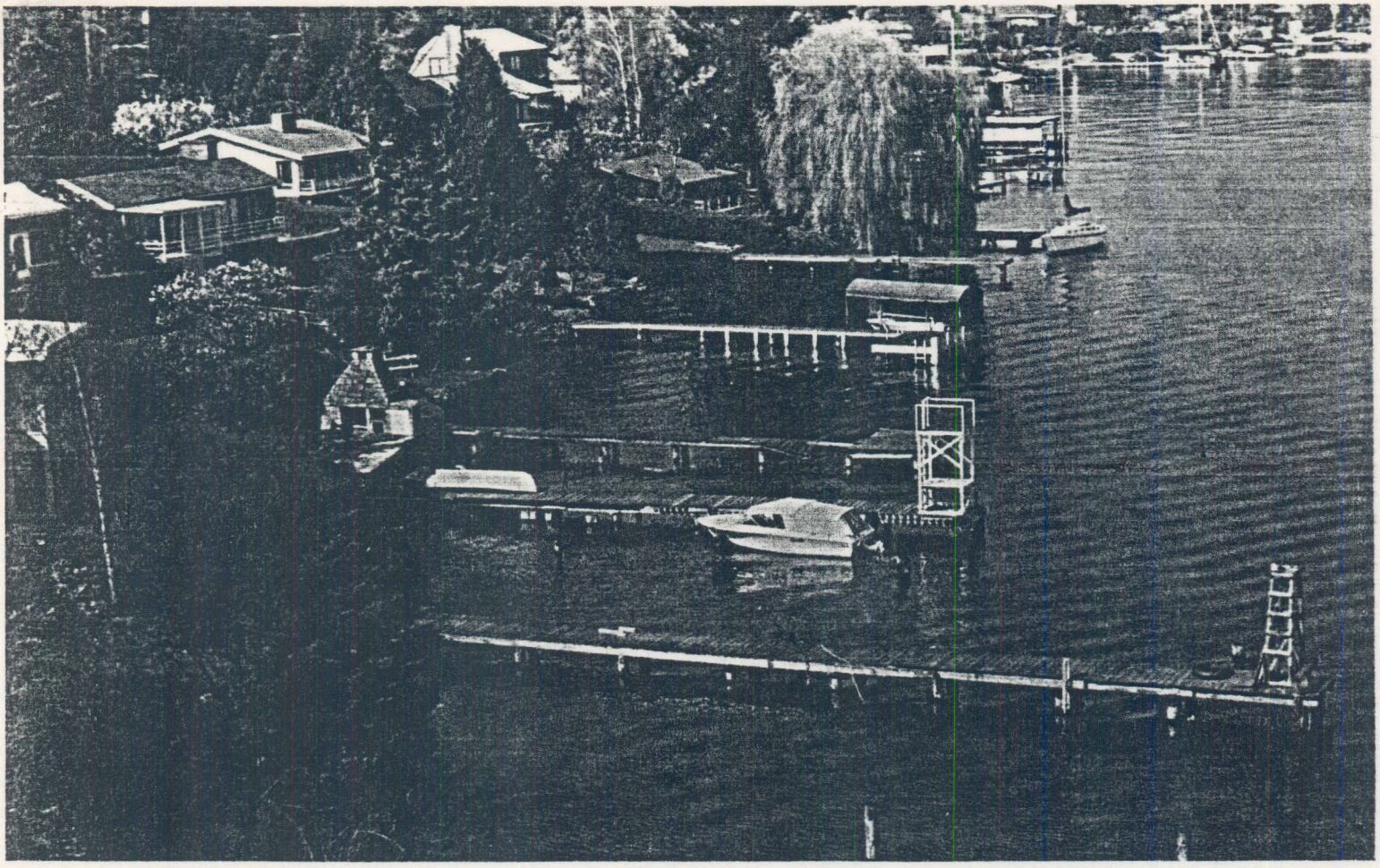

Waterfront Titles In The State of Washington

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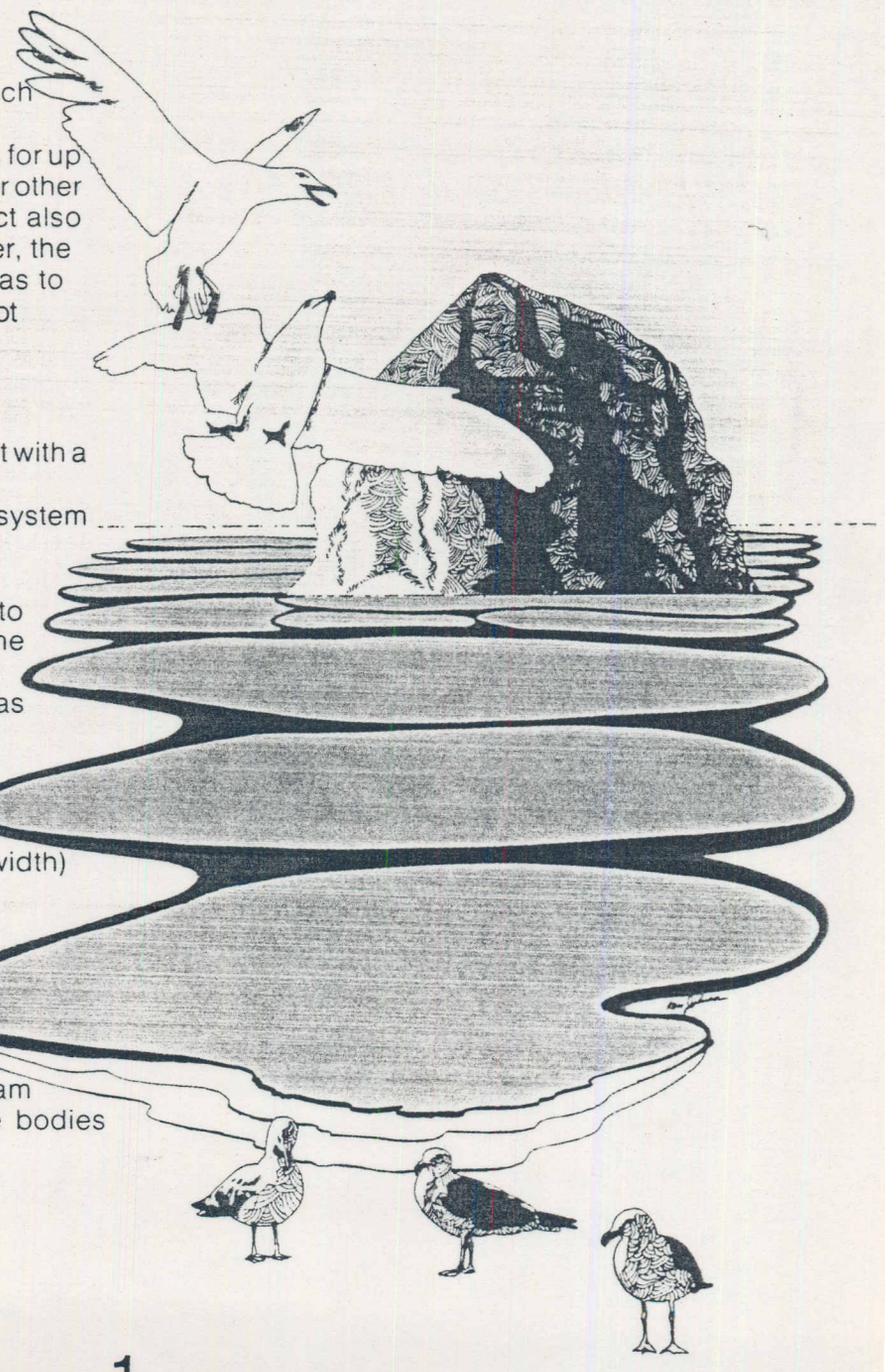
Waterfront Titles in the State of Washington

A brief overview of the principles affecting the ownership of waterfront property.

Those of us living in the Puget Sound area have a tendency to take our waterfront for granted. Actually, we should recognize that it is a most precious, irreplaceable asset. Private ownership of tidelands is limited to those parcels which have been sold by the State of Washington prior to 1971 when the Legislature prohibited all further sales of such property except to public entities. It is still possible for private parties to secure leases for up to 55 years or to acquire title by exchange for other tidelands. (R.C.W. 79.94.150). The 1971 Act also prohibited the sale of shorelands; however, the 1979 legislature removed the prohibition as to the sale of rural shorelands, which "would not be contrary to the public interest." (R.C.W. 79.94,210).

