MANAGING SENSITIVE ECOSYSTEMS: HONSINGER V. STATE AND THE NEED FOR FLEXIBILITY IN THE RULES OF REAL PROPERTY

I. INTRODUCTION

The Alaska Supreme Court's holding in *Honsinger v. State,*[1] benign on its face, adopts a rule of real property which unnecessarily interferes with the state's ability to manage its resources. At issue in *Honsinger* was the ownership of approximately ninety-five acres of land that had emerged contiguous to the littoral side of Honsinger's property. Under traditional principles of accretion and reliction,[2] principles which were applied by the *Honsinger* court,[3] title to newly emerged land vests in the former riparian owner.[4] Yet, application

1. 642 P.2d 1352 (Alaska 1982).

2. "Accretion" is the process by which solid material is deposited in such a manner as to cause that which had been covered by water to become dry land. This new land emerges contiguous to the original shoreline. *See, e.g.,* 5A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2560 (J. Grimes ed. 1978); BLACK'S LAW DICTIONARY 19 (5th ed. 1979).

"Reliction" occurs by the withdrawal of water from the shoreline leaving land exposed that was previously submerged. *See, e.g.,* G. THOMPSON, *supra,* § 2563; BLACK'S LAW DICTIONARY 1161 (5th ed. 1979).

3. 642 P.2d at 1354.

4. The doctrines of accretion and reliction are essentially interchangeable: under either rule the former riparian owner acquires title to the newly formed land. *See, e.g.,* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 325 (1973); Hughes v. Washington, 389 U.S. 290, 293 (1967). *See generally* 7 R. POWELL, POWELL ON REAL PROPERTY ¶ 983 (P. Rohan ed. 1982); G. THOMPSON, *supra* note 2, §§ 2560 & 2563. Alaska adheres to the traditional doctrines of reliction and accretion. *See* Department of Natural Resources v. Pankratz, 538 P.2d 984, 991 (Alaska 1975); Schafer v. Schnabel, 494 P.2d 802, 806-07 (Alaska 1972); Waynor v. Diboff, 9 Alaska 230 (D. Alaska 1937).

A "riparian" owner is technically defined as "one who owns land on [the] bank of [a] river." BLACK'S LAW DICTIONARY 1192 (5th ed. 1979). One who owns land bordering on an ocean, sea, or lake is properly regarded as a "littoral" owner. *Id.* at 842. Despite this technical distinction, the term "riparian" is often used by courts

of these common law rules need not have been automatic in *Honsinger* because the newly formed land was alleged to have resulted from a process known as glacio-isostatic uplift;[5] prior to *Honsinger,* no case in any jurisdiction had considered whether glacio-isostatic uplift is a form of either accretion or reliction.

If the court had concluded that glacio-isostatic uplift is not a type of accretion or reliction, it could have applied equitable principles to determine in which party, the state or private owner, title to glacio-isostatic uplifted lands should vest. Hence, rather than necessarily vesting ownership in the former riparian owner, the court could have balanced the interest of the state in obtaining ownership — effective management of its shorelines — with the interest of the former riparian owner in obtaining ownership — retaining the riparian feature of one's land.[6] The glacio-isostatic process would have thus served as an escape device from the inflexible doctrines of accretion and reliction. By holding that land uplifted by glacio-isostatic forces is a form of reliction, and accordingly that the property vests in the former riparian owner, the court failed to capitalize on this escape route. In effect, it has adopted a rule which ignores the state's interest in these lands, thereby adversely affecting Alaska's management of its delicate resources.

This note is divided into two sections. The first section will examine the weaknesses in the *Honsinger* court's reasoning. The second section discusses an alternative approach which the court could have adopted.

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and commentators to mean both "riparian" and "littoral." *See, e.g.,* Utah State Rd. Comm'n v. Hardy Salt Co., 26 Utah 2d 143, 145, 486 P.2d 391, 392 (1971); R. BOYER, SURVEY OF THE LAW OF PROPERTY 277 (3d ed. 1981). This note will use the term "riparian" to include both riparian and littoral land.

