Waterfront Titles in The State of Washington

Updated 2015

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A version of this material also appears as Chapter 4, "Waterfront Titles" of the Washington State Bar Association Real Property Deskbook.

This chapter is based upon material compiled by Vern L. Arnold and first published by Chicago Title Insurance Company in 1981, later revised in 1985. A version is in the current Washington State Bar Association Real Property Deskbook. Additional revisions have been made over the years. The author has used much of the original text and wishes to acknowledge Mr. Arnold's contribution and research and Chicago Title's copyright on those materials. The author also wishes to especially thank Steven B. Ivey, PLS, Aquatic Land Surveyor, State of Washington Department of Natural Resources, for his suggestions. The material expresses the author's opinion. Nothing contained herein should be construed as the opinion of Chicago Title Insurance Company or any entity other than the author.

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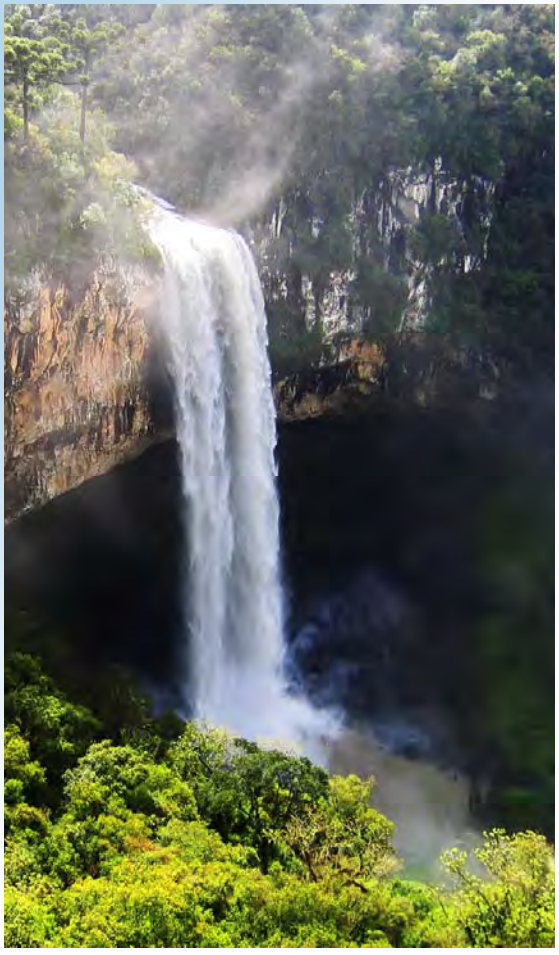
Table of Contents



Waterfront Titles in
The State of Washington

WATERFRONT TITLES IN THE STATE OF WASHINGTON

By George N. Peters Jr.

A brief overview of the principles affecting the ownership of waterfront property as they relate to title insurance.

NOTE: Entries in ***bold*** and ***italics*** are included in the list of definitions at the end of the material.

1.0 INTRODUCTION

Those of us living in the Puget Sound area have a tendency to take our waterfront for granted. Actually, we should recognize that it is a most precious, irreplaceable asset. Water itself is not owned by individuals. It is a natural resource owned and managed by the State of Washington. This article (1) discusses the nature of title to ***submerged lands*** (lands under water, whether permanently or only part of the time) and the boundaries between that land and the abutting ***uplands***, (2) provides a brief overview of the principles affecting the ownership of waterfront property as they relate to title insurance, and (3) gives examples of exceptions from title insurance coverage in connection with water-related title, boundary and use issues.

2.0 CATEGORIES OF SUBMERGED LANDS

There are five categories of ***submerged lands*** in the State of Washington relevant to title insurers. The first two are ***tidelands*** and ***shorelands*** that are the shallow areas of ***navigable*** waters. Title to these submerged lands was vested in the State of Washington on November 11, 1889, the date Washington was admitted to the Union.[1] This vesting is based on the "***equal footing doctrine***," where newly admitted states have equal footing with the original 13 states, including with respect to title to submerged lands.[2]

Some of these state-owned lands were then conveyed by the state to private owners. Such tidelands or shorelands involve a separate chain of title from that of adjoining uplands. Even when they are in common ownership with the abutting uplands they must be specifically included in the legal description of the land. (*See* "Legal Descriptions" in §12.0 below.)

The third category of submerged lands is ***bedlands***, which are beyond the outer limits of tidelands and shorelands. Except for a few rare exceptions they cannot be in private fee ownership. However, portions of bedlands, including ***harbor areas*** and ***oyster lands***, can be leased from the state. (*See* "Leases by the state or Port District" in §11.1 below.)

The fourth category of submerged land is under the bed of non-***navigable*** bodies of water such as small lakes and streams. The title to this land was not owned by the state but rather is held by the owner of the abutting upland property.

A legal description may or may not specifically refer to a body of water. Even when it does it is sometimes ambiguous. Water boundaries as a rule are not susceptible to specific location or survey definition. Caution should also be exercised whenever a legal description refers to a surveyed course and distance along a water line, or the meander line, as being the boundary between uplands and submerged lands or the outer limits of upland property.

A fifth category of submerged land includes waterways, wharf sites and public places that are created by the state by the preparation of a plat. This category of lands is generally not dealt with by title insurers. Waterways are discussed in "Waterways" in §10.0 below.

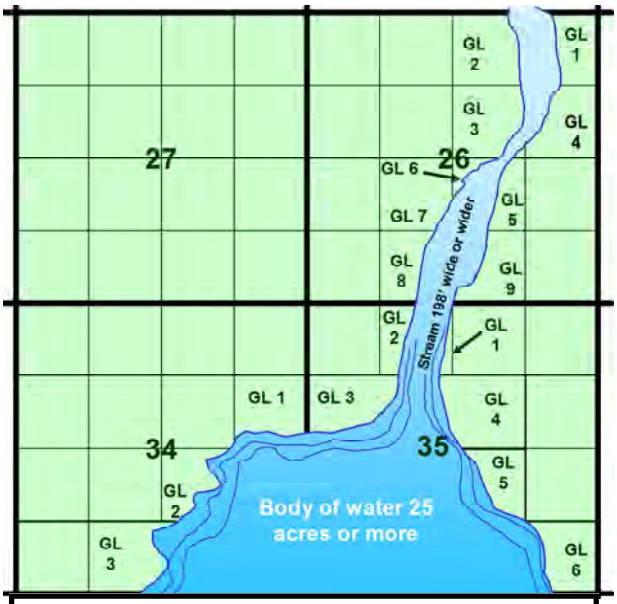


Diagram No. 1
Showing Government Lots in Sections 26, 34 and 35 created by the presence of a large body of water and a wide stream.

3.0 Government Survey

For an understanding of the nature of waterfront titles it is helpful to start with a review of some of the features of the U. S. Rectangular System of Survey. This is the system devised by Congress for subdividing land into Sections, Townships and Ranges in relation to *base lines* and *principal meridians* (the Willamette Meridian, usually referred to in a legal description merely as "W.M.," is the meridian running north-to-south through the states of Washington and Oregon).

Federal surveyors were required to identify important bodies of water on the surveys. This was done by laying out ***meander lines***. Meander lines were intended to approximate the shoreline (partly to be able to compute the area for valuation purposes) not only for all ***navigable*** bodies of water but also for smaller lakes (25 acres or larger) and streams (198 feet or more in width) even if not navigable. The surveyor was then required to assign a parcel number, called a ***government lot***, to each of the fractional subdivisions of a section created by the body of water.[3] *See* Diagram No. 1 for a typical group of sections where bodies of water required the creation of government lots.

4.0 Government Lot Boundaries

The location of the outer boundary of a government lot varies according to the date on which the ***patent*** (the conveyance document from the United States for federally owned lands) issued by the federal government was earned.

Note that patents in Washington State were given mostly under the authority of either the Donation Land Claim Act of 1850 or the Homestead Act of 1862, and could be issued only after the patentee had met specified conditions, or "earned" the patent. Working the land was one requirement in addition to basic requirements such as age, citizenship status and payment. Once earned the patent could be issued and then recorded, but in many cases this was many years after the application. Even in cases in which a patent did not have conditions prerequisite to when it could be issued, the recording date is not the applicable date.

The date a patent was earned often is not reflected in the county records because early records were incomplete abstracts, but it can be determined from reviewing the language in the original land patent files. These files can be obtained from the General Land Office Records of the Bureau of Land Management, which has a searchable index on its website.[4]

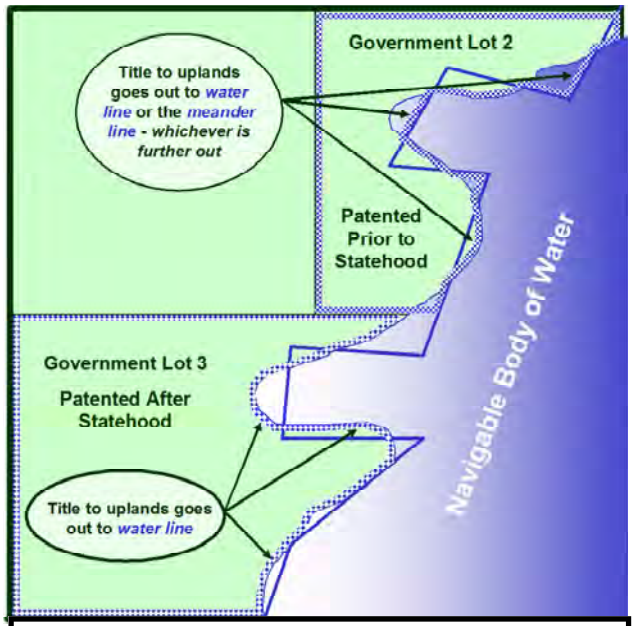


Diagram No. 2
Enlarged detail of Government Lots 2 and 3, Section 34, from Diagram 1 showing differences in the outer limits of Government Lots patented before and those patented after statehood.

Prior to statehood (Nov. 11, 1889) the federal government, which had the power to define the outer limits of the government lot, claimed title to the uplands and held the beds of navigable bodies of water in trust for the future state.

4.1 Patents before Statehood

The boundary of a ***government lot*** that borders on Puget Sound or on a ***navigable*** lake and that was patented to a private owner by the United States prior to statehood extends to *either* the water line *or* to the ***meander line***, *whichever is further* from the upland boundary. This rule, which appears to be unique among the 50 states, is the result of the disclaimer in the Washington Constitution to state ownership of ***tidelands*** or ***shorelands*** between the meander line and the upland boundary.[5] Note that this rule relates to the date the patent was earned and not the date it was issued or recorded.

Thus it is possible for an upland owner (who did not receive any separate conveyance of tidelands or shorelands from the State of Washington) to own some portion of the abutting submerged land that would otherwise be categorized as tidelands or shorelands under the Washington Constitution *if* (1) the patent to a government lot was earned prior to statehood *and* (2) the meander line was further out than the water line. As can be observed from the example in Diagram No. 2, it is possible for properties originating from ***patents*** earned prior to statehood to run well out into the water.

This rule does *not* apply to properties on the Pacific Ocean or properties bounded by ***navigable*** rivers.[6] (*See* "Accretion – Pacific Ocean" in §16.1.2 below.)

Note also that a legal description that references a government lot in such situations typically would not mention either the meander line or what would otherwise be considered ***tidelands*** or ***shorelands***, but those elements would still be applicable to the parcel.

It also follows from this rule that the boundary between tidelands or shorelands acquired later from the State of Washington (see "Conveyance and Lease by the State" in §11.0 below) by the owner of the abutting federally patented uplands, which included what would otherwise be considered tidelands in the absence of this rule, would thus be the meander line. (*See* "Legal Descriptions" in §12.0 below for an example of how tidelands or shorelands acquired from the state would be described.)