For an understanding of the nature of waterfront titles, it is probably helpful to start with a review of some of the features of the U.S. Rectangular System of Survey. This is the system devised by Congress for subdividing land into the well-known divisions of Section, Township and Range. In addition to mapping the Townships and Sections, the Federal Surveyors were also required to identify important bodies of water. This was done by laying out "meander lines," which were intended to approximate the shore line, for all navigable bodies of water and also for smaller lakes (25 acres or larger) and streams (198 feet or more in width) whether navigable or not. The surveyor then assigned an arbitrary number, called a Government Lot number, to the fractional subdivisions of a section created by the body of water. (Manual of U. S. Surveying Instructions - - U.S. Department of Interior). See Diagram No. 1 of a typical group of Sections where bodies of water have required the creation of Government Lots.



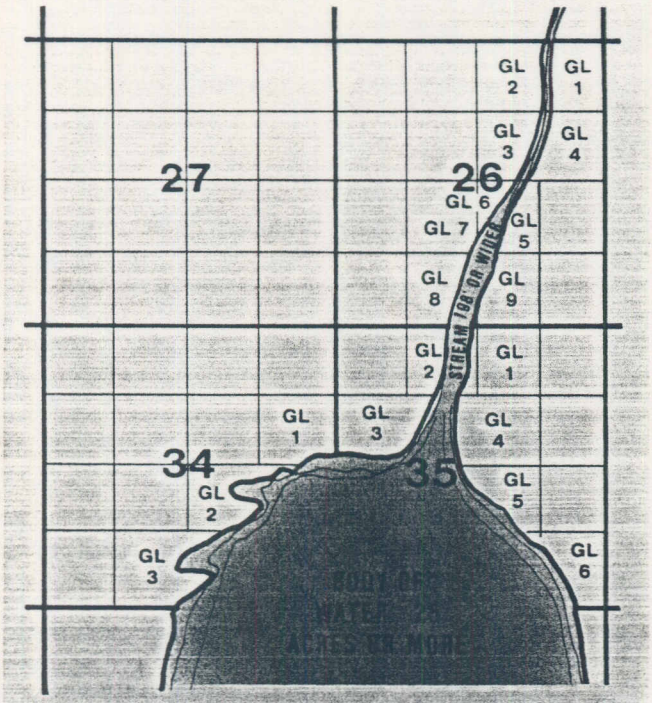


Diagram No. 1

Showing Government Lots in Sections 26, 34 and 35 created by the presence of a large body of water and a wide stream.

