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**IN THE 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.

REPLY BRIEF OF IDDINGS PETITIONERS

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I. INTRODUCTION

The Department of Natural Resources (“DNR”) does not dispute that the Department of Public Lands (“DPL”) had authority to sell Therese Reidell the tidelands she asked to purchase and that *Spath v. Larsen* did not restrict DPL’s authority to do so. Because *Spath* applies only to lateral boundary disputes *between two established tideland owners*, this Court must first determine whether the State of Washington (“State”) retained any ownership interest in the purchased tidelands before considering how, if at all, *Spath* might apply.

The trial court erred when it held that *Spath* controlled the outcome of the parties’ dispute without first determining what tidelands, if any, DNR still owned after selling tidelands to Ms. Reidell. Had the trial court examined the deeds and historic record, it would have found the parties intended for DPL to sell Ms. Reidell all tidelands in front of her upland property, extending from ordinary high water to extreme low tide. The State retained no tideland ownership interest between her tidelands and those owned by James Murray. This error requires reversal of the summary judgment and remand to determine tideland ownership. While DNR attempts to reframe the dispute as one about deed interpretation, the parties’ competing claims concerning the meaning of the language in the Reidell

Deed are just the kind of inferential questions that are not resolvable on summary judgment.

DNR wrongly asserts that Ms. Reidell could not have purchased the tidelands in front of the School District's uplands. DPL had authority to sell Ms. Reidell all tidelands in front of her upland parcel between ordinary high water and extreme low tide. DPL also had authority to sell the tidelands west of the District's upland property. Tidelands can be "in front of" multiple upland owners, and more than one upland owner can have a preferential right to purchase the same tidelands. When Ms. Reidell sought to purchase tidelands, the School District did not object. The School District did not seek to purchase any tidelands in the area until decades later. DPL had no obligation to hold tidelands for the School District, and there is no evidence that it did so. DPL simply sold Ms. Reidell the tidelands that she requested.

The historic record confirms this. In her application, Ms. Reidell requested all tidelands in front of her uplands, including the oyster spit that she called a "small rise." The DPL staff report confirms that the tidelands to be sold included the spit, similarly referenced as a "small rise" that contained oysters. DPL confirmed that the sale excluded only the Murray Tidelands. DPL noted that there were no competing applications on file. Prior to the sale of the tidelands to the Iddings family, DPL reaffirmed the

tidelands sold to Ms. Reidell excluded only the tidelands previously sold to Mr. Murray. The Court should reject DNR's attempt to recharacterize this sale 70 years after the fact. Contemporaneous records establish the parties' agreement.

DNR's survey by Sitts & Hill relies upon equitable apportionment, but that does not apply here. The upland boundary that Sitts & Hill shows between the Iddings' property and DNR's property is irrelevant if equitable apportionment does not apply. Even if this Court determines that equitable apportionment does apply, the Sitts & Hill survey cannot be relied on to establish that boundary. The Sitts & Hill survey references the wrong upland deed to determine the tidelands purchased by Ms. Reidell. Material errors in the Sitts & Hill survey, identified in the sworn declarations by three expert surveyors, undermine the survey's accuracy, its tidelands delineation, and the delineation of the shared upland boundary between the Iddings and DNR. The trial court's failure to consider such issues in a light most favorable to Petitioners is an independent reversible error.

II. ARGUMENT

A. The trial court erred in failing to determine whether DNR owned any tidelands before applying *Spath*.

The trial court ruled that *Spath* sets forth the legal standards to determine the lateral boundaries in this case. But the trial court failed to take

the necessary first step of determining whether DNR owned *any* tidelands. DNR makes no effort to defend the trial court's decision to apply *Spath*. Instead, DNR argues that the deed must be interpreted in DNR's favor and that the deed unambiguously means what DNR say it does. This is wrong for the reasons explained below, but the key point here is that *Spath* does not apply to any of this analysis.

As DNR concedes, State tideland ownership is determined by the "subtraction method" rather than by *Spath*. DNR Response Br. at 5. This means that the boundaries of tidelands sold to private parties must first be determined in order to evaluate what tidelands remain in DNR ownership. DPL sold Ms. Reidell all tidelands between her uplands and those previously sold to Mr. Murray (now owned by Virgil Timmerman). DNR has no standing to request "equitable apportionment" because it does not own any tidelands within the disputed area.

