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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HOOD CANAL SHELLFISH COMPANY, et al.,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

**RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF
NATURAL RESOURCES' RESPONSE BRIEF**

ROBERT W. FERGUSON
Attorney General

JOSEPH V. PANESKO, WSBA #25289
Senior Counsel
CHRISTA L. THOMPSON, WSBA #15431
Senior Counsel
ERIC A. MENTZER, WSBA #21243
Senior Counsel
PO Box 40100
Olympia, WA 98504-0100
(360) 586-0643

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I. INTRODUCTION

The State of Washington (State) retains ownership of a portion of tidelands in Dewatto Bay, on the east side of Hood Canal in Mason County. The State has managed and advertised those tidelands as a public shellfish beach known as “West Dewatto,” as far back as the 1970s, if not earlier. Many thousands of people have enjoyed this public resource over the years, without interruption or conflict, until 2013 when adjacent tideland and upland owners, members of the Iddings’ family, hired a commercial shellfish company and started posting signs along the public beach saying “Tide Flats, Commercial Beds, Keep Out, Private Property.” The Iddings’ family and a family company eventually sued the Department of Natural Resources (DNR) to quiet title to the adjacent public beach, arguing that their tideland deed included that public beach. DNR answered the lawsuit by asserting State ownership, and out of precaution raised adverse possession as an alternative defense in case the plaintiffs prevailed on their title claim. DNR prevailed on cross-motions for summary judgment as to the deed interpretation and ownership question, and Hood Canal Shellfish Company (HCSC) and Mr. Timmerman, who owns private tidelands on the opposite side of the public beach, filed this interlocutory appeal.

This appeal presents a simple legal question of deed interpretation: When a tideland deed to the Iddings’ predecessor conveyed and described

tidelands as being “in front of” a specified abutting upland parcel, but the upland parcel sits on a cove with a severe bend in the shoreline, how should a surveyor locate the sideline boundaries of the tideland so that the tidelands are “in front of” the specified uplands, but not in front of neighboring uplands? The same question applies to the Timmerman deed.

The trial court below correctly adopted DNR’s survey which “apportioned” or “prorated” the sideline boundaries to protect the rights of all the tideland owners in the cove. Appellants HCSC and Timmerman deny the existence of any public beach at this location, and they assert that HCSC’s tideland deed includes much more land than the legal description actually describes, extending to and wrapping around Timmerman’s tidelands. Their appeals should be denied, the State’s title affirmed, and the matter remanded for DNR to pursue its damages claims against the Iddings’ attempted theft of the beach and their admitted interference with the public’s right to harvest shellfish on the public beach.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court correctly find that the proration principle recognized in *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944), applies to the tidelands in the cove in West Dewatto?

2. Did the trial court properly accept the tideland boundaries in the McEvilly survey because no party offered material factual evidence challenging those boundaries?

3. Did the trial court properly accept the upland boundary in the McEvilly survey between the Iddings' and DNR uplands because no party offered material factual evidence challenging that boundary?

4. Did the trial court correctly reject Mr. Timmerman's res judicata, estoppel, and laches claims tied to a 1966 quiet title litigation that did not involve any boundary dispute?

5. Should this Court strike and not consider certain materials that cannot be authenticated, and strike certain other materials that were never provided to the trial court during the partial summary judgment hearing?

6. Should this Court award attorneys' fees to DNR under RCW 79.02.300 for having to defend its title on this appeal against HCSC's trespass and baseless ownership claims?

III. COUNTERSTATEMENT OF THE CASE

A. The State, as a Sovereign, Took Title to All Tidelands Within the State Upon Statehood.

When Washington became a state in 1889, it took ownership of "the beds and shores of all navigable waters" commonly referred to as state-

owned aquatic lands. Const. art. XVII, § 1; *Davidson v. State*, 116 Wn.2d 13, 16, 802 P.2d 1374 (1991); *Bilger v. State*, 63 Wash. 457, 464-65, 116 P. 19 (1911). This transfer of aquatic land ownership occurred automatically under the equal footing doctrine.¹ Unlike regular property title holders, the State possesses no deeds or other paper title for these sovereign state-owned aquatic lands. The State's ownership of submerged lands is an essential aspect of state sovereignty. *Oregon ex rel. State Land Bd.*, 429 U.S. at 381; *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283; *accord Caminiti v. Boyle*, 107 Wn.2d 662, 666, 732 P.2d 989 (1987).

DNR and its predecessors have been the statutory managers of state-owned tidelands since statehood. *See generally* RCW Title 79. Between 1889 and 1971, the State sold many parcels of tidelands into private ownership under a variety of statutes.² When the State sold second-class

¹ The equal footing doctrine means that "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (quoting *Pollard v. Hagan*, 44 U.S. 212, 228-29, 3 How. 212, 11 L. Ed. 565 (1845)); *see also Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977) (upon their admission to the Union, new states acquired absolute title to and dominion over the shores and beds of navigable waterways within their boundaries); 43 U.S.C. § 1301(a) (Submerged Lands Act).

² *See generally Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 777-778, 505 P.2d 457 (1973) (surveying early laws and discussing the history of tideland and shoreland sales after statehood). In 1971, the Legislature passed what is commonly known as the "Gissberg amendment," which effectively halted the sale of tidelands into private ownership. *See* Laws of 1971, 1st Ex. Sess., ch. 217, § 2, which is now codified at RCW 79.125.200.

tidelands,³ it would create new deeds that would typically describe the conveyed tidelands by reference to the legal description of the abutting upland parcel or the meander line.⁴ CP 404. More specifically, tideland deeds utilizing this method of description would convey those tidelands “situate in front of, adjacent to or abutting,” or “lying in front of” a described portion of uplands. *Id.* Such deeds would not provide specific descriptions of landward, waterward and lateral boundaries of the tidelands. *Id.* DNR’s aquatic land managers work with surveyors to do a “negative accounting” or “subtraction” method, whereby DNR subtracts out the legal descriptions all the tidelands that it previously sold to determine the aquatic lands remaining in State ownership. *Id.*

B. Dewatto Bay Tidelands Were Once Designated as an Oyster Reserve, Impacting Legal Analysis of Subsequent Sales.

In 1891, DNR began to designate certain areas of tidelands as “oyster reserves.” Laws of 1891, ch. 150, § 1.⁵ Oyster reserves were tracts

³ “‘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 79.105.060(18). Prior to 1911, tidelands extended only down to mean low tide. *See* Laws of 1897, ch. 89, § 4.

⁴ “‘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.” WAC 332-30-106(37).

⁵ Historic session laws cited in this brief are compiled chronologically and included in the attached Appendix I.

of second-class tidelands set aside for the purpose of preserving and growing natural oyster beds. *Id.* Dewatto Bay was designated as an Oyster Reserve in 1895. CP 2517. As years passed and the nature of the shellfish industry changed, DNR began vacating oyster reserves that it no longer saw a need to protect. Laws of 1929, ch. 224, § 1. The Dewatto Bay Oyster Reserve was vacated in 1930. CP 2519.

While an oyster reserve was in place, DNR was statutorily prohibited from selling any of the second-class tidelands within it. Laws of 1891, ch. 150, §§ 1-2. If the reserve was vacated, DNR could then sell those second-class tidelands. Laws of 1929, ch. 224, § 1. However, the Legislature specified that vacated oyster reserves should be sold under the statutory procedures governing second-class shorelands. *Id.* Those statutory procedures directed that abutting upland owners had a preference right to purchase shorelands in front of their uplands. *See* Laws of 1927, ch. 255, § 121. This preference right statute prohibited DNR from selling shorelands to anyone other than the abutting upland owner, without notice to the abutting upland owner and the expiration of a waiting period. *Id.*

If the abutting upland owner took no action on the preference right after receiving notice and DNR decided to offer the shorelands for sale after the expiration of the waiting period, the shorelands were to be “sold in the manner provided for the sale of state lands;” which meant they had to be

sold by auction. Laws of 1927, ch. 255, §§ 50, 121. Because the relevant Dewatto Bay tidelands were vacated oyster reserves, these statutory preference right restrictions governed all subsequent DNR sales.

C. Tracking the Tideland Sales History in West Dewatto Bay.

1. Murray tidelands sale, now owned by Timmerman.

The simplified map attached as Appendix A (Map) shows a thin strip of tidelands in the upper right that the State sold to Murray in 1903—the Murray ownership extends off the edge of the Map to the east, and the eastern boundary is not at issue in this case. The 1903 Murray deed conveyed second-class tidelands “situate in front of, adjacent to or abutting upon” a described portion of the government meander line. CP 2496.⁶ Timmerman is currently one of the owners of this tideland parcel.⁷ The Timmerman parcel sits to the east of a finger-like feature on the beach shown on the Map in the contour lines, just underneath the “Mean Low Tide” label, which feature will be referenced as the Oyster Spit.

The 1903 Murray tidelands deed fails to acknowledge that the tidelands were then designated as an oyster reserve, which by statute was prohibited from sale. This potentially fatal defect in the title apparently went

⁶ The 1903 Murray deed is attached as Appendix B to this brief.

⁷ Timmerman is not the sole owner of the Murray parcel. A corporation named BK Lovely, LLC, is also on the deed, but the individuals who own that company chose not to file any pleadings in the litigation. CP 25-26.

unnoticed until a quiet title action was filed between several competing claimants of those tidelands in 1966.⁸ CP 755 (Quiet Title Complaint, *Margett v. Armour*, Mason County Superior Court Cause No. 9217, filed July 23, 1966). The State was named as a defendant and participated in the case, and the State contested the validity of the 1903 Murray sale, arguing it was void. CP 766. The State settled out its interest in the case by accepting a payment of \$1,000.00 and releasing its claimed interest in the parcel, reconfirming the original legal description. CP 770. At no point in any of the 1966 litigation did any party survey the boundaries or make any assertion of where the lateral boundaries should be located on the beach.

2. Reidell tidelands sale, now owned by Iddings and HCSC.

In the 1930s and 40s, Ms. Therese Reidell owned uplands on West Dewatto, which property is shown on the bottom center of the Map as two tax parcels now owned by Iddings family members, located west of the line marked “Base of Hill.” A local school district owned the uplands parcel on the other side of that line, which parcel bears the label for Government Lot 5 as shown in the Map in Appendix A to this brief.

In 1937, Reidell applied to DNR to purchase the tidelands in front of both her and in front of the school district’s uplands, but DNR

⁸ Additional parcels of land not at issue in this case were also in dispute in the 1966 litigation. *See* CP 756-57.

disregarded the application because the lands were then under lease for log booming. CP 2423, 2536. In 1946, Reidell re-applied to purchase, but this time she asked only to purchase the tidelands in front of her uplands. CP 2472. In 1947, DNR sold Reidell the requested tidelands, with the deed describing “[t]hose portions of the tide lands of the second class and vacated State Oyster Reserve No. 2, Plat No. 137, situate in front of, adjacent to or abutting upon that portion of Government Lot 5, Section 28, township 23 north, range 3 west, W.M., described as follows:” with the next paragraph of the language providing a summary description of Reidell’s upland parcel. CP 2502 (emphasis added).⁹ Following the description of the abutting uplands, the deed states, “[t]he above description is intended to convey such tide lands as lie in front of a tract of uplands owned by Therese D. Reidell on November 18, 1946.” *Id.* (emphasis added). The deed does not explicitly describe the landward, waterward, or lateral boundaries of the tidelands being conveyed. *Id.*; CP 2540 (McEvelly Decl. ¶ 8).

3. The State has managed the Oyster Spit as a Public Shellfish Beach for at least sixty-five years.¹⁰

The Oyster Spit visible on the Map lays in between the Murray tidelands and Reidell tidelands. CP 405-06 (Ivey Decl. ¶¶ 9-12); CP 2539

⁹ A copy of the deed is attached as Appendix C to this brief.

¹⁰ Appellants contest most of these facts. Although none of these disputed facts are crucial to the question of the deed interpretation, DNR feels compelled to offer these well documented assertions to counter Appellants’ claims that they always treated the

(McEvilly Decl. at ¶ 3); CP 2554-55 (McEvilly Survey). As the tide goes down, the Oyster Spit begins to appear, and it attaches to the uplands formerly owned by the school district, and the spit does not connect to the uplands owned by Reidell. CP 2554-55, 2559.¹¹ DNR never sold these tidelands in front of the school district's property.¹² DNR and the Department of Fish and Wildlife (WDFW) have both managed the Oyster Spit as a public beach, named West Dewatto or "DNR-44A," since at least the early 1970s.¹³ Every year WDFW conducts surveys documenting the number of recreational shellfish harvesters on public beaches, and WDFW's survey records for West Dewatto go back to 1973. CP 2909, 2914-19. DNR started a campaign of marking public beaches with boundary markers to keep the public from straying onto adjacent private tidelands, and DNR published brochures to the public advertising these marked beaches as early

Oyster Spit as privately owned for decades and never knew the State asserted ownership of West Dewatto prior to 2013. Iddings Brief (HCSC Br.) at 14; Timmerman Br. at 2.

