Surveys, Subdivision and Platting, and Boundaries

with

State and Federal Laws, Administrative Regulations and Judicial Decisions

MUNICIPAL RESEARCH AND SERVICES CENTER
OF WASHINGTON

AND

MUNICIPAL RESEARCH COUNCIL
IN COOPERATION WITH
ASSOCIATION OF WASHINGTON CITIES

Report No. 14
(Revision of Report No. 4)

May, 1987

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SURVEYS, SUBDIVISION AND PLATTING, AND BOUNDARIES

With

State and Federal Laws, Administrative Regulations and Judicial Decisions

By

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CENTER OF WASHINGTON

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Municipal Research and Services
Center of Washington
4719 Brooklyn Avenue N.E.
Seattle, Washington 98105

Price $15.00

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PREFACE

"When I tug at one thing in the world, I find everything else is connected to it." John Muir

Anyone who has had anything to do with establishing, changing, or adjudicating property lines could believe that John Muir had land measurement and boundaries in mind. The human desire to control land as an expression of wealth and power has caused wars over international boundaries and feuds between neighbors. It is a natural consequence that governments, to maintain order, have always found it necessary to prescribe rules for the establishment and protection of property rights.

Since the days of the feudal barons, the laws and procedures involved with land measurement and use have become infinitely more complex. Statutory and case law now applicable to ownership, boundaries, and land use fill volumes and cover literally thousands of variations in circumstance and detail.

Today's public official, though possessing the wisdom of Solomon, cannot sit in sole judgment but must follow prescribed laws and legal precedents. Likewise, the surveyor must know much more than simply how to operate an instrument and reduce field notes.

This report up-dates MRSC Report No. 4, published in 1977, which has been one of the Center's most significant publications. It has been prepared primarily for use by members of city governing bodies and planning commissions, planners, city engineers, land surveyors, public works directors, and attorneys. In addition, it is also intended that Report No. 4 will continue to serve as a resource for other public officials and for private citizens in solving problems related to land surveys, subdivision and platting, and boundaries. This report also includes data relating to problems of location of tracts of land in relationship to water under state and federal jurisdiction, rules for acquiring title to land by adverse possession, and certain aspects of land boundaries and monuments pertaining to the subject of surveys, subdivision, and platting. This updated publication contains applicable legislation enacted through the 1986 session of the Washington State Legislature, constitutional provisions, selected judicial decisions, and Washington Administrative Code (WAC) sections, with analyses and interpretations useful to those concerned with the enactment and administration of land use controls.

John S. Lamb
Executive Vice President
Municipal Research and Services
Center of Washington

ACKNOWLEDGEMENTS

This is the fifth version of a document first published in 1949 as Report No. 1. Its original authors were staff professionals with the Bureau of Governmental Research and Services of the University of Washington, the predecessor of the Municipal Research and Services Center of Washington (the Center). The format and many of the illustrations and much of the original content are retained and are as valid as when first published, a tribute to the original authors: the late Joshua H. Vogel, engineer, architect, planner, and land surveyor, and Dr. Ernest H. Campbell, lawyer, for many years Associate Director of the Bureau, and later Municipal Law Specialist of the Center until his retirement in 1983. Special recognition is also given to Patrick W. Mason, lawyer and Legal Consultant on the Center's staff, who assisted with the revision of Report No. 1 in 1977 which was then published by the Center as Report No. 4; also to Mary K. Davis, Word Processor, for her cheerful and untiring assistance.

The Center also gratefully acknowledges the contributions of the following individuals and organizations to this revision of Report No. 4:

Joe E. Colcord, P.E., P.L.S., Professor of Engineering, University of Washington

Mike Kinnaman, P.L.S., Survey Manager, Division of Engineering Services, Washington State Department of Natural Resources

Thomas W. Ray, P.L.S., City of Vancouver, Spokesman for the Review Committee, Lower Columbia Chapter, Land Surveyors Association of Washington

LeRoy F. Middleton, P.L.S., Reid-Middleton & Associates, Inc., Edmonds, Washington

Larry Dixon, P.L.S. and Chuck Sajonia, P.L.S., King County Surveyor's Office

Figures 1, 2, 3, and 4 are from Modernization of the Public Land Survey System (see Bibliography)

Figures 18a, b, c, and 19a, b, c are from "Waterfront Titles in the State of Washington" (see Bibliography)

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I

INTRODUCTION

When George Washington practiced the art and profession of surveyor, the tools of the trade were very simple, even crude by comparison with those of today. Until the mid-1870's, fully acceptable survey lines were established using a surveyor's compass and chain. Long lines were "adjusted" after each day's work using "astronomical observation each night to correct the magnetic compass readings to true north bearing."[1]

In 1785 the Second Continental Congress enacted the Public Land Survey System (PLSS) which is responsible for major land division into six-mile square townships (Figure 1) comprised of 36 sections, (Figure 2), each one-mile square. Its stated purpose was to "facilitate the orderly settlement of the midwest, portions of the south, including Florida, and lands west of the Mississippi River, except Texas". This 1785 enactment made surveying public land a prerequisite to settlement. The system of rectangular surveys was amended by acts in 1800 and 1805 providing for division of sections into quarter sections (Figure 3). Again in 1832, the further division of sections into rectangular aliquots was adopted (Figure 4).

[1]Wilford, J. N., The Mapmakers, Knoft, New York (1981).

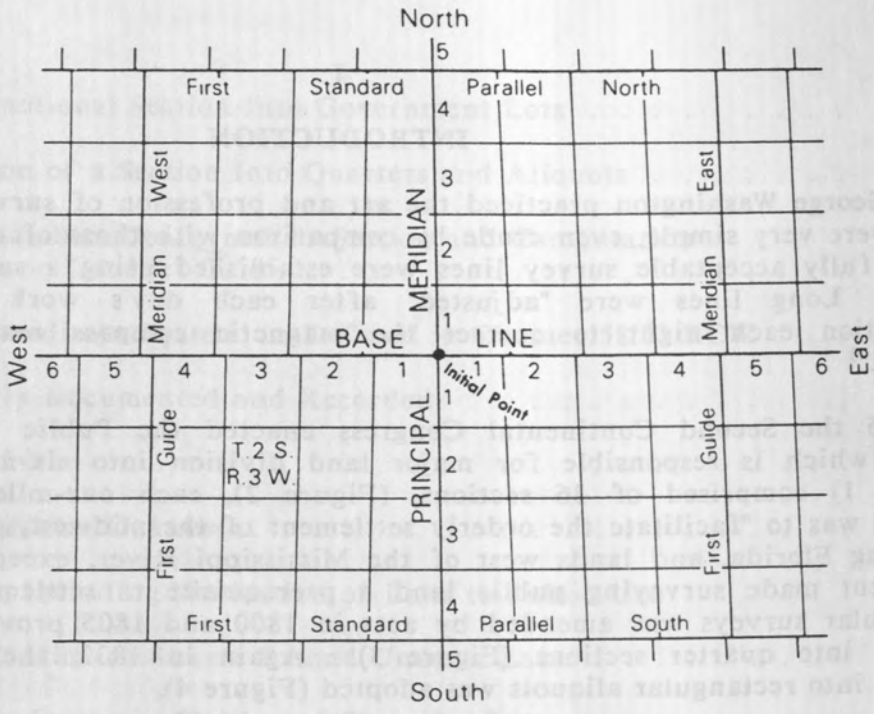

FIGURE 1 - TYPICAL TOWNSHIP GRID, however variations exist throughout the PLSS.

TOWNSHIP 2 SOUTH, RANGE 3 WEST

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	Section 14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

FIGURE 2 - BOUSTROPHEDONIC NUMBERING OF SECTIONS.

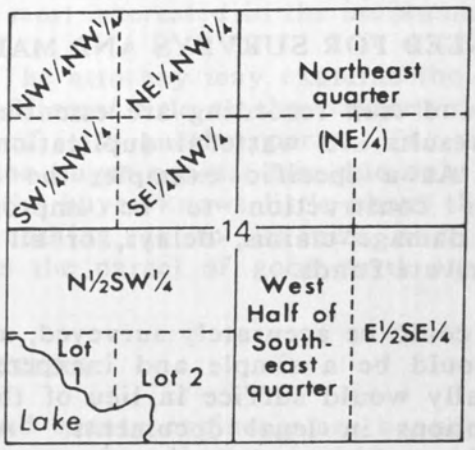

FIGURE 3 - DIVISION OF FRACTIONAL SECTION INTO GOVERNMENT LOTS.

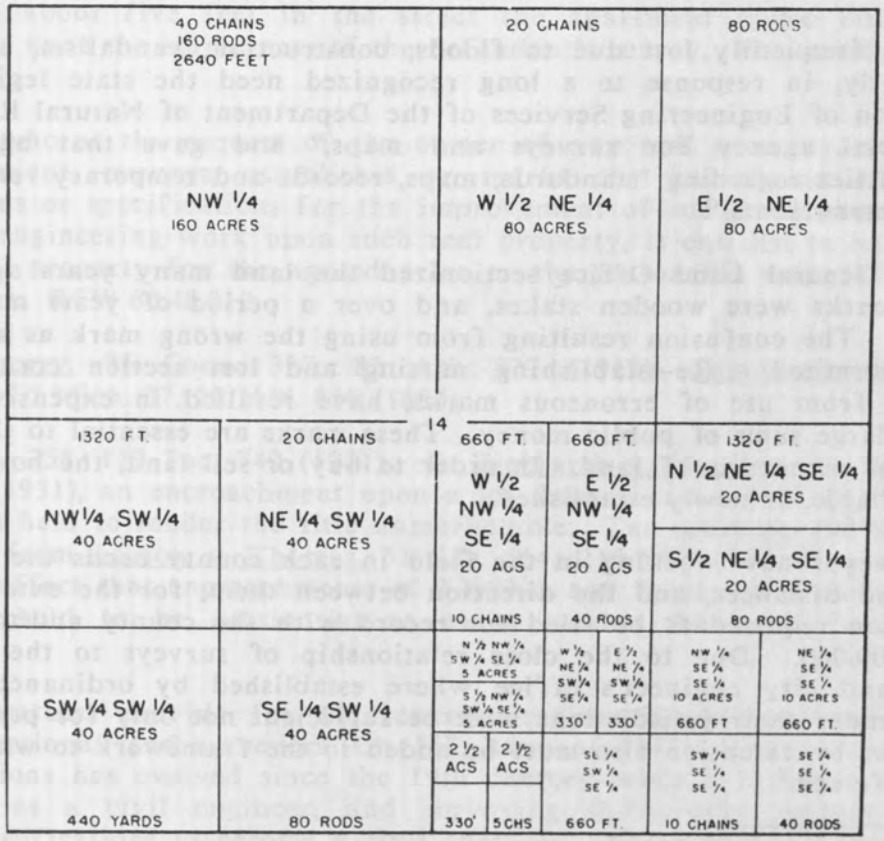

FIGURE 4 - NORMAL DIVISION OF A SECTION INTO QUARTERS AND ALIQUOTS. After the Public Land Survey System.

II

NEED FOR SURVEYS AND MAPS

Land surveying, mapping, and map recording are essential for orderly land ownership and use. Otherwise, the results are wasteful duplication, costly mistakes, confusion, antagonism, and lawsuits. As a specific example, the failure to conduct adequate surveys can cause major construction to be improperly located, resulting in reconstruction, substantial damage claims, delays, or all of those consequences, with huge losses of public and private funds.

Conversely, if all property could be accurately surveyed, mapped, platted, and recorded, the description of land would be a simple and inexpensive process. Lot and block number designations generally would suffice in lieu of the complex and often lengthy metes and bounds descriptions in legal documents. Additionally, control surveys, statewide plane coordination, river and harbor surveys, and vertical level systems should be coordinated on standard maps.

The effects of good or poor work in the administration of surveying and mapping activities by city engineers, and by county and state officials as well, materially affect the future of governmental units and of property owners, both public and private, for many years.

Marks are frequently lost due to floods, construction, vandalism, and natural decay. Consequently, in response to a long recognized need the state legislature designated the Division of Engineering Services of the Department of Natural Resources (DNR) as the "official agency for surveys and maps," and gave that agency powers and responsibilities regarding "standards, maps, records and temporary removal of boundary marks or monuments."[1]

The U.S. General Land Office sectionized the land many years ago. Many of the original marks were wooden stakes, and over a period of years many of these have been lost. The confusion resulting from using the wrong mark as a section corner is almost unlimited. Re-establishing missing and lost section corners, plus lawsuits generated from use of erroneous marks, have resulted in expensive delays and the waste of large sums of public money. These marks are essential to the orderly use and transfer of ownership of land. In order to buy or sell land, the boundary marks must be identifiable, or newly established.

Each surveyor now working in the field in each county needs the description of the marks, and distances, and the direction between them, for the extension of his work. Information required to be filed for record with the county auditor is prescribed in RCW 58.09.060. Due to the close relationship of surveys to the county engineer's office,[2] and city engineer's office where established by ordinance, records kept of surveys under their jurisdictions must be sufficient not only for performance of their duties, but by extension also must be added to the framework to which future surveys can be referred.[3]

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[1]Ch. 58.24 RCW.

[2]RCW 36.32.370 and 36.32.380.

[3]Ch. 58.09 RCW, "Survey Record Act".

The federal government originally set the section corners; the state regulates their use; and the local communities are most interested in the maintenance of them.

Land surveys are necessary. The attorney may examine the chain of title to determine if a seller has a good and sufficient title to the property legally described and if he can make a legal conveyance of it to another party. The title insurance company can guarantee the title, insuring the buyer against loss due only to defects in the recorded title. But, without a survey, the buyer knows little about the physical existence of the property legally described, nothing as to its size and location, or whether the description actually represents the parcel of good earth that the buyer observed and hopes to obtain for use.[4]

A. Exercise of Care by Surveyors

Both private civil engineers and county engineers are bound to exercise that degree of care that a skilled civil engineer of ordinary prudence would exercise under similar circumstances.[5] Presumably, city engineers are subject to the same standard. In Taft v. Rutherford,[6] the court found that the defendant civil engineer[7] entered into a contract with the plaintiff to make a survey of a lot on which the plaintiff desired to build an apartment house; that the defendant made an erroneous survey either by overlooking the parking strip or misreading the figures upon the chain; and that he therefore did not exercise due care. The court held the defendant liable for the cost of removing from about five feet in the street the apartment house built by the plaintiff in reliance upon the correctness of the defendant's survey. The court said:

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[4]Any person who at the request of the owner of any real property, or his duly authorized agent, surveys, establishes or marks the boundaries of, or prepares maps, plans or specifications for the improvement of such real property, or does any other engineering work upon such real property, is entitled to have a lien upon such real property for the agreed price or the reasonable value of his professional services. RCW 60.48.010.

[5]Ferrie v. Sperry, 85 Conn. 337, 82 Atl. 577 (1912); Commissioner of Highways v. Beebe, 55 Mich. 37, 20 N.W. 826 (1884).

[6]66 Wash. 256, 258, 119 Pac. 740 (1911). In Ziebrarth v. Manion, 161 Wash. 201, 296 Pac. 561 (1931), an encroachment upon a lot from 7 and 1/8 inches to 3 and 1/2 inches was held to render the title unmarketable. The court quoted with approval language from Larson v. Thomas, 51 S.D. 564, 215 N.W. 927, 57 A.L.R. 1246 (1927) to the effect that encroachments of 2 inches and from 1 to 3 and 1/2 inches have been held to be substantial so as to render the vendor's title unmarketable.

[7]Washington statutes provide for the separate registration of professional engineers and professional land surveyors (Ch. 167, Laws of 1935). Their identity as separate professions has evolved since the 19th century when a surveyor was often referred to as a civil engineer, and surveying skills were necessarily included in the qualifications to become a civil engineer. Where case law (prior to 1935 re Washington State) makes reference to a civil engineer in the context of surveyor, the court opinion is still valid subsequent to 1935 as applied to land surveyors licensed to practice as professional land surveyors, but not to civil engineers subsequent to 1935 unless also licensed as land surveyors.

"It is no doubt true that the owner may have in mind the construction of a cheap building, and so inform the surveyor at the time the survey is ordered, and afterwards change his mind and construct a large stone, steel, or other expensive building. In such case the surveyor might not be liable for the damages to the expensive building upon a mistaken location caused by an erroneous survey, because the survey was not made in contemplation of such building. But it seems clear, where the survey is made with reference to a particular building or use to which the lot is put, the surveyor would be liable for the damages naturally flowing from his error, because the parties had that use in contemplation."

RCW 4.16.300 through 4.16.320 provide that the accrual of a cause of action against a surveyor, among others, shall be limited to six years from the date of substantial completion or termination of improvements to real estate, but the question of when during the six-year period the cause of action for negligence of a land surveyor accrues was left with the courts. In Kundahl v. Barnett,[8] the court concluded that an action against a land surveyor for negligent breach of duty does not accrue, for purposes of the three-year statute of limitations,[9] until the aggrieved party discovers or has reasonable grounds to discover the breach. So an action against a surveyor for an erroneous survey must be brought within three years after it accrued, and it must accrue within six years after construction is completed.[10]

The survey indicates whether or not the boundaries lie around the physical improvements, if any, that the buyer expects to have. Perhaps the observed access to a public road is not actually there, as another private owner holds title to an intervening strip. Perhaps the public road is not properly located, and the observed auto driveway is on another person's land. Perhaps the sewer and water utilities constitute a trespass over another property and are subject to being cut off. Legal property lines must be run on the site whether for a city street, water, or sewer location, or whether for a private piece of property. Only then can the public or private owner be assured of the results.

Fences, buildings, drives, walks, and streets are not evidence of property lines unless verified by a survey. Gaps, overlaps, and encroachments must be ascertained. Grades and levels must be known and established for permanent construction work by surveys on the site; maps and records of these must be kept accurately.

Overall land maps and surveys will make possible settlement of ambiguities and errors in land descriptions and will determine the physical facts about adjoining properties and public lands.

---

[8]5 Wn. App. 227, 486 P.2d 1164 (1971), petition for review denied 80 Wn.2d 1001 (1971).

[9]RCW 4.16.080(2) provides a three-year limitation on: "An action for taking, detaining, or injuring personal proprety, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;..."

[10]Hundesman v. Meriwether Leachman Assocs., 35 Wn. App. 318 (1983).

B. State Base Mapping System

In 1973 the legislature adopted the state base mapping system, to be established and maintained by the DNR.[11]

The standards set by the legislature for the state base mapping system are as follows:[12]

1. A series of fifteen minute United States Geological Survey (USGS) quadrangle map separates at a scale of one to 48,000 (one inch equals 4,000 feet) covering the entire state; and

2. A series of seven and one-half minute USGS quadrangle map separates at a scale of one to 24,000 (one inch equals 2,000 feet) for urban areas.

All the features and symbols added to the quandrangle separates are to meet as nearly as is practical national map accuracy standards and specifications as defined by the USGS.

[11]Ch. 58.22 RCW.

[12]RCW 58.22.020.

III

IMPLEMENTATION BY PUBLIC OFFICIALS

In order that surveys, subdivisions, platting, and the determination of boundaries may be conducted and ascertained in an orderly manner, that the standards and rules relating thereto may be prescribed by the legislature and other governmental agencies, and that judicial decisions may be applied properly, it is necessary for public officials and governmental agencies to fulfill various responsibilities in these areas, and that adequate funds be appropriated for those purposes.

A. State Agencies

For example, under existing law the DNR is required to locate and establish harbor lines (including both "inner and outer;" these two defining the limits of the "harbor area"), and to relocate erroneously established inner harbor lines and to determine harbor areas in the navigable waters of all harbors, estuaries, bays, and inlets of the State of Washington whenever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side.[1]

The Commissioner of Public Lands is required, simultaneously with the establishment of harbor lines and the determination of harbor areas in front of any city or town, or as soon as practicable, to survey and plat all tide and shore lands of the first class not theretofore platted, and, in platting, to lay out streets to be dedicated to public use and public waterways.[2] The Commissioner is also required to prepare plats showing all tide and shore lands surveyed, platted, and appraised by him in the respective counties on which the location of all such lands with reference to the lines of the United States survey of the abutting upland is to be indicated,[3] and to correct erroneous plats and field notes of tide and shore lands submitted to his office by prospective purchasers.[4] The DNR is required to plat into lots and blocks all unplatted state lands, except capitol building lands, within the limits of any incorporated city or town or within two miles of the boundary thereof, when the valuation of such lands is found by appraisement to exceed one hundred ($100.00) dollars per acre before such lands are offered for sale.[5]

B. County Officials

All common boundaries and common corners of counties not adequately marked by natural objects or lines, or by surveys lawfully made, are required definitely to be established by surveys jointly made by the surveyors of all the counties affected

---

[1]RCW 79.90.015, 79.90.020, 79.90.025, 79.90.070, 79.92.010, and 79.92.020, and Wash. Const., Art. XV, Sec. 1, Amend. 15.

[2]RCW 79.93.010.

[3]RCW 79.94.040.

[4]RCW 79.94.270.

[5]RCW 79.01.100.

thereby and approved by the legislative bodies of such counties.[6] The Washington State Department of Transportation (WSDOT) and the county engineer are required to fix permanent monuments at the original positions of all United States Government monuments at township corners, section corners, quarter section corners, meander corners, and witness markers whenever any such original monuments or markers fall within the right-of-way of any primary state highway or county road. The same officials also are required to aid in the re-establishment of any such corners, monuments, or markers destroyed or obliterated by the construction of any primary state highway or county road, by permitting inspection of the records in the office of the WSDOT and of the county legislative body, and of the county engineering office.[7]

The county assessor is required to outline a plat of irregular subdivided tracts or lots of land, other than any regular government subdivisions, and to notify the owner thereof with a request to have the county engineer survey the same, and cause the same to be platted in numbered lots or tracts. However, when any county has in its possession the correct field notes of any such tract or lot, a new survey is not mandatory, and the tract may be mapped from those field notes.[8]

C. City Officials

The legislative bodies of cities and counties have the responsibility for approving plats, subdivisions, and dedications.[9] The DNR and a specially created joint committee have the responsibility for establishing recommendations pertaining to requirements of survey, monumentation, and plat drawings for subdivisions and dedication throughout the state.[10] The specially created joint committee met in 1970 in conjunction with the Surveys and Maps Advisory Board,[11] adopted the American Congress of Surveying and Mapping (ACSM) 1946 Technical Standards for Surveys, and recommended plat standards. The special joint committee disbanded, but the Surveys and Maps Advisory Board still may pursue changes to survey standards.[12]

Municipalities and other governmental authorities should, within the limits of their authority, make proper rules and regulations with respect to surveying, subdivision, platting, boundaries, monuments, and recording, and enforce them to avoid confusion and misunderstanding.

The foregoing serves to indicate some of the statutory responsibilities of public officials and governmental agencies with respect to surveys, subdivision, platting, and the determination of lines and boundaries. In addition, a number of public officials have been empowered to perform at their discretion certain related functions.

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[6]RCW 36.04.400.

[7]RCW 47.36.010, 36.86.050 and 58.09.130.

[8]RCW 84.40.170.

[9]RCW 58.17.060, 58.17.070, 58.17.100, and 58.17.170.

[10]RCW 58.17.260.

[11]RCW 58.24.020.

[12]Ch. 332-130 WAC.

IV

STATE PLANE COORDINATE SYSTEM (SPCS)

The case for the use of plane coordinates has been well presented in a progress report prepared by a joint committee of the Real Property Division, American Bar Association, and the Surveying and Mapping Division, American Society of Civil Engineers.[1] The following are excerpts from that report:

> "The Committee finds further that, in order to provide proper reference marks for fixing position and direction, a system of survey monuments should be established, connected by properly controlled precise surveys, and that the positions of these monuments, so determined, should be expressed in terms of a co-ordinate system, preferably by plane rectangular co-ordinates. Descriptions of the monuments, together with their co-ordinates, must be recorded by some public authority in the record made available for public use.
>
> "The United States Coast and Geodetic Survey has developed a plan for the establishment of such interrelated monuments and systems of plane co-ordinates for defining positions. This plan has already been put in operation in several States and has won the immediate approval of practicing land surveyors and title examiners. Many thousands of monuments have been set and their co-ordinates have been determined. The plan is known as the 'State System of Plane Co-ordinates.' It has been thoroughly studied by the members of the Committee, and it is believed to offer an adequate remedy for the deficiencies described. The utility of the plan extends to so many fields other than that of land surveys and descriptions that the cost to the taxpayer for its adoption will be returned manyfold. It provides a basis for checking and controlling instrumental and aerial surveys for maps and plans required for all engineering development. The time and cost of establishing special control for each project are thus obviated. Furthermore, all existing data can be compiled, and boundary lines can be correlated without field determination."

A. The State System of Plane Coordinates

"The entire United States is covered by series of triangulation stations which are physical marks on the ground. Most of the stations consist of concrete shafts, 4 ft. or 5 ft. long, set nearly flush with the ground, with bronze disks set in their tops which identify them and also contain a small hole which represents the exact position. Buried under each shaft is a short cylinder of concrete with another disk set directly under the surface disk. Usually, three or more shafts with disks are set near-by and witness measurements are recorded by which the station can be replaced precisely if destroyed. In rock outcrops the disks are grouted in holes in the rock.

---

[1]"Land Surveys and Titles" - first progress report of the Joint Committee of the Real Property Division, American Society of Civil Engineers, Proceedings of the American Society of Civil Engineers, Vol. 64, No. 9, November 1938, 1879-1882. The secretary of the joint committee which prepared this report was Professor A. H. Holt, Worcester Polytechnic Institute, Worcester, Mass.

"All these triangulation stations are connected by precise surveys so that their relative positions are determined accurately. Thus, even if all the marks of many stations were removed, it would still be possible to replace them in their original positions.

"Since this net of triangulation stations extends over so large an area---the entire United States--it is necessary, due to the curvature of the earth, to express the positions of the stations in terms of a spherical co-ordinate system; that is, by precise latitude and longitude. As it is unnecessary to consider the curvature of the earth in the reduction of most survey data, the mathematics[2] of this procedure is unfamiliar to all but a few specialists. It is clear then, in order to make them generally usable, that some form of plane rectangular co-ordinate must also be used to express the position of these stations. The U.S. Coast and Geodetic Survey has developed a plane co-ordinate system for every State, according to which the positions of the triangulation stations may be expressed. In the larger States several zones have been introduced, each zone having a separate origin. The zones are made as large as possible without introducing appreciable differences, caused by earth curvature, between measurements on the ground and distances as expressed by the co-ordinates. The variations thus introduced are so slight that they cannot be discovered by ordinary survey methods.

"It is planned that monuments will be established in convenient locations along highways and streets, and precise surveys[3] will be made connecting these monuments with triangulation stations. The co-ordinates of the monuments can be determined by using the plane co-ordinates of the triangulation stations. In many States this work is well under way, and many municipalities are extending the monument system throughout their streets. By this plan the position of every monument in the system can be determined with relation to that of every other monument, so that it is inconceivable that the position of the system should ever be lost.

"To utilize the system a land surveyor must make a proper survey connection with two monuments. He can then either state the plane co-ordinates of the property corners in his description, or give the bearings and distances of two or more property corners from the monuments. With these data in the description there can be no question as to the precise position of the property. Its location is described accurately and permanently. Moreover, it is possible to determine, by examination of descriptions of this kind, whether all the parcels lotted in a certain tract will, in fact, fit into the tract.

"When once the title examiner has become familiar with such a system, he can determine, without a field survey and a surveyor's guess, whether the requisite land exists for the title he is examining. Surveys are thus co-ordinated, and, in fact, made part of one great survey which is all-inclusive.

---

[2]Figure 5.

[3]See Glossary for definition of precision.

"There are many applications of the system to engineering and mapping. It has been proved of extreme value for tax maps and has been used considerably for that purpose.

"It is desirable that each State legislature enact enabling laws defining the system used in the State and naming it so that any co-ordinates used can be referred to by name.

. . .

"It is also desirable that a bureau of surveying and mapping be established in each State to administer the co-ordinate system. Such a bureau should be the depository of control-survey data, should disseminate it to the public, and should maintain the monuments. The bureau should be equipped to aid counties, municipalities, and other political subdivisions, to extend the monumentation along the roads and streets. By proper supervision of the work and by careful checking of the results, the bureau would be able to include these surveys in the State system.

"The Committee recommends, therefore, that each State legislature enact an enabling law as described herein and designate by law the establishment of a bureau of surveys either independent of existing State Departments or as a division of an existing department. The necessary appropriations should be made at the same time to start the bureau, to be increased as the work of the bureau results in savings in survey costs and litigation."

This report by a joint committee of two eminent national societies, those of law and civil engineering, is a very convincing indication of the value of coordinate surveying for land boundaries.

Administration of the SPCS is now under the National Oceanographic and Atmospheric Administration (NOAA). Revisions to the SPCS in the State of Washington are contained in Fed. Reg., Vol. 42, No. 57, Saturday, March 24, 1977.[4]

B. The Washington Coordinate System

In Ch. 58.20 RCW, Washington adopted the system of plane coordinates which has been established by the United States Coast and Geodetic Survey (USC&GS) for defining the locations of points on the earth's surface, designating the system within the State of Washington as the "Washington Coordinate System."[5] For purposes of the use of this system, the state is divided into a north zone and a south zone, and in any case in which the Washington Coordinate System is used in a land description, it is to be designated, the "Washington Coordinate System, North Zone," or the "Washington Coordinate System, South Zone."[6] The location of a point in the appropriate zone of this system is to be by reference to an "x-coordinate," giving the position in an east-and-west direction, and a "y-coordinate," giving the position in a north-and-south

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[4]Text in Appendix "D."

[5]RCW 58.20.010.

[6]RCW 58.20.020, see Figure 6.

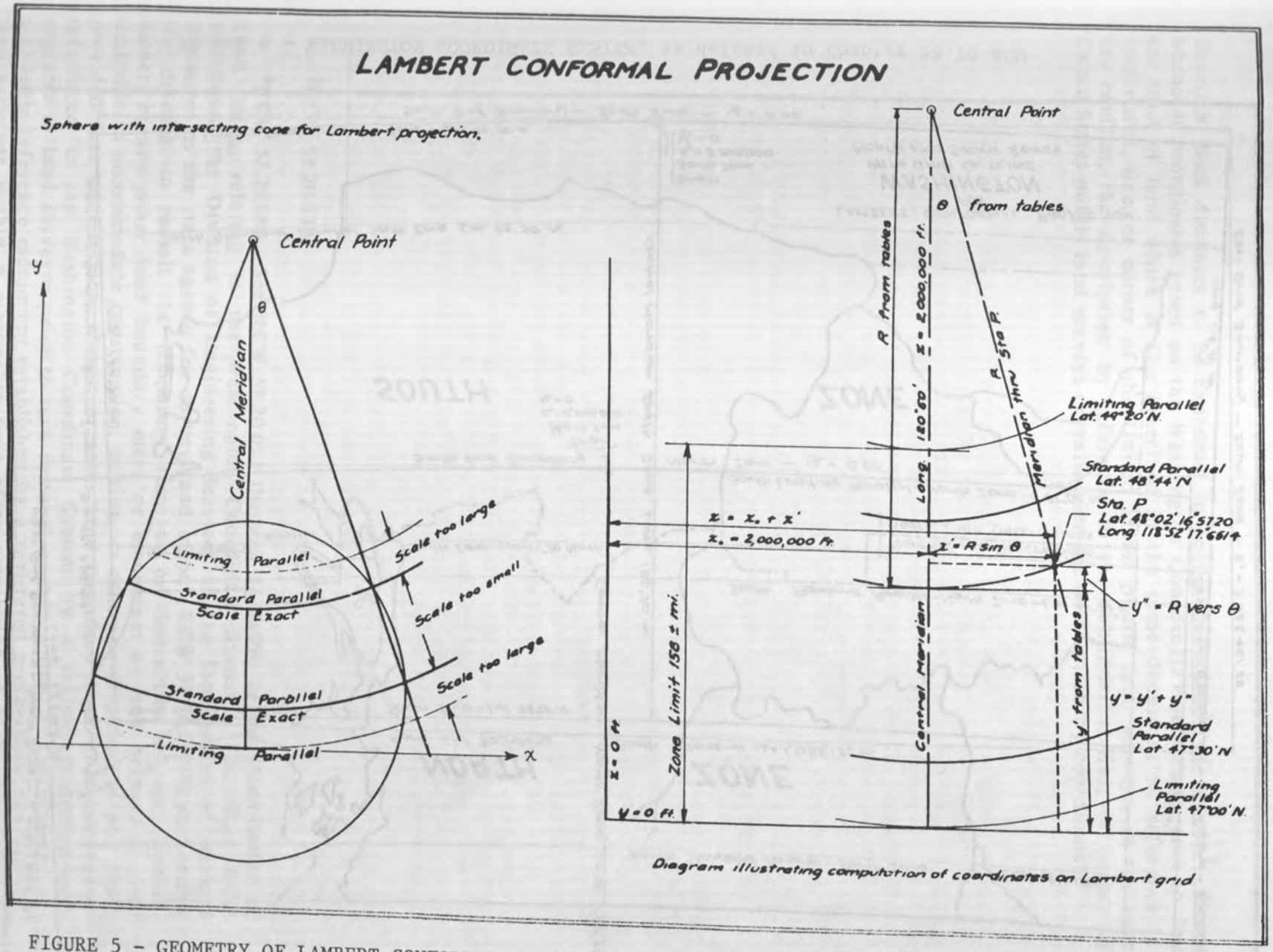

FIGURE 5 - GEOMETRY OF LAMBERT CONFORMAL PROJECTION, AND COMPUTATION OF COORDINATES ON LAMBERT GRID.

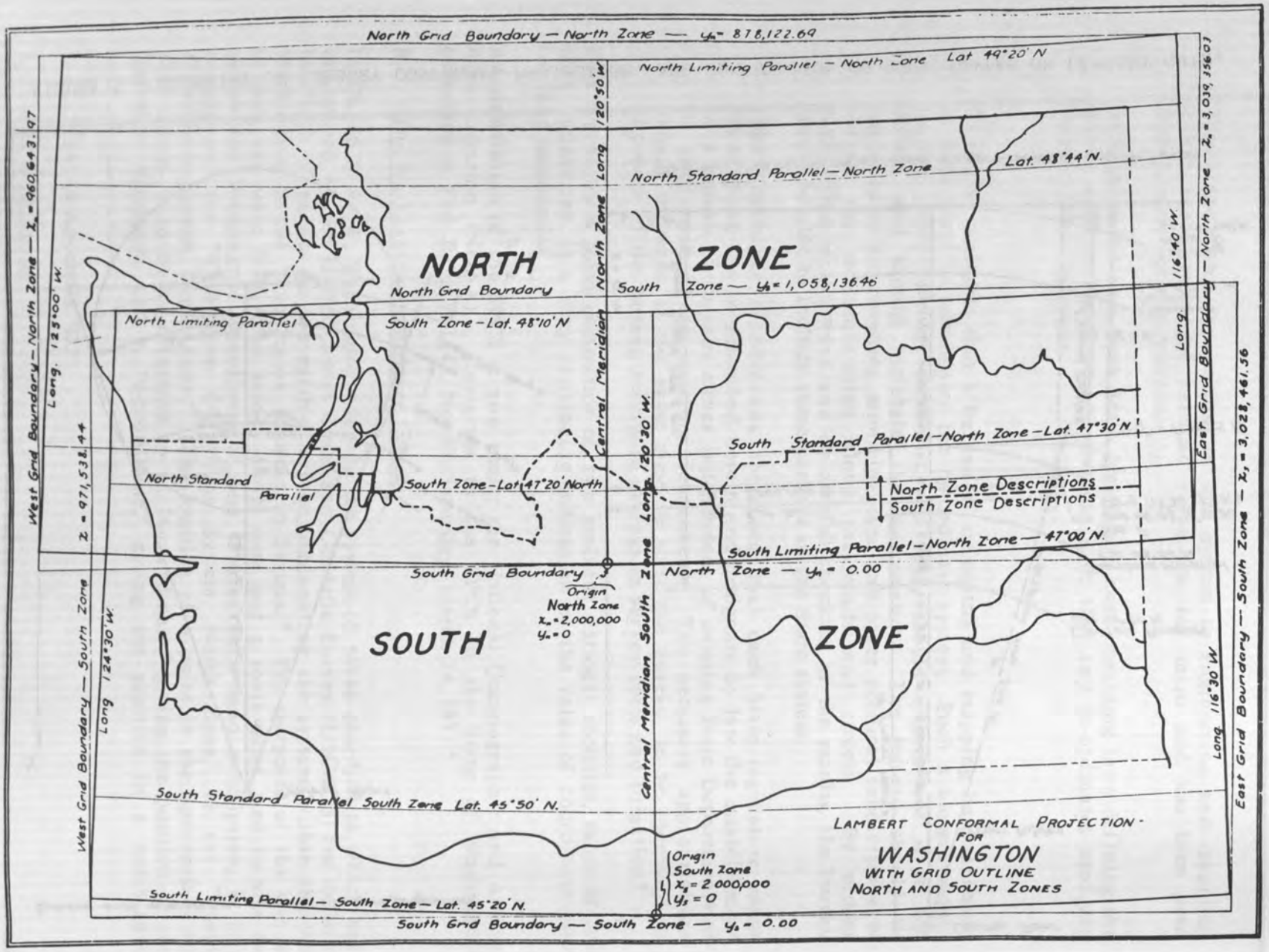

FIGURE 6 - WASHINGTON COORDINATE SYSTEM, as defined in Chapter 58.20 RCW

direction, both distances to be expressed in feet and decimals of a foot.[7] Generally, whenever coordinates based on the Washington Coordinate System are used to describe any tract of land which is also described in the same document by reference to any subdivision, line, or corner of the United States public land surveys, in the event of any conflict, the description by reference to the subdivision, line, or corner of the United States public land surveys prevails over the description by coordinates.[8]

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[7]RCW 58.20.030.

[8]RCW 58.20.080. See RCW 58.20.010 through 58.20.090 in the Compilation of Laws, infra, relating to the Washington Coordinate System. Ch. 58.24 RCW established the Division of Engineering Services of the Department of Natural Resources as the state agency for surveys and maps. RCW 58.24.040(7) authorized the division to permit the temporary removal or destruction of any section, corner, or any other land boundary mark or monument as may be necessary or desirable to accommodate construction, mining, or other development of any land; provided that such section, corner, or other land boundary mark or monument is referenced to the Washington Coordinate System by a registered professional engineer or land surveyor prior to such removal or destruction, and is replaced or a suitable reference monument established by a registered professional engineer or land surveyor within a reasonable time after completion of such construction, mining, or other development.

V

TECHNICAL STANDARDS FOR PROPERTY SURVEYS

Pursuant to Washington state legislation,[1] and consistent with the objectives set forth by the American Congress on Surveying and Mapping (ACSM),[2] the Division of Engineering of the Department of Natural Resources has issued survey standards[3] for land boundary surveys and geodetic control surveys.

The American Congress on Surveying and Mapping adopted Technical Standards for Property Surveys on June 28, 1946, for the use of the ACSM, affiliates, and all other persons who have occasion to use them. They are recommended only and not mandatory. The ACSM authorizes any changes, alterations, amendments, additions, or deletions which may become necessary from time-to-time provided such variations are made with the consent and under the direction of the proper officers or committees of the ACSM. Any or all parts or revisions of these standards may be segregated for particular use in any locality requiring them. Following are recommendations of the ACSM:

A. Land Titles and Location

"Every parcel of land whose boundaries are surveyed by a licensed surveyor should be made conformable with the record title boundaries of such land. The surveyor, prior to making such a survey, shall acquire all necessary data, including deeds, maps, certificates of title, centerline, and other boundary line locations in the vicinity. He shall compare and analyze all of the data obtained, and make the most nearly correct legal determination possible of the position of the boundaries of such parcel. He shall make a field survey, traversing and connecting all available monuments appropriate or necessary for the location, and coordinate the facts of such survey with the predetermined analysis. Not until then shall the monuments marking the corners of such parcel be set, and such monuments shall be set in accordance with the full and most satisfactory analysis obtainable.

"Any descriptions written for conveyance or other purposes, defining land boundaries, shall be complete and accurate from a title standpoint, providing definite and unequivocal identification of the lines or boundaries, and definite recitals as to use or rights to be created through such descriptions. Any form of description, regardless of presence or absence of any or all dimensions, but specifically tying to adjoiners, which fulfills the foregoing conditions, is acceptable. However, such description, insofar as possible, in addition to all necessary ties to adjoiners, should contain sufficient data of dimension, determined from accurate field survey, to enable the description to be completely platted. It is also advisable wherever correct surveys have determined the coordinate values of

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[1]RCW 58.24.040 and 48.17.160(2).

[2]"Technical Standards for Property Surveys," Surveying and Mapping, July-August, 1946, pp. 210-213.

[3]Ch. 332-130 WAC. (See Appendix A.)

boundary corners or monuments recited in a description, to make proper reference thereto in the description by any appropriate recital.

"Any surveys made for purposes other than location of land boundaries need only the ordinary information and data necessary to fix the situs of the work to be done, by one or more ties to some known and accepted title boundary line or corner, together with such other data as may be required to tie the project into adjoining matters appurtenant.

B. Maps

"Every land survey requires a map properly drawn, to a convenient scale, showing all the information developed by the survey; also a proper caption, proper dimensions and bearings or angles, and references to all deeds and other matters of record pertinent to such survey, including monuments found and set.

"If the survey is made for purposes other than land location, then the map should be comformable to the needs of the work authorized to be done, giving all the necessary information in conformity therewith.

"Wherever provided by law or whenever necessary to perpetuate valuable evidence of land line locations, a map of the survey should be recorded in a public office in accordance with the provisions or permissions of the law in the particular state in which the survey is made.

"Every map submitted to a client or presented as a public record must bear the name of the Licensed Surveyor responsible for the work, his official seal or license number, and the date.

C. Coordinate Surveys and Base Triangulation Systems

"The use of the coordinate survey systems of the U.S. Coast and Geodetic Survey and the U.S. Geological Survey is to be encouraged in all states.

"The establishment of secondary triangulation systems tied in and properly related to such coordinate systems is also recommended.

"Wherever available, within reasonable distances,[4] every land survey is to be connected with two or more monuments of the main or secondary triangulation system; and the maps of such survey shall show the correct verified coordinates of such monuments and of at least two of the monumented corners of such survey.

D. Measurements

"Measurement shall be made with instruments capable of attaining the required accuracy for the particular problem involved. All tapes shall be calibrated to government standard for temperature and pull, and all measurements in the category of accuracy of 1 part in 10,000 or greater

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[4]Considered by King County Surveyor's Office to be 1/2 mile (1985).

shall be made, taking into consideration such temperature and pull in the actual field work.

"All transits shall be maintained in close adjustment and the projection of lines shall be made with the system of double centering or proper adjustments made to field readings by predetermined coefficient of error. All angles with a transit shall be determined by the continuous repetition or run-up method, dividing the sum total of the angles by the number of repetitions for the average value of the measured angle.

"All leveling instruments shall be maintained in close adjustment, and the readings of elevations shall be made equal foresights and backsights as nearly as practicable and/or proper adjustment made to field readings by predetermined coefficient of error.

"The minimum accuracy of linear measurements between points shall be 1 part in 10,000 on all property lines of boundary or interior survey. Preliminary or reconnaissance surveys shall maintain an accuracy of not less than 1 part in 5,000, except in those cases where general information only is to be obtained and no precise monumented concerns are to be created.

"In a closed traverse the sum of the measured angles shall agree with the theoretical sum by a difference not greater than 5 seconds per angle, or the sum of the total angles shall not differ from the theoretical sum by more than 90 seconds, whichever is smaller.

"A circuit of levels between precise bench marks or a circuit closed upon the initial bench mark shall not differ more than 0.02 foot multiplied by the square root of the number of miles in the circuit, and in no case to exceed 0.05 foot, except in levels for preliminary or rough stadia control, in which case the allowable error of closure may be 0.10 foot.

"All field measurements must be balanced, both as to angles and distances, so that the dimensions shown on the map of such survey will be mathematically exact; this will permit the proper use of the prorated method in field relocation.

"Bearings or angles on the map shall be given to the nearest 5 seconds; distances to the nearest hundredth foot.

"Accuracy of measurement in triangulation dimensions shall conform with the standards set by the U.S. Coast and Geodetic Survey.

E. Monuments

"The type and position of monuments to be set on any survey shall be determined by the nature of the survey, the permanency required, the nature of the terrain, the cadastral features involved, and the availability of material.

"Monuments set in an inhabited area with improved streets, buildings, and other more or less permanent topographical features, shall be such as will remain for the life of such features and may be set in contact with or

alongside of such semi-permanent structures with reasonable security. Monuments set in open country where their maintenance is to be continued for long periods shall be of a material such as concrete, rock, or metal, of sufficient size that they will not be readily removable and will be easily discoverable; and witness monuments of ready visibility shall be placed alongside or nearby, if necessary.

