

IBA Draft of presentation to IC Commissioners in January after meeting between Jane Seymour, counsel for IBA, and IC Prosecutors

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Greeting

Good Morning, Commissioners. Thank you for agreeing to meet with me today.

Introduction

My name is Jane Seymour, Counsel for Island Beach Access (IBA), a party intervener in the lawsuit Island County (IC) v Montgomery. I have represented IBA pro bono since December of 2014. This lawsuit concerns the ownership of Wonn Road and tidelands, a dedicated county road leading to navigable waters of Puget Sound.

Importance of Public Beach Access

Public beach access is one of Island County's most precious economic resources for tourists and residents alike. Simply put, public beaches bring visitors to Island County who spend money. Due to the extreme limit on the amount of public beach access and the numerous cases of unlawful private encroachment onto public beach access, IBA's mission is timely and critical.

IBA Introduction and Role in the Lawsuit

IBA is a Washington nonprofit community service organization whose mission is to identify, map, sign, and preserve access to the public shorelines of Island County for everyone. The Court allowed IBA to intervene in the lawsuit because IBA represents members of the public, each of whom have suffered unique injury and loss as a result of the Montgomerys' interference with the public's legally protected right to reach navigable water at Wonn Road.

IBA is not interested in turning private property to public use, but strongly defends the public's right of access to public property which is being threatened by the defendants. Our interests align with IC in this respect.

IBA's two primary purposes in joining the lawsuit are:

First, to support IC in IC's claims to title in Wonn Road, including its tidelands and,

Second, to support IC in honoring its responsibility to the public to protect and preserve public access to navigable waters in accordance with Washington law.

Wonn Road at Greenbank is a critically important public access point to navigable waters on the east side of Whidbey Island. Wonn Road provides one of only two public accesses between Coupeville and Freeland. It is at the end of a public road just across from the historic Greenbank Farm, one of Whidbey's prime tourist attractions. The other access, Hidden Beach, is well north of Wonn Road and not nearly as accessible.

IBA serves the interests of more than 1,000 citizens who have signed petitions, 73 who have filled out questionnaires, and 17 who have stuck their necks out to file formal Declarations in superior court stating their unique interests and long-term use of Wonn Road as a public beach access.

Their writings document unique, specific harm they have suffered as a result of the Montgomerys' interference with public use of Wonn Road including personal confrontations, posting misleading signs, and construction of an imposing rock wall and chain across the entire right of way of Wonn Road.

These citizens comprise an important taxpaying and voting constituency in Island County. They are angry at the Montgomerys for closing off one of their favorite beach access sites, and upset with the County for tolerating this illegal action. Needless to say, they are very concerned about the outcome of this case.

I am appearing before you today because IBA is concerned that in the process of settling with the Montgomerys, IC would be giving away some of the public's legal access rights to this beach. Such a divestment of rights would be inconsistent with Washington law as stated in RCW 36.87.130 of 1969 and in the Shoreline Management Act of 1971, even if the road were not technically "vacated." As you are probably aware, RCW 36.87.130 prohibits vacation of a county road that leads to navigable waters.

It is troublesome to IBA that IC is engaging in settlement discussions without including IBA. As a party to this lawsuit, IBA is on the same side as Island

County, and we should be working together.

IBA LEGAL TEAM

To support IC in this matter, IBA has formed a legal team of volunteers named IBA LEGAL consisting of a lawyer, an engineer, an environmental specialist, a paralegal, a data analyst and a pharmacist. From the beginning of the lawsuit, this group has gone all out to support Island County, meeting at least twice a month for over a year and doing research and writing in between meetings.

Through its pro bono attorney, IBA LEGAL has given the IC prosecutors many useful evidentiary documents IC did not have. IBA LEGAL has constructed a time-line and assembled a collection of all recorded documents in the chain of title of Wonn Road and its tidelands, beginning prior to statehood (November 11, 1889) through the present-day.