¹¹ The official Clerk's Papers reproduction of the color aerial photograph at CP 2559 is almost entirely black and illegible. We started with the original digital document submitted to the trial court and generated a cleaner grayscale version which is attached as Appendix D to this brief.

¹² The school district applied to purchase these tidelands in 1967, but the application was denied in 1971 because DNR and the school district were in discussions about doing an upland exchange, and the abutting tidelands remaining in state ownership was a factor favoring an upland exchange. CP 2483-88. DNR ultimately did complete an exchange to acquire the uplands in 1982. CP 2490.

¹³ WDFW was formed in 1994 when the former Department of Fisheries and Department of Wildlife were merged. Laws of 1993, ch. 2. Any WDFW activities described herein that had occurred prior to the 1994 merger had been carried out by the former Department of Fisheries.

as 1975. CP 2426-33. A 1975 brochure includes DNR-44A with a crude scale map that shows the Oyster Spit within the State boundaries. CP 2433. DNR and WDFW jointly contracted for a tideland survey in 1992 by Mr. R.H. Winters, which survey showed an even larger portion of the beach to be state-owned than that parcel surveyed by McEvelly. CP 923.¹⁴

Members of the public have used West Dewatto as a recreational shellfish beach for decades, primarily to harvest oysters and clams. CP 398, 408, 410, 2532-34. WDFW harvester survey data shows the beach has averaged over 1,400 visits each year between 1990 through 2014. CP 2910, 2921. A county road, Northeast Dewatto Beach Drive, runs along the edge of the Public Beach. *See* CP 2554-55. Stairs leading from the road down to the beach were placed at that location, reportedly by the Port of Dewatto. CP 614, 618. These stairs allowed the public to more easily get down the riprap at the edge of the road to access the beach, until somebody destroyed them in 2014. CP 2532. WDFW law enforcement has for decades regularly patrolled the Public Beach for compliance with recreational shellfish harvest rules. CP 410. For many years WDFW staff enhanced the shellfish population on the Oyster Spit with additional clam and oyster seed. CP 2639, 2890. The Public Beach has been listed in WDFW's clam harvest

¹⁴ The State did not rely upon the Winters' survey in summary judgment. McEvelly considered the survey, as noted by the fact that he listed it on his own survey as one of the other surveys he referenced. CP 2554, Reference Note #11.

rule since 1995. WAC 220-330-110(124) (clam seasons, current rule, lists West Dewatto); former WAC 220-56-350(dd) (clam seasons, 1995 version, names West Dewatto, DNR beach 44A). Numerous local newspaper articles have mentioned shellfishing opportunity on the beach over the years. *See, e.g.*, CP 2847 (Shelton-Mason County Journal, 2/8/2007); CP 2849 (Belfair Herald section of Shelton-Mason County Journal, 2/15/2007); CP 2851 (Shelton-Mason County Journal, 10/12/1978). The State has also signed annual public beach harvest management plans with the Skokomish Tribe so the Tribe could exercise its treaty shellfishing rights on the beach. CP 2908.

4. Conflict, land surveys, and litigation history.

This conflict started in 2013 when a DNR employee noticed no trespassing signs posted along the front of the public beach. CP 315. DNR learned that Iddings family members had contracted with D.D. Denotta, a commercial shellfish company, to conduct commercial harvests. *Id.* The Iddings refused to acknowledge the State beach, and they formed the Hood Canal Shellfish Company and sued DNR in 2015. DNR counterclaimed for ownership, trespass, and damages, and named as third-party defendants other tideland owners in the immediate vicinity of the cove, knowing that the dispute may implicate neighboring boundaries.

Once this litigation commenced, DNR hired Michael McEvilly, a surveyor, to review the history of state tideland sales and render an independent opinion, shown through a survey, of the boundaries of the private tidelands and the boundaries of any remaining State tidelands. CP 2538. McEvilly consulted with another retired surveyor and aquatic land boundary specialist, Jerry Broadus. CP 378, 2538-39. McEvilly conducted field visits and viewed aerial photographs and determined the shoreline in the area contains “an almost 90 degree bend in the shoreline, shaped roughly like a backward ‘L.’” CP 2539 (McEvilly Decl., referencing the aerial photograph attached as Appendix D to this brief). McEvilly reviewed numerous deeds, photographs, surveys, and other historical documents. CP 2539. He observed that the legal description of the tidelands in the deeds at issue in this appeal use the “in front of” convention and do not include meets and bounds descriptions or any other descriptor of the lateral boundaries. CP 2539-40.¹⁵

Broadus explained how, when a shoreline is significantly curved, interpreting “in front of” to mean extending lateral tideland boundaries straight out (perpendicular) from the shoreline results in overlapping tidelands and conflicts. CP 379. Broadus included an illustration showing

¹⁵ All of the deeds at issue in the bay use some form of this “in front of” description. The Reidell deed is unique in that it uses that convention in the first paragraph and then repeats it again in the third paragraph.

how, because of the severe bend in the corner of shoreline, tidelands “in front of” Reidell’s uplands “would completely overlap and conflict” with tidelands “in front of” the school district’s adjacent uplands if both landowners had purchased their abutting tidelands. CP 379-80. Illustration attached to this brief as Appendix E.

Both Broadus and McEvilly explain that, given the severe bend in the shoreline that forms a cove, well-established surveyor methods called for applying a proration process to angle the sideline boundaries equitably, which process was extensively discussed and approved in *Spath*. CP 380, 2540-43. Using another method to locate the lateral boundaries of the tidelands, such as bisected angles of meander lines or projections perpendicular to meander lines, both of which were common methods prior to *Spath*, would have cut off some tideland owners from extreme low tide or conveyed to them tidelands disproportionate to their frontage. CP 2544-45. These methods were specifically rejected in *Spath* in areas of curved shorelines because they resulted in inequity and were thus rejected by McEvilly in accordance with the standards set forth by the Supreme Court. *Id.* Broadus listed and discussed over one-dozen surveyor treatises, papers, and studies that endorse the proration process on curved shorelines. CP 380-85. McEvilly extensively detailed the mathematical process he applied to angle the sideline boundaries fairly across the various tideland

parcels in the cove. CP 2540-45. The results of that process are reflected in the McEvilly survey that was completed in 2016 and shared with the parties. CP 2554-55, attached to this brief as Appendix F.

As part of locating the lateral boundaries of tidelands in front of an upland parcel, a surveyor also needs to locate the lateral boundaries of that upland parcel. McEvilly's 2016 survey located the upland boundary of the Iddings parcel where it abuts the former school district parcel.

Several of the parties filed cross-motions for partial summary judgment as to the ownership question. They collectively filed over 3,000 pages of materials including many hundreds of attached exhibits. The trial judge allowed a full day of oral argument, and about two months later issued a short order finding that DNR's survey was correct as a matter of law and in accord with *Spath*. After the court issued its summary judgment ruling, Earl James Iddings filed an untimely motion to strike the McEvilly survey, which motion was denied.

IV. STANDARD OF REVIEW

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *DeVeny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007). A "genuine issue"

under CR 56(c) is one on which reasonable persons could differ. *Mele v. Turner*, 106 Wn.2d 73, 83, 720 P.2d 787 (1986). A “material” fact under CR 56(c) is one that will affect the outcome under the governing law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). An appellate court’s review of a summary judgment ruling is de novo. *First Student, Inc. v. Dep’t of Revenue*, 194 Wn.2d 707, 710, 451 P.3d 1094 (2019).

V. ARGUMENT

A. **No Genuine Issues of Material Fact Exist—Determining the Scope of the Tideland Deeds at Issue Involves a Question of Law, and the McEvelly Survey Properly Depicts the Tideland Boundaries.**

No party contests that DNR conveyed tideland deeds to Reidell, Murray, or two other individuals in the cove.¹⁶ Every private party’s ownership claim rests solely upon the legal description in their deeds. The State’s ownership claim relies upon its sovereign ownership of those remaining tidelands not clearly conveyed in prior sales. The principal disagreement between DNR and Appellants involves the legal interpretation of historic State deeds conveying tidelands “in front of” described reference markers, where the curved shoreline forms a cove.

¹⁶ The other tideland sales to Hansen and Robinson as noted on the Map, are not at issue on this appeal. DNR named and served the current successors-in-interest of those private tidelands in this litigation, and they chose not to submit pleadings at the trial level.

The Reidell deed contains three short paragraphs. The first says “[t]hose portions of the tide lands of the second class and vacated State Oyster Reserve No. 2, Plat No. 137, situate in front of, adjacent to or abutting upon that portion of Government Lot 5, Section 28, township 23 north, range 3 west, W.M., described as follows:” Appendix B. The second paragraph provides a summary description of her uplands within a portion of Government Lot 5. The third paragraph contains one sentence, stating “[t]he above description is intended to convey such tide lands as lie in front of a tract of uplands owned by Therese D. Reidell on November 18, 1946.” *Id.* These quoted first and third paragraphs plainly indicate that the deed conveys only those tidelands in front of Reidell’s upland ownership. No language supports any inference that the deed is conveying tidelands in front of anybody else’s tidelands. As observed by McEvelly, the deed language is unambiguous. CP 2626.

1. Ordinary rules of deed interpretation do not apply to State sales of tidelands—such deeds are strictly construed in favor of the State’s sovereign interests.

State aquatic deeds are subject to unique standards of interpretation requiring narrow construction of the deed against the grantee. In *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 P. 349 (1910), DNR had sold second-class tidelands conveying “all tide lands of the second class owned by the state, situate in front of, adjacent to, or abutting upon certain portions

of the government meander line, particularly described in the state deeds.” *Pearl Oyster*, 57 Wash. at 534. At the time of the sale, public land laws defined tidelands as extending from the line of ordinary high tide down to the line of mean low tide, but the purchaser claimed that its ownership extended below the line of mean low tide. *Id.* The court determined that the public land laws controlled the interpretation of the deed, and the Department of Public Lands had little ability to modify the tideland boundaries because “the state deed simply described the tide lands by reference to the meander line, and their limits and boundaries in other respects are fixed by operation of law, and not by any act of the department.” *Id.* at 539. As part of this discussion, the court held that state aquatic deeds occupy a unique category when interpreting their scope:

[E]very grant by a sovereign state is construed most strongly against the grantee. Nothing passes by intendment or implication. And if the law or the state deed fixes no limit to a grant, it becomes the duty of the courts to fix the narrowest limit that will reasonably satisfy the terms of the grant. For these reasons we have no hesitation in saying that the tide-land grant to the respondents and their predecessors in interest did not extend beyond the line of mean low tide.

Id. at 538.

Eighty years later, the Supreme Court again emphasized that “ordinary rules of contract interpretation” do not apply when construing an aquatic land deed. *Davidson v. Washington*, 116 Wn.2d 13, 20, 802 P.2d

1374 (1991). *Davidson* rejected a shoreland owner’s claim that contractual intent was relevant to interpreting the original state deed, and held instead that “[w]here a deed or grant from the State fails to define or limit the boundary of the grant, the boundary will be interpreted most strongly against the grantee rather than the grantor state.” *Davidson*, 116 Wn.2d at 20 (citing *Pearl Oyster*).

The Supreme Court more recently re-emphasized the strength of this restrictive interpretive principle, connecting it to the public trust doctrine and the public’s interest in aquatic lands. *See Chelan Basin Conservancy v. GBI Holdings Co.*, 190 Wn.2d 249, 263, 413 P.3d 549 (2018) (“The general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication.”) (internal quotations omitted). The Appellants’ opening briefs ignore this controlling case law and instead rely solely on a fictionalized intent of Reidell, the deceased purchaser, even though Reidell’s claimed intent is not reflected in the tidelands deed language.

2. The trial court properly held that tidelands “in front of” the relevant upland parcels within the West Dewatto

Cove must be defined with angled sideline boundaries under the proration principle from *Spath v. Larsen*.

Neither the Reidell nor Murray deeds contain any explicit landward, waterward, or lateral boundaries. CP 2540. But the meaning of “in front of” is unambiguous and capable of being surveyed. CP 2626 (McEvelly Decl.). The lateral boundaries of these conveyances are located by proration, in accordance with common law, which informs established surveying methodology. *See Spath*, 20 Wn.2d 500; CP 2540 (McEvelly Decl.).

Spath v. Larsen is the seminal Washington case interpreting the phrase “in front of” in tideland deeds from the State where the shoreline forms a cove. Like here, *Spath* involved two adjacent tideland deeds that conveyed tidelands by describing them as “situate in front of, adjacent to and abutting” the legally described uplands, including a reference to the length of the frontage between the uplands and abutting tidelands, but containing no description of the lateral boundaries. *Id.* at 501-02; CP 385, 393-96. The two tidelands existed in Sequim Bay where the meander line presented a “decided curve.” *Spath*, 20 Wn.2d at 502, 508.

Using the “Massachusetts Rule,”¹⁷ as its basic guide, the Supreme Court set forth the following general principles:

¹⁷ The Massachusetts Rule is a common law principle for solving lateral boundary conflicts in coves, which first arose in the mid-1600s in Massachusetts common law and has carried across the country. For an extensive discussion of the Massachusetts Rule, *see Spath*, 20 Wn.2d at 508-23.