"Except in the case of original surveys, in which monuments are to be referred to in the record, permanent monuments shall not immediately be placed on lines or in positions where their destruction is more or less immediate by reason of construction; but semi-permanent monuments, such as stakes, pipes, or other material, shall be set in protected spots at definite known distances from the true corners for purpose of location of such corners after construction is completed. The surveyor shall make a definite commitment of record, that he will correctly set such true corners as soon as their permanence in position can be assured.

F. Planning and Design

"No standard is set for planning and design of land line location as to the form and position of such lines. Each particular problem carries its own plan and its own design within itself. A plan acceptable in one locality or under some conditions may not be adaptable in another."

VI

SURVEY RECORDING ACT

The legislature enacted the Survey Recording Act in 1973.[1] The express purpose of this Act is to "provide a method for preserving evidence of land surveys by establishing standards and procedures for monumenting and for recording a public record of the survey."[2]

Every map, plat, report, description, or other document issued by a land surveyor must comply with the Survey Recording Act if it is filed as a public record.[3]

A. When Record Must Be Filed

It is mandatory for a land surveyor to file a record of survey within 90 days after the establishment, reestablishment, or restoration of a corner on the boundary of two or more ownerships or general land office corner. The record is to be filed with the county auditor in the county where the lands surveyed are situated.[4]

It is also mandatory for a land surveyor to file within 90 days with the county auditor a record of monuments and accessories found or placed at the corner location if, while the land surveyor is conducting work of a preliminary nature or other activity that does not constitute a survey required by law to be recorded, he replaces or restores an existing or obliterated general land office corner.[5]

B. Contents of Record

The record of survey, as required by RCW 58.09.040(1), must show the following:[6]

1. All monuments found, set, reset, replaced, or removed, describing their kind, size, and location and giving other relevant data relating thereto;

2. Bearing trees, corner accessories or witness monuments, basis of bearings, bearing and length of lines, scale of map, and north arrow;

3. Name and legal description of tract in which the survey is located and ties to adjoining surveys of record;[7]

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[1]Ch. 58.09 RCW.

[2]RCW 58.09.010.

[3]RCW 58.09.030.

[4]RCW 58.09.040(1).

[5]RCW 58.09.040(2).

[6]RCW 58.09.060(1).

[7]In AGLO 1974 No. 61, the term "legal description" as used in this statute was defined as a "description of land sufficiently definite to locate it without recourse to oral testimony." This is the same standard as that sufficient to meet the requirements of a valid deed of conveyance.

4. Certificates required by RCW 58.09.080;[8]

5. Any other data necessary for the intelligent interpretation of the various items and locations of the points, lines, and areas shown.

The record of corner information, as required by RCW 58.09.040(2), must show the following:[9]

1. An accurate description and location, in reference to the corner position, of all monuments and accessories found at the corner;

2. An accurate description and location, in reference to the corner position, of all monuments and accessories placed or replaced at the corner;

3. Basis of bearings used to describe or locate such monuments or accessories;

4. Corollary information that may be helpful to relocate or identify the corner position;

5. Certificate required by RCW 58.09.080.

Where surveys are performed for the purpose of land subdivision, the Division of Engineering of the Department of Natural Resources has established additional requirements for the contents of the record:

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testimony." This is the same standard as that sufficient to meet the requirements of a valid deed of conveyance.

[8]RCW 58.09.080 Certificates - Required - Forms. Certificates shall appear on the record of survey map as follows:

SURVEYOR'S CERTIFICATE

This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of _____ in _____, 19__.

Name of Person
(Signed and Sealed)_____
Certificate No. _____

AUDITOR'S CERTIFICATE

Filed for record this _____ day of _____, 19____ at _____M. in book _____ of _____ at page _____ at the request of _____.

(Signed)_____
County Auditor

[9]RCW 58.09.060(2). (See Figure 7.)

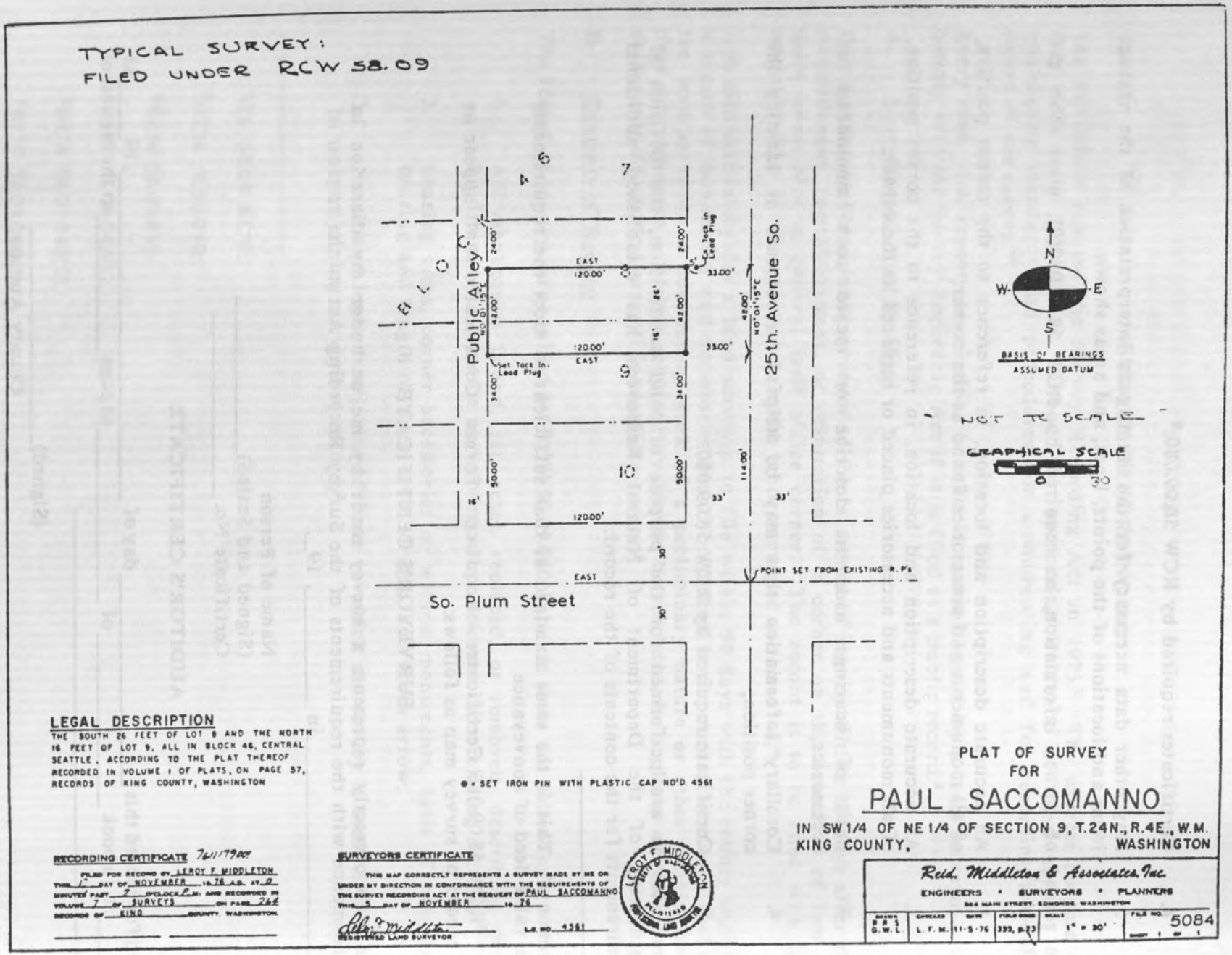

FIGURE 7 - SURVEY PROPERLY DOCUMENTED AND RECORDED.

1. Section subdivision and line data must be shown on the record of survey to the extent necessary to support the position of any subdivisional corner used to reference a surveyed parcel and to justify the location of the parcel boundary therein; except that where a section subdivision is a matter of public record, reference may be made to that record and only so much of the section subdivision as is necessary to properly orient the surveyed parcel need be shown.[10]

2. The documentation of any Government Land Office (GLO) or Bureau of Land Management (BLM) corner shall include at least three substantial references to the corner. A valid set of coordinates on the Washington Coordinate System may serve as one of the three required references.[11]

3. The record of survey shall be a map drawn to a convenient scale such as to satisfy the requirements of the Survey Recording Act and/or Ch. 58.17 RCW relating to platting, subdivision, and dedication of land.[12]

4. Title of survey, deed calls, and references to control monuments, hiatuses (gaps) and/or overlapping boundaries, physical appurtenances (fences, structures, etc.) which may indicate encroachment, lines of possession, or conflict of title.[13]

5. Indexing data block showing section, township, range and, additionally, the quarter(s) of a section in which the surveyed parcel lies, other official subdivisional tract of the GLO or BLM survey, and lot, block, name and number of subdivision with volume and page of recorded plat, if applicable.[14]

C. When Record of Survey Not Required

A record of survey is not required in the following situations:[15]

1. When a survey has been made by a public officer in his official capacity and a reproducible copy thereof has been filed with the county engineer of the county in which the land is located. A record of survey is not required of a survey made by the United States Bureau of Land Management.

2. When a survey is of a preliminary nature.

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[10]WAC 332-130-030(2).

[11]WAC 332-130-030(3).

[12]WAC 332-130-060.

[13]WAC 332-130-060(1)(a-l).

[14]WAC 332-130-060(1)(K-iii).

[15]RCW 58.09.090(1).

3. When a map is in preparation for recording or has been recorded in the county under any local subdivision or platting law or ordinance.

The exemption of a survey from the filing of a record of survey under the above provisions does not exempt a survey from the filing of a record of corner information as required by RCW 58.09.040(2).[16]

D. Processing of Record of Survey

Records of surveys, as required by RCW 58.09.040(1), are to be legibly drawn maps, printed or reproduced by a process guaranteeing a permanent record in black on tracing cloth, or the equivalent. The specified map size is 18 by 24 inches, unless a different size is required by the county auditor, and a 2 inch margin should be provided on the left edge and a 1/2 inch margin on the other edges.[17]

Records of monuments and accessories restored or replaced on a corner location, as required by RCW 58.09.040(2), are to be recorded on a standard form 8-1/2 inches by 14 inches as designed and prescribed by the Bureau of Surveys and Maps.[18]

The county auditor in the county in which the survey is to be recorded should be furnished two legible prints of each record of survey and records of monuments and accessories that are required by the Survey Recording Act. The auditor keeps one copy for his records and sends the second copy to the Bureau of Surveys and Maps in Olympia, Washington.[19]

E. Monument Requirements

The Act requires that any monument set by a land surveyor to mark or reference a point on a property or land line must be permanently marked or tagged with the certificate number of the land surveyor setting it. If the monument is set by a public officer, it must be marked by an appropriate official designation.

Monuments set are to be sufficient in number and durability and are to be placed so as not to be readily disturbed in order to assure, together with existing monuments, the preparation or reestablishment of any point or line of a survey.[20]

When adequate records exist indicating the location of subdivision, tract, street, or highway monuments, those monuments are to be located and referenced by or under the direction of a land surveyor at the time when the streets or highways are reconstructed or relocated, or when other construction or activity affects their perpetuation. If possible, a suitable monument is to be reset in the surface of the new construction. In all other cases, permanent witness monuments must be set to

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[16]RCW 58.09.090(2).

[17]RCW 58.09.050(1).

[18]RCW 58.09.050(2).

[19]RCW 58.09.050(3).

[20]RCW 58.09.120.

perpetuate the location of pre-existing monuments. In addition, sufficient controlling monuments are to be retained or replaced in their original positions to enable land lines, property corners, elevations, and tract boundaries to be re-established without requiring surveys originating from monuments other than the ones disturbed by the current construction or activity.[21]

The governmental agency or others performing the construction work have the responsibility of providing for the monumentation required by RCW 58.09.130. Monuments which are set to mark the limiting lines of highways, roads, or streets are not adequate unless they are specifically noted on the records of the improvement works with direct ties in bearing or azimuth and distance between those and other monuments of record.

F. Noncompliance Penalty

Noncompliance with any provision of the Survey Recording Act constitutes grounds for revocation of a land surveyor's authorization to practice the profession of land surveying.[22]

[21]RCW 58.09.130.

[22]RCW 58.09.140.

VII

PLATTING AND SUBDIVISION

The subdivision of land in the State of Washington is regulated by Ch. 58.17 RCW. The purpose of this law is stated in RCW 58.17.010:

> "The legislature finds that the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state. The purpose of this chapter is to regulate the subdivision of land and promote the public health, safety and general welfare in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other public requirements; to provide for proper ingress and egress; to provide for the expeditious review and approval of proposed subdivisions which conform to zoning standards and local plans and policies; to adequately provide for the housing and commercial needs of the citizens of the state; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description."

While the zoning process determines the general character that property may take, the subdivision process has become the process by which cities and counties regulate its actual development. The layout of streets and property lines, once the primary purpose of subdivision and platting, is now only the beginning of the process. Legislative bodies reviewing subdivision applications are now directed to inquire into a wide variety of characteristics of the subdivision that will affect not only its shape, but the overall general welfare or "quality of life" of the subdivision's future residents. RCW 58.17.110 directs legislative bodies to:

> "...determine if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds, and shall consider all other relevant facts and determine whether the public interest will be served by the subdivision and dedication."

Ch. 58.17 RCW provides exemptions for various types of property divisions, alternative procedures for small or "short" subdivisions, and a lengthy list of procedures to be followed, all of which will be discussed below.

A. Subdivisions Not Subject To Ch. 58.17 RCW

RCW 58.17.040 enumerates the following types of property divisions to which the act does not apply:

> "(1) Cemeteries and other burial plots while used for that purpose;
>
> "(2) Division of land into lots or tracts each of which is one-one hundred twenty-eighth of a section of land or larger, or five acres or larger if the land is not capable of description as a fraction of a section

of land, unless the governing authority of the city, town, or county in which the land is situated shall have adopted a subdivision ordinance requiring plat approval of such divisions: Provided, That for purposes of computing the size of any lot under this item which borders on a street or road, the lot size shall be expanded to include that area which would beounded by the center line of the road or street and the side lot lines of the lot running perpendicular to such center line;

"(3) Divisions made by testamentary provisions, or the laws of descent;

"(4) Divisions of land into lots or tracts classified for industrial or commercial use when the governing body of the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations: Provided, That when a binding site plan authorizes a sale or other transfer of ownership of a lot, parcel, or tract, the binding site plan shall be filed for record in the county auditor's office on each lot, parcel, or tract created pursuant to the binding site plan: Provided futher, That the binding site plan and all of its requirements shall be legally enforceable on the purchaser or other person acquiring ownership of the lot, parcel, or tract: And provided further, That sale or transfer of such a lot, parcel, or tract in violation of the binding site plan, or without obtaining binding site plan approval, shall be considered a violation of chapter 58.17 RCW and shall be restrained by injunctive action and be illegal as provided in chapter 58.17 RCW;

"(5) A division for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land when the governing body of the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations;

"(6) A division made for the purpose of adjusting boundary lines which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site; and

"(7) A division which is made by subjecting a portion of a parcel or tract of land to chapter 64.32 RCW if a city, town, or county has approved a binding site plan for all of such land."

The above exemptions are explained further below -- paragraph numbers correspond to those above:

1. Self-explanatory. Cemeteries are not required to subdivide before selling burial plots.

2. Most cities and towns do not attempt to regulate divisions of property creating lots that are all five acres or larger in size. However, if any single lot in a large lot subdivision is less than five acres in size, subdivision laws would apply.

3. Property divided upon a person's death either by will or through the laws of descent need not be subdivided.

4. A binding site plan is defined in RCW 58.17.020 as "...a drawing to scale specified by local ordinance which: (a) Identifies and shows the areas and locations of all streets, roads, improvements, utilities, open spaces, and any other matters specified by local regulations; (b) contains inscriptions or attachments setting forth such appropriate limitations and conditions for the use of the land as are established by the local government body having authority to approve the site plan; and (c) contains provisions making any development be in conformity with the site plan."

   Local regulations relating to binding site plans must be adopted before the binding site plan procedure may be used to avoid subdivision procedures. Such local regulations must include all of the requirements contained in the above definition of "binding site plan" and in the description of the exemption in RCW 58.17.040(4). This exemption applies only to divisions of land in industrial or commercial zones.

5. Normally, land divided for the purpose of leasing must follow subdivision procedures, even if the property is being divided to be used as a mobile home or trailer park. This exemption allows the binding site plan process to be used for nonresidential property and for property being divided to be used for mobile homes or travel trailers. In order to be effective, the binding site plan regulations should contain all the requirements found in the definition of "binding site plan".

6. Two requirements apply to boundary line adjustments: (1) no additional lot, tract, parcel, site, or division may be created, and (2) no lot, tract, parcel, site, or division may contain insufficient area and dimension to meet minimum requirements for width and area for a building site. Even though boundary line adjustments are exempt from subdivision requirements, many cities require that the city be notified of such adjustments so that property records are kept up to date.

7. Ch. 64.32 RCW is the "horizontal property regimes act" which is the law under which condominiums are developed. This exemption requires that a binding site plan be approved before such property is exempt from subdivision requirements. By implication, condominium projects that have not been developed pursuant to a binding site plan are subject to subdivision procedures.

In addition to the above exemptions, RCW 58.17.050 exempts assessors' plats made in accordance with RCW 58.18.010, except that the requirements of RCW 58.17.240 and .250, relating to requirements for permanent control monuments and surveys must be complied with.

B. Short Subdivisions

A large percentage of all property divisions are processed as short subdivisions. "Short subdivision" is defined in RCW 58.17.020(6) as:

> "...the division or redivision of land into four or fewer lots, tracts, parcels, sites or divisions for the purpose of sale, lease, or transfer of ownership: Provided, That the legislative authority of any city or town

may by local ordinance increase the number of lots, tracts, or parcels to be regulated as short subdivisions to a maximum of nine."

Therefore, any division with up to four lots may be regulated as a short subdivision with each legislative body having the option to raise this number to nine, by ordinance.

Unlike the uniform lengthy procedures of the subdivision process, state law allows for "...the summary approval of short plats and short subdivisions or revision thereof." Cities and towns are directed to adopt regulations and procedures and appoint administrative personnel for such summary procedures. Such regulations must be adopted by ordinance but may:

> "...contain wholly different requirements than those governing the approval of preliminary and final plats of subdivisions and may require surveys and monumentations and shall require filing of a short plat for record in the office of the county auditor: Provided, That such regulations must contain a requirement that land in short subdivision may not be further divided in any manner within a period of five years without the filing of a final plat...."

Cities and towns are free to adopt short subdivision procedures that can range from the minimum required by RCW 58.17.060 to procedures that are nearly as elaborate as the regular subdivision procedure. While "summary approval" procedures can save time and effort for both the applicant and city officials, it should be kept in mind that the health, safety, and general welfare concerns as stated in RCW 58.17.110 for regular subdivisions are equally applicable to short subdivisions. In fact, a 1978 study[1] indicated that more than one-half of the development in the state in 1977 occurred through short subdivisions, and that multiple short platting has been used to circumvent more formal subdivision procedures, making long range planning more difficult. Therefore, short subdivision procedures should insure that concerns such as adequate streets and other necessary improvements are being addressed.

C. Preliminary Plats

Preliminary plats of proposed subdivisions and dedications of land must be submitted for approval to the legislative body of the city, town, or county within which the plat is situated. Unless an applicant for preliminary plat approval requests otherwise, the plat must be processed simultaneously with applications for rezones, variances, planned unit developments, site plan approvals, and similar quasi-judicial or administrative actions to the extent that procedural requirements applicable to these actions permit simultaneous processing.[2]

D. Notice of Filing Preliminary Plat of Proposed Subdivision

Notice of the filing of a preliminary plat of a proposed subdivision located adjacent to, or within one mile of, the municipal boundaries of a city or town, or which contemplates the use of any city or town utilities must be given to the appropriate

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[1]A Survey of Short Platting in Washington Counties, Washington State Planning and Community Affairs Agency, September 1978.

[2]RCW 58.17.070.

city or town authorities;[3] this is true even though the proposed subdivision is located totally within a certain city but is also located within one mile of the municipal boundaries of another city or town.[4]

If the proposed subdivision is located within a city or town and adjoining the municipal boundaries thereof, notice of the filing of the preliminary plat must be given to the appropriate county officials; and, if the proposed subdivision is located adjacent to the right-of-way of a state highway or within two miles of the boundary of a state or municipal airport, notice of the filing of the preliminary plat must be given to the Secretary of Transportation. The Secretary is directed to respond within 15 days of such notice regarding the effect the proposed subdivision will have on the state highway or the state or municipal airport.[5]

Upon receipt of an application for a preliminary plat approval, a date is to be set for a public hearing. Notice of the hearing must be published in a newspaper of general circulation within the county and a newspaper of general circulation in the area where the proposed subdivision is located, and special notice of the hearing is to be given to adjacent land owners by any other reasonable method.[6]

E. Role of Planning Commission or Planning Agency -- Approval of Plats Vested in Legislative Body of City, Town, and County

When a planning commission or agency has been established, the commission or agency is to review all proposed subdivisions and make recommendations thereon to the city, town, or county legislative body to assure conformance of the proposed subdivision to the general purposes of the comprehensive plan and to planning standards and specifications as adopted by the city, town or county. Such recommendations are advisory only. The legislative body may delegate to the commission or agency administrative functions, powers and duties, including the holding of hearings and recommendations for approval or disapproval of preliminary plats.

Recommendations must be submitted to the legislative body not later than 14 days following action by the hearing body. The legislative body at its next public meeting must set a date for a public meeting where the recommendations will be adopted or rejected. If the legislative body decides to make a change in the commission's or agency's recommendations, the legislative body must conduct an additional public hearing before adopting its own recommendations. That hearing may be held before a committee constituting a majority of the legislative body. The legislative body has sole authority to approve final plats, and to adopt or amend platting ordinances.[7] A record of all proceedings must be kept and a failure to enter written findings indicating reasons for denial of an application may be considered arbitrary and capricious.[8]

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[3]RCW 58.17.080.

[4]AGO 1971 No. 9.

[5]RCW 58.17.080.

[6]RCW 58.17.090.

[7]RCW 58.17.100.

[8]Johnson v. City of Mt. Vernon, 37 Wn. App. 214, 679 P.2d 405 (1984).

A county, city or town may adopt an ordinance providing for the administrative review of a preliminary plat without a public hearing by adopting an ordinance providing for such administrative review. Before such an administrative process may be followed, notice requirements in addition to those of RCW 58.17.090 must be followed. Any person has a period of 20 days from the date of notice to comment upon the proposed preliminary plat. A public hearing must be held on the proposed subdivision if any person files a request for a hearing with the county, city, or town within 21 days of the publishing of such notice. If such a hearing is requested, usual procedures for a hearing before a planning commission or hearings officer must be followed.[9]

As an alternative to provisions requiring a planning commission to hear and issue recommendations for plat approval, a county or city legislative body may adopt a hearing examiner system. The legislative body shall specify whether the decision of a hearing examiner is to be given the effect of a recommendation to the legislative body or given the effect of an administrative decision appealable within a specified time limit to the legislative body.[10]

Preliminary plats of any proposed subdivision must be approved, disapproved, or returned to the applicant for modification or correction within 90 days from the date of filing unless: (1) the applicant consents to an extension, (2) the 90-day limitation is extended to include up to 21 days pursuant to procedures for administrative review, or (3) an environmental impact statement is required. When an environmental impact statement is required, the 90-day period will not include the time spent preparing and circulating the environmental impact statement by the local government agency.

F. Factors to be Considered in Approving or Disapproving Plat

As mentioned earlier in this chapter, the city, town or county legislative body must inquire into the public use and interest served by the proposed subdivision. The legislative body must determine if appropriate provisions are made for, but not limited to:

> "...the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds, and shall consider all other relevant facts and determine whether the public interest will be served by the subdivision and dedication."[11]

As will be seen later in this chapter, legislative bodies may require dedication of land to any public body as a condition of subdivision approval and such dedications should be clearly shown on the final plats. A condition that a release from damages be procured from owners of property outside the plat cannot be required.[12]
Plats may be disapproved because of flood, inundation, or swamp conditions. Construction of protective improvements may be required as a condition of approval, and no plat may be approved covering any land situated in a flood control zone

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[9]RCW 58.17.095.

[10]RCW 58.17.330.

[11]RCW 58.17.110.

[12]RCW 58.17.110.

without prior written approval of the Department of Ecology of the State of Washington.[13]

G. Dedications

RCW 58.17.110 provides:

> "Dedication of land to any public body, may be required as a condition of subdivision approval and shall be clearly shown on the final plat. The legislative body shall not as a condition to the approval of any plat require a release from damages to be procured from other property owners."[14]

A 1982 amendment to RCW 82.02.020 created a new limitation on the authority to require dedications. The amendment prohibited taxes, fees, or charges to be imposed upon the development, subdivision, classification, or reclassification of land. The amendment then provided:

> "However, this section does not preclude dedications of land or easements pursuant to RCW 58.17.110 within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply."

The amendment more severely limited the practice of requiring payments in lieu of a dedication of land. Such payments must now be pursuant to "voluntary agreements" and are subject to the following provisions:

> "(1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact; (2) The payment shall be expended in all cases within five years of collection; and (3) Any payment not so expended shall be refunded with interest at the rate applied to judgments to the property owners of record at the time of the refund; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest."

The amendment further requires the county, city or town to establish that any such payment "...is reasonably necessary as a direct result of the proposed development or plat."

H. State Environmental Policy Act

In some cases it will be necessary to file an environmental impact statement before a

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[13]RCW 58.17.120.

[14]In AGO 1970 No. 1, it was concluded that "other property owners" is to be interpreted to mean persons owning interest in lands outside of the subdivision. Consequently, only those persons having an interest in the lands subdivided are required to file waivers of claims for damages by RCW 58.17.165.

preliminary plat may be approved. In Loveless v. Yantis,[15] the court held that the issuance of a preliminary approval to the respondents' plat constituted a "major action" significantly affecting the environment so as to require an environmental impact statement. The court noted that preliminary plat approval is an early step in the actual development of the project, but still required that the environmental concerns raised by the plat be reviewed. The project in Loveless involved multi-family condominiums and it was unchallenged that the project would significantly affect the environment. The preliminary approval of the plat was held to be a major action because it involved a discretionary, non-duplicative stage of governmental action.

In Norway Hill Preservation and Protection Association v. King County Council,[16] the court also held that an environmental impact statement was required before approval of a preliminary plat for a project that would transform a heavily wooded and unpopulated area into a residential suburban neighborhood. The court emphasized the magnitude of the project, which involved 52 acres and 198 lots and also noted generally that:

> "Procedural requirements of SEPA, which are merely designed to provide full environmental information, should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."[17]

And in Swift v. Island County,[18] the determination by the county planning director that no impact statement was required for the approval of two shoreline plats for a development in Keystone Harbor, Whidbey Island, was challenged. The court noted that Crocket Lake, which is a wildlife refuge for a large number and variety of birds, would be adversely affected by the development and also noted that the area was of major historical and recreational significance. Using the "clearly erroneous" standard of review, the court then determined that an environmental impact statement should have been required prior to plat approval. Although it is not yet certain in all situations whether or not an environmental impact statement is required, these cases provide some indication as to when such a statement must be filed in order to obtain preliminary plat approval.

I. Final Plat Approval

Final plat approval is to be given when the legislative body finds that the subdivision as constructed conforms to all terms of the preliminary plat approval and in addition meets the requirements of other applicable state and local laws which were in effect at the time of preliminary plat approval.[19] In lieu of the completion of actual construction of required improvements, the legislative body may accept a bond or other

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[15]82 Wn.2d 754, 513 P.2d 1023 (1973).

[16]87 Wn.2d 267 (1976).

[17]87 Wn.2d 267, 278 (1976).

[18]87 Wn.2d 348 (1976).

[19]RCW 58.17.170.

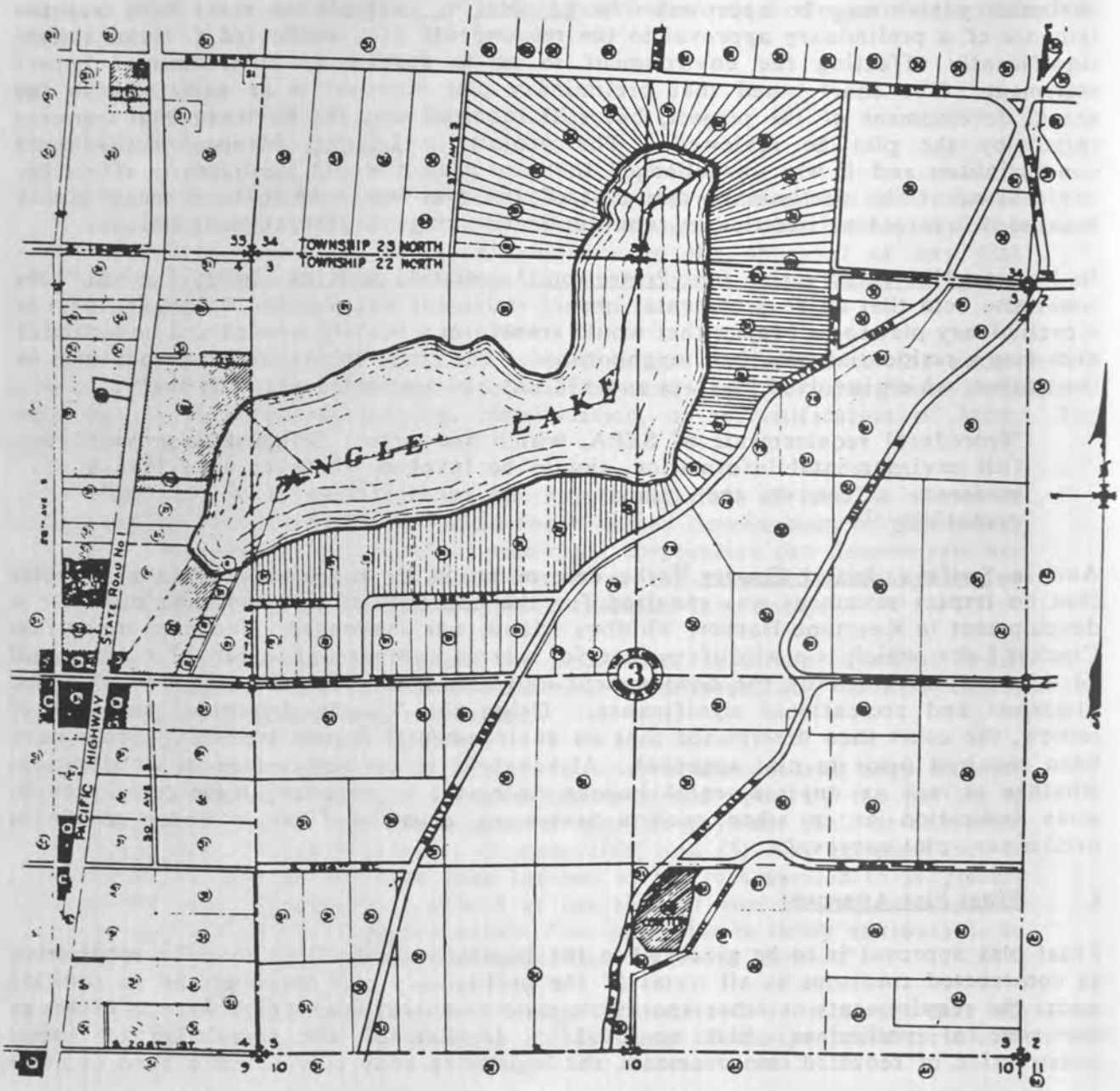

FIGURE 8 - WRONG TYPE OF PLAT. Property lines cannot be located. If lake is lowered, extension of lot lines is subject to theoretical methods and some unhappy results.

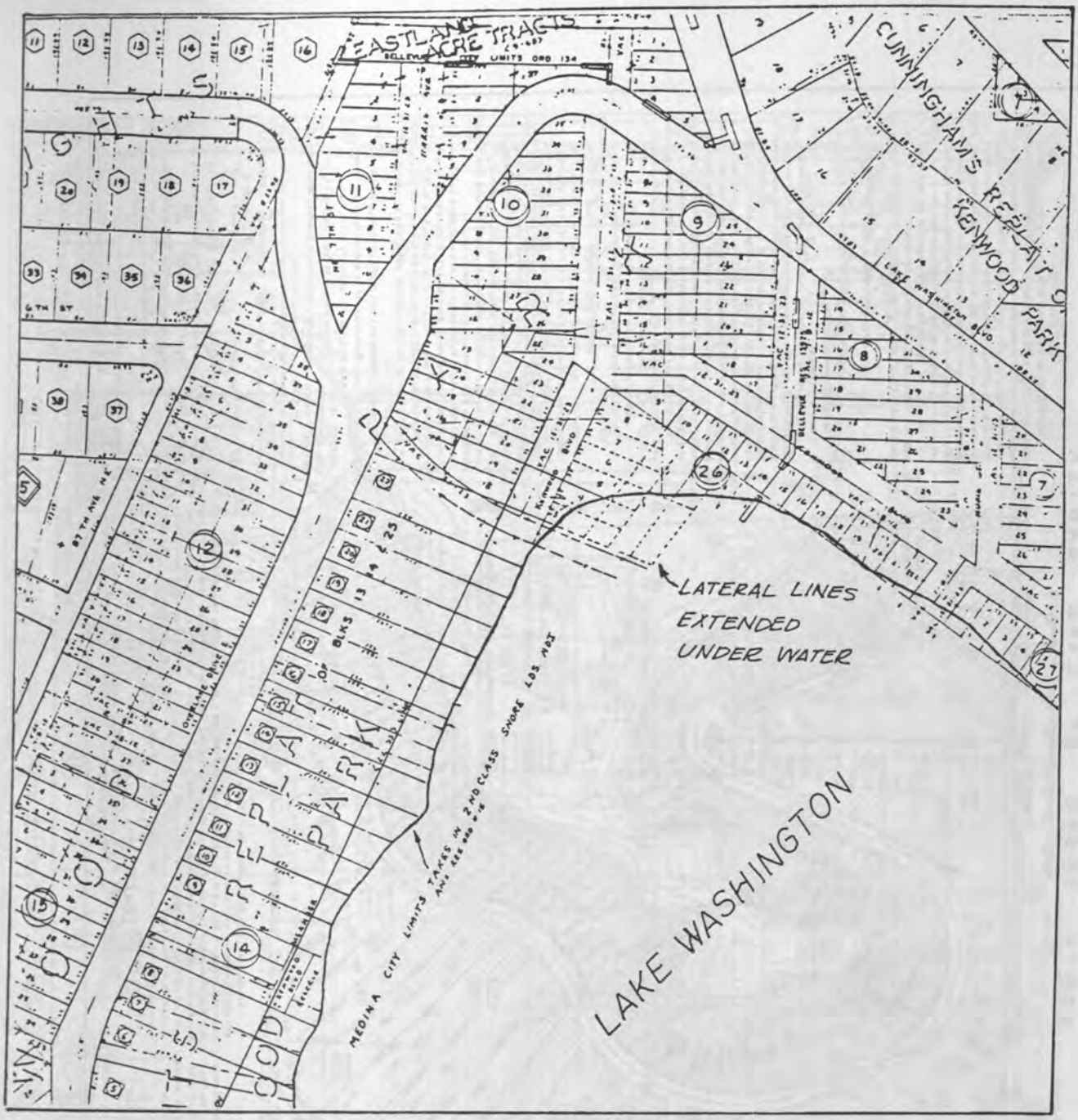

FIG. 9 SHORELANDS LOCATION UNKNOWN. Conflicts between neighbors arise if wharves are to be built in cove which shows lateral lines crossing. Lateral lines should have been extended using the procedure illustrated in Fig. 18a, however no line of navigability has been established.

Reviser's note: While the errors of decades ago still plague us at times, present standards, procedures and review processes have gone far in avoiding new problems.

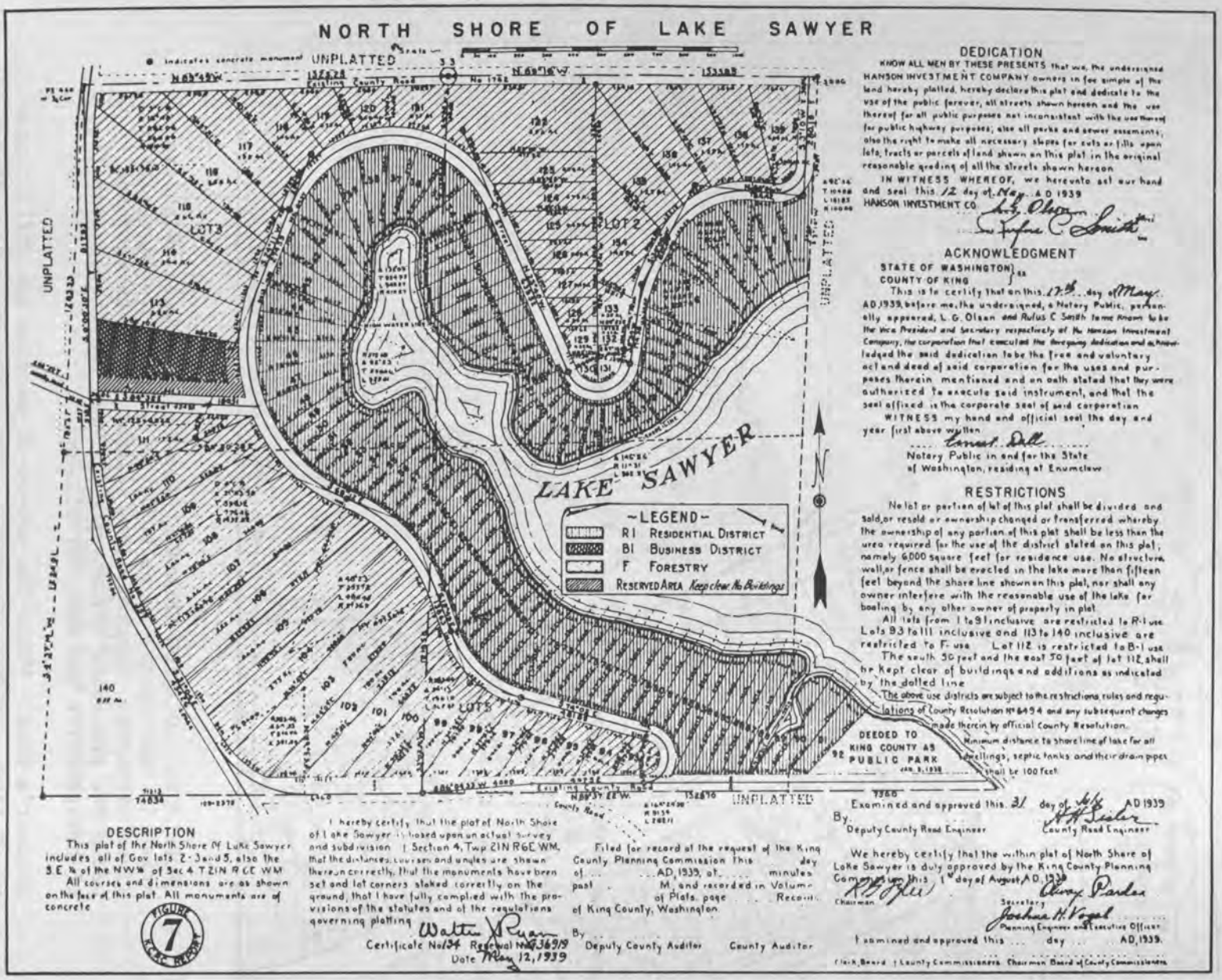

FIGURE 10 - COMPLETE PLAT, including dedication of lake to public use. Property staked out on shoreline can be located, and if water vanishes, land under water becomes public recreation area.

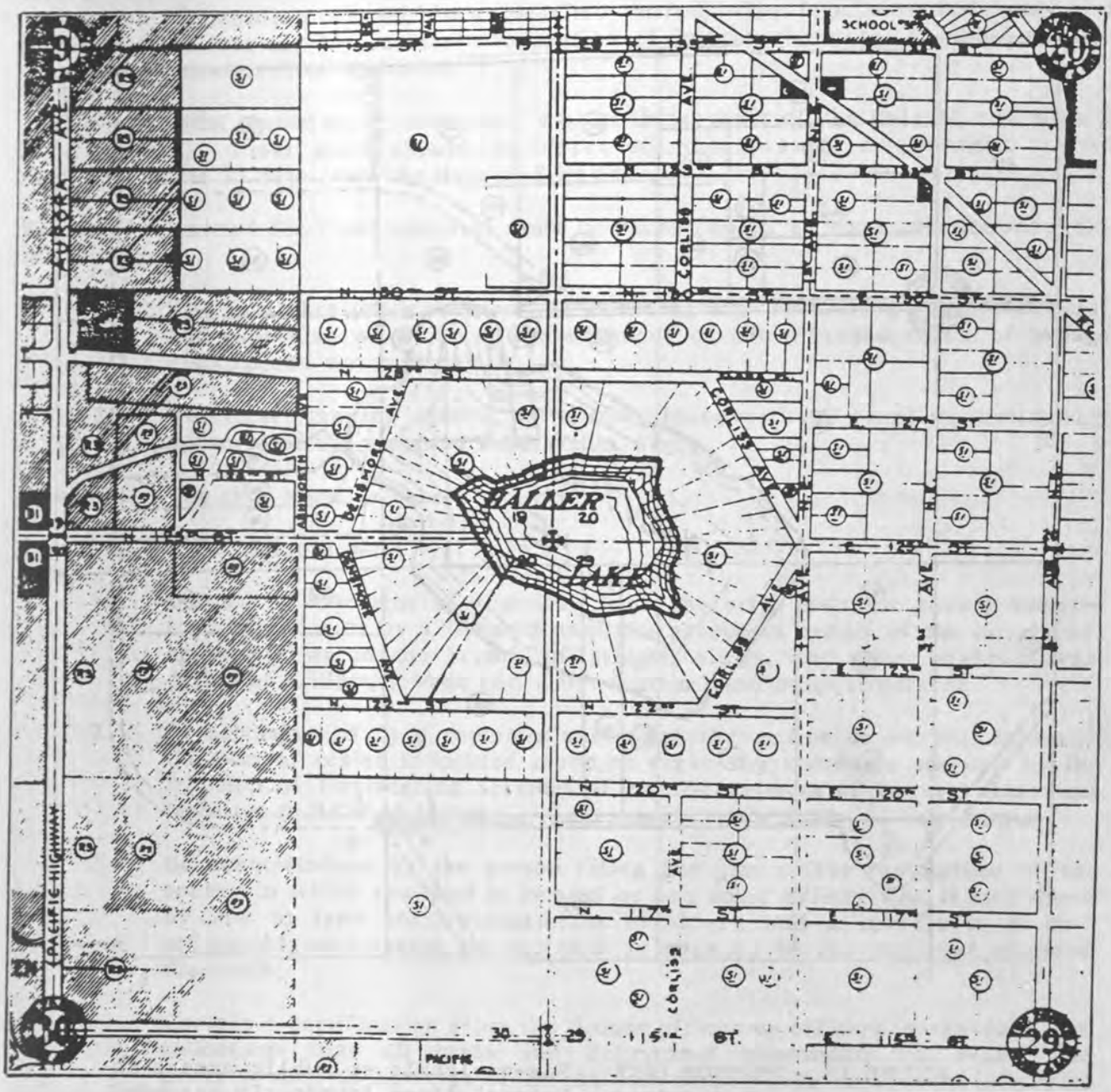

FIGURE 11 - HALLER LAKE. Lots located but use of street ends and lake indefinite. Ownership of land under lake assumed to be public, but is in considerable doubt. Dedication of street ends extends into lake indefinitely.