Note that the meander line is never the outer boundary of a government lot if it is located on the ***uplands*** portion of the government lot. In fact, the Washington Supreme Court has held that even when a legal description uses a meander line in a metes and bounds type of description and the meander line is located in the upland portion of the government lot, it will be construed against the grantor. The description in such cases is therefore interpreted to run to the water line, unless there is a very clear intent to the contrary.[7]

4.2 Patents after Statehood

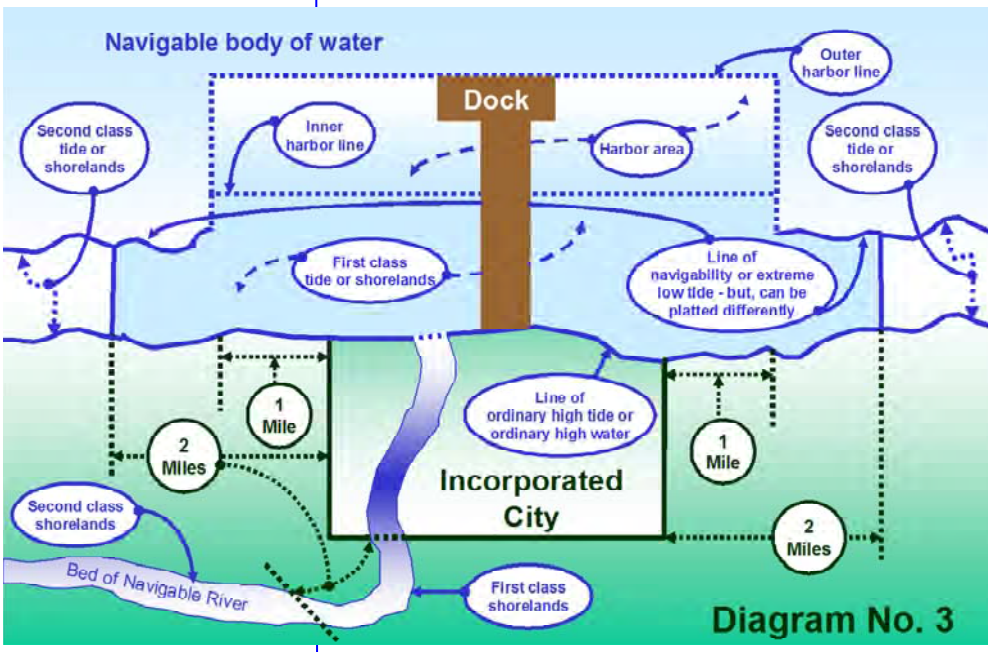
Government lots abutting ***navigable*** waters ***patented*** after statehood run only to the line of ***ordinary high tide*** (where abutting on tidelands) or to the line of ***ordinary high water*** (where abutting on shorelands). The reason lies in the fact that under the Federal Enabling Act[8] and our state Constitution, the beds and shores of all navigable bodies of water within the state were granted to the state in trust (this trust is commonly referred to as the ***public trust doctrine***; *see* "Public Trust Doctrine (Navigational Servitude)" in §21.0 below) for navigation and commerce. Therefore, after the date of statehood the federal government no longer held in trust those portions of the beds of navigable waters within the state that fell below either the line of ***ordinary high water*** or the line of ***ordinary high tide***. Consequently, ***federal patents*** to ***government lots*** earned and issued after that date carry title only to the water's edge.[9] See Diagram No. 2.

Determining the date the ***patent*** was earned relative to the date of statehood becomes especially significant when ***uplands*** property and the adjoining tidelands or shorelands are not in common ownership. Also, as noted in "Patents before Statehood" in §4.1 above, the key date is the date the patent was *earned* relative to the

date of statehood, not the date the patent was issued or recorded, either of which might have been much later than the date it was earned. This date might not be reflected in the county records.

5.0 TIDELANDS

The lands abutting the Pacific Ocean, Puget Sound and those portions of rivers feeding into the ocean or sound that are affected by the ebb and flow of tides have ***tidelands***. Tidelands extend out into the water varying distances depending upon (1) their classification as either ***first-class tidelands*** or ***second-class tidelands*** (depending on their location) and (2) the date on which they were sold by the state. The designation once established does not change. (*See* "Classification at Time of Sale" in §7.0 below.)



The boundary between ***uplands*** and all ***tidelands***, whether first-class or second-class - and subject to the meander line rule as discussed in "Patents before Statehood" in §4.1 above - is the line of ***ordinary high tide***.[10] The line of ordinary high tide has been defined in a federal case as being "…the average elevation of all high tides as observed at a location through a complete cycle of tides of 18.6 years."[11] Of course, this boundary is not readily identifiable as a fixed location and is susceptible to changes over time due to ***accretion***, ***reliction*** and ***erosion***.[12] *See* DIAGRAM NO. 3 and DIAGRAM NO. 4, and *see* "Changes in High Water Lines" in §16.0 below.

5.1 FIRST-CLASS TIDELANDS

First-class tidelands are those located within the limits of an incorporated city and within two miles on either side of the city limits.[13] The ***inner harbor line*** (see "Harbor Areas" in §9.0 below) becomes the outer limit of these tidelands within the boundaries of the city and to the first mile beyond the city limits. The outer limit of those ***first-class tidelands*** between the first and second mile beyond the city limits is either ***mean low tide*** or ***extreme low tide*** (*see* DIAGRAM NO. 3) but can be set at a fixed position when the tidelands are platted by the state. The state was required to plat all first-class tidelands prior to sale into private ownership. (*See* "State Tidelands and Shorelands Plats" in §15.1 below and see also "Classification at Time of Sale" in §7.0 below.)

The inner harbor line can be moved in or out.[14] If moved out it would create new first-class tidelands owned by the state, available for lease up to 55 years. (See "Leases by the State or Port District" in §11.1 below.) However, moving the inner harbor line closer to the ***uplands***, while creating in some cases new ***harbor area***, would not affect title to or the boundaries of any first-class tidelands or ***second-class tidelands*** already conveyed by the state. Such a new inner harbor line would "jog" around privately owned tidelands.

5.2 SECOND-CLASS TIDELANDS

Between 1890 and 1897, ***second-class tidelands*** were those ***tidelands*** outside the limits of ***first-class tidelands*** and "upon which are located valuable improvements."[15] This latter condition was removed in 1897,[16] when ***third-***

class tidelands (see "Third-class Tidelands" in §5.3 below) were eliminated.

Since 1987 second-class tidelands are all tidelands other than those defined as first-class tidelands, essentially those not in front of or within two miles of city limits (and those rare instances of third-class tidelands; *see* "Third-class Tidelands" in §5.3 below),[17] as shown in DIAGRAM No. 3. *See also* "Classification at Time of Sale" in §7.0 below.

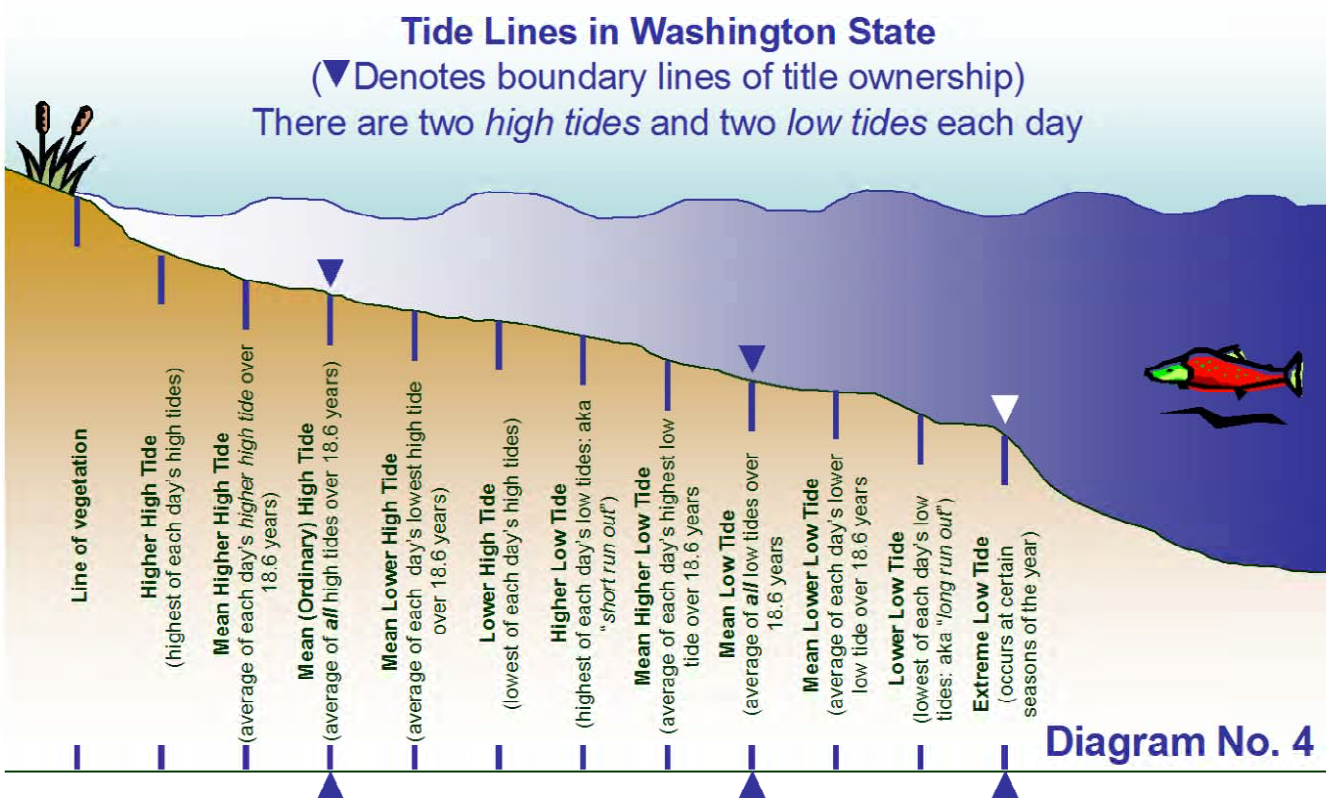
The outer limit of second-class tidelands is governed by the language of the statute that was in effect on the date an application to purchase was submitted to the state. Prior to March 8, 1911, the legislature defined second-class tidelands as extending only to ***mean low tide***.[18] In addition, applications prior to 1911 could have included a contract that would run up to 10 years. Only when the final payment was made would the deed, extending only to mean low tide, be recorded. Conveyance of second-class tidelands *applied for* after March 8, 1911, extended all the way out to ***extreme low tide***. *See* DIAGRAM NO. 4. Waterfront owners owning only to mean low tide were permitted to apply for purchase of the additional depth for their tidelands and a great many did so.

Note that the date of a deed from the state between March 8, 1911, and March 7, 1921, i***s*** *not conclusive* as to whether tidelands extended out to extreme low tide. If the deed was based on an application prior to March 8, 1911, it would only convey tidelands out to mean low tide. The deed recorded in the county records may not reflect the application date, which can be determined by contacting the state's Department of Natural Resources (DNR).

Typically, a legal description does not reference the deed from the state or the date it was given. Nor does it indicate whether (assuming the original deed was before 1911) the upland owner also acquired the additional tidelands out to extreme low tide. (*See* "Legal Descriptions" in §12.0 below for a discussion of legal descriptions.)

5.3 THIRD-CLASS TIDELANDS

Third class tidelands were all ***tidelands*** not designated first-class or second-class between the years 1890 and 1897.[19] The designation was eliminated in 1897.[20] The designation applies and remains applicable to only those third class tidelands that were actually conveyed



into private ownership by the state before 1897, and thus are not commonly encountered.

6.0 Shorelands

Shorelands are the ***submerged lands*** bordering the shores of ***navigable*** lakes and streams that are not subject to tidal flow.

The classification of shorelands as either "first-class" or "second-class" (or "third class" if conveyed by the state into private ownership prior to 1897) is similar to that of tidelands, being based on whether or not they are in front of cities. See "First-class Tidelands" in §5.1 above and "Second-class Tidelands" in §5.2 above and Diagram No. 3. However, there being no lines established by the movement of tides, the outer limit of ***second-class shorelands*** and of ***first-class shorelands*** between the first mile and second mile beyond the city limits is the ***line of navigability***.[21] As with tidelands, the designation as first class or second-class once established does not change. See "Classification at Time of Sale" in §7.0 below.

