

NO. 99943-1

Court of Appeals No. 53486-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

HOOD CANAL SHELLFISH COMPANY, LLC, a Washington limited
liability company, MARLENE IDDINGS, LINDA SLATES,
LLOYD E. IDDINGS, RENEE HANOVER, and
VIRGIL G. TIMMERMAN,

Respondents.

PETITION FOR REVIEW

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 2. Did the Court of Appeals misinterpret *Spath* when it held DNR’s survey should not have delineated the lateral boundary of the abutting uplands parcel, and ruled DNR’s surveyor should have located only a “point” on the shoreline, failing to recognize that the “point” on the shoreline cannot be established without first determining the location of the upland boundary?

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I. INTRODUCTION

The State, through the Department of Natural Resources (DNR) and Department of Fish and Wildlife (DFW), has managed a public shellfishing beach in a cove on Dewatto Bay for decades. In 2013, members of the Iddings family who own uplands and tidelands west of the public beach began posting no trespassing signs along the public beach frontage, and they later sued DNR, claiming ownership of the entire adjacent public beach. DNR counterclaimed, and named other adjacent tideland owners because the lateral boundaries of the tidelines in the cove needed to be prorated in accordance with *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944). After the trial court granted DNR's motion and adopted DNR's survey, the Court of Appeals reversed several aspects of the trial court's ruling. But in doing so, it misinterpreted *Spath*, applied res judicata inconsistently with Supreme Court precedent, and held questions of material fact remain without analyzing whether those alleged factual questions were supported by competent evidence or materially impacted the outcome of DNR's survey. The errors by the court enable private owners to encroach on a popular public shellfish beach in a region where most accessible tidelands with healthy shellfish populations are in private ownership.

II. IDENTITY OF PETITIONER

Petitioner is the Department of Natural Resources.

III. CITATION TO COURT OF APPEALS DECISION

DNR seeks review of *Hood Canal Shellfish Co. v. Department of Natural Resources*, No. 53486-0-II (filed June 2, 2021). *See* Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

4. Did the Court of Appeals decision conflict with *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978), when it held DNR is barred by res judicata from challenging the western lateral boundary of Timmerman’s tidelands because DNR allegedly could have raised the issue in a 1960s quiet title action that involved only superiority of title between competing claimants?
5. Did the Court of Appeals misinterpret *Spath* when it held DNR’s survey should not have delineated the lateral boundary of the abutting uplands parcel, and ruled DNR’s surveyor should have located only a “point” on the shoreline, failing to recognize that the “point” on the shoreline cannot be established without first determining the location of the upland boundary?
6. Did the Court of Appeals err in reversing summary judgment adopting DNR’s proposed survey when no party offered competent evidence raising a material question of fact disputing DNR’s survey?

V. STATEMENT OF THE CASE

A. Factual Background.

When Washington became a state in 1889, it accepted sovereign ownership of “the beds and shores of all navigable waters.” 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). DNR and its predecessor entities sold many tidelands into private ownership until further sales were statutorily prohibited in 1971. RCW 79.125.200.

Dewatto Bay is a small embayment on the east shore of Hood Canal. Much of the bay was designated as an oyster reserve in 1895. CP 2517. When tidelands were designated as oyster reserves, laws expressly prohibited their sale. Laws of 1891, ch. 150, §§ 1-2. Notwithstanding this statutory prohibition, DNR inexplicably sold a tideland parcel in the bay to Mr. Murray in 1903, which parcel is now co-owned by Mr. Timmerman.¹ That parcel lies northeast of the public beach.

The Commissioner of Public Lands vacated the Dewatto Bay oyster reserve in 1929. CP 2519. This action cleared the way for other tidelands in the bay to be sold legally. Abutting upland owners held a statutory preference right to purchase tidelands in front of their uplands, and if such owners did not exercise that right, the lands could be auctioned to the highest bidder. Laws of 1927, ch. 255, § 121; Laws of 1929, ch. 224, § 1.

DNR sold numerous tidelands to abutting upland owners along the south shore of Dewatto Bay, including a sale to Ms. Therese Reidell in 1947. The Iddings are successors to Ms. Reidell's title.² A simplified version of DNR's survey of the uplands and tidelands showing the current

¹ The Court of Appeals suggests DNR may have sold multiple parcels within the existing oyster reserve. Slip op. at 4. This statement is not supported by the record.

² The Reidell upland parcel was subdivided into two parcels, both of which are owned by members of the Iddings family. The Court of Appeals suggested Hood Canal Shellfish Company also owns an interest in "the Reidell upland parcel." Slip op. at 8. DNR does not believe this statement is supported by the record.

ownership is attached as Appendix B. The Iddings' tideland parcel lies west and south of the public beach. East and north of the Iddings' uplands is an upland parcel formerly owned by the Mason County School District, which upland parcel was exchanged to DNR in 1982. CP 2490. The public beach abuts the former school district uplands.

Both the Murray and Reidell deeds used a common method for state tideland sales, in that the legal description does not delineate the boundaries of the tidelands, beyond saying that the deeds convey tidelands "situate in front of, adjacent to or abutting upon" another descriptor. The 1903 Murray deed conveyed tidelands adjacent to a defined segment of the meander line, a federal survey line along the shoreline. CP 2496. The 1947 Reidell deed conveyed tidelands adjacent to her described uplands. CP 2502.

In the 1960s, Florence Margett, a successor to the Murray tidelands, initiated a quiet title action over the tideland parcel. CP 2119-27. Margett named DNR as the original seller of the Murray parcel, because DNR took the position that the 1903 deed was ultra vires and that the State still held title to the parcel. CP 2130. The parties ultimately settled their claims with one of the defendants, Robert Hemphill, who paid DNR \$1000 to quitclaim the Murray parcel to him, and paid other individuals including Margett to yield their interests. CP 2133-37. None of the *Margett* litigation documents in the record suggest the case raised any questions about where the parcel

boundaries were located, nor is there evidence any land survey was conducted as part of the case. CP 2119-41.

From at least the 1970s onward, DNR and DFW continuously and actively managed the public shellfish beach. CP 3446-47. The beach, under the name “West Dewatto: DNR Beach 44A,” appears in a DFW regulation regarding clam harvests. *See* WAC 220-330-110(125). Although evidence suggests DNR may have marked the lateral boundaries of the public beach in 1975 and advertised it in a public brochure, CP 2426-31; 2433, no declarant or surveyor was able to locate current evidence or locations of those lost 1975 markers.

In 2013, members of the Iddings family began posting “no trespassing” signs along the shoreline of the public beach. After being confronted by DNR, the family formed the Hood Canal Shellfish Co., transferred most of their tideland ownership interests to the company, and sued DNR in 2015 claiming title to the entire public beach, up to and wrapping around the western edge of the Timmerman tideland parcel.

DNR hired an outside surveyor who determined that West Dewatto formed a prominent cove shaped very much like Sequim Bay, which was the subject of tideland boundary litigation in *Spath*. *Spath* ruled that when the lateral boundaries of tidelands are not specifically delineated in the deed and the shoreline is curved, the lateral boundaries need to be angled

proportionately using a method called “proration.” *Spath*, 20 Wn.2d at 524-25. DNR’s surveyor surveyed the Iddings and Timmerman parcels and prorated the lateral boundaries of all the parcels. CP 2554-55. The surveyors for both the Iddings and Timmerman rejected application of proration to their clients’ tidelands, and both claimed no State ownership existed between their parcels. CP 147; CP 723-24.

B. Proceedings Below.

Multiple parties filed competing partial motions for summary judgment to resolve the boundary disputes. The record spanned over 3000 pages of material and 63 filed pleadings. CP 2161. Arguments filled an entire day. The trial court granted DNR’s motion for summary judgment, finding *Spath* controlled the resolution of the lateral boundary disputes, and adopted DNR’s survey. CP 2156-62; 2175-76.

The Iddings and Timmerman filed an interlocutory appeal.³ The Court of Appeals affirmed application of *Spath*, but found that Timmerman’s western lateral boundary had been fixed through res judicata by the 1960s *Margett* litigation, that DNR’s surveyor should not have delineated an upland lateral boundary of the Iddings parcel, and that questions of fact remained as to the correctness of the State’s survey.

³ The competing tideland claimants have unresolved trespass and damages claims against each other, depending on who prevails on title.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals conflicts with Supreme Court *res judicata* precedent. RAP 13.4(b)(1).

The superior court considered and rejected Timmerman’s *res judicata* and collateral estoppel arguments, and found that DNR’s survey properly prorated the lateral boundaries of all the tideland parcels in the cove, including Timmerman’s. CP 2161. The Court of Appeals reversed, finding that the 1960s *Margett* litigation—which involved only superiority of title and did not involve any boundary claims or surveys—thereafter “fixed” the undesignated lateral boundary and precluded DNR from applying proration to Timmerman’s boundary. The court’s holding forces DNR to accept Timmerman’s new 2018 survey as a matter of *res judicata*. Indeed, under the Court of Appeals’ application of *res judicata*, Timmerman’s surveyor could have seemingly drawn the lateral boundary in *any fashion whatsoever*, and DNR would be forced to accept it without challenge. But this holding directly conflicts with *Kawachi*.

Some courts, as the Court of Appeals did here, have suggested that *res judicata* precludes re-trying issues “that ‘could have’ or ‘might have’ been asserted in earlier litigation, as if that simpler criterion can substitute for the four required identities.” *Fortson-Kemmerer v. Allstate Ins. Co.*,

198 Wn. App. 387, 393, 393 P.3d 849 (2017). This Court rejected this oversimplification over 40 years ago in *Kawachi*, which explained in detail:

While it is often said that a judgment is res judicata of every matter which could and should have been litigated in the action, *this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant*. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. 50 C.J.S. Judgments s 668 (1947); 46 Am.Jur.2d Judgments s 404 (1969). A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.

Kawachi, 91 Wn.2d at 226 (emphasis added). The Court of Appeals below applied res judicata in the exact manner that *Kawachi* said it should *not* be.

To help determine whether an issue was properly part of an earlier matter, courts have long examined the “concurrence of identity” of the four factors “(1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.” *Weaver v. City of Everett*, 194 Wn.2d 464, 480, 450 P.3d 177 (2019) (quoting *N. Pac. Ry. Co. v. Snohomish Cty.*, 101 Wash. 686, 688, 172 P. 878 (1918)). The party asserting res judicata carries the burden of proof, and appellate review of the issue is de novo. *Fortson-Kemmerer*, 198

Wn. App. at 393. The third and fourth elements are met here. The Court of Appeals erred in finding that Timmerman proved the first and second issues.

1. The causes of action are not identical.

Washington courts apply the following four factors to determine whether two causes of action are identical:

(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (alterations in original, internal quotations omitted). None of these factors are met here.

First, Timmerman's superiority of title (the subject of *Margett*) is not destroyed or impaired by determining where the sideline lateral boundary of his tidelands should be located on the beach. Designating the lateral boundary on the beach does not alter a single word in Timmerman's deed. Second, the evidence presented in the two actions is not substantially the same: In *Margett*, the evidence referenced in the complaint consisted of claims to deeds by various real estate transactions. CP 2119-27. In the present case, the evidence consists primarily of recently conducted land surveys. Third, the two suits do not involve infringement of the same right: In *Margett*, the right in question was the validity of real property deeds

amongst multiple potential competing claimants, while in the present action the question is how to delineate the lateral boundary of the tideland parcels between multiple adjoining tideland owners in a cove where that lateral boundary is not specified in the legal description of the deeds. And fourth, the two suits do not arise out of the same transactional nucleus of facts: In *Margett*, the transactional nucleus of facts consisted of the chain of title to multiple parcels, and which claimants had the strongest claim of ownership to those parcels based upon various transactions. In the present case, the transactional nucleus of facts consists of a boundary dispute between adjacent tideland owners in a cove, resolved by applying *Spath* and prorating the lateral boundaries in a land survey.