IBA LEGAL has dug into Washington Archives in state offices from Bellingham to Olympia to turn up technical documents pertaining to waterfront titles and plat interpretation. IBA LEGAL has conducted on-line legal research to locate reported court decisions to support IC's claims and to locate any adverse court decisions. We found none.

IBA LEGAL has found a long, consistent, unbroken record of court decisions that constitute controlling law in this case. None of it supports the Montgomerys' claims. All of it supports IC ownership of Wonn Road and its tidelands.

Members of IBA LEGAL have attended every court hearing and read all of the IC and the Montgomerys' pleadings to cross-check facts and locate inconsistencies in the Montgomerys' arguments. **The judge heard some of these misrepresentations and commented on them in open court.** We found many more in various filings by Montgomerys attorney.

Through this education, IBA LEGAL team has become steeped in the Washington law as it applies to Wonn Road. Next, I want to orient you to the basic principles that apply to this matter.

WATERFRONT BOUNDARIES

Legal Basics

Waterfront boundaries comprise a large specialized, well-settled body of law in Washington. I will explain how waterfront boundaries have been created and interpreted in Washington since statehood.

1. There are five legal terms one must know to interpret waterfront boundaries:

TIDELANDS RCW 79.105.060 (18)¹

UPLANDS WAC 332-30-106 (76)²

**periodically covered by tidal water
everything else**

MEANDER LINE WAC 332-30-

106 (37)³

the dividing line

MEAN HIGH TIDE LINE RCW 79.105.060⁴

established every 18.5 years

EXTREME LOW TIDE LINE WAC 332-30-106 (18)⁵ **federal estimate**

2. Waterfront property consists of only two kinds of land: TIDELANDS & UPLANDS.

3. Waterfront boundaries are defined by law.

1.1 The seaward boundary of uplands is the MEAN HIGH TIDE (MHT).

1.2 The upper boundary of tidelands is the MEAN HIGH TIDE (MHT).

1.3 The lower boundary of tidelands is the EXTREME LOW TIDE (ELT).

1 RCW 79.105.060 (18) "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.

2 "Uplands" is defined in the definition of "Waterfront" in WAC 332-30-106 (76): "Waterfront" means a parcel of property with upland characteristics which includes within its boundary, a physical interface with the existing shoreline of a body of water.

3 WAC 332-30-106 (37) "Meander line" means fixed determinable lines run by the federal government 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.

4 RCW 79.105.060 and United States v. Milner (9th Cir. Oct. 9, 2009) (Under federal law, the upper boundary of any tidelands is the mean high water (MHW) line, which is determined by projecting onto the shore the average of all high tides over a period of 18.6 years).

5 RCW 90.58.030 (2)(a) "Extreme low tide" means the lowest line on the land reached by a receding tide; WAC 332-30-106 (18) "Extreme low tide" means the line as estimated by the federal government below which it might reasonably be expected that the tide would not ebb. In Puget Sound area generally, this point is estimated by the federal government to be a point in elevation 4.50 feet below the datum plane of mean lower low water, (0.0).

4. Washington surveyors usually depict the presence of large bodies of navigable water using a MEANDER LINE⁶.
 - 1.4 A Meander Line is a series of arbitrary line segments roughly parallel to the contours of the shore.
 - 1.5 Each line segment consists of a ***direction call*** and a ***distance call***.
 - 1.6 A Meander Line can run close to or some distance from MHT.
 - 1.7 A Meander Line is almost never a boundary line.
5. Whenever a tract of upland waterfront property is described using *direction calls* and *distance calls* (as in the “Description” of the Plat of Greenbank Beach) by law, the outer boundary line of each such tract is the MEAN HIGH TIDE line.