The line of navigability is usually defined as being a line along which the water is deep enough for ordinary navigability. It is to be established by the DNR but this has not yet been done for many bodies of water. Until such time as it is located for a particular area, the outer limits of those shorelands would be undetermined, and cannot be described or located by a title insurer.

The boundary between uplands and both first and second-class shorelands is the line of ***ordinary high water***,[22] although the term "***line of vegetation***" is sometimes incorrectly used. Again, this boundary is not readily identifiable as a fixed location and is susceptible to changes over time due to ***accretion***, ***reliction*** and ***erosion***.[23] *See* "Changes in High Water Lines" in §16.0 below.

7.0 Classification at Time of Sale

The DNR takes the position that ***tidelands*** and ***shorelands*** are classified as of the date of their sale by the state. Consequently, ***submerged lands*** conveyed by a deed as ***second-class tidelands*** located just outside the two-mile point beyond the city limits would retain that classification even if the city later annexed the property. In some cases such an event would also result in the extension of ***inner harbor lines*** in front of the ***uplands*** parcel, which would typically be further out than the line of low tide that marks the outer limit of the tidelands owner. This would create new ***first-class tidelands*** (lying between the second-class tidelands and the new inner harbor line) that would be owned by the state. (See "Harbor Areas" in §9.0 below for further discussion of ***harbor areas***.)

8.0 Oyster Lands

By contrast with the fee or leasehold title acquired from the state for ***tidelands*** or ***shorelands*** (*see* "Conveyance and Lease by the State" in §11.0 below) , one who acquired a deed to ***oyster lands*** to be used for the cultivation of oysters or other shellfish under any of the acts (referred to as the Bush Act and the Callow Act) regulating the sale of such lands acquired only a qualified fee.[24] Such conveyances are no longer made.

Title to oyster lands is subject to restrictions and in some cases reversion of "reserved" rights to the state in the event that the lands cease to be used for such cultivation. This reversion still applies to lands conveyed under the authority of the repealed statutes regulating the sale of oyster lands. However in some cases the reversion was acquired by the owner of the oyster lands.[25]

Since July 1, 1983, it has been possible to lease the beds of all ***navigable*** tidal waters for the cultivation of oysters or other shellfish. (See "Leases by the State or Port District" in §11.1 below.) As of 1993, the leases cannot exceed 30 years and the lands must lie below ***extreme low tide***.[26]

First-class tidelands and ***second-class tidelands*** set aside as state oyster reserves can also be leased.[27] Leases of first-class tidelands and second-class tidelands must be not less than five years or more than 10 years.[28]

Note that it is possible for such oyster lands to be located between tidelands and uplands.[29]

Title insurance is usually available for the "qualified fee" title to such lands, but title commitments, policies and guarantees describing such lands will take exception to the restrictions and reversions (see "Oyster Lands Reversions and Restrictions" in §27.12 below). In addition, title insurers will presume that the statutory provisions apply even if the deed did not expressly include them.

Note that while the Callow Act requires cultivation to avoid reversion and the Bush Act allows the oyster lands to lie fallow, title insurers will not make any determination as the status of any restriction or reversionary provisions.

9.0 Harbor Areas

Harbor areas were established by the Harbor Line Commission pursuant to the state's Constitution.[30] They could not be sold. This concept was a compromise between those who did not want to allow the sale of any ***tidelands*** or ***shorelands*** and those who did not want any restrictions on such sales.

Although the constitution originally referenced only tidal waters, and was amended in 1932 to include freshwater areas, harbor areas and tidelands in Kennewick and Pasco were platted in 1913 and those in Lake Whatcom were platted in 1928. (See "State Tidelands and Shorelands Plats" in §15.1 below for a discussion of state tidelands and shorelands plats.)

The state was required to establish ***inner harbor lines*** and ***outer harbor lines*** as far as the first mile beyond the city limits.[31] Not all eligible areas were actually established, however.

The outer harbor line (usually coincident with the federal ***pierhead line*** located pursuant to federal law) represents the outer limit of private construction. The area between the inner harbor line (set beyond the line of low tide) and the outer harbor line is known as the ***harbor area***. *See* Diagram No. 3. The harbor area cannot be given or sold, but may be leased. Unlike tidelands or shorelands that can be leased for up to 55 years, harbor area leases are limited to 30 years.[32] Most such leases are for commercial use. (For general leasing issues, see "Leases by the State or Port District" in §11.1 below.)

U.S. Army Corps of Engineer maps refer to the federal pierhead line and the ***bulkhead line*** as the outer and inner harbor lines, but the state and federal lines have two separate and distinct purposes.

Authority over harbor areas is now vested in the Board of Natural Resources of the DNR.[33]

10.0 Waterways

Waterways are designated by the state and are not less than 50 nor more than 1,000 feet wide, beginning at the outer harbor line and extending inland across the tidelands belonging to the state. They are areas that "…in the judgment of the department [*DNR*] may be necessary for the present and future convenience of commerce and navigation."[34] They cannot be sold or leased, but permits can be issued for private use. In general, permits do not create an insurable interest in real property, and title insurers will thus be reluctant to insure any waterways.

Waterways can be vacated by written order of the Commissioner of Public Lands if not excavated or used for navigation.[35] This vacation is effective if the waterway abuts port district property. If, however, it is navigable water of the United States (or subject to federal jurisdiction) this vacation must be approved by the U.S. Army Corps of Engineers. Upon vacation, title vests in the port district or the state, subject to the right of the city in which it is located to extend streets across the vacated waterway. The language of the statute suggests that title to any land selected as a street by the city would be vested in the city in fee.

Title insurers will carefully review any request to insure title to a waterway.

11.0 Conveyance & Lease by the State

The state was free to sell ***tidelands*** and ***shorelands*** in fee after statehood, although the Washington Constitution prohibited the sale

of areas in front of cities, which were to be designated as ***harbor areas*** (*see* "Harbor Areas" in §9.0 above), while allowing sale of all other tidelands and shorelands.[36]

Private fee ownership of either tidelands or shorelands is limited to those parcels that were sold by the State of Washington prior to August 9, 1971, after which the legislature prohibited all further sales of such property except to public entities.[37]

This statute does allow private acquisition of tidelands or shorelands by exchange for other tidelands or shorelands. It also permits the sale of some formerly ***submerged lands*** (referred to as "beds and shorelands"; tidelands are not named) that, based on permanent shifting of the water, now have the characteristics of ***uplands***.[38] This likely would only be applied by the state after an avulsive event caused by a natural disaster such as a flood or landslide. (*See* "Avulsion" in §16.2 below for a discussion of ***avulsion***.)

Although this statute prohibited the sale of shorelands, the state Legislature in 1979 removed the prohibition as to the sale of second-class shorelands on ***navigable*** lakes that would "not be contrary to the public interest."[39]

Generally, but not always, tidelands or shorelands have been conveyed by the state to the owner of the abutting uplands, but could have been conveyed to someone else, particularly when used for commercial purposes.

Title insurers will carefully review any request insure a fee conveyance of tidelands or shorelands by the State of Washington (for example, a deed to a city, town or park district pursuant to RCW 79.125.710).

11.1 Leases by the State or Port District

When the legislature prohibited the sale of ***tidelands***, ***shorelands*** and ***harbor areas*** to private parties in the 1971 statute it permitted leases of tidelands, shorelands and harbor areas to private parties for up to 55 years.[40]

Aquaculture leases[41] (for cultivation or harvesting oysters, clams, geoducks, etc.) are also permitted, and leases for log booming purposes are subject to special rules, including tolls, and reversion if not used for booming purposes.[42]

Preference is given to the abutting upland owner when leasing ***first-class tidelands***, ***first-class shorelands*** or ***second-class shorelands*** (but not ***second-class tidelands***).[43]

state-owned ***submerged lands***, including harbor areas (*see* "Harbor Areas" in §9.0 above), are leased by private parties from the DNR.[44]

For land within a port district, prior to 1982 port districts[45] leased the land from DNR and subleased it to private parties. However, since 1982, the DNR and a port district may enter into a management agreement for such land, giving the port district certain authority and jurisdiction over the property, including the right to lease the land.[46] Rents belong to the port district if "managed under this section for water-dependent or water-oriented uses," otherwise it is shared with the state.[47] If the lands lie within a town, rents will be paid to the municipality.[48]

Title insurers will carefully review the insurability of leases from the DNR or a port district to a private owner.

11.2 Easements Granted by the State

Easements can be granted by the state over ***tidelands*** or ***shorelands***, typically to public entities such as counties, cities and towns, and usually for roads and bridges.[49]

Title insurers will carefully review the insurability of any such easement granted by the state.

11.3 Estate or Interest

Owners of ***tidelands*** or ***shorelands*** own such land either in fee or under a leasehold estate acquired from the state.[50] However, that interest is subject to the limitations embodied in the ***public trust doctrine***, including the provisions of the ***Shoreline Management Act***,[51] and to statutory reservations appearing in the deeds from the state (see "Public Trust Doctrine" in

§21.0 below and "Navigation Rights" in §27.6 below and "Reservations" in §27.7 below.

The land can be improved significantly and used for such purposes as, for example, boat moorage facilities, where boat slips can become condominium units or limited common elements allocated to individual residential units. Since the termination of a lease will vest all reversionary interests in the land in the State of Washington, purchasers of interests in such projects need to be cognizant of the effect of the eventual termination of such a lease. This is particularly important when adjoining uplands (which are generally owned in fee and thus not subject to divestment of title when the tidelands or shorelands lease expires) and the leased tidelands or shorelands are part of a condominium, marina or similar project.

11.4 Permit Use of Non-Leased State Owned Lands

Although ***submerged lands*** can be leased from the state, under certain circumstances the state also permits the construction of private residential docks on state-owned submerged lands by the abutting residential ***uplands*** owner.[52] Such rights may not be an insurable interest in a title insurance policy, and the provisions of the permit and the statute will be excepted from coverage in a commitment, policy or guarantee that describes insured uplands (*See* "Permit to Build on State-Owned Lands" in §27.8 below). In addition, particularly in an extended coverage policy, the existence of a permit for such uses may be a factor in determining whether an exception for an encroachment onto the state-owned lands will be shown, or whether affirmative coverage with respect to encroachments will be provided to an insured.

11.5 Reservations

Prior to 1907 the state made no reservations in its deeds of ***tidelands*** or ***shorelands*** to the public. Beginning June 11, 1907, the deeds began reserving oil, gas, coal and minerals.[53] After March 17, 1911, the state deeds were also required to reserve rights-of-way for private railroads, skid roads, flumes, canals, watercourses and other easements.[54] To the extent ***submerged lands*** may still be conveyed, the deed from the state will also contain these reservations.[55]

An exception for these reservations will be included in title commitments, policies and guarantees. Title insurers also will presume the imposition of such reservations even in those instances when the deed from the state does not recite them. *See* "Reservations" in §27.7 below.

12.0 Legal Descriptions

The legal description of ***tidelands*** or ***shorelands*** shown in a deed from the state usually would not have been by metes and bounds, but would have instead only referenced the abutting ***uplands*** legal description. Leases from the state generally include a specific metes and bounds description.

Once conveyed to an upland owner, the legal description of tidelands or shorelands typically would be as follows when included with a description of the uplands property:

> Together with the adjoining [tidelands] [shorelands] of the [first][second] class.

This assumes that the deed from the state used similar language and does not instead, for example, tie to the meander line without identifying the upland parcel to which the tidelands or shorelands would attach. Although rare, this situation would result in a gap between the meander line and the upland parcel. Even if the purchaser of the tidelands or shorelands also owned the uplands, the intent to also convey those tidelands or shorelands between the ***meander line*** and the upland parcel should be expressly stated in the deed.