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 shore 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 shore line 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.

Spath at 524-25. The Court recognized that no single rule, “however elastic,” could determine the boundaries in every situation given the “endless variations of shorelines within this state.” *Id.* at 524. But given the circumstances of the tidelands at issue, the Court ruled that the lateral boundary “may be determined only by a survey in accordance with the principles above set forth” absent the ability of the landowners to reach an alternative agreement. *Id.* at 525 (emphasis added). So, while the Court admitted some flexibility in application of the rule, it mandated application of the rule in similarly situated coves.

The *Spath* rule lays the foundation for locating lateral tideland boundaries in Washington and sets the standard on the topic for professional land surveyors in the state. CP 379-85 (Broadus Decl. listing over one-dozen surveyor treatises, papers, and studies that endorse the proration process). The *Spath* rule has also been incorporated into legal treatises. *See, e.g., Washington Real Property Deskbook*, Vol 4, § 8.2(5)(c)(iv) Boundaries of Second-Class Tidelands; *Washington Real Property Deskbook*, Vol 6, § 12.2(5)(c)(ii) Sideline Boundaries of Tidelands and Shorelands; *Washington Practice Series*, Vol. 18, § 13.5 “Boundaries—Water Boundaries” at 100. Excerpts are included in Appendix G to this brief.

The tideland configuration in West Dewatto Bay is remarkably similar to the configuration of the tidelands at issue in *Spath*. In West Dewatto Bay, the shoreline sharply curves almost 90 degrees, in the shape of a backward “L.” CP 2539, 2554-55; Appendix D. The Murray and Reidell deeds use the identical phrasing as the *Spath* deeds, “situate in front of, adjacent to or abutting upon” defined uplands or a defined segment of a meander line. CP 2496, 2502 (McEvelly Decl.). The factual circumstances of the tideland deeds at issue in West Dewatto directly match the facts at issue in *Spath*, as found by DNR’s surveyors. CP 379-80 (Broadus Decl.), 2542-43 (McEvelly Decl.). McEvelly relied upon well-established survey

methodology, which incorporates the common law principles of *Spath* for tidelands along curved shorelands, to draw the lateral boundaries of the Reidell deed. CP 2543-45. If McEvelly did not prorate, then there would have been a direct conflict between a portion of the tidelands “in front of” Reidell and “in front of” the school district’s uplands. CP 379-80, 2544-45.

Spath provides the only logical method to apportion the tidelands in the heart of the cove so as to protect the statutory preference rights of each of the upland owners as shown in the McEvelly survey. *See* Appendix F. DNR had a statutory obligation to offer to sell vacated oyster reserve tidelands to the abutting upland owners. Laws of 1927, ch. 255, § 121. Because of the potential conflict between abutting upland owners located in a cove, DNR had to be particularly careful with its conveyances to not violate this preference right. The third paragraph of language in the Reidell deed reiterating that DNR was conveying only the tidelands in front of Reidell’s owned uplands shows DNR’s intent to comply with its statutory mandate.¹⁸ Had DNR included tidelands in front of the school district’s uplands in the Reidell deed without providing notification and an

¹⁸ Historically, this right of preference has been invoked in this same cove. The State sold tidelands to further west in the cove to a Mr. Hansen. The Commissioner’s order for that sale shows that the State received a purchase application from Gleason, a third party who was not the upland owner. The State notified Hansen as the upland owner, along with another party who had some upland interest but disclaimed it in lieu of Hansen, and Hansen asserted his preference right so the State sold the tidelands to Hansen instead of Gleason. CP 2442-43.

opportunity to purchase to the school district, such action would have been ultra vires.

Had DNR sold the school district the tidelands in front of its upland property at the same time that DNR sold Reidell the tidelands in front of her upland property, there would have been no question that *Spath* would dictate how the dividing lateral tideland boundary be drawn. But because the school district did not purchase its abutting tidelands HCSC attempts to claim them as being secretly included within Reidell's legal description. HCSC's arguments violate *Chelan Basin Conservancy's* mandate that "nothing shall be taken to pass by implication" in State aquatic land deeds. 190 Wn.2d at 263.

a. Appellants reject *Spath* and ask this Court to read substantive language into the deed.

Appellants and their surveyors reject application of *Spath* to this case, claiming that Reidell intended to acquire tidelands not only in front of her uplands, but also in front of the school district's uplands. CP 2398-99 (deposition testimony of Iddings Surveyor Terry Ferguson conceding that he drew the Reidell tidelands as extending across the entire frontage of the school district's uplands). Essentially, Appellants start from the presumption that the Ferguson survey is correct, and then argue backwards

to justify it. But they ignore the actual language of the Reidell deed because they cannot overcome its plain language.

Appellants' surveyors fail to explain how any portion of Reidell's deed language is ambiguous and could be reasonably interpreted as including tidelands located in front of the school district's uplands. Because the deed clearly and unequivocally conveys only those tidelands in front of Reidell's uplands, and because the shoreline bends into a sharp cove right at the edge of her uplands, application of *Spath* was appropriate and required. Applying *Spath* honors the mandate from *Pearl Oyster Co.* that when interpreting state deeds, courts must "fix the narrowest limit that will reasonably satisfy the terms of the grant." *Pearl Oyster*, 57 Wash. at 538.

HCSC weaves together a story from various selected letters and other documents preceding and postdating the sale to claim Reidell intended to purchase the tidelands also in front of the school district's uplands, as drawn by Ferguson's survey. HCSC also claims regular contract law applies, ignoring the mandate from *Pearl Oyster* and *Chelan Basin Conservancy* that state aquatic land deeds be construed narrowly against the grantee. But under contract law, HCSC can only resort to extrinsic evidence if the deed language is ambiguous. *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012) ("It has long been the rule of our state that, where the plain

language of a deed is unambiguous, extrinsic evidence will not be considered.”) (citations omitted). Reidell’s deed language is not ambiguous.

Even if it were, extrinsic evidence may be considered only in narrow circumstances not applicable here. A court may not consider a party’s claimed unilateral or subjective intent or consider extrinsic evidence that would vary, contradict, or modify the written legal description. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

HCSC’s claim that Reidell intended to purchase tidelands also in front of the school district’s uplands contradicts the plain language of the deed. “Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.” *Id.* at 697. HCSC also ignores the fact that while Reidell’s denied 1937 application expressly did indicate an intent to purchase the tidelands in front of both her and the school district’s uplands, the 1946 application which led to her acquisition asked to purchase tidelands abutting only her uplands, with no mention of the school district. *Compare* CP 2423 *with* CP 2472.

HCSC claims DNR shared Reidell’s purported intent to acquire the tidelands in front of the school district’s uplands, even though no DNR record expressly acknowledges such an intent, and multiple DNR records contradict such an intent by focusing on her statutory preference right to acquire tidelands only in front of her uplands. *See, e.g.*, CP 2453

(Commissioner of Public Lands’ order approving the tideland sale to Reidell, stating her application claimed “the preference right to purchase the tide lands by reason of ownership of the abutting uplands; that said application is accompanied by the proper proof showing the applicant to be the owner of the abutting uplands . . .” and stating further that Reidell “is entitled to the preference right to purchase the tidelands . . .”).¹⁹ In fact, not a single piece of correspondence in the 1946 Reidell application file mentions, yet alone discusses the tidelands in front of the school district’s uplands. CP 2445-78.

HCSC relies upon a crude hand-drawn map found in the Reidell application file which Reidell provided to DNR when asked for evidence of her upland ownership. CP 2465. DNR had not asked her to illustrate the tidelands she desired to purchase. CP 2466. That map nevertheless includes a thin sketched line in the shape of a rectangle over the tidelands, which rectangle does extend some in front of the school district’s uplands. No transaction documents show DNR endorsed Reidell’s sketch of the tidelands. The map is not referenced or incorporated into the deed language; and the sketch in the map is inconsistent with the deed language, so the map

¹⁹ This Commissioner’s order can be contrasted to the Commissioner’s order for the nearby tideland sale to Hansen, which says the State notified Hansen as the abutting upland owner about a purchase application from a third party, and Hansen exercised his statutory preference right, preempting the third party’s application. CP 2442-43.

must be rejected. *See Booten v. Peterson*, 34 Wn.2d 563, 577-78, 209 P.2d 349 (1949) (finding that the legal descriptions in the deed language control over stakes in the ground purportedly reflecting an unrecorded plat map).

McEvelly reviewed the map and transaction file and provided a reasoned analysis for why he rejected it—primarily because the area sketched on the map is simply not reflected in the deed language. CP 2543-44. By rejecting *Spath* and asking for the Reidell deed to be interpreted as including the tidelands also in front of the school district’s property, HCSC would require the Court to improperly read substantive language into the deed that simply is not present. *See Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006) (“Context evidence is not admissible to import into a writing an intention not expressed.”).

DNR will not further address the various other pieces of extrinsic evidence that HCSC relies upon in its brief, because HCSC cannot overcome the plain language of the deed restricting the conveyed tidelands only to those that directly abut Reidell’s uplands.²⁰

²⁰ The State devoted 13 pages of its motion for partial summary judgment providing a detailed rebuttal to each of the pieces of extrinsic evidence HCSC relied upon. CP 3468-80. The singular most important piece of HCSC’s evidence, a February 2, 1956 letter, is an unauthenticated document that DNR believes to be fake, and that document is addressed further below under Section V.D.1.

b. Timmerman offers no legal authority to reject applying proration to the west boundary of his tideland parcel.

The only dispute between DNR and Timmerman involves a small wedge of tidelands at the western boundary of Timmerman's parcel, illustrated in Appendix H attached to this brief. Timmerman rejects proration and his surveyor established the lateral boundary "to be the lines bisecting the angle points in the Meander Line." CP 679. In contrast, DNR's surveyor observed that the western boundary is located within the margins of the cove as it transitions to a headland and determined it would be appropriate to apply proration. CP 2544. McEvilly pointed out that had he applied the method of bisecting angles of meander lines, or projections perpendicular to meander lines, he "would have been using the methods specifically rejected in *Spath* because they would have created a division of tidelands devoid of equity." CP 2544-45. *See also Spath*, 20 Wn.2d at 524.

Timmerman claims *Spath* involved a conflict of a single boundary line between two adjacent owners who held "paper title" to their upland property and associated tidelands. Timmerman Br. at 39. Timmerman denigrates the State's sovereign ownership of tidelands by saying the State lacks paper title for its claimed tidelands, and thus *Spath* should not apply to this case. Timmerman cites no authority for his theory that the State's ownership of tidelands lacks "paper title" and thus should be treated

differently than the interests of subsequent private purchasers to whom the State issues written deeds. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, 381 P.3d 95 (2016) (internal quotations omitted).

Timmerman rejects *Spath* here because *Spath* involved a conflict between two private owners, and part of the rationale was to ensure equal access to deep waters by all neighboring tideland owners. Timmerman claims DNR manages other state-owned tidelands in the area and thus does not need access to deep water and cannot invoke *Spath* for this particular boundary dispute. Timmerman Br. at 38, 40. In other words, had the school district purchased its tidelands and then had a conflict with Timmerman, then *Spath* would apply, but because the school district never purchased the tidelands in front of its uplands and those tidelands remained in State ownership, *Spath* should not apply. This argument advocates for a rule that private tideland owners who abut state-owned tidelands could claim more private tidelands as against the State’s interests than against an abutting private tideland owner’s interests. Such a rule completely upends the principle reiterated in *Pearl Oyster, Davidson*, and *Chelan Basin Conservancy* that when a boundary in a state aquatic land deed is not

expressly described, “the boundary will be interpreted most strongly against the grantee rather than the grantor state.” *Davidson*, 116 Wn.2d at 20.

Timmerman also claims DNR’s application of *Spath* to the cove in West Dewatto purportedly departs from every standard survey convention: “If this is true, black letter real property law would be upset – if not eviscerated – by the trial court’s decision. If the trial court’s decision were affirmed by this Court, then it would potentially undermine every tideland deed ever granted to a private citizen adjacent to State-owned uplands.” Timmerman Br. at 41. First, Timmerman never cites what “black letter law” is violated by the trial judge’s agreeing with the DNR’s survey. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we need not consider arguments unsupported by authority). Second, *Pearl Oyster* held that providing a strict construction of aquatic deeds—the governing rule of construction for over 100 years—was paramount even in the face of claimed disruption. “We are told such a construction of the law at this time will disturb titles, and work irreparable injury to the purchasers of tide lands; but with that question the courts have little or no concern.” *Pearl Oyster*, 57 Wash. at 538.

In conclusion, the trial court correctly held that *Spath v. Larsen* applies to establish the lateral boundaries for the tideland deeds in the cove at West Dewatto, as a matter of law. No language in the deed justifies

HCSC's claim that their deed also includes tidelands in front of any of the other uplands in the cove.

3. No party materially challenged the factual application of proration in McEvelly's survey to establish the tideland boundaries in this case.