The outer boundary of a Government Lot so created will vary according to the date on which it was first patented. Since, prior to statehood, the Federal Government claimed title to both the upland and the beds of navigable bodies of water within the State, it was free to set the outer limits by its own definition. By the definition so adopted, a Government Lot bordering upon a lake, or Puget Sound, patented prior to statehood extended to the water line **or** to the meander line, **whichever was farther.** (Brace and Negert Mill Co. vs. State 49 Wn 2nd 450). Note that this does not apply to ocean front properties nor navigable rivers. (Hughes case 389US298 and Smith Tug & Barge vs. Columbia Pacific 78 Wn 2nd - 975).

In the event that the meander line is located on the upland portion of the Government Lot, it does not become the outer boundary. In fact, our Supreme Court has held that even where a legal description uses a meander line in a metes and bounds type of description and it is located in the upland portion of the Government Lot, it will be construed against the grantor and the description is interpreted to run to the water line, unless there is a very clear intent to the contrary. (Harris vs. Sevart Mortgage Co. 41 Wn 2nd 354, Smith Tug and Barge vs. Columbia Pacific 78 Wn 2nd 975 and Thomas vs. Nelson 35 Wn App. 868).

Government Lots patented **after** statehood run only to the line of ordinary high tide where abutting on tidelands and to the line of ordinary high water where abutting on shorelands. The reason lies in the fact that under the Enabling Act and our State Constitution, the beds and shores of all navigable bodies of water within the State were given to the State in trust for navigation and commerce. It follows that from the date of Washington's admission to the Union (November 11, 1889) the Federal Government no longer had title to those portions of the beds of navigable water within the State which fell below the line of ordinary high water or the line of ordinary high tide and, consequently, Federal patents to Government Lots issued after that date carry title only to the water's edge. (Scurry vs. Jones 4 Wn 468; Cogswell vs. Forest 14 Wn 1; Narrows Realty Co. vs. State 52 Wn 2nd 843). The line of ordinary high tide has been defined in a Federal Case, known as the Hughes case (389 US 298) as being "...the average elevation of all high tides as observed at a location through a complete cycle of tides of 18.6 years." See Diagram No. 2.

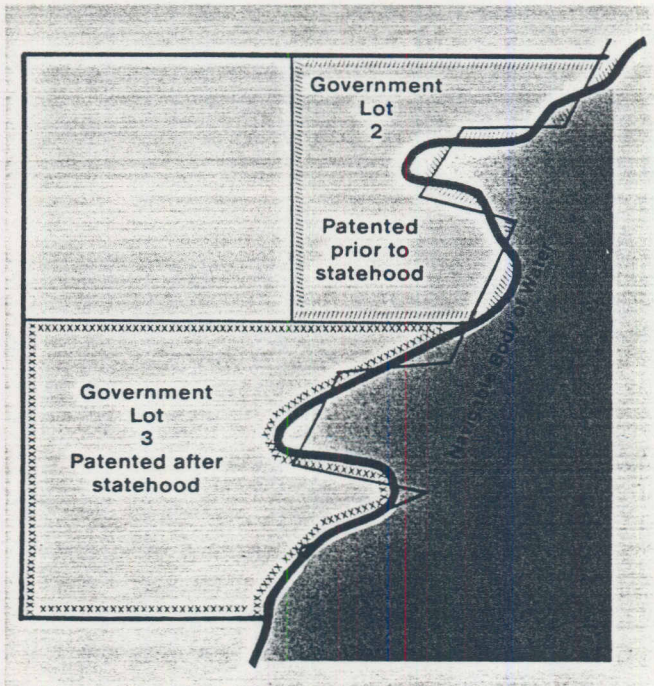


Diagram No. 2

Enlarged detail of Government Lots 2 and 3, Section 34, from Diagram 1 showing differences in the outer limits of Government Lots patented before and those patented after statehood.

All of the above only becomes really significant when the waterfront property does not include the adjoining tidelands or shorelands. As can be observed from Diagram No. 2, it is possible for properties originating from Patents issued prior to statehood to run well out into the water.

The lands abutting Puget Sound and those portions of the rivers feeding into the Sound which are affected by the tides have tidelands. These are classified according to their location and extend out into the water varying distances depending upon their classification and the date on which they were sold by the State.

First & Second Class Tidelands

Tidelands are now classified as either first class or second class. First class tidelands are those located within the limits of an incorporated city or within two miles on either side (R.C.W. 79.90.030). Second Class tidelands are simply all other tidelands than those defined as first class (R.C.W. 79.90.035). See Diagram No. 3.