2. The subject matter is not the same because *Margett* did not involve any boundary dispute.

The Court of Appeals primarily cited and relied upon one case, *Karlberg v. Otten*, 167 Wn. App. 522, 280 P.3d 1123 (2012), to support its claim that *Margett* involved the same matter. *Karlberg* has no comparison to the current litigation. In *Karlberg*, a landowner whose fence encroached about 82 feet onto a neighbor's property claimed adverse possession, but expressly limited its claim to just the first 45 feet towards the fence. After trial, the judge found that the claimant had established adverse possession to the full 82-foot area, but limited relief to the first 45 feet, as requested by

the claimant. *Karlberg*, 167 Wn. App. at 527. The claimant then initiated a second action seeking to quiet title to the remainder of the 82 feet. *Id.* at 534. *Karlberg* held, “[w]here judgment in the first action determines the boundary line between two adjoining properties, the judgment is preclusive of future attempts to move the boundary line in one direction or another.” *Id.* at 539-40.

Karlberg does not support the Court of Appeals here because *Margett* did not address the lateral boundary of Timmerman’s tideland against the adjacent public beach, or any boundary question whatsoever. DNR does not seek to alter the legal description of Timmerman’s property that was quieted in *Margett*, but seeks to locate a lateral tideland boundary that is not articulated in Timmerman’s deed.

3. The subject matter is also not the same because the lateral boundary dispute was not ripe in the 1960s.

No evidence in the record suggests that Timmerman’s predecessors had ever attempted to mark the western lateral boundary of their tidelands against the adjacent public beach at the location proposed in Timmerman’s December 2018 survey. As a result, no dispute existed in the 1960s over an unmarked boundary, and DNR had no basis to raise the claim. When an issue is not ripe during an earlier litigation, the subject matter of the cases differ and *res judicata* does not apply. *Weaver*, 194 Wn.2d at 481.

In conclusion, the Court of Appeals erred by holding that DNR “had the opportunity to litigate” the lateral boundary issue in *Margett*, and is thus precluded by res judicata from questioning Timmerman’s 2018 survey. Its holding conflicts with the express admonition in *Kawachi* that courts should not apply res judicata to ban every possible cause of action that is “joinable,” but not identical. *Margett* did not address how to draw the property boundaries, and the lateral boundary dispute was unripe. As a result, the Court of Appeals decision also conflicts with *Weaver*. By applying res judicata, the court precludes *Spath* from applying to Timmerman’s western boundary, causing inconsistencies in how the tideland boundaries in the cove get equitably prorated.

B. The Court of Appeals conflicts with *Spath* when it held DNR’s surveyor should not have established the upland lateral boundary. RAP 13.4(b)(1).

The superior court granted DNR summary judgment as to its survey of the tideland boundaries in the cove, which survey necessarily included delineation of the Iddings’ upland boundaries. Because the Reidell tidelands are legally described as “in front of, adjacent to or abutting upon” Reidell’s uplands, the lateral boundaries of those uplands must first be established, because the end points where those lateral upland boundaries intersect the shoreline become the starting points for drawing the lateral boundaries of the tidelands. If the lateral upland boundaries are not first properly

established, then the lateral tideland boundaries could not be properly delineated. The Court of Appeals held that the trial court erred in adopting the upland boundary in DNR's survey for two reasons, which conflicts with *Spath* about how to apply proration, and with *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 444 P.2d 701 (1968), regarding whether DNR properly raised the boundary issue below.

1. DNR properly raised the upland boundary issue in its pleadings filed in summary judgment.

The Court of Appeals concluded DNR did not seek to quiet title to the upland boundary, and held that an argument not raised in a pleading is not before the trial court CR 56(c). Slip op. at 30 (citing *Ferrin*, 74 Wn.2d at 285). But this statement conflicts with the language in *Ferrin* and is further contradicted by the record. In *Ferrin*, a party raised a new issue for the first time on *appeal* of an adverse summary judgment, and the court found the argument had not been properly "raised in the pleadings, *depositions or affidavits submitted to the trial court on the motion for summary judgment.*" *Ferrin*, 74 Wn.2d at 285 (emphasis added). Here, however, DNR *did* raise this issue in its summary judgment pleadings.

DNR did not seek to quiet title to the upland boundary in its answer to the Iddings' complaint because DNR did not know the Iddings were claiming to own a portion of DNR's adjacent uplands. CP 1-22. At the time

the Iddings first sued, they supplied a survey from 2014 showing only one disputed tideland boundary line, and not showing the eastern lateral boundary of the upland property. CP 86.

DNR's surveyor, following *Spath*, surveyed the upland boundaries of the Iddings' parcel after reviewing the upland deed and submitting a final survey in 2016. CP 2542, 2554-55, 2561-75. DNR had no need to amend its answer to the lawsuit at that time, because it believed its surveyor properly delineated the upland boundary, and DNR was still not aware of a competing claim from the Iddings. The Iddings first raised the upland boundary dispute in August 2017, when their surveyor provided a new survey drawing the lateral upland boundary for the first time. CP 147-49.

Once the Iddings asserted a contrary upland boundary in 2017, the parties had a thorough opportunity to conduct discovery and depose each other's surveyors about both the tideland *and upland boundaries*. The parties then filed competing cross-motions for summary judgment in early 2019, and they briefed the upland boundary issue, supported with declarations and excerpts of depositions. DNR expressly sought to resolve the upland boundary dispute in its summary judgment pleadings, to which the Iddings replied. CP 3451 (DNR Motion, Statement of Issues, “#4. Whether the survey . . . accurately establishes the upland boundary between the School Property and the L. Iddings Property.”); CP 3463-68

(argument section of DNR Motion); CP 3320-22 (argument section of DNR reply); CP 812-13 (Iddings' argument in response on the upland boundary issue).⁴ Even though the upland boundary dispute was not mentioned in the complaint or answer, the issue was nonetheless briefed, argued and decided on summary judgment by the implied consent of the parties as allowed under CR 15(b). *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

The Court of Appeals ruling below conflicts with *Ferrin* when it asserts the issue was not properly raised in superior court, because DNR *did* thoroughly brief and argue the upland boundary issue in its summary judgment pleadings, in accordance with the quoted language from *Ferrin*.

2. The lateral upland boundary must be established to prorate the tidelands.

The Court of Appeals' misinterpretation of *Spath* and instruction that the lateral upland boundary should not have been determined yields a logical impossibility that precludes a proration case from being properly resolved. The court cited to a portion of *Spath* stating that the "*course or courses of the boundaries of the upland properties should be disregarded*" to conclude that the State's survey was "flawed" because "it defined the

⁴ After briefly positing that the upland boundary issue was not properly raised, the Iddings nonetheless briefed the substance of the dispute. Furthermore, the Iddings' cross-motion for summary judgment asked the court to adopt their 2017 survey, which incorporated their competing lateral upland boundary. CP 136, CP 147-49.

course of the boundary between the upland parcels.” Slip op. at 31 (emphasis in original). The Court of Appeals concluded that “only the *point* on shore along the government meander line need to be determined; the whole of the upland boundary is not at issue and the trial court need not consider the portion of any survey defining the whole of the upland boundary.” *Id.*

The Court of Appeals misconstrues *Spath's* statement about the upland boundaries. *Spath* stated that the upland boundaries should be disregarded in the context of its core holding about how to prorate tideland boundaries in a cove: In proration, the *angles* of the lateral upland boundaries to the shoreline must be disregarded when plotting the angles of the lateral tideland boundaries. When *Spath* said the upland boundary is “not at issue,” and that only the point where that boundary hits the shoreline matters, the court was dealing with a case where there was apparently *no dispute over the location of the upland boundary*. But in this case, there is an upland dispute, triggered by the need to apply proration after the Iddings claimed to own the public beach, and that upland dispute *must* be resolved to solve the proration of the cove. If the upland boundary is not correctly delineated here, then the surveyor cannot determine the necessary starting point on the shoreline to apply proration properly to the tidelands.

Indeed, in *Spath*, the survey produced on remand specifically delineated the upland boundaries that the Court of Appeals concluded did not need to be determined here. That survey, obtained from the Clallam County Superior Court file in State Archives, and attached as Appendix C, delineates the lateral upland boundaries of all the parcels at issue in that case, demonstrating that the Court of Appeals erred in holding that DNR’s survey was flawed by including such lines.⁵

The Court of Appeals statements that “the trial court need not consider the portion of any survey defining the whole of the upland boundary,” and that DNR’s surveyor just should have found a point on the shoreline, presumes that such point can be located independent of the course of the lateral upland boundary. But it cannot. The shoreline point can only be located by first delineating the lateral upland boundary, because it is the course of that boundary line that creates the necessary starting point on the shoreline. Because the tideland boundaries in the West Dewatto cove must be determined through proration, as properly recognized by the Court of Appeals, the lateral upland boundaries must necessarily first be established

⁵ The *Spath* survey is not in the record below because DNR did not anticipate the Court of Appeals’ novel holding that it is legally erroneous for a surveyor conducting a tideland proration to fix the lateral upland boundary. The Court can take judicial notice of the survey as a court record from the *Spath* litigation. See *Eckstrom v. Hansen*, 4 Wn. App. 2d 580, 584 n.1, 422 P.3d 926 (2018). This survey is not being offered for a material question of fact, but for a proper legal understanding of *Spath* to contrast with the Court of Appeals’ erroneous holding. One certified copy, and one annotated version, are included.

to find the points on the shoreline. If a dispute arises between the parties as to the proper location of the upland boundaries, as has occurred in this case, that dispute can and must also be resolved as part of the proration process. As discussed in the previous section, that upland boundary dispute was thoroughly raised, briefed, and argued in summary judgment.

By holding that DNR's surveyor erred in locating the lateral upland boundary, and that the trial court should not have considered the issue, the Court of Appeals places DNR in an impossible quandary—how can DNR proceed on remand to further resolve the prorated tideland boundaries without the ability to first delineate the lateral upland boundary so as to establish the proper starting point on the shoreline? The Court of Appeals decision conflicts with *Spath* and review should be granted.

3. The superior court properly accepted the delineation of the lateral upland boundary in DNR's survey.

Because the Court of Appeals erroneously held that DNR's survey should not have established the upland boundaries, it never reached the Iddings' argument that they had raised questions of material fact as to the upland boundary so as to defeat summary judgment on that issue. The Iddings are unable to cite to a single page in the record proving that they raised any material questions of fact regarding the delineation of the lateral upland boundary. Instead, the dispute involves a legal question about which

geological feature the deed's legal description identifies as the property boundary. The interpretation of the legal description is a legal question capable of summary judgment.

The Iddings' surveyor interprets the legal description as placing the boundary along the edge of the creek. DNR's surveyor interprets the legal description as placing the boundary at the toe of the hill. Both surveyors submitted declarations and the parties submitted arguments over which interpretation best honors the language in the deed. No party raised genuine factual questions, such as where to designate the toe of the hill on the ground. Instead, the parties raised solely a legal question interpreting the deed language. On this record, no issue of material fact remained.

C. The Court of Appeals relied upon nonexistent evidence and speculation to reverse summary judgment adoption of DNR's survey, contrary to precedent. RAP 13.4(b)(1).

Iddings' and Timmerman's surveyors both opposed proration in this case and rejected the existence of any state beach. Timmerman's survey used a "bisecting the angle points" method to set the western lateral boundary, CP 679, which method was expressly rejected by *Spath* in a cove. *Spath*, 20 Wn.2d at 524; see CP 2544-45. Because both parties based their cases on *Spath* not applying, their surveys grounded in an incorrect legal methodology do not raise genuine questions of material fact to impugn DNR's proration survey.

The Iddings included a heading in one summary judgment brief stating material questions of fact existed over DNR's survey, CP 811, but every declaration offered in support was limited to the legal question of whether to apply *Spath*, and the separate legal question of whether the upland boundary was the creek or the toe of the hill. The Court of Appeals asserts Iddings' surveyor raised "doubts" about the accuracy of DNR's survey, but it failed to cite the record in support of this assertion.

Timmerman's surveyors surveyed his parcel only, and they did not survey the rest of the cove. CP 3336-43; 3355-56. Thus, they lacked competence to offer any opinions about DNR's proration of the rest of the cove. One of Timmerman's surveyors offered minor criticisms of DNR's survey but *never alleged that any of those criticisms would have caused a material alteration of DNR's survey lines*, and DNR's survey *aligned with Timmerman's survey but for the lateral boundary angle*, proving no material factual dispute exists. The Court of Appeals relied upon mere speculation and incompetent opinion testimony when it reversed summary judgment adopting DNR's survey, violating *Seven Gables Corporation v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

VII. CONCLUSION

DNR requests the Court grant this Petition for Review under RAP 13.4(b)(1).