Because DNR does not own any tidelands, *Spath* is irrelevant. Furthermore, because there were competing claims of deed interpretation involving material questions of fact bearing on what DPL sold Ms. Reidell, the lower court's determination of these issues on summary judgment was improper under *Kelly v. Tonda*, 198 Wn. App. 303, 393 P.3d 824 (2017). Because ownership issues must be determined before reaching *Spath*, this

Court should reverse and remand this case to the trial court to evaluate whether DNR retained any tidelands in the area.

B. Petitioners present the only interpretation of the deed that is reasonable and consistent with the extrinsic evidence.

Petitioners' interpretation is simple. The phrase "in front of" Ms. Reidell's uplands means exactly that: the tidelands in front of her uplands between ordinary high water and extreme low tide. This interpretation is consistent with the parties' intent as shown by contemporaneous records prepared by Ms. Reidell and DPL. DNR's interpretation, on the other hand, is flatly inconsistent with the parties' intent and the deed language. Whereas the deed establishes that Ms. Reidell's tidelands are "in front of" her uplands in Government Lot 5, DNR's interpretation would mean that the majority of her tidelands would actually be in front of her neighbor's upland property in Government Lot 6. Under DNR's interpretation, moreover, the tidelands sold to Ms. Reidell would *still* be "in front of" the School District's upland property to the west. DNR fails to explain how its interpretation can be reconciled with the common understanding of the phrase "in front of" or with common sense.

1. Extrinsic evidence is admissible to evaluate the deed.

Extrinsic evidence is admissible to determine the intent of a deed, regardless of whether the deed language is ambiguous. *Kelly*, 198 Wn. App.

at 312; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 743, 844 P.2d 1006 (1993); *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). Courts use the same traditional principles of contract law to evaluate tideland deeds as they do for other deed interpretation questions. *See* Petitioners' Opening Br. at 29–31. Indeed, this Court has previously performed a similar analysis of tideland deeds using extrinsic evidence. *See Barlow Point Land Co. v. Keystone Prop. I, LLC*, No. 46080-7-II, 2015 WL 5314196 (Wash. Ct. App. Sept. 9, 2015) (unpublished).

DNR seeks to avoid evaluation of the historic record by noting that deeds from the State must be interpreted in favor of the grantor. DNR Response Br. at 18–19. The cases DNR cites do not bear the weight that DNR seeks to place on them. Two involved the delineation of the waterward boundary of tidelands conveyed by the State and claims by the purchasers that the intent of the parties and/or deed language overrode legislative requirements or authorizations. *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 P. 349 (1910); *Davidson v. Washington*, 116 Wn.2d 13, 20, 802 P.2d 1374 (1991). Nothing similar is at issue here.

In *Davidson*, the court compared the owners' reliance on ambiguous contractual intent with the intent of the Legislature in expressly granting the Harbor Line Commission the authority to designate harbor lines, even after it had granted tidelands. *Id.* at 23–25. In holding for the State, the court held

that the Legislature granted the State the authority to later delineate harbor lines. *Id.* at 20.

Tideland purchasers in *Pearl Oyster Co.* contended that their deeds extended beyond mean low tide, which was the waterward boundary of tidelands established by the Legislature that could be sold by the State at the time of sale. *Id.* at 537–38. The court properly rejected that contention. Although DNR claims that *Pearl Oyster* holds that the Court should not look beyond the face of the deed, *Pearl Oyster* distinguished a previous holding in *Welsh v. Callvert*, 34 Wash. 250, 75 P. 871 (1904), on the basis that, in that case, “the character of the land was determined by the proper officer of the state before the deed issued, and that the state deed could not be collaterally attacked.” *Pearl Oyster*, 57 Wash. at 538. In other words, the court found it appropriate to consider extrinsic evidence when such evidence was not contrary to legislative authority. Not surprisingly, the court in both cases held that questions of intent relevant to deed interpretation could not override legislative intent associated with the delineation of the waterward boundary of tidelands.

