

1. **UPLANDS, TIDELANDS & BEDLANDS:**

Uplands: Portion of shorelands never covered by water.

Bedlands: Portion that supports and lies under body of water and is always covered by water.

Tidelands: Portion of shorelands between uplands and shorelands which is affected by tidal flow of water and is alternatively covered and not covered by water, depending on tides.

END OF EASY PART. Hard part is defining precise borders of the above for property purposes.

2. **LEGAL BORDERS: (Hard Part):**

Border of Upland/Tideland: "Average elevation of all high tides through a complete tidal cycle of 18.6 years" (*Hughes vs. State of Washington 1967*). EXCEPTION: If upland property acquired prior to date of Washington statehood and waterward border is defined by meander line, upland/tideland border extends to mean high tide line, or meander line, whichever is further out since Washington "disclaimed" any interest in tidelands that may have been conveyed by Federal Government into private hands prior to statehood (Article 17, Section 2 of Washington Constitution).

Waterward border of tideland ownership: *First Class Tidelands:* The "Inner Harbor Line" of the surveyed "Harbor Area" for tidelands within and up to 1 mile outside city limits, and line of extreme low tide for First Class tidelands between 1 mile and 2 miles outside of city limits.

Second Class Tidelands: Line of mean low tide (if acquired prior to March, 1911) or extreme low tide (if acquired after March, 1911) (RCW79.105.060(18)).

3. **EXTREME LOW TIDE:**

"Line estimated by the Federal Government below which it might be reasonably expected the tide will not ebb" (WAC 332-30-106 (18)). For Puget Sound this has been determined to be 4.5 feet below the "mean lower low water" (i.e. the mean of all lowest tides in a complete tidal cycle of 18.6 years).

4. **WHO OWNS TIDELANDS: (Harder Part):**

Original owner of all tidelands is the State of Washington pursuant to the "Equal Footing Doctrine" which required the Federal Government to convey all aquatic lands including tidelands to the State upon Statehood 1889. Washington claimed ownership of all tidelands up to the line of mean high tide (Washington State Constitution Article 17 Section 1). If tideland ownership is claimed by private upland owner tidelands must therefore expressly show up on deed or in chain of title. Typical deed language: (legal description of upland property) "*together with tidelands of the second class conveyed by the State of Washington situated in front of and adjacent to or abutting thereon*". If no express language referencing tidelands is in the deed of the upland owner, they cannot claim ownership of the tidelands and the owner is the State of Washington. To determine who owns all or any portion of the tidelands adjacent to an upland property 4 questions must therefore be answered:

- A. Does express language referring to tideland's ownership appear in the upland owner's deed or chain of title? If no, then owner of tidelands in vast majority of cases is the State of Washington.

- B. If no express tideland ownership contained in deed, was property acquired prior to date of Washington statehood and does legal description in deed refer to seaward border of property being a meander line? If so, likely at least a portion of the tidelands is owned by the upland property owner (see No. 2 above).
- C. If tideland language is contained in deed, are tidelands First Class? If so the waterward boundary of tideland ownership is the inner harbor line or line of extreme low tide (see Nos. 2 and 3 above).
- D. If tideland language is for Second Class tidelands (all tidelands other than First Class tidelands are Second Class) was property acquired prior to March, 1911? If so, waterward boundary is the line of mean low tide and tidelands privately owned to said line. If acquired after March, 1911 said boundary is the line of extreme low tide, and tidelands privately owned to said line.

In all instances except "B" above, upland/tideland border will be line of mean high tide.

5. **PUBLIC TRUST DOCTRINE** (The Hardest Part):

Certain resources, such as water (and the land used to access to it), are so crucial that the State holds them in trust for the public's benefit. This interest, known as *jus publicum*, cannot be given away by the State. In certain circumstances that State may convey away title of public trust land to private parties, but even after doing so it retains the *jus publicum* interest in said land. In *Illinois Central Railroad Co. vs. Illinois* 1892 the United States Supreme Court established this concept as the law of the land in invalidating a grant by the Illinois Legislature of the entire Chicago Harbor area to the Illinois Central Railroad, but also established how the public's interest was not absolute:

"It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in adjudged cases as valid exercises of legislative power consistently with the trust to the public upon which such lands are held by the State."