RESPECTFULLY SUBMITTED this 2nd day of July, 2021.

ROBERT W. FERGUSON
Attorney General

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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 July 2nd, 2021, as follows:

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

DATED this 2nd day of July, 2021, at Olympia, Washington.

s/ Danni K. Egen Friesner
Danni K. Egen Friesner
Legal Assistant

APPENDIX A

June 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HOOD CANAL SHELLFISH COMPANY,
LLC, a Washington limited liability company;
MARLENE IDDINGS, LINDA SLATES,
LLOYD E. IDDINGS, and RENEE
HANOVER, individuals,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT
OF NATURAL RESOURCES,

BK LOVELY, LLC, a Washington limited
liability company; STEVEN LOVELY,
individually, SUSAN LOVELY, individually,
and the marital community composed thereof;
VIRGIL G. TIMMERMAN, individually,
JESSIE DORENE TIMMERMAN,
individually and the marital community
composed thereof; PHILLIP PAUL ELDER,
individually; LISA MARLENE IVEY,
individually; TIMOTHY L. CLEMENTS,
individually, PAMELA J. CLEMENTS,
individually, and the marital community
composed thereof; PETER F. MARTINEZ,
individually, NANCY D. MARTINEZ,
individually, and the marital community
composed thereof; MICHAEL GRIFFITH,
individually, SUE A. GRIFFITH, individually,
and the marital community composed thereof;
LAURE A. IDDINGS, individually, and the
marital community of LAURE A IDDINGS
and LLOYD E. IDDINGS; EARL J.
IDDINGS, individually; CARON DENOTTA,
individually; and D.D. DENOTA, LLC, a
Washington limited liability company,

Respondents.

No. 53486-0-II

Consolidated With

No. 53616-1-II

UNPUBLISHED OPINION

WORSWICK, J. — Hood Canal Shellfish Company (HCSC), Virgil Timmerman, and other owners of Dewatto Bay tidelands appeal an order granting summary judgment to the Washington Department of Natural Resources (DNR) in a property dispute concerning those tidelands.¹ The trial court ordered that the tidelands be equitably divided according to a survey ordered by DNR. HCSC and Timmerman each own separate tideland parcels on opposite sides of the tidelands DNR claims: Timmerman to the northeast and HCSC to the west and south. The equitable division ordered by the trial court reduces the size of HCSC and Timmerman’s tideland claims as well as HCSC’s upland parcel.

Timmerman argues that the trial court erred when it granted DNR summary judgment because (1) DNR’s claim is barred by res judicata; (2) DNR waived its claim to any portion of Timmerman’s tidelands in prior litigation; (3) DNR should be equitably estopped from asserting a claim to any portion of Timmerman’s tidelands; (4) DNR’s claim to the disputed tidelands is barred by laches; and (5) that general equitable principles should not be used to divide the tidelands. HCSC incorporates Timmerman’s arguments, and also argues that (6) it is entitled to summary judgment on its quiet title claim against DNR based on evidence extrinsic to its tideland deed; and (7) that the survey ordered by DNR was fatally flawed and improperly reapportioned HCSC’s upland property.

¹ We refer to Hood Canal Shellfish Company and other owners of Dewatto Bay tidelands collectively as HCSC. Because Timmerman filed a separate brief with distinct arguments, he is referred to separately.

First, we hold that DNR’s claim on Timmerman’s parcel is barred by *res judicata*. Second, we hold that equitable division of the tidelands is appropriate as a matter of law but that genuine issues of material fact exist as to the boundaries set by DNR’s survey. Finally, we hold that the trial court erred when it adopted DNR’s survey results as to the extent of HCSC’s upland plot. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

FACTS

I. HISTORICAL BACKGROUND

This dispute has its roots in Washington’s tideland ownership and grant system. The Washington State Constitution, adopted in 1889, contains a declaration of State ownership over all submerged lands in navigable waters up to and including the line of ordinary high water. CONST. art. XVII, § 1. This declaration divested upland owners of all riparian rights, including the right of access to deep water. *Eisenbach v. Hatfield*, 2 Wash. 236, 240-41, 26 P. 539 (1891). The State was not, however, prohibited from subsequently selling such submerged lands and rights. *Davidson v. State*, 116 Wn.2d 13, 16, 802 P.2d 1374 (1991). The State’s first Legislature “authorized the sale of tideland and shoreland and provided a purchase preference to the abutting upland owners.” *Davidson*, 116 Wn.2d at 16; LAWS OF 1889–90, ch. 14, p. 431.

Between 1889 and 1971, the State, through DNR and its predecessor agencies, including the Department of Public Lands (DPL), sold tidelands into private ownership. *See generally* Chapter 79.125 RCW (aquatic lands—tidelands and shorelands). The State conveyed tidelands by deeds that usually described the abutting upland parcel. Deeds would typically describe tidelands as “in front of” or “abutting” the described upland parcel, without clearly defining the

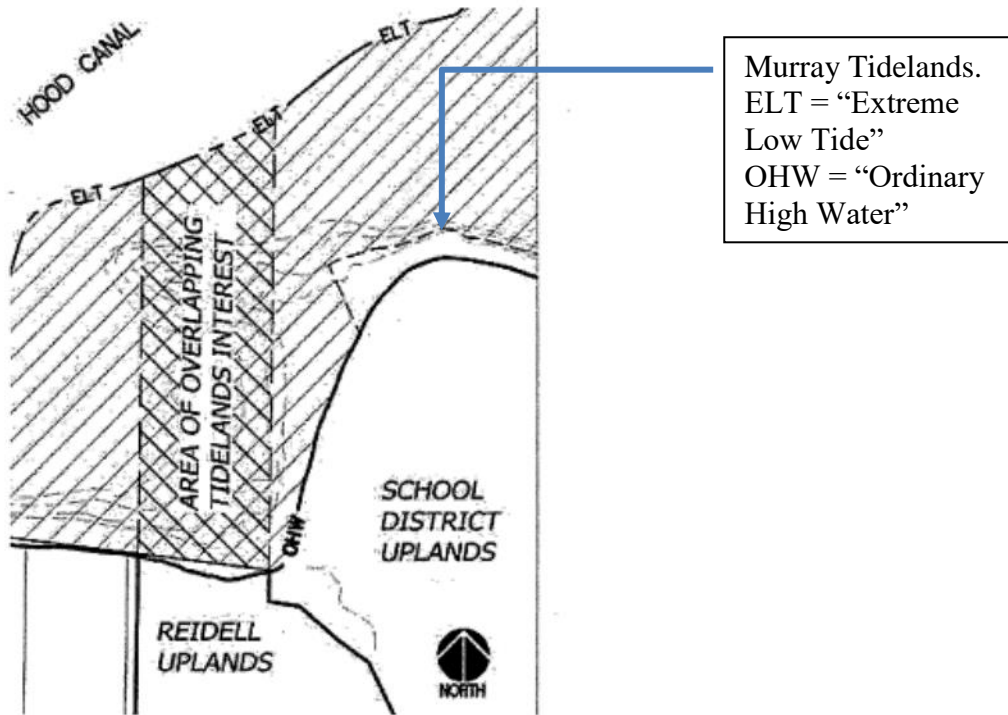
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lateral boundaries. Clerk's Papers (CP) at 404. The State rarely used metes and bounds to describe tideland deeds. In 1971, the Legislature halted the State's sale of tidelands. LAWS OF 1971, 1st Ex. Sess. Ch. 217, § 2; RCW 79.125.200. Tidelands not sold were retained by the State. *See* CONST. art. XVII, § 1. To determine remaining State tidelands, DNR subtracted the parcels previously sold based on descriptions in the deed to determine those lands remaining in State ownership.

Beginning in 1891, the State designated certain tidelands as oyster reserves to preserve and grow natural oyster beds. LAWS OF 1891, ch. 150, § 1. As Washington's shellfish industry changed, the State began vacating oyster reserves that it determined no longer required protection. LAWS OF 1929, ch. 224, § 1. After an oyster reserve was vacated, the State could sell the tidelands. *Id.* The statute providing the procedures for the sale of tidelands gave the owners of abutting uplands a preferential right to purchase the tidelands abutting their upland parcels. LAWS OF 1927, ch. 255, § 121.

The State designated Dewatto Bay an oyster reserve in 1895 and vacated it in 1930. A 1930 survey of Dewatto Bay shows the entire southern and eastern halves of the bay as "Reserve No. 2 Area." Suppl. CP at 2517. Regardless of the reserve designation, the record shows that the State deeded some parcels of tidelands within the Dewatto Bay reserve before it was vacated.

II. TIMMERMAN’S CLAIM: THE MURRAY TIDELANDS



CP at 380.

In 1896, James Murray—Timmerman’s predecessor in interest—owned the uplands in the eastern portion of Government Lot 5 on the south side of Dewatto Bay. Government Lot 5 forms a headlands that protrudes north into the bay, as shown in the portion marked “School District Uplands” in the image above.² CP at 690. Government Lot 5 also includes the Reidell uplands, which HCSC now holds title to and will be described in Part III, *infra*.

² Mason County School District owned the remainder of the headlands and is DNR’s predecessor in interest. The school district transferred the upland parcel to DNR in 1982.

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In 1903, despite the statutory ban on the sale of oyster reserves, the State sold Murray a parcel of second class tidelands.³ The deed conveyed to Murray “All tide lands of the second class owned by the State of Washington, situate in front of, adjacent to or abutting upon [a] portion of the United States government meander line.” CP at 694. The deed did not convey the tidelands in association with an upland parcel, but instead defined the tidelands with calls along the government meander line in detail by angles and chain lengths.

Under the laws in effect at the time the State conveyed the tidelands to Murray, tidelands extended waterward only down to mean low tide. LAWS OF 1897, ch. 89, § 4. In 1903, the lateral boundaries of the Murray tidelands would have been determined from using the angles and limiting points listed in the deed along the meander line and extending perpendicular lines from those limiting points to the waterward limit. Thus, the Murray tidelands occupy a narrow strip wrapping around the northern tip of the headlands between ordinary high water and mean low tide.

In 1966, Timmerman’s predecessor in interest sued to quiet title to the Murray tidelands. CP at 755 (Claim in a Quiet Title Action, *Margett v. Armour*, Mason County Super. Ct. No. 9217, July 23, 1966) (*Margett* litigation). DNR was a party to the *Margett* litigation. CP at 765-67. DNR filed an answer to the quiet title complaint and argued that the deed to the Murray tidelands was void. DNR requested the court “quiet[] title” to the Murray tidelands. CP at 766.

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).

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The *Margett* litigation did not proceed to trial because the parties stipulated to an order of dismissal with prejudice.

The *Margett* litigation was resolved when Timmerman's predecessor in interest settled with the State for \$1,000.00. In exchange, the State affirmed the validity of the Murray tideland deed and the trial court ordered that the State "shall have no further claim of right to the property described herein." CP at 773. The Commissioner of Public Lands then confirmed this settlement in a letter, restated the language from the deed, and ordered that the \$1,000.00 was "payment in full for any claim the State of Washington may have had in any of the tidelands herein described." CP at 77.

Timmerman acquired an ownership interest in the Murray tidelands in 1977. He has improved and maintained the tidelands and previously-built structures there since acquiring ownership.

III. HCSC'S CLAIM: THE REIDELL TIDELANDS

HCSC's predecessor in interest to its tidelands claim was Theresa Reidell. Reidell purchased an upland plot on the southwest shore of Dewatto Bay in 1933. At that time, the upland parcel to the east of her property, containing the headlands, was owned by the Mason County School District.