5. "Glacio-isostatic uplift" was defined by the *Honsinger* court as the "gradual rise of the earth's crust which occurs when the downward pressure exerted by a glacial ice mass diminishes. The result at the shoreline is an emergence of land which had been previously submerged." 642 P.2d at 1353 n.1. In technical terms, glacio-isostatic uplift is a form of "isostasy." *See generally* 7 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 401 (1982), which defines "isostasy" as:

> the principle that variations in the height of the earth's surface are compensated by mass distributions beneath, leading to a state of purely hydrostatic pressure, independent of geographic position, at some moderate depth beneath sea level.
>
> A very important case of loading of the surface is that produced by continental ice sheets. The additional weight of ice is compensated by a downward deflection of the plate, outflow of asthenospheric material beneath, and the production of a surface bulge around the margins of the sheet. Upon the disappearance of the ice sheet, the displaced material slowly flows back, leading to a collapse of the bulge and the uplift of the glaciated region.

6. *See infra* text accompanying notes 27-30, 33-37.

II. INFIRMITIES IN THE COURT'S ANALYSIS

To reach its conclusion that glacio-isostatic uplift is a type of reliction, the *Honsinger* court first classified land created by the glacio-isostatic process as land formed by a "rise of the bed."[7] It then stated that land formed by a "rise of the bed" is included within the reliction doctrine, citing as support a Nebraska case, *Ziemba v. Zeller.*[8] The *Ziemba* court, relying on an earlier Nebraska case, *Frank v. Smith,*[9] defined reliction as "the gradual withdrawal of the water from the land, by the lowering of its surface level *from any cause.*"[10] Though not expressly stated, the *Honsinger* court must have interpreted the phrase "from any cause" to include the withdrawal of water by a "rise of the bed." This construction is inconsistent with the meaning intended in the *Ziemba* and *Frank* decisions. By using the language "from any cause," the Nebraska courts intended to expand the traditional definition of reliction in order to include recessions resulting from artificial means.[11] The *Honsinger* court's reliance on *Ziemba* is, therefore, misplaced. The court cited no other precedent for the proposition that a "rise of the bed" is included in the definition of reliction. There is authority, however, including prior statements by the Alaska Supreme Court, that reliction is limited to a recession of the water and that it does not include a "rise of the bed."[12]

The *Honsinger* court also referred to Thompson, *Commentaries*

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7. 642 P.2d at 1354.

8. 165 Neb. 419, 86 N.W.2d 190 (1957).

9. 138 Neb. 382, 293 N.W. 329 (1940).

10. 165 Neb. at 421-22, 86 N.W.2d at 193 (quoting *Frank,* 138 Neb. at 388, 293 N.W. at 333) (emphasis added).

11. In *Ziemba,* the issue addressed was whether one party could obtain ownership to lands which accreted because of a dam. In order to emphasize that accretion or reliction resulting from artificial means did not prevent riparian owners from acquiring title, the court defined reliction to include land formed "from any cause." 165 Neb. at 421-22, 86 N.W.2d at 193. In *Frank,* the court used the language "from any cause" in defining reliction in order to include land additions resulting from unnatural obstructions placed in the river by third parties. 138 Neb. at 389, 293 N.W. at 333.

12. *See* Schafer v. Schnabel, 494 P.2d 802, 806 n.16 (Alaska 1972) (The doctrine of "reliction involves an increase in the amount of exposed land beside a body of water, but properly refers *only to situations where the water itself has receded.*" (emphasis added)); *see also* United States v. Ruby Co., 588 F.2d 697, 701 n.4 (9th Cir. 1978) (doctrine applicable to "land which becomes exposed by the gradual recession of water"); United States v. Wilson, 433 F. Supp. 57, 62 (N.D. Iowa 1977) (reliction is process "by which a gradual recession of water from a shoreline uncovers land"); Utah State Rd. Comm'n v. Hardy Salt Co., 26 Utah 2d 143, 146, 486 P.2d 391, 392 (1971) (Reliction encompasses "land which emerges from beneath a body of water caused *by a recession of the waters*.") (emphasis added). *See generally* 7 R. POWELL, *supra* note 4, at ¶ 983.

on the Modern Law of Real Property, as authority for its determination that a "rise of the bed" is a form of reliction.[13] Thompson asserts that reliction results from the "emergence of existing soil either through *rise of the bed* or through drying up of the water."[14] Because no authorities are provided by Thompson to support this proposition, the statement must be regarded as an overgeneralization.

