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Water Boundaries, Tide and Shore Land Rights

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WATER BOUNDARIES, TIDE AND SHORE LAND RIGHTS

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WATERFRONT PROPERTY, though extremely popular in Washington, presents problems of ownership with which few residents are familiar. The effect of transitory water boundaries upon the divisible proprietary interests is especially complex since the present status of such boundaries is uncertain under our court's interpretation of the applicable statutes.

I. RIGHTS AND TITLES UNDER FEDERAL AND STATE THEORIES

A. *Theories Based upon Riparian Rights:* Tide and shore land legislation in the United States has proceeded upon two theories depending upon whether riparian rights are recognized in the upland owner.[1] Where such rights are recognized, public rights (except as to navigation) are subordinated to the upland interests. Where such rights do not exist, the title to all shore and tidelands vests in the state, to be disposed of in aid of business and commerce and without reference to the convenience of the upland owner. Washington has asserted the latter doctrine as to upland abutting navigable waters.[2]

B. *Nonnavigable Waters Distinguished.* The Washington theory of ownership of waterfront property first distinguishes between land abutting navigable and nonnavigable waters. The problem as to land abutting nonnavigable water is comparatively simple. To such land attach riparian rights, and complexities arise primarily from transitory boundaries or from conflicts of common law interests.

C. *Tide and Shore Lands and Navigability Defined.* This state has classified abutting navigable waters as (1) uplands, and (2) first or second-class tide or shore land. Paraphrasing the statutes,[3] land above the line of high tide or high water of navigable bodies of water is upland. Shore land borders navigable lakes or streams, not subject to tidal flow, between the line of ordinary high water and the line of navigability First-class shore land lies in front of or within two miles

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[1] Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267 (1909).

[2] *Ibid.*

[3] REM REV. STAT. §§ 7797-5 to 8 [P.P.C. §§ 940-117 to 123].

of an incorporated city; second class pertains to all other shore land. First-class tide lands are the beds and shores of tidal waters between the line of ordinary high tide and the inner harbor line in front of, or within one mile on either side of, the limits of an incorporated city[4] and between the lines of ordinary high and extreme low tide within two miles of the corporate limits. Second-class tidelands are all other lands over which the tide ebbs and flows.

Accordingly, before determining the interests in specific waterfront property, the navigability of the contiguous body of water must be ascertained. This is a question of fact,[5] depending upon such things as the size, depth, location, and connection with or proximity to other navigable waters. It is not navigable merely because it will float logs or other timber products or because there is sufficient depth of water to float a boat of commercial size.[6] A lake which is chiefly valuable for fishing or for pleasure boats of small size is ordinarily not navigable.[7] Where the state has assumed the navigability of a particular body of water and sold what would accordingly be shore land, there is no adverse possession established by the state; the upland or shore land owner can still contest the navigability and claim the riparian rights which would attach to land abutting nonnavigable water.[8]

"Navigable" or "navigability" as intended within the state constitutional provisions of Article 17, the authority for this branch of Washington property law, applies to such bodies of water which are capable of being used for the carriage of commerce.[9] A slough, used by boats and for towing logs at high tide, was found to be navigable though it contained only four to twenty-four inches of water at low tide.[10] All meandered rivers, meandered sloughs, and navigable waters in this state are declared by statute to be public highways.[11] But this is an exception to the general concept of navigability So also are

[4] State *ex rel* McKenzie v. Forrest, 11 Wash. 233, 39 Pac. 684 (1895).
[5] Oklahoma v. Texas, 258 U.S. 574 (1921).
[6] Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).
[7] A lake one mile long, a quarter-mile wide, and between ten to forty-five feet in depth which had no visible outlet but had been meandered was held nonnavigable, although used by small fishing and pleasure boats. Snively v. State, 167 Wash. 385, 9 P.(2d) 773 (1932). This case did not mention or specifically overrule an earlier case holding navigable a lake one and one-half miles long by three-quarters of a mile in width with an average depth of sixteen feet, similarly used. One forty-five foot steamboat carried visitors and pleasure parties but no freight other than small packages. Kalez v. Spokane Valley Land & Water Co., 42 Wash. 43, 84 Pac. 395 (1906).
[8] Snively v. State, 167 Wash. 385, 9 P.(2d) 773 (1932).
[9] Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. 821, 54 L.R.A. 178 (1900).
[10] Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 (1904).
[11] REM. REV. STAT. § 8407 [P.P.C. § 453-17].

streams which have not been meandered but which are suitable for floating logs and timber; if navigable for such purpose, they are public highways for that purpose, but they are not thereby brought within the above constitutional provision which includes only such streams as are highways for general trade and commerce.[12] However, prior rulings as to navigability should be pleaded in subsequent litigations over the same or adjacent waterfront property to insure that the same rights adhere to all the land bordering any particular body of water.[13]

Once a body of water is found navigable, the proprietary interests are divisible between the uplands, which extend to the high water or high tide line, and the first or second-class tide or shore lands which lie below The tide or shore lands extend, per statute, from the ordinary high water or high tide line to the line of navigability or the inner harbor line.