A. *Reidell Upland Deed*

In 1912, Clara and W.M. Nance owned the majority of the Government Lot 5 uplands, including both the school district and Reidell parcels. A 1912 warranty deed conveyed an uplands parcel west of the headlands to James Harden Nance. The 1912 deed defined the dividing boundary as "the line along the aforesaid gulch to run on the south and west side of

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aforesaid creek . . . not to touch or cross aforesaid creek.” CP at 1058. The 1933 deed that conveyed the uplands from James Harden Nance to Reidell was identical:

All that portion of Government Lot five (5), Section twenty-eight (28), Township twentythree [sic] (23) North, Range three (3) West, W.M., which lies South and West of the main gulch and creek, the line along the aforesaid gulch to run on the South and West side of aforesaid *creek*, commencing at the meander line on the shore line between the aforesaid Lot 5 and the tide land at or near the base of the hill, where the bottom land meets the base or foot of the hill, then meander around the aforesaid base of the hill straight from point to point, not to touch or cross the aforesaid *creek*, to the south line of the aforesaid Lot 5

CP at 1061-62 (emphasis added). This parcel lies south of Dewatto Bay and to the southwest of the headlands, as depicted in the image above in Part II, *supra*. The Estate of Carrie Nance conveyed the headlands parcel to the Mason County School District in 1929.

Lloyd and Marlene Iddings purchased the upland parcel in 1959. The 1959 special warranty deed differed slightly from the above, stating, in pertinent part that the parcel would “. . . then meander around the aforesaid base of the hill straight from a point to point, not to touch or cross the aforesaid *gulch*” CP at 898 (emphasis added). Similarly, a 1961 survey commissioned by the school district (the Sadler survey) interchanged the words “creek” and “gulch” earlier in the description, describing the parcel as “south and west of the main gulch and creek. The line along the aforesaid gulch to run south and west of the aforesaid *gulch*. . . . not to touch or cross aforesaid *creek*” Suppl. CP at 2522 (emphasis added).

Today, appellant Marlene Iddings owns and resides on the western portion of the Reidell upland parcel. Appellants Laure and Lloyd Earl Iddings own the eastern portion of the Reidell upland parcel that abuts the boundary along the creek and gulch. The Iddings formed HCSC in

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2014 with other tideland owners Linda Slates and Renee Hanover. HCSC also owns an interest in the Reidell upland parcel.

B. *Reidell Tideland Deed*

In 1934, during Reidell's ownership of the upland parcel, she first wrote to the Commissioner of Public Lands of the State of Washington and asked to apply to purchase the tidelands abutting her upland parcel. However, another party held a log booming lease on that portion of Dewatto Bay. In 1937, Reidell applied to purchase tidelands from DPL. Her application stated she wished to purchase the second class tidelands that were in a tract of the vacated oyster reserve, to include a parcel "[i]n front of . . . Lot 5." CP at 161. Reidell requested the State notify the school district of her application. The application form asked, "Are you the owner of the abutting uplands?" to which Reidell responded, "Yes & School Dist[ri]ct." CP at 161.

However, DPL disregarded Reidell's 1937 application and instead approved another log booming lease for the whole of Dewatto Bay. Another company, Pope and Talbott Inc., renewed the log booming lease until 1947. In 1945, after Reidell's daughter requested an update from DPL, the Commissioner wrote to tell Reidell to re-apply shortly before the expiration of the Pope and Talbott log booming lease.

Reidell refiled her application to purchase tidelands in 1946. Reidell again requested to purchase a tract of vacated oyster reserves "[i]n front of part of Lot 5." CP at 188. In an affidavit included in her application for title to the tidelands, Reidell described the tidelands she requested title for to include "vacated oyster reserve land in front of a portion of lot 5." CP at 193. She stated, "There are some oysters and clams on the north west tip of oyster reserve only .

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. . . Clams and oysters are few and confined to a small rise at some distance from silt-wash.” CP at 193. This “small rise” is a spit that is revealed at low tide to extend westward from the northwest tip of the headlands.⁴

The Commissioner responded to Reidell’s application and asked her for additional details concerning her request because her affidavit was not sworn before a notary. Reidell responded with a notarized copy of her upland deed and a hand-drawn map depicting the southern portion of the bay, the Reidell upland parcel, and a box to the north of the parcel (abutting the school district headlands) marked “Oyster and Tidelands.” CP at 200. The Commissioner responded: “It is likely that this map will be of considerable assistance to us in processing your application.” CP at 202.

Subsequent documentation shows that there was conflict between Reidell’s application and Pope and Talbott’s renewal request for a log booming lease. The Commissioner explained to Pope and Talbott that Reidell’s application covered “the major portion of the vacated oyster reserve in front of the W1/2 [western half] of said lot 5” and returned its application. CP at 208. The State then conveyed tidelands in a deed to Reidell. The deed describes the tidelands conveyed relative to the Reidell upland parcel:

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

⁴ A note written on Reidell’s application states that her request would exclude listed tidelands under Deed V.4P.271. HCSC states that this refers to the Murray headlands. Although this appears to be true, the deed number does not appear elsewhere in the record and thus this reference cannot be verified in the record on appeal.

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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.^[5]

CP at 216.

When the Iddings purchased Reidell's property in 1959, they also purchased the tidelands as described above. Over time, Reidell tidelands have been transferred among members of the Iddings family but have remained under the family's ownership since 1959. The Iddings conveyed the Reidell tidelands to HCSC in 2015.⁶

C. *School District Uplands and DNR's Claim*

In 1967, the Mason County School District applied to purchase tidelands abutting the headlands. The application requested tidelands "situate in front of" its abutting uplands, running along the high tide line and "[e]xempting County roads, if any, together with a prior rights to the said grantee to the use of waters of said creek to the extent of its needs." Suppl. CP at 2487.

⁵ All Dewatto Bay tideland deeds use some form of the "in front of" language. CP at 969-77. However, the third paragraph of the Reidell deed is unique among other Dewatto Bay tideland deeds in that it restates the "in front of" language used in the first paragraph.

⁶ HCSC and Timmerman state in their opening briefs that the Commissioner of Public Lands also wrote a letter to Reidell's estate in 1956. The letter states that Reidell was granted "those second class tideland and vacated oyster reserve in front of the W1/2 of said lot 5. Excluded from Mrs. Reidell's purchase [were] tidelands conveyed to Mr. James Murray in 1903." CP at 218.

In its brief, DNR makes a motion to strike (1) the 1956 letter described above, and (2) Appendix A to HCSC's brief which contains a Google maps printout with lines depicting the approximate contested areas. We do not consider the 1956 letter (1) because we are not considering extrinsic evidence to interpret the tideland deeds. We consider HCSC's Appendix A (2) for illustrative purposes only and recognize that it is not a surveyor's depiction of the boundaries.

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DNR denied the school district's application in 1971 because DNR and the school district were discussing exchanging upland parcels.

The school district conveyed the upland parcel containing the headlands to DNR in 1982. The deed described the parcel in part as running "along the main gulch and creek on the South and West side thereof at the toe of the slope at the base of the hill." Suppl. CP at 2490.

In a 2013 letter, DNR informed HCSC of its ownership claim to the tidelands to the west of the headlands. DNR stated, "I am enclosing the original deed to Theresa Reidel [sic] which conveyed certain tidelands from the state in 1947. The tidelands immediately north of her tract were never sold and remain in state ownership." CP at 315. The 2013 letter contained copies of a 1992 survey (the R.M. Winters Co. Inc. survey). The Winters survey showed the HCSC tidelands as abutting its upland parcel, but not reaching the extreme low tide mark or extending north along the headlands. Instead, the Winters survey showed DNR owning a large tidelands parcel extending west off the headlands.

IV. PROCEDURAL HISTORY

In 2015, HCSC filed suit against DNR to quiet title to the tidelands and recover damages for inverse condemnation and conversion. DNR filed an answer and brought counterclaims against HCSC and other tideland owners to quiet title and for trespass and damages. In the alternative, DNR sought to quiet title by adverse possession. DNR's answer and counterclaim did not seek to quiet title to any upland parcel.

In its counterclaim, DNR abandoned the tidelands division shown in the Winters survey and argued that the tideland parcels be determined by "equitable apportionment." CP at 10. DNR relied on *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944), which provides a method

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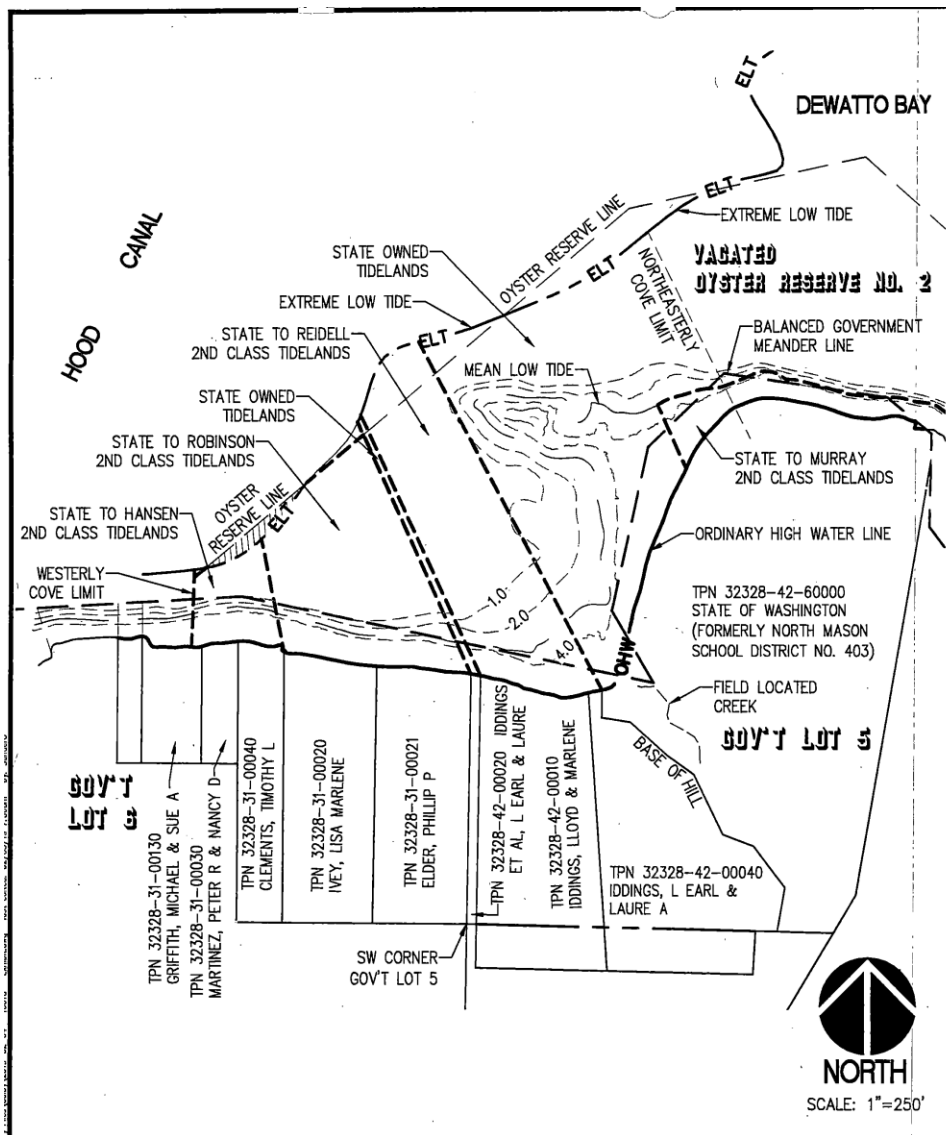
for equitable division of tideland parcels along curved shorelines where the lateral boundaries of contested tidelands are not unambiguously defined in a tideland deed. DNR, HCSC (through the Iddings family), and Timmerman each hired surveyors who submitted surveys and declarations in support of each parties' position.

A. *McEvelly Survey*

In support of its theory of equitable division, DNR commissioned Michael McEvelly to conduct a survey of the area (the McEvelly survey). McEvelly determined that the tideland deeds in Dewatto Bay in the area of the surveyed headlands do not include metes and bounds or any other description of lateral boundaries. Because of the curved shoreline west of the headlands, McEvelly determined the lateral boundaries of those tidelands, including the Reidell tidelands, should be determined through a proration process, which McEvelly described as equitable apportionment under *Spath*.

The McEvelly survey also placed upland boundaries on which to base the lateral tidelands boundaries. As a result, the McEvelly survey placed the upland division between the Reidell uplands and the DNR uplands west of the creek described in the Reidell uplands deeds. In his declaration, McEvelly cited the 1959 deed description that conveyed the Reidell uplands to the Iddings, which described the dividing line as “meander[ing] around the aforesaid base of hill straight from a point to point, not to touch or cross the aforesaid *gulch*.” Suppl. CP at 2542 (emphasis added). McEvelly concluded: “While some slight variations on the language exist in various deeds, the fact that the line is intended to run along the base of the hill, as opposed to along the creek, is not in doubt.” Suppl. CP at 2542.