These cases stand for the uncontroversial principle that State officials cannot sell property that they have no legislative authority to sell. This is very different from the current case, where there was no statutory or other legal limitation on the DPL’s sale to Ms. Reidell of the tidelands

between her uplands and extreme low tide.¹ *Spath* did not prevent DPL from establishing lateral tideland boundaries as agreed upon by the parties at the time of the sale to Ms. Reidell. *See Spath*, 20 Wn.2d at 517–18.

The controlling authority in cases where a State grant is not alleged to exceed the State’s statutory authority is *Strand v. State*, 16 Wn.2d 107 119–120, 132 P.2d 1011 (1943). That case held that the State could not change the terms of its agreement to sell tidelands years after the sale. *See also State v. Sturtevant*, 76 Wash. 158, 166, 135 P. 1035 (1913) (holding that, despite construction of deeds in favor of grantor state, a deed should not be construed contrary to State’s intent in making it and the construction must avoid unjust and absurd consequences). When tideland boundaries are not defined by statute, the boundaries are determined “under the general rules of law as construed by the courts.” *Id.* at 172.

In any case, general rules of deed construction should be consulted only if, after investigation of the deed and extrinsic evidence, the court remains in doubt as to the parties’ intent. Such rules may not be used to override the intent of the parties. *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 65, 277 P.3d 18 (2012); *Harris*, 120 Wn.2d at 745. As discussed further below, Petitioners present

¹ The same is true for *Chelan Basin Conservancy v. GBI Holdings Co.*, 190 Wn.2d 249, 263, 413 P.3d 549 (2018), which deals with a question of statutory construction of the Shoreline Management Act as opposed to a contract between the State and a private citizen.

the only reasonable interpretation of the deed that is consistent with the parties' clear intent to sell Ms. Reidell the tidelands in front of her property to extreme low tide. The Court does not need to look to general "tiebreaker" canons of construction. In the event that this Court finds that there is more than one reasonable interpretation or that the deed is ambiguous, it must remand the case to the trial court to determine those factual issues at trial. *Kelly*, 198 Wn. App. at 312.

2. DNR's interpretation of the Reidell Deed is nonsensical.

Petitioners interpret the Reidell Deed in the manner that anyone else would: the phrase "in front of" Ms. Reidell's uplands means exactly that. The words "in front of" mean the tidelands in front of her uplands, limited by the statutorily imposed uplands boundary (ordinary high water) and waterward boundary (extreme low tide), other than those tidelands previously sold to Mr. Murray. Not only is this the sole interpretation supported by the historic record; it is also the only sensible interpretation.

DNR would have this Court believe that Ms. Reidell actually purchased tidelands in front of her neighbor's uplands property to the west. DNR advances this strained interpretation of the plain language of the deed to resolve a hypothetical conflict between tidelands in front of both Ms. Reidell's uplands (directly north) and the School District's uplands (directly west). Tidelands can be in front of multiple uplands. Simply because the

School District *also* had a preferential right to purchase the tidelands does not negate that Ms. Reidell had a preferential right to purchase all tidelands in front of her uplands, extending to extreme low tide.

To interpret the language otherwise would lead to an absurd result. DNR claims that the plain language of the deed excludes any tidelands west of the School District because it does not explicitly mention “in front of” the School District upland property. As noted above, tidelands can be “in front of” two different uplands, and any reference to the School District in the deed would simply be duplicative. Further, given the geography in this case, almost *all* of the tidelands in question are both in front of Ms. Reidell’s uplands and west of the School District’s uplands. *See* DNR Response Br., Appx. E. Therefore, taking DNR’s argument to its logical conclusion, if the State could only sell the tidelands in front of Ms. Reidell’s uplands, with no overlap of the tidelands in front of the School District’s uplands, the tidelands sold to Ms. Reidell would be the miniscule amount of tidelands directly in front of her house. As described below, this is clearly not what either party intended. Further, the Sitts & Hill survey does not resolve this alleged conflict, because the tidelands granted to the Iddings based upon that survey would *still* include tidelands the School District could have purchased at the time. *Id.*

The State had a process to address this situation. It was required to

provide notice to all owners with a preferential right. The School District did not file an objection or seek to purchase the tidelands at that time.² DPL properly excluded the tidelands previously sold to Mr. Murray. Indeed, it is for this very reason that, in his order approving the sale, the Commissioner of Public Lands noted that there were “no conflicting applications . . .” CP 213. The hypothetical possibility of conflict does not invalidate the sale. DNR misses the point when claiming that the deed language does not support “any inference that the deed is conveying tidelands in front of anybody else’s tidelands.” DNR Response Br. at 17. The School District did not own any tidelands.