In addition to these unconvincing authorities, the *Honsinger* court advanced three justifications in support of its use of reliction principles to determine ownership in lands formed by glacio-isostatic uplift.[15] The court's relegation of these reasons to a footnote is indicative of their insignificant and unpersuasive value.[16]

The court first asserted that "no case has been located in which the application of the law of reliction turned upon the nature of the geophysical process which caused the new land to appear."[17] In other words, the court implied that the process by which relicted land is created is unimportant in determining the land ownership issue. Yet, the nature of the geophysical process is relevant insofar as it forms the basis of policy reasons for deviating from or adhering to the accretion and reliction doctrines. As the Washington Court of Appeals stated in *Strom v. Sheldon,*[18] "[r]ules pertaining to accretions, relictions, and avulsions should not be mechanically applied. Rather, each case must be decided on its facts, and owners must be afforded equitable treatment." Therefore, the fact that no case has turned upon the particular nature of the geophysical process is not unusual and should not be dispositive; rather, the relevant inquiry should be whether any case has employed policy reasons in classifying or not classifying certain natural or artificial land additions as reliction. Had it focused on this inquiry, the court would have discovered that many cases have used equitable principles to determine ownership of relicted lands.[19] Thus, the court's statement that no

13. 642 P.2d at 1354.

14. G. THOMPSON, *supra* note 2, § 2563, at 40-41 (emphasis added).

15. 642 P.2d at 1354 n.4.

16. *Id.*

17. *Id.*

18. 12 Wash. App. 66, 70-71, 527 P.2d 1382, 1385 (1974).

19. *See, e.g., Strom,* 12 Wash. App. at 70-71, 527 P.2d at 1385 (1974) (The court was not concerned with whether the change in land was technically an avulsion, accretion, or reliction. To determine in which party to vest ownership, the court applied equitable principles. Only after considering and weighing the respective interests of the parties did the court hold that the accretion and reliction rules should be applied.); *see also* Turpin v. Watts, 607 S.W.2d 895, 901 (Mo. Ct. App. 1980) (landowner not entitled to land created by reliction if it was the result of an artificial condition which was created by landowner); State v. Florida Nat'l Properties, 338 So. 2d 13 (Fla. 1976) (doctrine of reliction held inapplicable to situation in

reliction case has been decided involving the nature of the geophysical process is misleading and unpersuasive.

The court next reasoned that the common law definition of reliction, "when the sea shrinks back below the usual watermark,"[20] was developed prior to the glacio-isostatic uplift theory.[21] The court must have believed, therefore, that had the theory been known at the time of Blackstone, it would have been incorporated into the doctrine of reliction. Upon reflection, however, it becomes apparent that whether the common law would have included glacio-isostatic uplift in the reliction doctrine is irrelevant. Instead, the inquiry should focus on the policy reasons underlying the common law doctrine, and on whether these policy reasons support a classification of glacio-isostatic uplift as a form of reliction. Blackstone noted that the common law rule allowing the riparian owner the vested right to accreted and relicted lands was deemed the most equitable solution.[22] Determining if this is still the most equitable result depends upon an analysis of interests different than those considered by Blackstone. Today these interests demand that glacio-isostatic uplift not be classified as a form of reliction because of Alaska's overwhelming interest in safeguarding particularly sensitive shore ecosystems.[23]

The court's third reason for treating glacio-isostatic uplift as reliction is the purported difficulty of judicially determining with exactitude the physical process causing the land change.[24] While there may be some validity to this judicial caution, courts have considered problems of scientific complexity before,[25] and there is no reason why the present context should present an insurmountable barrier. Since the state has the burden of showing that the land change re-

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which land was uncovered as result of deliberate drainage); *accord* Garrett v. State, 118 N.J. Super. 594, 289 A.2d 542 (Ch. Div. 1972).

For similar holdings in the accretion area, *see infra* note 31.

20. 2 W. BLACKSTONE, COMMENTARIES *262.

21. 642 P.2d at 1354 n.4.

22. 2 W. BLACKSTONE, COMMENTARIES *262.

23. *See infra* notes 27-30 and accompanying text.

24. 642 P.2d at 1354 n.4.