After placing the uplands dividing line to the west of the creek, the McEville survey divided all the tidelands west of the headlands at an angle from the shore to the northwest. McEville divided the tidelands between a Northeasterly Cove Limit running northwest from the headlands, and a Westerly Cove Limit on the western extremity of the affected tidelands. As shown below, the McEville survey lines are drawn such that HCSC's tidelands would not include any of the "small rise" or spit off the western tip of the headlands.



Suppl. CP at 2557.

The McEville survey also alters the western boundary of the Murray tidelands (owned by Timmerman) to accommodate the apportionment McEville determined fit the shape of the shoreline. The result of the McEville survey is a domino effect, where each tideland parcel west of the headlands is redrawn to accommodate DNR's ownership of the spit. As a result, DNR included Timmerman and other tideland owners in a third-party complaint. DNR sued to quiet title, claiming superior title to the tidelands west of the headlands and stating that Timmerman and the other tideland owners' parcels would be affected by its claim for equitable apportionment under *Spath*.⁷

B. *Ferguson and Thalacker & Wilson Surveys*

The Iddings family hired Terrell Ferguson to conduct a survey in 2014 (the Ferguson survey). The Ferguson survey was based on the deeds and extrinsic communications related to the Reidell tidelands.⁸ Ferguson concluded that Reidell unambiguously intended to purchase

⁷ DNR also listed trespass to public lands and ejectment, wrongful taking of shellfish from public lands, and obstructing the taking of shellfish against HCSC and the Iddings in this complaint. However, these claims were not resolved on summary judgment.

⁸ After the trial court issued its summary judgment ruling, HCSC moved to strike the McEville Survey in the trial court. In support of this motion, HCSC submitted a declaration by Ferguson criticizing the McEville survey. In its brief, DNR moved to strike HCSC's motion and Ferguson's declaration. Br. of Resp't at 47-48. We do not consider either HCSC's motion or Ferguson's declaration in support of that motion because they were added to the record after the trial court rendered its ruling on summary judgment. RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.")

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tidelands directly north of the Reidell upland parcel to include the spit. Ferguson disputed the McEvelly survey and concluded that equitable apportionment was inappropriate.

The Ferguson survey also analyzed the Reidell upland parcel. Ferguson concluded that the creek defined the eastern boundary between the Reidell upland parcel and the DNR headlands parcel. The Ferguson survey divides the parcels using the language from the 1913 deed, which divides the properties on a “line along aforesaid gulch to run on the South and West side of aforesaid creek.” CP at 1054. Ferguson disagreed with the upland division proffered by McEvelly, explaining, “This is a controlling factor because it is the very beginning of the legal description and uses a very definable physical feature to be used as a boundary. There is less confusion over where a creek is as opposed to where a ‘base of hill’ is defined.” CP at 1054.

Timmerman hired Robert Wilson and John Thalacker to create a survey (the Wilson & Thalacker survey). The Wilson & Thalacker survey determined that the McEvelly survey erred in determining the meander corners associated with the Murray tidelands. The Wilson & Thalacker survey determined the corners and lateral boundaries of the Murray tidelands based on an interpretation of tideland boundaries using 1903 standards—the year the tidelands were deeded to Murray. Wilson & Thalacker also declared that the McEvelly survey did not appropriately equitably apportion the remaining tidelands. Wilson & Thalacker opined that the McEvelly survey positioned the Cove Limits arbitrarily and that different locations for those limits must be determined based on “naturally-occurring geologic features.” Suppl. CP at 2046.

C. *Summary Judgment*

In February 2019 the tideland owners, including HCSC and Timmerman, moved for summary judgment. They sought summary judgment on their quiet title claim and to dismiss

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DNR's claim of adverse possession. DNR also filed a motion for summary judgment on its counterclaim to quiet title to the tidelands.

The trial court granted DNR's motion for summary judgment. The trial court explained: "*Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944) established the legal standards to determine the lateral boundaries of tidelands owned by adjacent owners in a cove and is the controlling case law for the adjudication of this case." CP at 1668. The trial court therefore ruled that DNR holds superior title to the tidelands west of the headlands and adopted the McEvelly survey as depicting the boundaries for both the equitable apportionment of the tidelands and the upland parcels. The trial court therefore denied HCSC and the other tideland owners' motions. The trial court did not enter a decision as to adverse possession or trespass and resolved the dispute in favor of DNR only on the grounds of equitable apportionment under *Spath*.

HCSC, the Iddings, Timmerman, and other tideland owners timely appealed.

ANALYSIS

Timmerman argues that DNR is barred by res judicata from claiming any interest in the Murray tidelands. HCSC argues that the trial court erred when it applied the equitable principles in *Spath* to apportion the tidelands. Next, HCSC argues it is entitled to summary judgment on its quiet title claim because the extraneous evidence contemporaneous to Reidell's application to purchase the tidelands establishes she intended to purchase the tidelands in the disputed area. HCSC further argues that the trial court erred when it reapportioned and quieted title to the upland parcels. DNR argues that the trial court properly awarded summary judgment, applied *Spath*, and adopted the McEvelly survey.

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We hold that res judicata bars DNR from claiming interest in the Murray tidelands. Although we agree with DNR that the trial court properly applied *Spath* to the apportionment of the tidelands along the curved shore, we hold that there are genuine issues of material fact regarding the boundaries of the concave shoreline to be apportioned and that summary judgment was therefore improper. Accordingly, we neither consider evidence extraneous to the deeds nor grant HCSC summary judgment. Furthermore, we agree with HCSC that the trial court erred when it quieted title to the upland parcels.⁹

I. STANDARD OF REVIEW

We review a summary judgment ruling de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We perform the same inquiry as the trial court and affirm summary judgment only where “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013) (quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)). We “review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor.” *Lakey*, 176 Wn.2d at 922. A genuine issue of material fact exists where reasonable minds could differ on a fact that controls the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

⁹ As explained in Part III, *infra*, we construe tideland boundaries with no defined lateral boundaries in favor of the State. *Davidson v. State*, 116 Wn.2d 13, 16, 20, 802 P.2d 1374 (1991). However, we interpret the deeds to upland parcels under the traditional rules of deed interpretation. Thus, *Spath* does not apply to upland boundaries and all upland parcel divisions should be construed to give effect to the intention of the parties, to give particular attention to the grantor’s intent, and construed against the grantor where any doubt remains. *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64-65, 277 P.3d 18 (2012).

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Although a moving party is entitled to summary judgment if it submits affidavits establishing that it is entitled to judgment as a matter of law, a nonmoving party need set forth facts only to rebut those contentions to show the existence of a genuine issue of material fact. *Ranger Ins.*, 164 Wn.2d at 552. However, “the nonmoving party ‘may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.’” *Ranger Ins.*, 164 Wn.2d at 552 (alteration in original) (quoting *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

II. TIMMERMAN CLAIM: THE MURRAY TIDELANDS

Timmerman argues that the trial court erred when it granted summary judgment to DNR because DNR’s claim to the Murray tidelands is barred by res judicata. We agree. In the alternative, Timmerman argues that DNR’s claim is similarly barred by waiver, equitable estoppel, and laches. Because we agree that res judicata applies, we do not reach those issues.

Res judicata prevents relitigation by parties or privies who have had the opportunity to litigate the same matter in a prior action. *Karlberg v. Otten*, 167 Wn. App. 522, 535, 280 P.3d 1123 (2012). “[R]es judicata prohibits the relitigation of claims and issues that were litigated, or could have been litigated . . . in a prior action.” *Karlberg*, 167 Wn. App. at 535. To apply res judicata, there must be identity in the prior and judgment and current action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of the persons against whom the claim was made. *Karlberg*, 167 Wn. App. at 536.

For the purposes of identity of persons, the party in the prior litigation may be in privity with the current party. *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings*

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Bd., 2 Wn. App. 2d 737, 750, 413 P.3d 590 (2018). Privity exists between the seller and buyer of real property. *Riblet v. Ideal Cement Co.*, 54 Wn.2d 779, 782, 345 P.2d 173 (1959).

Here DNR's claim against Timmerman is res judicata because of the *Margett* litigation.

(1) The persons and parties are identical: Timmerman's predecessor in interest and DNR were parties to the *Margett* litigation. (2) Both causes of action were for quiet title. (3) The subject matter in both cases was a portion of the Murray tidelands. If DNR wanted to argue that *Spath* applied and that the tidelands in the area should be equitably apportioned, it could have. It did not. (4) The quality of the persons in each case was the same because Timmerman is in privity with his predecessor in interest. *Riblet*, 54 Wn.2d at 782. DNR's claim to quiet title to any portion of the Murray tidelands is, therefore, res judicata.

DNR argues that the *Margett* litigation does not preclude its claim here because DNR is not asking for Timmerman's deed to be narrowed. But the equitable apportionment ordered under *Spath* and the McEvilly survey would necessarily alter the boundary of Timmerman's parcel. See *Spath*, 20 Wn.2d at 512-14. Even if Timmerman's deed would not change, the extent of his parcel would. DNR attempts to get around this by arguing that only the angle of Timmerman's boundary would change. But our courts have held that after title is quieted a boundary line may not be altered.

This case is similar to *Karlberg*, there were two adjoining properties and the owners disputed where to draw the boundary line. 167 Wn. App. at 536. Division One of this court was presented with whether a litigant may bring successive quiet title actions involving a disputed boundary, where each time the litigant seeks to move the boundary to expand his own property. *Karlberg*, 167 Wn. App. at 536. The *Karlberg* court held that the subsequent action was barred

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by res judicata. 167 Wn. App. at 538-40. The court explained that Karlberg obtained precise relief in a quiet title action that resulted in a complete legal description of a parcel. *Karlberg*, 167 Wn. App. at 539. Thus, res judicata barred Karlberg’s second suit as to the boundary line only. *Karlberg*, 167 Wn. App. at 540. “Where judgment in the first action determines the boundary line between two adjoining properties, the judgment is preclusive of future attempts to move the boundary line in one direction or another.” *Karlberg*, 167 Wn. App. at 539-40.

Under DNR’s claim and the McEvelly survey, the western boundary of the Murray tidelands would swing eastward, moving the boundary and cutting off a portion of Timmerman’s parcel. But when the Murray tidelands were deeded in 1903, under the laws in effect at the time, the tidelands extended waterward down to mean low tide and the lateral boundaries were determined using the angles and limiting points listed in the deed along the meander line and extending perpendicular lines from those limiting points to the waterward limit. LAWS OF 1897, ch. 89, § 4. Thus, the western boundary of the Murray tidelands was set. Accordingly, any attempt by DNR to lay claim to the Murray tidelands by altering any boundary is res judicata. The trial court therefore erred when it granted DNR summary judgment as to Timmerman’s tidelands. Thus, the trial court erred when it denied Timmerman’s motion for summary judgment.

III. HCSC CLAIM: THE REIDELL PARCELS

A. *Legal Principles of Deed Interpretation*

The parties dispute the lateral boundaries of the Reidell tidelands.¹⁰ HCSC argues that

¹⁰ The parties appear to agree as to the waterward and landward boundaries of each tideland.

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the deeds at issue here should be construed to give meaning to the original parties' intent to determine those lateral boundaries. By looking to the intent of the parties at the time of the Reidell conveyance and relying on extrinsic evidence, HCSC argues that we can determine from the contemporaneous communications between Reidell and DPL the tideland boundaries the parties intended to convey. We disagree.

Interpretation of a deed is a mixed question of fact and law. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012). Normally, we construe deeds to give effect to the intention of the parties and give particular attention to the grantor's intent when discerning the meaning of the deed. *Newport Yacht*, 168 Wn. App. at 64. We give meaning to every word in a deed and where the plain language of the deed is unambiguous, extrinsic evidence will not be considered. *Newport Yacht*, 168 Wn. App. at 64. But where there is an ambiguity, we may consider extrinsic evidence. *Newport Yacht*, 168 Wn. App. at 65. Typically, where doubt remains, we will construe a deed against the grantor. *Newport Yacht*, 168 Wn. App. at 65.