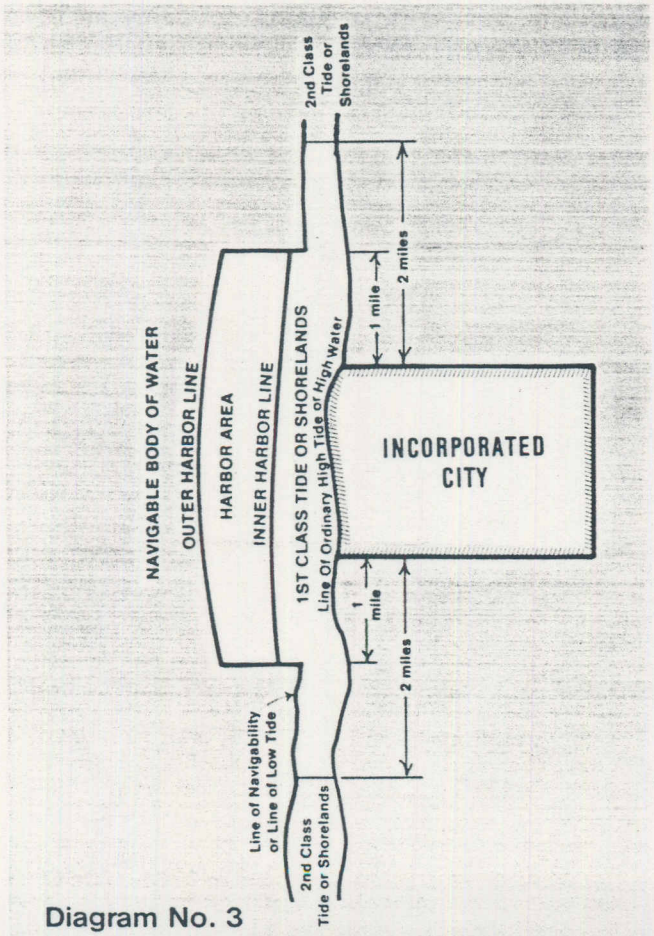


Diagram No. 3

Outer Limits of First Class Tidelands

The State was required to plat all first class tidelands prior to sale and to establish inner and outer harbor lines as far as the first mile beyond the city limits. (R.C.W. 79.94.010 and 79.94.020, and 79.93.010). The inner harbor line becomes the outer limit of the tidelands sold within the city and the first mile beyond. The outer harbor line (usually coincident with the pierhead line) represents the outer limit of private construction. The area between the two lines is known as the harbor area and within a port district they are leased directly from the port district. (R.C.W. 53.32.010 and 020). If on tidelands and within a port district, they are leased from the Department of Natural Resures and subject to an advisory recommendation from the port district (R.C.W. 79.92.040 to 110).
The outer limit of those first class tidelands between the first and second mile beyond the city limits is the same as for second class tidelands as detailed next.

Outer Limits Of Second Class Tidelands

The outer limits of second class tidelands is governed by the language in the statute which was in effect on the date on which the State made the conveyance of the tidelands. Until March 8, 1911 (Laws of 1911, Chapter 36), the legislature defined second class tidelands as extending only to mean low tide. Conveyance of second class tidelands after that date extended all the way out to extreme low tide. Waterfront owners were permitted to apply for purchase of the additional depth for their tidelands and a great many did so.

Shorelands

Shorelands are the submerged lands bordering the shores of navigable lakes and streams, which are not subject to tidal flow. The classification of shorelands is similar to that of tidelands, except that the outer limits of second class shorelands and of first class shorelands between the first and second mile beyond the city limits is the line of navigability. This latter line is usually defined in our courts as being a line along which the water is deep enough for ordinary navigability (R.C.W. 79.90.040 and 79.90.045).

Classification Fixed At Time Of First Sale

Incidentally, the Department of Natural Resources takes the position that tidelands and shorelands are classified as of the date of their sale by the State. Consequently, a deed of second class tidelands located just outside the city limits would retain that classification even if the city later annexed the property. Such an event, in some cases, resulted in the extension of inner harbor lines in front of such a parcel creating new first class tidelands.

Nature Of Title To Tide Or Shorelands

Those waterfront owners whose titles include the shorelands or tidelands adjoining, own such land in fee simple, subject only to the limitations in the nature of the trust under which the State acquired title and to the reservations appearing in the deeds from the State. Prior to 1907, the State made no reservations in its deeds. Beginning June 11, 1907, the deeds began reserving oil, gas, coal and minerals. After June 7, 1911, the State deeds also were required to reserve rights-of-way for private railroads, skid roads, flumes, canals, water courses and other easements. Ownership of shorelands abutting the waterfront upland property became extremely important when the level of Lake Washington dropped about 10 feet when the Government Locks, the Ship Canal and the Montlake cut were completed.

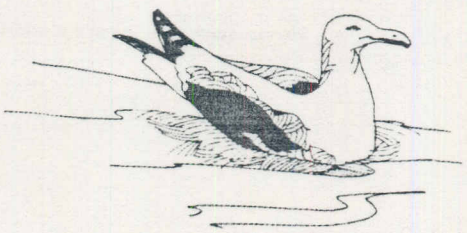
Relicted Lands

In numerous cases, the waterfront owner whose title included the abutting shorelands prior to the lowering of the Lake, was held to be a true riparian owner and, as such, was automatically entitled to the ownership of the relicted lands (see Glossary of Terms) and to the new shorelands (State vs. Sturtevant 76 Wn 158). On the other land, if the upland owner did not also own the abutting shorelands, that owner was limited to the original line of high water, as it existed prior to the lowering of the lake and the relicted lands were held to be owned by the State of Washington.