25. Compare the complexity of determining the exact geological process with the complexity of deciding if a certain pesticide poses an unreasonable risk to society. Although risk-benefit analysis in the pesticide area is fraught with uncertainty and difficulty of interpretation and extrapolation, the courts have reviewed these determinations with much success. *See, e.g.,* Environmental Defense Fund v. EPA, 548 F.2d 998 (D.C. Cir. 1976) (upholding Administrator's determination that heptachlor and chlordane posed unreasonable risks); Environmental Defense Fund v. EPA, 465 F.2d 528 (D.C. Cir. 1972) (reviewing and reversing EPA Administrator's determination that aldrin and dieldrin posed an unreasonable risk).

sulted from glacio-isostatic uplift,[26] the court's function is solely to analyze the evidence and to determine whether the state has met its burden. This is not an unreasonable request to ask of the court; it is its traditional function.

In summary, the court did not articulate convincing justifications for its finding that glacio-isostatic uplift is covered by the doctrine of reliction; nor did the court cite adequate judicial authority for its holding. Conversely, there are persuasive policy reasons to support a finding that glacio-isostatic uplift should not follow traditional rules of reliction, and that ownership of lands created by glacio-isostatic uplift is best determined by an equitable balancing approach.

III. AN ALTERNATIVE STRATEGY: ADOPTION OF AN EQUITABLE BALANCING APPROACH

A. The Need for a Balancing Approach

Accretion and reliction are doctrines which do not allow sufficient flexibility: newly created riparian land included in one of these doctrines automatically vests in the private riparian owner,[27] a result which frustrates Alaska's need to manage its fragile resources. In particular, Alaska has an important interest in effectively controlling its shorelines. Lands contiguous to water are particularly sensitive ecosystems, disrupted by the slightest intrusion into their natural cycles.[28] To ensure that shorelines maintain their natural environmental integrity, while providing the public with maximum aesthetic and recreational opportunities, ownership of these areas should, whenever possible, be held in public trust by the state.[29] Wisconsin,

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26. The burden is traditionally on the party claiming the benefit of the accretion to show that the land was added by accretion. Department of Natural Resources v. Pankratz, 538 P.2d 984, 989 (Alaska 1975); Schafer v. Schnabel, 494 P.2d 802, 807 (Alaska 1972). Analogizing this treatment to glacio-isostatic uplift, the burden of proof will be on the party attempting to show that the land was added in this manner.

27. *See supra* note 2.

28. *See generally* A. CAMPBELL, RIPARIAN VEGETATION IN OREGON'S WESTERN CASCADE MOUNTAINS: COMPOSITION, BIOMASS, AND AUTUMN PHENOLOGY (1979); J. CLARK, COASTAL ECOSYSTEMS (1974); Cooper, *Ecological Consideration,* in COASTAL ZONE RESOURCE MANAGEMENT (1971); B. GOPAL, WETLANDS: ECOLOGY AND MANAGEMENT (1982); O. PILKEY, HOW TO LIVE WITH AN ISLAND (1972); U.S. Dep't of the Interior, *Proceedings of the National Wetland Protection Symposium* (1977).

29. Pursuant to public trust principles, a state has the responsibility of protecting and maintaining the trust property and of devoting the land to those uses which will best serve the public interest. *See generally* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-53 (1892). If shoreland is not held in public trust, the necessary alternative means of managing shorelines is through regulation of private property.

a state which also has an abundance of natural resources, serves as an example of the importance of shorelines in the overall scheme of resource management. In 1965, that state passed shoreline legislation requiring each municipality to develop rules which would "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, and aquatic life; control building sites, placement of structures, and land uses and [p]reserve shore cover and natural beauty."[30]

Thus, in order to further the realistic objectives of Alaska, the doctrines of accretion and reliction should not be extended beyond their present application. It is neither recommendable nor plausible for the judiciary to undertake a total revision of the law in this area; to do so would, in essence, be equivalent to performing a legislative function. Nevertheless, the courts can legitimately refuse to extend traditional doctrines in the process of case-by-case decisionmaking. Controversies that do not fall squarely within the accepted law of accretion or reliction should be analyzed under a different approach: instead of vesting title automatically in the riparian owner, the courts should balance state and private interests to determine in whom title should vest. The many exceptions to the accretion doctrine illustrate that this would not be a revolutionary approach.[31]

There are two problems with a private regulatory scheme which militate against its use. First, the regulation may impair the private landowner's use of land to such an extent as to constitute a taking. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Second, enforcement of a regulation is more difficult when the regulation applies to private lands than when it applies to public lands. Thus, in order to facilitate effective management of shorelines, ownership of shorelands should vest in the state whenever possible.