This is the critical difference between *Spath* and the current case. *Spath* deals with an *actual* conflict between two confirmed property owners, both of which have an uncontested property interest in tidelands sold by the State. It does not address how to determine underlying tideland ownership,

² The School District submitted an application to purchase tidelands 20 years after the sale to Ms. Reidell. CP 2487. The School District did not specify what tidelands it sought to purchase. As DNR acknowledges, the intention of the School District, which was not a party to the original transaction, is irrelevant to questions of ownership. *See* DNR Response Br. at 26. Further, it is entirely unclear whether the School District was aware at the time of its application what tidelands it was requesting. For example, it was unaware that the State had sold tidelands in front of the School District property to James Murray. CP 979. DNR did not deny the request based upon any claim of tideland ownership; rather, it denied the request because there was a contemplated upland exchange whereby the School District’s request would become irrelevant. *See* DNR Response Br. at 10 n.12. DNR’s self-serving hypothesis regarding communications with a third party 20 years after the sale should be disregarded in favor of the communications between Ms. Reidell and DPL at the time of sale.

particularly when the party alleging ownership has no paper title. *Spath* does not hold that the phrase “in front of” is a term of art that requires that tidelands be delineated pursuant to “equitable apportionment.” As *Spath* notes, the parties to a tideland sale may define lateral tideland boundaries as they see fit. *See* Petitioners’ Opening Br. at 25–28; DNR Response Br. at 21 (acknowledging that parties can reach alternative agreement); *see* also CP 3448. Even DNR’s expert acknowledged that *Spath* does not prevent parties from establishing lateral boundaries for tidelands that do not use “equitable apportionment” and that extrinsic evidence is relevant to determine if there was such an agreement. CP 382.

DPL confirmed what it sold to Ms. Reidell. Both DPL’s order and the deed confirm that DPL intended to convey “such tide lands as lie in front of a tract of uplands owned by Therese D. Reidell on November 18, 1946.” CP 216, CP 892. DNR acknowledges that this additional language was unique to the Reidell deed. DNR Response Br. at 13 n.15. But DNR claims that this language confirms that no tidelands west of the School District’s uplands were conveyed. DNR Response Br. at 17. That would contradict the extensive extrinsic evidence regarding what DPL intended to sell. Further, the deed itself does not identify any tidelands as excluded from sale. Excluded tidelands are clarified through extrinsic evidence, where DPL noted that Ms. Reidell’s application excluded tidelands previously sold

to James Murray. CP 188, CP 218. The deed *could* have, but did not, state that the sale to Ms. Reidell excluded tidelands to the west of the School District's property. Instead, DPL confirmed that there were no competing applications at the time of sale. CP 213.

DNR claims that the State had an obligation to protect the statutory preference rights of upland property owners. DNR Response Br. at 23. This ignores the fact that Ms. Reidell *was* an upland property owner who had a preferential right to purchase the tidelands. Further, DNR does not dispute that DPL had the right to sell tidelands to third parties that did not own adjacent uplands, and in fact did so in Dewatto Bay. *See* Petitioners' Opening Br. at 28.

DNR accuses Petitioners of trying to work backwards to justify the boundaries delineated in the survey performed by Terrell Ferguson. Not so. Both of the surveys done by Mr. Ferguson and by Robert Wilson started with an analysis of the language of the underlying deeds and extrinsic evidence. CP 1050–55; CP 710–18. In contrast, the Sitts & Hill survey ignores the extrinsic evidence associated with the sale, instead concluding that the tidelands must be delineated by “equitable apportionment.” CP 2540–41. Given that “equitable apportionment” pursuant to *Spath* is irrelevant to determining underlying ownership interests, the Sitts & Hill survey is similarly irrelevant to analyzing what tidelands were sold by DPL

to Ms. Reidell. Mr. Ferguson and Mr. Wilson are the only experts that analyze the deeds and extrinsic evidence relevant to the sale.