The harbors of the state are established and regulated in accordance with Article 15 of the state constitution. This provides that the legislature shall appoint a commission to establish a harbor line in the navigable waters in front of or within one mile of incorporated cities beyond which no rights to the water shall be given, leased, or sold. The commission shall further determine an area which is reserved for landings, wharves, streets, and other conveniences of navigation and commerce. Accordingly, the board of state land commissioners, composed of the commissioner of public lands, the secretary of state, and the state treasurer,[14] locates the restricted harbor area by establishing the outer and inner harbor lines, the inner line being between the outer harbor line and the line of ordinary high tide and not less than fifty nor more than six hundred feet from the outer line.[15] the one-mile limit for the harbor line was extended by the legislature to two miles on either side of incorporated cities,[16] and by judicial interpretation it was held that the commission was not so limited by Article 15 that it could not extend harbor lines in front of second-class shore lands.[17] The inner harbor line is theoretically the line of navigation,[18] and since by statu-

[12] Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840 (1901).

[13] Both the trial court and appellate court refused to take judicial notice of a prior holding on the navigability of a particular stream for logs only (by the same trial court in a prior litigation between the same parties) when the parties admitted the general navigability of that stream and removed that question from issue. Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909).

[14] Rem. Rev. Stat. §§ 7797-10, 11 [P.P.C. §§940-63, 65.].

[15] *Id.* §§ 7797-2, 3, 4 [P.P.C. §§ 940-111, 113, 115].

[16] Rem. and Bal. Code §§ 6744-6769, Rem. Rev. Stat. §§ 7961-7993.

[17] Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310 (1916).

[18] State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913).

tory definition both first and second-class shore lands extend from ordinary high water to the line of navigability, this boundary is determined by the commission when it establishes the harbor area. Thus owners of both classes of shore land take subject to the possibility of having their outer boundary established by the commission.[19] Where such harbor lines have not been established and the outer boundary to shore land is being litigated, the court sets the boundary by determining the line of navigability.[20] In instances where no harbor line is established and the court can not determine navigability of the water at the point in question, the court will not recognize the preferential right of purchase in the upland owner as extending past the mean low water.[21] This limits the preference since otherwise it would extend to the line of navigability.[22] The legislature in 1895 confirmed the line of navigability as the boundary for state grants and provided that shore lands of the second class shall not be sold by tracts or lots (as are first-class tide or shore lands[23]), but by measurement on the meander line, subject to the right of the state to thereafter fix harbor lines.[24]

D *State and Federal Rights as Affecting Proprietary Interests:* Once the proprietary interests have been determined and the boundaries established, the intersts may be traced back to either federal or state grants. The United States originally held the shores of navigable waters in trust until the territories became states, and retained control over the navigable waters only for the purposes of navigation. The state of Washington asserted ownership to all beds and shores of navigable waters, including tide and shore lands, by Article 17 of the state constitution. Section 2 of the same article disclaimed all title in tide, swamp, or overflowed lands patented by the United States. This disclaimer clause was applied to both tide and shore lands obtained through federal patent prior to the adoption of the state constitution, where such land lay above the meander line of the government survey.[25]

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[19] Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310 (1916).

[20] REM REV. STAT. § 9733.

[21] Muir v. Johnson, 49 Wash. 66, 94 Pac. 899 (1908). (Injunction against obstruction below low water line denied.)

[22] State *ex rel* McKenzie v. Forrest, 11 Wash. 227, 39 Pac. 684 (1895).

[23] REM. REV. STAT. § 7797-110 [P.P.C. § 940-423].

[24] This statute, originally REM. & BAL. CODE § 6761, was reenacted in 1897 as REM. REV. STAT. § 7979 and again in 1927 with REM. REV. STAT. § 7797-120 [P.P.C. § 940-593] pertaining to tideland and § 7797-121 [P.P.C. § 940-595] applicable to shore land. The enactments of 1927, while not verbatim, are substantially the same as the prior statutes, and as they do not specifically supersede the prior legislation, it would appear that both laws are yet in effect.

[25] Hewitt-Lea Lumber Co. v. King Co., 113 Wash. 431, 194 Pac. 377 (1920) (shore

The Supreme Court of Washington was quick to find that the state had absolute title to all beds of navigable waters and that an abutting owner held no riparian or littoral rights to the waters or shores.[26] The court also denied that a federal grant prior to statehood vested any riparian rights or disposed of any land *below* the high water mark of navigable water where the meander line lay *above* such water mark, as such land had been held in trust by the federal government for the future commonwealth. No common law rights to navigable water have existed since adoption of the constitution.[27]

This view was affirmed in *Shively v. Bowlby*[28] where the U.S. Supreme Court declared:

> Grants by congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of the uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States.

The United States Supreme Court also determined that the right of the United States in the navigable waters of the several states is limited to control thereof for purposes of navigation, and that under Article 17 of the Washington state constitution, title to tidelands passed to the state, upon its creation, in full proprietary ownership.[29] These two decisions were followed in Washington[30] when the court specifically denied that restriction of federal sovereignty to a control of navigation implied any limitation to the power of the state.