Legal Basics Applied to Wonn Road

EXHIBITS: I have given each of you three maps:

- Plat Map of Greenbank Beach
with a Transcription of the DESCRIPTION and DEDICATION
- Wonn Road Area Map
- Current Assessor’s Map (since 2008)

Plat Map of Greenbank Beach

The Plat Map of Greenbank Beach was drawn in 1944 by a surveyor who signed his name on the Plat as L.A. Wanamaker You can see his signature in the lower left corner of the Map. Wanamaker drew many similar waterfront plats in Island County between 1920 and 1943.

The Plat Map of Greenbank Beach was signed by the Island County Commissioners in the lower right corner just above the County Engineer’s signature.

You may be able to read the DESCRIPTION and the DEDICATION right from the

⁶Meander lines were created as a convenience for measuring areas of land bordering on large bodies of water for sale and taxation. Natural bodies of water have irregular borders, and in the case of tidal waters, constantly shifting borders. Without universally accepted conventions, it would be extremely difficult to appraise or legally describe such land.

Plat Map. If not, you may refer to the Transcription.

The DESCRIPTION is given in terms of *direction calls* and *distance calls*.

The first such call is: THENCE S 41 41 ' W 1201.1 FEET, which you can locate on the Plat Map just above the word "DRIVE."

According to the description of the property in the Plat, the area of the plat lies

- between BEACH ROAD (now North Bluff Road) and the extreme lower tide line (by the inclusion of the words, "ALSO ALL TIDELANDS OF THE SECOND CLASS LYING IN FRONT OF THE ABOVE [SIC] DESCRIBED PROPERTY.", and
- between Tract "A" at the North end of the Plat and Lot 29 at the South end.

Wonn Road Area Map

On the Wonn Road Area Map, you can see each of the basic areas and lines labeled.

Note that with regard to each tract, none of the upland areas east of the MEANDER LINE are shown on the Plat. Nor are the tidelands shown on the Plat.

However, *implicitly* the plat owner promises to convey each tract with the associated tidelands unless he/she explicitly states otherwise. If the owner dies before all 29 lots are conveyed, it is the job of his Personal Representative to finish the job in probate court.

Montgomery's Claims

The Montgomerys make two fundamental claims in this lawsuit:

- 1 First, the Montgomerys claim title to the **Wonn Road tidelands**, in addition to the tidelands they rightfully own adjacent to each of their Lots 16 and 17.
- 2 Second, the Montgomerys claim title to part of the **Wonn Road uplands** as shown by the Assessor's map.

In both claims, Montgomerys are wrong under controlling Washington law. Both statutory law and an overwhelming body of case law support Island County's claim to the uplands from North Bluff Road to the MHT. Montgomerys' claims to the tidelands rest on invalid recorded deeds.

I will discuss each claim separately.

1 Montgomerys' claim to the TIDELANDS in front of Wonn Road *Montgomery's deed to the Wonn Road Tidelands is invalid because it is defective. The defect is that the chain of title traces back to a deed in which the grantors did not own the tidelands either before or after they signed and recorded the deed and therefore could not convey the tidelands to the grantee.*

Montgomery's claim to the tidelands in front of Wonn Road is based on the 2006 deed by which they acquired title to Lot 17C in the Plat of Greenbank Beach. The legal description of the property conveyed includes three areas:

- Distances and angles necessary to describe the uplands of Lot 17C to the meander line.
- The words, "Also the tidelands of the second class in front of and adjacent thereto as conveyed to Lot 17 per Plat of Greenbank Beach
- The words, "Also the tidelands of the second class lying in front of and adjacent to Greenbank Road..."

Montgomery's deed to the Wonn Road Tidelands is invalid under controlling Washington law because it is defective. The deed traces back to a prior invalid deed. The prior deed was invalid because the grantors of the prior deed did not own the property being conveyed. Here are the details:

2James Pratt, a widower, died in 1967 leaving numerous specific bequests, including a monetary bequest to Mr. Paul and Mrs. Alice Due and the residue of the Estate to them also.

3All of the specific bequests were for specific amounts of money.