30. 1965 Wis. Laws Ch. 614, §§ 22(6), 42(1) (Mason) (codified at WIS. STAT. ANN. §§ 59.971, 144.26 (1974)). *See also* WASH. REV. CODE § 90.58.140 (1976).

31. On occasion the courts have limited the strict application of the accretion rule when overriding considerations are present. For example, land added to one's property by "avulsion," a sudden change in the course of a stream, does not alter a legal boundary. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 327 (1973); Matthews v. McGee, 358 F.2d 516, 517 (8th Cir. 1966). *See generally* G. THOMPSON, *supra* note 2, § 2561. The reasoning of the courts is that it would be unfair, because of the suddenness and unforeseeability of the boundary change, to take land away from the abutting landowner in order to vest title in the former riparian owner. *See, e.g., Bonelli Cattle,* 414 U.S. at 327.

Another limitation on the traditional application of the accretion doctrine is the exception for "substantial accretions." In DeBoer v. United States, 653 F.2d 1313, 1315-16 (9th Cir. 1981), the court applied equitable principles, including unjust enrichment, knowledge of accretion at time of entry, failure to occupy or use the accreted lands, and denial of riparian access, in determining that "substantial accretions" should not vest in the former riparian owner. The court emphasized that such additions are not governed by traditional accretion rules. *Accord,* Smith v. United States, 593 F.2d 982, 986 (10th Cir. 1979); Wittmayer v. United States, 118 F.2d 808, 810 (9th Cir. 1941). *But cf.* United States v. 11,993.32 Acres of Land, 116

B. Balancing State and Private Interests

As previously discussed, Alaska has an important interest in managing its natural resources.[32] Alaska's interest in controlling the use of its shorelines cannot, however, be considered in a vacuum. Rather, the interest must be balanced against the interest that the former riparian owner has in retaining title to these newly formed lands. Traditionally, three justifications have been adduced for vesting ownership in the riparian owner. First, a continued access to the water is necessary to preserve the riparian feature of one's land.[33] Second, by obtaining ownership to the new lands, a former riparian owner is being compensated for the risk of loss caused by erosion.[34] Third, the doctrine of *de minimis non curat lex,* the law does not concern itself with trifles, is applicable.[35] Of these three reasons, only the first has relevance in modern society. The recognized importance of shorelines makes the third justification, *de minimis non curat lex,* unconvincing. Even if the slow, imperceptible land additions can be regarded as in themselves trifling, the importance of these newly created lands both to the state and to the private riparian owner illustrates that, viewed as a whole, the controversy is not trifling. Similarly, the compensation theory is not as justifiable as it might appear: the fair market value of riparian land is discounted

F. Supp. 671, 676-78 (D.N.D. 1953) (rejecting the "substantial accretion" exception).

At least one jurisdiction does not allow accretions caused by artificial means to vest in the former riparian owner. South Shore Land Co. v. Peterson, 230 Cal. App. 2d Supp. 628, 630, 41 Cal. Rptr. 277, 279 (Dep't Super. Ct. 1964) (no right to accreted lands by former riparian owner when lands filled by artificial means); People v. Hecker, 179 Cal. App. 2d Supp. 828, 837, 4 Cal. Rptr. 334, 343 (Dep't Super. Ct. 1960) (title to artificially caused accretions vests in the state, not the former riparian owner). But the majority of jurisdictions do allow artificial accretions to vest in the former riparian owner, provided the owner was not responsible for the accretion. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Department of Natural Resources v. Pankratz, 538 P.2d 984, 989 (Alaska 1975).

One court refused to hold that newly formed land resulted from accretion because of the unusual natural occurrence causing the land's creation. In State *ex rel.* Kobayashi v. Zimring, 566 P.2d 725 (Hawaii 1977), the Hawaii Supreme Court used the process of the land change as a means to escape from the inflexible application of the accretion doctrine. Instead of applying traditional accretion principles to land added to Zimring's property from basaltic lava flows, the court employed a balancing process to determine ownership. It concluded that the interests of the state exceeded those of the former riparian owner; hence, title properly vested in the state.