The disclaimer provision of Article 17, Section 2, excepts from the rule vesting all tide and shore land in the state land granted by federal patent prior to statehood and which, though lying beyond the high tide or high water line, was included within the patented boundaries of the government survey meander line. These meander lines were the lines whereby the survey mapped the area and plotted the bodies of water. They did not always accurately follow the outline of the body of water but in some cases cut over upland or across the water. Thus the bound-

land). Federal patent prior to statehood vested title to tideland lying above the meander line. Scurry v. Jones, 4 Wash. 468, 30 Pac. 726 (1892).

[26] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L.R.A. 632 (1891).

[27] Kalez v. Spokane Valley Land & Water Co., 42 Wash. 43, 83 Pac. 395 (1906).

[28] Shively v. Bowlby, 152 U.S. 1, 58 (1893).

[29] Port of Seattle v. Oregon and Washington R. Co., 255 U.S. 56 (1921).

[30] Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913), Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915).

aries of such prior federal patents are either (1) the line of ordinary high water or high tide or (2) the meander line, whichever extends farther from the upland. The interest of the state in such shore or tideland passed to the grantees of a federal patent as fully as it would by a special state grant.[31] The boundaries of land granted by federal patent are determined by the plat; its notes, lines and descriptions become a part of the grant or deed.[32] When by such means the meander line is found to be above the line of ordinary high water, the grant extends to the water line, for a water boundary to land under federal patent is the high water line *or* the meander line. The state can exert no claim to the land above the high water line where the meander line is above the water line, but such land passes under the patent although not specifically included in the meander line description. If the meander line lies beyond the high water line and into the water, the shore or tideland between the meander line and the high water line was included by the grant and waived by the state under the disclaimer clause.[33] Thus the meander line is an actual boundary to uplands only under a federal patent prior to statehood, and where such meander line lies below the high tide or high water line.

E. *Proprietary Interests in Waterfront Property*· Once the class of proprietary interest is determined, the rights that accrue thereto can be distinguished. Our court has consistently denied to upland owners any riparian rights to the navigable waters to which their land is contiguous, or to the abutting tide or shore lands.[34] As to the uplands, there is no right to the water for navigation or irrigation or to access across abutting shore or tidelands. In fact, the state can entirely divert the water away from the property without consideration of the upland owner. Nor do cities fare better in their rights to tideland against the superior right of the state. Actually then, in regard to uplands and any

[31] Scurry v. Jones, 4 Wash. 468, 30 Pac. 726 (1892).

[32] Cogswell v. Forrest, 14 Wash. 1, 43 Pac. 1098 (1896).

[33] Washougal Transportation Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 742 (1902).

[34] The upland owner was denied access to navigable water across abutting tidelands that had been conveyed to another by the state. Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909). The owner of upland bordering a navigable lake had no common law riparian right to the water of such lake for the purpose of irrigation. State *ex rel.* Ham, Yearsley & Ryrie v. Superior Ct., 70 Wash. 422, 126 Pac. 945 (1912). No riparian rights were gained from a federal patent. Brace v. Hergert Mill Co., 49 Wash. 326, 95 Pac. 278 (1908). Upland owners have no action against the state for diversion of a navigable stream entirely away from the property. Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913). A city acquired no rights by a plat over tidelands prior to admission of the statte into the union, but the title to tidelands vested in the state on its creation, and the state could dispose of it as it wished. Scott v. Standard Oil Co., 183 Wash. 123, 48 P.(2d) 593 (1935).

supposed water rights thereto, the term waterfront property is deceptive.

An upland owner has some rights, however, based upon the statutory preference of purchase of the abutting tide and shore lands. When the state determines to sell particular tide or shore land, the owners of the upland are given a preferential right to purchase the abutting tide or shore land; this preference is of thirty days duration for second-class and of sixty days for first-class tide or shore lands.[35] The thirty-day preference is computed from the date of personal service for resident or the date of mailing of notice to nonresident owners of the particular upland; for first-class lands the preference is computed from publication prior to the filing of the appraisement by the commissioner of public lands, and there is no provision for personal service.[36]

This preferential right has enabled an owner of upland on a navigable lake to enjoin the use of the shore land for access to a houseboat moored in front of the land. However, this right was not so extensive as to secure removal of the houseboat as an obstruction in navigable waters. Such an obstruction, if it were a nuisance, could be abated only in an action by the state and did not constitute a trespass to any littoral rights of the uplands.[37]

Contrasted to the denial of riparian rights in the uplands, such rights exist in both land abutting nonnavigable waters,[38] and in tide and shore lands. Since the state holds title in fee to the beds of navigable waters, a conveyance by the state to one other than the owner of the uplands vests clear title against which the upland owner has no claim through riparian or littoral rights.[39] The court has declared that the right of the owner of second-class shore land extends to the line of navigation, that the right is substituted for the denied riparian proprietorship, and that by such right one can improve his holding by the erection of docks and piers up to the line of navigability.[40] Also a conveyance of the tideland of a navigable river and of a slough subject to tidal flow carries title free from any claim by the upland owner for the use of any part of the premises below ordinary high tide; compliance

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[35] REM. REV. STAT. §§ 7797-112, 121 [P.P.C. §§ 940-427, 595].
[36] REM. REV. STAT. §§ 7797-111, 112, 121 [P.P.C. §§ 940-425, 427, 595].
[37] Van Siclen v. Muir, 46 Wash. 38, 89 Pac. 188 (1907).
[38] Riparian rights in a stream were protected from interference by diversion of the source, a navigable lake, even though there would be no riparian rights in the lake itself, and whether or not the land had directly abutted thereon. New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190 (1901).
[39] Bilger v. State, 63 Wash. 457, 116 Pac. 19 (1911).
[40] State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913).

with the statutes relating to boom companies[41] gives exclusive use of the beds and shores conveyed except for a free passageway between the boom and one shore sufficient for the ordinary purposes of navigation.[42]

Because of the varying values of different classes of water property, it is of the utmost importance to establish the classification and consequent boundaries of a given piece of land, and if necessary obtain the abutting tide or shore land for protection.