However, the rules of normal contractual intent do not apply to aquatic lands granted by the State. *Davidson*, 116 Wn.2d at 20. In *Davidson*, the State established harbor lines along a shoreline in 1921. 116 Wn.2d at 18. The *Davidson* plaintiffs owned property along the shoreline and sued to quiet title to the designated harbor area, contesting the harbor lines. 116 Wn.2d at 15. Our Supreme Court explained that the *Davidson* plaintiffs "characterize[d] the case as one of contractual intent. They contend[ed] the overwhelming evidence shows the parties intended the shorelands' waterward boundary to be the line of navigability." *Davidson*, 116

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Wn.2d at 19. The *Davidson* plaintiffs argued that mutual intent of the parties established the disputed boundary. *Davidson*, 116 Wn.2d at 19.

Our Supreme Court disagreed. “Where 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. The court reasoned that our constitution divested upland owners of all riparian rights and thus reserved submerged lands to the State. *Davidson*, 116 Wn.2d at 16, 20. Thus, under *Davidson*, where there are no defined boundaries in a deed, we construe the deed in favor of the State.¹¹

This is not a novel concept. Our Supreme Court first set this principle forth in *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 P. 349 (1910). There, DPL had sold second class tidelands “situate in front of” certain uplands described in state deeds. *Pearl Oyster*, 57 Wash. at 534. At the time of the sale, the legislature had defined tidelands to extend only to the line of mean low tide, but the purchaser claimed ownership below that line. *Pearl Oyster*, 57 Wash. at 534, 537. The court determined that the statutes of the era controlled deed interpretation as to the tide lines and that DPL could not modify those lines fixed by law. *Pearl Oyster*, 57 Wash. at 539. As part of its analysis, the *Pearl Oyster* court reasoned:

[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.

¹¹ HCSC argues that in *Barlow Point Land Co., LLC. v. Keystone Properties I, LLC*, No. 46080-7, slip op. (Wash. Ct. App. Sep. 9, 2015) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2046080-7-II%20%20Unpublished%20Opinion.pdf>, we previously performed analysis of tideland deeds using extrinsic evidence and asks us to do the same here. However the State was not a party there and neither party argued *Spath* applied.

57 Wash. at 538.

The Reidell tideland deed conveyed “[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” her upland parcel. CP at 216. We conclude that the Reidell tideland deed is unambiguous, but that it does not define any lateral boundaries of the tideland parcel. The Reidell tidelands were a grant from the State. The deed fails to define or limit the boundary of the grant. Thus, we interpret the boundary most strongly against the grantee rather than the grantor state. *Davidson*, 116 Wn.2d at 20. Therefore, even if the deed is ambiguous, we resolve the ambiguities in favor of DNR. Accordingly, under *Davidson* and *Pearl Oyster*, the lateral boundaries of the Reidell tidelands are undefined as a matter of law and we need not rely on extrinsic evidence to determine the intent of the grantor and grantee. However, to resolve this case, the trial court must define the lateral boundaries.

B. *Equitable Apportionment of Tidelands under Spath v. Larsen*

HCSC argues that the trial court erred when it determined *Spath v. Larsen*, 20 Wn.2d at 500, established the legal standards to determine the lateral boundaries of tidelands owned by adjacent owners along a cove or curved shoreline. HCSC argues that *Spath* requires that lateral boundaries of tidelands in a cove *must* be equitably apportioned and is inapt. We disagree. However, we conclude that there are genuine issues of material fact regarding the boundaries of the area to which *Spath* applies.

1. *Spath v. Larsen Applies When Apportioning Tidelands That do not Have Defined Lateral Boundaries in Their Deeds*

In *Spath*, owners of neighboring tidelands in a bay disputed the boundaries between their respective parcels. 20 Wn.2d at 501-02. Neither of the deeds defined the lateral boundaries between the two parcels of tidelands conveyed, each deed stating only that each tideland was “in front of” the abutting upland parcel. *Spath*, 20 Wn.2d at 501-02. The court explained that the shoreline abutting the tidelands was concave “presenting a decided curve, it is apparent that the fixing of the boundary line between the two parcels of tidelands cannot be determined by the simple method employed when the shore line is straight, by erecting a line across the tidelands perpendicular to the meander line.” *Spath*, 20 Wn.2d at 502.

Because the question of lateral boundaries along a concave shoreline was a matter of first impression, the *Spath* court set out to “establish certain rules which may serve as guides in similar cases.” *Spath*, 20 Wn.2d at 508. First, the court concluded, as a general proposition, that owners of adjoining tidelands have a right to access open water at the line of low tide. *Spath*, 20 Wn.2d at 508. Although the court acknowledged that other elements may be valuable to different tideland owners, it stated that “access to deep water is an important consideration.” *Spath*, 20 Wn.2d at 508. The court adopted a rule from Massachusetts which set forth “the fundamental rule, underlying and controlling all others, the flats are to be so divided as to give to each parcel a width at its outer or seaward end proportional to that which it has at high water mark.” *Spath*, 20 Wn.2d at 512 (quoting *Wonson v. Wonson*, 14 Allen 71, 96 Mass. 71 (1867)).

Our Supreme Court then laid out the following principles to guide drawing boundary lines along a curved shoreline:

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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, 20 Wn.2d at 524-25. Here the low water mark is defined as the extreme low tide line.

See RCW 79.105.060(18); LAWS OF 1927, ch. 255, § 6; .

Here, as in *Spath*, there are undefined lateral tideland boundaries dividing two owners. The Reidell deed defines the tidelands only as being "in front of" the upland parcel. The shoreline here is curved, bending to the north where the Reidell uplands meet the headlands. The parties cannot agree as to their rights. It is possible to divide each tideland parcel so that each upland owner receives a share of the tidelands along the line of low water proportionate to the width of each upland parcel. Thus, *Spath* applies here and the tidelands should be equitably apportioned accordingly.

Furthermore, contrary to HCSC's argument, nothing in *Spath* says equitable apportionment *must* be applied to all tidelands along curved shorelines. Indeed, *Spath* makes it

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clear it applies only where parties dispute a boundary that is not defined in the deed and where the parties cannot agree as to their rights. 20 Wn.2d at 502, 525.

HCSC argues that *Spath* does not stand for the proposition that we can ignore extrinsic evidence and equitably apportion tidelands. HCSC cites *Strand v. State*, 16 Wn.2d 107, 119-20, 132 P.2d 1011 (1943), where our Supreme Court relied on extrinsic evidence to ascertain the parties' intent as to tideland boundaries. But *Strand* was decided one year before *Spath* and involved waterward boundaries, not lateral ones. 16 Wn.2d at 113-15. Moreover, *Spath* says nothing about extrinsic evidence; our decision to examine extrinsic evidence turns on our interpretation of the deed in favor of the State under *Davidson* and *Pearl Oyster*.

HCSC also argues that *Spath* does not apply because DNR retains no ownership in the tidelands west of the headlands. But as explained above, the Reidell deed does not fix lateral limits. "And if . . . 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." *Pearl Oyster*, 57 Wash. at 538.

Indeed, as HCSC admits in its brief:

Tidelands not sold by the State are retained under State ownership. Unlike a private tideland owner, the State does not have a grant deed for its retained tidelands. Rather, its remaining tideland ownership is determined by defining what was sold by the State and subtracting those sold tidelands. The State owns the remainder.

Br. of HCSC at 24 (citing Suppl. CP at 3441). Because the eastern boundary of the Reidell tideland is undefined, and DNR owns the upland parcel to the east, the State owns a remainder in any tidelands between the Reidell tidelands and DNR's upland parcel. However, the exact bounds of the State's remainder tidelands must be determined.

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2. *There Are Genuine Issues of Material Fact as to the Boundaries of the Area to be Equitably Apportioned*

HCSC argues that the trial court erred when it granted summary judgment to DNR because the parties dispute genuine issues of material fact. HCSC argues that if *Spath* applies, it must be applied in the light of the facts of the particular situation. We agree.

Summary judgment is appropriate only where there is no dispute as to a genuine issue of material fact. *Lakey*, 176 Wn.2d at 922. A genuine issue of material fact exists where reasonable minds could differ on a fact that controls the outcome of the litigation. *Ranger Ins.*, 164 Wn.2d 545.

Here there are genuine issues of material fact as to the “cove” boundaries set in the McEville survey. The *Spath* guidelines set out that tidelands should be apportioned along “the whole length of the water boundary of the land within the concave shore, cove or bay.” *Spath*, 20 Wn.2d at 524.

As shown in the image in the facts section above, the McEville survey set the extreme limits of the tidelands to be apportioned between a Northeasterly Cove Limit running northwest from the headlands and a Westerly Cove Limit on the western extremity of the affected tidelands. This defined the length of the tideland within the concave shore to the west of the headlands. But the Wilson & Thalacker survey states that McEville placed these bounds arbitrarily and that those limits must be determined based on “naturally-occurring geologic features.” Suppl. CP at 2079. Ferguson also raised doubts as to the accuracy of the McEville survey.

DNR argues that no party challenged the factual application of proration in McEvilly's survey to establish the tideland boundaries. But DNR admits that "[a]ppellants and their surveyors reject application of *Spath*." Br. of Resp't at 24. The surveyors analyzed the division of the parcels compared to the deeds and physical landmarks. The surveys are therefore a factual application of tideland division. Because the Ferguson and Thalacker & Wilson surveys were proffered by HCSC and Timmerman, and because they show a different application of tideland division, the existence of the two surveys shows the appellants challenged the proration in the McEvilly survey. Indeed, Wilson and Thalacker stated that the cove boundaries McEvilly established at the extreme limits of the prorated area were arbitrary.

Because the record shows that experts disagree on this fact, it follows that reasonable minds could differ as to the amount of land "within the concave shore," depending on where the cove limits are placed.¹² *Spath*, 20 Wn.2d at 524. Any change would affect the way in which the proration would be applied and therefore could change the outcome of the McEvilly apportionment ordered by the trial court. Thus, the accuracy of the McEvilly survey and the easterly and westerly bounds of the area to be apportioned within the concave shore present genuine issues of material fact. Accordingly, summary judgment is not appropriate.

¹² Regardless of where the northeasterly bounds of the area within the concave shore are placed, this should not disturb Timmerman's claim to the Murray tidelands. As explained above, the Murray tidelands do not extend all the way to the extreme low tide mark. DNR's tidelands would. Thus, depending on where the finder of fact determines the northeast limit of the concave shore lies, DNR's tideland claim could wrap around the Murray tidelands to the west and north. Indeed, barring the existence of a conflicting deed, the State holds title to the tidelands north of the Murray tidelands to the extreme low tide mark. RCW 79.105.060.

3. *The Trial Court Erred when it Quieted Title to the Upland Parcels.*

HCSC argues that the trial court's determination of the upland boundary was improper, unnecessary, and that the McEvelly survey on which it was based was fatally flawed. Although we agree that the trial court erred when it adopted the upland boundary between the Reidell and DNR uplands from the McEvelly survey, for the reasons explained above, the accuracy of the remainder of the McEvelly survey is a genuine issue of material fact. The trial court's ruling to adopt the upland boundary from the McEvelly survey on summary judgment is in error for several reasons.

First, DNR did not seek to quiet title to the boundary between its parcel and the Reidell parcel now owned by the Iddings family. Under CR 56(c), a trial court shall render summary judgment "if the pleadings . . . 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." Thus, an argument not raised in a pleading is not before the trial court. *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701(1968); CR 56(c). If a matter was not raised in pleadings before the trial court, we do not consider it on appeal. *Ferrin*, 74 Wn.2d at 285. DNR's answer and counterclaim did not seek to quiet title to any upland parcel. DNR sought only to quiet title to the tidelands. Thus, the upland division was not before the trial court. Although evidence regarding the upland boundary as defined in the McEvelly survey is before us, the issue of quiet title to the upland divisions is not.

Second, DNR argues that to locate the lateral boundaries of the tidelands under *Spath*, McEvelly needed to locate the lateral boundaries of the upland parcel. Although any survey determining the lateral tideland boundaries based on abutting uplands must *locate* the upland

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parcel, *Spath* does not stand for the proposition that the divisions between the abutting uplands are subject to change or that title must be quieted in upland divisions—it applies only to tidelands.

The *Spath* court explained:

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.