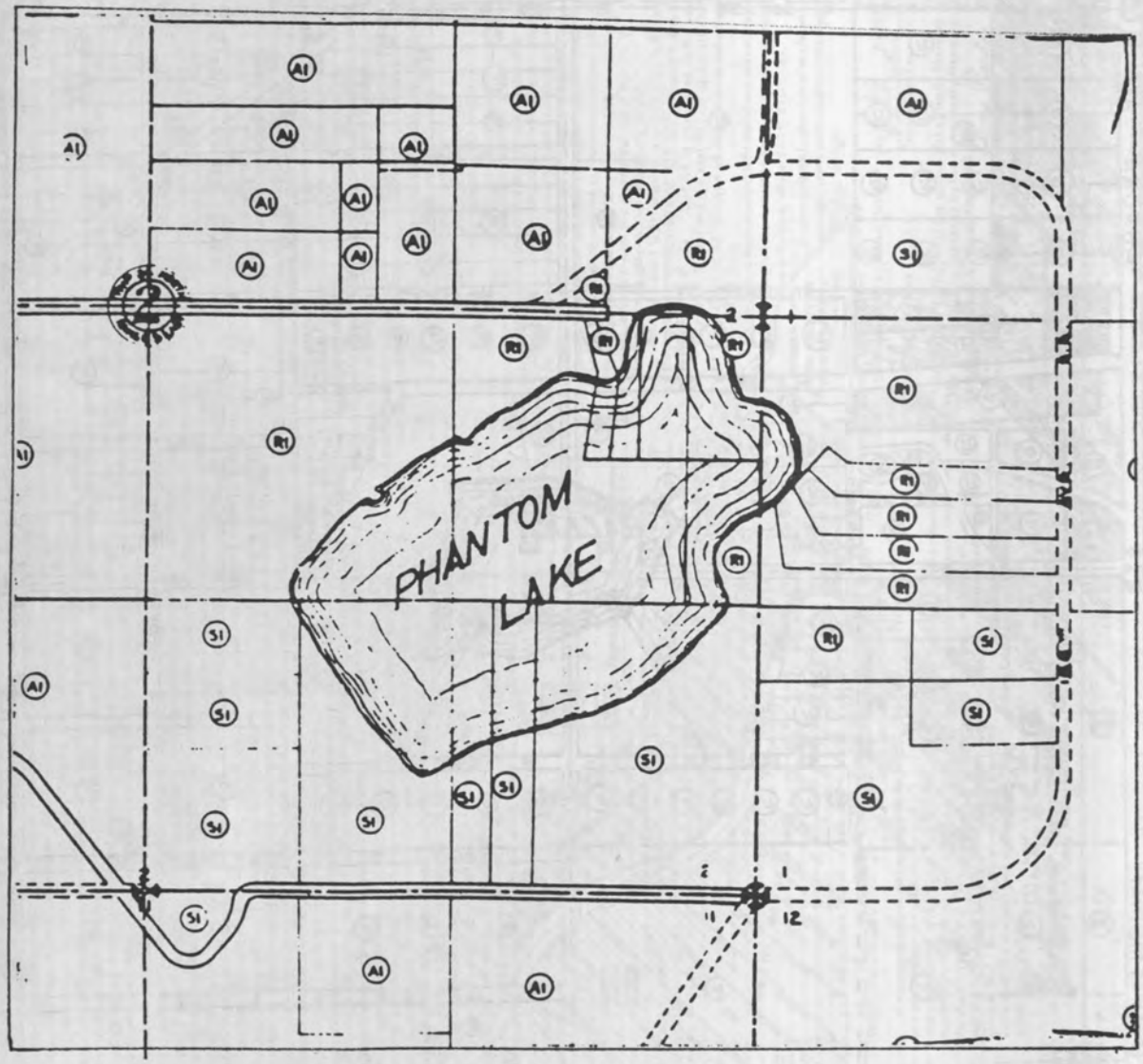

FIGURE 12 - PHANTOM LAKE. Non-navigable so public access is not required. Lateral lines improperly extended as property lines resulting in disproportionate relation between lake surface and abutting properties.

secure method which will provide for and secure the actual construction and installation of improvements within a specified period. The legislative body may also require a bond securing the successful operation of improvements for a period of time up to two years after final approval.[20]

Normally, a final plat must be submitted within three years of the date of preliminary plat approval. Final plats should be approved, disapproved, or returned to the applicant within 30 days from the date of filing.[21]

Each plat submitted for final approval must be accompanied by recommendations from the following:

1. The local health department or other agency furnishing sewage disposal and supplying water, as to the adequacy of the proposed means of sewage disposal and water supply.

2. The local planning agency, as to compliance with all terms of preliminary approval of the proposed subdivision, and

3. The city, town, or county engineer.[22]

Every plat filed for record must:

1. Contain a statement of approval from the city, town, or county licensed road engineer or by a licensed engineer acting on behalf of the city, town, or county as to the layout of streets, alleys, and other rights-of-way, design of bridges, sewage and water systems, and other structures;

2. Be accompanied by a complete survey of the section or sections in which the plat or replat is located made to surveying standards adopted by the Division of Engineering Services of the Department of Natural Resources pursuant to RCW 58.24.040;

3. Be acknowledged by the person filing the plat before the auditor of the county in which the land is located or any other officer who is authorized by law to take acknowledgements of deeds, and a certificate of said acknowledgement must be enclosed or annexed to the plat and recorded therewith;

4. Contain a certification from the proper officer or officers in charge of tax collections that all taxes and delinquent assessments for which the property may be liable as of the date of certification have been duly paid, satisfied, or discharged.[23]

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[20]RCW 58.17.130.

[21]RCW 58.17.140.

[22]RCW 58.17.150.

[23]RCW 58.17.160.

In addition every final plat or short plat filed for record must contain a certificate giving a full and correct description of the lands divided as they appear on the plat and include a statement that the subdivision has been made with the free consent and in accordance with the desires of the owner or owners. If the plat is subject to a dedication, the certificate or separate written instrument shall contain the dedication of all streets and other areas to the public and to other individuals, religious societies, or corporations and contain a waiver of all claims for damages against any governmental authority which may be occasioned by construction, drainage, and maintenance of the street or road. The certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

Every plat or short plat containing a dedication filed for record must be accompanied by a title report confirming that the title of lands as described and shown on the plat is in the name of the owner signing the certificate or instrument of dedication. An offer of dedication may include a waiver of right of direct access to any street from any property. Such a waiver may be required by local authorities as a condition of approval. Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation, or grant as shown on the plat will be considered to all intents and purposes as a quitclaim deed.[24]

A dedication of property which fails to follow formalities of execution and reporting may still be determined to be a "common law" dedication. Sweeten v. Kauzlarich, 38 Wn. App. 163, 684 P.2d 789 (1984).

When the legislative body finds that the plat meets all requirements, it must suitably inscribe and execute its written approval on the face of the plat. The original of the plat is then filed for record with the county auditor. The auditor should furnish a copy to the city and to the county assessor. Lots within a final plat filed for record are exempt from changes in zoning laws for a period of five years from the date of filing and the subdivision shall be governed by the terms of the final plat and statutes, ordinances, and regulations in effect at the time of approval by the local health department and city, town, or county engineer for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.[25]

Before a plat or short plat may be approved, the legislative body must make a formal written finding of fact that the proposed subdivision is in conformity with applicable zoning ordinances and other land use controls which may exist.[26]

Lots within a preliminary plat may be sold, leased, or otherwise transferred before final plat approval if the transfer is expressly conditioned on the recording of the final plat, and all payments on account of such an offer or agreement are deposited in an escrow or other regulated trust account. No disbursement to sellers may be permitted until the final plat is recorded.[27]

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[24]RCW 58.17.165.

[25]RCW 58.17.170.

[26]RCW 58.17.195.

[27]RCW 58.17.205.

The survey of the proposed subdivision and preparation of the plat must be made by or under the supervision of a registered land surveyor who is to certify on the plat that it is a true and correct representation of the lands actually surveyed. Recommendations pertaining to requirements of survey, monumentation and plat drawings for subdivisions and dedications throughout the State of Washington are to be made by a joint committee comprised of representatives from cities, counties, the Land Surveyors Association of Washington, and the Consulting Engineers Association of Washington; and those recommendations are to be published by the Department of Natural Resources.

J. Penalties

Any person who attempts to sell or transfer divided property in violation of the subdivision law or any local regulations is guilty of a gross misdemeanor for each sale, offer for sale, lease, or transfer of each separate lot, and may be enjoined and restrained from any such sales, transfers, or offers of sale and be compelled to comply with subdivision requirements by the prosecuting attorney.[28] Building permits and other development permits should not be issued for any lot divided in violation of subdivision laws and local regulations unless the authority authorized to issue the permit finds that the public interest will not be adversely affected thereby.[29] This prohibition does not apply to an innocent purchaser for value without actual notice. Purchasers may recover damages from any person, firm, corporation, or agent selling or transferring land in violation of subdivision laws and local regulations including any amounts reasonably spent as a result of inability to obtain a development permit and to conform to the requirements of subdivision laws as well as the cost of investigation, suit, and reasonable attorneys fees. A purchaser, as an alternative, may rescind the sale or transfer and recover costs.

Any person violating a court order or injunction issued pursuant to subdivision laws is subject to a fine of not more than $5,000 or imprisonment for 90 days or both.[30] The prosecuting attorney may accept assurance of discontinuance of any violations of subdivision laws.[31] The assurance must be in writing and filed with the superior court. Whenever land within a subdivision is used in a way which violates any provision of subdivision laws or local regulations or any term or condition of plat approval the prosecuting attorney, or the Attorney General if the prosecuting attorney fails to act, may commence an action to restrain and enjoin such use and compel compliance with the provisions of the subdivision laws and local regulations.[32]

All cities, towns, and counties are required to establish procedures to provide reasonable advance notice of proposals to adopt, amend, or repeal subdivision ordinances.

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[28]RCW 58.17.200 and .300.

[29]RCW 58.17.210.

[30]RCW 58.17.220.

[31]RCW 58.17.230.

[32]RCW 58.17.320.

K. Unrecorded Plats

The following suggestions, and discussion of applicable statutes, were first published nearly 40 years ago in the document[33] on which this report is based. While much has been achieved to date in identifying and recording previously unrecorded plats, some still exist. Where unrecorded plats do exist, the discussion and suggestions are still valid.

1. In the case of an unrecorded plat, when no sales have been made, the owner will be prevented from recording such plat if it does not comply with the present regulations and will be compelled to make any necessary changes to insure such compliance, even to making an entire layout in some cases.

2. On the other hand, in the case of an unrecorded plat which conformed to former standards and in which sales have been made in the past and recorded by metes and bounds description, it manifestly would be unfair to the individual lot owners to make too extensive a change in the general platting scheme from which their lots were selected, even though there might be legal grounds to sustain such action.

3. RCW 58.08.010 requires that any person who lays off any town shall, previous to the sale of any lots within such town, cause a plat of said town to be recorded. This statute applies only to the original platter of the town, and any owner of a lot other than the original platter in an unrecorded plat does not have to record the plat prior to the sale thereof.[34]

4. In view of the decision in Opsjon v. Engebo, supra, an unrecorded plat in which bona fide sales have been made, must be recorded as staked and mapped insofar as those sales are concerned, but excluding the sold lots from the new plat to be recorded, unless these owners are willing and can be prevailed upon to join in on the new plat.

5. Any common law dedicated roads and any roads shown on the unrecorded plat would have to be considered in their present location and cannot be changed without consent of, or perhaps quitclaim deeds from, the owners of the lots already sold. Thus, in Seattle v. Hill,[35] the State Supreme Court of Washington observed that "Upon acceptance, the dedication became complete and irrevocable, and the dedicator and his grantees were thereafter precluded from asserting any ownership in the land inconsistent with its use as a public street."

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[33]Vogel, Joshua H., et al., Surveys, Subdivision and Platting, and Boundaries, University of Washington, Bureau of Governmental Research and Services, June 1949, p. 22.

[34]Opsjon v. Engebo, 73 Wash. 324, 131 Pac. 1146 (1913).

[35]23 Wash. 92, 99, 62 Pac. 446 (1900).

6. The platter can only record his land as he has no control over the roads shown on the plat.[36]

7. Control of the proper area for a place of habitation, or the size of the area which would allow for the proper placing of underground sanitary sewage disposal systems, or other regulations, can be exercised under zoning regulations or deed restrictions.

RCW 84.04.170, which relates to platting irregular tracts, has some very useful features to help make possible the recording of unrecorded plats. It makes the cost, however, largely one to be borne by the county.

It is desirable that some funds be budgeted annually to continue the process of completing the recording of unrecorded plats and irregular tracts of land.

For the surveyor who encounters an unrecorded plat, it is well to remember that most jurisdictions have now adopted policies and regulations pertaining thereto. In addition to following statutory procedures, he should become acquainted with the regulations of the local (county, city) office having jurisdiction.

[36]Seattle v. Hill, supra.

VIII

LAND DEVELOPMENT ACT

The Land Development Act of 1973,[1] which became effective January 1, 1974,[2] is essentially a public disclosure act. The Act requires full and complete disclosure of pertinent information concerning a land development to prospective purchasers, including any encumbrances or liens which might attach to the land and the physical characteristics of the development and the surrounding land. The Act provides for a program of state registration and regulation of the sale and offering for sale of any interest in significant land developments within or without the State of Washington so that prospective purchasers will be provided with full, complete, and accurate information in the form of a public offering statement and all pertinent circumstances affecting their purchase.[3]

A. Applicability of Act

The provisions of the Land Development Act basically apply to developments involving the sale of more than ten separate lots in a 12 month period, unless one of the exceptions contained in the Act applies to the land. RCW 58.19.030 exempts numerous types of land offerings and developments from the provisions of the Act. Among the more important exemptions are the following:

1. All of the lots are sold in a single transaction to a purchaser;

2. There are fewer than 10 separate lots offered by a person in a period of 12 months;

3. Each lot in the development consists of five acres or more;

4. A building is on each lot in the development or the seller is legally obligated to construct a building on each lot within two years from the date of sale;

5. Either the developer will build on each lot or the developer will sell lots only to persons who will build on each lot;

6. A development is located entirely within an area incorporated prior to January 1, 1974.[4]

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[1]Ch. 58.19 RCW. Ch. 12, Laws of 1973, 1st Ex. Sess.

[2]RCW 58.19.930.

[3]RCW 58.19.010.

[4]In AGLO 1976 No. 75, the Attorney General concluded that this exemption (RCW 58.19.030(1)(f)), applies only to land that was situated within an incorporated municipality when the land development act took effect on January 1, 1974. Therefore, the exemption does not apply to land that is annexed to a city after the effective date of the act or land that is incorporated into a new city or town after the effective date of the act.

There is also a waiver provision whereby the Director of the Department of Licensing may waive the provisions of the Act for a development of 25 or fewer lots if the Director determines that the plan of promotion and disposition is primarily directed to persons in the local community where the development is situated.[5]

If each lot in the development is included in a final plat approved prior to January 1, 1974, or if the development is registered with the Interstate Sales Full Disclosure Act, and registration was granted prior to January 1, 1974, the provisions of the Land Development Act do not apply.[6]

B. Registration Requirements

Unless RCW 58.19.040 or one of the exemptions of RCW 58.19.030 applies, no person may offer or dispose of any interest in a land development until it is registered in accordance with the other provisions of the Act. This application for registration must be submitted to the Director of the Department of Licensing, who then enters an order either registering the development or rejecting the registration.[7]

The required contents of the application for registration are outlined in RCW 58.19.060 and include, among other requirements, the following documents and information:

1. An irrevocable appointment of the Director of the Department of Licensing to receive services of process;

2. A legal description of the development offered for registration, together with a map showing the division proposed or made, and the dimensions of the lots, and the relation of the development to existing streets, roads, and other off-site improvements;

3. The states or jurisdictions in which an application for registration has been filed, and any adverse order or judgment entered in connection with the development by the regulatory authorities in each jurisdiction or by any court;

4. The name and address of each person having an ownership interest of 5% or more in the development, together with the names, principal occupations, and addresses of every officer, director, partner, or trustee of the developer;

5. A statement of the existing provisions for access, sewage disposal, potable water, and other public utilities in the development; a statement of the improvements to be installed, how they are going to be financed, and the schedule for their completion; and a statement as to the provision for improvement maintenance, including certificates from the appropriate

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[5]RCW 58.19.040.

[6]RCW 58.19.910.

[7]In RCW 58.19.080 and 58.19.090 the factors for the Director of the Department of Licensing to consider in examining an application for registration are outlined along with the procedural timetable for rejecting or accepting the application.

governmental authorities certifying that the applicant has complied with all local health and planning and state and local subdivision requirements;

6. A statement of the condition of the title to the development, including easements of record, encumbrances, liens of record, blanket encumbrances, and the existence of partial release clauses, if any;

7. Copies of the contracts and other agreements which a purchaser will be required to agree to or sign;

8. If the development is encumbered by a blanket encumbrance which does not contain an unconditional release clause, then a statement as to which alternative condition provided for in RCW 58.19.180 the developer will adopt;

9. Copies of instruments creating easements, restrictions, or other encumbrances affecting the development;

10. A statement of the zoning and other governmental regulations, including existing or proposed taxes or assessments, which affect the development;

11. A narrative description of the promotional plan for the disposition of the development, together with copies of all advertising material which has been prepared for public distribution;

12. A statement of any hazard on or around the development;

13. The proposed public offering statement;

14. Any other information which the Director of the Department of Licensing requires for the protection of purchasers.

The proposed public offering statement (also called the property report) is one part of the application for registration. This public offering statement must be given to every prospective purchaser who visits the development site or who participates in a vacation or dinner program.[8]

A contract for the purchase of an interest in a development is voidable at the option of the purchaser if he or she was not given a current public offering statement in advance or at the time of signing. If the prospective purchaser has received a public offering statement less than 48 hours before signing the contract, he or she may revoke any such contract within 48 hours (the 48 hour period does not include Saturdays, Sundays or holidays). The notice of revocation must be in writing and delivered to the developer or his agent.[9]

The required contents of the public offering statement are outlined in RCW 58.19.070, and include the following information:

1. The name and principal address of the developer;

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[8]WAC 308-126C-090(5).

[9]RCW 58.19.050.

2. A general description of the development, stating the total number of lots;

3. The significant terms of any encumbrances, easements, liens, and restrictions, including zoning and other regulations affecting the development, and a statement of all existing taxes and existing or proposed special taxes or assessments which affect the development;

4. A statement of the use for which the property is offered;

5. Information concerning improvements, including streets, potable water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, customary utilities, and recreational facilities;

6. A statement of any hazard on or around the development;

7. Additional information required by the Director of the Department of Licensing to assure full and fair disclosure to prospective purchasers.

RCW 58.19.185 makes it unlawful for the developer to sell a lot or parcel within a development if the terms of the sale require that the purchaser pay any sum in addition to the purchase price of constructing, completing, or maintaining improvements to the development unless the sums are to be paid directly to:

1. A governmental agency;

2. A person who is not affiliated with the developer, in trust, and on terms acceptable to the Director of the Department of Licensing; or

3. An association comprised solely of persons who have purchased lots in the development, or their assignees.

The terms which require the payment of any additional sum must be set forth in the public offering statement.

C. Reporting Requirements

The developers of a registered development must submit quarterly reports and a final report.[10] The quarterly report should contain a list of all persons who agreed to purchase a lot and a list of purchasers who subsequently withdrew or attempted to withdraw from the agreement. Also in the quarterly report should be a statement of the escrow agent, copies of receipts of bond premiums paid during the quarter, and information concerning progress toward completion of improvements or amenities.

The final report is due when all lots have been sold or the developer is no longer subject to the Act. The final report must contain an affidavit of the date of termination of the obligation to report and the reason for such termination.

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[10]The reporting requirements are contained in the provisions of WAC 308-126B-130.

At the time of registration, copies of advertising material to be used to promote the development must be approved.[11] Subsequently, any material changes in the approved advertising are to be submitted to the Director of the Department of Licensing at least 15 days prior to its proposed date of use. Before approving any advertising, the Director of the Department of Licensing will determine whether the express and implied representations are true and make a full and fair disclosure as to all developed lands.[12]

D. Registration Under Federal Act

A developer who is required to be registered under the Federal Interstate Land Sales Full Disclosure Act (15 USC Sections 1701-1720) must still register under the State Land Development Act.[13] However, a shortened form may be utilized. Once a development is registered under the Federal Act, it will also be considered registered under the State Act if a developer:

1. Files with the Director of the Department of Licensing a copy of the federal statement of record and property report and copies of all papers, documents, exhibits, and certificates filed with the federal government in regard to federal registration;

2. Complies with the provisions of RCW 58.19.180, dealing with blanket encumbrances.

E. Blanket Encumbrances and Escrow Requirements

Blanket encumbrance, as used in this Act, means a trust deed, mortgage, mechanic's lien, or any other lien or encumbrance which secures the payment of money and affects the land to be developed. The term does not include taxes or assessments levied by a public authority.[14]

If a development is encumbered by a blanket encumbrance which does not contain an unconditional release clause,[15] RCW 58.19.180 provides several alternative procedures, one of which must be utilized by a developer, designed to protect the purchase money of the purchaser. One alternative, contained in RCW 58.19.180(1), is to deposit the purchase money in an escrow depository acceptable to the Director of the Department of Licensing. Another alternative, provided in RCW 58.19.180(2), is to hold title to the

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[11]The rules and presumptions relating to advertising are found in WAC 308-126C-070 and -080.

[12]WAC 308-126C-100.

[13]RCW 58.19.100.

[14]RCW 58.19.020(1).

[15]A deed release would be unconditional if, for example, the developer's lender agreed that, even if an action of foreclosure were brought against the developer, no action of foreclosure would be brought against a person who is purchasing a lot from the developer so long as the purchaser does not fall behind in payments.

development in trust until the proper release of a blanket encumbrance is obtained. The third alternative is to obtain and furnish to the State of Washington a bond or other proof of financial responsibility that is acceptable to the Director of the Department of Licensing and which provides that if a proper release from a blanket encumbrance is not obtained the purchaser's money will be returned.

IX

AQUATIC LANDS

In 1982 the Washington Legislature enacted a major reorganization of statutory requirements adding several chapters under the title "Aquatic Lands..."[1] defined as "all state owned tidelands, shorelands, harbor areas, and the beds of navigable waters."[2] The Department of Natural Resources (DNR) is designated as the administrative agency over locating (surveying), leasing, sale, and preservation of aquatic lands. The legislature found that "state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage."[3] The act established a joint legislative committee on aquatic lands to report by January 1, 1983 on "the laws governing the management of state-owned marine lands, shorelands, and harbor areas and the manner in which the DNR has interpreted and administered these laws in fulfillment of management responsibilities."[4] Resulting from this joint legislative committee report, significant additions and revisions were enacted in 1984[5] primarily treating the business aspects of rents, leases, sales, fees, acceptable uses, and division of income among governmental jurisdictions.

Under the Shoreline Management Act of 1971,[6] the Department of Ecology (DOE) is designated as the regulating agency for "shorelines of the state". The term "aquatic lands" encompasses all the lands which are defined in terms of relationship to waters of the state, including areas defined as shorelines, shorelands, tidelands, harbor areas, and wetlands. The DNR is given specific administrative responsibilities over aquatic lands, which would appear to give administrative authority to both departments. However, legislation giving authority to the DNR states: "Nothing in this chapter shall modify, alter, or otherwise affect the applicability of chapter 90.58".[7] In general, the DNR is responsible for defining boundaries for the various categories of aquatic lands, and for managing state-owned aquatic lands, while the DOE is responsible for control of the use of all shorelines of the state, which it does through a permit system and regulations adopted in the Washington Administrative Code.[8]

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[1](a) Ch. 79.90 RCW, Aquatic Lands - In General; (b) Ch. 79.91 RCW, Aquatic Lands - Easements and Rights of Way; (c) Ch. 79.92 RCW, Aquatic Lands - Harbor Areas; (d) Ch. 79.93 RCW - Aquatic Lands - Waterways and Streets; (e) Ch. 79.94 RCW - Tidelands and Shorelands; (f) Ch. 79.95 RCW, Aquatic Lands - Beds of Navigable Waters; (g) Ch. 79.96 RCW, Aquatic Lands - Aquacultural Uses.

[2]RCW 79.90.010.

[3]RCW 79.90.450.

[4]RCW 79.96.900.

[5]Ch. 221, Laws of 1984.

[6]Ch. 90.58 RCW.

[7]RCW 79.90.545.

[8]Chs. 173-14, 173-19 and 173-22 WAC.

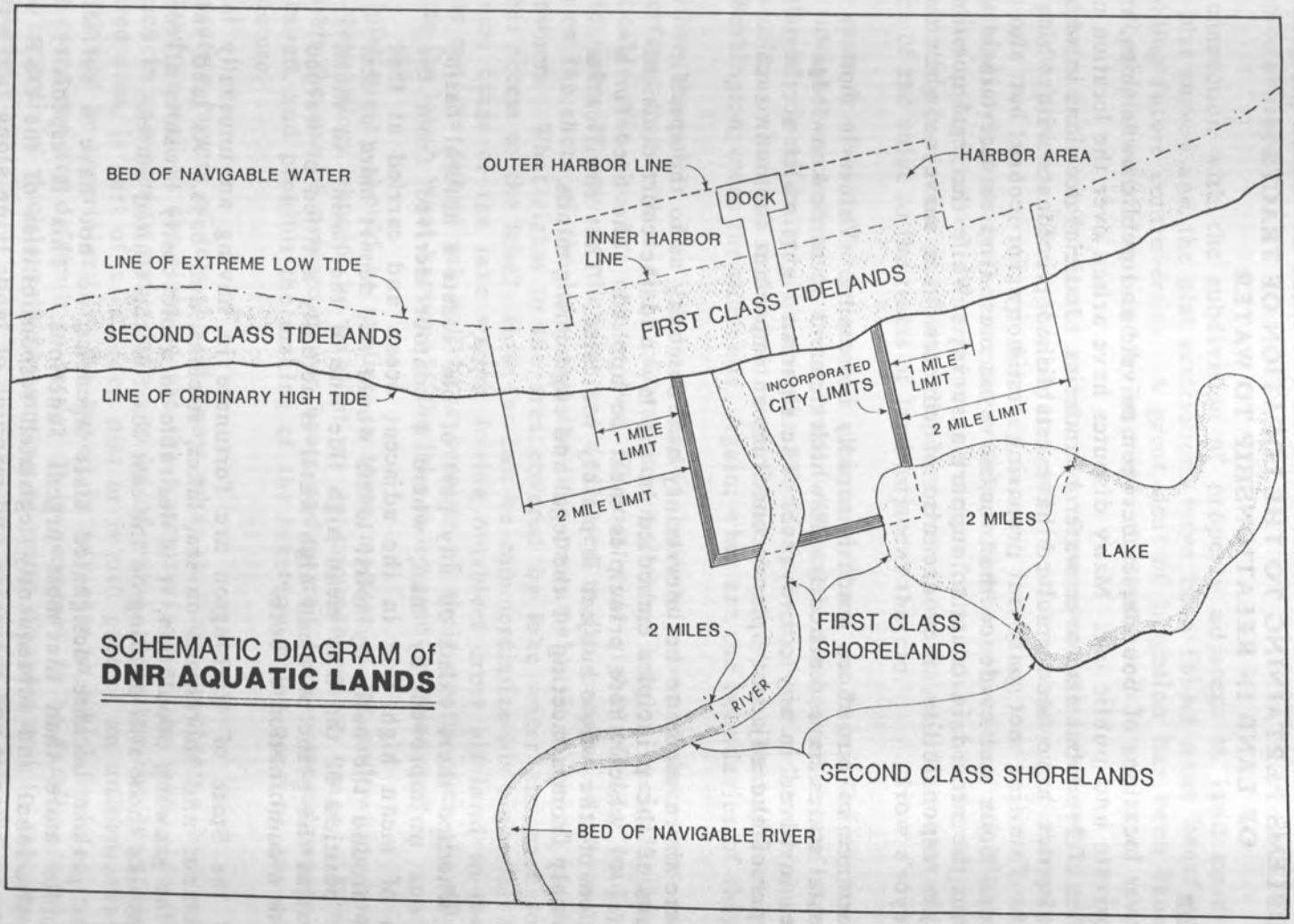

FIGURE 13 - AQUATIC LANDS AND HARBOR LINES DELINEATION
(from DNR publication TOTEM, Jan-Feb, 1983)

X

PROBLEMS PERTAINING TO THE LOCATION OF TRACTS OF LAND IN RELATIONSHIP TO WATER

A. Introduction

Questions arise over locations of boundaries between private and public ownerships, and overlapping of private and public use. Many disputes have arisen over the location not only of boundaries of land but also over water boundaries. Judicial decisions in which many of these disputes have been resolved have established precedents with which a surveyor must be familiar not only in preparing testimony for court, but also to appreciate the conditions and evidence that the surveyor must find or ascertain in the field and put into the record in court to support a survey. While the legal questions are the attorney's responsibility, they are also of concern to a surveyor when they involve the surveyor's work.

> "The importance of our shore lands is rapidly increasing. Values in most of our coastal states have reached levels which demand accurate knowledge of the area involved in any conveyance. The riparian rights which accrue to the owner of the adjacent upland constitute an important factor in such values.
>
> "Everywhere there seems to be uncertainty and obscurity as to the specific applications of the principles embodied in the law and the court decisions to the sites to which those principles must be applied. The need for a clarification of the whole subject is plainly indicated. That clarification can come only from a meeting of the legal and engineering minds.
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> . . .
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> "I doubt whether there exists on any part of our coasts a natural basin; that is, one unimproved by man; where a contour derived from the elevation of mean high tide in the adjacent ocean and carried at that elevation around the basin by spirit levels would not depart more or less from the position of the true mean high tide line of the basin. In short, in the basins the plane of mean high water is actually a titled or warped surface, or a combination of both."[1]

The people of the State of Washington are fortunate in having an unusually large amount of tidelands and shorelands on sea, lakes, streams, and bays. As land values increase with the growing population, it is desirable to avoid costly lawsuits affecting land ownerships like those still pending on the east coast of the United States.

Many problems persist because designated state agencies do not have a sufficient budget to handle more than the most urgent functions. This is especially true regarding constitutional and subsequently legislated responsibilities of the DNR with respect to water boundaries and surveying and mapping of lands lying along tide waters

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[1]Rear Admiral R. S. Patton, Relation of the Tide to Property Boundaries, (Washington, D.C.: Department of Commerce, U.S. Coast and Geodetic Survey 1940), 2, 11-12. This is a very informative 14 page document by a former director of the United States Coast and Geodetic Survey.

and shorelands. To date, along many of the tidelands and shorelands of the State of Washington, neither an inner nor an outer harbor line nor the line of navigability has been established.

In connection with the subdivision of property adjacent to land covered with water, the plat survey and the plat restrictions have been found most beneficial as an aid to avoiding future controversies. A great deal of litigation has been caused by the lack of proper plat restrictions and by improper surveys.

Engineers and owners should endeavor to foresee some of these difficulties and profit by past experience. It is possible to settle in advance some questions before there is a sale of the land to many diverse owners, including the exact boundaries of the shorelands lying along the stream or lake, thereby preventing misunderstandings as to location and rights of ownerships and uses of the land and the adjacent waters, and eliminating confusion and bitter disputes over those issues. It is the water which gives much of the value to the tracts of land adjacent thereto.

For example, two different parties own waterfront on Puget Sound; one has a deed to the tidelands as well as to the uplands. What are the boundaries of those uplands and tidelands? Specifically, where is the boundary line of the tidelands on the water side? The other owner has a deed to waterfront property, but someone else; e.g., the state of Washington, owns the tidelands. Again, what are the boundaries of these lands?

Another example: The lands around a privately owned lake are subdivided into waterfront lots with a right of way serving these lots on their landward side. The applicable plat also has one or two, 60 foot wide rights of way leading to the lake. These rights of way on the plat are dedicated to the people. Apparently the lot lines stop on the shore of the lake, and the lake presumably is to be of common use to the lot owners. What rights to the area covered by lake water has each lot owner since he has access to the lake? How far can he commercialize his rights of access and the common usage of the lake waters, letting outsiders cross his land to the lake? What rights can the public ask and have because of their access over the 60 foot right of way to the lake? What happens if the lake is lowered or dried up?

The plat survey should be explicit in these matters of lot and water boundaries. The plat restrictions should be explicit as to common water usage. Restrictions may prohibit the use of private power boats and permit hand-powered water craft only, if so desired, and prohibit the making of the lake into a log pond or any commercialized public use.

Prospective buyers of lots should know what they are purchasing both with respect to the land as well as the right to use the water surface of the lake, since the lake must be used in common to some degree to be of value. Whether the land, lying along the watered area, is part of a recorded plat or is still part of an unincorporated unplatted area should be ascertained by the buyer; in any case in which indefinite factors exist, these questions are difficult to settle. It is necessary to be familiar with the rules set forth in judicial decisions in attempting to settle disputes and to resolve uncertainties of the past.

A discussion of the difficulties involved and conditions arising as to the use of water adjacent to land, with examples, will demonstrate fully and convincingly that the only final solution to these questions if court action is to be obviated, is the establishment of surveys and mapping by the proper agency of the city, county, state, or federal government, of all beds of lakes and streams, and all first and second-class shorelands,

and all inner and outer harbor lines. These surveys and location of monuments upon the sites will make unnecessary the constant argument that now arises regarding the mean values of tidal planes, high water line, high tide line, line of ordinary high water, and similar references to the opposite or low stage of the tide line. The terms are indefinite, ambiguous, and not readily subject to definition by the courts. Surveys, monuments, maps, and their adoption by duly constituted authorities, and their recording will establish these water boundaries as physical factors specifically in place, with adjustments to warped surfaces and other problems reconciled.

In considering the relationship of tide to property boundaries, it has been observed that:

> "The grants, charters and conveyances which constitute the first links in the chains of title on which are based the present ownership of lands along our seacoasts contain frequent reference to such boundaries as the high water line, the high tide line, the line of ordinary high water, etc., and similar reference to the opposite, or low state of the tide. As a rule these references are indefinite to the point of ambiguity, primarily because of the inherently complex and variable character of the tidal phenomena, and secondarily because, at the time the early descriptions were written, either the significance of the first factor was not appreciated, or it was not considered of sufficient importance to require precise definitions of the phrases used.
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> . . .
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> "The result is that our courts are called upon from time to time for precise and workable interpretations of these vague and ambiguous phrases. The frequency with which such interpretations are necessary is strikingly evident to the Coast and Geodetic Survey, which as the agency of the Federal Government officially charged with the study and predictions of the tides, and the generally recognized authority in this country on that subject, is called upon many times each year for tabulation of tidal data applicable to this or that matter in litigation.
>
> "The most convenient method of dealing with the relationships between the various phases of the tide is in terms of average or mean values. Thus we have mean lower low water, mean low water, mean sea level, mean tide level, mean high water, mean higher high water, etc. Each of these expressions designates a more or less accurately determined average value, of the phrase designated, usually expressed in terms of its vertical relationship to one or more of the others, or to permanently marked points on shore.
>
> "Obviously, the accuracy of determination of these mean values will depend on the length of the series of observations from which they are derived. If we start with no known relationships, a series several years in length is the minimum which gives an accuracy sufficient for present engineering purposes, and a series of 19 years will be even better, as it takes full account of the longest-period forces.

"All the foregoing indicates the background of fact which must be taken into account in any adequate solution of this problem."[2]

B. Water Boundaries and Riparian Rights in the State of Washington

1. Water Boundaries

a. Navigable Waters

The recognized ownership and rights of riparian owners in the beds, banks, and shores of bodies of water, rivers, and streams by reason of their ownership of lands bordering, and abutting on, such waters is a matter of far-reaching importance. This discussion is concerned primarily with water boundaries and the effects on ownership once acquired of such factors as accretion, reliction, erosion, and avulsion; "riparian or water rights" are considered only insofar as they affect the ownership of riparian proprietors.

At the outset it is recognized that there are many varying rules in the sister states of the union governing the ownership and rights of riparian proprietors. The applicable provisions of the constitution, statutes, and judicial decisions of the State of Washington are considered herein.

The extent of ownership of the lands, comprising the beds, banks, and shores of bodies of water, rivers, and streams, is governed by whether the body of water is: (1) navigable or (2) nonnavigable.[3] Under Article XVII of the State Constitution,[4] the State of Washington asserted its ownership to the beds and shores of all navigable waters in the state, up to, and including, the line of ordinary high tide in water where the tide ebbs and flows, and up to, and including, the line of ordinary high water within the banks of all navigable rivers and lakes, with the exception of tide and shorelands sold by the federal government prior to statehood.[5] Prior to statehood, the

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[2]Patton, op. cit., 1, 9-10.

[3]John Scott Obenour, Jr., "Water Boundaries, Tide and Shore Land Rights," 23 Wash.L.Rev. 235 (1948).

[4]Const. Art. XVII, Sec. 1., provides: "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." (underscore supplied)

Const.Art. XVII, Sec. 2., provides: "The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, The same is not impeached for fraud."

[5]United States v. Utah, 283 U.S. 64, 75, 51 S.Ct. 433, 75 L.Ed. 844 (1930). Titles to the beds of navigable rivers passed to the states upon their admission to the Union. One who acquired property bordering on a navigable river from the

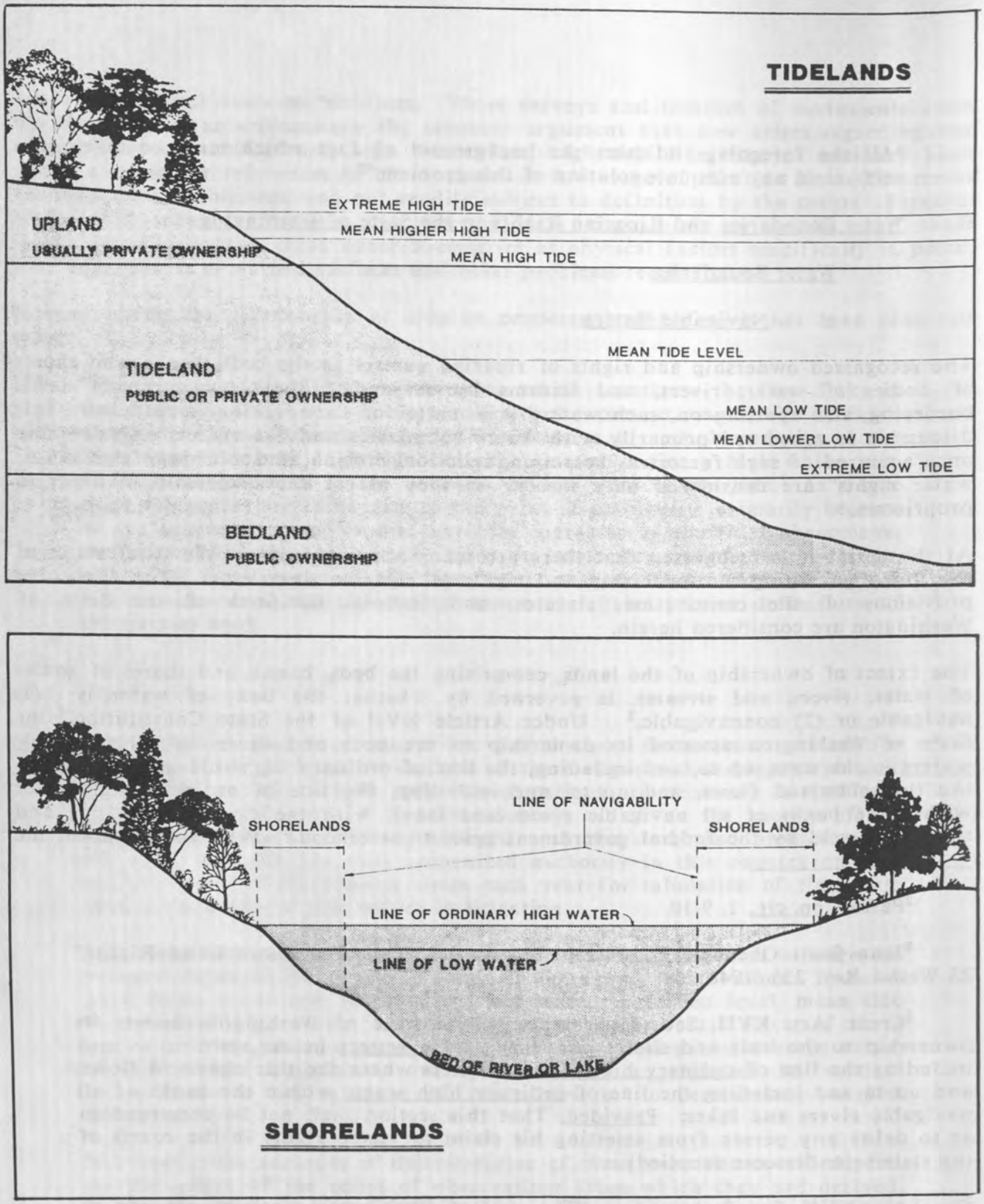

FIGURE 14 - VARIOUS TIDE/WATER ELEVATIONS, and their relationship to tidelands and shorelands ownership (from DNR publication "Aquatic Land Policy Plan" May, 1984).

United States held title to all of the land which is now within the boundaries of the State of Washington in trust for the future state. Since under Art. XVII, Sec. 1, of the Washington Constitution the state asserted ownership in all tidelands, upon admission of the State of Washington to the Union, the ownership of tidelands vested in the state except for those already patented.[6]

Public lands are transferred to individuals by means of "patent", which, in form, is a conveyance of the land that vests in the transferee the complete legal title to the land transferred. The extent of a federal patent is necessarily a federal question, since it concerns the effect and validity of an act of the United States.[7] As a matter of federal law, it is a settled rule of construction of federal patents to uplands bordering upon navigable waters that, unless specifically provided to the contrary, the patents pass title only to the line of ordinary high water.[8] If a patent was issued prior to statehood, the question of the extent of the patent is one of congressional intent. If the patent was issued after statehood, it is a question of congressional inability to convey title to tidelands which upon statehood passed to the state. Although a federal patent creates, in and of itself, no rights in the tidelands (lands between the low and high water marks), "rights and interests in the tideland (as federally defined), which is subject to the sovereignty of the state, are matters of local law."[9]

Two terms of special significance to the land surveyor are "ordinary high tide" and "ordinary high water". "Ordinary high tide" refers to tidal waters and is equated to "mean high tide", defined by the Coast and Geodetic Survey as the average elevation of all high tides at a given location through a complete tidal cycle of 18.6 years. The "line of ordinary high tide" is where that elevation meets the shore as it exists at any particular time. The "line of ordinary high water" refers to nontidal waters and is essentially equated to the vegetation line, which is found by examining the bed and banks of a nontidal body of water, and ascertaining where the presence and action of water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as to the nature of the soil itself.

United States by a patent granted after statehood acquired ownership of the property to the line of ordinary high water. One who purchased from the state the shorelands of a navigable river acquired the land lying between the line of ordinary high water and the line of navigability. Harris v. Swart Mortgage Co., 41 Wn.2d 354, 249 P.2d 403 (1952).

[6]Narrows Realty Co., Inc. v. State, 52 Wn.2d 843, 329 P.2d 836 (1958).

[7]Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967); Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935).

[8]Anderson v. Olson, 77 Wn.2d 240, 461 P.2d 343 (1969); Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894).

[9]Borax Consol., Ltd. v. City of Los Angeles, supra, at p. 22; Anderson v. Olson, supra, at p. 242; Shively v. Bowlby, supra; Shalowitz, Aaron L., Shore and Sea Boundaries, U.S. Department of Commerce, Coast and Geodetic Survey, Vol. 2, p. 451, (1964).

With respect to tidal waters, the U.S. Court of Appeals (9th Circuit), in United States v. State of Washington,[10] concluded that:

> (At p. 834) "In the case of tidal waters...the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination...is appropriate only in the case of streams and other nontidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes."[11]

The court held the boundary between uplands and tidelands to be the present line of "mean high tide", defined by the U.S. Coast and Geodetic Survey as the average elevation of all high tides at a given location through a complete tidal cycle of 18.6 years. This is an unchanging elevation and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time. The court also concluded that federal law, which follows the common law, determines that imperceptible accretions go with the uplands, title to which was in the federal government.

In Hughes v. Washington,[12] the central question before the U.S. Supreme Court was whether state or federal law determines the boundary between state-owned tidelands and privately-owned uplands which were patented by the United States prior to statehood. In reversing the decision of the Washington State Supreme Court, the U.S. Supreme Court concluded that a successor in title to a federal patent had a federal common law right to accretions to beach land gradually added to the upland since statehood despite the state property rule that such accretion belonged to the state. Though the question of whether the boundary is the line of mean high tide, determined by Coast and Geodetic Survey criteria, or the line of vegetation, determined by both

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[10]294 F.2d 830, 834 (1961); cert. denied, 369 U.S. 817, 82 S.Ct. 828, 7 L.Ed.2d 783 (1962). See also, Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9 (1935).

[11]with reference to the term "ordinary high water" and its mark on rivers (nontidal waters), Justice Benjamin R. Curtis, in his concurring opinion in Howard v. Ingersoll, 54 U.S. 381, 14 L.Ed. 189 (1851), observes:

> (At p. 427) "That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed, a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."