If tidelands or shorelands are separately described, whether or not also describing upland property (for example, when the upland parcel is in separate ownership), the format would be as follows, which includes a reference to the original deed from the state. If the deed from the state does not mention the uplands, or in those situations in which tidelands are described without reference to any uplands parcel, the description could be in one of the following formats:

> The [tidelands][shorelands] of the [first] [second] class in front of, adjoining and abutting the following described land: [*describe the upland parcel*], as [conveyed] [leased] by [*insert recording data for the deed or lease from the State of Washington or other deed creating the parcel*].

Or:

> Together with those [tidelands] [shorelands] of the [first][second] class described as follows: [*describe the tidelands or shorelands parcel, adding* "conveyed by" *the recording data for the deed or lease from the State of Washington or other deed creating the parcel*].

Note that this latter form of description would be carefully considered by a title company to confirm that there is no gap or overlap between abutting uplands and the tidelands or shorelands, *even if* the uplands and tidelands or shorelands are in common ownership.

Note that it may be advisable or necessary to have adjoining tidelands or shorelands owners mutually agree as to both the boundary between the two parcels and the title to any intervening land, if any.

12.1 Describing Platted Tidelands or Shorelands

The above approach would not be used when describing lots in a tidelands plat or shorelands plat (see "State Tidelands and Shorelands Plats" in §15.1 below). Rather, the description would use the same form of description used when describing any other platted subdivision lot.

Similarly, if privately owned tidelands or shorelands have been platted – including if they are a portion of the common elements in a condominium – no separate mention of tidelands or shorelands would be made in a legal description of the platted lot or condominium unit.

Boundary exceptions shown in "River, Stream or Slough Boundary" in §27.2 below and "Lake, Sound, Bay or Ocean Boundary" in §27.3 below would also apply to all uplands, tidelands or shorelands parcels.

12.2 Including Classification in Descriptions

The initial deed from the State of Washington of ***tidelands*** or ***shorelands*** should include the designation as "first-class" or "second-class" (which is a permanent classification *see* "Classification at Time of Sale" in §7.0 above) and that recital is usually included in subsequent deeds. Nevertheless subsequent deeds might not include those references. However, this lack of the designation in a legal description does not affect the validity of the legal description, because the classification is set at the time of sale and is not dependent on inclusion in a deed.

Nonetheless, if such a description is encountered, the classification should be determined and included in the legal description in a subsequent deed, title commitment, policy or guarantee .

It is also acceptable, but not required, to reference the original deed from the State of Washington.

12.3 Plat Ambiguities

Older subdivision plats are often ambiguous about ***tidelands*** or ***shorelands***. The plat map might show a waterward line and, even if labeled, might simply identify it as a "shoreline" or a similar designation. Usually any such line does not show surveyed courses or distances. In other words, the waterward boundary of the ***upland*** lots is not established.

These issues are present when a legal description expressly includes mention of tidelands or shorelands (although this is not typical with platted lots) or when only the platted lot with an ambiguous waterward boundary is described. In most cases, apparent boundary lines for any tidelands or shorelands that abut upland lots cannot be relied upon.

It is very important when dealing with such waterfront lots to determine the answer to each of the following: (1) whether the plattor owned the tidelands or shorelands; (2) whether the legal description of the land included in the plat included those tidelands or shorelands; (3) whether the plat map intended to include

any portion of the tidelands or shorelands into any of the waterfront lots, and if so, whether those boundaries are sufficiently described; (4) whether there is any ambiguity about the boundary between any upland lot and the tideland or shorelands; and (5) whether the plat made any express mention of the ownership or use of the tidelands or shorelands (as open to use by all lot owners, for example).

12.4 Describing Lateral Lines

The lateral lines of ***tidelands*** or ***shorelands*** that are expressly included in a legal description should not also be described, unless and only to the extent they have been mutually established between the insured land and any adjoining land. Such "boundary line adjustment" agreements must also include appropriate conveyance language from each party as to land lying on either side of the established boundary line. Such an agreement may or may not be subject to subdivision issues. *See* "Subdivision Ordinances" in §15.2 below) and "Platting Lateral Lines" in §15.3 below, and in general see also "Lateral Lines" in §19.0 below.

12.5 Describing Accreted or Relicted Lands

Special care should be taken when lands apparently added by ***accretion*** or ***reliction*** (*see* "Accretion, Reliction and Erosion" in §16.1 below) are requested to be insured. Title insurers will take special care to confirm that such lands would not be claimed by the state, and may actually expressly exclude such lands in the legal description or take exception for the possible rights of the State of Washington (*see* "State of Washington Ownership" in §27.1 below).

Caution should also be exercised when dealing with ***lateral lines*** in a legal description that includes ***accretions*** or ***relictions*** to ***uplands***, ***tidelands*** or ***shorelands***. In addition, a legal description might only reference a recorded subdivision lot, but if that lot included tidelands or shorelands (whether with but especially without a platted surveyed waterward boundary) the possibility of accreted or relicted lands should be addressed. *See* "River, Stream or Slough Boundary" in §27.2 below and see "Lake, Sound, Bay or Ocean Boundary" in §27.3 below.

Title insurers will carefully review the insurability of any accreted or relicted. This is especially important because the State of Washington treats accreted and relicted lands differently depending on the type of body of water (the Pacific Ocean, Puget Sound, rivers or lakes), notwithstanding ownership of the ***uplands***.

12.6 Foreclosures & Legal Descriptions

When a deed of trust or mortgage includes both ***uplands*** and ***tidelands*** or ***shorelands*** parcels special care should be taken to confirm that that a judicial foreclosure or a trustee's sale also expressly includes those tidelands or shorelands. The lender would not acquire title to those tidelands or shorelands unless it included both parcels in the legal description of the deed of trust or mortgage and the foreclosure (assuming that would be the lender's intent). No assumptions should be made that the tidelands or shorelands parcel automatically "runs" with the uplands parcel.

12.7 Multiple Parcels

Note that it is entirely appropriate, especially in a title commitment, policy or guarantee, to preface the upland parcel description with "PARCEL 1 [*or* "A" etc.]" and the tidelands or shorelands parcel with "PARCEL 2 [*or* "B" etc.]." Doing so will reinforce the fact that each parcel is separate and distinct and has an independent chain of title, which is particularly significant if each parcel is in separate ownership and/or needs to be vested differently in Schedule A.

As an example, the fee upland owner might have a leasehold estate from the state as to the adjoining tidelands or shorelands, in which case Schedule A of a commitment or policy would include the following language: "The estate or interest in the Land that is insured by this policy is: [*insert* "fee as to Parcel 1" *and* "a leasehold estate as to Parcel 2 created by…" *and recite the lease recording information*]."

12.8 Title Insurance for Waterfront Property

The "homeowner's protection" form of policy is generally not available for waterfront property,

even with platted lots that apparently include abutting tidelands or shorelands. In addition, extended survey coverage for the other forms of American Land Title Association (ALTA) policies should not be available without a current sufficient ALTA/ACSM survey.[56]

Of course, platted tidelands and shorelands (whether they are separate lots or are incorporated into an upland platted lot) are still subject to statutory reservations if applicable, as discussed in "Reservations" in §11.5 above and shown in "Reservations" in §27.7 below.

Tidelands and shorelands, as with an upland parcel fronting water, whether or not platted, are also subject to changes in boundary and area due to the movement of water, including ***accretion***, ***reliction*** and ***erosion*** (see "Changes in High Water Lines" in §16.0 below). Thus, title commitments, policies and guarantees should continue to also show the appropriate exceptions for such matters, as it would for any upland parcel. *See* "River, Stream or Slough Boundary" in §27.2 below and see "Lake, Sound, Bay or Ocean Boundary" in §27.3 below.

13.0 Real Estate Taxes

Tidelands or ***shorelands*** are a separate parcel from any abutting ***uplands*** parcel and thus are taxed under a different tax account number. Caution should be exercised when examining title to both uplands and tidelands or shorelands to account for the existence of real estate taxes or public assessment liens for all of the subject property.

14.0 Access

Access to ***tidelands*** or ***shorelands*** generally is across adjoining commonly owned ***uplands*** or via an easement appurtenant to the tidelands or shorelands over adjoining uplands. However, if the uplands are in separate ownership, and there is no abutting public, dedicated or open street or road, then an exception in the commitment, policy or guarantee for a lack of a right of access to and from the insured tidelands or shorelands would be appropriate.

The same issue arises with small islands (see "Islands" in §17.0 below) that have no public roads, whether or not the insured parcel includes tidelands or shorelands.

See also "Access to Tidelands, Shorelands or Islands" in §27.13 below for a form of exception used in current ALTA policies.

15.0 Subdivision & Platting

Subdivision and platting ordinances might be applied to ***tidelands*** or ***shorelands*** in the same way as they do to ***uplands***.

15.1 State Tideland & Shorelands Plats

The state was required to subdivide ***tidelands*** and ***shorelands***[57] but did so only in certain areas. Such plats, originally intended to facilitate the sale of such lands, have not been done since 1971 because of the prohibition on sale of submerged tidelands and shorelands to private parties.

The plats for the tidelands and shorelands platted by the state were to be recorded in the county records, but in many cases are only available at the offices of the DNR. Nevertheless, a reference to a lot in such a plat, referencing the DNR records instead of the county's plat book and page or recording number, is sufficient for describing the land. The legal description of such a lot need not mention additionally that it is also tidelands or shorelands. *See also* "Legal Descriptions" in §12.0 above.

Although a lot in such a plat is treated the same a lot in an ***uplands*** plat for legal description purposes it is still subject to statutory reservations if applicable, as discussed in "Reservations" in §11.5 above, and shown in "Reservations" in §27.7 below.

The lots in these state plats of tidelands and shorelands are not subject to the question of the location of "***lateral lines***" (as discussed in

"Lateral Lines" in §19.0 below), because the plat establishes those lot boundaries. (*See* "Platting Lateral Lines" in §15.3.) However, these state-platted lands are also subject to changes in boundary and area due to the movement of water.[58] Thus, title commitments, policies and guarantees should continue to show the appropriate exceptions for such matters, as it would for an upland parcel or other tidelands or shorelands, whether or not platted. (*See* "River, Stream or Slough Boundary" in §27.2 below and see "Lake, Sound, Bay or Ocean Boundary" in §27.3 below. Only boundaries that are affected by movement of water subject to these issues.)

The lots in these state plats of tidelands and shorelands are not subject to the question of the location of "***lateral lines***" (as discussed in "Lateral Lines" in §19.0 below), because the plat establishes those lot boundaries. (*See* "Platting Lateral Lines" in §15.3.)

15.2 Subdivision Ordinances & Title Coverages

Title policies (except for ALTA "homeowner's protection" forms) exclude matters relating to ordinances, including subdivision.[59] In some cases affirmative coverage is requested for such matters, but title insurers will be reluctant to provide affirmative coverage for subdivision matters when insuring waterfront property.

Most insurers will not issue the ALTA "homeowner's protection" policy forms, which include some limited coverages for governmental regulatory matters, when insuring residential property located on water.

When waterfront property includes both ***uplands*** and abutting ***tidelands*** or ***shorelands***, local ordinances may or may not address the separate nature of the parcels. Further, because the area and boundaries of a tidelands or shorelands parcel may not be readily ascertainable, and of course always subject to change (*see* "Changes in High Water Lines" in §16.0 below), the provisions of ordinances relating to zoning and land use regulations such as lot size and setbacks may or may not apply to the tidelands or shorelands portion of property being sold or encumbered.

Caution should be exercised when addressing all such coverage issues relating to tidelands or shorelands. A title insurer may not be able to provide a zoning endorsement, or might modify it with respect to any tidelands or shorelands, or might limit it to that portion of the land excluding the tidelands or shorelands. Requests to issue such endorsements would be carefully considered by a title insurer.

15.3 Platting Lateral Lines

Lateral lines of ***tidelands*** or ***shorelands*** can be established by platting them, including when the common owner of the abutting ***uplands*** extends them from the upland boundary on the plat with a specific course and distance and the stated intent to include them within individual lots. However, this is not always done, and caution should be exercised when reviewing a plat (particularly an older plat) because lines shown on the plat survey may not (1) be intended to be boundary lines or (2) have been surveyed without courses and distances. *See* also "Lateral Lines" in §19.0 below and see "Lateral Boundaries of Submerged Lands" in §27.4 below.