As discussed above, both Appellants and their surveyors adamantly opposed application of *Spath* to this case. Their arguments in summary judgment focused almost exclusively on opposing *Spath* as a legal matter, and they never offered any substantive material factual disagreements with McEvelly's application of the proration doctrine in his survey to locate the boundaries.

a. HCSC never raised a single factual dispute against the McEvelly survey.

Out of hundreds of pages of summary judgment pleadings and exhibits they filed below, HCSC never offered a single statement or exhibit challenging the factual application of the proration doctrine in McEvelly's survey to locate the tideland boundaries. In one pleading, they included a section heading stating "DNR's survey presents issues of material fact inappropriate to be decided on summary judgment." CP 811. But every declaration cited under that section focused on their disagreement over the legal question of whether *Spath* should apply, and on a separate legal upland boundary issue which is addressed further below in Section V.B. HCSC did offer a declaration by their surveyor, but not once did he contest the manner

in which McEvelly applied proration to set the tideland boundaries. CP 1049-55.

HCSC filed a second declaration by Ferguson, in support of an untimely motion to strike the McEvelly survey, which motion was filed after the trial court had issued his ruling on summary judgment. CP 1679, 1738. DNR opposed the motion, CP 1749, and the trial court issued an oral ruling denying it. CP 1754 (clerk's minutes). Because that second Ferguson declaration was not part of the material the trial judge had considered in rendering summary judgment, it should not be allowed now. *See* Section V.D.3 below. Even if the second Ferguson declaration is considered, it focuses on the separate upland boundary issue, which is addressed below under Section V.B.

b. The few factual assertions Timmerman offered against the McEvelly survey are speculative or immaterial and do not warrant reversal of the trial court's summary judgment ruling.

Timmerman's expert witnesses never surveyed HCSC's tidelands or did any other work on HCSC boundaries other than where they allege HCSC's boundary abuts Timmerman's western lateral boundary. CP 3336-43 (Thalacker deposition); CP 3355-56 (Wilson deposition). Therefore, any of Timmerman's arguments about McEvelly's survey beyond Timmerman's west boundary lack foundation and should be

disregarded. *See Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) (rejecting affidavits from two psychologists who never had contact with the patient, because “[a]n opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to a jury.”) (internal quotations omitted).

Even if Thalacker was competent to offer factual attacks against parts of McEvelly’s survey concerning matters beyond Timmerman’s western lateral boundary, Thalacker never connects his asserted errors to any material or substantive difference in the location of the boundaries drawn by McEvelly. A “material” fact under CR 56(c) is one that will affect the outcome under the governing law. *Ruff*, 125 Wn.2d at 703.

Thalacker claims McEvelly erred in locating a meander corner, and Thalacker claims the proper meander corner was 21 feet away. Timmerman Br. at 43. Thalacker claims McEvelly relied upon an erroneous interior section subdivision involving government lots 6 and 7. Timmerman Br. at 44. Thalacker criticizes McEvelly for identifying axles which Thalacker claims are iron pipes. *Id.* Thalacker and Wilson claim West Dewatto does not actually involve a cove at all, but rather a “substantially straight shoreline and one part of a headland.” Timmerman Br. at 45. Thalacker claims McEvelly did not properly locate the line of ordinary high tide along the Timmerman/Murray tidelands. Finally, Thalacker claims McEvelly

should have done two separate apportionment tables because the Murray tideland extends only to mean low whereas the Reidell tideland and others to the west extend to the extreme low tide line.²¹ Timmerman Br. at 46.

McEvelly compared his survey to Thalacker's survey and the only substantive difference in the boundaries between the two is the small wedge shape that is explained solely by Thalacker's rejection of proration. Appendix H; CP 3402. Therefore, Timmerman has failed to show how any of these Thalacker criticisms establish a substantive and material error in the actual boundaries shown on McEvelly's survey. "A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (citation omitted).

The criticism over a marker pipe being labeled as an axle obviously has no impact on the actual location of the boundaries shown in McEvelly's survey. The claim that the shoreline in the area does not contain a cove is

²¹ The apportionment table is included on the face of the McEvelly survey, and it explains the mathematical data behind the angles set for the lateral boundaries. CP 2554.

nonsensical. Timmerman’s unfathomable denial of the existence of this obvious cove fails to raise a genuine issue of material fact. “Opinion evidence in conflict with the physical facts is not substantial evidence, and may be disregarded.” *Washington v. United States*, 214 F.2d 33, 43 (9th Cir. 1954) (citations omitted). The claim that McEvelly should have used two proration tables instead of one was not supported by citation to any authority. In conclusion, Timmerman never connects Thalacker’s criticisms with any errors in McEvelly’s boundaries. “A summary judgment opponent ‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 430, 788 P.2d 1096 (1990) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). The trial court properly rejected Timmerman’s criticisms and adopted the McEvelly survey.²²

B. The Trial Court Correctly Adopted the Location of the Upland Boundary Between DNR and Iddings in the McEvelly Survey.

Appellant HCSC argues the trial court erred in adopting McEvelly’s survey of the upland boundary between the Iddings parcel and DNR parcel.

²² If this Court believes Timmerman did raise sufficient questions of material fact as the McEvelly’s application of proration to the Timmerman boundary, a remand must be narrowly limited to resolving only the boundary between the State tidelands and Timmerman’s western lateral boundary. HCSC should not be allowed a second bite of the apple to raise new challenges against other portions of the McEvelly survey when they introduced no facts challenging the proration below.

First, HCSC claims DNR improperly failed to raise a legal claim in its pleadings about any dispute over the upland boundary. But DNR was required to determine where the upland boundary intersects the shoreline because that intersection point then informs how to properly locate the tidelands that are located “in front of” those uplands. When HCSC sued, claiming ownership of the State beach, all relevant boundaries were necessarily implicated.²³

HCSC also claims questions of fact remain as to the location of the upland boundary, but they do not identify a single factual dispute in the record below that is material to the issue. The dispute involves the legal question over whether the legal description of the uplands places the boundary at the creek (Ferguson’s theory), or at the toe of the hill (McEvelly’s interpretation). The legal description in the uplands deed from Reidell’s estate to the Iddings demonstrates there is no issue of material fact:

All that portion of Government Lot 5, Section 28, Township 23 North, Range 3 West, W.M. which lies South and West of the main gulch and creek, the line along the aforesaid gulch to run on South and West side of aforesaid Creek, commencing at the meander line on the shore line between the aforesaid Government Lot 5 and the TIDELAND at or near the base of the hill, where the bottom land

²³ The parties were on notice over the upland boundary disagreement as of 2016 when McEvelly completed his survey, years before the summary judgment hearing. Surveyors submitted declarations and briefed the issue extensively for that hearing. If the Court believes DNR is technically required to separately plead the upland boundary dispute in its answer to the complaint, DNR will seek permission to amend its answer to conform to the evidence and issues when this matter is remanded for DNR to pursue its remaining trespass and damages claims against HCSC.

meets the base or foot of the hill, then meander around the aforesaid base of hill straight from a point to point, not to touch or cross the aforesaid gulch, to the South line of the aforesaid Lot 5 at the base of the hill. . . .

CP 2542, 2561 (emphasis added). McEvelly’s declaration explains how this language unequivocally uses the “base of the hill” as the eastern boundary, with that phrase being repeated four times in the tracing of the line. CP 2541-42. The references to the gulch and creek at the beginning of the description provide broader context of the location of the land. The deed language following the word “commencing” is the more specific language setting the precise boundary line. That more specific language following “commencing” references the gulch (or creek in an older deed) just one time, in a restrictive clause specifying that the boundary line is not to touch or cross it. The controlling deed language clearly sets the line at the toe of the hill as a matter of law. Ferguson’s claim that the boundary is the bank of the creek would nullify more than half the text in the legal description—there would be no reason to repeatedly mention the toe of the hill if the creek was the boundary. Ferguson’s interpretation of the upland boundary violates the fundamental tenet that “[i]n the construction of a deed, a court must give meaning to every word if reasonably possible.” *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973) (citing *Fowler v. Tarbet*, 45 Wn.2d 332, 274 P.3d 341 (1954)).

Courts may disregard conflicting expert opinions on a question of law. *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, 746, 373 P.3d 320 (2016). The trial court properly held that McEvilly's finding the toe of the hill as the boundary adhered to the plain deed language. While the location of a property boundary is a question of fact, HCSC did not raise any factual challenge about where McEvilly draws the toe of the hill on his survey. HCSC focuses solely on its claimed boundary of the creek, an incorrect interpretation of the boundary as a matter of law based on the language of the deed. The few claimed factual errors raised by HCSC are all tied to that incorrect legal boundary claim.

HCSC claims McEvilly relied on an erroneous legal description of the uplands boundary from one of the deeds. But McEvilly reviewed every legal description in the entire chain of title. CP 2542, 2561-75. The only significant difference in the legal descriptions of the upland boundary across all these deeds is that some of them replace the word "creek" with the word "gulch" in one or two places within the description. *Id.* This switch between gulch and creek has no impact on McEvilly's interpretation, because the deed language tying the boundary to the base of the hill remained consistent across all deeds. *Id.*

HCSC claims McEvilly's interpretation takes more than an acre of their land away from them and denies them access to a purported water

pipng system. These complaints were untimely raised below only after summary judgment had been granted. CP 1738. These complaints also fail to raise any material factual disputes with McEvilly's locating the upland boundary along the toe of the hill, which is the correct legal interpretation of the deed language.

C. The Trial Court Correctly Rejected Timmerman's Res Judicata, Estoppel, and Laches Arguments.

Timmerman claims a quiet title dispute amongst multiple private claimants and the State in 1966 precludes DNR from raising the boundary issue in this case. This argument fails because the subject matter of the two cases is not the same. In the 1966 *Margett* case, the State challenged the validity of the 1903 Murray deed and asserted ownership of the Murray tidelands because the tidelands had been in an oyster reserve and the 1903 sale was expressly prohibited by statute. CP 766. The State settled that case by waiving its claim to the Murray tidelands in exchange for a payment of \$1,000.00. CP 770. In this case, DNR makes no claim against Timmerman's title whatsoever. DNR acknowledges Timmerman's deed and DNR's survey follows Timmerman's legal description within his deed. The only issue in this case is how to angle the western lateral boundary of the Timmerman parcel, which angle is not specified in Timmerman's legal description.

The State's 1967 stipulation in *Margett* merely confirmed the original legal description from the Murray deed, conveying tidelands "situate in front of, adjacent to or abutting upon" a described portion of the meander line. CP 770. The outcome of the *Margett* stipulation put the State in no different situation than at the time of the original 1903 sale with respect to locations of the lateral boundaries: the legal description for the Timmerman tidelands does not specify the angle of the lateral boundary, thereby triggering application of *Spath* as discussed above.

Timmerman suggests the State "should have" raised the proration issue in the *Margett* litigation. Except there was no evidence of any boundary dispute or disagreement between the parties. Timmerman offers no evidence that his surveyor's theory of how his western lateral boundary should be angled, which theory was generated for a 2018 survey, had been understood as the location of the lateral boundary in 1966 by Timmerman's predecessors involved in the *Margett* litigation.²⁴ DNR's survey reveals no boundary markers in the area of Timmerman's claimed line. To the contrary, Mr. Lovely, who is a co-owner of the Timmerman parcel, testified in a deposition that he believed their western property boundary was

²⁴ DNR named Timmerman as a third-party defendant in 2015, and provided a copy of McEvilly's survey when it was completed in 2016. DNR had no knowledge of the location of Timmerman's claimed line until over two years later, when Timmerman belatedly filed an answer, CP 1934, and provided a copy of his new survey, CP 2087, just months before the summary judgment hearing.

somewhere near a different sign on the beach, which is located far inside of both Thalacker and McEvilly's boundary lines. CP 3364-66; Appendix H (showing location of the same "Markle" sign).

Because there is no evidence that Timmerman or any of his predecessors ever before attempted to locate the exact location of his western lateral boundary, there was no known dispute that the State could have raised in the *Margett* litigation, and thus res judicata does not apply. *See, e.g., Weaver v. City of Everett*, 194 Wn.2d 464, 480-81, 450 P.3d 177 (2019) (res judicata does not apply and subject matter of the cases differs if the later claim was not ripe at the time of the earlier claim) (citing *Mellor v. Chamberlin*, 100 Wn.2d 643, 647, 673 P.2d 610 (1983)).

Timmerman's related equitable estoppel and laches claims both fail as a matter of law because they are premised on the demonstrably false assertion that the State is now trying to take back something that the State previously conveyed in the *Margett* settlement. But as mentioned above, the State is not attempting to take back any of the tidelands covered by the *Margett* litigation. The State is not asking for Timmerman's deed to be invalidated, so *Strand v. State* has no applicability. 16 Wn.2d 107, 132 P.2d 1011 (1943). The State is not asking for Timmerman's deed to be reformed or narrowed. McEvilly's survey honors Timmerman's legal description in its entirety.