[12]389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967).

tide and wave action (the rule selected by the Washington State Supreme Court),[13] was not specifically determined in that opinion, the court did indicate that federal law would govern questions as to "the general definition of the shoreline."[14]

The question has arisen as to what are the boundaries of the patented lands referred to in the disclaimer clause of Const. Art. XVII, Sec. 2, by which the State of

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[13]The opinion of the Washington State Supreme Court in Hughes v. State, 67 Wn.2d 799, 410 P.2d 20 (1966), which was reversed, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967), is not clear as to the precise meaning to be attached to the term "ordinary high tide". At p. 811, the court, quoting from Harkins v. Del Pozzi, 50 Wn.2d 237, 240, 310 P.2d 532 (1957), indicated that the line of ordinary high tide is that "line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation". At p. 816, the court states: "In conclusion, we hold that the...property line is the line of ordinary high tide, which we equate to mean high tide...". Because the court sometimes uses the terms "ordinary high tide" and "mean high tide" interchangeably and sometimes in opposition to one another, only a careful examination of the opinion and the court's sketch showing the different lines in dispute reveals that "mean high tide" as used in the court's holding and "mean high tide" as determined by Coast and Geodetic Survey criteria are vastly different concepts and that the court actually intended a vegetation line as the line of "ordinary high tide". See, Charles E. Corker, "Where Does the Beach Begin, and to What Extent Is This a Federal Question," 42 Wash.L.Rev. 33, 43-47 (1966).

[14]Hughes v. Washington, 389 U.S. 290, dealt with the rights of a property owner who was a successor in title to the holder of a federal patent granted prior to statehood. A similar result was reached in California, ex rel. State Lands Commission v. U.S., 457 U.S. 273 (1982), where the upland property in question had always belonged to the federal government. Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, dealt with the rights of a property owner who held under a federal patent issued after statehood. United States v. State of Washington, 294 F.2d 830, dealt with the extent of property, title to which was still in the federal government. The cumulative effect of these four decisions is that federal law determines the extent of property, regardless of state property rules, whenever the federal government is the owner or the source of title. Because title to all lands in the public domain in Washington is in the federal government, title to almost all property held in private ownership can be traced to the federal government. Therefore, except in those few instances where title was derived from the State of Washington, the boundary between uplands and tidelands will follow the federal rule and will be the line of "mean high tide" with accretions to uplands belonging to the upland owner. See, Wilson v. Howard, 5 Wn. App. 169, 486 P.2d 1172 (1971), petition for review denied, 79 Wn.2d 1011 (1971), in which the State Court of Appeals held that a plat, indicating that a parcel of land extends up to the "beach", with no indication of whether the inner or outer shoreline was intended, did not operate to extend the boundary across the shore but only to the line of ordinary high water mark, which is the line of "mean high tide", determined by calculating the average height of all high tides at that location over the 18.6 year tidal cycle, as that line may shift from time to time. In those few instances where title was derived from the state, the boundary between uplands and tidelands will probably be fixed as the line of vegetation, unless, of course, the State Supreme Court changes the state property rule.

Washington disclaimed "all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, The same is not impeached for fraud."[15] This section operated to leave the title of the person who had acquired patented land from the federal government below the high water mark before statehood in 1889 unaffected by statehood. Where a patent was issued subsequent to statehood, but proof of all facts necessary to perfect it were made prior to statehood, the state disclaimer to all title in or claim to tidelands patented by the United States Const. Art. XVII, Sec. 2, is applicable.[16] Patents issued by the United States prior to the adoption of the Washington Constitution, to land bordering bodies of water in which the government meander line is below the line of ordinary high water, except in the case of navigable rivers, operate to carry title to the meander line.[17] This rule applies even though the patent was actually issued after statehood, if the right to the patent accrued prior to the adoption of the state constitution.[18]

However, no act of the legislature of the Washington Territory granting shore or tidelands to any person, company, or any municipal or private corporation was deemed valid after statehood. In Eisenbach v. Hatfield,[19] the State Supreme Court of Washington in 1891 observed:

> "The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in actual propriety, and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature."

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[15]In Scurry v. Jones, 4 Wash. 468, 30 Pac. 726 (1892), the court, in construing Const. Art. XVII, Sec. 2, states that: "fairly construed, we think it must be held to have, in effect, confirmed the patents which covered such lands".

[16]Narrows Realty Co., Inc. v. State, supra.

[17]Smith Tug and Barge Co. v. Columbia-Pacific Towing Corp., 78 Wn.2d 975, 482 P.2d 769 (1971).

[18]Mercer Island Beach Club v. Pugh, 53 Wn.2d 450, 334 P.2d 534 (1959). In discussing the application of the word, "patent", as used in Const. Art. XVII, Sec. 2, the court, in Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608 (1905), observed: "It has been the holding of the courts that the virtue of a patent dates from the time the patentee became entitled to it, and not merely from the date of its issuance. In the case of Stark v. Starrs, 6 Wall. 402, 18 L.Ed. 925, the United States Supreme Court, speaking by Mr. Justice Field, used the following language: 'The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.'"

[19]2 Wash. 236, 244-245, 26 Pac. 539 (1891); Brace and Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278 (1908).

The court also stated:

> "And so zealous were the people of the state in guarding their rights in these lands that they inserted a proviso in the constitution to the effect that no law of Washington Territory, granting shore or tide lands to any person, company, or any municipal or private corporation, should be deemed valid."

The holding of the court in Eisenbach v. Hatfield, supra, has been consistently adhered to by the Washington State Supreme Court in a long line of cases.[20]

b. Nonnavigable Waters

Generally, the boundary of land abutting nonnavigable lakes, ponds, streams, and bodies of water is the "thread" of the stream or in the case of a nonnavigable lake, the center line.[21] There is a presumption that when a grantor of private property bounds it generally upon a natural stream, the grantor does not intend to reserve any land between the upland and the stream, and the grant will carry title to the grantee so far as the grantor owns unless the shoreland or bed of the stream is expressly reserved from the grant.[22]

If, however, it is clear that the grant in a deed extends only to the bank of the stream, and not to the stream itself, then title to the bed of the stream would not pass to the upland owner and the boundary would be the bank. In Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co.,[23] the court stated:

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[20]The Board of Harbor Line Commissioners v. State, 2 Wash. 530, 27 Pac. 550 (1891); Scott v. Standard Oil Co., 183 Wash. 123, 48 P.2d 593 (1935).

[21]Island County v. Dillingham Dev. Co., 99 Wn.2d 215, 662 P.2d 32 (1983); Powell v. Schultz, 4 Wn. App. 213 (1971), Parker v. Farrell, 74 Wn.2d 553, 445 P.2d 620 (1968); Glenn v. Wagner, 199 Wash. 160, 90 P.2d 734 (1939); Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922). The term "Thalweg" means the middle or deepest, or most navigable channel, and is applied more particularly to interstate and international water boundaries. 86 CJS 654; Johnnsson v. American Tug Boat Co., 85 Wash. 212, 147 Pac. 1147 (1915).

[22]Bernhard v. Reischman, 33 Wn. App. 569, 658 P.2d 2 (1983). In Knutson v. Reichel, 10 Wn. App. 293, 518 P.2d 233 (1973), a deed contained a call to a nonnavigable river as well as language indicating that the bank of the river was to be the boundary. The court applied the principles of construction of a deed and concluded that a deed which employs a river as one of the calls in its description will be construed against the grantor and title will pass to the thread of the stream absent an express reservation of the shorelands or bed of the river. The parol evidence in this case also supported the presumption.

[23]76 Wash. 181, 194, 135 Pac. 1042 (1913). See also, Murphy v. Copeland, 51 Ia. 515, 1 N.W. 691 (1879); Lambeck v. Nye, 47 Ohio St. 336, 24 N.E. 686, 21 Am. St. 828, 8 L.R.A. 578 (1890); John M. Gould, A Treatise on the Law of Waters, Callaghan and Co., Chicago, (1900), (3rd Ed.), Sec. 199, p. 384.

"It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream."

In State ex rel. Davis v. Superior Court,[24] the court said:

"As to the effect of the description in the plat, the general rule appears to be, that where the description in a plat, deed, or field notes makes a nonnavigable stream a boundary, that the boundary line is the thread of the stream and not the bank, unless a contrary intention appears from the language used in the description. Where the calls in a deed or plat are to a river, naming it, 'thence along the river' to a certain point, 'thence leaving the river,' the boundary line is the center of the stream."

The presumption of a grant to the thread of a stream established by an initial call to the stream applies notwithstanding a terminating call that refers to the bank of the stream.[25]

In the case of stationary nonnavigable bodies of water, such as lakes and ponds where there is no thread, if the body is generally circular in shape, divergent lines should be drawn from the center of the lake to each upland corner at the water's edge. If the body of water is oblong in shape, the center line should be established in the body of water and the upland owners on either side take to that center line, each upland owner taking an area of the bed in proportion to his upland water frontage. However, such rules are not universally followed.[26]

2. Riparian Rights

"Riparian rights" have been described as "vested property interests,"[27] and they include at least the rights to use water for irrigation, consumption, fishing, boating, hunting, swimming, and similar domestic and recreational uses.[28] A riparian owner enjoys riparian rights only when his property abuts on public, natural bodies of water.[29] Generally a riparian owner on a nonnavigable lake has a right in common with the

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[24]84 Wash. 252, 256, 146 Pac. 609 (1915).

[25]Bernhard v. Reischman, 33 Wn. App. 569, 658 P.2d 2 (1983).

[26]John S. Grimes, Clark On Surveying and Boundaries, (4th Ed.). The Bobbs-Merrill Co., Inc. (1976), Secs. 588,595. See Figure 18-b.

[27]Dept. of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985).

[28]Johnson and Morry, "Filling and Building on Small Lakes - Time for Judicial and Legislative Controls," 45 Wash.L.Rev. 27, 36 (1970).

[29]Clippinger v. Birge, 14 Wn. App. 976, 547 P.2d 871 (1976). In this case, the Court of Appeals held that there were no riparian rights in Lake Tapps, because that lake is an artificially created private reservoir.

VARIOUS TIDES AND THEIR SIGNIFICANCE
IN SHORELINES MANAGEMENT, RE:

1. River & Harbor Act of 3 March, 1899 (Sec. 10)
2. Fish & Wildlife Coordination Act of 1958
3. National Environmental Policy Act of 1969 (NEPA)
4. Water Quality Improvement Act of 1970
5. Shorelines Management Act of 1971
6. Aquatic Lands Act of 1982

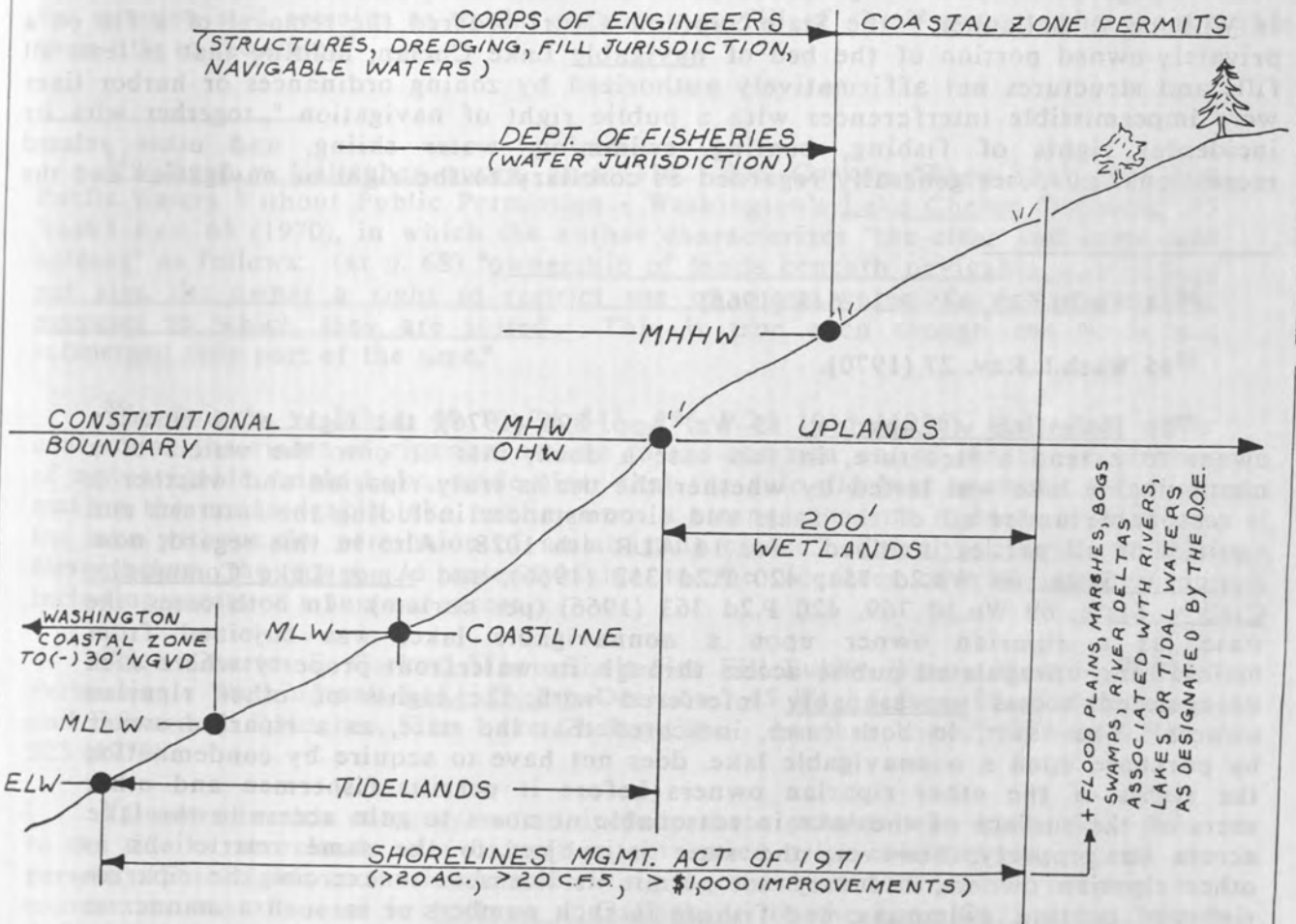

FIGURE 15 - VARIOUS TIDES and Relationship in Shoreline Management.

other riparian owners on the lake to use the entire surface of the lake so long as there is no unreasonable interference with the exercise of these rights by the other respective owners. Thus, in Bach v. Sarich,[30] an apartment building extending over the surface of a nonnavigable lake was ordered to be removed on the ground that it interfered with the common rights of riparian owners to boat, fish, and swim over the entire surface of the lake.[31] The court, in Bach, supra, restricted allowable building and filling on nonnavigable lakes to structural uses and fills that are "riparian". The court said:

> (At p. 579) "Mere proximity of the apartment to the water does not render it a riparian use. With respect to a structure, such a use must be so intimately associated with the water that apart from the water its utility would be seriously impaired." (Underscore supplied)

Thus, if a structural use or fill is non-riparian, it must also be "reasonable" to be permissible.[32]

In Wilbour v. Gallagher,[33] the State Supreme Court ordered the removal of a fill on a privately-owned portion of the bed of navigable Lake Chelan, holding that at least all fills and structures not affirmatively authorized by zoning ordinances or harbor lines were impermissible interferences with a public right of navigation "...together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the

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[30]74 Wn.2d 575, 445 P.2d 648 (1968).

[31]45 Wash.L.Rev. 27 (1970).

[32]In Heferline v. Langdow, 15 Wn. App. 896 (1976), the right of a riparian owner to extend a structure, in this case a dock, into or onto the waters of a nonnavigable lake was tested by whether the use is truly riparian and whether it is reasonable under all of the facts and circumstances including the interests and equities of all parties involved. See 14 ALR 4th 1028. Also in this regard, note Botton v. State, 69 Wn.2d 751, 420 P.2d 352 (1966), and Ames Lake Community Club v. State, 69 Wn.2d 769, 420 P.2d 363 (1966) (per curiam). In both cases, the state, as a riparian owner upon a nonnavigable lake, was enjoined from maintaining unregulated public access through its waterfront property where such unregulated access unreasonably interfered with the rights of other riparian owners. The court, in both cases, indicated that the state, as a riparian owner by purchase upon a nonnavigable lake, does not have to acquire by condemnation the rights of the other riparian owners before it permits fishermen and other users of the surface of the lake in reasonable numbers to gain access to the lake across its property; however, the state is subject to the same restrictions as other riparian owners, and may not permit its licensees to exercise the riparian rights of boating, swimming, and fishing in such numbers or in such a manner as to unreasonably interfere with the similar rights of others.

[33]77 Wn.2d 306, 462 P.2d 232 (1969); certiorari denied by the United States Supreme Court, 400 U.S. 878 (1970).

use of public waters."[34]

While Bach v. Sarich, supra, dealt with a private right of other riparian owners to exercise their rights to boat, swim, fish, and recreate over the entire surface of a nonnavigable lake,[35] Wilbour v. Gallagher, supra, dealt with a public right of navigation and its corollaries, exercisable over the entire surface of the waters of a navigable lake. These two decisions, in recognizing the public and private rights to the use of various bodies of water, go far in pointing out the essential differences between the ownership of land abutting or lying beneath water and the ownership of land which is always dry.

The Wilbour v. Gallagher decision, supra, has left many questions unanswered. Primary among these is the question of the scope of the decision.[36] Does it stand for the impermissibility in general of developing private lands underlying navigable waters in Washington? More particularly, to what extent has the State of Washington, by selling tide and shorelands, expressly or impliedly authorized its grantees to fill these lands? If such tide and shoreland grants are treated as authority for fills in navigable waters, the question still remains as to the authority to fill of those owners who cannot trace their title to the state.[37]

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[34]Wilbour v. Gallagher, supra, at p. 316. See, Corker, "Thou Shalt Not Fill Public Waters Without Public Permission - Washington's Lake Chelan Decision," 45 Wash.L.Rev. 65 (1970), in which the author characterizes "the clear and important holding" as follows: (at p. 68) "ownership of lands beneath navigable waters does not give the owner a right to restrict use of those waters for all the public purposes to which they are suited. This is true even though the lands are submerged only part of the time."

[35]In Snively v. Jaber, 48 Wn.2d 815, 296 P.2d 1015 (1956), the court while confirming the rights of riparian owners to the common use of the entire surface of nonnavigable Angle Lake, made clear that the rule did "not have the effect of making the nonnavigable lake public, since a stranger has no right to enter upon the lake without the permission of an abutting owner." Snively v. Jaber, at 882. Nevertheless, the court did extend rights to the licensees of riparian owners, including guests of a summer resort.

[36]See, Charles E. Corker, "Thou Shalt Not Fill Public Waters Without Public Permission - Washington's Lake Chelan Decision," 45 Wash.L.Rev. 65, 72-76 (1970); and Edward A. Rauscher, "The Lake Chelan Case - Another View," 45 Wash.L.Rev. 523 (1970).

[37]Owners in this category would include those persons who trace their title to the tide or shorelands to a federal patent issued prior to statehood as well as persons whose rights to the lands underlying the water stem directly from private sources, as was the case in Wilbour v. Gallagher. In the Lake Chelan case, the defendant's land was entirely above the natural level of the lake. Title to all the land in question was in private ownership and had been since 1891. The defendant's land came to be "land underlying navigable water" only because of the artificial raising of the level of the lake by a hydroelectric project initiated in 1927. The lands in question, consequently, were never owned by the state, and the state, therefore, could not have expressly or impliedly authorized the fill of these lands by selling them.

In Harris v. Hylebos Industries, Inc.,[38] the Supreme Court dealt with some of these issues in relation to first class tidelands. The court stated that the notion that all tidelands must be left in their natural state is incompatible with the legislative intent and then went on to affirm the right of an owner of first class tidelands located in the industrial harbor area of Tacoma to fill in and develop such tidelands. The case of Wilbour v. Gallagher, supra, was distinguished for several reasons, the most important difference being that Wilbour dealt with navigable waters while the court recognized that waters overflowing first class tidelands landward of the inner harbor line have never been classified by the state as navigable waters, but rather have been treated as land. In a significant closing comment, the court noted:

> (At pp. 786-87) "In the case of Wilbour v. Gallagher,..., we did not purport to and did not intend to overrule, sub silentio, all of the case law in this jurisdiction pertaining to tidelands of the first class, or to ignore all the statutory law pertaining thereto. As the footnote at page 317 of the opinion discloses, we had in mind the right of appropriate governing bodies to authorize fills and commercial uses of lands situated on the shores of navigable bodies of water."

C. Ownership of Lands Beneath Navigable Waters Within the Boundaries of the State

By the Submerged Lands Act of 1953 the federal government released and relinquished to the states "the lands beneath navigable waters within the boundaries of the respective states and the natural resources within such lands and waters,"[39] and this Act expressly provides that:

> "Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."[40]

This Act also provides:

> "(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act.

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[38]81 Wn.2d 770, 505 P.2d 457 (1973).

[39]43 U.S.C. 1311(a).

[40]43 U.S.C. 1311(d). For the complete text of the Submerged Lands Act of 1953, see Appendix B, under Compilation of Selected Laws.

"(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor."[41]

In State of Alabama v. State of Texas,[42] the United States Supreme Court held that, under the Submerged Lands Act of 1953 (43 U.S.C. 1301 et seq.), Congress has exercised its power to dispose of proprietary rights over lands beneath the navigable waters within the boundaries of the respective states, and Congress has unlimited power to dispose of any kind of property belonging to the United States. By that Act, Congress quitclaimed to the states land underlying tidal waters to a line three geographical miles from the coast line, defined in Sec. 2(c) as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." In United States v. Louisiana,[43] the United States Supreme Court held that "the line marking the seaward limit of inland waters" is to be drawn in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone; and in the companion case,[44] the court held that the term "coast line" means the modern, ambulatory coastline, based on the definition of "coast line" formulated by the international Convention on the Territorial Sea and Contiguous Zone.

The effect of the Submerged Lands Act was to grant to the State of Washington title and ownership to that portion of the lands of the continental shelf which extends from its coast line seaward three geographical miles, and the power to manage, administer, lease, develop, and use such lands in accordance with state law.

Concurrent with the passage of the Submerged Lands Act, Congress enacted the "Outer Continental Shelf Lands Act" (43 U.S.C. 1331), which relates to jurisdiction and control of the "outer" continental shelf, or lands seaward from the state's historic boundary to the edge of the continental shelf. (43 U.S.C. 1331(a)). By this Act the United States relinquished to the coastal states all of its rights in all lands beneath navigable waters within a three-mile limit, or in excess of that limit, if the state's boundaries extended beyond the three-mile limit at the time a state became a member of the Union or as theretofore approved by Congress. This Act provided for the development of natural resources and the administration and leasing of these lands.

The submerged continental shelf lands in the area between the Pacific Ocean coast line of the State of Washington and the state's western boundary located three geographic miles to the west are subject to the Oil and Gas Conservation Act, Ch. 78.52 RCW, and

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[41]43 U.S.C. 1314.

[42]347 U.S. 272, 74 S. Ct. 481, 98 L.Ed. 689 (1954). See also United States v. Louisiana, 363 U.S. 1, 80 S. Ct. 961, 4 L.Ed.2d 1025 (1960); United States v. Florida, 363 U.S. 121, 80 S. Ct. 1026, 4 L.Ed.2d 1096 (1960); Justheim v. McKay, 229 F.2d 29 (1956).

[43]394 U.S. 11, 89 S. Ct. 773, 22 L.Ed.2d 44 (1969).

[44]United States v. Lousiana, 394 U.S. 1, 89 S. Ct. 768, 22 L.Ed.2d 36 (1969) rehearing denied 394 U.S. 994, 89 S. Ct. 1451, 22 L.Ed.2d 771 (1969).

the administration and enforcement of its provisions rest with the Oil and Gas Conservation Committee. The Shoreline Management Act of 1971 also covers land out to the western boundaries of the State.[45] It is noteworthy that RCW 90.58.160 prohibits "surface drilling for oil and gas...in the waters of Puget Sound north to the Canadian boundary and the Strait of Juan de Fuca seaward from the ordinary high water mark and on all lands within one thousand feet landward from said mark." Arguably, slant drilling would not be so prohibited.

On the other hand, federally-owned submerged continental shelf lands owned by the United States located west of the State's western boundary (i.e., three geographic miles to the west) are not subject to the state Oil and Gas Conservation Act or the Shoreline Management Act, and neither the Oil and Gas Conservation Committee, nor the DOE, has any duties or responsibilities regarding such lands; those lands are subject solely to the conservation laws of the federal government as administered by the Secretary of the Interior. (43 U.S.C. 1333 and 1334).[46]

The Magnuson Fishery Conservation and Management Act of 1976 was adopted in an attempt to conserve and manage the fishery resources off the coasts of the United States. This Act expressly states, however, that it is not designed to extend or diminish the jurisdiction or authority of any state within its boundaries, except to the limited extent noted in 16 U.S.C. 1856(b) of the Act.[47]

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[45]RCW 90.58.030(2)(e)(i).

[46]AGO 63-64 No. 23 and United States v. Louisiana, 363 U.S. 1, 80 S. Ct. 961 4 L.Ed.2d 1025 (1960).

[47]The pertinent provision of this Act reads as follows:

> 16 U.S.C. 1856(b) Exception. (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with Section 554 of Title 4, that -
>
> (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and
>
> (B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.
>
> (2) If the Secretary, pursuant to this subjection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which

D. Harbor Lines

Article XV of the Washington Constitution also affects navigable waters. This constitutional provision directed the legislature to provide for the appointment of a commission "to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side."

This same article of the constitution also prescribed the following restraint upon the disposition of tidelands by the state:

> "The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."

The area between the inner and outer harbor lines may be leased for the use of navigation and commerce, but that area may never be sold. The area beyond the outer harbor lines may not be given, sold, or leased to any private person, corporation, or association.

The Washington State Supreme Court held that Art. XV of the State Constitution applies not only to tidal waters but also to navigable rivers and lakes.

In State ex rel. Seattle v. Savidge,[48] the court observed:

> "It is as much the duty of the state authorities defined by Art. 15 of the constitution, to provide for the location and establishment of harbor areas in inland navigable waters, if within or in front of or within one mile of the corporate limits of any city or town, as to establish the same in salt or sea water."

Article XV, Sec. 1, of the State Constitution was amended by Amendment 15 in 1932 to provide that: "Any harbor line so located or established may thereafter be changed, relocated, or re-established by the commission pursuant to such provision as may be made therefor by the legislature."[49]

> he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

[48]95 Wash. 240, 163 Pac. 738 (1917). See also, State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913), and Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310 (1916).

[49]An AGLO 1976 No. 62 dealt with the legal limitations on the exercise of the authority of the Harbor Line Commission to relocate harbor lines. Basically, the relocated harbor lines must satisfy the same criteria as would apply to the initial establishment of harbor lines.

An excellent discussion of the origin, development and operation of the harbor line system is found in, Johnson, "Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters," 54 Wash. L. Rev. 275 (1979).

E. Tide and Shorelands

In the State of Washington, the tide and shorelands have been classified in Ch. 79.90 RCW as first and second class tidelands and first and second class shorelands as follows:

> "Whenever used in chapters 79.90 through 79.96 RCW the term 'first class tidelands' means the shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line; and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide." RCW 79.90.030
>
> "Whenever used in chapters 79.90 through 79.96 RCW the term 'second class tidelands' means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide." RCW 79.90.035
>
> "Whenever used in chapters 79.90 through 79.96 RCW the term 'first class shorelands' means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city or within two miles thereof upon either side." RCW 79.90.040
>
> "Whenever used in chapters 79.90 through 79.96 RCW the term 'second class shorelands' means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city." RCW 79.90.045

Since deeds often describe land in terms of "first class shorelands abutting" a particular piece of property, it is necessary that the surveyor be familiar with the statutory definition of tidelands and shorelands.

All area landward of the line of ordinary high tide is uplands.[50] By extending the shorelands of a certain portion of Lake Washington, pursuant to what is now RCW 79.94.220[51] to the line of ordinary navigation after the lake was artificially lowered,

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[50]Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957).

[51]Section 1, Ch. 183, Laws of 1973 was replaced by RCW 79.94.220, which relates to the boundaries of shorelands when water is lowered and grants certain shorelands to the City of Seattle, providing:

> "In every case where the State of Washington had prior to June 13,

the result was an equitable distribution of second class shorelands (being more than two miles from the corporate limits of any city) and protected access to navigable water by the upland owner. The fixing of such a line normally is the responsibility of the Department of Natural Resources (DNR). Grill v. Meydenbauer Bay Yacht Club.[52]

After the Duwamish Waterway had been dredged to accommodate its water, the bypassed and abandoned portions of the bed and shores of the Duwamish River ceased to be a part of the Duwamish River, waterway, or watercourse, and title thereto, with the power of alienation, vested in the waterway district which had been created for the purpose of dredging the waterway. King County v. The Boeing Co..[53]

The term "ordinary high tide" has been defined earlier in this report. The term "extreme low tide" used in defining first and second class tidelands, however, requires definition. In State v. Edwards,[54] the Washington State Supreme Court defined "extreme low tide" as follows:

> "There are two low tides each day called the short run out and the long run out. The lower of these daily tides is called 'lower low tide.' The average of all low tides, both low and lower low, over a fixed period of

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> 1913, sold to any purchaser from the state any second class shorelands bordering upon navigable waters of this state by description wherein the water boundary of the shorelands so purchased is not defined, such water boundary shall be the line of ordinary navigation in such water; and whenever such waters have been or shall hereafter be lowered by any action done or authorized either by the State of Washington or the United States such water boundary shall thereafter be the line of ordinary navigation as the same shall be found in such waters after such lowering, and there is hereby granted and confirmed to every such purchaser, his heirs and assigns, all such lands: PROVIDED, HOWEVER, That RCW 79.94.220 and 79.94.230 shall not apply to such portions of such second class shorelands which shall, as provided by RCW 79.94.230, be selected by the department of natural resources for harbor areas, slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys, or other public purposes: PROVIDED, FURTHER, That all shorelands and the bed of Lake Washington from the southerly margin of the plat of Lake Washington shorelands southerly along the westerly shore of said lake to a line three hundred feet south of and parallel with the east and west center line of section 35, township 24 north, range 4 east, W.M., are hereby reserved for public uses and are hereby granted and donated to the City of Seattle for public park, parkway and boulevard purposes, and as a part of its public park, parkway and boulevard system and any diversion or attempted diversion of such lands so donated from such purposes shall cause the title to said lands to revert to the state."

[52]61 Wn.2d 432, 378 P.2d 423 (1963). The facts of this case are outlined in 57 Wn.2d 800, 359 P.2d 1040 (1961).

[53]62 Wn.2d 545, 384 P.2d 122 (1963).

[54]188 Wash. 467, 470, 62 P.2d 1094 (1936).

time is called 'mean low tide,' and the average of lower low tides over a like period is called 'mean lower low tide.' Tides which are lower than lower low, and therefore lower than mean lower low, occur at certain seasons and are called 'extreme low tide.'"

The term "line of navigability" as used in the definition of first and second class shorelands means the inner harbor line as fixed by the DNR. If that line has not yet been fixed, then the outer boundary of shorelands will simply remain undetermined until the inner harbor line is fixed by the Department of Natural Resources; the Department will establish additional harbor lines when there is a demonstrated need, demand, and available funds.[55]

In 1895, (Sec. 2, Ch. 178, Laws of 1895), the legislature had defined tidelands as extending from the line of ordinary high tide to the line of mean low tide. Then in 1911, (Sec. 1, Ch. 36, Laws of 1911), the definition of tidelands was changed to "from the line of ordinary high tide to the line of extreme low tide," (emphasis supplied) except in front of cities where harbor lines had been established or might thereafter be established. In those instances tidelands were defined to be those lands lying between the line of ordinary high tide and the inner harbor line and excepting oyster reserves. The current definition discussed previously still places the outer boundary of tidelands at the extreme low tide line, except for first class tidelands within one mile of the corporate limits of a city where the inner boundary is the inner harbor line. In view of the foregoing, a purchaser of the tidelands from the state between 1895 and 1911 acquired title to the line of mean low tide, while a purchaser after 1911 acquired title to the line of extreme low tide except as indicated above.[56]

Washington has made several reservations of tidelands for highways, conservation, and recreational purposes. RCW 79.94.360, for example, declares:

> "The shore and beach of the Pacific Ocean, including the area or space lying, abutting, or fronting on said ocean and between ordinary high tide and extreme low tide (as such shore and beach are now or hereafter may be) from the Columbia River or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, state of Washington on the north, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.
>
> "No part of said shore or beach shall ever be sold, conveyed, leased, or otherwise disposed of."

RCW 79.94.350 makes the same declaration applicable to the area between Damon's Point on the north side of the entrance to Gray's Harbor, to the mouth of the Queets River. RCW 79.94.340 includes the area from the mouth of the Queets River north to

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[55]Johnson, "Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters," 54 Wash.L.Rev. 275, 300.

[56]For significant illustrations of tidelines, harbor lines, and other water lines, see Figures 13 and 14.

Cape Flattery.[57]

RCW 79.94.370 reaffirms those highway reservations and declares that portion of the public highway "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be," a public recreation area, "set aside and forever reserved for the use of the public."[58]

RCW 79.94.150 provides that after August 9, 1971, no first or second class tidelands, or first or second class shorelands (except for certain second class shorelands on navigable lakes), or any waterway described in RCW 79.93.010 can be sold or given away by the state to any private party. Such lands may be sold to other public agencies when authorized by law. Such tidelands and shorelands may also be leased to a private party; however, the term of the lease is limited to 55 years.

The Seashore Conservation Act, contained in RCW 43.51.650 - 43.51.685, established the Washington State Seashore Conservation Area between the lines of ordinary high tide and extreme low tide, or, where applicable, between the seashore conservation line[59]

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[57]In AG0 1970 No. 27 it was concluded that members of the public have the right to use and enjoy the wet and dry sand areas of the ocean beaches of the State of Washington by virtue of a long-established customary use of the area. However, this AGO also concluded that, although the statutes declaring certain beaches a "public highway forever and as such highway shall remain forever open to the use of the public," purported to include the beaches fronting on the Quinault Indian Reservation, they were without effect as to those beaches, because the Quinault beaches were lands over which the state legislature had no jurisdiction or control; they were not part of the public domain at the time Washington became a state, and no rights to those beaches, or tidelands, passed to the state upon its admission to the Union.

In AGLO 1976 No. 41 the opposite conclusion was reached in regard to the beaches of Puget Sound. The AGLO concluded that "members of the public do not have the right to use and enjoy the wet and dry sand areas of Puget Sound beaches by virtue of customary use." In this AGLO it was reasoned that there did not exist a general, customary, and habitual use of Puget Sound beaches extending back to before statehood as existed in relation to the ocean beaches. Also, there did not exist an express legislative acknowledgement of the "public" nature of the Puget Sound beach areas as did exist relating to the ocean beaches.

[58]In light of the holding in Hughes v. Washington, 389 U.S. 290, and United States v. State of Washington, 294 F.2d 830, the legislature, in enacting this statute, was incorrect in assuming that the state owned those lands above the mean high tide line.

[59]In an Attorney General's Opinion, dated December 14, 1970 (AGO 1970 No. 27), the "seashore conservation line" is described as follows:

> (Note 9 at page 8) "The seashore conservation line is a line, agreed to by the upland property owners and surveyed and monumented by the Washington state parks and recreation commission. It generally parallels and lies slightly inland from the line of visible vegetation. The seashore conservation line has been established on the Long Beach Peninsula in Pacific county, and at one location in the vicinity

and the line of extreme low tide, on all lands "now or hereafter under state ownership or control lying between Cape Disappointment and Leadbetter Point; between Toke Point and the South jetty on Point Chehalis; and between Damon Point and the Makah Indian Reservation...," provided that the conservation area is not to include "any lands within the established boundaries of any Indian reservation".

An Attorney General's Opinion (AGO 1977 No. 5), dated February 16, 1977, deals with the application and significance of the Seashore Conservation Act, particularly in relation to the later enacted Shoreline Management Act. This AGO indicates that "the legal significance of an area of land being included in the Seashore Conservation Area is that such land is to be used for recreational uses and other uses not inconsistent with such a use". This legislative mandate that such lands be used for recreational purposes or other uses not inconsistent therewith must be given great weight in the development of comprehensive use regulations under the Shoreline Management Act and both of these laws must be followed in areas where they apply.

F. Meander Lines

Meander lines are run along the banks of all navigable bodies of water and other important rivers and lakes for the purpose of defining the sinuosities of the shore or bank and as a means of ascertaining the areas of fractional subdivisions of the public lands bordering thereon. Meander lines are not intended as boundaries of the upland tracts, and the watercourse itself forms the boundary, unless there is a clear indication to the contrary.[60] As a general rule, a deed conveying land by a description which employs a meander line as a boundary will be construed against the grantor, and, if he owns to the water, he will be deemed not to have intended to cut off his grantee from the water, the rule being subject to the qualification that if the parties to the deed appear to have intended that the meander line should be the actual boundary, then such intention will be given effect.[61] Since the purpose of meandering any body of water is to obtain information that would aid in the plotting of the body of water on maps, the shoreline itself is the best evidence of its true location, and such a natural monument normally will govern. However, when a survey has been found to be grossly inaccurate by reason of mistake or fraud in that tracts of public lands are purported

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of Ocean City in Grays Harbor county. It is established by coordinates and is recorded with the appropriate county auditor."

[60]Thein v. Burrows, 13 Wn. App. 761, 537 P.2d 1064 (1975); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 78 Wn.2d 975, 482 P.2d 769 (1971); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 19 L.Ed. 74 (1868); 12 Am.Jur.2d Boundaries, Sec. 29, p. 569 (1964, Supp. 1970); Shalowitz, Aaron L., Shore and Sea Boundaries, U.S. Department of Commerce, Coast and Geodetic Survey, Vol. 2, p. 451 (1964). John S. Grimes, Clark On Surveying and Boundaries, (4th Ed.), The Bobbs-Merrill Co., Inc. (1976), Sec. 259.

[61]Grimes, Clark On Surveying and Boundaries, (4th Ed.), supra, Sec. 259. Erickson v. Wick, 22 Wn. App. 433, 591 P.2d 804 (1979). In Vavrek v. Parks, 6 Wn. App. 684, 495 P.2d 1051 (1972), the court emphasized that before meander lines can be considered to be the actual boundaries of the land conveyed, evidence thereof must be clear. The court found no such evidence and concluded that the real intent of the parties was to "employ the meander line...in its normally accepted usage, as intending to convey title to the line of ordinary high tide of the Pacific Ocean".

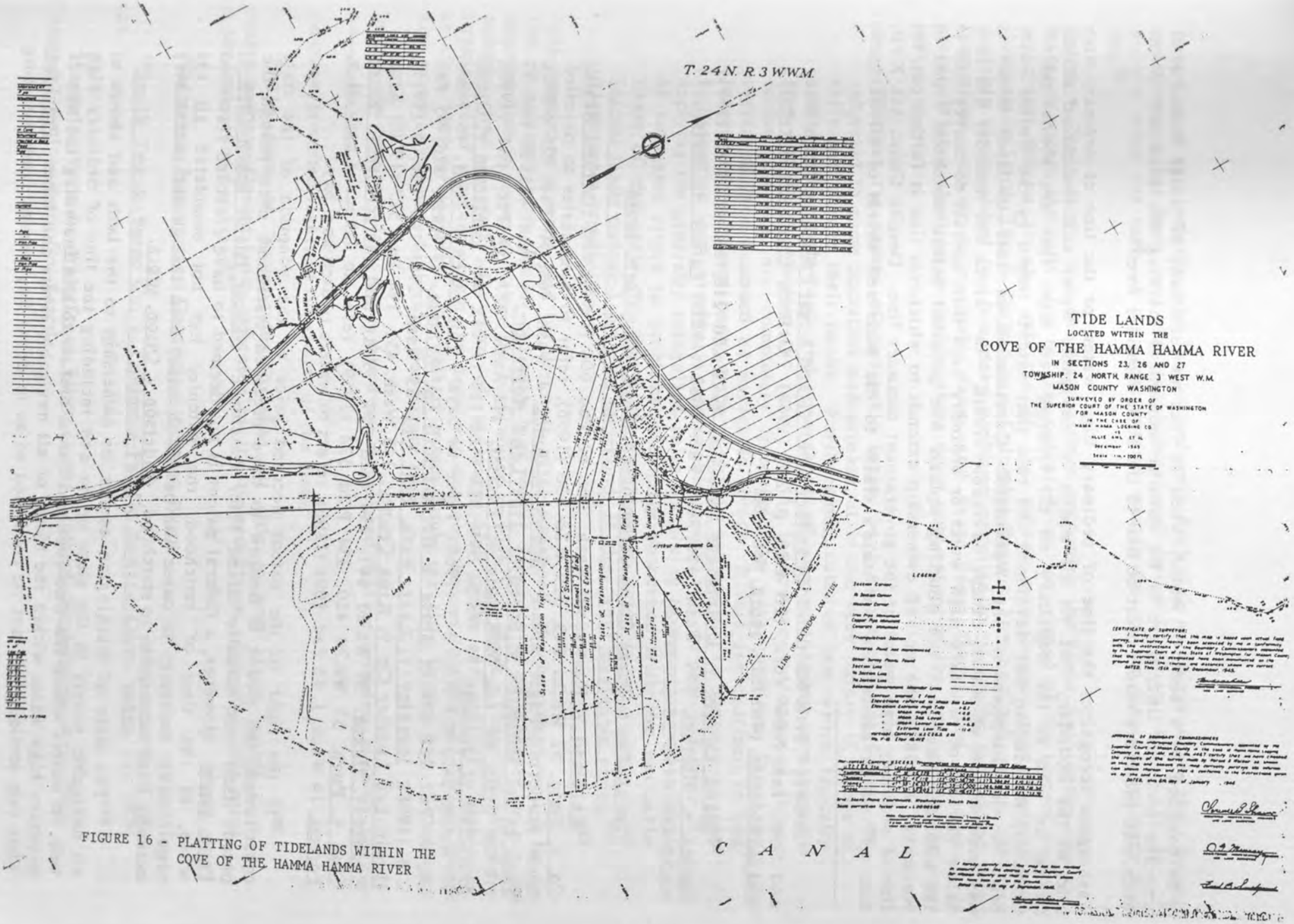

FIGURE 16 - PLATTING OF TIDELANDS WITHIN THE COVE OF THE HAMMA HAMMA RIVER

to be bounded by a body of water, when in fact no such body of water existed at or near the meander line, there is no natural monument marking the boundary of the lands, and therefore resort must be had to the false meander line.[62]

Washington recognizes the line of ordinary high water, or the line of ordinary high tide, as the boundary line on all bodies of navigable water and the thread of the stream or lake as the boundary on all streams and lakes that are nonnavigable.[63] However, Washington has developed the rule that patents issued by the United States prior to the adoption of the Washington Constitution in 1889 to lands bordering navigable bodies of water, except navigable rivers,[64] in which the meander line runs below the line of ordinary high water or ordinary high tide, operate to convey title to the meander line.[65] If the abutting upland was patented before statehood,[66] that is, November 11, 1889, the upland ownership extends to whichever line is farther out, the line of ordinary high water or the government meander line. Despite Const. Art. XVII, Sec. 1,[67] which establishes the state's claim to the beds and shores of all navigable

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[62]Brown, Curtis Maitland, Boundary Control and Legal Principles, John Wiley and Sons, Inc. New York, (2d Ed.), p. 217 (1968). Grimes, Clark On Surveying and Boundaries, (4th Ed.), supra, Sec. 268.

[63]Island County v. Dillingham Dev. Co., 99 Wn.2d 215, 662 P.2d 32 (1983); Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922); Parker v. Farrell, 74 Wn.2d 553, 445 P.2d 620 (1968).

[64]Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra.

[65]Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608 (1905); and Narrows Realty Co. v. State, 52 Wn.2d 843, 329 P.2d 836 (1958), refer to boundaries to patented lands bordering Puget Sound. Scurry v. Jones, 4 Wash. 468, 30 Pac. 726 (1892); State ex rel. Battersby v. Board of Tide Land Appraisers, 5 Wash. 425, 32 Pac. 97 (1892); State ex rel. McKenzie v. Forrest, 11 Wash. 227, 39 Pac. 684 (1985); Stockwell v. Gibbons, 58 Wn.2d 391, 363 P.2d 111 (1961); and Anderson v. Olson, 77 Wn.2d 240, 401 P.2d 343 (1969), refer to bays. Van Siclen v. Muir, 46 Wash. 38, 89 Pac. 188 (1907); Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278 (1908); Bleakley v. Lake Wash. Mill Co., 65 Wash. 215, 118 Pac. 5 (1911); Hewitt-Lea Lumber Co. v. King County, 113 Wash. 431, 194 Pac. 377 (1920); King County v. Hagen, 30 Wn.2d 847, 194 P.2d 357 (1948); and Mercer Island Beach Club v. Pugh, 53 Wn.2d 450, 334 P.2d 534 (1959), refer to lakes. Cogswell v. Forrest, 14 Wash. 1, 43 Pac. 1098 (1896), refers to waters treated as a bay.