F *Descriptive Boundaries and Meander Lines:* In addition to the question of navigability, locating a water boundary may require an interpretation of the deed under which a holder's claim is established. This presents difficulties, whether the land be on navigable or nonnavigable waters, when the descriptions are in terms of the original government surveys or refer to the water itself.[43] Although meandered streams are public highways by statute, the fact that such streams are meandered does not determine navigability [44]

The rule has evolved that streams themselves are the actual boundary though the conveyance is in terms of the meander line.[45] By the laws of Washington, the boundary line of all navigable streams is the line of ordinary high water, while with nonnavigable streams the boundary is the thread of the stream.[46] Litigation has arisen to dispute a government survey and plat where there has been a wide variance between the actual location of rivers and the locations as established upon the plats by the meander lines. Where an original call specified the west bank of a river and thence southerly along the west bank, the court rejected an engineer's testimony of his visual survey of the river location as insufficient to impreach the government survey although the actual acreage was double that platted. It was there held that it must be indisputably established that the plat was the result of gross negligence or fraud, that there was no river near the spot indicated, and that adopting the stream as it is actually located would increase the patentee's land to such an extent as to be fraudulent or wholly inequitable. Nor does a statement of acreage established from the plats limit the extent of the grant, since that would establish meander lines as bound-

[41] REM. REV. STAT. §§ 7797-134, 135, 136 [P.P.C. §§ 940-243, 245, 247].
[42] Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909).
[43] Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922).
[44] REM. REV. STAT. § 8407 [P.P.C. § 453-17]. Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840 (1901).
[45] Jeffries v. East Omaha Land Co., 134 U.S. 178 (1890).
[46] Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922).

aries, which is not the case.[47] The meander line and the high water line may each be presumptive but not conclusive proof of the other.[48]

The court has had difficulty interpreting deeds which are specific in their description as to which part of the stream was intended as the boundary Riparian rights were not in issue when the above rule was applied, and it would be very important to have the intentions accurately drafted into any conveyance affecting land abutting nonnavigable water or in distinguishing between the rights of upland and tide or shore land.

Where the descriptions intermingled the terms "bank of the river" and "meander of the river" and the river in question was navigable, the court has held that the former term would control, as in any event navigability would destroy any claim past the bank.[49] But what would be the ruling had the river been nonnavigable and riparian rights to the thread of the stream been in issue? The specific use of "bank" of a nonnavigable stream has been held to limit the interest conveyed to the specific boundary with no right to the bed of the stream, though the court conceded that a general description of a nonnavigable water boundary would mean the thread of the stream.[50] Where the description was "ten feet east of the *course* of the stream," the boundary was held to be a parallel line ten feet east of the thread and not of the bank of the stream.[51] Similarly, if the plat specifies courses and distances and shows that a strip of land between the water and land conveyed was not included, a sale by lot number will not give title to the high water line, but will be restricted to the specifications of the plat as staked upon the ground.[52] Where the grantor holds both the upland and the tide or shore land, a conveyance should clearly express what interests are being conveyed rather than risk interpretation.

II. CHANGING WATER COURSES

One of the common problems in this field is the location of water boundaries which have changed by accretion, reliction, or avulsion, especially when the boundaries separate uplands from the tide or shore lands.

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[47] Rue v. Ore. & Wash. R. Co., 109 Wash 436, 186 Pac. 1074 (1920).
[48] Washougal Transp. Co. v. Dalles Etc., Nav. Co., 27 Wash. 490, 68 Pac. 742 (1902).
[49] Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913).
[50] Commissioners Comm. Waterway Dist. No. 2 v. Seattle Factory Sites Co., 76 Wash. 181, 135 Pac. 1042 (1913).
[51] Rossi v. Sophia, 163 Wash. 173, 300 Pac. 522 (1931). Note, 6 WASH. L. REV. 178.
[52] Spinning v. Pugh, 65 Wash. 490, 118 Pac. 635 (1911).

Black's *Law Dictionary* defines accretion as the addition to land of portions of soil by gradual and imperceptible deposition through the operation of natural causes. It is of two kinds: (1) *alluvion,* or the washing up of sand or soil so as to form solid ground, and (2) *dereliction,* as when the sea shrinks below the usual water mark. *Avulsion* is the removal of a considerable quantity of soil from the land of one and its deposit upon or annexation to the land of another, suddenly and by perceptible action of water, and includes a sudden change of channel.