15.4 Streets Ending in Water

Many streets, particularly those created by platted subdivisions, end in water. This can present two special problems for title insurers.

15.4.1 Street Vacation

One issue to keep in mind relates to vacated streets.

In most cases, vacated streets ending in the water do no accrue to the adjoining privately owned waterfront property.

A road abutting a body of water in a county cannot be vacated unless it is for public purposes or the property is zoned for industrial use.[60] Public uses include use for port purposes, boat moorage or launching sites, a park, viewpoint, and recreational or educational purposes. Unless the property is industrial, title insurance will not usually be requested for a county-vacated street ending in the water.

Vacation of a street (or alley; for all practical purposes there is no difference to a title insurer between a street, road or alley) in a city or town is treated differently. First, the street cannot be vacated except for one of three reasons:[61] (1) the

vacation is for those types of public purposes allowed for county road vacations, (2) the street is not being used as such, and is not suitable for those types of uses, or (3) the vacation enables the implementation of a plan (adopted by resolution or ordinance) that provides similar public access to the shoreline if the properties in the plan had not been vacated. Only in the latter two situations would title insurance likely be requested.

Any request to insure a vacated street ending in or abutting water would be carefully considered by a title insurer.

15.4.2 Encroachments into Streets

Another issue for title insurers is that streets that end in water are often not physically open and there is no evidence of any roadway, path or other access from another open right of way down to the water. Over time, waterfront owners on either side of the street may appropriate portions for private uses, and the area may be landscaped, fenced or improved. Unless the street has been properly vacated (not always possible; *see* "Street Vacation" in §15.4.1 above), the adjoining owners do not have the right to use or improve portions of the street.

In many cases, the city or county will want the right of way kept open to allow public access to the water.

Title insurers will exercise caution if asked to insure title to waterfront lots adjoining rights of way extending to the water, whether or not the transaction involves a purportedly vacated street.

Title insurers also generally decline to offer the ALTA's "homeowner's protection" form of policy on waterfront property. In addition, when a traditional ALTA policy is issued, extended coverage may not be available without a survey and the possible inclusion of exceptions from coverage for encroachments or similar adverse matters.

16.0 Changes in High Water Lines

The boundary between ***uplands*** and ***submerged lands*** normally moves if the line of high water or high tide moves gradually and by natural means (***accretion***, ***reliction*** or ***erosion***). However, sudden (*avulsive*; *see* ***avulsion***) movement of the water line can create problems with boundaries, not only as between the upland parcel and the adjoining tidelands or shorelands, but also between privately owned uplands on either side of the body of water. Both issues are discussed in the following subsections.

16.1 Accretion, Reliction & Erosion

Where property is bounded by a body of water, whether navigable or non-***navigable***, and whether tidal or not, the water may move, or land may be added to or removed from the ***upland*** parcel, causing the watercourse to move.

This water movement might be created by ***accretion*** (when the buildup of soil deposited on one bank, called ***alluvion***, forces the water to move, or shift, its location), ***reliction*** (when the movement of water, such as by erosion of land on one bank, exposes formerly ***submerged lands*** on the other bank) or ***erosion*** (the gradual eating away of soil by water action).

The general rule for non-navigable water is that accretion, reliction or erosion shifts the boundary between the uplands parcel and the submerged lands, as well as the boundary between the upland parcels on either side of the body of water, if applicable.[62] This rule usually means that the newly added or exposed land becomes part of the upland parcel and that the boundary between it and the fronting ***tidelands*** or ***shorelands*** moves accordingly. It also preserves access to the water for all adjoining parcels. This latter concept also factors into decisions by Washington courts that allow for varying from a fixed rule, so that accreted land is apportioned equitably among ***riparian*** owners.[63]

However, accretions and relicted land on navigable rivers and lakes, including those abutting submerged lands previously sold by the state, are claimed by the state.[64] This is notwithstanding a case[65] that says that the state is entitled only to the bed and shores of the river as they were situated when it ceased to be navigable, albeit with provisions for sale under certain circumstances to the abutting private owner. (*See also* "Accretion – Pacific Ocean" in §16.1.2 below.)

The rule regarding accretion and reliction applies to these same natural processes affecting tidelands on the Pacific Ocean, the Straits of Juan de Fuca, Haro and Georgia, Puget Sound and rivers emptying into them, except that the state cannot claim relicted lands in front of privately owned uplands. (*See also* "Accretion – Pacific Ocean" in §16.1.2 below.)

It applies also to shorelands on a lake, even if there are no opposing banks that are conversely affected. (*See also* "Accretion and Reliction – Rivers" in §16.1.1 below and "Reliction – Lakes" in §16.1.3 below.)

When title to the uplands and tidelands or shorelands are in common private ownership, the state would not claim accreted or relicted land, but it could do so if the tidelands or shorelands were owned by the state (i.e., have not been conveyed into private ownership, usually to the upland owner).

A title insurer cannot determine, first, whether accretion, reliction or erosion has occurred, or second, if it has occurred, whether it resulted in a change to the boundary of the insured land. It also will not insure that the state has, or has not, claimed relicted or accreted land. *See* "River, Stream or Slough Boundary" in §27.2 below and "Lake, Sound, Bay or Ocean Boundary" in §27.3 below for the title exceptions related to these possibilities

16.1.1 Accretion & Reliction - Rivers

There are numerous cases in which courts have held that if a stream is the boundary between two parcels and the stream shifts gradually over a period of time, the boundary between the two parcels shifts with the change in location of the ***thread*** of the stream.[66] *See* Diagram No. 5.

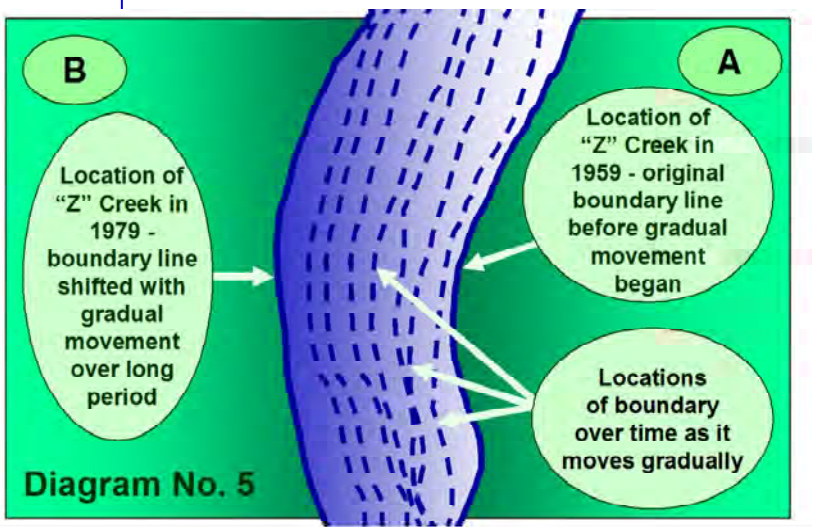
This rule applies to non-navigable rivers[67] and may apply to navigable rivers as well, but if the river is navigable, the state would claim accreted or relicted lands.

A title insurer would not be able to insure that such a boundary will not ***shift its location*** nor be able to determine whether it has or has not, in fact, already shifted from some prior location, and will take exception for that possibility. *See* "River, Stream or Slough Boundary" in §27.2 below.

16.1.2 Accretion - Pacific Ocean & Straits

Accretions to ***uplands*** on the Pacific Ocean (and likely the Straits of Juan de Fuca, Haro and Georgia) are not owned by the state (except where the uplands and ***tidelands*** are owned by the state). A private upland owner acquires them as a result of a seminal case affecting waterfront property in Washington.[68] The *Hughes* court said that it applied federal law over state law in part because the waters "lap both the lands of the State and the boundaries of the international sea." Note that if the upland owner did not own the tidelands, those tidelands created by the accretion process would "move" and continue to be owned by the state.

Accretion was also applied where an upland owner dredged part of Whiskey Slough and claimed title to the resulting exposed lands on the far side of the ***slough*** on the theory that the change was avulsive (*see* "Avulsion" in §16.2 below). However, the court applied the rule of



accretions.[69] The change in the course of the slough shifted the boundaries of the land on either side, and both upland parcels retained riparian rights to the water.

In all cases, title insurers will except the possibility of changes in boundary from coverage. *See* "Lake, Sound, Bay or Ocean Boundary" in §27.3 below.

16.1.3 Reliction - Lakes

Reliction could occur on a ***navigable*** lake if the level of the lake was lowered gradually by natural processes. As with ***accretions*** and relictions on rivers, newly exposed lands would be claimed by the state. (*See* a related issue in "Rights of the Public – The Lake Chelan Case" in §24.4 below.)

Relicted land on a non-navigable lake would accrue to the ***upland*** parcel. However, in all cases, title insurers will except the possibility of changes in boundary from coverage and assume the lake is navigable. *See* "Accretion & Reliction - Title Insurance" in §16.1.4 below, "Navigability" in §20.0 below, "State of Washington Ownership" in §27.1 below and "Lake, Sound, Bay or Ocean Boundary" in §27.3 below.

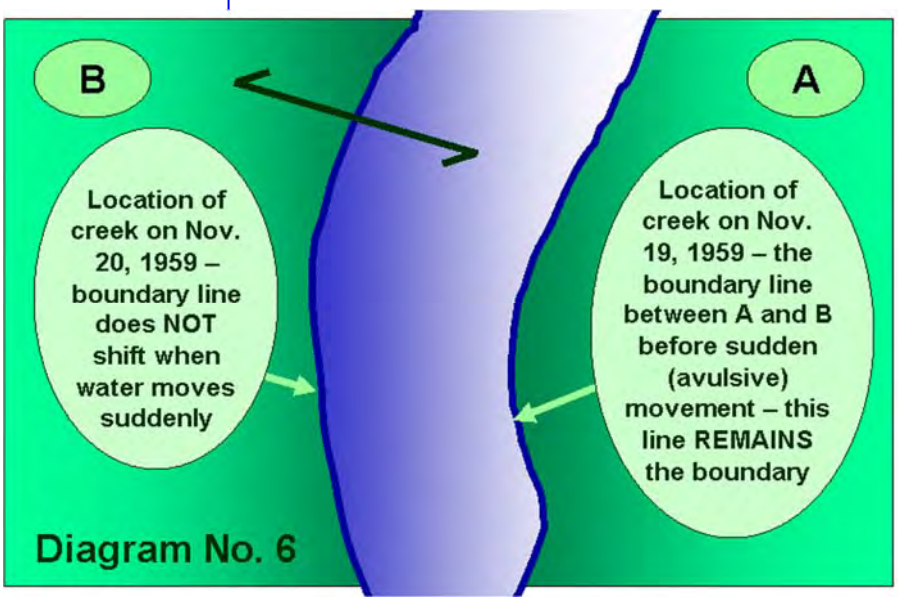
16.1.4 Accretion & Reliction - Title Insurance

While ***accreted*** or ***relicted*** lands are generally considered part of either the ***upland*** parcel or ***tidelands*** or ***shorelands*** to which they accrete, without the need to expressly include them in a legal description, a title insurer will be reluctant to expressly insure accreted or relicted lands or to include a reference to them in the legal description (*see* "Describing Accreted or Relicted Lands" in §12.5 above). Similarly, if such lands are apparently connected to an insured upland parcel the title insurer may either expressly exclude accretions or relictions or alternatively show an exception for the right or title of the State of Washington as to any accretions or relictions that might be encompassed by the insured legal description (*see* "State of Washington Ownership" in §27.1 below). *See also* "Legal Descriptions" in §12.0 above for more discussion of legal descriptions.