6. **WILBOUR VS. GALLAGHER (1969) WASHINGTON SUPREME COURT:**

Court finds that filling in private submerged land interferes with public's "common law right of navigation" so said filling prohibited. The Court defines this right as "the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." However, in discussing the property owner's rights concerning said property, the Court states:

"In such situations owners whose lands are periodically submerged are said to have the rights to prevent trespass when not submerged."

7. **CAMINITI VS. BOYLE (1987) WASHINGTON SUPREME COURT:**

Court finds that a state statute allowing private upland landowners to erect and maintain docks over public tidelands rent free did not violate Public Trust Doctrine. The Court, in discussing the Public Trust Doctrine, goes on to state, however:

"The concept is part of the established common law of the United States. This jus publicum interest expressed in English common law and the law of this State since earliest statehood is composed of the right of navigation and fishery...more recently this jus publicum interest was more particularly decided by this court as the right of navigation together with its incidental rights of fishing, boating, swimming, water skiing and other recreational purposes generally regarded as corollary to the right of navigation and use of public waters".

8. **ORION CORPORATION VS. STATE OF WASHINGTON (1987) WASHINGTON SUPREME COURT:**

Court finds that the effect of regulatory provisions preventing the Orion Development Corporation from dredging and filling in 5600 acres of Padilla Bay tidelands and shorelands to build a large "Venetian style" development do not amount to a "taking" of a property interest held by Orion Corp. in said lands requiring compensation. Filling and dredging would interfere with the public's navigation and related rights and therefore violates the Public Trust Doctrine. Since the State's jus publicum interest attached to said property from the time Washington became a state (see *Caminiti*, above), Orion Corp. never had the right to dredge and fill (as doing so would violate the Public Trust Doctrine) therefore there was no "taking" of a property interest. However, in discussing the rights of a property owner, the Court stated as follows:

"Property" includes a bundle of rights with respect to the physical thing. The bundle includes the right to possession and the right to exclude others".

9. **STATE VS. LONGSHORE (2000) WASHINGTON SUPREME COURT:** Longshore prosecuted for entering onto private tidelands and taking over 300 pounds of clams. Longshore argues that Washington's theft statute requires he take "the property of another". Since clams are "*ferae naturae*" (in a "natural" or "wild" state) they could not be owned by any individual, including the tideland owner, so there could be no taking of "the property of another". The Court finds Washington law has chosen not to classify clams as "wild", and since they are imbedded in the soil considers them property of the landowner on which they are found. Longshore argues alternatively that the clams are a public resource, and the State cannot convey away its jus publicum interest in the clams by classifying them essentially as private property. The Court finds that each State has the right to determine its own interpretation and extent of the Public Trust Doctrine and since clams in this case were classified as the private property of the tideland owner according to Washington law, Longshore is guilty of theft. Court goes on to state, however:

"Amicus curiae Washington Environmental Council correctly notes we need not determine whether and under what circumstances the public has the right to enter and cross over private tidelands on foot".

10. **CURLEY VS MOUNTFORD (2000) UNPUBLISHED OPINION WASHINGTON COURT OF APPEALS:**

Mountfords attempt to claim a portion of tidal property held in Curley's name through adverse possession. Washington's adverse possession statute requires, among other things, that possession of Mountford's must be adverse and "exclusive". Curley argues that possession of Mountfords' was not "exclusive" since Public Trust Doctrine allowed all members of the public to access the property, so not all elements of adverse possession were present. Court, citing the *Wilbour* case, finds that Public Trust Doctrine only applied to the property when the property was submerged, and Curley could have excluded the Mountfords (and the public),

when the tide was out. The Mountfords therefore could show “exclusiveness” since facts indicated they extensively and exclusively used property while tide was out.