Timmerman offers no evidence that the *Margett* settlement ever considered or established the lateral boundary that Thalacker proposed in his 2018 survey. Absent evidence that Thalacker's proposed 2018 line was historically asserted, there can be no evidence that any State employee ever made any statements or representations to Timmerman or his predecessors so as to give rise to collateral estoppel or laches. Timmerman's arguments that the State is legally precluded from contesting his surveyor's newly proposed location of the western boundary line fail.

D. This Court Should Not Consider Certain Unauthenticated Records

1. The February 2, 1956 letter should be stricken.

In summary judgment argument, HCSC relied heavily upon a letter dated February 2, 1956, which letter HCSC claims was written by an Assistant Commissioner of Public Lands, to a law firm that was probating Ms. Reidell's estate. This letter was purportedly discovered by an Iddings family member in their family files in 2017. Panesko Decl. at 2, Ex. 4 attached thereto, Dkt #232.²⁵ DNR filed a motion to strike that letter, among other records, because the letter was unsigned and could not be authenticated. DNR's Motion to Strike Exhibits, Dkt #231. The trial court

²⁵ DNR submitted a request for supplemental clerk's papers but they have not yet been numbered, so DNR will cite to the specific pleading and the superior court docket number instead. If the Court wishes DNR to provide a replacement brief with updated CP citations once the supplement is completed, DNR will do so.

never ruled on DNR's motion, and the issue was rendered moot when the trial court adopted the McEvilly survey.

In this appeal, the February 2 letter is again the primary exhibit relied upon by both HCSC and Timmerman in support of their claims about Reidell's purported intent to purchase tidelands in front of the school district's uplands. HCSC quotes it, in full, not once but twice in their brief. HCSC Br. at 13, 36. Timmerman likewise quotes from it. Timmerman Br. at 35. Appellants' reliance on the letter fails as a matter of law because no extrinsic evidence can contradict the plain language of the deed. *See* Section V.A.2.a., above. Nonetheless, this Court should strike the letter because it cannot be authenticated, and DNR has reason to believe it is fake.

Whether a party is advocating for or against summary judgment, the party can only rely upon "such facts as would be admissible in evidence." CR 56(e); *See Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 286, 227 P.3d 297 (2010). Authentication of a record "is a condition precedent to admissibility." *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366, 966 P.2d 921 (1998). "Although the trial court has discretion to rule on a motion to strike, a court may not consider inadmissible evidence when ruling on a motion for summary judgment." *Allen v. Asbestos Corp. Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007) (emphasis added) (internal quotations and citation omitted); *see also Wagers v. Goodwin*, 92 Wn. App.

876, 882, 964 P.2d 1214 (1998) (finding it inappropriate for the trial court to have considered on summary judgment an unsigned, undated excerpt of a letter that could not be authenticated). The burden is on a proponent of offered evidence to establish the authenticity of the evidence. ER 901.

In this case, an attorney for Appellants attempted to authenticate the letter. *See* CP 141 (Smith Decl., “Attached as Exhibit 28 is a true and correct copy of the February 2, 1956 letter from Commissioner Otto Case to Robert Lee Ager.”); CP 218 (copy of the letter). But an attorney’s declaration cannot authenticate a document “about which [the] attorney has no personal knowledge; [the] document is therefore inadmissible for purposes of summary judgment.” *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) (citing *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004)); *see also Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 355 n.11, 423 P.3d 197 (2018) (an attorney’s personally attesting to the authenticity of a police report is insufficient and the report is inadmissible under ER 901). On this basis alone, the Court should strike the February 2 letter.

DNR also has very strong concerns about the authenticity of the letter. DNR staff extensively searched its historic files, but could not find a copy of the document, and copies of the document were supposed to have been stored in two separate files. Decl. of Rolin Christopherson at 2-3,

Dkt #234. DNR's Reidell application file does contain three related letters from 1956 that post-date the February 2 letter, one dated February 24, one dated February 29, and one dated March 7, 1956. *Id.* at 3, Ex. 1 attached thereto. The March 7 letter refers to a prior letter dated February 2, but from the context it is clear that the intended reference was to the known February 29 letter, and the number "9" had been inadvertently omitted from the date.²⁶ If the February 2 letter had actually been written and exchanged between the parties, the known February 24 letter does not fit the context because it asks for information which had already been provided in the likely inauthentic February 2 letter.

DNR asked the Washington State Patrol Crime Laboratory to conduct a forensic document examination on the purported "original" version of the February 2 letter produced by Iddings family members. The laboratory determined that the Iddings' "original" was printed with chemically produced toner which has been in production since the mid-1990s. Decl. of Brett Bishop at 3, Dkt #233. The Iddings have never offered an explanation for the source of this 1990s-or-newer copy, and an older original has never been produced. The laboratory also found substantive and inexplicable discrepancies in the typeface within the letter that cast further

²⁶ The February 29 letter called for a payment of \$1.50, and the March 7 response letter was enclosing that same payment of \$1.50. Decl. Christopherson, Ex. 1, Dkt #234.

suspicious on the letter. *Id.* at 3-5. For all these reasons, the February 2 letter should be stricken from the record for lack of authentication.

2. Appendix A to HCSC's Opening Brief should be stricken.

DNR urges the Court to strike Appendix A from HCSC's opening brief, because that document is not from the record below. HCSC represents the appendix as coming from CP 101, and they indicate they added the "court-ordered" boundaries to the document for "ease of reference." But the boundaries they have drawn on the document do not match the boundaries shown on the McEvilly survey. HCSC's purported boundaries make it appear the State is claiming more tidelands than actually encompassed in the McEvilly survey. Because the document does not accurately reflect the boundaries established in other documents in the record, it should be stricken.

3. Factual allegations raised after summary judgment was granted should be disregarded.

Finally, HCSC has included with the record documents that Earl James Iddings filed with an untimely motion to strike the McEvilly survey, which motion was not filed until after the trial court had issued his summary judgment ruling. That motion to strike was based on old evidence that existed but was not introduced at the time of the summary judgment briefing, and it was also based upon new declaration statements from

Iddings' surveyor that easily could have been raised during summary judgment. "Unless discovered after the opportunity passes, the parties should generally not be given another chance to submit additional evidence." *Meridian Minerals Co. v. King Cty.*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991). The motion (CP 1738-48), and the declaration of Terrell Ferguson in support of it (CP 1679-1737), should be disregarded as containing information not offered to the trial court at the time the judge heard the matter and rendered his decision. *See also* RAP 9.12 (only evidence and issues raised to trial court on summary judgment should be considered on appeal and the order granting or denying summary judgment should identify the documents and evidence called to the "the attention of the trial court before the order on summary judgment was entered").

E. DNR Requests an Award of Attorneys' Fees for Defending This Appeal Under RCW 79.02.300.

Attorneys' fees may be recovered only when authorized by statute, when there is a recognized ground of equity, or by agreement of the parties. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Whether a statute authorizes an award of attorneys' fees is a question of law reviewed *de novo*. *Id.*

RCW 79.02.300(1) provides that persons who, without authorization, remove valuable materials from or cause waste or damage to

public lands shall be liable for either treble or single damages. “In addition, the person is liable for reimbursing the state for its reasonable costs, including, but not limited to, its administrative costs, survey costs . . . , and its reasonable attorneys’ fees and other legal costs.” RCW 79.02.300(1).

This case started as a conflict in 2013 when Iddings family members began posting “commercial shellfish bed, no trespassing” signs along the State beach, and harassing members of the public attempting to access the State beach. HCSC sued DNR in 2015, attempting to take over ownership from the State, relying in part on inadmissible evidence of questionable origins. DNR requested attorneys’ fees against HCSC and the Iddings in its pleadings below. CP 15, 34. DNR has incurred hundreds of thousands of dollars in expert fees, staff time, and attorney time defending against the Iddings’ efforts to steal a state-owned beach that has been managed for public shellfish harvest for nearly seventy years. Because this interlocutory appeal involves DNR defending the State’s title against the Iddings’ baseless claims, and because this appeal is a part of DNR’s pursuit of its still-pending trespass claims against the Iddings and HCSC, DNR is entitled to attorneys’ fees under RCW 79.02.300.

VI. CONCLUSION

The trial court correctly granted summary judgment upholding the State’s title to the public beach in West Dewatto and adopting the McEvelly

survey as establishing the boundaries of the properties in the cove. The judgment below should be affirmed, attorneys' fees awarded DNR, and the matter remanded for DNR to continue pursuing its damages claim against HCSC and the Iddings.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

ROBERT W. FERGUSON
Attorney General

s/ Joseph V. Panesko

JOSEPH V. PANESKO, WSBA #25289

Senior Counsel

ERIC A. MENTZER, WSBA #21243

Senior Counsel

CHRISTA L. THOMPSON, WSBA #15431

Senior Counsel

P.O. Box 40100

Olympia, WA 98504-0100

(360) 586-0643

*Attorneys for Respondents State of
Washington, Department of Natural
Resources*

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on June 8, 2020, through the Washington State Appellate Courts' e-filing Portal and as follows:

<p>Robert M. Smith K&L Gates LLP 1218 Third Avenue, Suite 2000 Seattle, WA 98101 robert.smith@klgates.com gabrielle.thompson@klgates.com jessica.pitre- williams@klgates.com</p> <p><i>Attorney for Appellants Hood Canal Shellfish Company, Marlene Iddings, Lloyd Iddings, and co-counsel for Earl J. Iddings and Laure Iddings</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Amanda M. Carr Plauché & Carr, LLP 1218 Third Avenue, Suite 2000 Seattle, WA 98101 amanda@plauchecarr.com jesse@plauchecarr.com sarah@plauchecarr.com</p> <p><i>Attorney for Appellants Hood Canal Shellfish Company, Marlene Iddings, Linda Slates, Lloyd Iddings, and Renee Hanover</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>

<p>Jose F. Vera Vera & Associates, PLLC 200 W. Thomas Street, Suite 420 Seattle, WA 98119 josevera@veraassociates.com</p> <p><i>Attorney for Appellant Earl J. Iddings</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Nicholas Power Law Office of Nicholas Power 540 Guard Street, Suite 150 Friday Harbor, WA 98250 nickedpower@gmail.com</p> <p><i>Attorney for Appellant Laure Iddings</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>James Grifo Law Office of James P. Grifo 164 Dougherty Lane Friday Harbor, WA 98250 jpg@grifolaw.com</p> <p><i>Attorney for Appellants Virgil G. Timmerman and Jessie Dorene Timmerman</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 8th day of June, 2020, at Olympia, Washington.

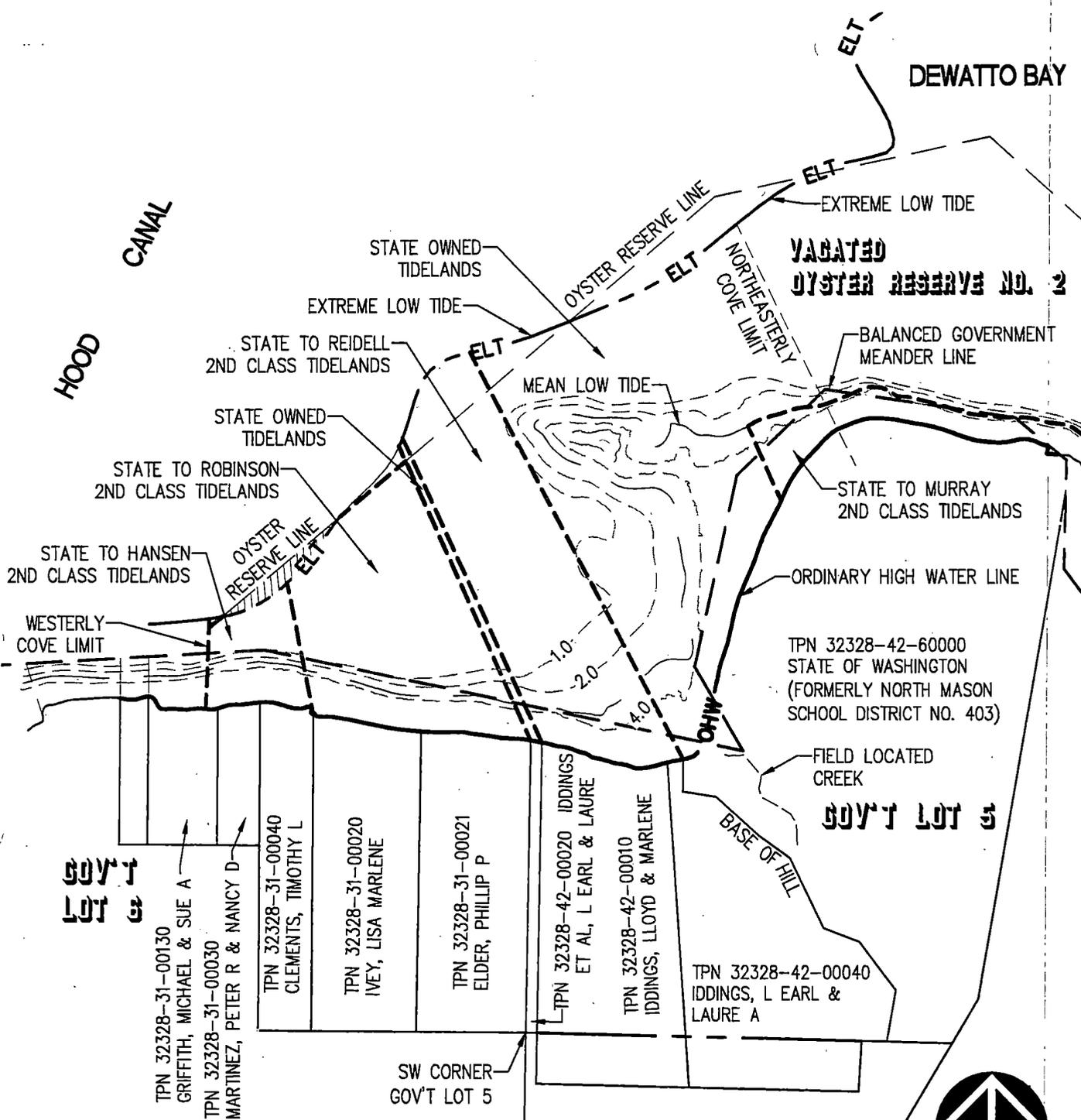
s/ Joseph V. Panesko
JOSEPH V. PANESKO
Senior Counsel