Typically, a title insurer will not affirmatively insure the location of the boundary between uplands and ***submerged lands***, or whether that boundary has been affected by ***accretion***, ***reliction*** or ***erosion***, even if those lands are in common ownership. Rather, an exception from coverage will be taken for this issue. (*See* "River, Stream or Slough Boundary" in §27.2 below and "Lake, Sound, Bay or Ocean Boundary" in §27.3 below.) Nor will it insure with respect to the title to newly exposed apparently accreted or relicted land. (*See* "State of Washington Ownership" in §27.1 below.) Even if the newly created or exposed lands are no longer submerged, and thus considered uplands, title to them might be claimed by the state. One theory would be that because the title of the underlying land (typically being tidelands or shorelands before the change) was originally vested in the state, accretion or reliction does not divest that title. In other words, the lands now permanently exposed were once partially or totally submerged, and the movement of the water would not divest the state of title to that land.

16.2 Avulsion

In contrast to the gradual processes of ***accretion*** and ***reliction***, if a body of water changes or shifts its location suddenly, whether by a natural event (such as an earthquake or landslide) or by some man-made activity (such as the construc-



tion of a dam or the rechanneling of a river) the property lines normally do not shift. This type of water action is called ***avulsion*** or inundation. Each owner continues to own to the original location of his or her property boundaries.[70]

For example, land covered by water after construction of a dam must be conveyed by the owner (either in fee or an easement) or the land would need to be taken by condemnation. It also follows that ***riparian*** rights do not remain with ***uplands*** that no longer abut water as a result of the avulsive action. *See* "Riparian Rights" in §24.0 below and DIAGRAM NO. 6**.**

However, a landowner cannot effect such a change in the course of a river or stream and then claim title to land on his or her side of the ***thread*** as a result of the change.[71] In *Strom*, one upland owner caused a change in the location of Whiskey Slough, but could not claim title to the resulting exposed lands on the far side of the ***slough***. This case is also interesting because, although the change to the course of Whiskey Slough was the result of man-made dredging, which the defendant argued was therefore avulsive, the court applied the rule of accretions (*see* "Accretion, Reliction and Erosion" in §16.1 above). Thus, the change in the course of the slough also shifted the boundaries of the land on either side, and both upland parcels retained riparian rights to the water.

Again, a title insurer cannot insure with respect to the boundaries between ***uplands*** and ***submerged lands*** (or formerly submerged lands) nor as to the title to the exposed land, whether the movement was avulsive or gradual.

16.2.1 AVULSION & THE LAKE WASHINGTON CASE

Ownership of ***shorelands*** abutting waterfront ***uplands*** property became extremely important after the level of Lake Washington dropped about 10 feet when the Government Locks, the Lake Washington Ship Canal and the Montlake cut were completed. One possible result was that the permanently exposed (***relicted***) lands were considered uplands and, if so, could be (1) claimed by the abutting upland owner, as an extension of the uplands, or (2) claimed by the state. Alternatively, they could be considered an extension of the existing shorelands, and either (1) owned by the upland owner if those had earlier been conveyed by the state, or (2) newly created shorelands owned by the state.

Ultimately, the upland owner whose title included the abutting shorelands prior to the lowering of the lake was held to be a true ***riparian*** owner and, as such, was automatically entitled to the ownership of the new shorelands created by the lowering of water level.[72] This is not consistent with the usual rules applying to ***avulsion*** (*see* "Avulsion" in §16.2 above).

On the other hand, if the upland owner did not also own the abutting shorelands, that owner was limited to the original line of high water, as it existed prior to the lowering of the lake, and the relicted lands were held to be owned by the State of Washington. This is consistent with the usual rules applying to avulsion.

16.2.2 AVULSION & THE DUWAMISH CASE

Similar issues arose when the Duwamish River was rechanneled into the Duwamish Waterway (Commercial Waterway No. 1; *see* "Waterways" in §10.0 above). Many property owners who had access to the river prior to the construction of the new channel were left with no access to ***navigable*** waters. ***Riparian*** rights did not remain with the ***uplands*** when those uplands no longer abutted the water as a result of the rechanneling the river. The adjudicated results were similar to the Lake Washington case (*see* "Avulsion and The Lake Washington Case" in §16.2.1 above).

The permanently exposed land was free to be sold by the state, and those owners whose titles did not include the abutting ***tidelands*** or ***shorelands*** were not compensated for the loss of water access.[73]

17.0 ISLANDS

Islands, especially those in rivers and ***sloughs***, present special problems. An island might be shown on the original government survey and be described by reference to a ***government lot***, and in such cases can be considered ***uplands***. Generally in such situations the government lot can be insured, but with the same exceptions applicable to other uplands.

For example, if an island is located in a ***navigable*** river, an exception for the rights of the

State of Washington would be appropriate (*see* "State of Washington Ownership" in §27.1 below). ***Shorelands*** on an island in a navigable river could not be expressly insured if not conveyed by the state to the upland owner.

If the river or stream has been adjudicated non-navigable, title would be presumed to extend to the ***thread*** of the river or stream, but still subject to ***riparian*** rights (*see* "Riparian Rights" in §24.0 below and *see* "Public and Private Riparian Rights" in §27.5 below) and perhaps federal navigation rights (*see* "Public Trust Doctrine (Navigational Servitude)" in §21.0 below and "Navigation Rights" in §27.6 below).

In general, the location of the boundaries between uplands and adjoining shorelands or ***tidelands*** on an island can be particularly elusive because ***accretion*** and ***reliction*** action will likely be more constant and pervasive.

In some situations an island could have existed but over time become permanently connected to uplands on one side. If this was a result of accretions extending from the bank of the river out to the island then the island becomes part of the upland parcel. Similarly, if it resulted from accretions extending from the island to the bank of the river, the description applicable to the island would include this added land up to the boundary of the original uplands. In either case, a title insurer would be reluctant to insure title to the island, either expressly or by implication when describing original uplands, particularly because the state may claim title to all accretions to uplands on rivers

An island might also have been created by a change in a portion of the channel of a river, where it cuts into the uplands and creates a new channel, isolating part of the uplands. The resulting "island" technically would be part of the upland parcel (but also including portions of the adjacent shorelands if the river is navigable), but with the characteristics of a separate island. A title insurer may be reluctant to expressly insure such land using the original government lot designations, unless it is satisfied that the island is part of that upland description. In any case, the bed of the new channel would be subject to a claim by the State of Washington and maybe even by the State of Oregon if it is located in the Columbia River between Washington and Oregon.

In some cases islands are created after the government survey. This could be caused by the buildup or deposits of sediment over time in a portion of a riverbed.

A title insurer probably would presume that title to an island in a river or ***slough*** not shown on a government survey is vested in the State of Washington (because the bed of the river would be considered navigable, and thus owned by the state), assuming it is even willing to try to describe the land. However, such land that has the characteristics of uplands may be available for sale by the state after certain survey requirements are met.[74]

Islands in lakes and tidal waters (for example, Puget Sound, or the Straits of Juan de Fuca, Haro or Georgia) are less susceptible to change over time, but these issues still apply.

A title insurer will carefully consider any request to insure uplands, tidelands or shorelands located on an island, particularly a small one.

In all cases, access to an island may be limited or impractical, and title insurers will likely limit coverage for access, particularly with small islands that have no public road system. *See* "Access to Tidelands, Shorelands or Islands" in §27.13 below for a form of exception used in current ALTA policies.

18.0 Sloughs & Estuaries

A ***Slough*** can refer to more than one type of body of water or ***wetlands*** area. It can mean a boggy, swampy, marshy or muddy area, which

can be unconnected to any other body of water, and this generally does not have boundary line or title implications. Nonetheless, where it is located along the course of a river and as long as there is some water flow in the river through the boggy area, it will be a part of the river, with attendant boundary ambiguities.

More commonly in Washington State a slough will refer to an ***estuary***, typically where a creek or river meets the Pacific Ocean or Puget Sound, and where the water is brackish (a mixture of fresh and saltwater). To the extent it may be a moving channel, the flow of water may be slow and subject to the ebb and flow of tides.

Owners of property on either side of the slough may dispute whether the slough is part of the ocean or part of the river, and challenge how the submerged lands (being possibly either ***tidelands*** or ***shorelands***) are treated by the state. (*See* "Accretion, Reliction and Erosion" in §16.1 above and "Avulsion" in §16.2 above for a discussion of how ***accretions***, ***relictions***, ***erosion*** and ***avulsion*** can affect this issue.)

Islands can be located within sloughs and may or may not have been surveyed or created after the federal survey. Such islands may also have been subject to significant changes over time. (*See* "Islands" in §17.0 above.)

The implication of these issues generally involves changes to the shoreline along a slough due to accretion or reliction. (*See* "Accretion, Reliction and Erosion" in §16.1 above.) Sloughs may present challenges that are more complex because there may be multiple channels that shift and change over time. As with other accreted or relicted lands, a title insurer will be reluctant to assume that any of them are part of a privately owned upland parcel (which would be the case if it is ocean front property, based on the *Hughes* case) or part of the riverbed or shorelands (which would be the case if the abutting water is part of the river). The insurer will generally assume such lands could be claimed by the state, as an accretion to upland property on a river.

Complicating these title issues relating to sloughs is the fact that the state has not located boundaries between tidelands and shorelands at the mouths of rivers as required by statute[75] except for the Columbia River.

19.0 Lateral Lines

An area where there are often misconceptions is in the question of how property lines extend out into the ***tidelands*** or ***shorelands***, assuming they have been conveyed by the state. These boundary lines are commonly termed "***lateral lines***"

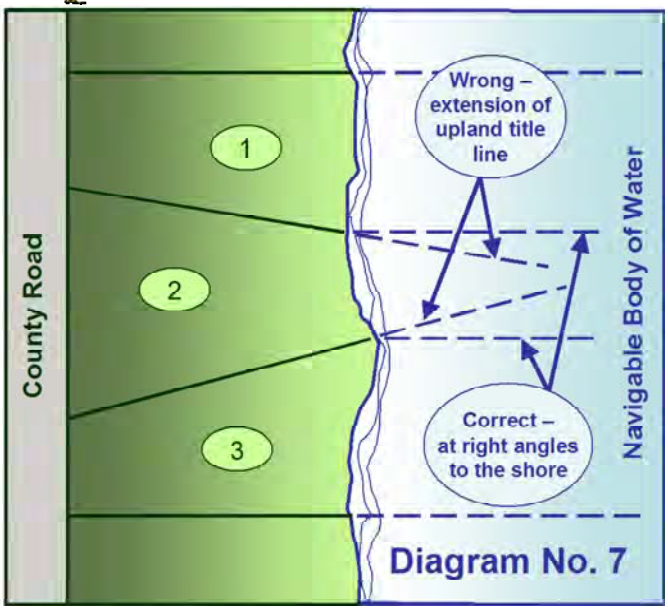
Note that tidelands or shorelands are usually conveyed to the abutting ***uplands*** owner, and the lateral lines in such cases would normally extend out over the submerged lands from a point on the shoreline where the upland boundary intersected. However, such ***submerged lands*** can be owned by someone other than the abutting upland owner, and the lateral lines between adjoining owners of such ***submerged lands*** may have no relationship to the boundaries of the upland parcel.

A waterfront owner is not allowed to unilaterally project the upland boundaries out into the tidelands or shorelands. To do so might deprive either that owner or a neighbor of tidelands or shorelands to which one would be entitled under Washington Supreme Court decisions.[76]

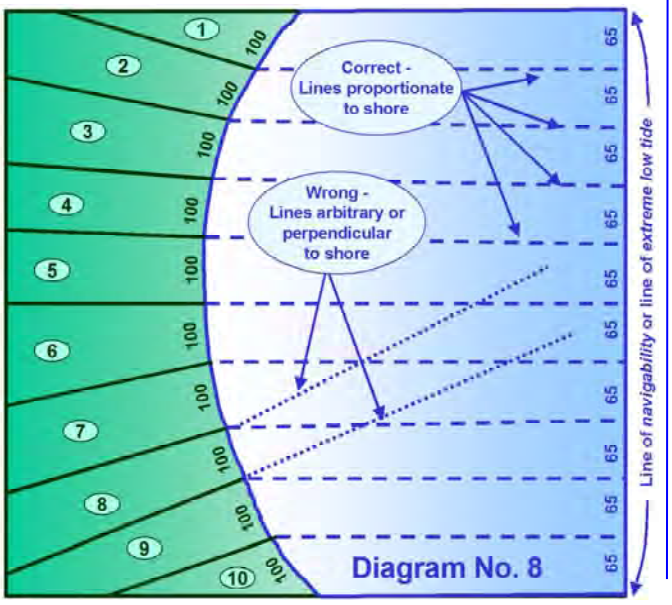
There are no statutes defining the location or direction of these lateral lines through tidelands or shorelands. Neither is there any helpful language in the original deeds of these lands from the State of Washington. The deeds simply convey all tidelands or shorelands, for example: "… all tidelands of the second-class lying in front of and abutting Government Lot 3, Section [ ], Township [ ] North, Range [ ] East, W.M." (*See* "Legal Descriptions" in §12.0 above for a discussion of legal descriptions.)

