western boundary of the National Seashore has created questions in the minds of some concerning the application of North Carolina's public trust doctrine to the Atlantic beach, particularly in those areas adjacent to the Hatteras Island communities. The public trust doctrine is a recognition that the State holds tidelands and the beds of navigable waters in trust for all its citizens. Public rights in these areas traditionally included navigation and fishing. With respect to the foreshore, the public trust doctrine recognizes the rights of the public, subject to State regulation, to travel over the lands and engage in other recreational activities such as swimming. Comment, *Sunbather's Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. Rev. 159 (1985). The public trust doctrine also prevents the State from alienating such lands, except by express legislative grant. *Gwathmey v. State of North Carolina, supra*. In the absence of express legislative action, grants by the State land department are interpreted as conveying merely an easement, not a fee interest. *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39, 47 (1903); N.C. Gen. Stat. § 146-3.

When the State of North Carolina conveyed all its ungranted lands within the described boundaries of Cape Hatteras National Seashore in 1958 pursuant to express authority of the State General Assembly, it parted with title to lands which otherwise would have been subject to the public trust doctrine. Where the State has lawfully conveyed its tidelands or beds of navigable waters, the public trust doctrine no longer applies to such lands. *Gwathmey v. State of North Carolina*, *supra* at 682-684. The lands conveyed by the State to the United States within the boundaries of the National Seashore were conveyed in absolute fee simple by an express legislative grant. The State retained no property interest upon which the public trust doctrine could operate. It is immaterial that the foreshore owned by the United States is in places in a different location than it was when the 1958 deed was executed. The National Seashore's eastern boundary at the line of mean low water is a movable boundary. Hence, the United States continues to own the foreshore to the exclusion of the State's public trust doctrine. These lands are owned by the United States and are subject to the laws enacted by Congress under the Property Clause of the United States Constitution, Art. 4, § 3, cl. 2, including those governing the National Park System. State laws at odds with federal laws and regulations, are inapplicable to such lands. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

The General Assembly of the State has defined the area subject to the public trust doctrine as including both the wet and dry sand beach, up to the "the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." N.C. Gen. Stat. § 77-20(e). However, this definition has never been tested in the State courts, *Fabrikant v. Currituck County*, *supra*. Hence, application of the public trust doctrine to the dry sand beach above the line of mean high water has not been definitively answered. Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869 (2000). Where the dry sand beach is located landward of the 500 foot line, it is most likely in private ownership, and we will not express an opinion concerning the applicability of the State's public trust doctrine to those private lands.

Conclusion

In conclusion it is the opinion of this office that:

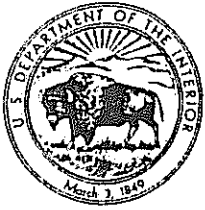
1. Erosion of the Atlantic beach, causing the line of mean low water to move westward, has resulted in a concomitant movement of the eastern boundary of Cape Hatteras National Seashore. Although this line has moved, it remains the eastern boundary. In those places where the line of mean low water has moved through the stationary 500 foot line fronting the Hatteras Island communities, the line of mean low water continues to be the eastern boundary of the National Seashore.
2. In a 1958 deed the State of North Carolina conveyed to the United States its foreshore lands on Hatteras and other islands, forming the National Seashore. Erosion has caused the location of the foreshore to shift westward since 1958. In some places erosion has obliterated the western boundary adjacent to the Hatteras Island communities, which was fixed as a north/south line a

distance of 500 feet from the line of mean high water. Where erosion has obliterated this line, the United States is still the owner of the land between the lines of mean low and mean high water, as those lands were conveyed to the United States in 1958. The movement westward of the foreshore past the 500 foot line does not divest the United States of its title to lands currently between the lines of mean low and mean high water.

3. Where the foreshore has migrated westward and has by the process of erosion eroded away the stationary 500 foot western boundary adjacent to the Hatteras Island communities, the new western boundary of the National Seashore is the extent of the United States' ownership, being the line of mean high water.

4. The public trust doctrine of the State of North Carolina, which keeps the foreshore open for purposes of navigation, fishing, and recreational pursuits, does not apply to the foreshore of the islands forming Cape Hatteras National Seashore because the State parted with its title to these lands, granting to the United States an absolute fee simple interest. The applicability of the public trust doctrine to private lands above the line of mean high water on what is known as the dry sand beach is a matter between the private land owner and the State of North Carolina. Accordingly, this office will make no comment upon that issue.

Further inquiries regarding this matter may be directed to Assistant Regional Solicitor John H. Harrington at (404) 331-4447 ext. 228.



United States Department of the Interior



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FEB 13 2013

IN REPLY REFER TO:

MPS
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LG-13

February 7, 2013

Outer Banks Group

TO: Gordon Wissinger, Acting Regional Director

FROM: Horace Clark, Regional Solicitor *Horace G. Clark*

SUBJECT: Applicability of 2009 Solicitor's Opinion on ownership of the foreshore at Cape Hatteras National Seashore to additional villages on Hatteras Island

On August 27, 2009, this office issued an opinion concerning the ownership of lands between the mean high water line (MHW) and mean low water line (MLW) on the Atlantic side of Cape Hatteras National Seashore (Seashore). The opinion applied to lands acquired in the vicinity of several named villages on Hatteras Island, and by its terms did not apply to lands near several other villages. You have asked us to determine whether the conclusions of the 2009 opinion apply to these other villages.