APPENDIX A

HOOD
CANAL

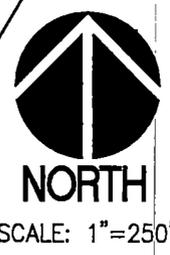
DEWATTO BAY

**VACATED
OYSTER RESERVE NO. 2**



TPN 32328-42-60000
STATE OF WASHINGTON
(FORMERLY NORTH MASON
SCHOOL DISTRICT NO. 403)

GOV'T LOT 5



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PROJECT DEWATTO BAY MASON COUNTY	PREPARED FOR STATE OF WASHINGTON OFFICE OF THE ATTORNEY GENERAL	PREPARED BY SITTS & HILL ENGINEERS, INC.	APPROVALS	SHEET NO. 1 OF 1
SHEET TITLE TIDELANDS EXHIBIT	NATURAL RESOURCES DIVISION 1125 WASHINGTON STREET SE PO BOX 40100 OLYMPIA WA 98505-0100	CIVIL • STRUCTURAL • SURVEYING 4815 CENTER STREET TACOMA, WA. 98409 PHONE: (253) 474-8448 FAX: (253) 474-0188 http://www.sittshill.com/	DESIGNED _____ DRAWN CHS CHECKED MAM DATE 02/05/2019 SCALE AS NOTED	PROJECT NO. 16618

APPENDIX B

STATE OF WASHINGTON.

IN CONSIDERATION of Sixty-six and no/100 (\$66.00) Dollars, the receipt of which is hereby acknowledged, the STATE OF WASHINGTON does hereby grant, bargain, sell and convey unto James Murray, his heirs and assigns, the following described tide land of the second class, situate in Mason County, Washington, to wit:

All tide lands of the second class owned by the State of Washington, situate in front of, adjacent to or abutting upon that portion of the United States government meander line described as follows:

Commencing at the corners to fractional sections 28 and 33, township 23 north, range 3 west of the Willamette Meridian; thence along the meander line of the United States survey 69 chains to the place of beginning, it being a certain point described in the United States survey field notes as north $44-3\frac{1}{4}^{\circ}$ east 3.30 chains; thence south $82-3\frac{1}{4}^{\circ}$ east 5.20 chains; thence south $52\frac{1}{2}^{\circ}$ east 1.80 chains; thence south 2.90 chains; making in all 13.20 chains measured along said government meander line.

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said James Murray, his heirs and assigns forever.

WITNESS the Seal of the State, affixed this 12th day of June, 1903.

HENRY McBRIDE.
Governor.

(SEAL.)

Attest:

J. THOS. HICKLEY.
Assistant Secretary of
State.

APPENDIX C

Vacated Oyster Reserve & Second Class Tide Lands
~~DEED - REGISTERED IN THE PUBLIC RECORDS~~ sold subsequent to June 7, 1911.
 S.F. No. 40 - 11-4-1047

State of Washington

IN CONSIDERATION OF Two Hundred Thirty and 40/100 (\$230.40) Dollars,

the receipt of which is hereby acknowledged, the STATE OF WASHINGTON does hereby grant, bargain, sell and convey unto

Therese D. Reidell, her

heirs and assigns, the following described tide ~~and~~ lands of the second class, as defined by Chapter 255 of the Session Laws of 1927, situate in Mason County, Washington, to-wit:

Those portions of the tide lands of the second class and vacated State Oyster Reserve No. 2, Plat No. 137, situate in front of, adjacent to or abutting upon that portion of Government Lot 5, Section 28, township 23 north, range 3 west, W.M., described as follows:

That portion of said Government Lot 5, lying east of a line which is 20 feet east of and parallel to the west line of said Lot 5, and southerly and westerly of the main creek running through said Lot 5 and having a frontage of 5.76 lineal chains; more or less.

The above description is intended to convey such tide lands as lie in front of a tract of uplands owned by Therese D. Reidell on November 18, 1946.

The above described lands are sold subject to all the provisions of Chapter 312 of the Session Laws of 1927, to which reference is hereby made, and which shall be as binding upon the grantee and any successor in interest of said grantee as though set out at length herein.

"The grantor hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its successors and assigns forever, all oils, gases, coal, ores, minerals and fossils of every name, kind or description, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals and fossils; and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its successors and assigns forever the right to enter by itself, its agents, attorneys and servants upon said lands or any part or parts thereof, at any and all times, for the purpose of opening, developing and working mines thereon, and taking out and removing therefrom all such oils, gases, coal, ores, minerals and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain and use all such buildings, machinery, roads and railroads, sink such shafts, remove such soil, and to remove on said lands or any part thereof for the business of mining and to occupy as much of said land as may be necessary or convenient for the successful prosecution of such mining business hereby expressly reserving to itself, its successors and assigns, as aforesaid, generally all rights and powers in, to and over said lands, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved"; Provided, That no rights shall be exercised under this reservation by the state, its successors or assigns, until provision has been made by the state, its successors or assigns to pay to the owner of the land upon which the rights herein reserved to the state, its successors or assigns are sought to be exercised, full payment for all damages sustained by said owner, by reason of entering upon said land.

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said _____

Therese D. Reidell, her heirs and assigns, forever.

WITNESS, The Seal of the State, affixed this 28th
day of AUGUST, 194 7

[SEAL]

Mon C. Wallgren
Governor.

-Attest:

Ray J. Yeoman
Assistant Secretary of State.

Deed No. 19670
Cont. No.
App. No. 11330

APPENDIX D



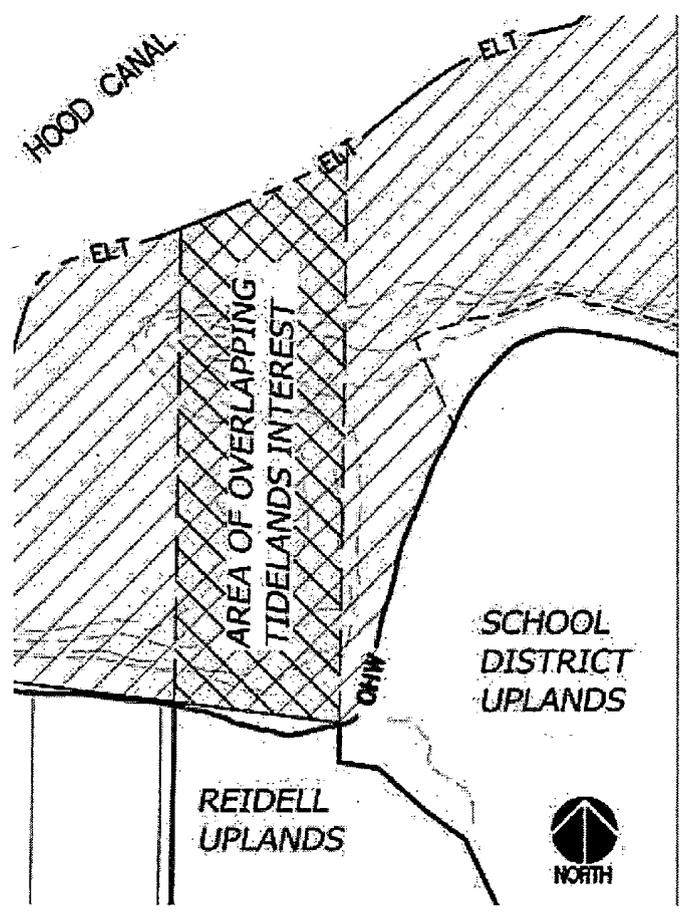
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D.O.E. MASON

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APPENDIX E

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6. The conflict between Reidell and the School District both owning tidelands in front of their uplands properties at a bend in the shoreline is resolved using the *Spath* principles. By using a process of proration to locate the lateral tidelands boundaries at an angle, both Reidell and the School District would share in a ratable portion of the tidelands to Reidell's north and the School District's west, providing both parties access to deep water proportionate to their shares of water frontage.

7. Examples of respected survey treatises, references, and guides commonly used by professional land surveyors in Washington include the following on the topic of locating lateral boundaries on tidelands:

APPENDIX F

APPENDIX G

**WASHINGTON
REAL PROPERTY
DESKBOOK
SERIES**

**FOURTH EDITION
AND 2016 SUPPLEMENT**

VOLUME 6

LAND USE DEVELOPMENT

WASHINGTON STATE BAR ASSOCIATION
1325 FOURTH AVENUE, SUITE 600
SEATTLE, WA 98101-2539

RECEIVED

OWNER: _____

DEC. 21 2016

ATTORNEY GENERAL'S OFFICE
NATURAL RESOURCES DIVISION
Rev. 2016

§12.2(5)(c)(iii) / State-Owned Public Lands

(ii) Sideline boundaries of tidelands and shorelands

Sideline boundaries of waterfront upland parcels do not necessarily extend straight out over tidelands or shorelands. The sideline boundary of a tideland or shoreland parcel will vary in angle from the shoreline depending on the shape of the water body and the curvature of the shoreline. The rules for sideline boundaries of tidelands and shorelands are subject to common-law principles. *See Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944); *Lloyd v. Monteccuo*, 83 Wn. App. 846, 924 P.2d 927 (1996), *review denied*, 131 Wn.2d 1025 (1997). Volume 1, Chapter 13 (Surveys, Land Descriptions, and Boundaries), of this deskbook discusses sideline boundaries in more detail.

(iii) The waterward boundary of tidelands and shorelands; the landward boundary of the beds of navigable waters

For tidelands where the Harbor Line Commission has not established a harbor area, the waterward boundary is the line of extreme low tide. RCW 79.105.060(4), (18). Beds of navigable waters abutting tidelands lie below the line of extreme low tide. RCW 79.105.060(2). DNR defines extreme low tide in WAC 332-30-106(18) as

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). Along the Pacific Ocean and in the bays fronting thereon and the Strait of Juan due Fuca, the elevation ranges down to a minus 3.5 feet in several locations.

For shorelands where the Harbor Line Commission has not established a harbor area, the waterward boundary is the line of navigability. RCW 79.105.060(3), (17). Abutting beds of navigable waters lie below the line of navigability. RCW 79.105.060(2). Under WAC 332-30-106(33), the line of navigability is "a measured line at that depth sufficient for ordinary navigation as determined by the board of natural resources for the body of water in question."

Although the state has issued deeds to shorelands throughout the state, Lake Washington is the only freshwater body for which the BNR has defined a line of navigability. The Washington Supreme Court has observed that when the state sells shorelands

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Encroachment & Trespass / §8.2(5)(c)(iv)

Second-class shorelands are defined by RCW 79.105.060(17) as "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."

Because RCW 79.120.010 and .020, and their predecessors, RCW 79.01.428 (repealed 1982) and 79.93.010 (recodified 2005), require that all first-class tidelands and shorelands be platted by state agency, little litigation has arisen or will arise in Washington concerning the establishment of the boundaries of such tidelands and shorelands. In *Lloyd v. Montecucco*, 83 Wn. App. 846, the court resolved a tideland and shoreland boundary dispute with regard to lots that were patented before statehood. However, the court did not specify whether the disputed tidelands and shorelands in that case were first class or second class.

(iv) Boundaries of second-class tidelands

With respect to establishing boundaries of second-class tidelands and shorelands, a considerable volume of litigation has ensued because of the convex and concave curvature of many of the shores of navigable waters and the state's common practice, when selling or leasing second-class tidelands and shorelands, of simply describing such lands as abutting or adjoining adjacent upland tracts.

Washington courts, in establishing the lateral boundaries of second-class tidelands and shorelands and apportioning such lands among owners of adjacent upland tracts, have basically followed what is commonly known as the Massachusetts Rule. *Spath v. Larsen*, 20 Wn.2d 500, 524-25, 148 P.2d 834 (1944). That rule, amended to conform with Washington definitions, can be stated as follows:

Where the shoreline curves or bends two objectives are to be kept in view: to give to each proprietor a fair share of the tidelands or shorelands, and to secure to the proprietor convenient access to the water from all parts of his or her land by giving him or her a share of the line of extreme low tide or navigability proportionate to the share of the line of ordinary high tide or ordinary high water owned by him or her.