Similar issues arose when the Duwamish River was re-channeled into the Duwamish Waterway (Commercial Waterway No. 1). Many property owners who had access to the river prior to the construction of the new channel were left stranded with no access to navigable waters. Those owners whose titles did not include the abutting tidelands or shorelands were not compensated for this loss. (Newell vs. Loeb 77 Wn 182).

Oyster Lands

By contrast with the fee title acquired by State deeds for tidelands or shorelands, one who acquired an oyster land deed under any of the Acts regulating the sale of such lands (Bush Act, Callow Act, Laws of March 18, 1919, and Laws of March 21, 1927), acquired only a qualified fee and title is subject to reversion to the State in the event that the lands cease to be used for the cultivation of oysters or other shellfish. It is now possible only to lease oysterlands for the cultivation of oysters or other shellfish. The leases are for a mamximum of 10 years, the lands must lie below exteme low tide, cannot exceed forty acres per lease, if used for cultivation of oysters (R.C.W. 79.96.010). Larger parcels are available for clams or other aquaculture. Even first and second class tidelands can be leased for oyster growing (R.C.W. 79.96.090).



Navigability

There is a great deal of misunderstanding as to the definition of the word "navigable" and the term warrants further discussion. Title companies generally take the position that the question of navigability of a particular body of water is one that can only be settled by a decision from our State Supreme Court (U.S. vs. Holt, 270 US 49).

Our court has quite uniformly held that for a particular body of water to be navigable, it must be capable of being used practically for the carriage of commerce. The most common misconceptions include:

1. If a body of water is meandered, it must be navigable. NOT SO! The presence of meander lines means only that the particular body of water is a lake of more than 25 acres or a

stream over 198 feet in width and the meander lines were laid out solely to comply with the requirements of the U.S. Rectangular Survey Act.

2. If a stream will float logs, it is navigable. NOT SO! While it is true that there is a statute which provides that a stream which will float logs is navigable for that purpose, it does not imply that the stream is capable of commercial navigation and the bed of such a stream does not belong to the State of Washington. (Proctor vs. Sim 134 Wn 606)

3. If the State of Washington has issued deeds for shorelands on a particular lake, that lake must be navigable. NOT SO! The Department of Natural Resources has long taken the position that until a Supreme Court determination has been made on a particular body of water, they will assume that it is navigable and, for many years has issued deeds for shorelands on small lakes and rivers.

Lateral Lines

Another area where misconceptions abound is in the question of how property lines extend out into the tidelands or shorelands. These are termed the "lateral lines."

There are no statutes defining the direction of these lateral lines through second class tidelands or shorelands, nor through the last mile of first class tidelands or shorelands.

Neither is there any helpful language in the original deeds of these lands from the State of Washington. The deeds simply convey all tidelands or shorelands "... of the second class lying and abutting Government Lot _____, Section _____, Township _____ North, Range _____ East, W.M."

So, in order to find what rules to apply, we have to turn to decisions by our Supreme Court for interpretation of the word "abutting." The basic rule, where the beach is a relatively straight line, is that the lateral lines are erected at right angles to the line of ordinary high tide in the case of tidelands or to the line of ordinary high water in the case of shorelands. See Diagram No. 4. Note particularly that a waterfront owner is not allowed to project the upland boundaries out into the tidelands or shorelands. To do so would either deprive a neighbor or oneself of tidelands or shorelands to which one would be entitled under our Supreme Court Decisions. (Spath vs. Larsen 20 Wn 2nd 500: Kalin vs. Lester 27 Wn 2nd 785).

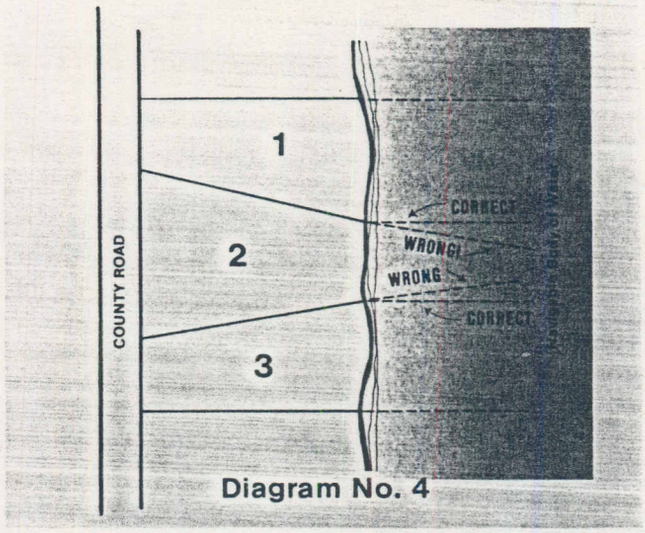


Diagram No. 4

Our Supreme Court applies a different rule where the properties are located on a cove. In such a situation, the right angle rule does not usually provide an equitable division of the tidelands or shorelands to the abutting waterfront owners. In Seattle Factory Sites vs. Saulsberry, 131 Wn 95, our Supreme Court set out a method for projecting the lateral lines on a cove which makes a much fairer distribution of the tidelands or shorelands. The technique involves connecting the property line at the shore line to proportionate lengths of frontage at the line of navigability or line of extreme low tide. See Diagram No. 5.