The normal rule of avulsion is that when a boundary stream suddenly abandons the old channel and creates a new one, or suddenly washes from one bank a considerable body of land and deposits it on another, the boundary does not change with the changed course of the stream.[53]

The leading accretion cases are federal and are not concerned with distinguishing between shore land and upland, but simply state that when a boundary line is any line of any water course, gradual shifting of that line by either reliction or accretion results in a shift of the boundary line.[54] This rule was later held to apply to both tide and fresh water regardless of the size or navigability of the water course.[55]

It is debatable whether the rule of accretion is a riparian or littoral right or is simply a convenient means of retaining an identifiable boundary.[56] The Washington rule of accretion has evolved from judicial interpretations which varied, depending upon whether the waterway was navigable, whether the boundaries to tide or shore land were in issue, and whether the state was asserting ownership to the shores of navigable waters.

In addition to Article 17, a statute of 1899, reenacted in 1927, provides that accretions to any tide or shore lands after such lands have been sold, belong to the state. There is a further provision for survey and sale of such accretion with a thirty-day preference to purchase to the owner of the adjacent tide or shore land.[57] This legislation is the

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[53] Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922). Where a violent flood had changed the course of a stream, the court recognized the rule of avulsion, but by finding adverse possession in the present occupant (who by the change had become the adjoining owner) quieted title to the land separated by the altered course. Nixon v. Merchant, 19 Wn.(2d) 97, 141 P.(2d) 411 (1943).

[54] Arkansas v. Tennessee, 246 U.S. 158 (1917).

[55] Jefferies v. East Omaha Land Co., 134 U.S. 178 (1890).

[56] Ghione v. State of Washington, Commercial Waterway District No. 2 of King County, 26 Wn.(2d) 635, 175 P.(2d) 955 (1946).

[57] REM. REV. STAT. § 7797-123 [P.P.C. §940-599].

principal stumbling block to the solution of problems of conflicting interests of waterfront property

In cases where the state was not a party and where the divisible upland and shore land interests were not in issue, the normal rule of accretions was applied to determine that accretions to the banks belong to the upland owner.[58] Where land had been excluded from separate surveys of either side of a river that had gradually changed course in the interim, so that the second survey located the river in its altered course, it was held that the accreted land passed to the owner of the abutting land even though the patent description was in terms of the prior survey.[59] Similarly, where a stream widened from about 225 feet at the 1862 survey to over 700 feet at the time of litigation, with a decrease of eighty acres to a particular tract, it was held that whether the stream was navigable or not the boundary changed with the stream. It was there determined that the owners on either side of the stream were not adjoining owners, and whether the changes were by avulsion or accretion the benefiting owner held by adverse possession since the time of the last possible avulsion, and that REM. REV STAT. §§ 947 to 949 [P.P.C. §§ 13-1, 13-3, 13-5] (pertaining to the restoration of lost boundaries) did not apply.[60]

The rule of accretion provides that land gradually deposited upon one bank by the action of the river belongs to the owner of such land. Such addition of land often results in a loss to the owner of the opposite bank. This loss is recognized by the rule. In contrast to this rule, applied where the litigation does not involve the state or the conflicting interests of upland and shore land owners, the Washington court applied a rather incongruous rule when only one eroded bank was in litigation. It was held that where the bank is perpendicular and forms a retaining wall both above and below ordinary high tide, the boundary line between tideland and upland is a perpendicular plane, and neither party has the right to complain of the encroachment of the other if the plane is not crossed.[61] It has also been held that where high and low water were marks upon such perpendicular banks and there were no shore lands when the uplands were granted, the state had no claim to shore lands created by erosion within the boundaries of a private claim or to fills in the river caused by artificial means. The fills could be removed as a nuisance by the state, but not claimed for use

[58] Spinning v. Pugh, 65 Wash. 490, 118 Pac. 635 (1911).
[59] Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922).
[60] Glen v. Warner, 199 Wash. 160, 90 P.(2d) 734 (1939).
[61] Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909).

or sale to another.[62] This rule was set forth in litigation where the parties were concerned only with the action of the water upon one bank, but it is difficult to distinguish the effect of the erosion here and that resulting from a changing water boundary as determined by the recognized law of accretion. It would appear impossible to align the rationale of the rule applied where only one bank is in litigation to that of the rule of accretion as applied to the eroded bank against which the water course has moved, unless the former were restricted to instances of duplicated circumstances. The rule that declares that no shore land shall be created by erosion upon a perpendicular bank would appear to prevail in any action against the upland owner by the state or any other shore land interest. But it should be overruled or held inapplicable in an action for the accreted land brought by the holder of the land on the opposite shore of the altered watercourse. Otherwise, the "perpendicular bank" rule would appear to be a defense for the owner of the eroded bank and to be in direct conflict with the rule of accretions.