3. The historic record does not support DNR's interpretation of the Reidell Deed.

Unlike the tideland purchasers in *Pearl Oyster* and *Davidson*, Petitioners do not claim that the State sold tidelands to Ms. Reidell by implication. Rather, there was agreement between the DPL and Ms. Reidell as to the extent of tidelands sold, documented through over 13 years of correspondence between the parties. While there are numerous documents throughout this timeframe that evidence the tidelands sold, the following documents most clearly show that the tidelands sold are those depicted on the Ferguson survey refuting the Sitts & Hill survey delineation:

- a. Ms. Reidell's updated 1946 application described the requested tidelands to include the "small rise at some distance from silt-wash" where clams and oysters were present. CP 193. As shown in the photograph submitted with the DNR Response Brief, there is only one "small rise" anywhere near Ms. Reidell's uplands property, and it is located west of the School District property. DNR Response Br., Appx. D. DNR does not credibly dispute this or identify any other area that could be the "small rise" referenced in the application.
- b. Ms. Reidell submitted a map to DPL on November 18, 1946,

showing the tidelands “as applied for,” including all tidelands from in front of her uplands, extending beyond the headland. This included the tidelands west of the School District’s upland property. CP 198–200. Rather than correct her or tell her that DPL planned to sell her significantly less than she requested, Commissioner of Public Lands Otto Case replied: “It is likely that this map will be of considerable assistance to us in processing your application.” CP 202.

- c. In a May 20, 1947 letter to Pope & Talbot, Commissioner Case confirmed that Ms. Reidell’s application covered “the major portion of the vacated oyster reserve in front of the W1/2 of said lot 5.” CP 208. Under DNR’s interpretation, Ms. Reidell’s application would not cover the major portion of the western half of Government Lot 5. *See* DNR Response Br., Appx. A. In fact, over half of Ms. Reidell’s tidelands would be in front of *Government Lot 6. Id.* Further, they would not significantly overlap with Pope & Talbot’s leased area. CP 179.
- d. In DPL’s staff report presented to the Commissioner immediately prior to sale, Chief Engineer Raymond Reed states that Ms. Reidell’s proposed purchase includes the “small rise.” CP 210.
- e. DPL twice states that Ms. Reidell’s tidelands purchase was for the

tidelands in front of her uplands property except for those previously sold to James Murray. This statement was included in Ms. Reidell's application file by DPL engineer Raymond Reed (CP 188) and a letter from Commissioner Case to the attorneys for Ms. Reidell's estate (CP 218). Under DNR's interpretation, this language would be a complete *non sequitur*. There would be no reason for DPL to state (twice) that Ms. Reidell's tidelands excluded tidelands that (under DNR's interpretation) were located significantly east of her tidelands—indeed, *two* tidelands to the east of her tidelands, with State ownership in between. It would make no sense for DPL to state that the Murray Tidelands were excluded but fail to mention that State-retained tidelands immediately adjacent to and between Ms. Reidell's tidelands and the Murray Tidelands were also excluded. Again, DNR fails to offer any evidence supporting its erroneous interpretation, because all evidence is to the contrary.³

Far from DNR's assertion that the tidelands west of the School District property were "secretly included," the record shows that Ms. Reidell requested, and DPL sold her those tidelands (including the spit),

³ The correspondence from DPL shows that there was agreement between the parties as to the tidelands sold and that this was not just the subjective intent of Ms. Reidell. The fact that DPL refers to both the oyster spit and the lands previously sold by Mr. Murray, without mentioning the School District, indicates that DPL viewed "in front of" literally, just as Petitioners do.

excepting only the tidelands previously sold to Mr. Murray. Indeed, it would have been quite a shock to Ms. Reidell to learn that she purchased the tidelands as shown in the Sitts & Hill survey, which are *drastically* different from those she requested over 13 years of communications with the State.