11. **CITY OF BAINBRIDGE VS. BRENNAN (2005) UNPUBLISHED OPINION WASHINGTON COURT OF APPEALS:** Farmer allows public use of road running through his property and ending in Fletcher Bay, and which property includes tidal rights. The Public had extensive historical use of the road and a wharf constructed on its end, from which ferry service was operated for many years. Farm subsequently divided and developed following his death. The Tidal rights were conveyed to private parties. Parties owning tidal rights at the road end erected a fence to keep the public out. City of Bainbridge Island sues to enforce public access to the road and the road end tidal lands. Court finds farmer had dedicated the road to the public during his lifetime. Since Washington law presumes all tidal lands located at a public road end are public and extend to the water, tidelands and road end are public and fence must be removed. The issue of pedestrian travel over private tidelands adjoining the road end tidelands was also raised. The Court discussed the language in *Wilbour* that indicated an owner could exclude others from their property when the tide was out, and the language from *Orion* which stated that ownership included the right to exclude others and stated as follows:

“This language suggests that our Supreme Court did not contemplate pedestrian passage over tidelands. Accordingly, while recognizing the right under the Public Trust Doctrine of navigation, commerce, fisheries, recreation and environmental quality, we affirm the trial court’s dismissal of the Larsons’ claims to pedestrian travel over privately owned tidelands when not covered by water”.

12. **KELLOGG VS. HARRINGTON (2009) UNPUBLISHED OPINION WASHINGTON COURT OF APPEALS:** Dispute over the existence, width and location of a public easement ending in the Columbia River, and the public’s right to access private tidelands on either side of the easement corridor. Court finds the easement existed and determines its width and location, however, goes on to state as follows regarding the private tidelands adjoining the 20-foot easement:

“Application of the Public Trust Doctrine does not seem to alter the rule that a tideland owner may at times exclude other persons...We hold that under existing authority the Public Trust Doctrine does not allow pedestrian use of private beach property without the owner’s permission”.

13. **OREGON CAN LEAD US TO THE TROUGH BUT CAN’T MAKE US DRINK PART – DOCTRINE OF CUSTOM**

OREGON EX REL THORNTON VS. HAY (1969) OREGON SUPREME COURT:

The Oregon Supreme Court holds that the English common law Doctrine of Custom which holds that a public’s use of a resource can be so longstanding, continuous and beneficial that it becomes a custom and law of the land, coupled with an 1899 Oregon law expressly reserving to the State the shoreline as a “public highway”, coupled with a history of ancient, long term public use, results in the public having the right to access the privately held tidal properties extending along the Pacific Ocean the length of the State. This right extended from the water up to the “dry sands” or “extreme high tide line”. There appear to be no published Washington State

Court appellate rulings construing the Doctrine of Custom, however there have been two opinions issued by the Washington Attorney General summarized as follows:

WASHINGTON ATTORNEY GENERAL OPINION NO. 27 (1970): Since the historic public use of the beach in Washington State has been no different than said use in Oregon, the Doctrine of Custom should apply to most Pacific Ocean beachfront.

WASHINGTON ATTORNEY GENERAL OPINION NO. 41 (1976): The Doctrine of Custom does not apply to beach areas within Puget Sound. No “general, customary and Habitual continuous use of the Puget Sound beaches” existed to support the Doctrine of Custom argument as it applies to Puget Sound.

14. SUMMARY OF LAW REGARDING PUBLIC ACCESS TO TIDELANDS:

Above Line of Mean High Tide: No legally established right unless publicly owned.

Below Line of Mean High Tide: Can access public tidelands. If Private Tidelands, have legally established right to travel on surface of water over submerged portion. Open question on wading or traveling on foot on dry portion (see *Longshore*, above). 3 unpublished Washington Court of Appeals cases (*Curley*, *Bainbridge* and *Kellogg*) have expressly ruled there is no public access on dry portion, and at least one Washington Supreme Court case (*Wilbour*) seems to imply no right to public access on dry portion. Language in 2 Appeals Court cases (*Curley* and *Bainbridge*) and one Supreme Court case (*Wilbour*) appear to imply a possible public right to wade on the submerged portion of private tidelands, but no express ruling on this issue has been made to date.

If the tidelands are First Class tidelands, waterward boundary is the inner harbor line or line of extreme low tide (see No. 2 above). If the tidelands are Second Class tidelands and were first acquired prior to March, 1911, waterward boundary of the tideland interest extends only to the line of mean low tide. If water is below this line, there may be a public strip between private portion and the water over which public may travel. No such strip exists if First Class tidelands or Second Class tidelands first acquired after March, 1911, as waterward boundary is the line of extreme low tide.