CLARK ON SURVEYING AND BOUNDARIES §25.17, at 902.

A different rule applies where disputed property was patented (sold) by the federal government prior to statehood. Under those circumstances, the water boundary is stationary at the meander

**§8.2(5)(c)(iv) / Adverse Possession, Boundary Litigation,
Encroachment & Trespass**

line if the meander line is lower than the line of ordinary high tide, provided that the patent contains no water boundary description. *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 505 P.2d 457 (1973).

If the parties are unable to agree as to the location of the boundary line between their respective tidelands or shorelands, that line may be determined only by a survey made in accordance with the foregoing rule as governed by the following guidelines and principles. See *Spath*, 20 Wn.2d at 525.

- (1) In adjudicating the ownership of tidelands and shorelands between adjoining upland owners on a concave or convex shoreline, each upland owner is entitled to a proportionate share of the tidelands or shorelands extending to the low water mark.
- (2) 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 or shorelands having regard only to the amount of shoreline that the owner owns, lying between the points where the lateral boundaries of the owner's upland meet the shoreline or government meander line, whichever, in the particular case, constitutes the water boundary of his or her upland.
- (3) Tidelands and shorelands should be apportioned between the respective upland owners so that, as the whole length of the water boundary of the land within the concave or convex 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 or shorelands along the line of low water.
- (4) Tidelands or shorelands may be divided between adjoining owners by erecting lines perpendicular to the general course of the shoreline only in cases in which the shoreline is straight, or substantially so. *Spath*, 20 Wn.2d at 524-25. This rule applies only when the lateral or side lines are not otherwise established by the terms of the grant under which the upland owner holds. *Lloyd*, 83 Wn. App. at 857.
- (5) If the tidelands or shorelands that are to be divided are situated on a headland, then the sidelines that

**Adverse Possession, Boundary Litigation,
Encroachment & Trespass / §8.3(1)**

divide the tidelands or shorelands should be drawn divergent from the water boundary of the upland to the outer edge of the tidelands or shorelands. *State v. Corvallis Sand & Gravel Co.*, 69 Wn.2d 24, 28, 416 P.2d 675 (1966).

- (6) Marking a water boundary with concrete blocks, movable by tidal action, and seeding of oysters, were held to be insufficient to establish a clear and well-defined line for the purpose of satisfying the doctrine of recognition and acquiescence. *Johnston*, 2 Wn. App. 452; *Lloyd*, 83 Wn. App. at 855-56.

§8.3 ENROACHMENT AND TRESPASS

The purpose of this section is to discuss, in brief fashion, some of the general principles and approaches applicable to conflicts that arise between the owners of adjoining or related land. No attempt has been made to provide or set forth definitive treatment of certain specific problems that are, at times, characterized as involving "encroachment." Thus, the reader concerned with matters relating to, for example, adverse possession, support, partition, and boundaries, should consult those sections of this deskbook that deal with those matters in greater depth. See also §§8.1 and 8.2, above.

(1) General considerations

As a general matter, any invasion of a landowner's real property is an unlawful encroachment. For example, the fact that tree branches or shrubs protrude over a property line gives the owner of the adjoining property the right to have the overhanging portion of the tree or shrub removed. In *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921), the court stated that, in the absence of a nuisance statute, the sole remedy of a landowner is to cut down the offensive branches. The court held that the predecessor to RCW 7.48.010 provided for an abatement of overhanging branches because they caused annoyance or damage, even though "insignificant." RCW 7.48.020 provides that the successful party is entitled to have an order requiring the sheriff to abate the nuisance. The area protected from invasion includes the airspace above and the earth below a landowner's property. *Gostina*, 116 Wash. at 232.

The relative insignificance of an encroachment is not always a determining factor with regard to whether removal should be ordered. In *First Methodist Episcopal Church v. Barr*, 123 Wash. 425, 212 P.

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§ 13.5

REAL ESTATE TRANSACTIONS

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ownership. As already implied, the upland owner owns down to the line of mean high tide on tidal water or to ordinary seasonal high water on navigable fresh water lakes and streams.¹¹ Subject to ownership or rights of the Federal Government, the State of Washington owns the shorelands and beds of navigable bodies of water, both tidal and fresh, as stated in Article XVII, Section 1, of the Washington State Constitution. Of course in many cases the state has conveyed the title to shorelands, so-called "beach rights," to the adjacent upland owners, who have preference rights to purchase shorelands in locations where the state decides to sell them. When upland owners own shorelands, the side boundary lines of each one's shorelands extends outward from the end of his upland side lines, across the shoreland, to the low-tide line. The extension of the side boundary lines may cause a problem. On a straight beach, one that runs substantially parallel to the seaward boundaries of a line of adjoining upland parcels, there is no particular problem; the side lines are extended perpendicularly to the shore line. But if the adjoining parcels lie on a concave bay or cove, then it would cause a problem to run side lines perpendicularly; they would cross each other. To solve this problem, *Spath v. Larsen* held that when upland owners own shorelands on a concave bay or cove, each will own that portion of the shorelands on the bay or cove that is proportional to his portion of upland ownership on the entire bay or cove.¹²

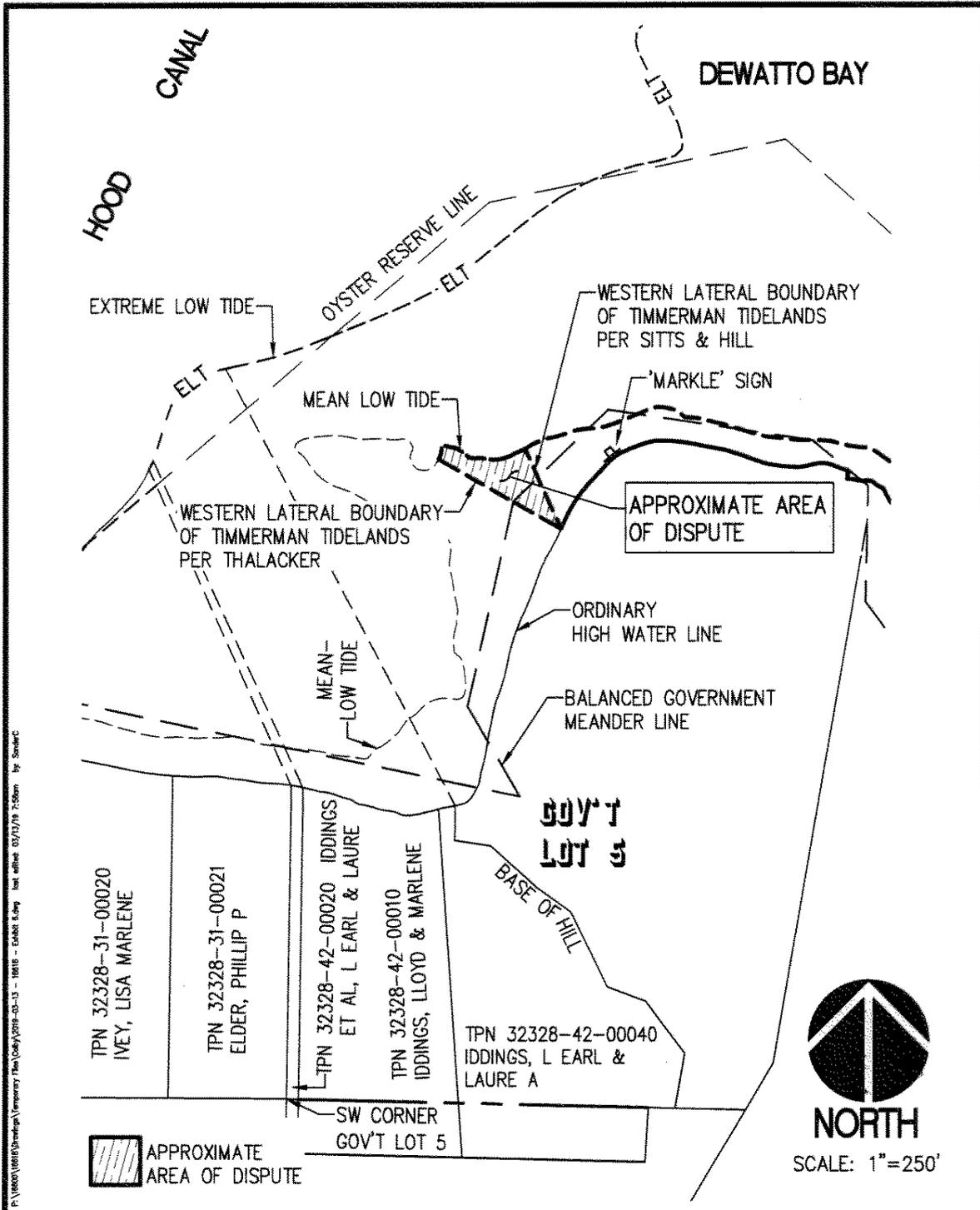
We have repeatedly referred to the line of "mean high tide," but it is not that simple to measure the line of mean high tide. One general method is to make a mathematical calculation of surface levels from United States Coast and Geodetic Survey figures, striking the mean of all "high tides" over a complete tidal cycle of 18.6 years. This sounds complex enough, but it is even more complex than it sounds. Does one consider extraordinarily high "neap" tides? Is an allowance made for "seiche," which is an oscillation in the water level independent of tidal flow? The other general method is to measure the "vegetation line," the line impressed upon the shore by salt water, where upland vegetation begins to grow. This has the advantage of being visible to surveyors in many locations. It can also be argued that the vegetation line, above which landowners may cultivate crops, is a more significant point than is a mathematically calculated line. However, vegetation is not visible in some locations.¹³ Worst of all, a conflict exists between the method used

11. See, e.g., *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935) (tidal water); *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957) (tidal water); *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955) (navigable river); *Proctor v. Sim*, 134 Wash. 606, 236 P. 114 (1925) (navigable lake; dictum); *Wilson v. Howard*, 5 Wn.App. 169, 486 P.2d 1172 (1971) (tidal water).

12. 20 Wn.2d 500, 148 P.2d 834 (1944).

13. See *Corker, Where Does the Beach Begin*, 42 Wash. L. Rev. 33, 65-72 (1966), for discussion of the problems of measuring mean high tide.

APPENDIX H



SHEET TITLE DEWATTO BAY MASON COUNTY TIDELANDS EXHIBIT 6	PREPARED BY SITTS & HILL ENGINEERS, INC. CIVIL ■ STRUCTURAL ■ SURVEYING 4815 CENTER STREET TACOMA, WA. 98409 PHONE: (253) 474-9449	SHEET 1 OF 1 PROJECT NO. 16618
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APPENDIX I

Year	Ch.	§	Page in brief where cited	Topic
1891	150	1-2	5, 6	Designating oyster reserves
1897	89	4	5, fn.3	Definition of tidelands
1927	255	50	7	Requires sales of state lands to be by auction
1927	255	121	6, 7, 23	Procedures for sale of second-class shorelands
1929	224	1	6	Authorizing vacation of oyster reserves
1971 1st Ex. Sess.	217	2	4	Gissberg amendment banning further sales of most aquatic lands

or kill, any feathered game for the market or sale in any month in the year except the month of December.

SEC. 2. Such game shall be of the several kinds as follows: Swan, geese, brants, sand-hill cranes, grouse, pheasants, partridges, prairie chicken, snipe and all the various and different kinds of ducks.

Limit of close season.

SEC. 3. It shall be unlawful for any person or persons to sell or dispose of, except in the month of December, or have in their possession for the purpose of sale, any of the game mentioned in section two, for money, or for any pay whatever.

SEC. 4. That it shall be unlawful to ship any kind or kinds of game out of this state for the market any month in the year.

SEC. 5. That it shall be unlawful for any person or persons to kill, trap, or in any manner cause to be killed, quail and golden, silver, China or Mongolian pheasants for the period of five years after this act becomes a law.

Disposition of fines.

SEC. 6. That all fines or moneys collected under this act be paid to the county treasurer and held in and made a sinking fund for a game commissioner.

SEC. 7. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined for each offense in a sum not less than ten dollars nor more than one hundred dollars.

Approved March 9, 1891.

CHAPTER CL.

[H. B. No. 255.]

RELATING TO TIDE AND SHORE LANDS.

AN ACT relating to tide and shore lands.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That the tide and shore lands belonging to the State of Washington, not within two miles of any cor-

porated city or town, covered by natural oyster beds, or so much shore and tide land as is necessary for the preservation and growth of any natural oyster bed, is hereby withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve.

To protect natural oyster beds.

SEC. 2. The board of appraisers of tide and shore lands appointed and acting under and by virtue of an act entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," approved March 26, 1890, shall, when this act takes effect, investigate and determine the shore and tide lands within their county covered by a natural oyster bed, as well as such parts of tide and shore lands within the said county not covered by a natural oyster bed but which is necessary for the preservation and growth of any natural oyster bed. And such board of appraisers shall cause to be made a plat of such natural oyster beds, and of such tide and shore lands which they deem necessary and reserve for the preservation and growth of such natural oyster beds; and such plat shall be marked and noted upon the tide and shore land plats of such county, and thereafter shall be known as "natural oyster beds reserved," and the same shall not be offered for sale or lease, nor sold nor leased.