DNR hypothesizes, without any evidence, that Ms. Reidell was not requesting any tidelands west of the School District's uplands because she did not request notification to the School District in her refiled 1946 application. The better explanation is that Ms. Reidell, being unfamiliar with State tideland purchasing requirements, simply forgot or assumed that the School District had already been notified based upon her previous application. Regardless of the reason, other documents in the record clearly refute DNR's guess as to her intent. As noted above, her 1946 application included a hand-drawn map showing that she intended to purchase the vast majority of tidelands west of the School District's uplands and she referenced the spit in her 1946 application as part of the tidelands she sought to purchase.⁴

⁴ DNR describes its alleged use of the disputed tidelands over the years. DNR Response Br. at 9–12. As DNR admits, these allegations are all disputed facts not properly before the Court on an appeal from summary judgment. DNR Response Br. at 9 n.10. Even if the alleged use were as described, that would establish only that the State started using the tidelands over *20 years* after the sale to Ms. Reidell. Regardless, the State's alleged use of the property is not relevant to determine the tidelands' underlying ownership. Any such claims relate to DNR's claim for adverse possession, which is not before this Court, and which was challenged by Petitioners below. *See* CP 123–135. Should this Court find in favor of Petitioners, much of this evidence, such as the taking of shellfish from the Iddings' property, supports Petitioners' inverse condemnation and conversion claims. CP 46–49.

4. There were no procedural errors in the sale of tidelands to Ms. Reidell. Even if there were, they would not invalidate the sale.

DNR claims that, because Ms. Reidell was not an upland owner with a preferential right, she was required to purchase the tidelands at an auction, and any sale of the tidelands west of the School District property without notice of the School District would be *ultra vires*. To the contrary, Ms. Reidell *was* the owner of the adjacent uplands, with a preferential right to purchase the tidelands between her uplands and extreme low tide. Even in cases where tidelands were purchased by third parties that did not have a preferential right, DPL did not sell them pursuant to auction. *See* Petitioners' Opening Br. at 28 (describing sale of Robinson tidelands, which were not sold by auction).

Ms. Reidell had also already requested notification to the School District as part of her original application. If DPL received an application to purchase tidelands that involved an abutting upland owner, the Commissioner of Public Lands was responsible for providing personal service of the notice to the abutting upland owner. Laws of 1927, ch. 255, § 121. If the property owner did not exercise his or her preference right to purchase the tidelands, the tidelands could be sold to the applicant. *Id.* There is nothing in the record to indicate that the School District objected to the sale. The failure of DPL to notify the School District cannot invalidate the

sale 70 years later. See *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123–25, 233 P.3d 871 (2010); *Metro. Park Dist. of Tacoma v. State, Dept. of Nat. Res.*, 85 Wn.2d 821, 825–28, 539 P.2d 854 (1975); *State v. Hewitt Land Co.*, 74 Wash. 573, 586, 134 P. 474 (1913).

Strand v. State involved the same situation: procedural errors raised by the State decades after a tideland sale. Those alleged errors did not invalidate the sale. 16 Wn.2d at 119–20. In fact, the court made the same determination when the State made a similar argument in litigation concerning the adjacent tidelands in the *Margett v. Armour* litigation cited by DNR. See Opening Brief of Appellant Virgil Timmerman, at 18; DNR Response Br. at 7–8.⁵

C. The Sitts & Hill survey contains fatal errors that preclude summary judgment.

Should this Court determine that “equitable apportionment” under *Spath* does not apply to this case, it does not need to consider upland boundaries, for they are relevant only to the extent *Spath* applies.⁶ Such a

⁵ DNR is also prohibited from now raising procedural violations associated with allegedly deficient notice. Any claim associated with lack of notice would need to have been asserted by the School District as the entity that should have received notice at the time of sale. Any applicable statute of limitations has long since passed. DNR cannot resurrect a stale claim merely because it obtained ownership of the School District property in 1983. *Gorman v. City of Woodinville*, 160 Wn. App. 759, 764, 249 P.3d 1040 (2011).

⁶ The tidelands sold to Ms. Reidell were based upon her uplands property defined as “southerly and westerly of the main creek running through said Lot 5 and having a frontage of 5.76 lineal chains” CP 216.

determination itself requires rejection of the Sitts & Hill survey, which is explicitly premised on using “equitable apportionment.” Petitioners and their experts also pointed out several other errors in the Sitts & Hill survey. The trial court’s failure to account for these errors in its decision resulted in an improper grant of summary judgment.