In actions where the state has been a party, the issue has generally been the ownership of the entire bed of the watercourse as distinguished from the shore or tideland. Dry beds of navigable waters, abandoned by changes of course prior to statehood, and passed by accretion or federal patent to the abutting owners, are free from any claim of the state, but when the change of course occurs after statehood, the state retains title to the old channel.[63] Also the statute vesting accretions in the state is operative only where accretion occurs after the state divested itself of title to the tide or shore land; otherwise accretion would merely be an addition to land owned by the state.[64]

Other litigation over the beds of navigable watercourses has arisen with regard to the interests of the commercial waterway districts. Under the WATERWAYS ACT of 1911, any claim of the state to the beds of navigable waters is vested in the district when such beds shall have been abandoned by the improvement of the navigational facilities of the waterway The disposal of such beds is given to the waterway district in order to render financial aid in accomplishing the improvement.[65]

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[62] Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 742 (1902).

[63] George v. Pierce County, 111 Wash. 495, 191 Pac. 406 (1920).

[64] Strand v. State, 16 Wn.(2d) 107, 132 P.(2d) 1011 (1943).

[65] REM. REV. STAT. § 9732 [P.P.C. § 431-35]. Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913) (statute found valid).

The effect of an artificial or natural alteration of the boundary between shore and upland upon the relative proprietary interests has not been decided by the Washington court. Similarly, the courts have left undetermined the interests of the state contrasted to those of the individual, *e.g.*, when *A* dredges a private anchorage, thereby admitting the tide over his property and creating new tideland. Where a waterway district had obtained by warranty deed land through which a new channel was dredged, the district was held to be owner of the new tideland created in the channel. The court did not decide whether title to the new tideland was obtained from the title to the land through which the channel was dredged or had vested in the state by virtue of Article 17, as in any event such title had been granted to the district by the WATERWAYS ACT of 1911.[66] But what is the position of *A*? Does he surrender his claim to a superior statutory or constitutional claim of the state? This appears unlikely as the court here doubted that Article 17 would include tideland artificially created after adoption of the constitution. It would appear that REM. REV STAT. § 7797-123 [P.P.C. § 940-599] (vesting title to accretions to tide and shore land in the state) would be inapplicable unless a heretofore unknown definition of "accretions" was found to include changes immediately and artificially created. It is to be remembered that *Washougal Transp. Co. v. Dalles, etc. Nav. Co.*[67] stated that the state could remove artificial fills from a river as a nuisance but could not claim them as shore land.

In another recent action[68] between the state and an upland owner, there were several issues involving water boundaries, but the shore land question was expressly reserved. The court recognized the gen-

[66] Commercial Waterway Dist. #1 v. C. J. Larson, 26 Wn.(2d) 219, 173 P.(2d) 531 (1946). REM. REV. STAT. § 9732 [P.P.C. § 431-35].

[67] Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 742 (1902).

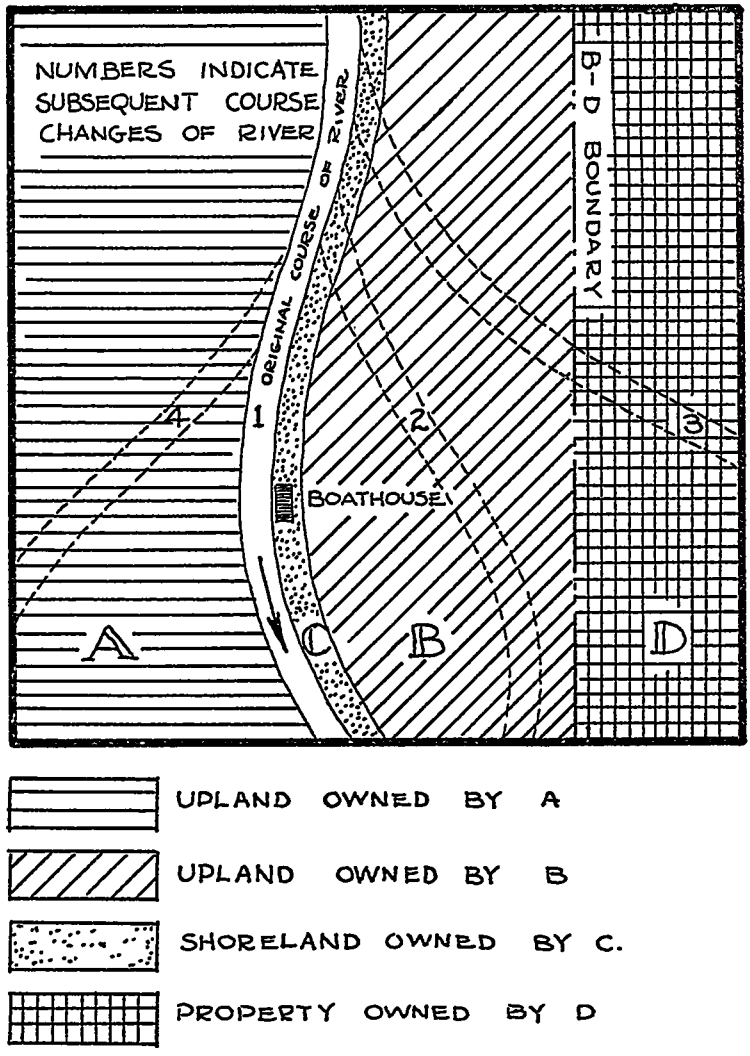
[68] Ghione v. State of Wash., 26 Wn.(2d) 635, 175 P.(2d) 955 (1946). A subsequent holder under a federal patent (in which the description on two sides was the intersecting meander lines of two rivers) quieted title to the land many years after the rivers had been abandoned. Only dry river beds, largely obliterated, now marked the boundaries of the federal patent, and the court found that the second river had changed course between the time of the survey and when it was abandoned. The state claimed the land between the boundaries of the river as shown by the meander lines of the 1865 survey and the abandoned bed, the waterway district claimed only the abandoned beds of both rivers; the upland owner claimed all land included within the enlarged boundaries by the rule of accretion. The waterway district was awarded the channel of the first river abandoned in the course of improvements of that waterway by the district; the bed of the second river when abandoned was awarded to the state since the district only contributed with the federal government to the diversion of that river; the abutting upland owner was awarded all land up to the banks of the abandoned beds under the description of his title.