The basic rule, where the beach is a relatively straight line, would be that the lateral lines are projected into the water at right angles to the line of ***ordinary high tide*** (in the case of tidelands) or to the line of ***ordinary high water*** (in the case of shorelands).[77] Note that this does not necessarily equate to an extension of the side boundaries of the uplands parcels. In addition, the lateral lines of the tidelands or shorelands should not intersect with those of other upland owners. *See* Diagram No. 7.

The Supreme Court has applied a different, but not absolute, rule when the properties are on bays, coves and inlets. In such a situation, the right angle rule does not usually provide an eq-

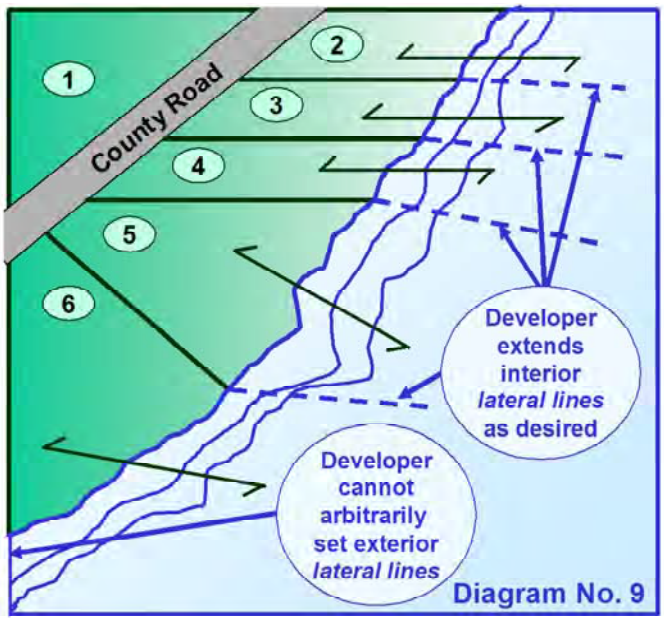


uitable division of the submerged lands to the abutting waterfront owners. Because the "physical characteristics of the bays, coves, and inlets present…many peculiarities," courts do not simply apply "a particular formula and let [ ] the chips fall where they may."[78] Instead, "it is desirable that all affected property owners be treated equitably."[79] Thus, for example, in one case[80] the court set out a method for projecting the lateral lines on a cove that made a much fairer distribution of submerged lands. The technique involved connecting the property line at the shore line to proportionate lengths of frontage at the line of extreme low tide (for tidelands conveyed after 1911; mean low tide for tidelands conveyed earlier) or the line of ***navigability*** (for shorelands). *See* DIAGRAM NO. 8**.**



Of course, an owner of upland property that includes the abutting submerged lands and that is large enough to be divided into smaller parcels (and this would include the beds of non-navigable lakes; *see* "Non-Navigable Lakes" in §22.0 below) is free to subdivide the property, including submerged lands, and delineate the specific locations of the interior lateral lines. (*See* "Platting Lateral Lines" in §15.3 above).

In DIAGRAM NO. 9 a developer has laid out such a waterfront plat, in which the direction of the lateral lines of the interior lots have been fixed without applying the usual rules from Washington court decisions. It is important to note, however, that the *exterior boundary* lines (that is, on either end of the entire submerged lands parcel) cannot be fixed without agreement and conveyance between the adjoining submerged land owners.



A title insurer generally cannot insure an owner of any waterfront property, no matter what the configuration of the shoreline, as to the location of the lateral lines unless:

1. there has been a court decree establishing the location of such lines (which decree would also presumably confirm the title of each owner in the respective portions on either side of the lines), or
2. a plat was created by a common owner, or

3. an agreement has been entered into by the adjoining owners establishing the mutual lateral boundaries.

Such an agreement must also, of course, include mutual conveyance between the owners to actually confirm title according to the agreed upon boundaries. *See* "Describing Lateral Lines" in §12.4 above.

20.0 Navigability

In Washington, navigability "means that a body of water is capable or susceptible of having been or being used for the transport of useful commerce."[81] In one case the court said:

> Whether a body of water is navigable in the true sense of the word depends, among other things, upon its size, depth, location and connection with, or proximity to, other navigable waters. It is not navigable simply because it is floatable for logs or other timber products or because there is sufficient depth of water to float a boat of commercial size. A lake which is chiefly valuable for fishing or for pleasure boats of small size is ordinarily not navigable. In order to be navigable, it must be capable of being used to a reasonable extent in the carrying on of commerce in the usual manner by water.[82]

Navigability also has meaning in a non-title (i.e., regulatory) context; see "Public Trust Doctrine" in §21.0 below and the exception in "Navigation Rights (Navigational Servitude)" in §27.6 below.

For title purposes, title insurers will always assume a body of water is navigable unless and until it has been adjudicated non-navigable, since navigability is always a question of fact[83] and can only be settled by a decision from the Washington Supreme Court.[84]

Whether a body of water is navigable depends on its navigability on November 11, 1889, the date Washington became a state. In other words, the current appearance of a stream or lake (even if it has long since dried up) does not determine its status. If it was navigable at the date of statehood, the bed would be owned by the state. (*See* "Categories of Submerged lands" in §2.0 above.) Navigability, once established, cannot be destroyed by disuse.[85]

Although a determination of navigability for a particular body of water is not made by title insurers, there are often misunderstandings as to the definition of the term "navigable" that are worth mentioning. Common misconceptions include the following:

1. If the government survey showed meander lines on a body of water it must be navigable. NOT SO! The presence of ***meander lines*** means only that the particular body of water is a lake of more than 25 acres or a stream of over 198 feet in width. The body of water may or may not be navigable, but the meander lines themselves were laid out solely to comply with the requirements of the U. S. Rectangular Survey Act.
2. If the State of Washington has issued deeds for ***shorelands*** on a particular lake, that lake must be navigable. NOT SO! The DNR has long taken the position that until a Supreme Court determination has been made on a particular body of water, it will assume that it is navigable and for many years has issued deeds for shorelands on small lakes and rivers.
3. If a stream will float logs, it is navigable. NOT SO! Although there is a case that provides that a stream that will float logs is navigable *for that purpose*, it does not automati-

cally follow that the stream is capable of commercial navigation and the bed of such a stream does *not necessarily* belong to the State of Washington.[86] Of course, the stream would still be presumed navigable by a title insurance company (and the bed therefore owned by the state) unless a court determines otherwise.

21.0 Public Trust Doctrine (Navigational Servitude)

The ***Public Trust Doctrine***, typically excepted from title coverages when the insured land is submerged or abuts water (*see* "Public & Private Riparian Rights" in §27.5 below), is essentially the theory that vests the government with the authority to protect the public interest (initially with respect to commerce, but later with respect to recreational uses as well), to regulate the use of ***tidelands***, ***shorelands*** and ***wetlands***, and certain ***uplands***. Although the term is not necessarily expressly used in our statutes or case law, it is embodied constitutionally in the harbor line system and statutorily in the ***Shoreline Management Act*** [87] enacted in 1971.

In the context of navigational servitudes, issues relating to development, commerce, navigation and environmental protection are discussed in detail in the Washington State Bar Association's Real Property Deskbook, principally in (as of March 2015) Volume 5, Chapters 15 (Shoreline Management Act – Planning and Regulation), 16 (Coastal Zone Management and Watershed Planning), and 18 (The Public Trust Doctrine in Washington), and Volume 6, Chapter 12 (State-Owned Public Lands)..

The principal state agency involved in such matters is the DNR. In addition, the U. S. Army Corps of Engineers must usually issue a permit to place improvements in ***navigable*** waters. The right of the federal government to deal with navigation is sometimes referred to as a "***navigational servitude***." *See* "Navigation Rights (Navigational Servitude)" in §27.6 below for a title policy exception relating to such rights.

It should be noted that the state can extinguish such public interests if, as a result of a navigational improvement program, it abandons and sells formerly submerged lands.[88] The state also has authority to grant interests over public lands (such as the right to construct a dock or buoy) to private parties (*see* "Permit Use of State-Owned Lands" in §11.4 above) in compliance with the Shoreline Management Act if, among other things, doing so would not block public access to the public tidelands or shorelands or to the water.[89]

The state can also acquire privately owned ***submerged lands***, including a fee interest in or a conservation easement over privately owned submerged lands within an unconfined avulsive channel migration zone.[90]

The courts have confirmed the validity of waterfront projects that have been authorized under the provisions of the Shoreline Management Act. One such decision[91] related to property located in Pierce County. In *Harris* the court confirmed a landowner's right to fill in and build on ***tidelands***. The court noted that the Legislature wanted to encourage "the development of first class tidelands and lands adjacent thereto…."[92] The case was also decided subsequent to both the Bitter Lake case (*see* "Private Lake – The Bitter Lake Case" in §24.2 below) and the Lake Chelan case (see "Rights of the Public – The Lake Chelan Case" in §24.4 below), which respectively dealt with private development on non-navigable and navigable lakes.

22.0 Non-Navigable Lakes

As noted (*see* "Navigability" in §20.0 above) bodies of water are assumed to be ***navigable*** unless a court has determined otherwise. This would be true even if (1) the water body was not shown on the government survey and/or (2) no ***meander lines*** were shown on that survey, and/or (3) the adjoining ***uplands*** are not described as ***government lots***.

With respect to the beds of known non-navigable lakes, they are ***submerged lands*** but are not ***shorelands***, and the State of Washington has no interest in them. Such beds are owned by the adjoining property owners.

When all of the land surrounding a small, non-navigable lake is owned by one person, that person also owns the bed of the lake. However, when there are multiple owners around the lake, the rules for ***lateral lines*** (*see* "Lateral Lines" in

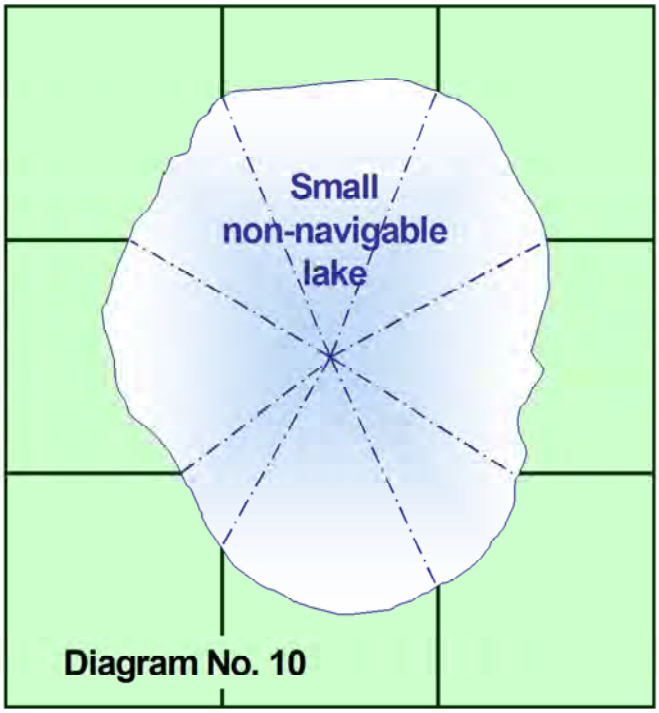


Diagram No. 10

§19.0 above) are not as clearly drawn by court decisions as they have been for ***tidelands*** and shorelands. In those cases when the bed of the lake is not subdivided (*see* "Platting Lateral Lines" in §15.3 above) or included within a specific metes and bounds description, property owners on such lakes may agree to own an undivided interest in the entire lake. In some cases they have divided the bed of round lakes by making pie-shaped connections to the center of the lake. Each owner, then, would have fee title to the pie-shaped parcel of the bed of the lake that adjoins the upland parcel. (*See* DIAGRAM NO. 10, *and see* "Platting Lateral Lines" in §15.3 above, "Lateral Lines" in §19.0 above and "Lateral Boundaries of Submerged Lands" in §27.4 below.)