Duty of local board.

SEC. 3. The decision of the board of appraisers hereinbefore mentioned shall be open to appeal and review in making the reservations provided for in the foregoing sections. This act shall be open to all appeals and supervisions provided now by law under the act entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," approved March 26, 1890, and as may hereafter be provided by law either amendatory to said last named act or in addition thereto.

Open to appeal.

Approved March 9, 1891.

Records of
board, etc.

SEC. 2. Said board and commission shall keep a full and complete record of their proceedings in separate records, one relating to appraisement, sale, lease and selection of lands; one relating to harbor lines, harbor areas, tide and shore lands. A clerk in the office of the commissioner of public lands shall act as the secretary of said board and commissions, and their office shall be in the office of the commissioner of public lands, and all records relating to said board and commissions of public lands of the state shall be kept in the office of the commissioner of public lands, and shall be subject to public inspection.

Rules and
regulations.

SEC. 3. Said board of state land commissioners shall make all rules and regulations for carrying out the provisions of this act, not inconsistent with law, and the commissioner of public lands shall act as chairman of said board and commissions.

Classification
of public lands.

SEC. 4. That for the purpose of this act all lands belonging to and under the control of the state shall be divided into the following classes:

(1) *Granted Lands*: (a) Common school lands and lieu and indemnity lands therefor. (b) University lands and lieu and indemnity lands therefor. (c) Other educational land grants. (d) Lands granted to the State of Washington for other than educational purposes, and lieu and indemnity lands therefor. (e) All other lands, including lands acquired or to be hereafter acquired by grant, deed of sale, or gift, or operation of law, including arid lands.

(2) *Tide Lands*: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands.

(3) *Shore Lands*: Lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow.

(4) *Harbor Lines and Areas*: Such lines and areas as are described in article 15 of the constitution of the State of Washington and which have been established according

to law. All of which outer harbor lines so established as aforesaid are hereby ratified and confirmed, also all such harbor lines and areas as may and shall be hereafter established.

SEC. 5. All lands described in section four are “public lands” and the terms “public lands” and “state lands” shall be defined and deemed to be synonymous whenever either is used in this act. Defining terms.

That the selection, inspection and appraisal of land as hereinafter provided for in this act may be made by one of the members of the said board or commission; but when it is deemed advisable and for the best interests of the state, the commissioner of public lands may employ two or more citizens of the state, familiar with such work, to personally inspect, appraise or select lands, harbor areas, etc. Inspection, etc., of lands.

The word “improvements” used in this act, when referring to school or granted lands, shall be interpreted to mean fencing, diking, draining, ditching, houses, barns, shelters, wells, slashing, clearing or orchards, and also breaking that has been done prior to application for purchase or lease, and all things that would be considered fixtures in law. When referring to tide or shore lands and harbor areas, the word “improvements” shall be interpreted to mean all fills or made ground of a permanent character, and all structures erected or commenced on said lands or actually in use for purposes of trade, business, commerce or residence prior to March 26, 1890, and completed before January 1, 1891: *Provided*, That ordinary capped piles or similar structures or fixtures shall not be considered an improvement. Improvements, how defined.

SEC. 6. The compensation of such inspectors so appointed by the commissioner of public lands shall not exceed four dollars per diem for time actually employed, and necessary expenses, which shall be submitted to the commissioner of public lands in an itemized and verified account, to be approved by the commissioner of public lands. Compensation of inspectors.

SEC. 7. Said state land inspectors shall, immediately upon their appointment, under the direction of the commissioner of public lands, inspect such unsurveyed lands Duties of inspectors.

shall be made by affidavit of the publisher, or person in charge, of the newspaper publishing the same and proof of posting the notice of sale and the receipt of the lists shall be made by certificate of the county auditor which shall forthwith be sent to and filed with the commissioner of public lands.

Advertising
expense au-
thorization.

SEC. 48. The commissioner of public lands is authorized to expend any sum in additional advertising of such sale as he shall determine to be for the best interest of the state.

Place of sale.

Time of sale.

SEC. 49. Such sale shall take place in the county in which the whole, or the greater part, of each lot, block, or tract of land, or the material thereon, to be sold, is situated, as shown by the official plat thereof on file in the office of the commissioner of public lands, on the day advertised, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, in front of the court house, or of the building in which the superior court is held in counties in which there is no court house.

Sales at pub-
lic auction.

SEC. 50. All sales shall be at public auction to the highest bidder, on the terms prescribed by law and as specified in the notice hereinbefore provided, and no land or materials shall be sold for less than its appraised value.

Sales by
county
auditor.

SEC. 51. Such sales shall be conducted under the direction of the commissioner of public lands, by the county auditor of the county in which the sale is held, and such auditor, upon the payment to him, by the purchaser, either in cash or by certified check or accepted draft drawn upon some bank doing business in this state, or by postal money order, payable to the order of the commissioner of public lands, of an amount equal to one-tenth of the purchase price of the land purchased by him, or the full amount of the purchase price of the timber, fallen timber, stone, gravel or other valuable material

waterway or portion of waterway shall be embraced within the limits of a port district created under the laws of the state, the title to such portions thereof as shall then remain undisposed of by the state shall vest in such port district. Such title so vesting shall be subject to any railroad or street railway crossings existing at the time of such vacation.

Title subject to existing railroad crossings.

The provisions of this section shall not apply to any waterway or portion of waterway which forms, or by improving the same may be made to form, a connection between a river, or another waterway, and tidal waters.

Waterways excepted by act.

SEC. 119. Any replat of tide or shore lands heretofore, or hereafter, platted shall be in full force and effect and shall constitute a vacation of streets, alleys, waterways and other public places theretofore dedicated and the dedication of new streets, alleys, waterways and other public places appearing upon such replat, when the same is recorded and filed as in the case of original plats.

Streets, alleys, etc., vacated or dedicated when plat or replat of tide or shore lands recorded.

SEC. 120. All tide lands, other than first class, shall be offered for sale and sold in the same manner as state lands, other than capitol building lands, but for not less than five dollars per lineal chain, measured on the United States meander line bounding the inner shore limit of such tide lands, and each applicant shall furnish a copy of the United States field notes certified to by the officer in charge thereof, of said meander line with his application, and shall pay one-tenth of the purchase price on the date of sale.

Tide lands sold as other state lands.

Minimum price.

Field notes filed with application.

SEC. 121. Whenever application is made to purchase any shore lands of the second class or whenever the commissioner of public lands shall deem it for the best interest of the state to offer any shore lands of the second class for sale, he shall cause a notice to be personally served upon the abutting upland owner if he be a resident of this state, or if

Application for shore lands of the second class.

Notice to abutting upland owner.

the upland owner be a non-resident of this state, shall mail to his last known post office address, a copy of a notice notifying him that application has been made for the purchase of such shore lands or that the commissioner deems it for the best interest of the state to sell the same, as the case may be, giving a description and the appraised value of such shore lands in no case less than five dollars per lineal chain frontage and notifying such upland owner that he has a preference right to purchase said shore lands at the appraised value thereof for a period of thirty days from the date of the service or mailing of said notice, and no such shore lands shall be offered for sale, or sold, to any other person than the abutting upland owner until after the expiration of said thirty days from the date of the service or mailing of such notice. If the upland owner is a non-resident of this state and his address is unknown to the commissioner of public lands, notice to him shall not be necessary or required. If at the expiration of the thirty days from the service or mailing of the notice, as above provided, the abutting upland owner has failed to avail himself of his preference right to purchase and paid to the commissioner of public lands the appraised value of the shore lands described in said notice, then in that event said shore lands may be offered for sale and sold in the manner provided for the sale of state lands, other than capitol building lands. The commissioner of public lands may cause any of such shore lands, to be platted as is provided for the platting of shore lands of the first class, and when so platted such lands shall be sold or leased in the manner in this act provided for the sale or lease of shore lands of the first class.

Upland owner has preference right.

Upland owner non-resident and address unknown—notice not required.

May sell to others if right not exercised within time.

Platting and sale as in case of shore lands of first class.

Second class tide or shore lands.

SEC. 122. Tide or shore lands of the second class which are separated from the upland by navi-

pany, electrical company, water company, telephone company, telegraph company, wharfinger and ware-houseman as such terms are defined in this section.

Passed the House March 8, 1929.

Passed the Senate March 12, 1929.

Approved by the Governor March 26, 1929.

CHAPTER 224.

[H. B. 108.]

STATE OYSTER RESERVES.

AN ACT authorizing the vacation of State Oyster Reserves or portions thereof, and providing for the manner of sale or lease thereof and the disposition of the proceeds.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The commissioner of public lands is hereby authorized to sell or lease tide lands which have heretofore or which may hereafter be set aside as state oyster reserves in the same manner as provided for the disposition of second class shore lands in so far as the statutes relating to the sale of such second class shore lands may be applicable to the sale of tide lands in state oyster reserves.

Sale or
lease of tide
lands.

SEC. 2. The commissioner of public lands, upon the receipt of an application for the purchase or lease of any tide lands which have heretofore or which may hereafter be set aside as state oyster reserves, shall notify the director of fisheries and game of the filing of the application, describing the lands applied for. And it shall be the duty of the director of fisheries and game to cause an inspection of the reserve to be made for the purpose of determining whether said reserve or any part thereof should be retained as a state oyster reserve or vacated.

Application.

Director of
fisheries and
game.

Vacation.

SEC. 3. In case the director of fisheries and game approves the vacation of the whole or any part of said reserve, the commissioner of public lands may vacate and offer for sale or lease such parts or all of said reserve as he deems to be for the best interest of the state, and all monies received for the sale or lease of such lands shall be paid into the state treasury to the credit of the state oyster reserve fund. *Provided*, That nothing in this act shall be construed as authorizing the sale or lease of any tide lands which have heretofore, or which may hereafter, be set aside as state oyster reserves in Eld Inlet, Hammersley Inlet or Totten Inlet, situated in Mason or Thurston counties.

Passed the House March 13, 1929.

Passed the Senate March 12, 1929.

Approved by the Governor March 26, 1929.

CHAPTER 225.

[H. B. 424.]

REAPPROPRIATION FOR STATE HIGHWAYS.

AN ACT re-appropriating certain sums from the motor vehicle fund for the purpose of construction and maintenance of state highways and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

Reappropriation of \$5,497,569.10 for state highway.

SECTION 1. That the sum of five million, four hundred ninety-seven thousand, five hundred sixty-nine and 10/100 dollars (\$5,497,569.10) from the motor vehicle fund or so much thereof as may be necessary be and the same is hereby re-appropriated for completing and maintaining work already under contract, or in progress and for new work on certain state roads hereinafter mentioned, the same being the unexpended balances of certain existing appro-

purchase to the whole, or any portion of the lot or tract, involved, and shall, unless appeal be taken from his determination to the superior court of the county in which the land is situated, proceed to sell such lands in accordance with his determination.

In case of appeal the court after a hearing de novo shall enter an order determining the rights of the parties to the appeal and the commissioner of public lands shall proceed to sell the lands in accordance with the court's determination.)

NEW SECTION. Sec. 2. There is added to chapter 79.01 RCW a new section to read as follows:

(1) This section shall only apply to:

(a) First class tidelands as defined in RCW 79.01.020;

(b) Second class tidelands as defined in RCW 79.01.024;

(c) First class shorelands as defined in RCW 79.01.028; and

(d) Second class shorelands as defined in RCW 79.01.032.

(2) Notwithstanding any other provision of law, from and after the effective date of this 1971 amendatory act, all tidelands and shorelands enumerated in subsection (1) owned by the state of Washington shall not be sold except to public entities as may be authorized by law, and shall not be given away.

(3) Tidelands and shorelands enumerated in subsection (1) may be leased for a period not to exceed fifty-five years: PROVIDED, That nothing herein shall be construed as modifying or canceling any outstanding lease during its present term.

(4) Nothing herein shall:

(a) be construed to cancel an existing sale contract;

(b) prohibit sale or exchange of beds and shorelands where the water course has changed and the area now has the characteristics of uplands;

(c) prevent exchange involving state-owned tide and shorelands.

Passed the House May 9, 1971.

Passed the Senate May 7, 1971.

Approved by the Governor May 21, 1971.

Filed in Office of Secretary of State May 21, 1971.

CHAPTER 218
[Engrossed House Bill No. 1046]
PUBLIC HOSPITAL DISTRICTS--
CITY OR TOWN INDEBTEDNESS FOR OPEN SPACE
AND PARK FACILITIES

AN ACT Relating to public hospital districts and the fiscal practices

ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

June 08, 2020 - 1:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53486-0
Appellate Court Case Title: Hood Canal Shellfish, et al., Petitioners v. Dept. of Natural Resources, Respondent
Superior Court Case Number: 15-2-00267-1

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