4The residue of an estate is everything not disbursed by the PR after the distribution of specific bequests and payment of the expenses of the Estate.

5Pratt's Estate was probated by the personal representative (PR) appointed by the Court, Howard Patrick (later ICSC Judge) for EVERETT TRUST & SAVINGS BANK.

6Because they were beneficiaries named in Pratt's Will, Paul and Alice Due were given Notice of the Probate and an opportunity to participate in the probate proceedings if they objected to anything.

7The PR filed an Estate Inventory of the Estate with the Court as required by law.

8The Estate Inventory included just three tracts of land, Lots 20, 22 and 25. Everything else was money and securities.

9The Estate Inventory did not list the tidelands at the end of Wonn Road among the other real estate holdings.

10During the period of the probate, the PR executed three deeds distributing each of the three tracts of land listed in the Inventory, all within the Plat of Greenbank Beach.

11Lot 25 was distributed to Paul and Alice Due, presumably in partial fulfillment of their monetary bequest.

12Paul and Alice Due did not receive a deed to the Wonn Road Tidelands from the probate.

13Paul and Alice Due did not file any objection to the Estate Inventory, such as by claiming that it should have listed the tidelands at the end of Wonn Road.

14The tidelands at the end of Wonn Road were not conveyed out of the Estate by Personal Representative's Deed, as were all real estate holdings listed in the Inventory.

15On 10/10/69 Pratt's Estate was closed with a Declaration of Completion filed in Island County Superior Court. The Dues did not file an objection to the closing of probate or to the terms of the Declaration of Completion.

16On 09/17/1970 (almost a year after the close of probate) Paul and Alice Due recorded a deed purporting to convey tidelands at the end of Wonn Road to Allen and Constance Frank.

17Paul and Alice Due did not own the Tidelands at the end of Wonn Road at the

time of this conveyance.

18In 1972 Franks signed a deed purporting to convey the tidelands at the end of Wonn Road to Walter Kirkpatrick.

19In 2006, Walter Kirkpatrick signed a deed conveying Lot 17C to Bruce and Joanne Montgomery, together with adjacent tidelands and also purporting to convey the tidelands at the end of Wonn Road to them.

2 Montgomerys' claim to the UPLANDS in front of Wonn Road

2 Montgomerys claim title to part of the **Wonn Road uplands** east of the MEANDER LINE as shown by the Assessor's map. Applicable law does not confirm that Montgomerys own the UPLANDS east of the MEANDER LINE. The Plat of Greenbank Beach is very generic. It is like thousands of other plats in Washington and like hundreds of others drawn by the same surveyor, L.A. Wanamaker, between 1920 and 1946. These common surveys follow a common set of predictable rules and are legally interpreted under a very stable, long-established set of legal principles.

In legal analysis we first look at the facts:

20In 2008, the Island County Assessor's Map showing the end of Wonn Road suddenly changed to show the area east of the meander line was part of Lot 17C of the Plat of Greenbank Beach.

21There is evidence that the Montgomerys "engineered" the change in the Assessor's office in about 2008. Your Prosecutors have the notes of County employees suggesting which County employees were involved in the decision and the map change.

22The area beyond a meander line in Island County is rarely shown on the Assessor's map.

23The Montgomerys have produced no deed to that area as proof of ownership in court or in discovery.

24The only deed Montgomerys have shown to anyone in this matter as proof of ownership of anything is 2006 deed reciting conveyance to them of the Wonn Road Tidelands along with Lot 17C and its tidelands.

25In 2008 Montgomerys installed an IMPOSING ROCK WALL and CHAIN to the corner monument where the MEANDER LINE meets the southerly line of Lot 16 closing off the entire 40 foot right of way of Wonn Road. That monument is called out in all the recorded surveys of the area.