As described in the 2009 opinion, the United States acquired lands for the Seashore during the 1950s. Although the original plan was to acquire lands between the MHW of the Atlantic Ocean and a line 1,000 feet westward, based on community concern the boundary—and line of acquisition—was moved to 500 feet west of MHW in the villages of Rodanthe, Waves, Salvo, and Avon. The United States eventually acquired all private oceanfront lands in these villages. In 1958, the State of North Carolina conveyed to the United States all state-owned land within the described Seashore boundary, namely the foreshore and submerged lands down to MLW. Consequently, the United States owned all lands between an upland boundary 500 feet west of MHW and an ocean boundary of MLW.

Because of dynamic shoreline processes such as erosion, avulsion, and accretion, ocean boundaries are moving boundaries, in contrast to the boundaries on land, which are stationary, i.e., set in reference to a fixed location on the ground. Since 1958, the shoreline of the Seashore has moved significantly, due to erosion and other processes. As the shoreline has moved, so has the water boundary. In some places, the MLW line has moved past the stationary 500 foot line that marked the original upland boundary of the acquired properties. This prompted NPS to request a legal opinion on the following question: what, if any, lands would the United States still own after the moving ocean (MLW) boundary crosses the stationary upland boundary? In our 2009 opinion, we found that (1) the MLW continues to be the ocean boundary of the Seashore even where it has migrated past the 500-foot stationary upland boundary; (2) where the 500-foot stationary boundary has been obliterated by erosion, it is replaced as the upland boundary by the MHW; therefore (3) even following the obliteration of the stationary boundary,

the lands between MHW and MLW (i.e., the foreshore or “wet sand”), which were conveyed to the United States outright by the State, continue to be owned by the United States.

This opinion was limited to the shoreline in front of Rodanthe, Waves, Salvo, and Avon. In a footnote, we stated that the opinion did not apply to three other communities on Hatteras Island—Buxton, Frisco, and Hatteras—because the policy decision to set a 500-foot upland boundary did not include them, even though the United States also acquired lands in these villages at the same time. However, since the opinion was issued, the same concerns that prompted it have arisen with respect to these villages. Accordingly, you have asked us whether the 2009 opinion applies to these villages as well. We conclude that it does.

Although upland boundaries of the acquired properties in Buxton, Frisco, and Hatteras are not the same as for properties in the other villages, they are still stationary boundaries. The reference point for most of these properties is a Coast Guard telephone line (no longer in existence) that at the time ran parallel to and between 350 to 450 feet from the shoreline. For the Buxton properties, the upland boundary is described as 25’ west of the telephone line; for Frisco, 35’ north of the telephone line; and for Hatteras, 70’ south of the telephone line.^{1 2}

The 2009 opinion does not depend on whether the western boundary was 500 feet from MHW, but on the fact that it was a stationary boundary. The issue, then and now, is the legal effect on ownership when erosion causes the moving shoreline boundary to cross the fixed upland boundary, regardless of the specific location of the stationary boundary. Because the principle is the same, we reach the same conclusions for Buxton, Frisco and Hatteras villages as we did for the villages in the 2009 opinion: (1) the water boundary of Seashore properties will continue to be MLW, no matter how far that line migrates due to erosion; (2) as long as the water boundary remains shoreward of the stationary boundary, the stationary boundary will continue to be the upland boundary; and (3) if erosion causes the water boundary to cross the stationary boundary, then the MHW line will become the new upland boundary, and the United States will own the area between MHW and MLW; and (4) notwithstanding subsequent erosion, the boundaries will continue to be MHW water on the upland side and MLW on the ocean side.

A copy of the 2009 opinion is attached. If you have any questions, please contact Michael Stevens of this office at (404) 331-4447, x238.

cc: Barclay Trimble, Superintendent, Cape Hatteras National Seashore
Steve Thompson, Special Park Uses Coordinator, Cape Hatteras National Seashore

Attachment

¹ Hatteras Island, from its northernmost point at Oregon Inlet to Cape Hatteras, is oriented north-south, so that the Atlantic Ocean is to the east, and the Seashore’s upland boundary is to the west. This includes all of the villages covered in the 2009 opinion, and for Buxton in this opinion. However, at Cape Hatteras, the island bends to an east-west orientation, so that below Cape Hatteras the Atlantic Ocean bounds the island to the south, and the upland boundary is to the north. The telephone line follows this orientation, and so at Buxton runs from north to south but at Frisco and Hatteras east to west so that the fixed boundary is either north or south of the line.

²There are some exceptions. For Tract 322, near Buxton, the boundary is a marker 400’ from the ocean. Similarly, for Tracts 254 and 258, near Frisco, the upland boundary is 500’ from MHW. However, both of these are fixed points. Therefore, this rationale for this opinion applies to these properties as well.