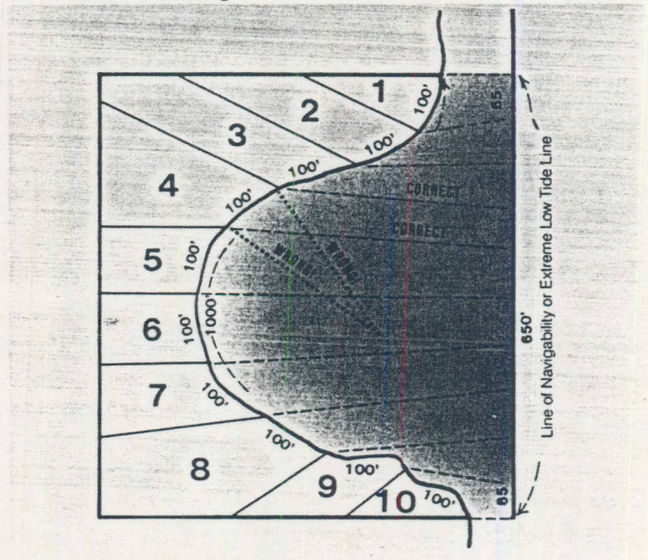


Diagram No. 5

As can be seen on the diagram, the right angle rule would not even give many of the cover property owners access to the line of navigability. (See the effect of applying that rule to the lateral lines of Lot 4.)

A title company cannot advise an owner of waterfront property located on a cove as to the location of the lateral lines unless there has been a court decree establishing the location of such lines or an agreement has been entered into by the adjoining owners establishing their mutual, lateral boundaries.

Of course, an owner of a waterfront parcel which includes the abutting tide or shorelands and which is large enough to be divided into smaller parcels is free to convey portions of his property setting out specific directions of the interior lateral lines. In diagram 6 below, a developer has laid out such a waterfront plat, in which the direction of the lateral lines of the interior lots have been fixed without applying the usual rules from our court decisions.

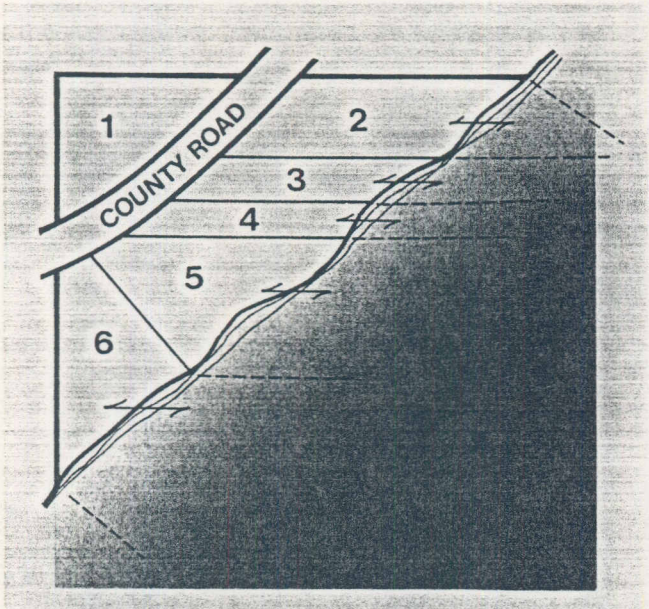


Diagram No. 6

Non-Navigable Bodies Of Water

So far, we have discussed only the boundaries in the beds of navigable bodies of water. Let's now turn to the beds of non-navigable bodies. Such beds are owned by the adjoining property owners and the State of Washington has no interest therein. Where all of the land surrounding a small, non-navigable lake is owned by one person, that person also owns the bed of the lake. The rules for lateral lines are not quite as clearly drawn by court decisions as they have been for tidelands and shorelands, but property owners on non-navigable lakes have generally divided the bed of round lakes by making pie-shaped connections to the center of the lake. See Diagram 7.

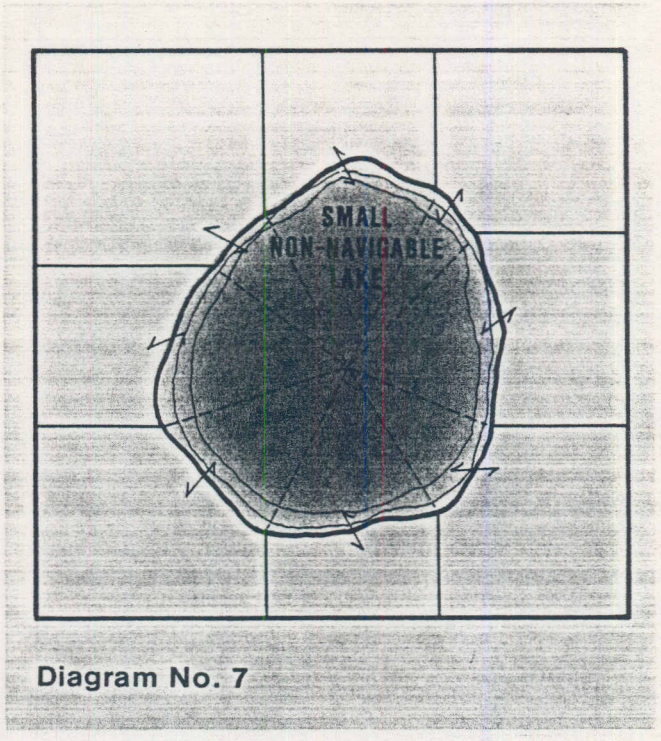


Diagram No. 7

Each owner, then, has fee title to the pie-shaped parcel of the bed adjoing his upland but also, as a riparian owner, has been held to have the right, along with all other owners fronting on the lake, to the reasonable use of the surface of the lake.