[66]If the right to the patent accrued prior to the adoption of the state constitution, the patent is deemed to have preceded statehood, even though the patent itself was actually issued after statehood. Mercer Island Beach Club v. Pugh, supra. However, a federal patent is not deemed to have preceded statehood when, at the time of statehood, the patentee has not completed all the requirements necessary to cause the patent to issue, even though the patent may actually issue subsequent to statehood. Anderson v. Olson, supra.

[67]"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting

waters up to and including the line of ordinary high tide in waters where the tide ebbs and flows, it has been held that the "disclaimer" clause in Const. Art. XVII, Sec. 2[68] prevails when the calls of a patent extend waterward of the line of ordinary high tide.[69]

Scurry v. Jones, supra, was the first case to recognize the basic Washington rule that all lands within the calls of a federal patent, lying waterward of the line of ordinary high tide, belong to the patentee if the patent was issued prior to statehood. However, in Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra, the court expressly distinguished the boundary problems peculiar to navigable meandered rivers from those peculiar to navigable lakes and bays, Puget Sound, and the ocean. In excepting lands abutting navigable rivers from application of the Scurry rule, the court said:

> "Whereas the shores of navigable lakes, bays and the Puget Sound are subjected to some accretion and erosion, it is the very nature of rivers to shift and change their banks. Furthermore, rules of law which logically apply to the single bank and open shores of an ocean, sound or navigable bays and lakes, wherein the rights of the landowners on opposite shores seldom conflict, are completely irreconcilable with problems faced by owners of land bounded by navigable rivers. Rivers are confined to two immediately adjacent banks both of which are subject to constant change by accretion and erosion...A reasonable result can be reached only by applying the generally recognized rules pertaining to accretion and erosion of navigable rivers to problems peculiarly concerned with the navigable rivers of this state...the line of ordinary high water is the boundary of federal lands patented prior to statehood, if they abut navigable rivers."[70] (Underscore supplied)

With respect to uplands sold by the state after statehood, the boundary would be the line of ordinary high tide or ordinary high water, irrespective of whether or not the meander line is above or below the high water or high tide mark. Therefore, when the meander line is above the line of ordinary high water or ordinary high tide, irrespective of whether or not the deed was executed before 1889 by the United States or after 1889 by the state, the upland owner holds the title to the line of ordinary high water or ordinary high tide. See Figure 18.[71]

In case the body of water never has been meandered, but nevertheless is navigable for

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his claim to vested rights in the courts of the state."

[68]"The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, The same is not impeached for fraud."

[69]Scurry v. Jones, supra; Cogswell v. Forrest, supra.

[70]Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra, pp. 982-983.

[71]Arnold, Vern L., Waterfront Titles in the State of Washington, Rev. 1985, Chicago Title Insurance Co., Seattle.

general commercial purposes, the boundary will be the high water or high tide mark.[72] However, the fact that a river or lake is meandered does not make it navigable. In Proctor v. Sim,[73] in considering a meandered lake, the court stated:

> "To be navigable, a lake must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation....It is meandered, but all of the authorities hold that that fact does not make a river or lake navigable."

G. Navigable and Nonnavigable Bodies of Water

The meaning of the term, "navigable waters", in Art. XVII, Sec. 1 of the State Constitution, has given rise to considerable litigation, and the test of navigability which the State Supreme Court has laid down is this: To be "navigable" within the meaning of Art. XVII, Sec. 1 of the State Constitution, a body of water must be capable of being used to a reasonable extent in the carrying on of commerce in the usual manner by water, and be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.[74]

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[72]Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891); Washington Boom Co. v. Chehalis Boom Co., 90 Wash. 350, 156 Pac. 24 (1916); Brace & Hergert Mill Co. v. State, supra; Harper v. Holston, supra; Glen v. Wagner, 199 Wash. 160, 90 P.2d 734 (1939).

[73]134 Wash. 606, 611-612, 236 Pac. 114 (1925). See also, Griffith v. Holman, 23 Wash. 347, 63 Pac. 29 (1900); and Snively v. State, 167 Wash. 385, 388, 9 P.2d 773 (1932), in which the court observed that: "The fact that Angle Lake is meandered does not make that body of water navigable."

[74]Procter v. Sim, 134 Wash. 606, 236 P.2d 114 (1925). In Johnson and Austin, "Recreational Rights and Titles to Beds on Western Lakes and Streams," 7 Natural Resources J. 1, 24-25 (1967), the navigability for title cases are summarized as follows:

> "There are four criteria for navigability for title:
>
> (1) Navigability for title is determined as of the date each state came into the Union.
> (2) Such navigability is determined by the natural and ordinary condition of the water at the time, not whether it could be made navigable by artificial improvements. However, the fact that rapids, rocks, or other obstructions make navigation difficult will not destroy title navigability so long as the waters were usable for a significant portion of the time.
> (3) Navigability in intrastate commerce is all that is required, not usability in interstate commerce.
> (4) The waters must be usable by the 'customary modes of trade or travel on water'....This includes waters as little as three or four feet deep that are geographically located so they have been, or can be used by canoes and rowboats for commercial trade and travel (fur traders' canoes). This does not include waters which are difficult of access because of surrounding mud flats or the like, and which are geographically isolated

The public has a right of navigation on navigable waters, which includes water over land that is submerged only part of the year. The owner only has a right to exclusive possession while the land is not submerged. This principle was expanded to include waters artificially raised and lowered, in Wilbour v. Gallagher.[75]

The definition of "navigable" used by the courts in the State of Washington may be more restrictive than that used by the federal courts.[76]

In Snively v. State,[77] the court observed:

> "Angle Lake is nonnavigable. It is not used, nor is it susceptible for use, in its natural and ordinary condition, as a highway for commerce. That a seaplane equipped with pontoons could safely land on and take off from Angle Lake, is not determinative of the question whether the lake is navigable. Such lone use of the lake would not be use of the lake in its natural and ordinary condition as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water."

Since Angle Lake is a nonnavigable body of water, the several riparian owners along the shore of Angle Lake are the several owners of the lands contiguous to their own when extended to the thread of the lake. To the same effect, see also State ex rel.

> from habitation and transportation routes, and which have never been and are not likely to be used for commercial trade or travel. This probably does not include waters that are geographically isolated from habitation and transportation routes and which have never been and are not likely to be used for commercial trade or travel, even though these waters are deep enough and large enough to float commercial type vessels, and are not physically inaccessible because of mud flats or the like."

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). "Navigability is always a question of fact." Kemp v. Putnam, 47 Wn.2d 530, 533, 288 P.2d 837, 839 (1955) (overruled on other grounds by SAVE v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978)).

[75]77 Wn.2d 306 (1969).

[76]See, Conklin, "Floating Down the River In Re: The Little Spokane," 17 Gonzaga Law Review 869, (1982), which contains a historical overview of the issue of navigability.

[77]167 Wash. 385, 389, 9 P.2d 773 (1932). See also, Lefevre v. Washington Monument and Cut Stone Co., 195 Wash. 537, 81 P.2d 819 (1938); Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104 (1914); and Alaska v. U.S., 754 F.2d 851 (1985).

Davis v. Superior Court,[78] in which the court recognized that even though the riparian owners along the shore of a nonnavigable body of water own land to the thread of the body of water, it may be navigable for special purposes, with the owner entitled to claim the underlying ground. The court quoted with approval from Watkins v. Dorris,[79] as follows:

> "The title to the bed of the stream, therefore, passed from the government to the land owner, but it is subject to the right of the public to use for floating logs and timber."

With respect to the boating, swimming, fishing, and other similar rights of riparian proprietors upon a nonnavigable lake, these rights or privileges are owned in common, and any proprietor or his licensee may use the entire surface of a lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners. This rule does not have the effect of making the nonnavigable lake public, since a stranger has no right to enter upon the lake without the permission of an abutting owner.[80]

Although the owners of property abutting upon a nonnavigable lake own the bed of the lake, where its contour is uneven, a formula would have to be devised to apportion the lake bed equitably among the owners before the boundaries of the portion belonging to each owner could be set.[81]

In considering the ownership and control of the beds and banks of navigable and nonnavigable waters, particular attention must be given to the statutes and judicial decisions under which the logging and timber industry is accorded certain rights; the state is accorded absolute control over navigable waters; and the control of riparian owners over nonnavigable waters is limited. By reason of the importance of the logging and timber industry in the State of Washington and convenience and necessity because of the environment of the industry, state laws have enlarged the rights of those engaged in this industry, and thereby have affected the rights of the riparian owners.

RCW 76.28.090, which was enacted in 1890, provides:

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[78]84 Wash. 252, 146 Pac. 609 (1915). In New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 502, 64 Pac. 735 (1901), in which an attempt was made to appropriate for domestic purposes the water of a nonnavigable stream, thus depriving the landowner operating a mill with water coming from the lake's only outlet, the court quoting from Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147 (1894), observed:

> "The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament...And this right is a substantial one, and may be the subject of sale or lease like the land itself."

[79]24 Wash. 636, 64 Pac. 840 (1891).

[80]Bach v. Sarich, 74 Wn.2d 575, 445 P.2d 648 (1968); Snively v. Jaber, 48 Wn.2d 815, 296 P.2d 1015 (1956); Hefferline v. Langkow, 13 Wn. App. 896 (1976).

[81]Snively v. Jaber, supra.

> "All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways, and said corporations [boom companies] shall be declared public corporations for the purpose of this chapter; and the improvement of such streams, sloughs and waters shall be deemed and declared a public use and benefit."

Corporations created, either in whole or in part, for clearing out and improving rivers and streams in the State of Washington, and for the purpose of catching, booming, sorting, rafting, and holding logs, lumber, or other timber products are required within 90 days after their articles of incorporation have been filed, to file in the office of the Secretary of State a plat or survey of so much of the shorelines of the waters of the state or of any of the rivers or streams thereof and lands contiguous thereto as the corporation intends to utilize for logging. Such plat is required to be made from the records of the United States in the Surveyor General's office of the State of Washington, or by a competent surveyor, subsequent to the actual survey. Whenever such a corporation desires to extend its operations to portions of streams not embraced in its original plat, or to other streams tributary to the stream or streams described in the original plat, or in any manner to change, modify, or correct its original plat, it may file additional plats or surveys in the office of the Secretary of State of so much of the shorelines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for logging by the corporation. In addition, whenever by reason of floods or otherwise, the channel of any stream is changed so as to put such stream beyond the limits of the original plat or any supplemental plat that has been filed pursuant to either RCW 76.28.020 or RCW 76.32.030, the corporation may file in the office of the Secretary of State supplemental plats or surveys showing the change in the channel and so much of the shorelines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for logging.[82]

In Watkins v. Dorris,[83] the court, in considering RCW 76.28.030 supra, held the term "navigable waters" in Art. XVII, Sec. 1 of the State Constitution does not embrace a stream which is only navigable for the purposes of floating logs, and therefore title to the bed of such a stream is in the owner of the adjoining uplands, and stated:

> "Under this section all 'meandered rivers and meandered sloughs' shall be deemed as public highways for the purposes specified in the act, viz., booming and floating logs and timber. Nothing further is needed to establish them as such public highways, when it is shown that they are meandered. This section further provides that all 'navigable waters' shall be deemed as public highways for the same purpose. If the stream is not meandered, it must then be determined whether it is or is not navigable in fact for floating logs or timber. If navigable for such purpose, it is a public highway for that purpose."

Thus, whether the stream or body of water is or is not meandered, if it is navigable for general commercial purposes, the bed belongs to the state and the public.

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[82]RCW 76.32.010 - 76.32.030 et seq., as amended. Unplatted first class tide or shorelands may be leased for booming purposes. RCW 79.94.280. Second class tide or shorelands whether or not reserved from sale or from lease for other purposes, except any oyster reserves containing oysters in merchantable quantities, may be leased for booming purposes. RCW 79.94.290.

[83]24 Wash. 636, 644-645, 64 Pac. 840 (1901).

However, whether the stream or body of water is or is not meandered, if it is nonnavigable for general commercial purposes, the title to the thread of the stream is in the riparian owners provided the description in the deed of the abutting upland owner does not limit his boundary "to the bank" of the stream, but is "subject to the right of the public to use the stream for floating logs and timber." Although the right to use streams for floating logs and timber was only expressly conferred upon corporations by statute, the court in Watkins, supra, further stated that:

> (At p. 645) "With this right given to a corporation to use the stream as a public highway, there is no reason, in principle, why an individual or partnership...may not use it as such. Indeed, if a corporation only could so use the stream, the act would be of doubtful force, because of its discrimination....But neither such corporation nor individuals can interfere with the soil in a stream of the character of Elochoman creek, the bed of which is owned by the land owner, without the land owner's consent, or, by operation of law, with due compensation made."

In East Hoquiam Boom and Logging Co. v. Neeson,[84] the court in considering Ch. 72, Laws, 1895, Ch. 76.32 RCW, as amended, with respect to a stream that was not navigable for any purpose in its natural state, declared:

> "It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway."[85]

And the court continued:

> "If there is a principle..more firmly settled in the law than any other, it is that, in the absence of congressional interference with, or control of, the subject, the state possesses the undoubted right to promote, by artificial means, the navigability or floatability of rivers and streams within its borders, and thereby render them more useful and beneficial to the public."

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[84]20 Wash. 142, 146-147, 54 Pac. 1001 (1898). See also, Sumner Lumber and Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220 (1913).

[85]See, however, the definition of "navigable waters" of the Federal Water Power Act under which bodies of water that may be made navigable by artificial means are treated as navigable for the purpose of regulation of commerce by the federal government. Title 16, U.S.C.A. Sec. 796(8) of the Federal Water Power Act contains a rather broad definition of "navigable waters"; it provides:

> "'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among several states, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority." (Underscore supplied)

After examining the above-mentioned 1895 act relating to booming companies, the court stated in Burrows v. Grays Harbor Boom Company:[86]

> "From an examination of the statute, we conclude that, with the exception of the right of eminent domain and the right to charge and collect fees, the boom company stands upon no different footing from an individual. That the legislature did not intend to give any exclusive right of navigation to boom companies, although they may be dealing in business of great magnitude, but that they were restricted to a joint user of the waters of the stream, and that it was the plain intention to protect from their encroachments all other rights of navigation and rights of use in the waters of the river, is evident from the enactments on the subject."

H. Accretion

With respect to land which abuts upon a body of water, accretion is the process whereby either: (a) new soil is deposited as an addition to land by gradual and imperceptible deposition through the operation of natural causes to form new solid ground, called alluvion, or (b) the bed of a body of water gradually is exposed when the water recedes from the land, called reliction (sometimes called dereliction). Under the rule of accretion, land that is gradually deposited upon one bank by the action of a stream belongs to the owner of such abutting upland. This rule is applicable to upland owners abutting both on navigable and nonnavigable streams and is recognized in the state of Washington.[87]

RCW 79.94.310, which declares that all accretions to "tide or shore lands of the first or second class heretofore sold, or that may hereafter be sold, by the state, shall belong to the state..."[88] applies only to tide and shorelands that have been sold by the state. In Ghione v. State, supra, the court observed, in reference to a similar previous enactment:

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[86]44 Wash. 630, 644, 87 Pac. 937 (1906). See also, Monroe Mill Company v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904); State ex rel. United Tanners Timber Co. v. Superior Court, 60 Wash. 193, 110 Pac. 1017 (1910); and Robinson v. Silver Lake Railway Lumber Co., 153 Wash. 261, 279 Pac. 1190 (1929).

[87]Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 78 Wn.2d 975, 482 P.2d 769 (1971); Hughes v. Washington, 389 U.S. 290 (1967); Heikkinen v. Hansen, 57 Wn.2d 840, 360 P.2d 147 (1961); Ghione v. State, 26 Wn.2d 635, 650, 175 P.2d 955 (1946); Strand v. State, 16 Wn.2d 107, 132 P.2d 1011 (1943); Glenn v. Wagner, 199 Wash. 160, P.2d 734 (1939); Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922); Spinning v. Pugh, 65 Wash. 490, 118 Pac. 635 (1911).

[88]This statute, similar to statutes in effect since 1899 (Ch. 83, Laws of 1899), requires that state accreted land be surveyed prior to sale, and also provides that the owner of the adjacent tide or shorelands shall have the preference right to purchase such lands produced by accretion for 30 days after notification by registered mail of the preference right to purchase such accreted lands. However, the sale of tide and shorelands by the state is restricted by RCW 79.94.150.

(At pp. 650-651) "The statute...clearly shows that it does not relate to accretions in the ordinary sense of the term, that is, accretions to uplands, but, on the contrary, relates to accretions to tide and shore lands, and therefore accretions, by definition, situate below the line of ordinary high tide or ordinary high water which marks the boundary between tide or shore land and the adjoining upland."

In that case a subsequent holder under a federal patent claimed land under the rule of accretion. The court held that with respect to a navigable river which imperceptibly shifted its bed toward the west and subsequently dried up, the owners of the uplands on the east were entitled to the accretions on the eastern bank, and the state was entitled only to the bed and shores of the river as they were situated when it ceased to be navigable.

In Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra, the court held that Const. Art. XVII, Sec. 2, under which the state disclaims all title to overflowed lands patented by the United States, does not operate in disregard of erosion to permanently fix boundaries of federal patents abutting navigable streams, issued prior to statehood, at the ordinary high water or meander line existing at the time of the patent. The "line of ordinary high water is the boundary of federal lands patented prior to statehood, if they abut navigable rivers", and, when the course of a river is changed by accretion or erosion, the owner's water boundary "shifts with the natural and gradual erosion and accretion of the river. Although one may lose his land by gradual natural erosion, he is entitled to the addition caused by natural accretion."[89]

In Hughes v. Washington,[90] the United States Supreme Court held that the question of ownership of accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood, was governed by federal, not state, law, and that under federal law, the grantee of the land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore.[91]

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[89]Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra, at p. 983. This case expressly overruled Washougal & LaCamas Trans. Co. v. Dalles, Portland & Astoria Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902), with respect to the following observation dealing with accretion at a point where there were no shorelands: "It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state...".

[90]389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967).

[91]In this case the U.S. Supreme Court rejected the conclusion of the Washington State Supreme Court in Hughes v. State, 67 Wn.2d 799, 410 P.2d 20 (1966), that, with respect to tidal waters, the dividing line between the upland and the tidelands, where there have been accretions, is the line of ordinary high tide, defined as that line which the water had impressed on the soil as of November 11, 1889, by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. The Washington State Supreme Court had concluded that all accreted lands formed after statehood constituted a portion of the public highway dedicated and reserved for the people by the legislature. See also, United States v. State of Washington, 294 F.2d 830 (1961); certiorari denied, 369 U.S. 817, 82 S. Ct. 828, 7 L.Ed.2d 783 (1962); and Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9 (1935).

In Glenn v. Wagner,[92] the court stated:

> "When grants of land border on running water and the course of the stream is changed by the gradual washing away on the one side and the gradual building up on the other, the owner's boundary changes with the changing course of the stream."

In Harper v. Holston[93] the court quoted with approval from New Orleans v. United States, 10 Peters 662, as follows:

> "'No other rule can be applied, on just principles [meaning the rule quoted above, that the owner's boundary changes with the changing course of the stream]. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gains.'"

The court continued:

> "That rule is as much applicable to the government as it is to private individuals. If the government chooses to grant its lands, making a running stream one of the boundaries of the grant, it must expect this part of the boundary to change as time goes on. Ordinarily it gains in one place what it loses in another, and on no principle of justice can it say that it is not to be subjected to the general rule. And such we understand to be the holding of the Supreme Court in Jefferies v. East Omaha Land Co., 134 U.S. 178.
>
> . . .
>
> "And since the land in controversy is not within the defined boundaries of the conveyances under which they hold, it must appear, if they are to recover, that the disputed land has been added to their original boundaries by accretion."

In Hudson House, Inc. v. Rozman,[94] the court first noted that cases regarding ownership of lands adjacent to bodies of water must emphasize equitable treatment of all affected property owners. The case involved an unusual accretion that had built up in front of waterfront property at the ocean, but across a stream from the upland property. The court held that the accretion should belong to the upland property, even though across a stream, in order to preserve the upland property owner's access to the ocean beach. The court emphasized that access to the water might well be the greatest value of the property and this consideration overrode the usual rule by which accretions belong to the land to which they adjoin.

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[92]199 Wash. 160, 166, 90 P.2d 734 (1939).

[93]119 Wash. 436, 441-442, 205 Pac. 1062 (1922).

[94]82 Wn.2d 178, 509 P.2d 992 (1973).

I. Avulsion

Avulsion is the sudden change of the banks of a stream such as occurs when a stream, from any cause, suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank. In Parker v. Farrell,[95] the court observed:

> (At pp. 554-555) "This court has held that the line of ordinary high water is the boundary of navigable streams and that the thread or channel of a nonnavigable stream is the boundary line between two parcels of real property. When the course of the stream changes, the boundary line may or may not shift with the stream. If the change is slow and imperceptible so that it may be classified as accretion or reliction, the boundary line shifts. If, however, the change of the stream is avulsive, the original boundary line remains."

The issue in Storm v. Sheldan[96] was whether an owner of a parcel which extends to the thread of a nonnavigable stream may by artificial means shift the course of that stream onto his property and thereafter claim the protection of the avulsion rule, so that the adjacent riparian owner is deprived of access to the watercourse. The court refused to apply the usual rule of avulsion to this artificially produced change and noted a general rule:

> "Unless no harm would occur to other interests, a person may not induce an artificial change in water boundaries, and then claim for himself whatever advantage the change has induced. For example, the accretion doctrine has been held inapplicable to accretions produced artificially by one riparian owner at the expense of the other." Storm v. Sheldon, supra, p. 73.

In George v. Pierce County[97] the court held that when a navigable river changed its course by avulsion over public lands before the admission of the State of Washington into the Union in 1889, the bed of the new channel remained in the federal government and was held in trust for the future state, and the trust title in the old channel thereupon ceased, and the State of Washington upon entering the Union acquired no title to the old channel.

The court stated in relevant part:

> (At pp. 501-502) "There could be no reason, in fact or in law, for both

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[95]74 Wn.2d 553, 445 P.2d 620 (1968). See also Heikkinen v. Hansen, 57 Wn.2d 840, 360 P.2d 147 (1961); Hirt v. Entus, 37 Wn.2d 418, 224 P .2d 620 (1950); and Harber v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922). In AGO 57-58 No. 57 it was concluded that when a sudden change in the course of a river which forms the boundaries between counties results from the construction of a highway, this does not change the boundary between the two counties to conform to the new course of the river because this constitutes an avulsion.

[96]12 Wn. App. 66, 527 P.2d 1382 (1974).

[97]111 Wash. 495, 191 Pac. 406 (1920).

titles to persist for the benefit of the future state....Although there are numerous authorities which hold that, if the change of channels had occurred after the state's title had become vested, then the state's title to the old channel would not have been thereby divested, and we have so held in Newell v. Loeb, [77 Wash. 182] and Hill v. Newell, [86 Wash. 227] supra,....

"...As the title of the government had been freed from the trust for the future state long prior to its admission, the full and unrestricted title must, therefore, have vested in the government as a part of the public domain, which it could retain or grant or permit to pass to the owner by patent of the abutting uplands under the rule as to accretions, without any further consent from the state than that contained in the constitutional provision which has been set forth."

In Arkansas v. Tennessee,[98] the United States Supreme Court held that when the bed and channel of a running stream forming a boundary between states are changed by accretion and erosion, the boundary follows the varying course of the stream, but if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by avulsion, there is no resulting boundary change, even though there be no water flowing in the old channel. So long as the channel of a river separating two states, the course of which has been changed by avulsion, remains a running stream, the boundary marked by it is still subject to change by erosion and accretion. But when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the formerly navigable channel, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion.

J. Apportionment of Tide and Shorelands

While the classification of first and second class tidelands and shorelands may appear on its face to be a simple and satisfactory method of describing the tidelands and shorelands, difficulty arises from the fact that the government surveys did not include tide and shorelands, and, as a result, left no monuments below the high tide or high water line.

Because a large portion of the tide and shorelands in the State of Washington are not bounded by straight or even substantially straight high tide or high water lines, innumerable problems can arise in the division of the tidelands among coterminous owners that will defy determination by any one fixed rule, however elastic. However, the Washington State Supreme Court, in State v. Corvallis Sand & Gravel Co.,[99] and Spath v. Larsen,[100] has set out several guidelines to be used in tideland sideline cases.

In State v. Corvallis Sand & Gravel Co., supra, at page 28, the court, involved with the division of tidelands in a headland, quoted with approval the case of Commonwealth v. Roxbury, 9 Gray (75 Mass.) 451, which stated at page 522:

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[98]397 U.S. 88, 90 S. Ct. 784, 25 L.Ed.2d 73 (1970).

[99]69 Wn.2d 24, 416 P.2d 657 (1966).

[100]20 Wn.2d 500, 148 P.2d 834 (1944).

"4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high water, and the side lines of the lots extended at right angles with the shore line.

"5th. Around a headland, the lines dividing the flats must diverge towards low water mark."

The court then concluded that, in the case of a headland, the sidelines which divide the tidelands should be drawn divergent from the water boundary of the upland (whether that be the high water line or the meander line) to the outer edge of the tidelands, or to the line of navigability.[101]

In Spath v. Larsen, supra, at pp. 524-525, the court in dealing with a boundary dispute over tidelands in a cove, stated the following general principles from which the dividing line in such cases may be determined:

"First: In adjudicating the ownerships of tidelands between adjoining upland owners on a concave shore line, each upland owner is entitled to a proportionate share of the tidelands extending to the low water mark."

"Second: The course or courses of the boundaries of the upland properties should be disregarded, each upland owner being entitled to share ratably in the adjoining tidelands, having regard only to the amount of line which he owns, lying between the points where the lateral boundaries of his upland meet the shore line or the government meander line, whichever, in the particular case, constitutes the water boundary of his upland."

"Third: Tidelands should be apportioned between the respective upland owners so that, as the whole length of the water boundary of the land within the concave shore, cove, or bay, is to the whole length of the low water line, so is each landowner's proportion of the shoreline to each owner's share of tidelands along the line of low water. Tidelands may be divided between adjoining owners by erecting lines perpendicular to the general course of shore line only in cases where the shore line is straight, or substantially so."[102]

In a situation such as that indicated in Figure 17a, supra, in which a well-defined cove projects in form a generally overall straight shoreline, the technique involves connecting the property line at the shoreline to proportional lengths of frontage at the line of navigability. The following proportion would be used to determine the location of the points B and C which would mark the extremities of the tidelands abutting Lot 10:

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[101]In Kalin v. Kister, 27 Wn.2d 785, 180 P.2d 86 (1947), the court stated that the line dividing tidelands should be run at right angles from the meander line.

[102]See also, Seattle Factory Sites Co. v. Saulsberry, 131 Wash. 95, 229 Pac. 10 (1924); and E.B.M., "Lateral Boundaries - Second Class Tidelands," 20 Wash. L. Rev., pp. 67-68 (1945), for discussion of formulas for determination of tideland sideline boundaries.

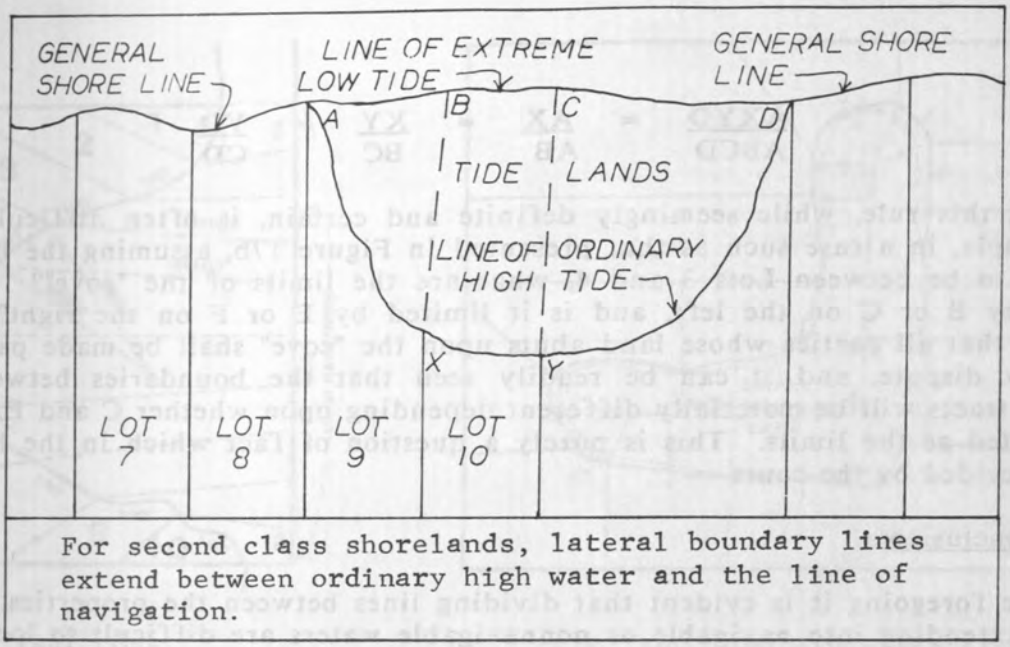

FIGURE 17a - PROJECTION OF LATERAL BOUNDARY LINES over Second Class Tidelands or Shorelands.

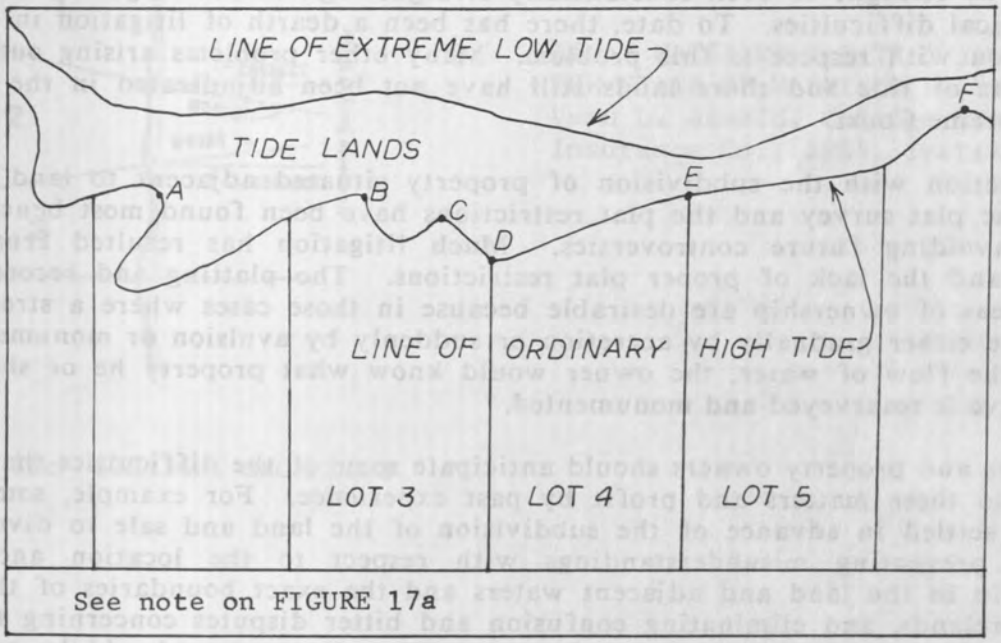

FIGURE 17b - PROJECTION OF LATERAL BOUNDARY LINES over Second Class Tidelands or Shorelands.

$$\frac{AXYD}{ABCD} = \frac{AX}{AB} = \frac{XY}{BC} = \frac{YD}{CD}$$

However, this rule, while seemingly definite and certain, is often difficult to apply. For example, in a case such as that presented in Figure 17b, assuming the boundary in question to be between Lots 3 and 4, what are the limits of the "cove"? Is the cove limited by B or C on the left, and is it limited by E or F on the right? The rule provides that all parties whose land abuts upon the "cove" shall be made parties to the boundary dispute, and it can be readily seen that the boundaries between various tideland tracts will be materially different depending upon whether C and E or B and F are selected as the limits. This is purely a question of fact which in the last analysis can be decided by the court.

K. Conclusion

From the foregoing it is evident that dividing lines between the properties of riparian owners extending into navigable or nonnavigable waters are difficult to locate without surveying and mapping, and, in some cases, will have to be resolved by litigation. There is not much confusion, however, in determining the proper location of the dividing lines between riparian owners which run under the water to the thread of a nonnavigable river or stream when the description reads to the thread of the stream.

As indicated above, where the line of high water or high tide is substantially straight, the establishment of the lines dividing the tidelands is relatively simple and the rule for the determination thereof is well-settled. However, in attempting to apply this rule to lakes, ponds, and other bodies of water where the tide and shorelands are not bounded by straight or even substantially straight high tide or high water lines, there are practical difficulties. To date, there has been a dearth of litigation in the state of Washington with respect to this problem. Many other problems arising out of various alignments of tide and shore lands still have not been adjudicated in the Washington State Supreme Court.

In connection with the subdivision of property situated adjacent to land covered by water, the plat survey and the plat restrictions have been found most beneficial as an aid in avoiding future controversies. Much litigation has resulted from improper surveys and the lack of proper plat restrictions. The platting and recording of the exact areas of ownership are desirable because in those cases where a stream changes its course either gradually by accretion or suddenly by avulsion or monuments are lost due to the flow of water, the owner would know what property he or she owns and could have it resurveyed and monumented.

Engineers and property owners should anticipate some of the difficulties that arise with respect to these matters and profit by past experience. For example, some questions may be settled in advance of the subdivision of the land and sale to diverse owners, thereby preventing misunderstandings with respect to the location and rights of ownership in the land and adjacent waters and the exact boundaries of the tidelands and shorelands, and eliminating confusion and bitter disputes concerning the right of use and kind of use of the body of water. The plat survey should be explicit with respect to upland and water boundaries. The plat restrictions should be explicit with respect to common water usage. In plats adjacent to navigable waters, plat restrictions cannot interfere with reasonable public use of the water. However, in plats bordering nonnavigable waters, restrictions may permit only hand-powered water craft if so desired, prohibit the use of private power boats, and prohibit any commercialized public use.

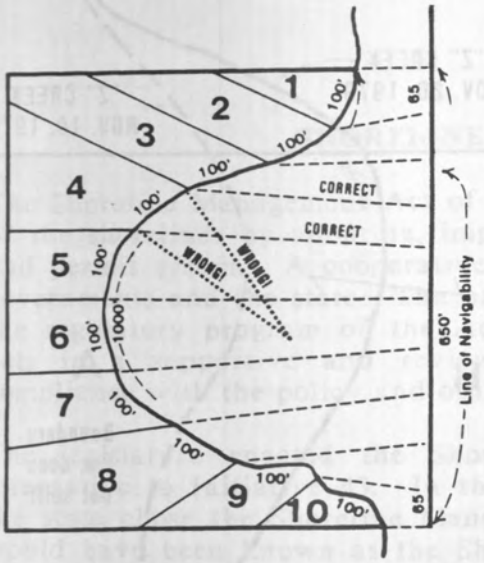

FIG. 18a COVE

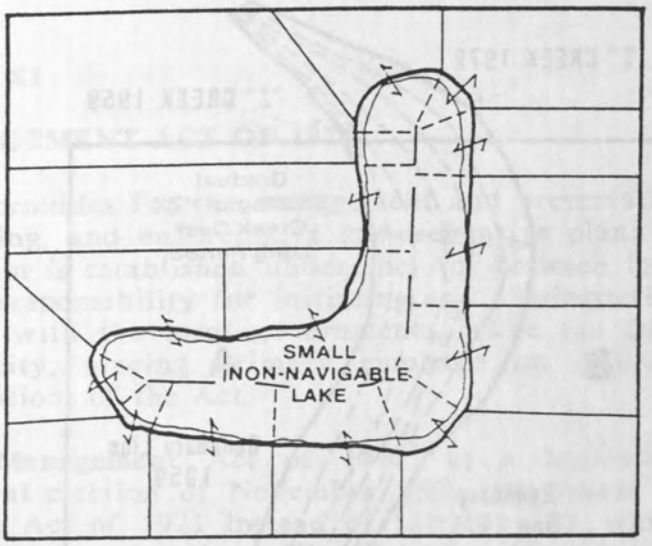

FIG. 18b NON-NAVIGABLE LAKE

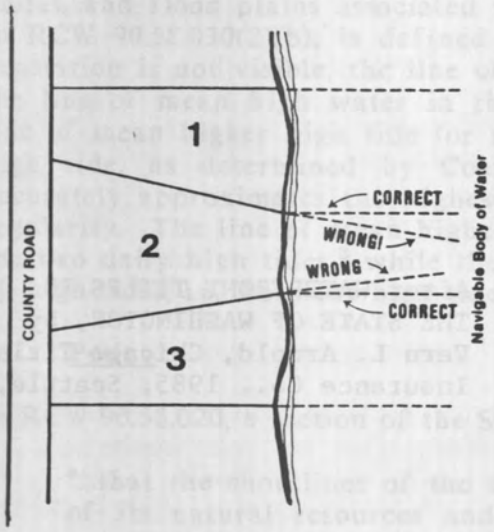

FIG. 18c STRAIGHT SHORELINE

After WATERFRONT TITLES IN THE STATE OF WASHINGTON, by Vern L. Arnold, Chicago Title Insurance Co., 1985, Seattle, WA.

FIGURE 18 - LATERAL LINES OVER TIDELANDS AND SHORELANDS.

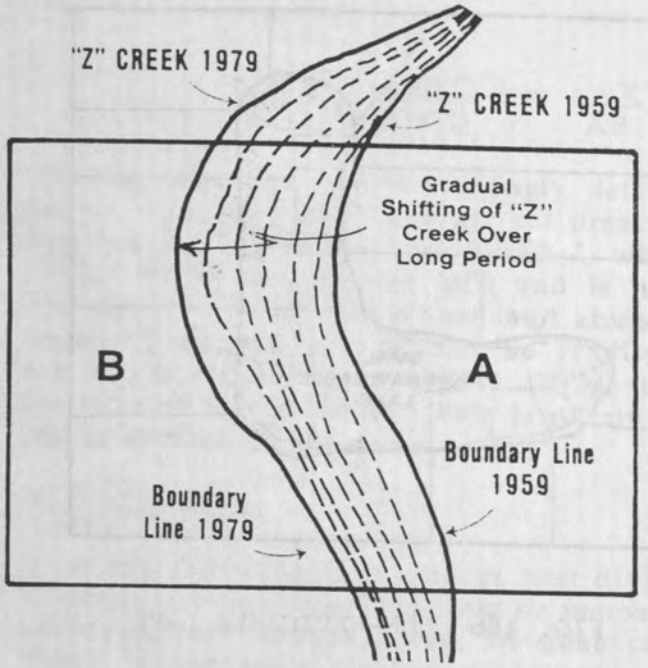

FIG. 19a ACCRETION

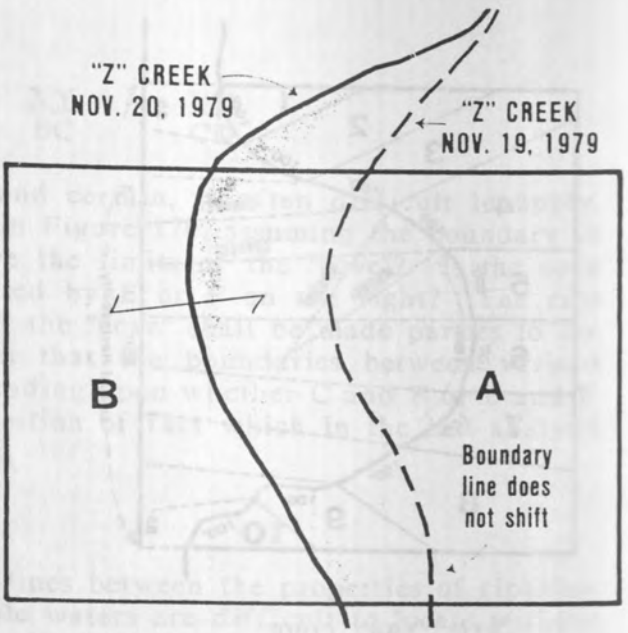

FIG. 19b AVULSION

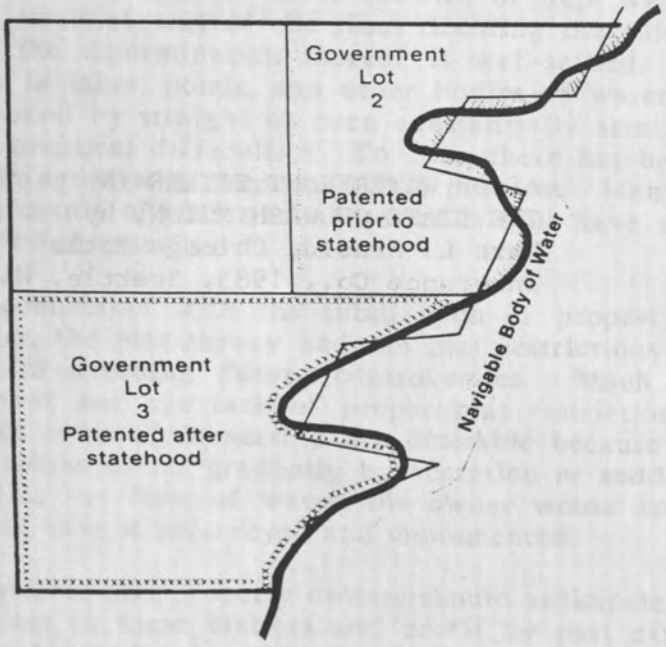

FIG. 19c EFFECT OF STATEHOOD ON OWNERSHIP AT SHORELINE

After WATERFRONT TITLES IN THE STATE OF WASHINGTON, by Vern L. Arnold, Chicago Title Insurance Co., 1985, Seattle, WA.

FIGURE 19 - OWNERSHIP AS AFFECTED BY A CHANGE IN SHORELINE

XI

SHORELINE MANAGEMENT ACT OF 1971

The Shoreline Management Act of 1971[1] provides for the management and preservation of the shorelines by adopting, implementing, and enforcing, a comprehensive planning and permit system. A cooperative program is established under the Act between local governments and the state. The primary responsibility for initiating and administering the regulatory program of the Act rests with the local governments, while the DOE acts in a supportive and review capacity, placing primary emphasis on insuring compliance with the policy and other provisions of the Act.

The legislature enacted the Shoreline Management Act of 1971[2] as a legislative alternative to Initiative 43. In the general election of November, 1972, the voters of the state chose the Shoreline Management Act of 1971 instead of Initiative 43, which would have been known as the Shorelines Protection Act. The Shoreline Management Act went into effect June 1, 1971.

The Shoreline Management Act applies to marine water areas of the state, including those segments of streams downstream of a point where the mean annual flow is 20 cubic feet per second or greater, and lakes larger than 20 acres, and to the land extending landward 200 feet as measured on a horizontal plane from the ordinary high water mark on these water areas and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated therewith. The "ordinary high water mark," as used in RCW 90.58.030(2)(b), is defined to be the line of vegetation, or where the line of vegetation is not visible, the line of mean higher high tide in the case of salt water or the line of mean high water in the case of fresh water. The vegetation line or the line of mean higher high tide (or mean high water) was chosen over the line of mean high tide, as determined by Coast and Geodetic Survey criteria, because it more accurately approximates the highest point on the land reached by the water with any regularity. The line of mean higher high tide is determined by averaging the higher of the two daily high tides,[3] while the line of mean high tide is determined by averaging all high tides; i.e., both the high tides and the higher high tides.

A. Policy

In RCW 90.58.020, a section of the Shoreline Management Act, the legislature provided:

> "...that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the

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[1]Ch. 90.58 RCW; Ch. 286, Laws of 1971, Ex. Sess.

[2]See Geoffrey Crooks, "The Washington Shoreline Management Act of 1971," 49 Wash.L.Rev. 423 (1974).

[3]Shalowitz, Aaron L., Shore and Sea Boundaries, U.S. Department of Commerce, Coast and Geodetic Survey, Vol. 1, pp. 292 and 300, (1962).

uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

"It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.[4] This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

"The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the statewide interest over local interest;
(2) Preserve the natural character of the shoreline;
(3) Result in long term over short term benefit;
(4) Protect the resources and ecology of the shoreline;
(5) Increase public access to publicly owned areas of the shorelines;
(6) Increase recreational opportunities for the public in the shoreline;
(7) Provide for any other element...deemed appropriate or necessary.

"In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline."

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[4]In Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974), the court noted: "The purpose of the Shoreline Management Act of 1971 is not to totally prohibit future development along state shorelines and waters, but rather to ensure that such development be carefully carried out in keeping with the public interest." See also 51 Wash. L. Rev. 405 (1976) for a discussion of this case and its implications.

B. Adoption of Initial Guidelines

The DOE was directed by RCW 90.58.060 to adopt guidelines for the use of local governments in the development of master programs for the: (1) regulation of the use of shorelines, and (2) regulation of the uses of shorelines of statewide significance. These guidelines were also to serve as the criteria upon which proposed developments were to be judged until the master programs of the local governments were adopted. These guidelines were adopted in final form June 20, 1972, after a series of public hearings and extensive input from local governments and other interested groups, and are contained in the Washington Administrative Code, WAC 173-16, Shoreline Management Act Guidelines for Development of Master Programs.