32. *See supra* notes 27-30 and accompanying text.

33. *See, e.g.,* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973); Hughes v. Washington, 389 U.S. 290, 293 (1967). *See generally,* G. THOMPSON, *supra* note 2, § 2560.

34. *See* County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874); Waynor v. Diboff, 9 Alaska 230, 232 (D. Alaska 1937).

35. *See* 2 W. BLACKSTONE, COMMENTARIES *262.

by the probability that land will be lost by erosion. Accordingly, to allow accreted land to vest in the former riparian owner would grant him a windfall.[36] Hence, the only valid justification for applying the accretion and reliction doctrines to land formed by glacio-isostatic uplift is the landowner's desire to remain riparian. When land loses its riparian nature, there can be a decrease in fair market value, a deprivation of commercial opportunities, and a decline in recreational and aesthetic activities.[37]

Therefore, the optimal approach would have been for the Alaska Supreme Court in *Honsinger* to have used the glacio-isostatic uplift theory as an escape device in order to insert equitable considerations into the determination of land ownership. The court would then have balanced the state's interest in obtaining ownership to the newly created lands against Honsinger's desire to retain the riparian feature in part of his land.

C. Arguments Against the Use of an Equitable Balancing Approach

There are basically two arguments against using a balancing approach in the accretion and reliction area. First, if the state is granted title to the newly created lands, this may result in an unconstitutional taking of the riparian feature of the private owner's land. An unconstitutional taking may occur under either the United States Constitution or the Alaska Constitution.

The fifth amendment to the United States Constitution reads, in part: "nor shall private property be taken for public use, without just compensation."[38] The Supreme Court's most recent discussion of whether denial of riparian access amounts to a taking under the fifth amendment is in *Kaiser Aetna v. United States.*[39] Under *Kaiser Aetna,* a denial of riparian access will not violate the fifth amendment if the denial results from state or federal actions that improve

36. To illustrate this principle, consider the following hypothetical. Assume there are two homes, identical in every respect except one: house A sits five feet from a bank overlooking water, while house B is set back fifty feet from this bank. Assume further that the cliff is known to have serious erosion problems. Although identical, the houses will not have the same fair market value. House A will be priced lower to take into account the probability that the bank will erode to such an extent as to render the home useless. Thus, any risk of loss by erosion is a risk which is calculated into the price of house A. Granting the owner of house A title in newly accreted lands in essence grants him a windfall.

37. For a discussion of the qualities of being riparian, see Wernberg v. State, 516 P.2d 1191, 1194 (Alaska 1973).

38. U.S. CONST. amend. V.

39. 444 U.S. 164 (1979).

navigation.[40] If, however, the deprivation is for a purpose other than improving navigation, the question of whether there has been a taking will be decided on an individual basis.[41]

Using a balancing approach to determine ownership in lands uplifted by glacio-isostatic forces can result in private owners being deprived of riparian access for nonnavigational purposes, and thus raises possible taking problems under the *Kaiser Aetna* standard. Yet these problems are more apparent than real. For example, to determine if there has been a taking, a court will engage in an ad hoc inquiry into several factors, including: economic impact on the private owner of the governmental action, interference with reasonable investment-backed expectations, and importance to the public of the governmental action.[42] These factors are essentially the same considerations that the court will examine to determine if glacio-isostatic uplifted land should vest in the former riparian owner or the state. Thus, a determination that land should vest in the state is, in essence, a determination that the court would have found no taking had the state legislature enacted legislation depriving the landowner of riparian access.

In addition to the United States Constitution, a taking may occur under the Alaska Constitution. The Alaska Constitution, article VIII, section 16, provides: "No person shall be involuntarily divested of his right to *use of waters,* his interest in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."[43] "Use of waters" has been interpreted to include a riparian right of access to water.[44]

In *Wernberg v. State*[45] and *Classen v. State,*[46] the Alaska Supreme Court established standards to determine when an interference with access to water, without compensation, will be deemed a violation of section 16. In *Wernberg,* the construction of the Minnesota bypass totally prevented Wernberg's access to Cook Inlet from Chester Creek.[47] The court held that an uncompensated interference

40. *Id.* at 178. *See also* United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961).