ral property rule of accretion as benefiting the abutting upland and that it was applicable to governments as well as to individuals, reasoning that the abutting owner should not be held accountable for his gains since he has no remedy for his losses. The court denied that Article 17 vested title in the state to all lands covered by navigable waters in 1889 and to all lands which have since been submerged in navigable waters, recognizing that it would deprive owners of the benefits of recession and create a difficult artificial boundary The statute pertaining to accretions was held to apply only to tide and shore lands previously conveyed by the state and not to accretions to uplands; accretions to uplands thereby passed to the upland owner whose boundary continued to be the high water line.

Now let us attempt to correlate the rules previously presented with the hypothetical shown in the accompanying figure.

A and *B* own upland on opposite sides of the river, as shown in position one. The shore land on the east side of the river (*B*'s side) has been conveyed to *C* and on it has been built a boathouse. A fixed boundary separates *B*'s property on the east from property of *D* Now let us attempt to discern the effect of an altered watercourse upon the various proprietary interests. *C*'s shore land interest would appear to be precarious. As the river moves westward to position four, the newly accreted shore land below the high water line on the east bank would vest in the state by REM. REV STAT. § 7797-123 [P.P.C. § 940-599], and following behind the high water line would be the claim of upland owner *B* Under the rule given in the *Ghione* case,[69] that accretion shall benefit the upland owner, *B* would seemingly take the former shore land, boathouse and all. The boundaries to the uplands of *A* and *B* would then be the high water lines of the river as in position four; *B* would take the benefit of the property added by accretion and *A* would suffer the loss; *C*'s rights would appear to be extinguished. If *C*'s rights were thus extinguished, what would be the effect of the two statutes giving preferences of purchase of shore land; would the preference of purchase of *accreted* shore land given to abutting shore land owners[70] prevail over the preference given to upland owners of buying *abutting* shore land?[71] The preference to the shore land owner would appear to prevail if his rights otherwise had not been extinguished.

[69] *Ibid.*
[70] REM. REV. STAT. § 7797-123 [P.P.C. § 940-599].
[71] REM. REV. STAT. §§ 7797-112, 121 [P.P.C. §§ 940-427, 595].



Then what would be the respective interests if the river moves eastward to position two? Arguably there might be no newly accreted shore lands on the east bank. Former upland would have become shore land by the erosive action of the water on the east bank, but would this be considered newly accreted shore land to which the state could make claim? There would be a conflict between the rule of the *Washougal* case[72] and the form of accretion defined as dereliction or

[72] Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 742 (1902).

reliction. Aluvion shore land would be on the west bank of the river in position two, but if the shore land had not been sold previously by the state, the statute vesting such accretions in the state[73] would not be applicable. Seemingly, the boundary to the properties of *A* and *B* would still be the high water line of the river in position two, and *A* would hold title to the former shore land upon which the boathouse was situated. Again *C*'s position would be questionable; should newly accreted shore land under the state's statutory claim include shore land created by the erosion? Seemingly, *C*'s position should be between the line of navigability and the high water line of the river in position two, with the high water line separating the interests of *B* and *C*. But arguably, if the shore land interest can be lost by a moving watercourse revesting such interests in the state through the alluvial form of accretion, why cannot such interests be lost through reliction? Both forms constitute accretion and create "new" shore land to which the state might make claim.

What results if the river gradually changed its course eastward and crossed the fixed boundary between the upland of *B* and the land of *D* to position three? The boundary of the upland of *A* would be the high water line of the west bank of the river in that position, and seemingly much of *B*'s land would have passed to *A* by the rule of accretion. *C* would either still hold the shore land on the east bank or have lost such interest to the state, as discussed in the preceding paragraph. But would the land of *D* then become upland to which the rights of accretion would attach? By statutory definition it could be so argued.

The problem would become extremely vexatious should the river retrace its movements to the original course diagramed as position one. Would the claim of *B* as the former upland owner be revived or would the property of *D* follow the line of ordinary high water as upland? Seemingly, once fixed, the boundary between the properties of *B* and *D* should remain so. But as the river retraces its movement, either *D*, despite his fixed boundary, must claim as an upland owner or the claim of *B* as the upland owner must revive in what had been his original holding, to have the title to such land vest in anyone. The state might claim only the newly accreted shore land at the time of litigation, for the *Ghione* case[74] denied that the state had any claim under Article 17 to land once covered by navigable water but since uncovered. The statutory right to newly accreted shore land would seemingly

[73] REM. REV. STAT. § 7797-123 [P.P.C. § 940-599].
[74] Ghione v. State of Wash., 26 Wn.(2d) 635, 175 P.(2d) 955 (1946).

give no greater claim to land that had completed the transformation from shore land to upland by the continued movement of the river.