First, Petitioners raised challenges to the methodology used in the Sitts & Hill survey. With respect to “equitable apportionment,” Petitioners noted that the points Mr. McEvelly used to establish the “cove” in the Sitts & Hill survey were completely arbitrary, a concern reiterated by Mr. Timmerman’s expert surveyors.⁷ CP 797, CP 682–83, CP 715–16. The area apportioned by Mr. McEvelly is only one portion of the cove, and he identifies only one headland. This is inconsistent with the methodology described in *Spath*, where the boundaries of a cove “are the headlands on each side.” *Spath*, 20 Wn.2d at 513.

This has a drastic impact on the apportionment, as it excludes over two-thirds of Dewatto Bay uplands that should be included in apportioning tidelands. CP 682, CP 715–16. Indeed, Mr. Wilson questions whether “equitable apportionment” can even be performed if the cove is properly

⁷ DNR argues that the Iddings Petitioners did not raise these arguments below, but they were all discussed by Petitioners’ expert, Mr. Ferguson, or by Mr. Timmerman’s experts. The Iddings can raise issues on appeal that were raised by Mr. Timmerman below. RAP 2.5(a).

defined. CP 716.⁸ Mr. Wilson and Mr. Thalacker also opined that Mr. McEvelly established the wrong delineation of ordinary high tide, which is the line used to determine the upland frontage used for “equitable apportionment.” CP 682–83; CP 715–16. Errors in this calculation would significantly affect the pro rata amount of tidelands provided to each tideland owner.

Mr. McEvelly made another critical error in his delineation of upland boundaries: he used the wrong deed for his analysis. As DNR admits, the Iddings’ upland boundary is relevant (if at all) only in establishing the tidelands purchased by Ms. Reidell. That means that the only deed to uplands that may be considered is the one that conveyed the uplands to Ms. Reidell, for it describes what she owned when she purchased the tidelands. *See Reidell Deed and Mason County Auditor’s confirmation*, CP 1081–82, CP 872. Mr. McEvelly does not address this deed *at all*. CP 2542.

DNR claims that the difference in deeds is immaterial in that the later deeds reference a “gulch,” whereas Ms. Reidell’s upland deed

⁸ DNR asserts that Mr. Wilson lacks foundation to comment on issues involving the Iddings tidelands. This is a new evidentiary objection not previously raised below, and therefore should be disregarded. RAP 9.12. Further, Mr. Wilson provides a foundation for his opinions in his declaration, citing his surveying work in the area and review of both the Ferguson survey and associated deeds. CP 710–15.

references a “creek.”⁹ However, “creek” is the very term that Mr. Ferguson found to be determinative in the survey. CP 1054. The creek is also the key feature DPL relied upon to establish Ms. Reidell’s uplands at the time of its sale of the tidelands. CP 215. Mr. Ferguson’s declaration, which points out that Mr. McEvelly relied upon the wrong deeds, and therefore relied upon both improper and inaccurate deed language as compared to the key terms relied upon by Mr. Ferguson and DPL, is sufficient to overcome DNR’s motion for summary judgment. *Reinhold v. Renne*, No. 52915-7-II, 2020 WL 1158088 (Wash. Ct. App. Mar. 10, 2020) (unpublished). This error also resulted in the Sitts & Hill survey depicting significantly less upland frontage for the parcels owned by Ms. Reidell at the time of sale than what DPL determined at the time of sale. DPL concluded that Ms. Reidell owned 5.76 lineal chains of upland frontage. CP 216. The Sitts & Hill survey depicted only 3.94 lineal chains, or approximately 120 feet less.¹⁰ CP 2554.

Further, determination of the upland boundary was not properly before the trial court. DNR concedes that it was not properly pled. DNR Response Br. at 37. DNR claims that Petitioners were on notice regarding

⁹ Mr. McEvelly did not consider the different language in the Reidell Deed because he did not analyze the Reidell Deed in his survey or opinion. DNR’s rationalizations are not based upon their expert’s stated opinion.