41. 444 U.S. at 178.

42. *Id.* at 175; Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

43. ALASKA CONST. art. VIII, § 16 (emphasis added).

44. Classen v. State, 621 P.2d 15, 16 (Alaska 1980); Grant v. State, 560 P.2d 36, 39 (Alaska 1977).

45. 516 P.2d 1191 (Alaska 1973).

46. 621 P.2d 15 (Alaska 1980).

47. 516 P.2d at 1193.

which makes access to water impossible violates section 16.[48] *Classen,* the court's most recent discussion of the issue, refused to extend the *Wernberg* holding.[49] In *Classen,* the court held that even though Classen's use of the Chena River was impaired, thereby making his commercial activities less profitable, the interference did not violate section 16 because his access to the river was not totally impaired.[50] Hence, provided that the interference does not result in a total preclusion of access to water, the *Classen* case indicates that an impairment of a private owner's riparian rights will be allowable under the Alaska Constitution.

Thus, under the *Wernberg* and *Classen* rationales, a court which engages in an equitable balancing approach can avoid section 16 problems by granting the former riparian owner a limited easement, one that preserves the owner's access to water over the newly formed glacio-isostatic uplifted lands.

The second possible problem with the use of a balancing approach in the accretion and reliction area is premised on an efficiency rationale.[51] If the justification for vesting ownership in the state is that the land is more valuable to the public than it is to the private landowner, then it is arguable that the state should pay the private landowner the market value of the riparian interest. That is, to ensure efficiency, a state should be forced to pay the fair market value of the shoreland; if it is unwilling or unable to do so, then the value of managing this resource should be deemed to be outweighed by the value of the shoreland to the private owner.

In this area, it is submitted that requiring the state to compensate the landowner is not a necessary device to ensure the efficient utilization of resources. Judicial decisionmaking can serve the same function. In weighing the competing state and private interests, the court must examine the fair market value of each claim. A determination that title to glacio-isostatic uplifted land vests in the state is,

48. *Id.* at 1201.

49. 621 P.2d 15 (Alaska 1980).

50. *Id.* at 17 (the court concluded: "While Classen's property may have lost some of its value as a result, not all such unfortunate consequences of public projects are compensable.").

51. To illustrate economic efficiency theory, consider the following hypothetical. Assume X values a parcel of land at $100, Y at $120. The efficient result is for the ultimate ownership to vest in the person who will receive the greatest utility from the land. The most convenient method of judging utility is by the willingness to pay. Thus, since Y values the land at $20 (that is, "willingness to pay") more than X, Y will receive greater utility from the land. Thus, vesting ownership in Y would be considered the efficient result. If, however, the value to society of having the state retain ownership in the parcel is $130, then the efficient result would be to vest ownership in the state, not Y. *See generally* R. POSNER, ECONOMIC ANALYSIS AND THE LAW (1977).

in actuality, a finding that the land is more valuable if held in public trust by the state than if held by a private individual. To require compensation by the state for this land would thus serve no function. Furthermore, a requirement of compensation would result in an unnecessary transfer of state funds to private individuals.

It can thus be persuasively argued that the two primary objections to the balancing approach — one based on efficiency theory and one on the United States and Alaska Constitutions — are not barriers to its adoption.

IV. CONCLUSION

Alaska's current need to manage sensitive resources and ecosystems demands that the rules of real property be characterized by more flexible approaches. Flexibility is particularly necessary in the accretion and reliction area. Though radical modification of this area properly belongs to the state legislature, the court can influence legislators and, in the interim, create flexibility in the area by not extending the doctrines beyond their present common law application.

Land added by glacio-isostatic uplift is not contained within either the common law doctrines of reliction or accretion. Hence, the process provides the quintessential opportunity in which to disregard traditional accretion and reliction principles and to adopt an equitable balancing approach which considers both the state's interest in managing its resources and the private interest in retaining the riparian feature of one's land. The Alaska Supreme Court in *Honsinger v. State* failed to capitalize on this opportunity; instead, the court classified glacio-isostatic uplift as a form of reliction. By so doing the court has precluded, at least temporarily, the introduction of needed flexibility into the rules of real property.

Lou Harrison