C. Timetables for Completion of Shoreline Inventories and Master Programs

Within six months of the effective date of the Act, (by November 30, 1971), local governments were required to submit letters to the DOE agreeing to make an inventory and develop a master plan for the shorelines within their respective jurisdictions. If a local government failed to comply within six months, the department was authorized to develop a plan for the shorelines within the jurisdiction of that local government. The inventory had to be completed within 18 months after the date of the Act, and was to include general ownership patterns of shorelines in terms of public and private ownership, a survey of the general natural characteristics, present uses, and initial projected uses.[5]

The master programs for the regulation of uses of shorelines consistent with the guidelines adopted also were to be completed within 24 months after the adoption of the guidelines.[6] They were (and still are required) to include, when appropriate, elements concerning economic development, access to public areas, recreational opportunities, circulation patterns, land use, conservation, historic, cultural, scientific, and educational considerations, and any other element appropriate or necessary. Maps, texts, diagrams, and charts or other descriptive material also had to (and still must) be included.[7] Public hearings were required to be held by each local government before adoption of their master program.

D. Approval of Master Program

If the DOE disapproved the local program, it was to indicate within 90 days from the date of submission the precise facts upon which that decision was based, and was to submit to the local governments the suggested modification of the program to make it consistent with the policy of the Shoreline Management Act of 1971 and the guidelines. The local government had 90 days after it received the recommendations of the DOE to make modifications to eliminate the inconsistencies and to resubmit the program to the department for approval.[8] If there was still disagreement, appeals could be made to a Shorelines Hearings Board, a six member quasi-judicial body composed of the present

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[5]RCW 90.58.070 and 90.58.080(1).

[6]The 18 month requirement in RCW 90.58.080 was changed to 24 months by Sec. 1, Ch. 61, Laws of 1974, 1st Ex. Sess.

[7]RCW 90.58.100.

[8]RCW 90.58.090.

three member Pollution Control Hearings Board, a representative appointed by the Association of Washington Cities, a representative appointed by the Association of Washington Counties, and the State Land Commissioner or his designee.[9]

E. Local Government Appeals to Shorelines Hearings Board

Local governments may appeal to the Shorelines Hearings Board any rules, regulations, or guidelines, adopted or approved by the DOE within 30 days of adoption or approval. The Board is then required to make a final decision within 60 days following the hearing.[10]

F. Review and Adjustments to Master Programs

The DOE and each local government are required to review periodically any master programs under their jurisdiction and make adjustments as are necessary. Adjustments proposed by a local government must be forwarded to the DOE for review and its approval, rejection or modification. Appeals may be made to the Shorelines Hearings Board. No adjustment becomes effective until it has been approved by the DOE or by decision of the Board.[11]

G. Applicability of the Act

Developments on the shorelines of the state are made subject to the policy and provisions of the Shoreline Management Act of 1971 by RCW 90.58.140(1), which provides:

> "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules or master program."

Because "shorelines of the state" are expressly defined in RCW 90.58.030(2)(d) to exclude "shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments," and "shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes," developments on those areas need not be consistent with the policy and the applicable guidelines, rules, and master programs provided for in the Act.

The definition of "associated wetlands" was one of the issues in Juanita Bay Valley Community Assoc. v. Kirkland.[12] The DOE had made a determination that the area in dispute did not fall within the definition of the term "associated wetlands" for the purposes of the Shoreline Management Act. The court accepted the DOE's definition which basically required a wetland area to be at the same level as the major body of water and also that it have a direct surface connection with the major body of water.

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[9]RCW 90.58.170.

[10]RCW 90.58.180.

[11]RCW 90.58.190, as amended by Sec. 3, Ch. 292, Laws of 1986.

[12]9 Wn. App. 59, 510 P.2d 1140 (1973).

In so doing the court noted that the legislature specifically gave the DOE the power to designate the "marshes, bogs, swamps,...associated with the streams, lakes and tidal waters" subject to the provisions of the Shoreline Management Act.

In Merkel v. Port of Brownsville[13] the issue arose as to whether a project could be divided into segments for purposes of complying with the Shoreline Management Act. The port wanted to divide a boat marina into segments, continuing with the upland portion even though the proper shoreline permit had not been obtained for the marina portion. The court did not allow this piecemeal development to proceed and halted the entire project until the proper permits had been obtained.

Variances and conditional uses under approved master programs must be submitted to the DOE for approval or disapproval.[14]

H. Permit System

Any party undertaking a "substantial development" on the shorelines of the state must first obtain a permit from the governmental entity having administrative jurisdiction under the provisions of the Shoreline Management Act.[15] "Substantial development" is defined in RCW 90.58.030(3)(e) as follows:

> "'Substantial development' shall mean any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state...."

"Development" is defined by RCW 90.58.030(3)(d) as:

> "a use consisting of the construction or exterior alteration of structures; dredging; drilling, dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any stage of water level;"

No "substantial development," then, may be initiated after June 1, 1971, on and within the shorelines of the state covered by the Shoreline Management Act without obtaining a permit.[16]

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[13]8 Wn. App. 844, 509 P.2d 390 (1973).

[14]RCW 90.58.140(12).

[15]RCW 90.58.140(2). And RCW 90.58.280 provides: "The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them."

[16]RCW 90.58.140.

In English Bay Enterprises, Ltd. v. Island Co.[17] the court stated:

> "The Shoreline Management Act of 1971 is to be broadly construed in order to protect the state shorelines as fully as possible. See RCW 90.58.900. A liberal construction of the act is also mandated by the State Environmental Policy Act of 1971."

In keeping with the requirement of liberal construction, the court in Weyerhaeuser v. King County[18] found that the dumping of gravel and displacement of soil in conjunction with construction of a logging road constituted a "substantial development" requiring a permit under the Shoreline Management Act. The contents of the substantial development permit was an issue in Hayes v. Yount.[19] The permit issued described the proposed uses as "operation of a solid waste landfill and marine industrial area." No detailed site plan or description of the uses was included. The Shorelines Hearings Board vacated the substantial development permit because it lacked sufficient detail. The court agreed with the Shorelines Hearings Board and noted:

> "...the scope and extent of authorized uses is defined only by the contents of the development permit. Effective operation of the permit review process, as well as enforcement of the act, demands that shoreline permits be complete in themselves and contain sufficient detail to enable the local government and the board to determine consistency with the policy of water-dependent uses and other policies set forth in RCW 90.58.020..." (At pp. 295-296)

I. Exemptions from the Permit System

RCW 90.58.030(3)(e) also provides that the following activities are not to be considered "substantial developments":

(1) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;
(2) Construction of the normal protective bulkhead common to single family residences;
(3) Emergency construction necessary to protect property from damage by the elements;
(4) Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on wetlands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels: Provided, That a feedlot of any size, all processing plants, or other activities of a commercial nature, alteration of the contour of the wetlands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other

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[17]89 Wn.2d 16, 20, 568 P.2d 783 (1977). See also Hunt v. Anderson, 30 Wn. App. 437, 635 P.2d 156 (1981).

[18]91 Wn.2d 721, 592 P.2d 1108 (1979).

[19]87 Wn.2d 280 (1976).

livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;

(5) Construction or modification of navigational aids such as channel markers and anchor buoys;

(6) Construction on wetlands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his family, which residence does not exceed a height of 35 feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this chapter;

(7) Construction of a dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee or contract purchaser of a single family residence, the cost of which does not exceed two thousand five hundred dollars;

(8) Operation, maintenance, or construction of canals, waterways, drains, reservoirs, or other facilities that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored ground water for the irrigation of lands;

(9) The marking of property lines or corners on state owned lands, when such marking does not significantly interfere with normal public use of the surface of the water;

(10) Operating and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975 which were created, developed or utilized primarily as a part of an agricultural drainage or diking system.

(11) Any action commenced prior to December 31, 1982, pertaining to (a) the restoration of interim transportation services as may be necessary as a consequence of the destruction of the Hood Canal bridge, including, but not limited to, improvements to highways, development of park and ride facilities, and development of ferry terminal facilities until a new or reconstructed Hood Canal bridge is open to traffic; and (b) the reconstruction of a permanent bridge at the site of the original Hood Canal bridge.

These activities, therefore, are not subject to the permit provisions of the Shoreline Management Act (RCW 90.58.140), but must be consistent with the policy of the act and the applicable guidelines, rules, and master programs provided for therein.[20]

Further exemptions from the permit requirements of the act are provided for in RCW 90.58.140(9), which excludes any development for which there is a certification from the governor pursuant to Ch. 80.50 RCW, which relates to thermal power plants, and in RCW 90.58.140(10), which provides for special exemptions for certain properties where the final plat was approved after April 13, 1961 or the preliminary plat was approved after April 30, 1969 and the development is completed by June 1, 1973.

Even if the development is exempt from the permit requirements, however, Putnam v. Carroll[21] makes clear that the project must still be consistent with the basic policy of

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[20]Putnam v. Carroll, 13 Wn. App. 201, 534 P.2d 132 (1975).

[21]13 Wn. App. 201, 534 P.2d 132 (1975).

the Shoreline Management Act and the other applicable regulations. The Putnam case also held that the denial of an application for an exemption from the permit requirements does not give rise to an appeal under RCW 90.58.180 to the Shoreline Hearings Board. Rather, the appeal procedure only relates to the granting or denying of the permit itself.

J. Administration of Permit System by Local Governments

Local governments have the responsibility for issuing substantial development permits. They are directed by RCW 90.58.140(3) to establish a program, consistent with rules adopted by the DOE,[22] for the administration and enforcement of the permit system. Notice requirements concerning the application for a permit are outlined in RCW 90.58.140(4). Notice of such application must be published at least once a week on the same day of the week for at least two consecutive weeks in a legal newspaper of general circulation within the area of the proposed development. Additional notice must be given in one of three ways: (1) it may be mailed to the latest recorded real property owner within 300 feet of the boundary of the property on which the proposed development is to be placed, (2) notice may be posted on a conspicuous place on the property, or (3) notice may be given by any other manner deemed appropriate by local authorities to provide appropriate notice to adjacent landowners and the public.

This Act also provides that no construction pursuant to a permit will be authorized until 30 days from the date the final order is filed or until all review proceedings are terminated if such proceedings were initiated within the 30 day period.[23]

K. Appeals from Granting, Denying, or Rescinding Permits

Any person aggrieved by the granting, denying, or rescinding of a permit may seek review by the Shorelines Hearings Board by filing a request for review with the Hearings Board, the DOE, and the Attorney General within 30 days of the receipt of the final order. Either the DOE or the Attorney General, after concluding that there are valid reasons for the review, must certify the request to the Shorelines Hearings Board within 30 days after its receipt. The Shorelines Hearings Board then conducts the review. Four votes (of six) are required for a decision to be final.[24] Any party who fails to obtain certification, or any party to a review before the Shorelines Hearings Board may appeal to Superior Court.[25]

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[22]See Ch. 173-14 WAC, Permits for Substantial Developments on Shorelines of the State.

[23]RCW 90.58.140(5).

[24]In Hayes v. Yount, 87 Wn.2d 280 (1976), the court reviewed the decision of a Shorelines Hearings Board in which three members of the Hearings Board voted to limit a land fill to ten acres and one voted to limit the fill to 42 acres. The court held that no binding decision was made as to the size of the area to be filled since WAC 461-12-034 requires that "ultimate decisions shall be by at least four or more members of the Board." In this instance, at least four members did not agree on the size of the area to be filled.

[25]RCW 90.58.180(1).

Either the DOE or the Attorney General may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by a local government by filing a written request for review with the Shorelines Hearings Board and the appropriate local government within 30 days from the date of the filing of the final order.[26]

Any party to the review may appeal from the decision of the Shorelines Hearings Board to the Superior Court.

In Department of Highways v. Washington Environmental Council,[27] the question arose as to the proper court of original jurisdiction for an appeal of a decision of the Shorelines Hearings Board. The court first determined that appeals from the Shorelines Hearings Board are governed by the Administrative Procedure Act. The court then decided that appeals should be heard by the Superior Court.

L. The Power to Acquire Lands and Easements to Achieve Implementation of Master Programs

The DOE and local governments are empowered to acquire lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in concert with other governmental entities, when necessary to achieve implementation of master programs.[28]

M. Public Navigation Rights and Nonapplication of the Act to Certain Existing Structures, Docks, and Developments Placed in Navigable Waters

The case of Wilbour v. Gallagher, supra, has been taken into account in the Shoreline Management Act, which provides in RCW 90.58.270 that nothing contained in the Act constitutes authority for requiring or ordering the removal of any structure, improvement, dock, fill, or developments placed in navigable waters prior to December 4, 1969, the date the decision in Wilbour v. Gallagher was issued. The Act actually goes further than simply not requiring the removal of developments existing in navigable waters and purports to affirmatively grant "the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments...."[29]

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[26]RCW 90.58.180(2).

[27]82 Wn.2d 280, 510 P.2d 216 (1973).

[28]RCW 90.58.240(1). The special power to acquire lands and easements by eminent domain to achieve implementation of master programs was eliminated by Sec. 1, Ch. 53, Laws of 1972, Ex. Sess.

[29]RCW 90.58.270(1).

XII

LAND BOUNDARIES AND MONUMENTS

The elements affecting boundaries and their establishment by surveys may be classified into two distinct categories. First, there are the elements which control boundaries which are to be established for the first time. These elements are those of policy, such as safety, convenience, expense, aesthetics, and future development. Many of these policy factors, where the public interest is sufficiently involved, have been set forth by the legislature in the form of subdivision, platting, and related laws. The process of carrying these policies into effect in the field involves the application of scientific techniques of land surveying, including the running of traverses and curves, division of given tracts into smaller tracts, computation of areas, measurement of distances and angles, and triangulation. These techniques are outside the scope of this publication; attention is invited to the standard texts on land surveying for a discussion of them.

Second, there are the elements which control the re-establishment of boundaries which were at one time established, but their location has since become uncertain.[1]

In Thein v. Burrows,[2] the court noted that:

> "The general rule governing the determination of boundary lines by resurvey is that the intent of the new survey should be to ascertain where the original surveyors placed the boundaries rather than to determine where the new and modern surveys would place them."

When two adjacent land owners are in disagreement as to the location of the boundary line between their respective tracts, the matter may have to be resolved by the courts. Since one of the most frequent tasks undertaken by surveyors today is that of re-establishing old boundaries, it is essential that they have at least a working understanding of the rules of law to be applied. Therefore the rules, together with citations to applicable judicial decisions and statutes, have been set forth and discussed herein with special emphasis being placed on the rules applied in the State of Washington.

A. The Control of Intention

The present location of a legal boundary between two tracts of land requires the consideration of two basic questions:

1. Where was the dividing line between the two tracts when the division was first made?

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[1]See Ch. VI of this report for a discussion of the "Survey Recording Act", Ch. 58.09 RCW, which establishes standards and procedures for monumenting and for recording surveys.

[2]13 Wn. App. 761, 763, 537 P.2d 1064 (1975). See also Colonial Investment Co. v. Mackenzie, 8 Wn. App. 264, 505 P.2d 834 (1973); Erickson v. Wick, 22 Wn. App. 433, 591 P.2d 804 (1979).

2. Have subsequent events changed the location of this original dividing line?

Assume that A owns a ten acre tract of land, and that he desires to sell the north five acres to B. A will execute a deed transferring title to the north five acres from A to B; this deed must contain a description of the land so conveyed. The description must refer, either expressly or impliedly, to certain monuments, which probably, although not necessarily, are in existence at the time of the execution of the deed. The intention of the grantor and the grantee named in the deed with respect to the boundary line bisecting the ten acre tract is the controlling factor in determining this boundary line.[3] This intention may be either express or implied, and may be ascertained primarily from:

1. The description in the deed, and
2. The monuments mentioned in the description which link the deed to the ground.

Various factors affecting the location of legal boundaries in the state of Washington will be considered in the following paragraphs.

B. Re-establishment of the Boundary as of Date of the Original Division

1. The Description in the Deed or Other Instrument of Conveyance

a. The Accuracy and the Definiteness of the Description

The description in the deed or in other writings relating to the conveyance are the most commonly used sources for ascertaining the intention of the parties with respect to the original division. In the State of Washington, title to land can only be transferred by a deed containing an adequate description.[4] An agreement containing an inadequate legal description of the property to be conveyed is void and is not subject to specific performance, but the agreement may be reformed under an appropriate factual setting, such as when a mutual mistake occurs.[5] This raises the question of what constitutes an adequate description. In Bigelow v. Mood,[6] the Washington Supreme Court stated:

> "We have held consistently that, in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description." [Citing cases]

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[3]Cook v. Hensler, 57 Wash. 392, 107 Pac. 178 (1910).

[4]RCW 64.04.010 and 64.04.030.

[5]Howell v. Inland Empire Paper Co., 28 Wn. App. 494, 624 P.2d 739 (1981); Williams v. Fulton, 30 Wn. App. 173, 632 P.2d 920 (1981).

[6]56 Wn.2d 340, 341, 353 P.2d 429 (1960).

In Sengfelder v. Hill,[7] the court observed that:

> "A description by which the property may be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient."

Each case must be resolved on its merits with respect to whether or not a given description satisfies the test of "reasonable certainty". While a review of the numerous cases concerning equivocal descriptions is beyond the scope of this report, a few relevant Washington cases to indicate certain guidelines which may be employed to ferret out the intention of the vendor and the vendee should be examined.[8]

A basic rule of construction, indicated in Colonial Investment Co. v. Mackenzie,[9] is that in construing a written instrument, it is the duty of the court to give effect to each and every part thereof, if that can be done. If there are contradictions in the text, the court may hold that the intention of the maker cannot be determined, or the court may select the one of the conflicting interpretations which, upon a consideration of the whole matter, appears most likely to reflect the maker's intent. In Hodgins v. Washington,[10] the court followed the further basic rule that:

> "If a deed admits of more than one construction, it must be construed most strictly against the grantor, and most favorably to the grantee."

While it is generally conceded that the deed usually constitutes conclusive evidence of the land that the grantor intended to convey, in the event the deed is either ambiguous or susceptible to different constructions or if it can be established by clear, cogent, and convincing evidence that the deed does not reflect the intention of the parties, parol (oral) evidence is admissible so that a court may take into consideration the circumstances attending the transaction and the particular situation of the parties at the time the deed was executed, for the sole purpose of explaining it and of arriving at the intention of the parties which must control.[11]

While parol evidence may not be admitted to contradict the language of a deed, it may be admitted if needed to ascertain the real intent of the parties and to determine to what property the particulars of description contained in the deed apply. As stated by

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[7]21 Wash. 371, 380-381, 58 Pac. 250 (1899); Maxwell v. Maxwell, 12 Wn.2d 589, 593, 123 P.2d 335 (1942).

[8]Ray H. Skelton, Boundaries and Adjacent Properties, (Indianapolis: The Bobbs-Merrill Company, 1930); Booten v. Peterson, 34 Wn.2d 563, 209 P.2d 349 (1949).

[9]8 Wn. App. 264, 505 P.2d 834 (1973).

[10]9 Wn. App. 486, 492, 513 P.2d 304 (1973). See also Carr v. Burlington Northern, Inc., 23 Wn. App. 386, 597 P.2d 409 (1979).

[11]Queen City Savings and Loan v. Mechem, 14 Wn. App. 470, 534 P.2d 355 (1975); Cook v. Hensler, 57 Wash. 392, 107 Pac. 178 (1910).

the court in Vavrek v. Parks,[12] when seeking to resolve an ambiguity arising outside a deed, the court's duty is:

> (At pp. 690-691) "First, to find the true sense of the written words as the parties used them, as evidenced by (1) the facts and circumstances at the time of the transaction and (2) by the practical construction given by the parties while in interest with respect to the ambiguity; and secondly, after the true sense is ascertained, to subject the instrument, in its operation, to established rules of law."

Before a deed will be declared void either because it does not contain such a description of the land to be conveyed as can be properly and clearly identified or because it does not contain a reference to another instrument which does include a sufficient description, all sources of inquiry which the description itself and the attendant circumstances at the time of the execution of the deed suggest, must be exhausted in a vain effort to locate the property. A deed executed in blank is void for the reason that it lacks a subject matter upon which it can operate.[13]

The description in a deed or in a contract for the conveyance of land must be sufficiently definite to comply with the statute of frauds; otherwise, recourse to oral testimony is not permitted. (The term "statute of frauds", as used herein, refers to RCW 64.04.010 which requires that every conveyance of real estate or any interest therein must be in writing.) The Washington State Supreme Court has declared this standard of definiteness as follows:

> "Parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite piece of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description otherwise so incomplete as not to definitely describe any land. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described."[14]

Use of the term "fractional" in a description of land in an instrument of conveyance, as in "The fractional northeast quarter of...," does not render the description indefinite for purposes of the statute of frauds. "Fractional" is a term of art and, when followed by language designating a particular subdivision of land, describes all the land contained in that subdivision, with the implication that the particular subdivision, because of an external interference such as a body of water, contains less land than similar subdivisions ordinarily contain.[15]

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[12]6 Wn. App. 684, 495 P.2d 1051 (1972). See also, Knutson v. Reichle, 10 Wn. App. 293, 518 P.2d 233 (1973).

[13]Sengfelder v. Hill, supra, and Barth v. Barth, 19 Wn.2d 543, 143 P.2d 542 (1943). The requisite of a valid deed are: (1) that it be in writing, (2) be signed by the party bound thereby, and (3) be acknowledged by such party before some person authorized to take acknowledgements. RCW 64.04.020.

[14]Cushing v. Monarch Timber Co., 75 Wash. 678j, 686, 135 Pac. 660 (1913); Martinson v. Cruikshank, 3 Wn.2d 565, 101 P.2d 604 (1940); and Forsburgh v. Sando, 24 Wn.2d 586, 166 P.2d 850 (1946).

[15]Lilygren v. Rogers, 1 Wn. App. 6, 459 P.2d 44 (1969).

In numerous instances both the grantor and the grantee have had an identical intention with respect to the terms to be embodied in a written conveyance or agreement, but the writing executed by them inadvertently was materially at variance with such intention. Courts of equity will reform such writings to express the intention of both the grantor and the grantee. In Thorsteinson v. Waters,[16] the court stated:

> (At pp. 744-745) "As a general rule, where parties to a transaction have an identical intention as to the terms to be embodied in a proposed agreement or in the extent of property to be conveyed by a deed or other instrument, and the writing executed by them is materially at variance with such intention, a court of equity will, upon appropriate application, reform the writing so that it will truly express the intention of the parties, provided innocent third parties will not be adversely affected thereby."

In a substantial number of cases, the Washington State Supreme Court has approved the striking of certain words and figures and the substitution of others in order that a deed may be intelligible and to avoid having a deed describe land not owned by the grantor. For example, the court changed "southwest" to "southeast" in order to make the tract close;[17] "185.15" was changed to "185.5" in order that the deed might be consistent with itself.[18] "Wallace's First Addition"[19] and "Plat of the City of Edmonds"[20] were substituted for "Wallace's Second Addition" and "Plat of Edmonds" since the grantors did not own land in the last two places, but did in the former two places. With respect to a description in a deed which specified the lot numbers and the name of the addition involved, but failed to indicate the block number, since these were the only lots owned by the grantor in that addition, the court read the appropriate block number into the deed.[21] Parol evidence has been held to be admissible to prove that the tract of land described in a deed as "lot 6" was intended to include an unnumbered adjacent triangular, fractional lot which it was supposed was embraced in "lot 6".[22]

As a general rule, a metes and bounds description in a conveyance of real estate is controlling as against a conflicting quantity description. The metes and bounds description is construed as if it stood alone, and the quantity description is treated as

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[16]65 Wn.2d 739, 477-745, 399 P.2d 510 (1965), overruled on other grounds in Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

[17]Edison v. Knox, 8 Wash. 642, 36 Pac. 698 (1894).

[18]Maxwell v. Maxwell, 12 Wn.2d 589, 599-600, 123 P.2d 335 (1942).

[19]Thompson v. Stack, 21 Wn.2d 193, 150 P.2d 387 (1944).

[20]Konnerup v. Milspaugh, 70 Wash. 415, 126 Pac. 939 (1912).

[21]Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867 (1909).

[22]Newman v. Buzand, 24 Wash. 225, 64 Pac. 139 (1901).

surplusage.[23] In the determination of boundaries, natural and ascertained objects control as against courses and distances.[24]

On the other hand, in a contract for the conveyance of land, "northerly" and "approximately 207 feet" have been held to be so indefinite as to fall within the statute of frauds; recourse to oral testimony was therefore not permitted; and the contract was declared to be void.[25] The Washington State Supreme Court also reached the same conclusion with respect to a contract in which the description therein referred to "160 acres, more or less" in a certain section and township.[26] However, another case interpreted westerly and southwesterly, in a metes and bounds description, as referring to a general direction rather than an exact course which caused the description to close and thus adequately describe the land.[27] These same requirements for definiteness of description are also applicable to earnest money agreements,[28] mortgages,[29] leases,[30] easements, and other transactions[31] relating to real property which require written descriptions. A real estate broker's employment contract need not contain a complete legal description of the property being listed.[32]

Where a particular and a general description in a deed conflict and are repugnant to each other, the particular will prevail unless the intent of the parties is otherwise

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[23]Fowler v. Tarbet, 45 Wn.2d 332, 274 P.2d 341 (1954).

[24]Camping Commission of the Pacific Northwest Conference of the Methodist Church v. Ocean View Land, Inc., 70 Wn.2d 12, 421 P.2d 1021 (1966), (mean high tide line of the Pacific Ocean); State ex rel. Davis v. Superior Court, 84 Wash. 252, 146 Pac. 609 (1915), (center of a slough).

[25]Fosburgh v. Sando, 24 Wn.2d 586, 166 P.2d 850 (1946).

[26]Martinson v. Cruikshank, 3 Wn.2d 565, 101 P.2d 604 (1940). The words, "consisting of 39 acres, more or less", puts the grantee on notice that the area conveyed might be less than 39 acres; Heikkinen v. Hansen, 57 Wn.2d 840, 360 P.2d 147 (1961).

[27]Marchel v. Bunger, 13 Wn. App. 81, 533 P.2d 406 (1975).

[28]Ecolite Mfg. Co. v. R. A. Hanson Co., 43 Wn. App. 267, 716 P.2d 937 (1986).

[29]55 Am.Jur.2d 267, Sec. 116.

[30]51C C.J.S. 544, Sec. 214, "Description of Property."

[31]An owner may be divested of his title to land through a tax foreclosure when the land is described with reasonable certainty so that a person of ordinary intelligence can, from an examination of the foreclosure proceedings, locate the property sought to be foreclosed. Centralia v. Miller, 31 Wn.2d 417, 197 P.2d 244 (1948).

[32]House v. Erwin, 83 Wn.2d 898, 524 P.2d 911 (1974).

manifested on the face of the instrument.[33] A description merely designating land as a part of a larger tract, without greater certainty as to the identity of the particular part sought to be conveyed, is fatally defective.[34] Thus, a description "25 A. in Sec. 14 Twp. 20 Range 3, Acres 25", was held to be insufficient to confer jurisdiction upon the court in a foreclosure proceeding, and fatally defective.[35]

A tax deed is favored; it initiates a new title, and the original owner cannot attack it after the expiration of the three year statute of limitations, provided the holder of the tax deed was in possession of the realty during such three year period.[36]

b. Incorporation by Reference in Descriptions

"Incorporation by reference" of a separate writing in a deed, plat, or other instrument of conveyance relating to real property is permissible. The most common "incorporation by reference" in boundary descriptions is incorporation of officially recorded plats in which the description refers to "Lot X, Block Y, of the ABC addition to D city as filed in the E county auditor's office."

The United States Supreme Court has observed:

> "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself."[37]

"Official Plats" are plats filed for record with the county auditor by private owners and the plats of the Federal Government surveys which are the basis for land descriptions in terms of government townships and sections. All such plats must be approved as required by Ch. 58.17 RCW, prior to being filed for record with the county auditor and in order to be authorized to sell the land thereon by block and lot number.

c. Rewritten Descriptions

Often it becomes either necessary or desirable to rewrite old descriptions of a certain

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[33]Stockwell v. Gibbons, 58 Wn.2d 391, 363 P.2d 111 (1961); Powell v. Schultz, 4 Wn. App. 213, 481 P.2d 12 (1971).

[34]Asotin County Port Dist v. Clarkston Community Corp., 2 Wn. App. 1007, 472 P.2d 544 (1970); Matthews v. Morrison, 195 Wash. 288, 80 P.2d 856 (1938); Miller and Sons v. Daniels, 47 Wash. 411, 92 Pac. 268 (1907).

[35]Miller and Sons v. Daniels, supra.

[36]Kupka v. Reid, 50 Wn.2d 465, 312 P.2d 1056 (1957); Marcom v. Brunner, 30 Wn. App. 532, 635 P.2d 778 (1981).

[37]Craigin v. Powell, 128 U.S. 691, 9 S. Ct. 203, 32 L.Ed. 566-568 (1888); Lilygren v. Rogers, 1 Wn. App. 6, 459 P.2d 44 (1969); Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608 (1905); Cook v. Hensler, 57 Wash. 392, 397-398, 107 Pac. 178 (1910).

boundary in somewhat different language to clear up ambiguities in an earlier description, to make the language conform to that of a new division line, or for various other reasons. In doing so, the drafter may create new ambiguities or change the meaning of the words so that they may actually describe a different line from the one described by the earlier description. This raises the question of what interpretation should be attached to the new words and figures. In this connection, the intention of the drafter must be considered. If, from all the surrounding circumstances, it can be said that the drafter intended to describe the same line as the earlier description called for, effect would probably be given to that intention. If not, then the grantor named in the deed or contract will retain any land not included in the new description. On the other hand, if the rewritten description embraces more land than the grantor owns, since the grantor could only convey what is owned, the line would probably stand at the old line, and include only what the grantor owned.

d. Catchall Clauses

"Catchall clauses" purporting to convey all of a grantor's property in a given area are valid, if real estate records in the vicinity involved can identify with certainty the property being transferred.[38]

e. Part Performance

Sufficient part performance of an oral contract for the sale or lease of real property will remove the contract from the operation of the statute of frauds so that the agreement may be enforced even though no adequate written contract exists. The three elements to be considered to determine if sufficient part performance has occurred are: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial, and valuable improvements referable to the contract. Richardson v. Taylor Land & Livestock Co.[39] Although the strongest case for sufficient part performance is made when all three elements are present, the court has found sufficient part performance where two elements exist.[40]

2. Monuments

a. In General

Even the most accurately written deed containing an absolutely clear expression of the intention of the grantor and grantee is of no practical meaning whatsoever until applied to the ground. The linking factors between the description and the boundary are the monuments. Monuments may be any tangible, physical objects in existence which mark a point or line on the earth's surface. They may be securely set and clearly marked concrete posts, ordinary high tide or mean high tide, extreme low tide or low water line, the thread of a stream, a tree or row of trees, an iron pipe, a rotten stump, a surveyor's lot stake, a fence, a building, a curb, a sidewalk, a hedge, a cliff, or a mountain range. However, a monument must be an existing monument.

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[38]Roeder Co. v. Burlington Northern, Inc., 105 Wn.2d 567, 716 P.2d 855 (1986).

[39]25 Wn.2d 518, 528-29, 171 P.2d 703 (1946).

[40]Powers v. Hastings, 93 Wn.2d 709, 612 P.2d 371 (1980).

(There is a rule of law which treats an "adjoiner" as a monument, but this is a pure fiction, and will be considered later. An "adjoiner" is a boundary of an adjacent tract, which boundary is coincident with the boundary of the tract being described.)

(1) Date of the Monument in Relation to Date of the Deed

In order for a monument to be a valid link between the description and the boundary in question, that monument must have either been: (a) already in place at the time of execution of the deed, or (b) placed at, or soon after, the execution of the deed. The purpose of this rule stems from the basic rule that monuments control over the written descriptions in the event the monuments and descriptions are at variance, and if the monuments were allowed to be placed at any time after the actual transfer of title, it would have the effect of leaving many boundaries actually undetermined for unlimited periods.[41] The law, however, allows some latitude of discretion to the parties in placing their monuments after execution of the deed, but the precise length of time that will be allowed is a question which the courts determine in each particular case. In the case of Atwell v. Olson,[42] a monument placed pursuant to an agreement between the vendor and the vendee, six months after the execution of an executory contract to convey real property, was held to have fixed the boundary line.

(2) Proving Genuineness of Existing Original Monuments

(a) Identification

While it may make no difference whether we: (1) establish that the existing monument is the actual original monument, or (2) seek to re-establish the location of a missing original monument, the nature of the evidence employed in arriving at these conclusions is necessarily different, and in order to properly employ the evidence which has been gathered, it is important to keep in mind which of these two ultimate facts we are trying to establish.

In laying out a boundary, the first step is to find some kind of a monument which appears to bear a relation to the boundary in question, this relation appearing from either the description or references to the monument in the deed, or from the general surrounding circumstances.[43] Even though it is not mentioned in the deed, the monument may still be ascertained from the surveyor's field notes applicable to the property or from admissible parol evidence, so that it may be used as a factor in determining the boundary in question.

> "The mark or object [monument] is of no probative value if the field notes or grant contain no description of it or no reference to it and there is no evidence directly connecting it with the work of the original surveyor. But, on the other hand, when it is clearly shown that the mark was made or the object placed by the surveyor at the time he made his survey and

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[41]Matthews v. Parker, 163 Wash. 10, 14, 299 Pac. 354 (1931); see also Fairwood Greens Homeowners v. Young, 26 Wn. App. 758, 614 P.2d 219 (1980).

[42]30 Wn.2d 179, 190 P.2d 783 (1948).

[43]Reed v. Firestock, 93 Wash. 148, 160 Pac. 292 (1916); Cunningham v. Weedin, 81 Wash. 96, 142 Pac. 453 (1914).

for the purpose of marking a line or corner, then the object or mark has probative value."[44]

Almost every survey is open to some kind of attack upon its validity, and quite often this attack takes the form of a controversy with respect to whether or not the proper monuments were used. One surveyor may say that "A" is the proper starting point, while another surveyor may say that "B" is the proper starting point. Hence, it is at once apparent that the surveyor must, of necessity, have some affirmative evidence to demonstrate that his or her monument is the proper one. The surveyor has what is known as the "burden of proof," that is, the duty to come forward with some substantial evidence to establish the validity of that monument. It is obviously not enough to say "I have found the monument referred to in the deed," and then stop there. The surveyor must be prepared to support that statement with valid reasons. As the court observed in Boyt v. Weiser, supra, the burden of proof is on the plaintiff (the party asserting that the monument in question is the correct one) to establish a definite dependable beginning point.[45]

In Suter v. Campbell,[46] the Washington State Supreme Court refused to sustain a survey based on monuments set by the City of Seattle because there was no evidence that the monuments were planted when the platting was done. And in Wilson v. Creech Bros. Contracting Co.,[47] the court said that the evidence would have to be clear and convincing that the monument found by the plaintiffs was in fact the true original quarter corner. If the plaintiff has introduced sufficient evidence to prove the monument, then the burden of proof shifts to the defendant who has claimed the monument to be lost in order to disprove the monument.[48]

(b) What Kind of Evidence is Legally Admissible to Prove a Monument as an Existing Original

Generally speaking, evidence usually will be admissible to tie the deed to the monument provided it has some reasonable relation to the issues raised.

The most common type of admissible evidence to prove a monument is the physical characteristics of the monument itself, such as its apparent age, material from which it was made or consists, and markings. These factors may or may not be mentioned in the deed.

Another common type of admissible evidence is that of the testimony of the surveyor who actually placed the monument in question, as well as the surveyor's field notes.[49]

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[44]Boyt v. Weiser, (Texas) 180 S.W.2d 953 (1944).

[45]Ibid.

[46]139 Wash. 44, 46, 245 Pac. 29 (1926).

[47]159 Wash. 120, 127, 292 Pac. 109 (1930); San Juan County v. Ayer, 24 Wn. App. 852, 604 P.2d 1304 (1979).

[48]State v. Shepardson, 30 Wn.2d 165, 191 P.2d 286 (1948); Lappenbusch v. Florkow, 175 Wash. 23, 26 P.2d 388 (1933); San Juan County v. Ayer, supra.

[49]Lappenbusch v. Florkow, supra; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45 (1906); see also Erickson v. Wick, 22 Wn. App. 433, 604 P.2d 1304 (1979).

Statements by persons who claim actually to have seen the monuments placed, or in place, will be considered by the court. Even hearsay evidence with reference to the proving and locating of monuments is admissible; i.e., it may be admitted even though the party testifying did not personally see the monument, but only heard someone else say he or she saw it.[50]

The proximity of the monument to the theoretical location is quite often important. In Milwaukee Land Co. v. Weyerhauser Timber Co.,[51] the court was not convinced that a quarter corner monument 950 feet north of its theoretical location was the original. And in Wilson v. Creech Bros. Contracting Co.,[52] the fact that the alleged quarter corner monument was 300 feet east of its theoretical location undoubtedly had some effect on the court's conclusion that it was not the original.

An important class of evidence to prove that a monument is the original, the admissibility of which is sometimes questioned, is reputation evidence. The question of its admissibility has only occasionally been considered by the Washington State Supreme Court. In Hope v. Brown,[53] the court admitted evidence that a certain post had the general reputation of being the meander corner, although the evidence by itself was held not to be enough to establish the corner. And in Inmon v. Pearson,[54] prima facie evidence with respect to general reputation was held to be admissible to establish the location of a lost or obliterated line or corner.

(c) How Much Evidence is Necessary to Prove a Monument

No definite answer can be given to the question of how much evidence is necessary to prove a monument; each case must be solved on its own merits. In general, the court considers: (a) what kind of evidence is given, (b) who gives it, and then must determine the credibility of the witness and the weight to be attached to the evidence. Hearsay, for example, will probably not be given as much weight as direct evidence, and testimony as to reputation will not have the same weight as direct testimony of a witness who saw the actual placing of the monument. The court attaches much significance to who is claiming the monument in question to be the proper one. Thus, in Bowdey v. Tracey,[55] the plaintiff had the engineer who had retraced the meander line in question testify concerning the location of the position of the meander line. There being no evidence to the contrary, the court accepted the engineer's finding of fact. In State v. Shepardson,[56] the court found the monument, which had been

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[50]Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907); Kay Corporation v. Anderson, 72 Wn.2d 879, 436 P.2d 459 (1967).

[51]106 Wash. 604, 180 Pac. 879 (1919).

[52]159 Wash. 120, 292 Pac. 109 (1930). See also, Reed v. Firestock, 93 Wash. 148, 160 Pac. 292 (1916).

[53]74 Wash. 421, 133 Pac. 1030 (1913).

[54]47 Wash. 402, 92 Pac. 279 (1907); see Alverson v. Hooper, 108 Wash. 510, 513, 185 Pac. (1919).

[55]38 Wash. 364, 244 Pac. 545 (1926).

[56]30 Wn.2d 165, 191 P.2d 286 (1948).

declared to be the original monument by a licensed civil engineer with 41 years of experience, was in fact the original monument, being strongly impressed with the qualifications of the engineer. In Lappenbusch v. Florkow,[57] the court attached great weight to the testimony of a former county engineer in determining the location of an original monument.

(3) The Relocation of Lost or Missing Monuments

Many monuments disappear with the passage of time, but the establishment of the location of the original monument is permitted, and evidence is admissible to establish its location. This procedure is to be distinguished from that discussed above of proving a monument, which has been discovered as being in fact the original monument.

After a diligent search has been made for the original monument without success, and it is necessary or desirable to determine its location, the only possible way in which this can be done is by reference to monuments of some type which are now in existence and which bear some dimensional relationship to the missing marker. These reference monuments, which are being used in this connection to establish the location of a missing original monument, will themselves have to be proved as existing monuments. In the re-establishment of missing monuments, the burden of proof is upon the party who claims to have properly relocated the missing monument to establish that fact.

After proving the reference monument, the person who asserts having relocated the missing monument must be prepared to come forward with some definite evidence with respect to the distance and direction from the reference monument to the alleged location of the missing monument. The three most common sources of evidence on distance and direction from the reference monument are:

a. The description itself in the event the reference monument and missing monument are both mentioned therein.

b. Witnesses who saw the original monument which is now missing while it was still in existence and noted the distance and direction from the reference monument or that the missing monument was coincident with the reference monument.

c. Testimony that the missing original monument is, by reputation, a certain distance and direction from, or coincident with, the existing and proved reference monument.

Before any attempt is made to re-establish the missing original monument, it should again be pointed out that the surveyor must be certain that no trace of the original itself can be found. Since one of the cardinal rules of boundaries is that monuments will control over courses and distances, if the original monument still exists, its location must control over any evidence, from whatever source, to the contrary.[58]

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[57]175 Wash. 23, 26 P.2d 388 (1933).

[58]Thayer v. Spokane County, 36 Wash. 63, 78 Pac. 200 (1904); Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907); Caudeau v. Elliott, 7 Wash. 205, 34 Pac. 916 (1893); Staaf v. Bilder, 68 Wn.2d 800, 415 P.2d 650 (1966); Washington Nickel

With reference to the first above-mentioned source of evidence, namely, the description itself, when an original monument is missing and the surveyor is attempting to re-establish it from a proved, existing reference monument by using distances and directions given in the description, it is essential that the actual distance measured now between the reference monument and the missing monument be as nearly identical as possible to the distance which was measured off by the original surveyor. It is quite possible that the original surveyor's chain was not exactly standard length, or it may also be that the chain now being used is not precisely standard. For this reason, it is accepted practice to find two adjacent monuments of the original survey, measure the distance between them, compare the measured distance with that given in the description, and then proportion the measured distance from the reference to the missing monument's location.

The second source of evidence in re-establishing a missing original monument from an existing proved by reference monument, is the testimony of witnesses who saw the original monument while it was still in existence and noted the distance and direction from the reference monument or that it was coincident with the existing reference monument. In Cunningham v. Weedin,[59] the quarter corner had been obliterated, and local residents were permitted to testify as to the corner's location with reference to the road, schoolhouse, cemetery, and certain private boundary monuments. In Samples v. Kergan,[60] the fence built at the time of the original division (hence an original monument) was completely gone, but the court admitted parol evidence that the fence had been built four feet from a concrete wall which was in existence at the time of the trial. The court held that this evidence was sufficient to re-establish the location of the original monument, i.e., the fence.

A special, but important situation with respect to the second source of evidence arises in connection with replacement monuments, that is, when the reference monument is coincident with the missing original monument. In King v. Carmichael,[61] testimony that the witnesses themselves had placed a fence post, which constituted a reference monument, in exactly the same location as the original section corner was held to re-establish the missing section corner. And in Hale v. Ball,[62] testimony that a present fence, which constituted a reference monument, was built coincident with the old, now lost, quarter corner, was held sufficient to re-establish the quarter corner.

The third source of evidence in re-establishing a missing original monument (as distinguished from proving an existing monument as an original) a certain distance and direction from, or coincident with, the existing and proved reference monument (or replacement monument) is that of reputation. While there appear to be no Washington cases on this point, it would seem that the rule admitting reputation evidence to

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v. Martin, 13 Wn. App. 180, 534 P.2d 59 (1975); San Juan County v. Ayer, 24 Wn. App. 852, 604 P.2d 1304 (1979).

[59]81 Wash. 96, 142 Pac. 453 (1914).

[60]109 Wash. 503, 187 Pac. 383 (1920). See also Parks v. Newcomer, 117 Wash. 646, 202 Pac. 244 (1921).

[61]45 Wash. 127, 87 Pac. 1120 (1906); see also Washington Nickel v. Martin, 13 Wn. App. 181, 534 P.2d 59 (1975).

[62]70 Wash. 435, 126 Pac. 942 (1912).

establish an existing original monument would be applicable.[63] In Suter v. Campbell,[64] a dispute had arisen with respect to the validity of certain monuments which had been set by the City of Seattle subsequent to the platting of the property involved. The court held that there was no showing that the monuments placed on the ground by the city survey coincided with those placed by the original platter. No attempt was made to show by reputation evidence that the city monuments coincided with the original plat monuments. The question of reputation was not raised in that case. In the light of this decision, which conforms to the established rules of boundaries, it is apparent that any monument which cannot be proved as an original and with respect to which there is no evidence available to show that it replaced an original, is in serious jeopardy unless it may be proved by reputation evidence.