Bitterlake Case

In Bach vs. Sarich (74 Wn 2nd 575), a developer attempted to erect an apartment building over the bed of Bitter Lake. Even though there was no question as to the developer's title to this portion, the court required that the building be removed because of its inteference with the rights of the other riparian owners on Bitter Lake to make reasonable use of the surface of the lake.

Lake Chelan Case

A similar case arose in Lake Chelan (Wilbour vs. Gallagher 77 Wn 2nd 307) wherein the court ordered removal of landfill from the bed of Lake Chelan because it interfered with the rights of the general public to use the surface of the lake.

Obviously, in light of these decisions, you can expect title companies to be extremely reluctant to insure titles which involve improvements located over water, whether navigable or non-navigable, and particularly if they are new construction.

Hylebos Case

It is true that the Shoreline Management Act enacted in 1971 was subsequent to both of the above cases and we may now see the courts confirming the validity of waterfront projects which have been authorized under its provisions (R.C.W. 90.58). In fact, there has already been one such decision confirming a landowner's right to fill in and construct on tidelands. (Harris vs. Hylebos Industries, Inc. 81 Wn 2nd 770). The decision was apparently influenced by the fact that the tidelands involved were first class tidelands and the Legislature intended such lands to be "reclaimed, filled and developed . . ."

On non-navigable lakes that are not round, abutting waterfront owners have generally developed common sense allocations of the beds using center lines along the long lengths of the lake. See Diagram No. 8.

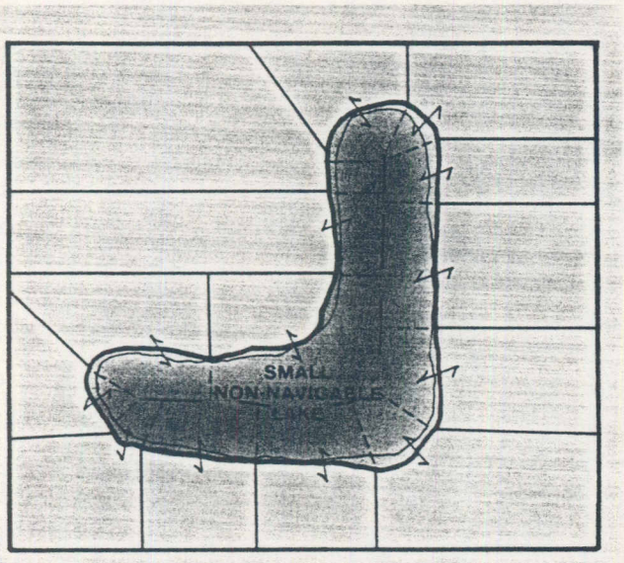


Diagram No. 8

Non-Navigable Streams

On non-navigable streams which form a boundary between two ownerships, the true boundary line between the two (unless the descriptions clearly recite otherwise), is the the thread of that stream. The thread is further defined as being the fastest moving part of the main channel of the stream. A recent case has held that even where limiting terms such as "to the east bank of X Creek . . ." are present, the description will be construed against the seller and presumed to run to thread of the stream. (Knutsen vs. Reichel 10 Wn App 293 and Bernhard vs. Reischman 33 Wn App 569).

Accretion

Where property is bounded by a river or stream, whether navigable or unnavigable, you will note that a title company does not insure that such a boundary will not shift its location or that it has not, in fact, already shifted from some prior location. This is because of a long line of cases holding that if a stream is the boundary between two parcels and shifts by accretion (See Glossary of Terms), the boundary between the two parcels shifts with the stream (Harper vs. Holston 119 Wn 436 and Smith Tug and Barge vs. Columbia Pacific 78 Wn 2nd 975 and Ghione vs. Washington 26 Wn 2nd 635). See Diagram No. 9.