26Montgomerys installed an 18 X 24 inch white metal sign with imposing red letters hanging from the chain. The sign states:



PRIVATE PROPERTY
BEYOND THIS SIGN
(Confirmed by Island County Survey)
NO PUBLIC BEACH ACCESS WITHOUT
OWNERS PERMISSION

[REDACTED]

27Montgomerys have not produced any survey to explain the claim in the sign, either in court or in discovery.

The legal analysis is based on the 5 key definitions I spoke of earlier and legal principles which are well established in Washington.

- Washington law directs that unless the maker of a waterfront plat clearly expresses otherwise, the Plat is interpreted according to these principles.
- Each tract or area in the plat consists of either UPLANDS or TIDELANDS.
- In the Plat of Greenbank Beach, the Pratts described “the land embraced in the annexed plat of Greenbank Beach” as

UPLANDS described in directions and distances using the MEANDER LINE as the eastern side of it
and
“ALSO TIDELANDS ..LYING IN FRONT OF THE ABOVE DESCRIBED PROPERTY.
which tidelands were even farther to the east.

- Notice that the Pratts left completely out any mention of the area east of the MEANDER LINE. There is no word about the area between the MEANDER LINE and the MEAN HIGH TIDE. This is not an error or oversight. The law fills the gap with the rule:

Whenever a tract of upland waterfront property is described using direction calls and distance calls and includes a MEANDER LINE, the outer boundary line of each such tract is the MEAN HIGH TIDE line.

- It is expected that developers of subdivisions in Washington give something to the community in return for the privilege of creating lots much smaller than the usual minimum lot size. Their profits are thus leveraged. In the Plat of Greenbank Beach, Pratts Dedicated to the public the roads including one road that led to the beach. Thus, the law views a plat as a contract.
- In a plat, the developer is presumed to provide for the disposition of all the land within the bounds of the plat. The Plat of GBB had these areas: 29 lots, 2 roads, Tract “A” and the tidelands. Implicitly, Pratts promised to convey all the uplands with tidelands *except Tract “A”*.
- Because only Tract “A” was excepted from receiving tidelands, all other areas were to be conveyed with tidelands which means all the lots and all the roads. Only one of the two roads had tidelands in front of it, which, of course, is Wonn Road.

- But I digress. Here we are analyzing Wonn Road UPLANDS. According to the Plat, WONN ROAD UPLANDS extend from North Bluff Road all the way to the MEAN HIGH TIDE LINE. Montgomerys' wall bisects the Wonn Road UPLANDS about 90 feet west and upland of the MEAN HIGH TIDE LINE.
- The logical conclusion drawn from these facts and controlling law is:
The Montgomery's Wall constitutes a trespass on Island County Property.

HEARINGS

Based on the documented facts and controlling Washington law, IBA has concluded that IC has a very strong case for winning on summary judgment. IC's 2013 Motion for Summary Judgment was well-written and persuasive. Island County was forced to file its motion prematurely as a defense against Montgomery's precipitous, multiple, untimely motions. The judge denied Montgomery's motions to dismiss and all defensive motions. The rulings were procedural (too early) rather than substantive (you are wrong).

Instead, the judge said he chose not to rule because discovery had not even started. There were many issues of fact on both sides of the case that the judge could not rule in favor of anyone

During the hearing, there was one item the judge found helpful, which was Island County's colored Topographic Survey of Wonn Road, which I copied for my exhibit today. The judge commented on Island County's Motion, noting that it included just the uplands, saying, "that's just from the upland to the high tide line. He asked how large a piece it was. Montgomery answered, "40 feet X 80 feet." Judge Rickert said, "it is small but significant."

Although IC's Motion was not granted in 2013, it is now RIPE for re-submission to the Court without a lot of additional work. Most of the discovery, fact checking, and legal research has been done. The evidence and law supporting IC's ownership of the uplands at Wonn Road is so compelling that the matter can be settled without a trial. I believe the judge has shown favor toward that happening.