Whenever the boundaries of lands between two or more adjoining owners have been lost or have become obscure or uncertain and such owners cannot agree upon the boundary, one or more of such owners may bring an action in equity in the superior court to have such boundaries re-established. To assist the court in re-establishing such boundaries, the court may appoint three disinterested commissioners residing in the state, one or more of whom shall be practical surveyors, to prepare an advisory report regarding the boundary. The court is required to apportion the costs of such proceedings equitably, and such costs constitute a lien against the lands involved.[65]

(4) Special Rules Applicable to Relocation of Lost and Obliterated Federal Government Survey Monuments

The division of public lands in the United States into townships and sections is a function of the federal government. The rules for the re-establishment of lost federal government survey monuments have been prescribed by an act of Congress.[66]

It should be noted that the Bureau of Land Management distinguishes between "lost" and "obliterated" monuments. "Lost" monuments are those of which there is not only no physical trace, but also no other evidence of their location, save for the other official government monuments in the vicinity; namely, quarter corners, section corners, and meander corners. On the other hand, the Bureau defines "obliterated" monuments as monuments of which no physical trace can be found, but with respect to which there are only indications of their location in the immediate vicinity, such as witness trees, rocks, streams, and ravines, save for the section, quarter, or meander corners in the vicinity. The term "missing," as heretofore used above, would apply equally to both lost and obliterated monuments under the Bureau's terminology.

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[63]Hope v. Brown, 74 Wash. 421, 133 Pac. 612 (1913); Smith v. Chambers, 112 Wash. 600, 192 Pac. 891 (1920); Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907); Thoen v. Roche, 57 Minn. 135, 58 N.W. 686 (1894).

[64]139 Wash. 44, 245 Pac. 29 (1926).

[65]RCW 58.04.020, 58.04,030 and 58.04.040.

[66]43 U.S.C. Secs. 751, 752 and 753. See U.S. Department of Interior, Bureau of Land Management, Restoration of Lost or Obliterated Corners and Subdivision of Sections, (Washington, D.C.: U.S. Government Printing Office, 1975) which may be procured from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. Also see this publication for an explanation of single and double proportionate measurement.

In Martin v. Neeley,[67] the Washington State Supreme Court referred to the distinction between a lost corner and an obliterated corner as follows:

> (At p. 222) "'...an obliterated corner may be defined as one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence. A lost corner is one which cannot be replaced by reference to any existing data or sources of information, although it is not necessary that evidence of its physical location may be seen or that one who has seen the marked corner be produced.'"

The federal rules respecting the re-establishment of lost and obliterated corners are quite explicit. Several Washington cases have reiterated the rule that a lost quarter corner must be re-established on a straight line between the adjacent section corners, and equidistant between them. When it is established by competent evidence that a government monument does not accord with a survey or plat, the corner as established on the ground must control. If no monument or marking of quarter corner can be found, or if testimony of its location can be overcome by better evidence, a court will decree the establishment of a corner at a point equidistant from the section corners. However, if there is evidence of a corner which has been destroyed or obliterated by lapse of time, it does not follow that a court will direct the establishment of a corner under this rule, or any other rule, since the law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be correctly located by a correct survey.[68] Thus, unless the court finds that there was a lost corner, the true corner is at the point where the government surveyor actually located it, and any error in its location, however plainly shown, is not subject to correction by the courts. This rule is accurate for the normal case, but does not apply in every situation, such as that of quarter corners on the north and west sides of a township. In re-establishing any monument, the surveyor is actually trying to retrace as closely as possible, the steps of the original survey, and recourse to the original field notes is necessary for this purpose. In the case of practically all interior sections of a township, the quarter corner should be placed midway between the two adjacent section corners, because that was where the original surveyor theoretically placed it, but if in fact he did not do so and made appropriate notes in his records, then the monument must be restored in accordance with those notes, provided always, of course, that the monument is now lost.[69]

With respect to the re-establishment of lost meander corners, the only Washington case discovered involving a lost meander corner merely declares: "'Lost meander corners

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[67]55 Wn.2d 219, 347 P.2d 529 (1959), quoting from 11 C.J.S. 553, Boundaries, Sec. 13.

[68]Washington Nickel v. Martin, 13 Wn. App. 180, 534 P.2d 59 (1975); King v. Carmichael, 45 Wash. 127, 87 Pac. 1120 (1906); State v. Shepardson, 30 Wn.2d 165, 191 P.2d 286 (1948); Haybrook v. Index Lumber Co., 49 Wash. 378, 95 Pac. 324 (1908); Hale v. Ball, 70 Wash. 435, 126 Pac. 942 (1912); and Martin v. Neeley, supra, at p. 222. See also, Restoration of Lost or Obliterated Corners and Subdivision of Sections, op. cit.

[69]Strunz v. Hood, 44 Wash. 99, 87 Pac. 45 (1906).

are to be restored by running the line from the nearest known corner...'".[70] This statement is not entirely in accord with the federal rule which is:

> "Lost meander corners, originally established on a line projected across the meanderable body of water marked upon both sides will be relocated by single proportionate measurement, after the section or quarter-section corner upon the opposite sides of the missing meander corner have been duly identified or relocated."[71]

b. Specific Cases of Reference Monuments and Their Utilization in Conjunction with Applicable Rules of Law

Monuments may be classified into two distinct categories with respect to their effect on the location of boundaries. First, there are the monuments which are actually located on the boundary in question, and these will be referred to herein as boundary monuments. Second, there are the monuments which do not coincide with the boundary in question, but bear some relation to that boundary by evidence which may be adduced from such sources as the description itself or extrinsic parol evidence. These will be referred to as reference monuments. Since, whether or not a monument falls within one or the other of these categories depends upon its relation to the boundary with which we are dealing, a single monument may be a reference monument as to one tract of land, and at the same time also may be a boundary monument with respect to another tract. It is extremely important to take cognizance of this distinction because the rule is well established that a boundary monument will control over a reference monument. In other words, monuments control over courses and distances, but it must be observed that before courses and distances in a description can have any meaning, there must be some beginning monument on the ground from which to measure the indicated courses and distances. This beginning monument, with respect to the boundary in question, will be a reference monument.

In the preceding discussion concerning the relocation of lost monuments, certain rules were enumerated as controlling in their re-establishment. In the following treatment of proportionate measurement and apportionment of excess and deficiency, attention will be focused upon points which were presumably never fixed by monuments as part of the original survey. The basic rules which control the relocation of lost monuments are also applicable to monuments which were never set at the outset, but since those subjects have been treated separately in the standard texts and treatises, in the interest of clarity and conformance to accepted usage, those subjects will be treated separately here.

(1) Proportionate Measurement

When it appears on the face of the description that only one reference monument is intended to control the boundary in question, and that it was not intended that the boundary be controlled by two or more reference monuments, then to establish that boundary, using the courses and distances given in the description, the proper procedure is to adjust those courses and distances so that they harmonize as closely as possible with the rest of the survey. This is accomplished by measuring the distance

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[70]Simmons v. Jamieson, 32 Wash. 619, 622, 73 Pac. 700 (1903).

[71]Restoration of Lost or Obliterated Corners, and Subdivision of Sections, Sec. 1036, (1939 Edition).

between two existing reference monuments which have been proved as original or replacement monuments and which were placed as a part of the original survey of which the boundary in question is a part. When this measured distance is compared to the distance indicated in the description between the two monuments, there will, in all probability, be some discrepancy between the measured distance and the distance in the deed, and if so, the procedure is then to determine the ratio between them and apply that ratio to the courses and distances given in the deed, which determines the boundary we are trying to establish.[72] It is usually advisable to measure between more than two sets of existing reference monuments in order to determine the required ratio, and in the event of discrepancies between the two ratios, the surveyor must simply use his own judgment with respect to whether or not to use one or the other, or the average of the two ratios.

(2) Excess and Deficiency

Very often the description will be of such a nature that the boundary in question may be controlled by two or more reference monuments, and the boundary may have different locations depending upon which of the monuments is used as a point of beginning. This situation commonly arises when plat descriptions are used and when the only points of beginning are, for example, the monuments at the street intersections, and the boundary in question is in the interior of the block. Upon taking the distances given on the plat and measuring from one monument, the boundary in question is found at "A" but when measuring from the other monument, the boundary is found to be at "B". There is usually no indication in the plat which prescribes any preference of one reference monument over the other.

The solution to the problem is found in the rules of apportioning excess and deficiency. The rule is that when there is an ambiguity in the description with respect to which of two or more reference monuments shall control the boundary, then any excess or deficiency of the distance measured on the ground over or under the distance indicated in the description must be apportioned among the several tracts between the two monuments in proportion to the lineal frontage of each tract.[73] Thus, if there are ten lots in the block, the designated width of each being 30.00 ft. or a total of 300 feet, but the actual measurement on the ground between streets is found to be 301.00 ft., then the width of each lot will actually be 30.10 ft. instead of the designated 30.00 ft.

It is important to note that if there is no ambiguity in the description as to which of two or more reference monuments is to be used, then the rule of excess and deficiency will not apply; i.e., if A conveys X plus Y land to B, and then A conveys Y plus Z land to C, the conveyance of Y land to B controls over the conveyance of the Y land to C.[74] In other words, the grantee first in time of a portion of a tract set off by metes and bounds, without reference to other conveyances, is not required to yield any portion of his land to satisfy a deficiency in a subsequent overlapping grant from the common grantor, the rule of excess and deficiency having no application. In the event

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[72]John S. Grimes, Clark On Surveying and Boundaries, (4th Edition), The Bobbs-Merrill Co., Inc., Sec. 387.

[73]Booth v. Clark, 59 Wash. 229, 109 Pac. 805 (1910); Ditty v. Freeman, 55 Wn.2d 306, 347 P.2d 870 (1959).

[74]Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26 (1911).

there is a gap in land conveyed to B and C that is not conveyed by the descriptions in either deed, then usually B will not take the excess, but as to whether C will take the excess depends upon whether we can find that A intended to retain the strip in question. This, therefore, presents a question of deed construction.

An important qualification upon the rule of apportionment of excess and deficiency is that which arises when one of the lots is not dimensioned on the plat. In that event, it is presumed that the platter was aware that there may have been an excess or deficiency, and intended to place all of such discrepancy into that particular lot, leaving the other lots at exactly the indicated width.[75]

The effect of established streets upon the rule of apportionment of excess and deficiency is exceedingly important. "Streets that have been opened in supposed conformity to a plat and have been long acquiesced in should be accepted as fixed monuments in locating lots or blocks thereto or fronting thereon."[76] When such a result is reached, the streets themselves become the reference monuments, and the excess or deficiency must be apportioned, using each block as a separate unit.

(3) Subdivision of Government Sections

When the United States Government divided the public lands into townships and sections, its surveyors set only eight monuments to indicate the external boundaries of each section; namely, the four section corners and the four quarter corners.[77] When any tract of land less than a complete section is described, then some of these eight monuments become reference monuments, and when the land is sold and described in terms of a certain part of a section, the normal rules of excess and deficiency will apply. These rules have been crystallized and set forth in the Bureau of Land Management's pamphlet entitled, Restoration of Lost or Obliterated Corners and the Subdivision of Sections, (1939), op. cit.[78] Probably the most commonly used rule in

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[75]11 C.J.S., Boundaries, Sec. 124, pp. 738-739.

[76]Skelton, Boundaries and Adjacent Properties, op. cit., Sec. 219, p. 218.

[77]For further information with respect to the survey of Public Lands of the United States, see: U.S. Department of Interior, Bureau of Land Management, Manual of Instructions for the Survey of the Public Lands of the United States 1973, (Washington, D.C.: U.S. Government Printing Office, 1973). 18 U.S.C. Sec. 1858 provides a penalty for the unauthorized alteration or removal of any government survey-monument or marked trees, as follows:

> "Whoever willfully destroys, defaces, changes, or removes to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or willfully cuts down any witness tree or any tree blazed to mark the line of a Government survey, or willfully defaces, changes, or removes any monument or bench mark of any Government survey, shall be fined not more than $250 or imprisoned not more than six months, or both."

[78]Re duty of the Department of Transportation and the county legislative body and the county engineer to fix permanent monuments at the original positions of all United States government monuments at township corners, section corners, quarter-section corners, meander corners, and witness markers wherever

this field is that which says that the center of the section will be located by the intersection of the two lines which connect the north and south quarter corners, and the east and west quarter corners.[79] These two lines divide the section into the northwest, northeast, southwest and southeast quarters. To subdivide these quarter sections further, simply measure the length of each side of the quarter, divide each side in half and connect the opposite mid-points, thereby obtaining four quarter-quarter sections. Further subdivisions are made in a similar manner.

There are special rules applicable to the subdivision of sections on the north and west sides of a township, and, for these, attention is directed to the above-mentioned publication of the Bureau of Land Management.[80]

(4) Adjoiners

In describing a tract of land by metes and bounds, it is often necessary or desirable to describe one or more of the boundary lines in terms of the boundary line of an adjacent tract, when it is intended that the two lines be coincident. (This same procedure is used in describing corner points of the tract.) This procedure is permissible, provided, of course, the boundary line of the adjacent tract is now actually marked by monuments or may be established by using the description of the adjoining tract.

Very often, for the sake of clarity, the written description of the tract in question will describe the boundary both by metes and bounds and by reference to the adjoiner, and the question then arises as to which of these two calls (the language in the deed describing the boundary line) shall control. The general rule is that the call for the adjoiner shall have the same status as a boundary monument, and it will therefore control over the metes and bounds call in the event of a discrepancy between these two calls.[81] This rule is applicable even though the adjoiner is not at the time marked on the ground by monuments.[82] The rule is logical since the grantor, by referring to the adjoining boundary, clearly indicates that he intends to convey all the land which he owns to the boundary line.

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any such original monuments or markers fall within the right-of-way of any primary state highway or county road, and to aid in the re-establishment of any such corners, monuments, or markers destroyed or obliterated by the construction of any primary state highway or county road, by permitting inspection of the records in the offices of the Department of Transportation and the county legislative body and the county engineering office, see RCW 47.36.010 and RCW 36.86.050.

[79]Heybrook v. Index Lumber Co., 49 Wash. 378, 95 Pac. 324 (1908); King v. Carmichael, 45 Wash. 127, 87 Pac. 1120 (1906); and Packsher v. Fuller, 6 Wash. 534, 33 Pac. 875 (1893).

[80]43 U.S.C., Secs. 751 and 752.

[81]Fagan v. Walters, 115 Wash. 454, 197 Pac. 635 (1921); and Austrian American Benevolent Cemetery Assoc. v. Tasse Brien DeDesrochers, 124 Wash. 179, 214 Pac. 3 (1923).

[82]Edson v. Knox, 8 Wash. 642, 36 Pac. 698 (1894).

C. The Effect Upon the Legal Boundary of Events Subsequent to the Original Division

Boundaries between adjoining properties, at variance with the true boundary as revealed by subsequent survey, may be established through the following doctrines, all of which have been recognized in Washington:

1. Location by common grantor;
2. Estoppel in pais;
3. Parol agreement of the adjoining owners;
4. Mutual recognition and acquiescence in a definite line by interested parties for a long period of time;
5. Statutory settlement of disputed boundaries;
6. Adverse possession.

1. Location by Common Grantor

The location of a boundary line by a common grantor is binding upon the grantees and their successors in interest.[83] For a boundary line to be fixed by a common grantor, the land must have been sold and purchased with reference to the boundary, and there must have been a meeting of the minds as to the identical tract of land to be transferred by the sale.[84] Where an existing line was established by a survey and mutual agreement between the former owners, subsequent purchasers to whom the line was pointed out when they purchased the property, are bound by the definite agreement made by their predecessors in interest.[85] In Kay Corp. v. Anderson,[86] a line, which was located on the ground and accepted by a grantor and grantee as dividing the property being purchased, from the property being retained by the grantor, was binding upon subsequent holders of the grantor's interest in the retained parcel, notwithstanding that the agreed line was at variance with the deed executed by the grantor, where the grantees and their successors occupied and claimed to the line fixed by the grantor in a manner and character visible to anybody looking at the property.

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[83]Strom v. Arcorace, 27 Wn.2d 478, 178 P.2d 959 (1947).

[84]Kronawetter v. Tamoshan, Inc., 14 Wn. App. 820, 545 P.2d 1230 (1976); Winans v. Ross, 35 Wn. App. 238, 666 P.2d 908 (1983).

[85]Angell v. Hadley, 33 Wn.2d 837, 207 P.2d 191 (1949). The line established upon the ground by the parties is presumably the line mentioned in the deed. Clausing v. Kassner, 60 Wn.2d 12, 371 P.2d 633 (1962). See also, Martin v. Hobbs, 44 Wn.2d 787, 270 P.2d 1067 (1954). Where the evidence was insufficient to establish a laurel hedge, fence, and return wall from the bulkhead as the actual boundary fixed by the common grantor, the true boundary line was the one which was located by independent surveys made by licensed land surveyors employed by one of the parties. Martin v. Hobbs, supra.

[86]72 Wn.2d 879, 436 P.2d 459 (1967).

2. Estoppel in pais[87]

Estoppel in pais, or equitable estoppel, is that condition in which justice forecloses one from denying one's own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another.

If A makes certain statements to B, and B in reliance upon those statements acts to B's detriment, A is later estopped to deny the truth of those statements when B attempts to hold A to A's word. Thus, if A tells B: "I, A, do not own this strip of land, but you, B, do own it" and B, in justifiable reliance upon this statement, in good faith, erects a building or makes other extensive improvements on the strip, A is later estopped from claiming that A, in fact, owns the land, and B thereby becomes the legal owner of the strip. The Washington Supreme Court, in Thomas v. Harlan,[88] has required the presence of the following three conditions precedent before a boundary may be established by estoppel in pais:

> "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."

The burden of proof is, of course, upon the party asserting the estoppel and the evidence required to support it must be "clear and cogent."[89] Absent fraud or misrepresentation, only those who have reasonably relied upon such representations may raise an estoppel. And, the party claiming estoppel must have been misled by the representation made.[90] The representation must be made by the party who is the owner of the adjacent land, and misrepresentation by a seller to his buyer will not, of course, bind the adjacent owner, unless the seller is also the owner of the adjacent strip.[91]

3. Parol Agreement of the Adjoining Owners

Generally, adjoining landowners may locate a boundary line by oral agreement, and not have such agreement invalidated as being within the purview of the statute of frauds, if the agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided further, that the proper location of the line is uncertain or in dispute. Such an agreement as to a common boundary line, effective between the parties to the agreement, also binds their successors in

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[87]Ellis, J.R., "Boundary Disputes in Washington," 23 Wash.L.Rev. 125, 128 (1948). (See Glossary.)

[88]27 Wn.2d 512, 518, 178 P.2d 965 (1947); Metropolitan Park District of Tacoma v. State of Washington, 85 Wn.2d 821, 827-28, 539 P.2d 854 (1975); Muench v. Oxley, 90 Wn.2d 637, 584 P.2d 939 (1978).

[89]Tyree v. Gosa, 11 Wn.2d 572, 119 P.2d 926 (1941); Houplin v. Stoen, 72 Wn.2d 131, 431 P.2d 998 (1967); Muench v. Oxley, supra.

[90]Fralick v. Clark County, 22 Wn. App. 156, 589 P.2d 273 (1978).

[91]Strom v. Arcorace, supra.

interest, provided, of course, that a bona fide purchaser for value cannot be bound by his predecessor's agreement unless he took with actual or constructive notice thereof.[92]

Parol agreements between adjoining owners, to be valid, must satisfy the following minimum requirements enumerated by the Court of Appeals in Johnston v. Monahan:[93]

> (At pp. 457-458) "(1) There must be either a bona fide dispute between two coterminous property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary; (2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary; (3) they must in some fashion physically designate that permanent boundary determination on the ground; and (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest; or (as an alternative to (4) above), (4a) bona fide purchasers for value must take with reference to such boundary....
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> "These requisite elements, therefore, provide (1) a prerequisite condition of boundary uncertainty or dispute to circumvent the statute of frauds; (2) permanency and specificity of the agreement resolving the dispute or uncertainty; (3) initial execution of the agreement by demarcation on the ground; and (4) full execution of the agreement by use of the premises pursuant to the agreement to provide reasonable notice thereof."

For purposes of satisfying the requirement that a boundary be physically designated when establishing a boundary by parol agreement, it is necessary to locate more than one marker in order to have a line, and the markers must be located with an intention that they be permanent.[94]

4. Mutual Recognition and Acquiescence

As stated by the court in Lamm v. McTighe:[95]

> (At pp. 592-593) "[T]he following basic elements must, at a minimum, be shown to establish a boundary line by recognition and acquiescence: (1)

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[92]2 Tiffany, Real Property, (3rd Ed. 1939), Sec. 653 at pp. 678 and 682.

[93]2 Wn. App. 452, 469 P.2d 930 (1970); petition for review denied, 78 Wn.2d 993 (1970).

[94]Johnston v. Monahan, supra; Piotrowski v. Parks, 39 Wn. App. 37, 691 P.2d 591 (1984).

[95]72 Wn.2d 587, 434 P.2d 565 (1967). See also Farrow v. Plancvhich, 134 Wash. 690, 236 Pac. 288 (1925); Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965 (1947); Scott v. Slater, 42 Wn.2d 366, 255 P.2d 377 (1953); Waldorf v. Cole, 61 Wn.2d 251, 377 P .2d 862 (1963); Houplin v. Stoen, 72 Wn.2d 131, 431 P.2d 998 (1967).

> The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession."

In order for acquiescence in a fence or other line of demarcation to be sufficient to make the fence or other line a true boundary line and transfer title from one property owner to another, the acquiescence must be bilateral, and must include a recognition of the fence or other barrier as an actual boundary line, and not as a mere barrier.[96] However, the existence of an express agreement between the adjoining owners resolving an uncertainty or dispute about the location of the true boundary line is not an indispensable element in the establishment of boundaries by mutual recognition and acquiescence. It is sufficient if the adjoining parties have, for the requisite period of time, actually demonstrated, by their possessory actions with regard to their properties and the asserted line of division between them, a genuine and mutual recognition and acquiescence in the given line as the mutually adopted boundary between their properties.[97]

The lack of a well defined boundary mutually agreed upon by the adjoining owners is a fatal defect to the claim of boundary by mutual recognition and acquiescence. In an action to quiet title based on adverse possession and boundary by acquiescence, the court, in Scott v. Slater,[98] held the plaintiffs failed to sustain their burden upon the essential fact of a well defined boundary, an essential element to both acquiescence and adverse possession, where there never had been a fence or any other mark such as a point to which the ground was cultivated to define the line asserted by plaintiffs, and plaintiffs' cultivation of the strip in question did not terminate at a well defined point and varied in its extent. The court pointed out that the line asserted by plaintiffs had not been mutually selected, and, never having been defined mutually by the adjoining owners, it could not have been recognized or acquiesced in as the true boundary for any period of time.

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[96]Muench v. Oxley, 90 Wn. 2d 637, 584 P.2d 939 (1978).

[97]Lamm v. McTighe, supra.

[98]42 Wn.2d 366, 255 P.2d 377 (1953); see also Waldorf v. Cole, 61 Wn.2d 251, 377 P.2d 862 (1963); wherein the court held that there could be no boundary by acquiescence because of a complete lack of proof of a well-defined boundary between the adjoining properties, or of mutual acquiescence in any boundary. The 15-foot strip claimed by plaintiffs was apparently not used and was essentially in its original condition, and the only improvement in the area was a rockery built against a dirt bank. Even if the parties regarded this as a boundary line and acquiesced in it, such acquiescence had continued for less than the requisite ten years.

5. Statutory Settlement of Disputed Boundaries

When boundaries between two or more adjoining properties have become lost or uncertain, and the adjoining property owners[99] cannot agree to establish the location of their boundaries, then one or more of said adjoining property owners may petition the Superior Court for the county in which said lands are situated to establish the boundaries pursuant to RCW 58.04.020, 58.04.030 and 58.04.040.

This procedure is available only when there is a boundary line dispute[100] and the court can determine that a corner or boundary is lost or uncertain.[101] The procedure is not available in a situation where neither party involved will admit that a corner or boundary is lost, but each insists that a corner contended for is the true corner,[102] or where both parties contend that a different existing boundary is the true division line.[103]

RCW 58.04.030 provides that the court may, in its discretion, appoint not more than three commissioners, at least one of whom shall be a "practical surveyor," and that these commissioners shall report their findings to the court. The report of the commissioners is advisory only, and the parties requesting establishment of the boundary may take exception to the commissioners' report. Under RCW 58.04.030, the appointment of a commission in an action to establish lost boundaries is within the discretion of the trial court, and its ruling in refusing to appoint a commission will not be disturbed in the absence of abuse of discretion.[104]

6. Adverse Possession

Adverse possession is a system whereby a legal right is obtained by action which, by definition, must be wrongful. Based on considerations of public policy assuring maximum utilization of land, encouraging the rejection of stale claims, and quieting titles,[105] the doctrine of adverse possession usually arises from a statute of limitations which operates to bar a true owner's right to recover land which has been occupied without his permission by an adverse possessor for the statutory period. But, unlike the usual statute of limitations situation, in which only a remedy is barred, the legal effect of the doctrine of adverse possession is to take the legal title from the true

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[99]See Cady v. Kerr, 11 Wn.2d 1, 118 P.2d 182 (1941), to the effect that a vendee in an executory real estate contract may not invoke RCW 58.04.020, unless the owner of the land is joined as a party plaintiff; but see Cascade Security Bank v. Butler, 88 Wn.2d 777, 567 P.2d 631 (1977).

[100]Large v. Shively, 194 Wash. 608, 79 P.2d 317 (1938), aff'd, 194 Wash. 608, 82 P.2d 793, certiorari denied, 306 U.S. 649, 83 L.Ed. 1047, 59 S.Ct. 590 (1938).

[101]Hale v. Ball, 70 Wash. 435, 126 Pac. 942 (1912); San Juan County v. Ayer, 24 Wash. App. 852, 604 P.2d 1304 (1979).

[102]Ruston v. Borden, 29 Wn.2d 831, 190 P.2d 101 (1948).

[103]Stewart v. Hoffman, 64 Wn.2d 37, 390 P.2d 553 (1964).

[104]Booten v. Peterson, 34 Wn.2d 563, 209 P.2d 349 (1949).

[105]7 R. Powell, Real Property, Sec. 1012(3) (1982).

owner and vest it in the adverse possessor. Since there is a presumption that one who enters into the possession of the property of another does so with the permission of the true owner and holds in subordination of his title,[106] the claimant, in order to

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[106]Mourik v. Adams, 47 Wn.2d 278, 287 P.2d 320 (1955). The use of a way of necessity is permissive and not adverse; therefore it is not the foundation of a prescriptive right. Todd v. Sterling, 45 Wn.2d 40, 273 P.2d 245 (1954). On an issue as to whether the public had acquired a prescriptive right to use a logging road, the existence of gates erected by the owner and the logging company which built the road is conclusive as to permission to use it since the gates were notice to the world that the road was not a public road, and this permissive use may not ripen into a prescriptive right. Millard v. Granger, 46 Wn.2d 163, 279 P.2d 438 (1955). If the user is initiated by permission, it does not ripen into a prescriptive right unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the servient estate. Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955). The presumption that one entering into the possession of another's land does so with the true owner's permission, is spent and disappears as soon as there is proof that such use has been open, notorious, hostile, continuous, and for the required time, and the one claiming the easement has established a prima facie case, which it is incumbent upon the one denying the existence of the easement to controvert; and whether the use was hostile or permissive becomes a question of fact. Anderson v. Secret Harbor Farms, Inc., 47 Wn.2d 490, 288 P.2d 252 (1955).

The presumption of permissive possession in the general rule that a grantor remaining in possession after a conveyance holds in subservience to the grantee, is not valid when the grantor gives up possession of the major part of the property conveyed, but remains in possession of a portion of it under the mistaken belief that it was not conveyed. Under such circumstances, allegations of adverse possession and acquiescence and recognition may be considered. Stockwell v. Gibbons, 58 Wn.2d 391, 363 P.2d 11 (1961).

Evidence of adverse possession by a cotenant must be stronger and more convincing than that which would be required to establish title by adverse possession in a stranger. The function of the court in such a case is not simply to determine whether there is substantial evidence to support a finding of actual or inquiry notice, but whether the evidence meets the higher standards of being "clear", "unequivocal", "unmistakable", or "convincing". Silver Surprise, Inc. v. Sunshine Mining Co., 15 Wn. App. 1, 547 P.2d 1240 (1976). This conclusion was affirmed by the State Supreme Court in 88 Wn.2d 64 (1977). Generally, a cotenant's sole possession of land becomes adverse to fellow tenants by repudiation or disavowal of the relation of cotenancy between them, and any act or conduct signifying an intention to hold, occupy, and enjoy the premises exclusively, and of which the tenant out of possession has knowledge, or has sufficient information to be put on inquiry, amounts to an ouster. The claimant must show a definite and continuous assertion of an adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other cotenants. In Fritch v. Fritch, 53 Wn.2d 496, 335 P.2d 43 (1959), where husband and wife held land as tenants in common, adverse possession by a husband as against his former wife was not established. To the effect that ouster is essential to a cotenant's claim of adverse possession, as well as to an assertion of an applicable statute of limitations, and that in order for the act of a cotenant of real property to constitute an ouster of another cotenant, it must clearly indicate a repudiation or disavowal of the other cotenant's interest in the property, see Shull v. Shepherd, 63 Wn.2d 503, 387 P.2d 767 (1963).

establish adverse possession, must be asserting a claim of freehold to the land and the character of the possession must be actual and uninterrupted, open and notorious, hostile and exclusive, and under a claim of right made in good faith.[107] In Jackson v. Pennington,[108] the Court of Appeals held, in relevant part, that the "...existence of the elements necessary to create a title by adverse possession raises questions of fact. The burden of establishing those facts is upon the person claiming title by adverse possession". Generally, one on the land, who is not the owner, is an adverse possessor if possessing in the fashion that a true owner would.

a. The Statutes

Washington has four main statutes governing adverse possession (one of which allows for acquisition of vacant and unoccupied land without possession). The primary adverse possession statute is RCW 4.16.020, which requires that actions for the recovery of real property must be brought within ten years. If all the elements of adverse possession (possession that is actual and uninterrupted, open and notorious, hostile and exclusive, and under a claim of right made in good faith) have been continuously present for the entire ten-year period, title is taken from the true owner and vested in the adverse possessor.

Variations from the ten-year statute are found in RCW 7.28.050, 7.28.070 and 7.28.080 which require that in certain circumstances actions for the recovery of real property must be brought within seven years. Of the seven-year statutes, RCW 7.28.070 is the most important. This statute provides that one, who for seven years has actual, open and notorious possession of lands under claim and color of title, believing in good faith that claimant's title is good, and who pays all taxes levied on the land during the seven year period, becomes the legal owner of such lands as are included within claimant's colorable title. Title cannot be acquired by simply paying taxes when nothing is done toward taking actual possession of the land.[109] It also should be kept in mind that the payment of taxes and local assessments upon a strip of land used by the public generally as a street, for the prescriptive period, does not estop the city from claiming the same as a public street by dedication and prescription. The right of the public to use the land as a street established by continuous and uninterrupted use cannot be admitted away by the taxing officers.[110]

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[107]Stoebuck, "The Law of Adverse Possession in Washington," 35 Wash.L.Rev. 53 (1960). Sisson v. Koelle, 10 Wn. App. 746, 752, 520 P.2d 1380 (1974); Muench v. Oxley, 90 Wn.2d 637, 584 P.2d 639 (1978). In Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984), overruling a number of previous cases, the court held that as to the adverse possession elements of "hostile" and "under a claim of right made in good faith" require only that the claimant treat the land as his own throughout the statutory period. The nature of the possession is measured objectively, and the claimant's subjective belief regarding his true interest and the interest of others is irrelevant to establishing the element. See also Wells v. Miller, 42 Wash. App. 94, 708 P.2d 1223 (1985).

[108]11 Wn. App. 638, 645, 535 P.2d 822 (1974).

[109]Waldrip v. Olympia Oyster Co., 40 Wn.2d 469, 244 P.2d 273 (1952).

[110]City of Seattle v. Hinckley, 67 Wash. 273, 121 Pac. 444 (1912).

RCW 7.28.050 provides a seven-year limitations period on the bringing of actions to recover property from one who is in actual, open, and notorious possession under record title running back to a state or federal deed, to a tax sale, or to a state or federal judicial sale. This statute operates to validate titles derived from the state or federal government that are void because of some defect in the deed or sale or the proceedings leading up to the sale or deed. Unlike the other adverse possession statutes, RCW 7.28.050 does not require good faith, and, unlike the other two seven-year statutes, it does not require payment of taxes.

Though not strictly an adverse possession statute,[111] RCW 7.28.080 does provide a substitute therefor in giving title to one who claims vacant and unoccupied land under color of title and pays taxes on it for seven successive years,[112] even though claimant does not take actual possession. RCW 7.28.080 is unique among the adverse possession statutes in that a claim made under this statute may be extinguished by the payment of taxes on the land for one or more years during the seven-year term by a person having a better paper title than the party claiming under the statute.

Possession and use of land, sufficient to defeat the application of the "vacant land" statute, need not be so extensive as to support a claim for adverse possession or to defeat a claim for adverse possession asserted by another. Any use, however slight or temporary, if consistent with the general nature of the property, is sufficient to prevent application of RCW 7.28.080. In Wilson v. Howard,[113] incidental and occasional use of the disputed land as a family recreational area, consistent with the obvious nature of the land as wild and ill-formed accretions in front of existing beach front property, was held sufficient as a matter of law to take the land out of the category of "vacant and unoccupied".

Under RCW 7.28.080, where land was acquired by warranty deed and the taxes assessed against such land were paid for 20 years and the land was vacant during such period except for the use thereof made by the grantee, it was not necessary to show open and notorious possession by the grantee.[114] "Tacking" of time by successive adverse holders is expressly permitted under this statute.

The ten-year statute is tolled by infancy (under 18 years), incompetency or extreme disability, or incarceration (RCW 4.16.190); absence from or concealment in the state (RCW 4.16.180); war when the owner is an enemy alien (RCW 4.16.210); military service of the owner (RCW 4.16.220); and injunction or statutory prohibition against bringing an action (RCW 4.16.230); if the disability existed at the time the cause of action arose (RCW 4.16.250). The personal representative of a deceased owner has one year after the owner's death to bring an action to recover the property (RCW 4.16.200). Under

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[111]William v. Striker, 29 Wn. App. 132, 627 P.2d 590 (1981).

[112]Mourik v. Adams, 47 Wn.2d 278, 287 P.2d 320 (1955). Failure to pay all taxes and assessments for the entire seven-year period was held fatal to a claim of adverse possession under either RCW 7.28.070 or 7.28.080.

[113]5 Wn. App. 169, 486 P.2d 1172 (1971). See also McCoy v. Lowrie, 42 Wn.2d 24, 253 P.2d 415 (1953), in which a temporary use of timber lands by "cedar makers", employed by the party claiming title and working but not living on the land, was deemed to be sufficient to categorize the land as neither vacant nor unoccupied.

[114]McGill v. Shugouts, 58 Wn.2d 203, 361 P.2d 645 (1961).

both the color-of-title and vacant-land statutes (RCW 7.28.070 and .080), tolling occurs if the owner is an infant or incompetent, but an action to recover the land must be commenced within three years after the disability ceases (RCW 7.28.090). There are no tolling provisions for the connected-title statute (RCW 7.28.050).

A reservation of mineral rights in a deed constitutes a severance of title to the mineral rights and title to the surface, and where there has been such a severance, possession of the surface by the owner is not adverse to the owner of the minerals below it. Where there has been a severance of title to mineral rights, title thereto by adverse possession can be acquired, but all of the essential elements of adverse possession must exist as in the ordinary case of title to real property by adverse possession, and the exploration for minerals or mining operations relied upon to establish those essential elements must be open, notorious, continuous and hostile, and under color of title where that is required. Where there has been a severance of title to the mineral rights and title to the surface of a tract of land, but no segregation for taxation purposes, the purchasers of such land under a deed without reservations or exceptions, by paying taxes on the property as a unit for seven years, did not acquire title to the mineral rights by virtue of the seven-year adverse possession statute, RCW 7.28.080, since payment of taxes on the land does not constitute payment of the taxes on the mineral rights.[115]

b. The Elements of Adverse Possession

(1) Actual and Uninterrupted

Except for the vacant-land statute (RCW 7.28.080), statutes allowing the establishment of claims of adverse possession require that the adverse possessor, or one claiming under him, such as a tenant, be in actual possession of the land,[116] either by staying on the land personally, having it occupied by one claiming under him, or putting on the land physical objects of a nature that a true owner would put on the land.[117] This is not to say that the adverse possessor must physically be present all the time; it is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character

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[115]McCoy v. Lowrie, 42 Wn.2d 24, 253 P.2d 415 (1953).

[116]Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984); El Cerrito Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962); O'Brien v. Schultz, 45 Wn.2d 769, 278 P.2d 322 (1954); Foote v. Kearney, 157 Wash. 681, 290 Pac. 226 (1930).

[117]Young v. Newbro, 32 Wn.2d 141, 200 P.2d 975 (1948) (overruled on other grounds in Chaplin v. Sanders, supra); Snively v. State, 167 Wash. 385, 9 P.2d 773 (1932) (State was held not to have occupied bed of nonnavigable lake by simply making claim that lake was navigable, thereby raising flag of state ownership of bed); Grays Harbor Commercial Co. v. McCulloch, 113 Wash. 203, 193 Pac. 709 (1920); Cartright v. Hamilton, 111 Wash. 685, 191 Pac. 797 (1920) (held that claimant did not have possession when he did not use up to neighbor's fence, which was over on neighbor's side of boundary line).

of the premises.[118] As stated in Butler v. Anderson,[119] the nature of possession and attendant acts necessary to constitute adverse use are deemed sufficient "if a person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general, in holding, managing, and caring for property of like nature and condition."

Normally an adverse possessor who places physical objects on part of another's land will be deemed to possess such an additional area around the objects as is reasonably necessary to carry out his objective.[120] However, an adverse possessor may be allowed, by constructive possession, to claim additional lands to those actually possessed. If an adverse possessor acts in good faith under color of title, his possession will be deemed constructively to include all lands described in the instrument which constitutes his color of title.[121] If his document inadequately describes the area, there will be no constructive possession. Actual possession by the true owner of any part of the land will wipe out the claim of constructive possession. Also, there can be no constructive possession beyond the confines of the land in which actual possession exists - if the actual possession is of a tract of land, there will be no constructive possession of any part of an adjacent tract, because there is nothing to give notice to the true owner of the adjacent tract that the owner's premises have been invaded. Likewise, there can be no constructive possession by a claimant who is the legal owner of the land that is actually occupied, since there would be nothing to give notice of the constructive claim.

Whether any particular acts of dominion or control over the land are sufficient to constitute possession is necessarily a question of fact that will depend on the peculiarities of the land in dispute; i.e., its size, location, normal use, etc. In Frolund v. Frankland,[122] the court was concerned with land devoted to rural waterfront homesites and beach recreational areas with their more landward portions being allowed to remain in their original or unimproved state. The court concluded that the claimant had "unfurled the flag" of hostile ownership when, pursuant to a survey line obtained by him in good faith, claimant destroyed part of an old boundary fence at the widest and most seaward portion of the disputed area and thereafter cleared and maintained

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[118]Danner v. Bartel, 21 Wn. App. 213, 584 P.2d 463 (1978); Howard v. Kunto, 3 Wn. App. 393, 477 P.2d 210 (1970) (overruled on other grounds in Chaplin v. Sanders, supra); Fadden v. Purvis, 77 Wn.2d 23, 459 P.2d 385 (1969) (overruled on other grounds in Chaplin v. Sanders, supra).

[119]71 Wn.2d 60, 426 P.2d 467 (1967) (overruled on other grounds in Chaplin v. Sanders, supra).

[120]State v. Stockdale, 34 Wn.2d 857, 210 P.2d 686 (1949) (overruled on other grounds in Chaplin v. Sanders, supra) (held that the state, claiming an area of a state park by adverse possession, was entitled to an additional area around buildings and other improvements put on another's land by mistake, which amounted to several acres); Skog v. Seymour, 29 Wn.2d 355, 187 P.2d 304 (1947) (overruled on other grounds in Chaplin v. Sanders, supra).

[121]Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 455 P.2d 372 (1969); Sparks v. Douglas County, 39 Wn. App. 714, 695 P.2d 588 (1985).

[122]71 Wn.2d 812, 431 P.2d 188 (1967) (overruled on other grounds in Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984)).

the land in the recreational and yard area up to the survey line. Considering the nature, location, and customary usage of like property in the general area, the court concluded that the claimant's acts in the residential and beach portions of the disputed area were sufficient to amount to an occupancy of the entire area between the old fence line and the survey line.

In Drumheller v. Nasburg,[123] the necessary occupancy was found by the enclosure of a part of a draw containing a series of springs by placing a barbed wire fence around it with the idea of developing the area into an integral part of a fish hatchery. Mowing the lawn, planting flower beds, constructing a brick patio, and maintaining a compost heap on a disputed strip of land between an original fence line and the true boundary was held sufficient to establish adverse possession in Krona v. Brett.[124] The existence of a small orchard and a cement marker were sufficient to show possession and occupancy in Fadden v. Purvis.[125] Cutting the grass only along a claimed strip of land that crossed an area between two houses which was planted in lawn has been held sufficient to establish a claim of ownership, when considered in connection with more conclusive acts of ownership at either end of the claimed strip, because in that situation there is little other evidence of ownership or hostile possession that might be offered.[126] In Wood v. Nelson,[127] the cutting of wild grass on wild, unimproved, or unfenced land was held insufficient of itself to establish adverse possession. Likewise, entry upon an unoccupied and unimproved 640 acre tract for the purpose of cutting firewood has been held to be insufficient possession for adverse possession purposes.[128]

Repairing and maintaining an old fence and using the disputed property for grazing has been held to establish sufficient possession.[129] Planting a holly hedge, allowing native growth to reach hedge proportions, trimming both hedges, laying a pipeline, and running a cable from a piling to designate an area claimed for swimming has been held sufficient to establish adverse possession.[130]

The adverse possession must be continuous and uninterrupted during the whole statutory period.[131] A break in the continuity of possession will place constructive

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[123]3 Wn. App. 519, 475 P.2d 908 (1970).

[124]72 Wn.2d 535, 433 P.2d 858 (1967) (overruled on other grounds in Chaplin v. Sanders, supra).

[125]77 Wn.2d 23, 459 P.2d 385 (1969).

[126]Mesher v. Connolly, 63 Wn.2d 552, 388 P.2d 144 (1964).

[127]57 Wn.2d 539, 358 P.2d 312 (1961).

[128]Pettigrew v. Greenshields, 61 Wash. 614, 112 Pac. 749 (1911).

[129]Hill v. Weidert Farms, Inc., 75 Wn.2d 871, 454 P.2d 220 (1969) (overruled on other grounds in Chaplin v. Sanders, supra).

[130]Butler v. Anderson, 71 Wn.2d 60, 426 P.2d 467 (1967) (overruled on other grounds in Chaplin v. Sanders, supra).

[131]Howard v. Kunto, 3 Wn. App. 393, 477 P.2d 210 (1970), petition for review denied 78 Wn.2d 996 (1970) (overruled on other grounds in Chaplin v. Sanders, supra) (held that the uninterrupted possession which is necessary for adverse possession does not necessarily mean continuous occupancy, that there was

possession back in the legal owner. If the adverse holder purports to sell the land, and the purchaser from him goes into possession, then possession by the adverse holder is not considered interrupted, and the new owner is allowed to "tack" the time during which his vendor held the land adversely.[132] Also, the granting of a lease and possession to the lessee, or the termination of a lease with possession reverting to the landlord-owner will not interrupt the possession, and the landlord may "tack" the tenant's possession to his own.[133] Tacking is explicitly provided for in the three seven-year statutes, and it has been held with regard to the ten-year statute that tacking will be permitted when the successive occupants are in "privity".[134] Normally privity exists if there is a deed or document running between the successive occupants which purports to convey the land possessed.[135] Where the original possessor claims more land than described in his deed, under the mistaken impression that the disputed area is actually part of his land, and conveys his land by deed and gives possession of it and the mistaken area to the grantee, sufficient privity has been found to allow tacking of the successive periods of occupation.[136] In Howard v. Kunto,[137] the court held there was sufficient privity of estate to permit tacking and thus established adverse possession where several successive purchasers received record title to tract A under the mistaken belief that they were acquiring tract B, immediately contiguous thereto, and where possession of tract B was transferred and occupied in a continuous manner for more than ten years by the successive occupants. The court said:

> (At p. 400) "The technical requirement of 'privity' should not, we think, be used to upset the long periods of occupancy of those who in good faith received an erroneous deed description. Their 'claim of right' is no less persuasive than the purchaser who believes he is purchasing more land than his deed described.
>
> "In the final analysis, however, we believe the requirement of 'privity' is no more than judicial recognition of the need for some reasonable

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sufficient continuity of possession provided by summer occupancy only of a summer beach home for more than the ten-year period, together with the continued existence of permanent improvements on the land and beach area).