¹⁰ A lineal chain is equivalent to 66 feet. *See Chain (unit)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Chain_\(unit\)#:~:text=The%20chain%20is%20a%20unit,chains%20in%20one%20statute%20mile](https://en.wikipedia.org/wiki/Chain_(unit)#:~:text=The%20chain%20is%20a%20unit,chains%20in%20one%20statute%20mile).

the upland boundary dispute *to determine the tideland boundaries*. But DNR did not ask to quiet title to the uplands property. The upland boundary may be considered in the context of determining the *tidelands boundaries only if “equitable apportionment” applies*, and it does not. DNR must amend its cross-complaint to seek adjudication of the uplands boundary if it wants to quiet title on that property. Petitioners can then present the information that they submitted to the trial court concerning their water rights to establish a claim for adverse possession, which would be relevant to a claim to quiet title to the uplands but was not relevant to DNR’s tideland ownership claims.¹¹

As discussed above and in Petitioners’ Opening Brief, the Ferguson survey, based upon the relevant deeds and full historic record, correctly delineates the tidelands sold by the State. Petitioners were entitled to summary judgment on this issue. To the extent that the Court determines that there is a material dispute between experts, the case must be remanded for consideration of these issues at trial. *See Kelly*, 198 Wn. App. at 310–11; *Lake Chelan Shores Homeowners Association v. St. Paul Fire & Marine*

¹¹ Although Petitioners may not claim adverse possession against the State, they may claim adverse possession based upon utilization of their water rights when the School District held the uplands in a proprietary capacity. *See Gorman v. City of Woodinville*, 175 Wn.2d 68, 74–75, 283 P.3d 1082 (2012); *Sisson v. Koelle*, 10 Wn. App. 746, 748–49, 520 P.2d 1380 (1974).

Insurance Co., 176 Wn. App. 168, 174–75, 313 P.3d 408 (2013); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 119–20, 11 P.3d 726 (2000).

D. DNR’s evidentiary objections are improper and should be disregarded.

DNR reiterates its objection to a February 2, 1956, letter submitted by Petitioners. As DNR admits, the trial court did not grant DNR’s motion to strike this evidence. DNR Response Br. at 43–44; CP 1662–69. DNR did not preserve this issue, as it failed to cross-appeal the lower court’s refusal to grant its motion to strike. In any case, an appellate court must examine all of the evidence presented to the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

DNR’s claims about this letter are nothing more than a prejudicial attempt to defame the Iddings family. Petitioners refuted DNR’s baseless accusations with an expert report submitted by a former Secret Service agent that evaluated the letter in question and established its authenticity. CP 1338–1596. The Court should disregard DNR’s objection.¹²

¹² DNR also objects to Petitioners’ Appendix A but does not explain how it is inaccurate. Petitioners’ Appendix A simply illustrates the parties’ claims. To the extent that it might be inaccurate in any respect (for example, if the scale is slightly off), the Court can rely upon the surveys submitted as the best evidence available of the actual boundaries.

E. DNR is not entitled to attorneys' fees.

There is no basis for an award of fees in an action to quiet title. *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895 (2003); *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001); *King Cty. v. Squire Inv. Co.*, 59 Wn. App. 888, 801 P.2d 1022 (1990). DNR claims it is entitled to damages and fees under RCW 79.02.300 for the Iddings' removal of shellfish. But this claim awaits adjudication by the trial court, where the trial court granted DNR's motion to bifurcate this issue from the ownership issues. CP 4440–41. Any award of attorneys' fees before this claim is adjudicated would deprive Petitioners of their constitutional right to a jury trial provided under the Seventh Amendment and must be rejected.

III. CONCLUSION

The trial court's determination that *Spath* was controlling authority prior to any determination of underlying tideland ownership was an error of law. So were the trial court's failure to identify what tidelands (if any) were retained by DNR and its failure to account for the significant errors in the Sitts & Hill survey. This Court should reverse the trial court's summary judgment and remand with instructions to grant summary judgment for Petitioners or, at a minimum, to conduct further proceedings to determine what tidelands the State sold to Ms. Reidell.

DATED this 8th day of July, 2020.

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