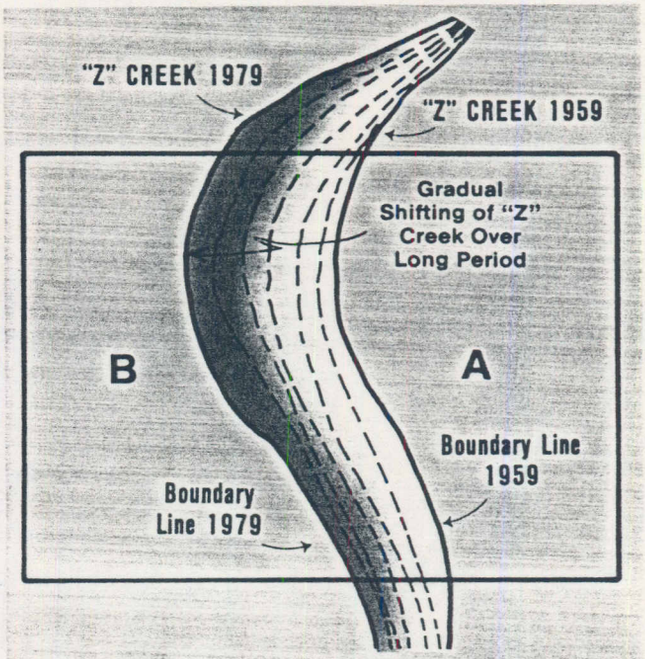
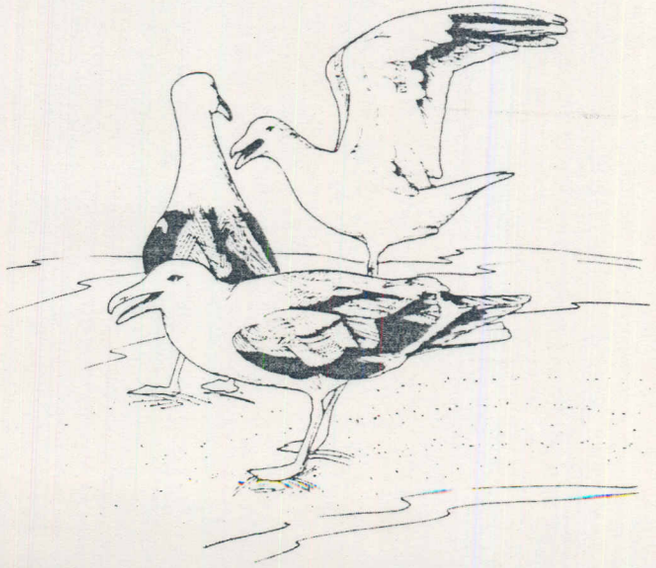
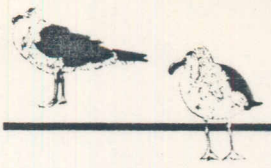


Diagram No. 9





Avulsion

On the other hand, in the same situation, if the stream shifts by avulsion (See Glossary of Terms), the property lines do not shift. Each owner continues to own to the original location of their property boundaries (Parker vs. Farrell 77 Wn 2nd 553 and Hill vs. Newell 86 Wn 277 and Commercial Waterway vs. Washington 50 Wn 2nd 335). See Diagram No. 10.

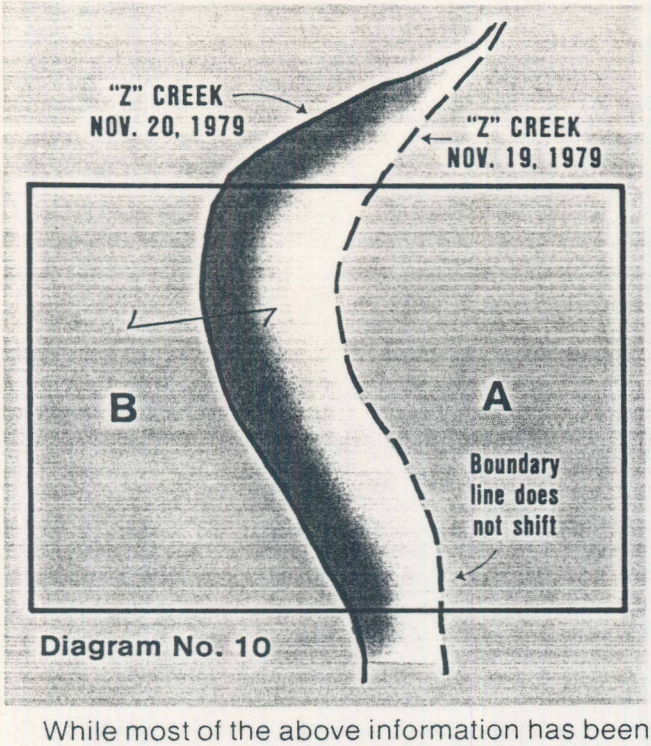


Diagram No. 10

While most of the above information has been limited primarily to questions involving the location of boundaries it is hoped that this brief outline proves to be of assistance for those interested in waterfront titles.

Glossary of Terms

ACCRETION - the building up of land, as by the deposit of silt and sediment

ALLUVION - That which is deposited, i.e., silt

AVULSION - the establishment of a new channel by a stream or river in a sudden action, as where a stream jumps its bank during an overnight spring storm

EROSION - gradual wearing away by action of water

MEANDER LINE - an arbitrary line, approximating the shoreline, laid out by Federal Surveyors primarily to permit computation of the area contained within a Government Lot

LITTORAL - belonging or pertaining to the shores of a large lake or sea

NAVIGABLE - capable of being used practicably for the carriage of commerce, Proctor vs. Sim, 134 Wn 606; Watkins vs. Dorris, 24 Wn 636; Purdy vs. State, 199 Wn 638; Kemp vs. Putnam, 47 Wn 2nd 530 (See text, page 7)

PATENT - the original conveyance of Federally-owned lands.

RELICTION - the uncovering of lands formerly covered by water, as by the lowering of the water level in a lake

RIPARIAN - the rights which belong or pertain to the owner of lands abutting a stream, river or lake, or an owner of such rights (generally now used universally to include littoral right)

SHORELANDS - lands adjacent to the shore of a navigable body of water, covered by water, not subject to tidal action (See text, pages 5 & 6)

TIDELANDS - the land over which the tide ebbs and flows (See text, page 6)

UPLANDS - the dry land adjoining a body of water