Spath, 20 Wn.2d at 524 (emphasis added). Thus, the McEvilly survey was flawed because it defined the course of the boundary between the upland parcels. Accordingly, only the *point* on shore along the government meander line need be determined; the whole of the upland boundary is not at issue and the trial court need not consider the portion of any survey defining the whole of the upland boundary. Thus, the trial court erred when it ordered summary judgment to quiet title to the upland parcel. Because the extent of the uplands boundary was not before the trial court, we do not reach the remaining issues of deed interpretation as to the upland parcels.

4. *The Trial Court Did Not Err when it Denied HCSC Summary Judgment against DNR*

HCSC argues that it is entitled to summary judgment on its quiet title claim. It again argues that *Spath* does not apply and that the communications contemporaneous to the Reidell conveyance establish the boundaries of the tidelands. However, for the reasons explained above, the State retains an interest in tidelands where there are undefined boundaries and there are genuine issues of material fact regarding the boundaries of the concave shoreline to be apportioned. Accordingly, HCSC is not entitled to summary judgment.

IV. CONCLUSION

The trial court erred when it granted DNR summary judgment as to Timmerman's tideland parcel because DNR is barred from making any claim to that parcel by res judicata as a result of the *Margett* litigation. Thus, the trial court erred in denying Timmerman's motion for summary judgment. Regarding the remaining tidelands, the trial court correctly applied *Spath v. Larsen* in this case because neighboring tideland owners dispute lateral boundaries that are undefined in any deed along a concave shoreline. However, the trial court erred when it granted summary judgment to DNR because there are material questions of fact as to the boundaries of the concave shoreline to be equitably apportioned. For the same reasons, HCSC is not entitled to summary judgment.

ATTORNEY FEES

DNR argues that it is entitled to attorney fees for defending this appeal. It argues that it is entitled to fees under RCW 79.02.300(1) because HCSC caused damage or waste to public lands by taking shellfish from DNR lands and attempting to prevent members of the public from accessing the spit. We disagree.

We review the award of statutory attorney fees de novo. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Typically, there is no basis for fees in an action to quiet title. *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895 (2003). But RCW 79.02.300(1) provides,

Every person who, without authorization, uses or occupies public lands, removes any valuable material as defined in RCW 79.02.010 from public lands, or causes waste or damage to public lands, or injures publicly owned personal property or from public lands, or causes waste or damage to public lands, or injures publicly owned personal property or publicly owned improvements to real property on public lands, is liable to the state for treble the amount of the damages. . . . In addition, the person is liable for reimbursing the state for its reasonable costs

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including, but not limited to, its administrative costs, survey costs to the extent they are not included in damages awarded for restoration costs, and its reasonable attorneys' fees and other legal costs.

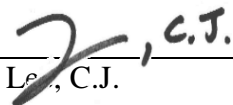
Here, however, the issues related to DNR's claim for damages are still properly before the trial court. The trial court bifurcated the issues and ruled that the issue of damages was separate from the equitable determination of quiet title. Indeed, only the quiet title issues were before the court on summary judgment, and the trial court stayed any issues that could result in damages pending this appeal. Because RCW 79.02.300 is a statute that describes damages resulting from a factual conclusion that was not reached below, the issue is not properly before us. Accordingly, DNR is not entitled to damages.

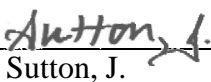
We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Le., C.J.

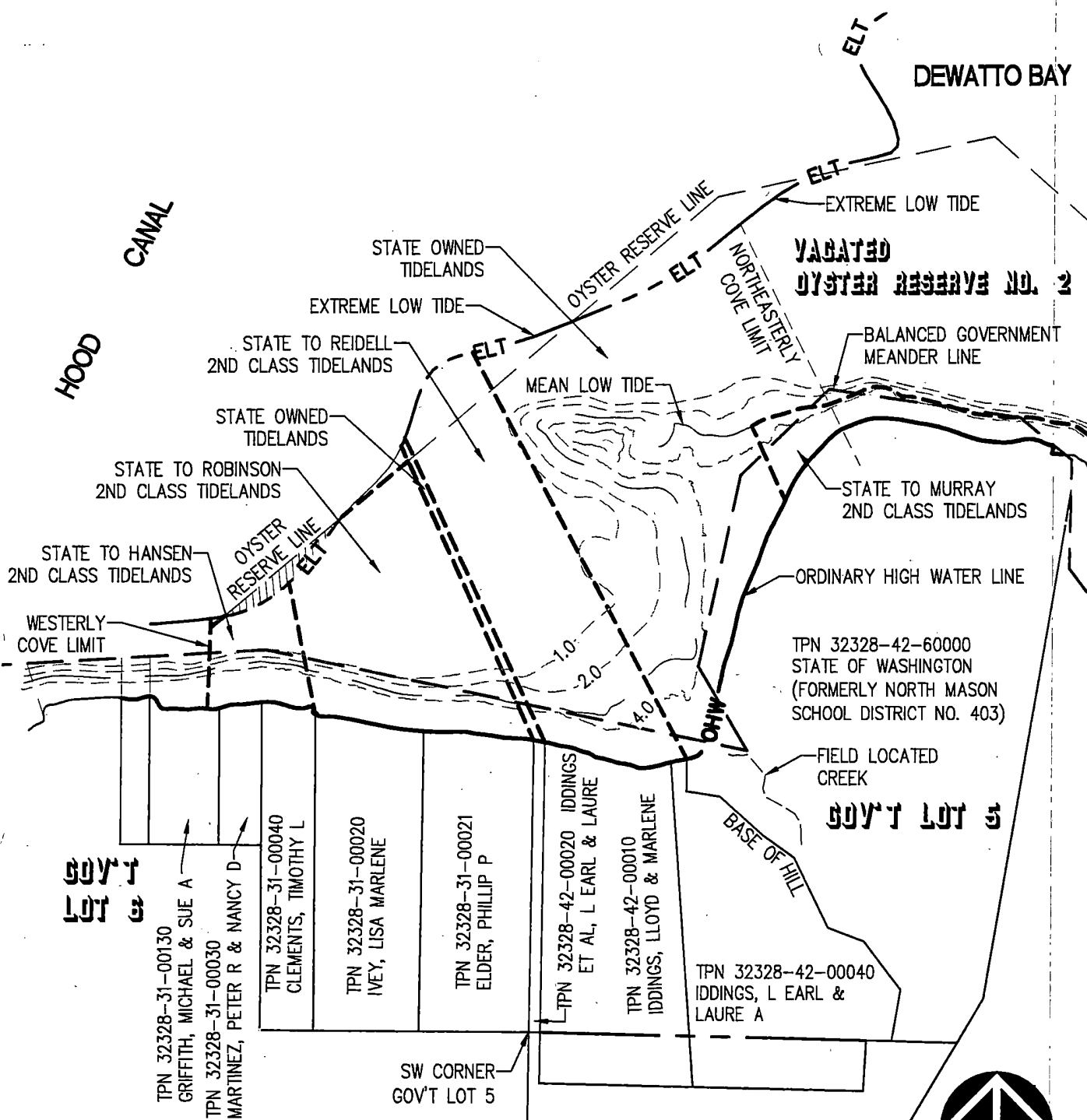

Sutton, J.

APPENDIX B

HOOD
CANAL

DEWATTO BAY

**VACATED
OYSTER RESERVE NO. 2**



**GOV'T
LOT 3**

TPN 32328-31-00130
GRIFFITH, MICHAEL & SUE A
TPN 32328-31-00030
MARTINEZ, PETER R & NANCY D

TPN 32328-31-00040
CLEMENTS, TIMOTHY L

TPN 32328-31-00020
IVEY, LISA MARLENE

TPN 32328-31-00021
ELDER, PHILLIP P

TPN 32328-42-00020
IDDINGS
ET AL, L EARL & LAURE

TPN 32328-42-00010
IDDINGS, LLOYD & MARLENE

TPN 32328-42-00040
IDDINGS, L EARL &
LAURE A

GOV'T LOT 5



NORTH
SCALE: 1"=250'

P:\16618\16618\Drawings\Temporary Files\Colby\2019-02-04 - 16618 - Exhibit.dwg last edited: 02/05/19 7:55am by: SanderC

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 C

The State of Washington



Office of the Secretary of State
Kim Wyman, Secretary of State

Certificate

I, *Alison B. Costanza*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

Clallam County Government

County Clerk

Civil Case Files

#8856 Spath vs. Larsen et al

Exhibit "A:"

Tide Lands in Sequim Bay survey map

Approved by Commissioners appointed by the Superior Court on November 24, 1946

(1 page)

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Alison B. Costanza
Done at Whatcom County, Washington this 29th day of June, 2021



WASHINGTON STATE
ARCHIVES

[Signature]

Washington State Archivist

T. 30 N. R. 3 W.W.M.

Exhibit "A" by stipulation of
Court in Court's opinion
J. H. Hightower
Deed Clerk

SEQUIM

**TIDE LANDS
IN
SEQUIM BAY**

ADJACENT TO GOVT LOTS 3 AND 4 OF SECTION 27
AND GOVT LOTS 1 AND 2 OF SECTION 34
TOWNSHIP 30 NORTH, RANGE 3 WEST W.M.
IN CLALLAM COUNTY, WASHINGTON

SURVEYED BY ORDER OF
THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY
IN THE MATTER OF
SPATH VS. LARSEN ET AL
CAUSE NO 8856



TRAVERSE OF LINE OF MEAN HIGH TIDE

POINT NO.	DIST.	AZIMUTH	POINT NO.	DIST.	AZIMUTH
1	118.20	352° 39' 00"	12	217.56	3° 07' 20"
2	347.70	350° 31' 00"	13	410.10	323° 49' 30"
3	297.25	64° 18' 10"	14	376.40	293° 45' 50"
4	23.20	98° 18' 30"	15	173.00	313° 39' 30"
5	81.10	153° 22' 00"	16	108.00	242° 31' 40"
6	139.80	74° 31' 50"	17	243.00	318° 07' 20"
7	255.00	58° 35' 20"	18	107.60	314° 39' 00"
8	295.00	48° 34' 00"	19	134.60	309° 31' 30"
9	212.00	40° 01' 40"	20	374.70	291° 16' 20"
10	358.00	34° 07' 10"	21	313.20	314° 05' 10"
11	405.30	20° 39' 50"	22		

BAY

HORIZONTAL CONTROL: U.S. Engr. monuments "Bugge", "Knap", "Pitship"
Washington Coordinate System-North Zone from U.S.C.G.S.
Published values.