LAW OF SUMMARY JUDGMENT

To win on Summary Judgment the moving party must demonstrate 2 things:

- 1 There must be no material facts in dispute.
 - 2 The moving party must be entitled to judgment as a matter of law.
-
- 1 There must be no material facts in dispute.

27.1 There are plenty of facts in this case. There are manufactured facts, irrelevant facts, trivial facts, distracting facts, disputed facts and outright misrepresentations of facts. But there are no MATERIAL facts that can be disputed.

27.2 Here is an important MATERIAL FACT that cannot be disputed:

There is no document in the court record, the discovery materials, in the Auditor's files or produced at hearing that shows Montgomery owns any of the uplands of Wonn Road. The plat dedicates all roads to IC. There is no deed or any other type of legal document to the contrary. Under Washington law, the plat serves as a quit claim deed.

- 2 The moving party (Island County) is entitled to judgment as a matter of law.
 - a. Montgomerys deny that there was a valid dedication by which title was conveyed to IC and what are the boundaries of Wonn Road.
 - b. In 1944, Pratts dedicated ownership and use of Wonn Road to the public forever. Island County Commissioners signed the plat, indicating their acceptance of the plat and the dedication of public roads.
 - c. The intent of the plattor, gleaned from the words of the plat, control the interpretation of the plat. There are no other indications in the plat that would indicate a contrary intent.
 - d. The Wonn Road uplands tidelands constituted valuable consideration for approval of the Plat.
 - e. Following the Commissioner's signing, the Island County Auditor recorded the Plat of Greenbank Beach which conveyed title to Island County just as any valid deed conveys title.
 - e. The above is sufficient under Washington law to complete the dedication of a public road including tidelands.

Plat interpretation is a matter of law for the judge to decide, and if presented with a proper motion, the judge will decide the matter on summary judgment.

With a good strong Motion, Legal Memorandum of Authorities, and Declarations of qualified Expert Witnesses testifying as to plat interpretation, Montgomery will not be able to defeat Island County's Motion for Summary Judgment.

CONCLUSION

The Montgomerys have failed to establish legal proof of ownership of either the UPLANDS or the TIDELANDS of Wonn Road. They have not produced factual evidence necessary to prove either claim, nor to overcome presumptions inherent in the law. They have relied on conflating facts with non-facts and specious arguments.

As to the tidelands, they have wilfully ignored the fact that the chain of title in the tidelands is not complete.

Their claim to the tidelands is further weakened by the fact that it would require twisting the law to justify such a contrary plat interpretation.

As to the uplands east of their imposing wall, their case rests upon their misunderstanding or ignorance of waterfront boundary law.

Their case rests upon their ability to convince the judge he should ignore the facts and well-settled law in declaring the Montgomerys owners of these properties.

THIS THEY DO NOT WANT TO RISK. THUS, THEY HAVE PROPOSED THIS SETTLEMENT.

There is no reason for IC to enter into a settlement with Montgomerys without first re-submitting IC's Motion for Summary Judgment on the uplands, and adding a second Motion for Summary Judgment on the tidelands. To do otherwise would be a terrible waste of taxpayer money invested thus far, and a violation of the state mandate to protect public beach access and the County's own mandate under the newly approved Shoreline Management Plan.

Why should Island County Commissioners care about this case?

28To settle a case so heavily weighted by facts and law would be a terrible waste of the taxpayers' money. At the very least the County's Motion for Summary Judgment should be presented again and re-consider settlement after the outcome is known.

29The County is under a legal obligation not to sell, trade, or otherwise give up the public's legal rights in roads leading to the water. RCW 36.87.130.

30To settle would set a terrible precedent in Island County as to enforcement of public rights of way.

31Access to public beaches, especially this one so near the Greenbank Farm, is an important economic resource for Island County.

32In approving the County's Shoreline Management Plan, the Commissioners have committed to maintaining public access to navigable water for recreation purposes.

END

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White Paper for BICC.wpd