In any event, the interests of *C* would appear extinguished by the application of the rule of accretion benefiting the abutting upland owner or by the statute vesting the new shore land in the state. *C*'s only interest as a shore land owner might be the preference to purchase newly accreted shore land.[75] Yet the shore land owner holds under a conveyance of the entire shore land over given sections of the river. Is such a conveyance a grant of riparian rights in the form of an easement or a conveyance of specific property to which such rights attach? Determining whether the rule of accretion is a riparian right or a means of retaining an identifiable boundary would resolve whether a conveyance of shore land is an irrevocable right of access to the water *or* a peculiar type of grant subject to termination and to which the state holds a form of reversion.

It is submitted that this whole problem might be simplified in two ways: *First,* REM. REV STAT. § 7797-123 [P.P.C. § 940-599] is arguably unconstitutional as a violation of the due process clause of the federal Constitution. Neither the state nor the federal government may deprive one of property without due process of law.[76] The courts have declared that riparian rights exist in tide and shore lands. These rights are such property that the deprivation thereof by the state could be a violation of due process. The right of access to the water and to the use of the land for private purposes are rights constituting property whether or not the court resolves the debate as to the rule of accretion constituting a riparian right. The state has defined the boundaries of shore lands to the water line and the line of navigability, and yet claims a form of reversion contingent upon soil being deposited upon the submerged land. What is the nature of a conveyance by the state of tide or shore land? Whether it is a right to the use of the water or land between the line of high water and the line of navigability or a grant of the land between such boundaries with the accompanying rights to the water by which the land is submerged, the grantee has received property for which he is entitled the protection of due process. The court has recognized that the state cannot artificially expose shore lands so conveyed and divest the owner of his rights.[77] Can the deed

[75] REM. REV. STAT. § 7797-123 [P.P.C. § 940-599].

[76] Ferris v. Wilbur, 27 F.(2d) 262. (C.C.A. 4th 1928).

[77] State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913). The court treated the right to access to water as the principal value of shore land. Also where water is artificially lowered and land previously submerged becomes shore land and clearly without

be less effective to extend to the line of navigability by the intervention of fortuitous and natural causes?

The right to devote the land to any legitimate use is "property" within the due process clause, and legislatures may not under the guise of police power impose unnecessary and unreasonable restrictions upon the use of private property [78] The legislature must determine such use to be inconsistent with public health, safety, morals, or general welfare to seize property Certainly a statute which arguably forbids submerging one's own land to tides or waterways at penalty of seizure and sale by the state does not involve such a determination.

Second, the courts should interpret Article 17 as of its adoption and not to subsequently created tide or shore land. The state's interest in tide or shore land and the accretion thereto would then be limited to those not yet conveyed, subject of course to the right of eminent domain.

With the state limited to an interest in the beds of navigable watercourses, the courts could more easily resolve problems of water boundaries. Riparian rights should be based upon the right of access to water. Then by extending the rule applied when access was artificially removed by the state[79] to removal by accretion or private alteration, the interests of property owners would be protected except for the recognized risk of erosion. Without undoing all Washington concepts of waterfront property, the distinctions between lands bordering navigable and nonnavigable waters as well as between upland and shore land could be sustained. Fixed boundaries would be maintained unaffected by water boundaries. The problem would then be reduced to

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the boundaries of present shore lands, such added area was held to belong to those who had bought the shore land, and their boundary, the line of navigability, extends to its new location.

The court declared that the right of these shore owners to relief is recognized under the holding of Bilger v. State, 63 Wash. 457, 116 Pac. 19 (1911). There can be no remedy unless there be an antecedent wrong. The wrong lies in taking from the shore owners the rights to riparian proprietorship, *i.e.,* in extending the line of navigation after deeding the land. The deeds were executed in virtue of the statute; there can be no implied warranty, and there is no express warranty; consequently the only remedy left, under the reasoning of the *Bilger* case, is to hold that the deeds to shore owners carry title to the line of navigability as it may theretofore be fixed.

If the land to be artificially created was a reliction, no question as to its ownership could arise. The state being the owner of shores and beds of navigable lakes and having made a grant of the shore with the right of access to navigable water, it would seem that its legal position is no different from that of a private grantor who had made a deal under similar circumstances.

This same view is in statutory form. REM. REV. STAT. § 9733.

[78] State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 86 A.L.R. 654 (1928).

[79] State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913).

determining navigability, locating the actual watercourse and the high tide or water marks and the line of navigability which, per statute, are the boundaries to the severable proprietary interests, and affixing the rights that attach thereto. Riparian rights, including the right of accretion and of access to the water, would continue to attach to tide and shore land and land abutting nonnavigable waters, and be denied to uplands. But litigation would be lessened, the boundaries and interests of the various proprietary interests would be more readily and satisfactorily distinguishable, and established riparian rights would benefit owners as the rule of accretion intended.