VERTICAL CONTROL:
Datum: Mean Lower Low Water - U.S.C.G.S.
Elev. Tidal S.M. 2 = 9.39 (4738-Mean Sea Level)
+ U.S.G.S. M. J. 4 (Mean Sea Level) = 155.534
+7.2 Ft. Ordinary High Tide (Mean High Tide)
+ Mean Sea Level
- Mean Lower Low Water
Elev. Extreme Low Tide (U.S.C.G.S. Lowest Tide, estimated) - 4.0

COORDINATES - POINTS OF SURVEY CONTROL

POINT	X	Y
U.S. Engr. Sta. "Bugge"	1,465,003.55	402,980.00
U.S. Engr. Sta. "Knap"	1,460,638.82	401,755.37
U.S. Engr. Sta. "Pitship"	1,460,588.83	385,310.01
Triang. Sta. "B"	1,459,483.88	395,010.67
Via Cor. Secs. 23 & 27	1,458,927.50	390,354.93
Cor. Secs. 21 & 27 & 28	1,456,257.63	399,036.07
MC Secs. 22 & 27	1,459,468.55	398,840.91
North Headland - M.T. No. 1	1,460,695.10	395,748.50
MC Secs. 27 & 34	1,459,235.59	393,630.02
Triang. Sta. "A"	1,461,047.54	392,240.57
South Headland - M.T. No. 21	1,460,050.10	392,225.30
MC Secs. 34 & 35	1,461,323.01	391,940.79

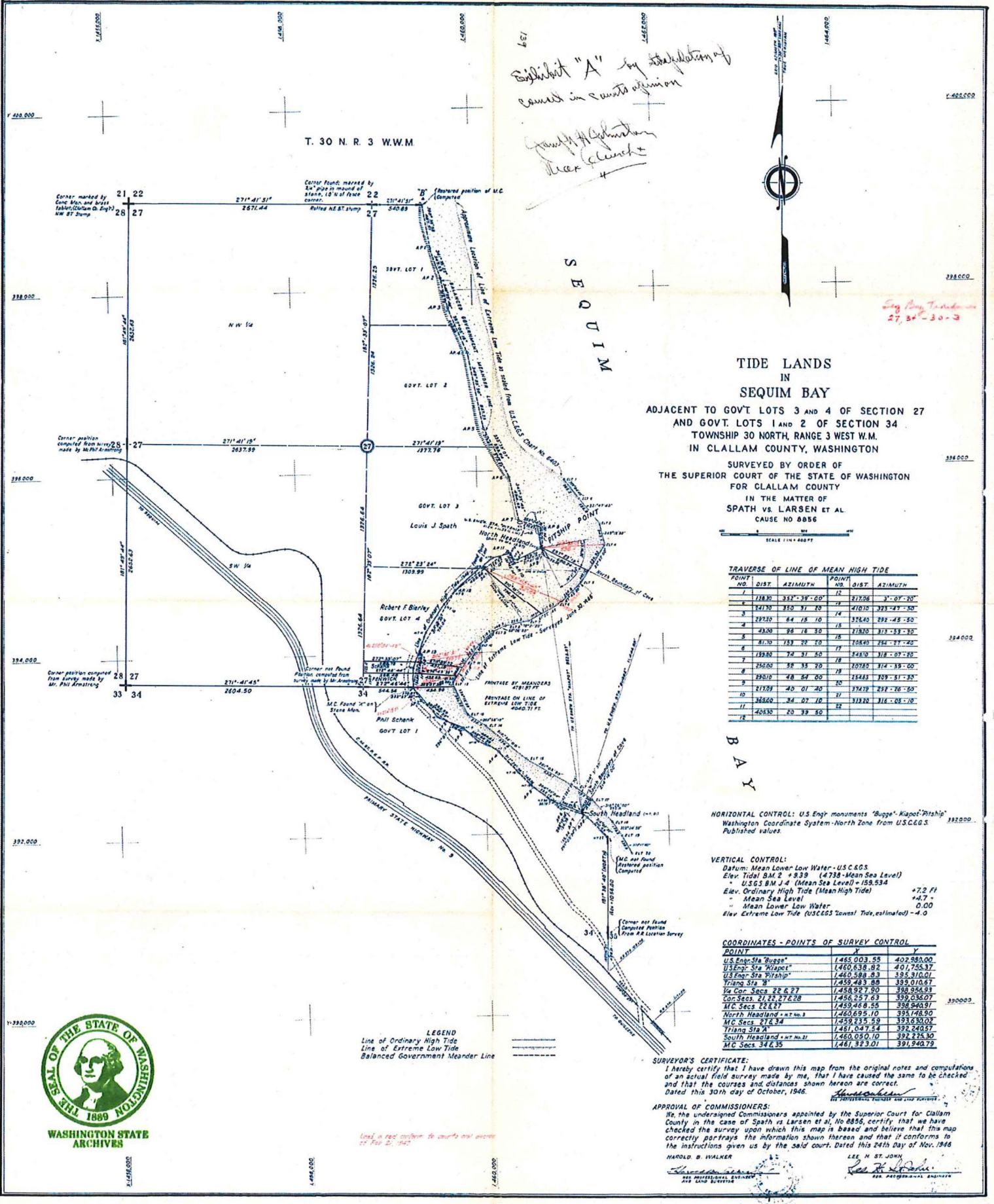
SURVEYOR'S CERTIFICATE:
I hereby certify that I have drawn this map from the original notes and computations of an actual field survey made by me, that I have caused the same to be checked and that the courses and distances shown hereon are correct.
Dated this 30th day of October, 1946.

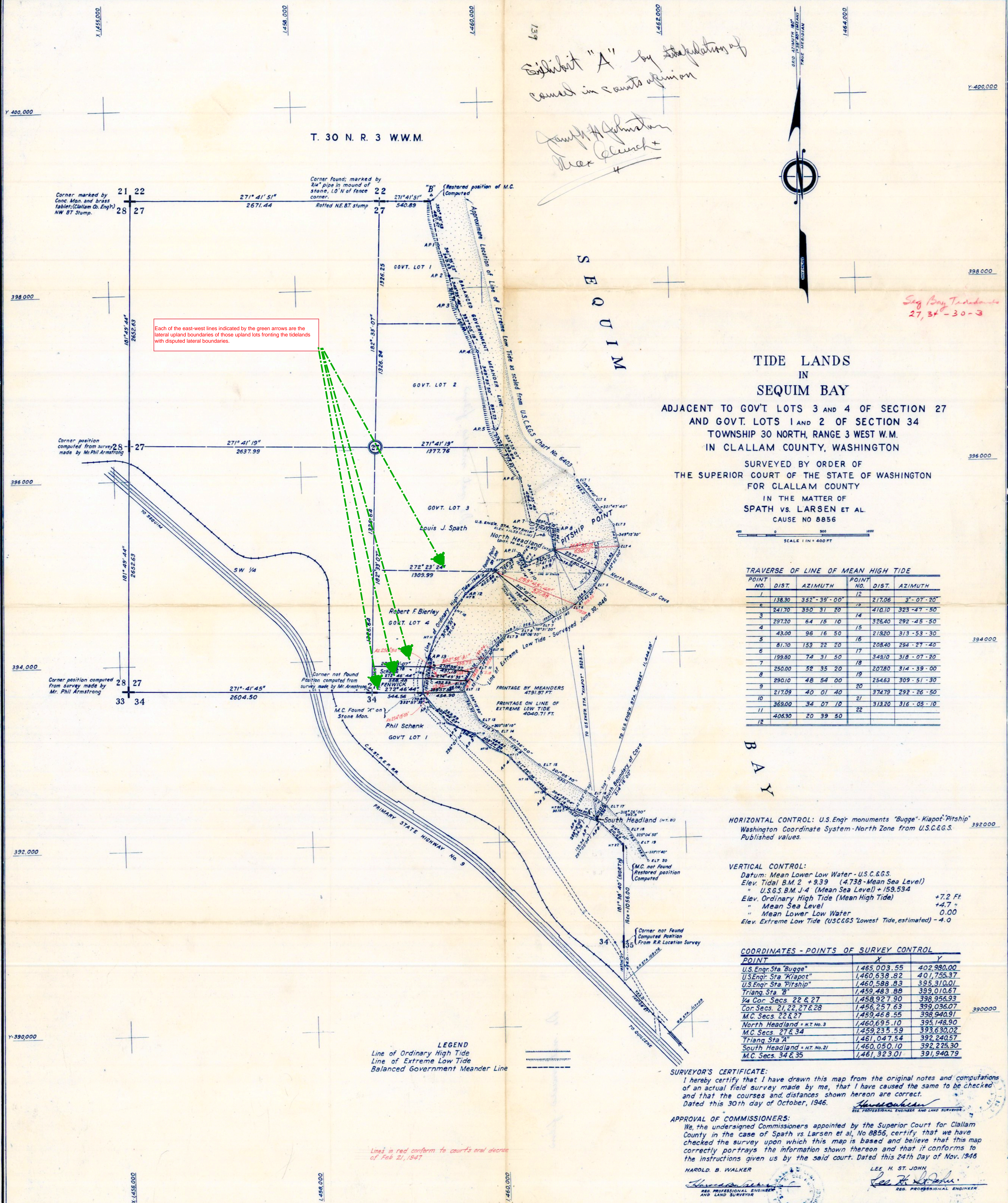
APPROVAL OF COMMISSIONERS:
We, the undersigned Commissioners appointed by the Superior Court for Clallam County in the case of Spath vs. Larsen et al, No. 8856, certify that we have checked the survey upon which this map is based and believe that this map correctly portrays the information shown hereon and that it conforms to the instructions given us by the said court, Dated this 24th day of Nov. 1946.



LEGEND
Line of Ordinary High Tide
Line of Extreme Low Tide
Balanced Government Meander Line

Look at red outline to court's new survey of Feb. 21, 1947





139
 Exhibit "A" by stipulation of
 court in court's opinion
 Joseph H. Johnston
 Max Church

**TIDE LANDS
 IN
 SEQUIM BAY**
 ADJACENT TO GOV'T LOTS 3 AND 4 OF SECTION 27
 AND GOV'T LOTS 1 AND 2 OF SECTION 34
 TOWNSHIP 30 NORTH, RANGE 3 WEST W.M.
 IN CLALLAM COUNTY, WASHINGTON

SURVEYED BY ORDER OF
 THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 FOR CLALLAM COUNTY
 IN THE MATTER OF
SPATH VS. LARSEN ET AL.
 CAUSE NO 8856

TRAVERSE OF LINE OF MEAN HIGH TIDE

POINT NO.	DIST.	AZIMUTH	POINT NO.	DIST.	AZIMUTH
1	138.30	352°-39'-00"	12	217.06	3°-07'-20"
2	241.70	350 31 20	13	410.10	323-47-50
3	297.20	64 15 10	14	326.40	292-45-50
4	43.00	96 16 50	15	219.20	313-53-30
5	81.70	153 22 20	16	208.40	294-27-40
6	199.80	74 31 50	17	349.10	318-07-20
7	250.00	52 35 20	18	207.80	314-39-00
8	290.10	48 54 00	19	254.63	309-51-30
9	217.09	40 01 40	20	374.79	292-26-50
10	369.00	34 07 10	21	313.20	316-05-10
11	406.30	20 39 50	22		
12					

HORIZONTAL CONTROL: U.S. Engr monuments "Bugge", "Kiapot", "Pitship"
 Washington Coordinate System - North Zone from U.S.C.&G.S.
 Published values.

VERTICAL CONTROL:
 Datum: Mean Lower Low Water - U.S.C.&G.S.
 Elev. Tidal B.M. 2 + 9.39 (4.738 - Mean Sea Level)
 " U.S.G.S. B.M. J-4 (Mean Sea Level) + 159.534
 Elev. Ordinary High Tide (Mean High Tide) + 7.2 Ft.
 " Mean Sea Level + 4.7 "
 " Mean Lower Low Water 0.00
 Elev. Extreme Low Tide (USCGGS "Lowest Tide, estimated) - 4.0

COORDINATES - POINTS OF SURVEY CONTROL

POINT	X	Y
U.S. Engr. Sta "Bugge"	1,465,003.55	402,980.00
U.S. Engr. Sta "Kiapot"	1,460,638.82	401,755.37
U.S. Engr. Sta "Pitship"	1,460,588.83	395,310.01
Triang. Sta "B"	1,459,483.88	399,010.67
1/4 Cor. Secs. 22 & 27	1,458,927.90	398,956.93
Cor. Secs. 21, 22, 27 & 28	1,456,257.63	399,036.07
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North Headland - M.T. No. 3	1,460,695.10	395,148.90
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LEGEND
 Line of Ordinary High Tide
 Line of Extreme Low Tide
 Balanced Government Meander Line

SURVEYOR'S CERTIFICATE:
 I hereby certify that I have drawn this map from the original notes and computations of an actual field survey made by me, that I have caused the same to be checked and that the courses and distances shown hereon are correct.
 Dated this 30th day of October, 1946.

APPROVAL OF COMMISSIONERS:
 We, the undersigned Commissioners appointed by the Superior Court for Clallam County in the case of Spath vs. Larsen et al., No 8856, certify that we have checked the survey upon which this map is based and believe that this map correctly portrays the information shown thereon and that it conforms to the instructions given us by the said court. Dated this 24th Day of Nov. 1946

HAROLD B. WALKER
 REG. PROFESSIONAL ENGINEER AND LAND SURVEYOR

LEE H. ST. JOHN
 REG. PROFESSIONAL ENGINEER

Each of the east-west lines indicated by the green arrows are the lateral upland boundaries of those upland lots fronting the tidelands with disputed lateral boundaries.

Lines in red conform to court's oral decree of Feb 21, 1947

FISH, WILDLIFE, & PARKS SECTION - ATTORNEY GENERAL'S OFFICE

July 02, 2021 - 1:40 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Hood Canal Shellfish, et al., Petitioners v. Dept. of Natural Resources, Respondent (534860)

The following documents have been uploaded:

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