[132]Naher v. Farmer, 60 Wash. 600, 111 Pac. 768 (1910). A purchaser may tack the adverse use of his predecessor in interest to that of his own, where the land was intended to be included in the deed between them, but was mistakenly omitted from the description. Buchanan v. Cassell, 53 Wn.2d 611, 335 P.2d 600 (1959).

[133]El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962); McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744 (1894).

[134]Faubion v. Elder, 49 Wn.2d 300, 301 P.2d 153 (1956) (overruled on other grounds in Chaplin v. Sanders, supra).

[135]Flint v. Long, 12 Wash. 342, 41 Pac. 49 (1895).

[136]Buchanan v. Cassell, 53 Wn.2d 611, 335 P.2d 600 (1959); Faubion v. Elder, supra.

[137]3 Wn. App. 393, 477 P.2d 210 (1970), petition for review denied 78 Wn.2d 996 (1970) (overruled on other grounds in Chaplin v. Sanders, supra).

connection between successive occupants of real property so as to raise their claim of right above the status of the wrong-doer or the trespasser."

If an adverse possessor, once in possession, abandons possession, and then he himself, or another adverse holder, later repossesses adversely, the statute is interrupted, and the ten-year period must begin to run anew from the time of the last taking of possession.[138] The holding is also considered interrupted when the adverse holder accepts a lease of the land from the true owner.[139] The possessor of property which has been held adversely for ten years may bring an action to quiet title at any time thereafter even though all of the elements of adverse possession were not present immediately prior to initiating the action.[140]

(2) Open and Notorious

To be adverse, possession must not only be actual, but also sufficiently "open and notorious" to give actual or constructive notice to the legal owner that the premises have been invaded.[141] In other words, the possession must be of such a nature as to at least give the legal owner an opportunity to know that he will lose title to his land unless he acts to protect it. The erection of inexpensive shanties on the land by the claimant was held in Blake v. Schriver,[142] to be insufficiently open and notorious to put the true owner on notice. The erection of the shanties was not what a normal owner of land would do in that particular community. In Flint v. Long,[143] the adverse holder cleared the land, fenced it, and planted shrubbery, and the court said:

"The face and appearance of the land must have been completely changed so notice must have been given to anyone who saw that possession had been taken."

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[138]Noyes v. Douglas, 39 Wash. 314, 81 Pac. 724 (1914).

[139]Northern Pacific Ry. Co. v. George, 51 Wash. 303, 98 Pac. 1126 (1908).

[140]El Cerrito, Inc. v. Ryndak, supra, at 855.

[141]McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744 (1894) (owner had actual notice of adverse possession); Davies v. Wickstrom, 56 Wash. 154, 105 Pac. 454 (1909) (owner charged with constructive notice of adverse possession); Downie v. Renton, 167 Wash. 374, 9 P.2d 372 (1932) (held that a city's adverse use of a gulch for the drainage of waste water, once or twice a year, was not "notorious," open or visible, where the gulch was a wild stretch of unused and unimproved land, in its natural state, so covered with trees and underbrush that no one passing over it could have discovered the acts of user, which were of such a nature as to negate the idea of presumptive notice); Bowers v. Ledgerwood, 25 Wash. 14, 64 Pac. 936 (1901) (possession held to be sufficiently open and notorious where claimant planted an orchard, dug a well, and placed a barn and outbuildings on land mistakenly enclosed by a fence).

[142]27 Wash. 593, 68 Pac. 330 (1902). A purchaser in possession of property is estopped to deny the title of his vendor and will not be permitted to acquire a title adverse to him. Nethery v. Olson, 41 Wn.2d 173, 247 P.2d 1011 (1952).

[143]12 Wash. 342, 41 Pac. 49 (1895).

The court found the "open and notorious" element had been satisfied.

Oral declarations by the adverse holder that he owns the land or oral declarations of adverse intent may give added weight to the "open and notorious" element, but it is not required that the claimant make such a declaration to initiate the running of the statutory period nor to support an action to establish title by adverse possession.[144] As stated in Krona v. Brett,[145] a party seeking to establish title to land by adverse possession need not have given an express communication to the true owner that he is claiming the land, since the intention may be evidenced by the acts of the claimant. There is a presumption that the owner knows of the adverse possession if it is open and notorious. While either the acts or declarations may evince an intention to claim land adversely, the acts of the user most frequently control. If his acts clearly evince an intention to claim land as its owner, a general declaration by the user that he did not intend to claim another's land will not prove lack of intention.[146]

Normally the legal owner is charged with constructive notice of the adverse claim if the adverse possessor's conduct is sufficiently open and notorious to make his conduct discoverable by the legal owner. However, when the adversely occupied land is "wild, broken, mountainous, and sparsely settled," the true owner must have actual notice of the occupation before he loses title by adverse possession.[147]

(3) Hostile and Exclusive

At the very heart of adverse possession is the requirement that the possession must be "hostile". As stated frequently by the Washington State Supreme Court:

> "In the law of adverse possession 'hostile' does not mean animosity, but is a term of art which means that the claimant is in possession as owner and not in a manner subordinate to the title of the true owner."[148]

Essentially, then, hostility is the opposite of permissiveness, and possession will not be hostile and will not be adverse if it is by the owner's permission.[149] In cases where two neighbors, being unsure of the exact location of their mutual boundary, agree to

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[144]Foote v. Kearney, 157 Wash. 681, 290 Pac. 226 (1930); Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955).

[145]72 Wn.2d 535, 433 P.2d 858 (1967) (overruled on other grounds in Chaplin v. Sanders, supra).

[146]O'Brien v. Schultz, 45 Wn.2d 769, 278 P.2d 322 (1954) (overruled on other grounds in Chaplin v. Sanders, supra); Faubion v. Elder, 49 Wn.2d 300, 306, 301 P.2d 153 (1956) (overruled on other grounds in Chaplin v. Sanders, supra).

[147]Murray v. Bousquet, 154 Wash. 42, 280 Pac. 935 (1929); Todd v. Sterling, 45 Wn.2d 40, 273 P.2d 245 (1954).

[148]El Cerrito, Inc. v. Rynkdak, 60 Wn.2d 847, 854, 376 P.2d 528 (1962); King v. Bassindale, 127 Wash. 189, 220 Pac. 777 (1923).

[149]Ormiston v. Boast, 68 Wn.2d 548, 413 P.2d 969 (1966) (express permission to use right of way); Price v. Humptulips Driving Co., 116 Wash. 56, 198 Pac. 374 (1921) (prescriptive easement case).

use a chosen line until the true line can be set by survey, whichever neighbor finally turns out to be using his neighbor's land will be doing so by reason of mutual permission by both neighbors and will not be allowed to claim the land by adverse possession.[150] Conversely, if the two neighbors have simply located the boundary by mistake and subsequently treated the false line as a true boundary, then adverse possession will be allowed.[151]

The existence of a close relationship[152] or, more simply, friendly relations[153] between possessor and owner may imply permissiveness and militate against the element of hostility, though it does not necessarily preclude a use that is hostile in the legal sense.[154] While an inference of adverse use may be drawn from the fact that the use is unchallenged for the prescriptive period, it does not compel a finding that the use was other than permissive.[155]

In Chaplin v. Sanders,[156] the court overruled a long line of cases holding that the subjective intent of a claimant would defeat the required element of hostility. The court's opinion stated:

> (At pp. 860-861) "The 'hostility/claim of right' element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which

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[150]Beck v. Loveland, 37 Wn.2d 249, 222 P.2d 1066 (1950) (overruled on other grounds in Chaplin v. Sanders, supra); Lindberg v. Davis, 164 Wash. 680, 4 P.2d 501 (1931); Davis v. Kenney, 131 Wash. 168, 229 Pac. 311 (1924); Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803 (1905).

[151]Niven v. Sheehan, 46 Wn.2d 152, 278 P.2d 784 (1955); Stoebuck, William B., "The Law of Adverse Possession in Washington," 35 Wash.L.Rev. 53, 81 (1960).

[152]Schmitz v. Klee, 103 Wash. 9, 173 Pac. 1026 (1918) (no hostile possession when woman entered land with the permission and invitation of her daughter and son-in-law, maintained cordial relations with them, and lived part of the time at their home); Diel v. Beekman, 7 Wn. App. 139, 499 P.2d 37 (1972) (overruled on other grounds in Chaplin v. Sanders, supra) (no hostile possession when one stands in the relation of a tenant to a landlord or the beneficiary of a trust to the trustee. In both of these relationships the possession is considered permissive).

[153]Miller v. Jarman, 2 Wn. App. 994, 471 P.2d 704 (1970), petition for review denied, 78 Wn.2d 995 (1970). Reciprocal use and benefit to adjacent owners of property paved as a driveway was found to be permitted as a neighborly courtesy and, therefore, permissive.

[154]Faubion v. Elder, 49 Wn.2d 300, 301 P.2d 153 (1956) (overruled on other grounds in Chaplin v. Sanders, supra) (parties were brother and sister).

[155]Spear v. Basagno, 3 Wn. App. 689, 477 P.2d 197 (1970) (overruled on other grounds in Chaplin v. Sanders, supra), petition for review denied 78 Wn.2d 996 (1971).

[156]100 Wn.2d 853, 676 P.2d 431 (1984).

he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination."

Under this analysis, permission to use the land will still operate to negate the element of hostility.

Closely related to the requirement that hostility be directed to the title of the true owner is the necessity for the adverse holding to be exclusive of the true owner and third persons.[157] Because, in the eyes of the law, possession is by its very nature exclusive, the owner, if on the land, will be deemed in exclusive possession and control, thereby precluding any contention on the part of an adverse claimant that he is in actual and hostile possession in opposition to the rights of the true owner. To constitute adverse possession or to set in operation the statute of limitations does not necessarily require the claimant to live upon the land or to enclose it with fences, or to stand guard at all times upon its borders, or to oppose the entry of trespassers or hostile claimants. It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.[158] Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence, and there is no requirement that a particular degree or kind of use be established as to every part of a fenced tract of land as a prerequisite to finding possession thereof.[159]

(4) Claim of Right

There is some authority for the proposition that "claim of right" means the same as "hostile" for purposes of adverse possession,[160] though some cases tend to treat it as a

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[157]King v. Bassindale, 127 Wash. 189, 220 Pac. 777 (1923); Peeples v. Port of Bellingham, 93 Wn.2d 766, 613 P.2d 1128 (1980) (overruled on other grounds in Chaplin v. Sanders, supra).

[158]Frolund v. Frankland, 71 Wn.2d 812, 417 P.2d 188 (1967) (overruled on other grounds in Chaplin v. Sanders, supra); Heriot v. Smith, 35 Wn. App. 496, 668 P.2d 589 (1983).

[159]Wood v. Nelson, 57 Wn.2d 539, 358 P.2d 312 (1961).

[160]Stoebuck, "The Law of Adverse Possession in Washington," 35 Wash. L. Rev. 53, 73 (1960). After quoting 4 Tiffany on Real Property to the effect that, "There would seem to be reason to doubt, however, whether, in asserting this requirement [that possession must be under claim of right or title], the courts ordinarily have in mind anything more than a restatement of the requirement of hostility of possession," the court in Bowden-Gazzman Co. v. Hogan, 22 Wn.2d 27, 35, 154 P.2d 285 (1944) (overruled on other grounds in Chaplin v. Sanders, supra) went on to state: "From a reading of our own cases where adverse possession is based on the ten-year statute of limitations, we are of the opinion that this court must have given to the term 'claim of right' the same meaning accorded to it by Tiffany...."

separate element.[161] Chaplin v. Sanders, supra, treats "hostility" and "claim of right" as essentially the same thing. In Wickert v. Thompson[162] the court concluded that:

> "The 'claim of right' to which the doctrine refers is simply that the claimant is in possession as owner, with intent to claim the land as his own, and not in recognition of or subordination to the record title owner."

The former requirement of "good faith" appears to have been abandoned in Chaplin.

Where a road is shown to have been opened or maintained by the owner of the land for his own benefit, and the claimant's use appears to have been merely in common with him, no presumption arises that the latter's use of it was adverse or under a claim of right. This signifies only that the owner is permitting his neighbor to use the land as a neighborly courtesy and was not adverse. In the absence of additional circumstances pertaining to the origin or nature of the claimant's use, and expressing a purpose to impose a separate servitude upon the land, the use is presumed to be permissive only.[163]

Where a party has shown an open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, and the burden of rebutting that presumption by showing that the use was permissive is upon the owner of the servient estate, but there is no presumption that the use is adverse when the lands in question are vacant, open, unenclosed and unimproved. In an action for trespass, defended on the ground that the defendant had acquired a prescriptive right to maintain a dam on the property involved, the court held that no such prescriptive right had been acquired.[164]

If one by mistake enclosed adjoining land belonging to another, and claims it as his own and satisfies the requirements of adverse possession, his actual possession of such erroneously enclosed land will operate to divest the adjoining owner of title thereto.[165]

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[161]Williamson v. Horton, 157 Wash. 621, 289 Pac. 1025 (1930); Miller v. O'Leary, 44 Wash. 172, 87 Pac. 113 (1906); Howard v. Kunto, 3 Wn. App. 393, 477 P.2d 210 (1970), petition for review denied 78 Wn.2d 996 (1970) (overruled on other grounds in Chaplin v. Sanders, supra).

[162]28 Wn. App. 516, 517-518, 624 P.2d 747 (1981) (overruled on other grounds in Chaplin v. Sanders, supra).

[163]Cullier v. Coffin, 57 Wn.2d 624, 358 P.2d 958 (1961). The cutting of the entire lawn between two houses could well be an act of neighborly accommodation and does not evidence any intent to claim any right of ownership. On the other hand, the circumstances and manner of cutting of a lawn to a certain point on the defendant's lot may be much more indicative of a claim of ownership. Mesher v. Connolly, 63 Wn.2d 552, 388 P.2d 144 (1964).

[164]Stroup v. Kieszling, 35 Wn.2d 620, 214 P.2d 163 (1950).

[165]Phinney v. Campbell, 16 Wash. 203, 47 Pac. 502 (1896) (overruled on other grounds in Chaplin v. Sanders, supra); Bowers v. Ledgerwood, 25 Wash. 14, 64 Pac. 936 (1901); Alverson v. Hooper, 108 Wash. 510, 185 Pac. 808 (1919); Thornely v. Andrews, 45 Wash. 413, 88 Pac. 757 (1907); and Faubion v. Elder, 49 Wn.2d 300, 301 P.2d 153 (1956) (overruled on other grounds in Chaplin v. Sanders, supra).

On the other hand, if, being ignorant of the boundary line, one mistakenly places his fence so as to enclose a part of the adjoining owner's property, and makes no claim to the land thus erroneously enclosed, but only to the true line as it may be subsequently ascertained, he does not acquire title to such land by adverse possession because the possession is not hostile and is not under a claim of right.[166] As stated in Skansi v. Novak:[167]

> "While adverse possession may originate in a mistake it must be such a mistake as to lead to an unequivocal claim, either by acts or words, of a title or right to the land possessed. Mere possession up to the mistaken line without any claim of right or ownership beyond the true line is insufficient to constitute adverse possession or to work a dissiezin of the true owner."

A common grantor, under certain circumstances, may establish the boundary line between two tracts, both of which he owned. It is true that a purchaser of real estate may be bound by a line fence established by a common grantor, but such cases turn upon peculiar circumstances disclosed by the evidence. In the absence of an agreement that a fence between the properties shall be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title to a disputed strip of ground. Possession of land up to a fence will not be considered hostile for the purpose of establishing title by adverse possession, where it appears that, at the time the fence was built, the adjoining landowners did not know the true location of the boundary line, and it was agreed between them that the fence was to be moved if a later survey was made changing the line, and the fence was never taken as the true line.[168]

In Young v. Newbrow,[169] the court observed that the mere building of a fence to control pasturage on disputed land does not constitute such possession as would establish an adverse title. However, such an act would not militate against a claim of adverse holding if the use of the land were an incident under a claim of right, the question being whether a property fence is maintained as a matter of convenience or under a claim of ownership, but in this instance acquisition of title by adverse possession was not established.[170] An owner of residential property claiming an adjoining strip by adverse possession in the nature of physical structures extending upon such strip, is not required to limit his claim to the actual ground area of the structures or improvements which may have been built by him beyond his true line, nor

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[166]Thornely v. Andrews, supra; Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803 (1985); Lindley v. Johnson, 42 Wash. 257, 84 Pac. 822 (1906).

[167]84 Wash. 39, 45, 146 Pac. 160 (1915) (overruled on other grounds in Chaplin v. Sanders, supra

[168]Beck v. Loveland, 37 Wn.2d 249, 222 P.2d 1066 (1950) (overruled on other grounds in Chaplin v. Sanders, supra).

[169]32 Wn.2d 141, 200 P.2d 975 (1948) (overruled on other grounds in Chaplin v. Sanders, supra).

[170]See also, Taylor v. Talmadge, 45 Wn.2d 144, 273 P.2d 506 (1954) (overruled on other grounds in Chaplin v. Sanders, supra). See also Annot. 48 ALR 3rd 818 (1975).

is the erection or the existence of a fence a condition precedent to a claim of adverse possession.[171]

(5) Color of Title

For purposes of adverse possession after seven years pursuant to Ch. 7.28 RCW, "color of title" means "that which is a semblance or appearance of title, but is not title in fact nor in the law.[172] In other words, "color of title" is provided by a document which on its face appears to carry title but is actually void. A void sheriff's certificate of sale alone[173] or void certificate of sale and sheriff's deed[174] are color of title. So is a void tax sale deed,[175] a deed to community real property executed solely by the husband,[176] and a decree of distribution pursuant to a will admitted to probate.[177] A person claiming title to property is not precluded from obtaining ownership of the property under the provisions relating to adverse possession by one holding color of title by the mere fact that the title was derived from the cotenant; and a statutory quitclaim deed from one having incomplete title by reason of holding only a cotenant's interest may pass color of title, since the quitclaim form demonstrates no more than the fact that no warranties are given and, thus, does not preclude the intention to convey the entire estate.[178]

An instrument, in order to operate as a color of title, must purport to convey title to the grantee or to those with whom the grantee is in privity, and must describe and purport to convey the land in controversy; it cannot be aided by parol evidence.[179] Therefore, one may not claim property under color of title when the property is not described in the deed.[180] On the other hand, when a claim to an interest in land by adverse possession is based on color of title, a party who has possession of part of the land described in the recorded deed is deemed to be constructively possessed of the

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[171]El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 853-854, 376 P.2d 528 (1962).

[172]Gardenspot Ranch, Inc. v. Baker, 11 Wn. App. 109, 114, 521 P.2d 757 (1974); Bassett v. Spokane, 98 Wash. 654, 168 Pac. 478 (1917).

[173]Prentice v. How, 84 Wash. 136, 146 Pac. 388 (1915).

[174]Johnson v. Bartlett, 50 Wash. 114, 96 Pac 833 (1908); Cox v. Thompkimson, 39 Wash. 70, 80 Pac. 1005 (1905).

[175]Lara v. Sandell, 52 Wash. 53, 100 Pac. 166 (1909).

[176]Biggart v. Evans, 36 Wash. 212, 78 Pac. 925 (1904).

[177]Nicholas v. Cousins, 1 Wn. App. 133, 459 P.2d 970 (1969), petition for review denied, 77 Wn.2d 961 (1969).

[178]Scramlin v. Warner, 69 Wn.2d 6, 416 P.2d 699 (1966).

[179]Schmitz v. Klee, 103 Wash. 9, 16, 173 Pac. 1026 (1918); Scramlin v. Warner, supra, at 10.

[180]Finley v. Jordan, 8 Wn. App. 607, 610, 508 P.2d 636 (1973); Heikkinen v. Hansen, 57 Wn.2d 840, 844, 360 P.2d 147 (1961).

tract to the extent of its boundaries.[181] Put succinctly, when any claim to land is made by adverse possession under color of title, the extent of that claim depends strictly upon the description of the land contained in the colorable title document itself.

Under the ten-year statute of limitations, the adverse holder does not have to come into possession by virtue of even an invalid instrument or conveyance for the reason that no showing of color of title is required to acquire title by adverse possession under that statute.

c. Adverse Possession - the State and Political Subdivisions

In the absence of enabling legislation, adverse possession will not run against the United States.[182] Adverse possession also will not run against the state.[183] Neither will it run against a county[184] nor a municipality[185] with respect to property held in a governmental capacity for public purposes. However, it is also true that if land is held by a governmental body in its proprietary, as opposed to its governmental capacity, the land is subject to being acquired by adverse possession the same as if owned by a private individual.[186] Thus, title to part of a platted street[187] or alley[188] cannot be

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[181]Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 455 P.2d 372 (1969).

[182]Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946).

[183]Pioneer National Title v. State, 39 Wn. App. 758, 695 P.2d 996 (1985); McLeary v. Department of Game, 91 Wn.2d 647, 591 P.2d 778 (1979).

[184]Gustaveson v. Dwyer, 83 Wash. 303, 145 Pac. 458 (1927); and RCW 4.16.160 and 4.16.170.

[185]RCW 4.16.160 and 4.16.170. Goedecke v. Viking Investment Corp., 70 Wn.2d 504, 424 P.2d 307 (1967); West Seattle v. West Seattle Land and Improvement Co., 38 Wash. 359, 80 Pac. 549 (1905). However, where only the center portion of a waterway of a commercial waterway district had been dredged so as to permit shipping, the owner of the land abutting on the waterway could not be ejected from that portion of the adjacent undredged right-of-way necessary for access to the navigable channel, so long as neither navigation on the waterway nor any right of the general public was interfered with by the owner's encroachment on the right-of-way. Commercial Waterway District No. 1 of King County v. Permanente Cement Co., 61 Wn.2d 509, 379 P.2d 178 (1963).

[186]Sisson v. Koelle, 10 Wn. App. 746, 520 P.2d 1380 (1974).

[187]Mueller v. City of Seattle, 167 Wash. 67, 8 P.2d 994 (1932); Vetter v. K & K Timber Co., 124 Wash. 151, 213 Pac. 927 (1932); West Seattle v. West Seattle Land & Improvement Co., 38 Wash. 359, 80 Pac 549 (1905). But see: Annot. "Private Improvement of Land Dedicated But Not Used As Street As Estopping Public Rights," 36 ALR 4th 625.

[188]Rapp v. Stratton, 41 Wash. 263, 83 Pac. 182 (1905).

acquired by adverse possession, though title to a vacated road may be so acquired.[189] In pertinent part, RCW 7.28.090 expressly provides that:

> "RCW 7.28.070 [the 7 year - color of title statute] and 7.28.080 [the vacant and unoccupied land statute] shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose."

On the other hand, the state, and its political subdivisions, can acquire title from a private owner by adverse possession provided, of course, that all of the requirements of adverse possession are satisfied.[190]

It is also possible for one governmental unit to acquire land from another by adverse possession.[191]

d. Divesting Title Acquired by Adverse Possession

Where a title has become fully vested by adverse possession, it cannot be divested by parol abandonment or relinquishment, or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed. The fact that one has ceased to use a strip of land in such a way that his claim of adverse possession is apparent, did not divest him of the title he had acquired. The recording statutes (RCW 65.08.060 and 65.08.070) do not apply to titles acquired by adverse possession or under the vacant land statute,[192] and a conveyance of the record title to a bona fide purchaser under such statutes does not extinguish the title acquired by adverse possession.[193]

In Palin v. Sherman,[194] which involved an action to determine the ownership of a strip of land as between a claimant in possession having title by adverse possession and a claimant seeking possession having a tax title, where there was no finding of fact that the adverse holder had paid the taxes on the property, the court applied the rule that the foreclosure of a tax lien is a proceeding in rem and invests the purchaser with a

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[189]O'Brien v. Schultz, 45 Wn.2d 769, 278 P.2d 322 (1954) (overruled on other grounds in Chaplin v. Sanders, supra); Tamblin v. Crowley, 99 Wash. 133, 168 Pac. 982 (1917).

[190]Snively v. State, 167 Wash. 385, 9 P.2d 773 (1932). Todd v. Kitsap Co., 101 Wn.2d 245, 676 P.2d 484 (1984). A public highway over private property can be acquired by prescription when the public use is general, uninterrupted, and continuous for a period of ten years, under a claim of right. Todd v. Sterling, 45 Wn.2d 40, 273 P.2d 245 (1954). Wheeler v. Rendsland, 38 Wn.2d 685, 231 P.2d 322 (1951).

[191]Highline School District v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976). This case actually involved an acquisition by prescription and not adverse possession but the court's discussion of the principle applied to both doctrines.

[192]Williams v. Striker, 29 Wn. App. 132, 627 P.2d 590 (1981).

[193]Muggas v. Smith, 33 Wn.2d 429, 206 P.2d 332 (1949).

[194]38 Wn.2d 806, 232 P.2d 105 (1951).

new title superior to any possessory rights, however exclusive or adverse, and the trial court quieted title to the property in the claimant under the tax title.

On the other hand, in Berry v. Pond,[195] the court observed:

> [4, 5] "A title by adverse possession is no higher or better than any other, nor is the adverse possessor exempt from taxation or tax foreclosure. His defenses do not differ from those of any other owner of real estate. A tax title when valid is a new title and takes free from all pre-existing claimants, but that does not mean that a tax foreclosure is subject to no defenses or that the judgment of foreclosure is valid against one who has either paid his taxes in fact or made a bona fide attempt to do so."

Thus, a judgment of tax foreclosure is not valid against one who has acquired the property through adverse possession and who has paid his taxes in fact, although under a wrong description. It is the fact of payment of the taxes on the land occupied, not the description used in the tax receipt, that is controlling.

e. General Observations

The subject of adverse possession is essentially a matter falling within the orbit of the lawyer rather than the surveyor, but the possibility of its application is involved in practically every survey made to re-establish old lines. Accordingly, it is essential that surveyors have a good working knowledge of the applicable statutes and rules of law in establishing boundaries. For example, a surveyor must apply rules of law when determining the proper starting monuments, in interpreting a deed, in apportioning excess or deficiency, and in many other situations. In the event a boundary is disputed on legal grounds, such as adverse possession, the surveyor should refer his client to the client's lawyer.

7. Prescriptive Easements

In order to establish an easement by prescription, (prescription is the term used when acquiring an easement, while adverse possession refers to acquiring lands), the claimant must prove that his use of the right of way has been, for a period of ten years, open, notorious, continuous, uninterrupted, adverse to the owner of the servient estate, and with the knowledge of such owner at a time when the owner was able in law to assert and enforce his rights. It is not necessary for one establishing a prescriptive easement to have a bona fide belief that he or she is the true owner of the property.[196] An adverse use will not ripen into a prescriptive right unless the owner of the servient estate knows of, and acquiesces in, such use, or unless the use is so open, notorious, visible, and uninterrupted that knowledge and acquiescence on the owner's part will be presumed. Protest by the property owner is not sufficient to interrupt adverse use and prevent the prescriptive right to an easement from accruing, but there must be an act which actually does cause a cessation of use temporarily at least.[197]

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[195]33 Wn.2d 560, 565, 206 P.2d 506 (1949).

[196]Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980).

[197]Huff v. Northern Pacific Ry. Co., 38 Wn.2d 103, 228 P.2d 121 (1951). Smith v. Breen, 26 Wn. App. 802, 614 P.2d 671 (1980).

A finding of fact that a strip of land, running along a property line and extending a few feet onto each of the adjacent properties, had been used by the owners of both properties for parking of motor vehicles for a period of more than 30 years, was held to support a conclusion of law that the owners of both properties had a perpetual easement over the strip for the parking of automobiles.[198] See also Todd v. Sterling.[199] Mere non-use, for no matter how long a period, does not operate to extinguish an easement. The owner of the property has the right to use the land for purposes not inconsistent with its ultimate use for the reserved purpose during the period of non-use. Thompson v. Smith, 59 Wn.2d 397, 367 P.2d 798 (1962).

In order to establish an easement by implication, one must prove three essentials: (1) Unity of title and subsequent separation by grant of the dominant tenement, (2) apparent and continuous user, and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant tenement. An implied grant of easement of a sewer line was held not to have been established where it appeared that the servient tenement was served first and not the dominant tenement; that the sewer was invisible and its existence unknown to the parties; and there was no showing that the easement was reasonably necessary to the proper enjoyment of the dominant tenement.[200]

A provision in a contract to convey real estate "free of encumbrances" does not refer to granted easements, permanent in character, which either are known to a vendee or the existence of which he should have known or ascertained had he made a reasonable investigation. Somers v. Leiser, 43 Wn.2d 66, 259 P.2d 843 (1953).

The case of Washburn v. Esser,[201] illustrates the exceptional situation in which the use of another's land, in this case for a road, was adverse and ripened into a prescriptive easement even though the landowner agreed to the use of his property. The court concluded:

> (At p. 172) "The important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the property was intended. It is generally agreed that use of an easement under claim of right by virtue of an oral grant may be adverse so as to give a title by prescription, although the parol grant itself is void under the statute of frauds.
>
> "If the use of the easement acquired by the oral grant continues for the prescriptive period of ten years in a manner that is open, notorious, continuous, and adverse to the owner of the land, the oral grant then ripens into a prescriptive easement to permanently use the road."

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[198]York v. Cooper, 60 Wn.2d 283, 373 P.2d 493 (1962).

[199]45 Wn.2d 40, 273 P.2d 245 (1954).

[200]Wreggitt v. Porterfield, 36 Wn.2d 638, 219 P.2d 589 (1950). See also, Silver v. Strohm, 39 Wn.2d 1, 234 P.2d 481 (1951); Adams v. Cullen, 44 Wn.2d 502, 268 P.2d 451 (1954); and King County v. The Boeing Co., 62 Wn.2d 545, 551, 384 P.2d 122 (1963).

[201]9 Wn. App. 169, 172, 511 P.2d 1387 (1973).

It is possible to establish an easement by prescription for a water line or sewer line underneath the ground provided that the owner of the servient estate has knowledge of the pipeline. In Davidson v. Columbia Lodge No. 8,[202] the court indicated that no easement could be established if the servient owner was not aware of the pipeline and there was nothing to indicate its presence.[203]

In order to establish a highway by prescription, it is necessary that the public use be general, uninterrupted, and continuous for a period of ten years under a claim of right.[204]

8. Vacation of Roads, Streets, Alleys and Highways

Section 32, Ch. 19, p. 603, Laws of 1889-1890 provided as follows:

> "Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time."

The above statute remained in full force and effect until March 12, 1909, when the following significant proviso was added by Sec. 1, Ch. 90, Laws of 1909:[205]

> "Provided, however, That the provisions of this section shall not apply to any highway, street, alley or other public place dedicated as such in any plat, whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any land conveyed by deed to the state or to any town, city or county for roads, streets, alleys or other public places."

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[202]90 Wash. 461, 154 Pac. 383 (1916).

[203]In connection with establishing an easement by prescription to maintain a pipeline across the defendant's property, if the use of another's land is open, notorious, and adverse, the law presumes knowledge or notice insofar as the owner is concerned; and if the owner knew of the adverse user, no further proof as to notice is required to establish such an easement by prescription. Chaplin v. Sanders, supra. Easements by prescription in artificial drains, pipes, and sewers are covered in 55 A.L.R.2d 1144.

[204]Wheeler v. Rendsland, 38 Wn.2d 685, 231 P.2d 322 (1951). Where land is wild, uncultivated, and unenclosed, the use by the public is deemed to be permissive. Turner v. Davisson, 47 Wn.2d 375, 287 P.2d 726 (1955). However, an easement by prescription may be established for a roadway over vacant, wild, and unenclosed land where hostile use of the land for ten years is proved, such as by marking the roadway's entrance upon a county road with no-trespassing signs and with signs inscribed with the name of "The Mountaineers" and maintaining a gate at the roadway entrance which from time to time was padlocked. The Mountaineers v. Wymer, 56 Wn.2d 721, 355 P.2d 341 (1960).

[205]Ch. 90, Laws of 1909 (see for later enactment RCW 36.87.090) contained an emergency clause and therefore became effective on March 12, 1909, the date on which it was approved by the Governor.

The statute, until its amendment March 12, 1909, applied to all platted streets and alleys outside cities and towns under the control of the county that were unopened for five years prior to March 12, 1909.[206] However, streets platted on first class tidelands (i.e., tidelands within two miles of the corporate limits of any city), are not "county roads" within the meaning of this 1889-1890 statute, and are not vacated if they were not developed within five years. The legislative intent expressed in Ch. 178, Sec. 52, p. 549, and Sec. 54, p. 550, Laws of 1895, and in Ch. 179, Sec. 1, p. 572, Laws of 1895, is that the public ways platted on tidelands of the first class should be subject to the control of the city to which they are adjacent, whether or not they lie within the corporate limits of the city.[207] When such platted streets or alleys were dedicated prior to March 12, 1909, but remained unopened for a period of less than five years prior to March 12, 1909, such streets and alleys were not vacated by the 1889-1890 act.[208]

The right of the public to use an alley has been held to have been lost through having remained unopened for public use for five years after dedication where it appeared that the plat was filed in 1889 and no public use was ever made of the alley, and only a portion thereof had ever been opened for use as a private driveway.[209]

Where streets were dedicated to a public use on a plat of an area outside of an incorporated city or town, were used only intermittently by the public, and not systematically for the period from 1890 through 1895, under Sec. 32, Ch. 19, p. 603, Laws of 1889-1890, they were vacated in 1895 by operation of law and the public lost any easement rights in the streets.[210] This 1889-1890 statute is self-executing. Where a platted county road became vacated through being unopened for five years, a judicial determination was necessary to free the land from the apparent record easement, but the owner's failure to obtain such an adjudication did not restore to the public any interest which it lost through non-user.[211]

While a vacation of streets or alleys under the 1889-1890 statute terminated all interest of the public in platted streets and alleys, it did not affect private easements over the

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[206]Brown v. Olmstead, 49 Wn.2d 210, 299 P.2d 935 (1962).

[207]Wyckoff v. City of Seattle, 60 Wn.2d 100, 371 P.2d 935 (1962).

[208]Gillis v. King County, 42 Wn.2d 373, 255 P.2d 546 (1953). Even though Sec. 32, Ch. 19, Laws of 1889-1890, as amended by Sec. 1, Ch. 90, Laws of 1909, was repealed by Sec. 70, Ch. 187, Laws of 1937, the five year statutory time limit for opening a county road provided for in said 1889-1890 statute, is applicable to determine the present rights of the parties to a street dedicated in a plat which was filed in 1890. Miller v. King County, 59 Wn.2d 601, 369 P.2d 304 (1962).

[209]Burkhard v. Bowen, 32 Wn.2d 613, 203 P.2d 361 (1949).

[210]Turner v. Davisson, 47 Wn.2d 375, 287 P.2d 726 (1955); and Howell v. King County, 16 Wn.2d 557, 134 P.2d 90 (1943).

[211]Van Sant v City of Seattle, 47 Wn.2d 196, 287 P.2d 130 (1955); Wells v. Miller, 42 Wn. App. 94, 708 P.2d 1223 (1985).

streets by those who had purchased with reference to a plat and in reliance thereon. Title to such vacated streets and alleys continued to be subject to such easements.[212]

The boundaries of land abutting upon public streets and highways may be changed when such streets or highways are lawfully vacated. By virtue of RCW 35.79.030, when cities or towns vacate streets by municipal ordinance, such an ordinance may provide that the city may retain an easement or right to exercise and grant easements in respect to the vacated land for the construction, repair, and maintenance of public utilities and services. A similar power for counties to retain an easement for the construction, repair, and maintenance of public utilities and services which are physically located on the land being vacated is provided in RCW 36.87.140. Under RCW 35.79.040, whenever any street or alley in a city or town is vacated by action of the legislative body of the city or town, the property so vacated shall belong to the abutting owners, one-half to each,[213] although RCW 35.79.030 allows the city or town to require compensation from abutting property owners before the vacation becomes effective.

As a general rule, the dedication of a street for public use conveys only an easement, with the abutting property owners retaining the fee interest in the property subject to the dedication. When the abutting property is conveyed, it is presumed that the conveyance includes the fee to the center of the street, unless a specific reservation or exception is included.[214] Where a dedicated street has been vacated by operation of law but there is nothing in the records to show the vacation, a conveyance by lot or block carries with it the fee to the center of the street unless the street is expressly excluded; however, where a street is officially vacated and the vacation is a part of the public records, a grantee is presumed to have notice of the fact of vacation, and a conveyance describing the property by lot or block does not carry with it any part of the vacated, abutting street unless specifically included.[215]

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[212]Brown v. Olmstead, supra; and Humphery v. Jenks, 61 Wn.2d 565, 379 P.2d 366 (1963). While a property owner may, by his own conduct, estop himself from claiming the benefits of an easement over adjacent land, there can be no estoppel unless the acts of the owner of the easement manifest an intent to abandon the easement in question, and the owner of the servient tenement relies on such conduct so that continuation of the easement would result in undue hardship.

[213]This states the general rule. If one abutting owner has provided the entire right-of-way by dedication of an easement, that owner would be entitled to the entire parcel upon vacation. London v. City of Seattle, 93 Wn.2d 657, 611 P.2d 781 (1980). See also RCW 35.79.050.

[214]Adams v. Skagit County, 18 Wn. App. 146, 566 P.2d 982 (1977).

[215]Turner v. Davisson, supra. In a conveyance of property abutting a street easement which has been vacated by operation of law, even if the description of property is by metes and bounds, the conveyance of property includes the fee to the center of the street easement unless such portion is expressly excluded or the intent of the parties to exclude such portion clearly appears. Finley v. Jordan, 8 Wn. App. 607, 508 P.2d 970 (1972).

In Pederson v. Peters,[216] the State Court of Appeals quoted with approval the rule stated in 11 C.J.S. Boundaries, Sec. 35 (1938):

> "Even though the description in a conveyance is to the side of a highway and names the quantity of land, the grantee will take to the center, and this is true even if the conveyance has been limited to a specified strict measure within boundary lines described as abutting on the exterior line of a street; but where the required quantity can be obtained by beginning at the side of the highway or street, and such is clearly the intent of the instrument, the grantee will take the quantity contracted for exclusive of the street."

The court then concluded that where property adjacent to a public street easement is conveyed by describing a specific quantity of land, such as "the south 80 feet of tract 12," rather than by referring to a platted lot or block by number, whether or not the quantity of land conveyed is measured exclusive of the street right-of-way, depends upon the intention of the grantor and grantee as reflected in the deed. Substantial evidence was found that the intent of the parties involved was to measure the boundaries of the property in question beginning at a point 15 feet west of the centerline of the street and not from the centerline itself.

In Rainier Avenue Corp. v. City of Seattle,[217] the court concluded that where it was the intent of a dedicator to create a single public park incidentally transversed with access streets, rather than to dedicate the park streets independently of the park, the entire area will be subject to an easement for park purposes, with certain designated areas having an additional easement for street purposes. The vacation of the street easement, then, leaves the underlying fee, which belongs to the dedicators and their successors in interest, subject to the easement for park purposes. The street vacation merely removes that particular burden and leaves the park unencumbered by the street easement, but still in existence as a park.

A city ordinance purporting to vacate a portion of a street was attacked in Hoskins v. Kirkland.[218] The court held that a city is empowered to vacate a public street and extinguish the public easement thereon by the enactment of an ordinance pursuant to Ch. 35.79 RCW so long as the vacation provides a public benefit or is for a public purpose. The fact that there is direct or indirect benefit to some private person does not necessarily exclude public use and benefit.

Generally, the vacation of a street or alley or portion thereof cannot be challenged by a person whose property does not abut on the street, alley, or portion thereof, or whose access is not substantially impaired by the vacation, absent a showing of fraud or collusion or that there is no possible benefit to the public from the vacation. A property owner is not entitled to recover damages for vacation of a street, alley, or

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[216] 6 Wn. App. 908, 914, 469 P.2d 970 (1972).

[217] 80 Wn.2d 362, 494 P.2d 996 (1972).

[218] 7 Wn. App. 957, 503 P.2d 1117 (1972).

portion thereof, unless the owner has sustained an injury different in kind and not merely in degree from that suffered by the public in general. In State v. Wineberg,[219] the court summarized the law as follows:

> (At p. 375) "A review of prior decisions by this court establishes: (1) a property owner must abut directly upon the portion of the roadway being vacated in order to be awarded compensable damages per se; (2) where the closure and the owner's property are separated by an intersecting street, compensation is usually denied; and (3) where the closure occurs within the same block but not directly in front of the property, the owner must show physical impairment of his access different in kind from that of the general public (i.e., if the impairment is merely an added inconvenience that is common to all travelers it cannot form the basis for payment of compensation)."[220]

The Court of Appeals in Hoskins v. Kirkland,[221] held that:

> "In Washington, at least in the absence of overriding public benefit, a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury. If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged."

In Yarrow First Associates v. Town of Clyde Hill,[222] where property, located in one municipality, was landlocked by the construction of a limited access highway and completely surrounded by a second municipality, and where the property owners had obtained a permit from the first municipality to construct a high-rise apartment building, and to prevent this construction the second municipality had adopted a resolution designed to vacate the only access road to the property in question, the court held that the fact that a proposed vacation of a street would deliberately landlock certain valuable property, creates a special damage that will support a challenge to the attempted vacation. The court noted that the public ways for which streets are maintained are for the whole people, with every citizen having an equal right to use them. The court held that municipalities, being vested only with such

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[219]74 Wn.2d 372, 444 P.2d 787 (1968).

[220]See also, Banchero v. City Council of the City of Seattle, 2 Wn. App. 519, 468 P.2d 724 (1970); petition for review denied, 78 Wn.2d 993 (1970), in which the owner of property, separated by a cross-street from a street to be vacated, alleging potential loss to business due to such vacation, sought to prevent the city council from approving the vacation. The court held that the plaintiff was unable to show that he was a nonabutting owner who would suffer special damages because of the vacation, noting that: (1) inconvenience to a property owner, as the result of a street vacation, that is common to all travelers, does not constitute a substantial impairment of access, and (2) loss of business revenue by a nonabutting property owner does not, by itself, give standing to challenge the vacation of a street unless there is some physical injury to property.

[221]7 Wn. App. 957, 960-961, 503 P.2d 1117 (1972).

[222]66 Wn.2d 371, 403 P.2d 49 (1965).

powers over streets as is conferred upon them by the legislature, may not vacate streets when such action would be to the detriment of other citizens or municipalities, since the residents of a particular municipality possess no proprietary right to use its streets in priority to, or exclusion of, the general public.

With respect to the vacation of streets and alleys in unincorporated towns, RCW 58.11.030 declares that upon vacation, title to the street shall vest in the persons owning property bordering on each side of the street in "equal proportions," provided the lots or ground so bordering on the street or alley have been sold by the original owner. This statute further provides, that:

> "If the original owner possesses the title to the lots or grounds bordering the street or alley on one side only, the title shall vest in the owner, if the board [of county commissioners] shall judge it to be just and proper."

The dedication to public use of a street extending to the shore of a lake will be presumed to have been intended to enable the public to have access to the water for all proper public purposes. If a street affords the public access to public waters, it will not be vacated as "useless." RCW 36.87.130 provides that:

> "No county shall vacate a county road or part thereof which abuts on a body of salt or fresh water unless the purpose of the vacation is to enable any public authority to acquire the vacated property for port purposes, boat moorage or launching sites, or for park, viewpoint, recreational, educational or other public purposes, or unless the property is zoned for industrial uses."[223]

Standing to challenge vacation of a street abutting a body of water extends to any member of the public who can show an actual injury that is related to public access to the water.[224] The county may develop waterfront street ends into boat launching ramps and use county road funds, including motor vehicle funds, for that purpose.[225]

With respect to the effect of forces of nature, such as accretion and avulsion upon boundaries, attention is invited to the text above relating to problems pertaining to location of tracts of land in relationship to water.

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[223]See also, RCW 35.79.030 which establishes an identical limitation upon the vacation of city streets. In AGO 1970 No. 26, it was concluded that: (1) Sec. 7, Ch. 185, Laws of 1969, Ex. Sess., (RCW 36.87.130) applies to a county road, a lateral edge of which touches or encroaches upon a body of salt or fresh water, as well as to one whose terminal end touches upon such a body of water (whether navigable or nonnavigable); and (2) a county road abuts on a body of salt or fresh water if it touches or encroaches upon the line of ordinary high tide or high water as marked by the line of vegetation. In view of the holding in Hughes v. Washington, 389 U.S. 290 (1967), and United States v. State of Washington, 294 F.2d 830 (1961), the assumption in AGO 1970 No. 26 that the line of ordinary high tide is marked by the line of vegetation was incorrect. The line of ordinary high tide is the line of mean high tide as determined by Coast and Geodetic Survey criteria.

[224]DeWeese v. Port Townsend, 39 Wn. App. 369, 693 P.2d 726 (1984).

[225]AGO 61-62 No. 182.