On non-navigable lakes that are not round, abutting waterfront owners have generally developed common sense allocations of the beds using centerlines along the long lengths of the lake. *See* DIAGRAM NO. 11.

Litigation to determine lateral lines may be necessary and would require the joinder of all owners around the lake in such an action.[93]

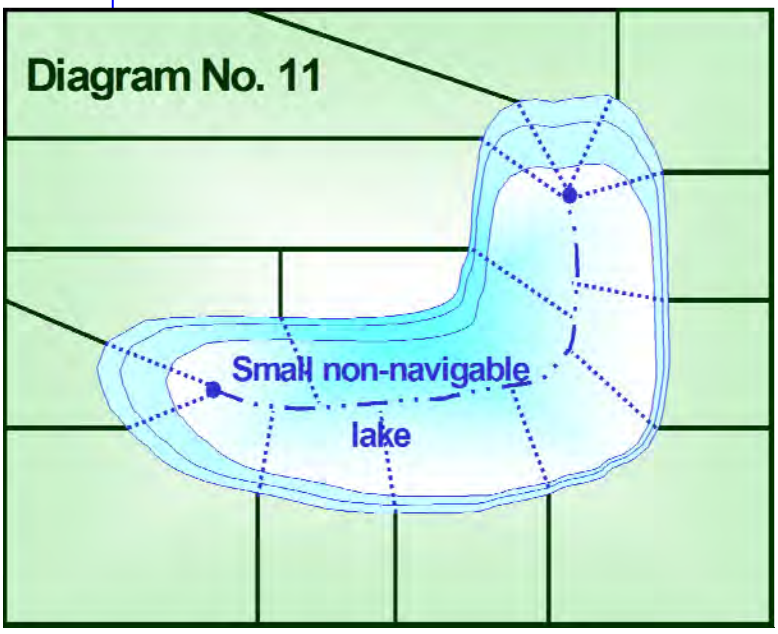
Notwithstanding ownership of the bed of a non-navigable lake, the riparian rights of the owners are not affected (*see* "Private Lake – The Bitter Lake Case" in §24.2 below).

23.0 NON-NAVIGABLE RIVERS & STREAMS

On a non-***navigable*** stream or river that forms a boundary between two ownerships, the true boundary line (unless the descriptions clearly recite otherwise) is the ***thread*** of that stream. The thread is the center of the main channel of a stream or river or a line following the deepest or lowest points of the bed. An alternative method is the median line, which is the mathematical mean between the controlling points and lines on the opposite bank meander courses or informative traverse. The median line is composed of straight line and curved segments halfway between the controlling lines and points on either bank.

Courts have held that even when apparently limiting terms such as "…to the east bank of Crystal Creek…" are present, the description will be construed against the seller and presumed to run to the thread of the stream.[94]

The bed of such a stream is owned by the abutting ***uplands*** owners (whether or not it also constitutes a boundary between separate ownerships) and is not vested in the State of Washington. However, until a court determines the navigability of a stream, it will be presumed navigable for title insurance purposes, and an exception would normally be raised by a title insurer



for the rights of the state in the bed (*see* "State of Washington Ownership" in §27.1 below).

The issue of lateral lines generally does not present itself in connection with rivers and streams, whether navigable (where ***shorelands*** have been conveyed to an upland owner) or non-navigable (where the title to land bounded by a river or stream runs to the thread). Nonetheless, the question may arise, particularly where there are significant sinuosities along the river or stream. In such cases, particularly with respect to non-navigable rivers or streams, no attempt should be made to describe or locate such lines, and an exception for the question of their location should be shown. *See* the discussion in "Lateral Lines" in §19.0 above and the exception in "Lateral Boundaries of Submerged Lands" in §27.4 below.

24.0 Riparian Rights

Riparian rights in Washington State pertain to the access to and use of non-***navigable*** water abutting or covering the land by the private owner of that land and other owners with similar property. These rights would include rights of swimming, fishing, boating and other recreational uses. Those rights are shared equally by all riparian owners, and one riparian owner cannot do something to alter the body of water and thus deprive other riparian owners of their equal rights. An obvious example would include damming or diverting a stream that interrupts or restricts the flow of the water and affects the ability of downstream owners to exercise their riparian rights of access to or use of the water. Note that public ownership of ***uplands*** on a non-navigable body of water (such as a park) will also allow public access to the water. That use is also excepted from title insurance coverage (*see* "Public and Private Riparian Rights" in §27.5 below).

For riparian rights on navigable waters, *see* "Riparian Rights on Navigable Waters" in §24.3 below.

Technically, riparian rights pertain to a river or stream, while ***littoral*** land borders the ocean, sound or a lake. However, the term riparian is now commonly used for both littoral and riparian land, and can generally be assumed to refer to either as applicable to the type of body of water in question.[95]

24.1 No Title Insurance for Riparian Rights

Riparian rights, although included in the "bundle of sticks" that represent the benefits of land ownership, and are thus severable, are not expressly or affirmatively insured as an element of title or as part of the legal description shown in a title insurance policy. Rather, exception will be taken with respect to such rights when land abutting water is insured. *See* "Public & Private Riparian Rights" in §27.5 below. Put another way, there is no title policy coverage should the insured no longer have access to water (which right of access might have been included in the ownership rights when the insured acquired title to the ***uplands***, ***tidelands*** or ***shorelands*** in question), whether an actual or possible change in the location of the body of water was ***avulsive*** or gradual, and whether or not tidelands, shorelands or the bed of a non-***navigable*** lake, river or stream was also part of the insured land.

24.2 Private Lake - The Bitter Lake Case

In addition to ownership of the bed of a non-***navigable*** lake, river, ***slough***, or stream, the abutting ***uplands*** owner is a ***riparian*** owner. That person has been held to have the right, along with all other owners fronting on the lake, to the reasonable use of the surface of the lake.[96] These riparian rights of abutters are owned in common.[97] In other words, each upland owner has the right to use the entire surface of the lake, not just the area over that portion of the bed of the lake owned by the riparian abutter.

A developer attempted to erect an apartment building over the bed of Bitter Lake in North Seattle. Even though there was no question as to the developer's title to that portion of the bed of the lake, it being non-navigable, the court required that the building be removed because of its interference with the rights of the other riparian owners on Bitter Lake to make reasonable use of the surface of the lake.[98]

24.3 Riparian Rights on Navigable Waters

It is important to note that in Washington an ***upland*** owner adjoining ***navigable*** water does not have ***riparian*** rights unless it also owns the ***tidelands*** or ***shorelands***, because those lands are owned by the state and such rights would impede the state's ownership and control of such lands.[99] This rule essentially means that the state or a private owner of tidelands or shorelands is not subject to the ability of the upland owner to use the water or ***submerged lands***, nor can the uplands owner interfere with the tidelands or shorelands owner's use of those lands. The upland owner could purchase such lands and thus obtain the riparian rights.

Notwithstanding this general rule, in the Lake Washington case the court held that the lowering of Lake Washington did not deprive those who acquired title to shorelands from the state from access to the Lake when the water level was lowered.[100] *See* "Avulsion & The Lake Washington Case" in §16.2.1.

The private owner of tidelands has the right to fill in and construct on those privately owned tidelands, thus preventing access to the water by the abutting upland owner.[101]

Riparian rights do not remain with land that no longer abuts or is covered by a river as a result of avulsive action, when the boundary of the upland parcel does not also move. *See* Diagram No. 6.

This discussion does not deal with appropriation (the right to withdraw water for beneficial use by the land owner or a permittee from the state) or other similar water rights (*see* "Water & Water Rights" in §27.9 below). Those rights are not insured and are excepted from coverage (*see* "Certificates of Water Rights" in §27.10 below).

24.4 Rights of the Public - The Lake Chelan Case

The public has rights of use of and access to ***navigable*** waters. A case concerning the use of water and the beds under the water arose in Eastern Washington on Lake Chelan wherein the court ordered the removal of landfill from the bed of Lake Chelan[102] because it interfered with the rights of the general public to use the surface of the lake for recreational purposes.

In this case the land was submerged only part of the year, unlike the Lake Washington case (*see* "Avulsion & The Lake Washington Case" in §16.2.1 above). The water level fluctuated because of the construction of a dam, and the ***upland*** owner retained full use of the land when the water level was low. However, that did not include the right to add land to that portion of the uplands that would then interfere with the rights of the public to use the entire surface of the lake when the water level was high.

24.5 Exceptions for Riparian Rights

Obviously, in light of these decisions, title companies are extremely reluctant to insure titles that involve improvements located over water, whether ***navigable*** or non-navigable, and particularly if there is new construction, without taking exception to such rights. *See* "Public & Private Riparian Rights" in §27.5 below.

25.0 Tribal & Indian Rights

Certain Indian tribes have asserted claims to portions of ***submerged lands*** that were conveyed by the State of Washington. One case involved the location of the boundaries of the Puyallup Indian reservation.[103] The State of Washington had assumed ownership of portions of the former bed of the Puyallup River, and had

conveyed them to private parties. The tribe asserted ownership to this land on the basis that it was within the boundaries of the reservation, which position was eventually upheld.

Another case addresses the right of Indian tribes to harvest shellfish from ***tidelands***, including the right to cross privately owned land to access the beach.[104] The court in this case held that the sale of tidelands or ***shorelands*** by the state did not defeat those rights, and set out the provisions that govern them. As a result of this decision, many private tidelands and ***uplands*** owners have entered into arrangements with local tribes to manage tidelands and share the shellfish harvest from those lands.

Title insurers take a "general" exception with respect to such matters in commitments, policies and guarantees. *See* "Indian & Tribal Rights" in §27.11 below.

26.0 Flood Zones

Flood zones are established by the Federal Emergency Management Agency (FEMA). Maps are maintained by FEMA in connection with flood hazard information produced in support of the National Flood Insurance Program. Title companies do not provide information about flood zones, including whether particular properties are located in a flood zone or whether flood insurance is available. Private companies do provide that information. Information about flood zones and companies that provide related certifications can be found at the Flood Map Service Center, FEMA, *https://msc.fema.gov/* (last visited April 28, 2015).

27.0 Title Exceptions

Many people become aware of title issues relating to water when they buy or sell waterfront property. Following are examples of common exceptions found in title policies, when they apply, and the reasons for showing them. The language may vary somewhat among title companies, but all insurers will generally take exception for such matters.

Section 27.1 below deals with ***TITLE*** to submerged land that may be included within a particular legal description. This is contrasted with ***BOUNDARY*** questions raised by §27.2, §27.3 and §27.4 below, and the ***USE*** questions discussed in §27.5, §27.6, §27.7, §27.8, §27.10, §27.11 and §27.13 below. Sections 27.9 and 27.12 below deal with both ***TITLE*** and ***USE*** questions.

27.1 State of Washington Ownership

> ___. Rights of the State of Washington in and to that portion of said premises, if any, lying in the bed or former bed of the *[insert the name of the body of water]*, if it is navigable.

This paragraph would be added as a special exception to commitments, policies and guarantees when the land is ***riparian*** (but only when ***navigable*** water flows through, covers, or adjoins the insured property). Title insurers will always assume a body of water is navigable, unless it has previously been adjudicated non-navigable. Thus, this ***TITLE*** exception is always shown, unless the body of water has been adjudicated non-navigable, in which case this exception can be deleted.

Some exceptions may specifically mention ***accreted*** or ***relicted*** land, or mention ***avulsive*** or artificial actions that might have caused changes in the body of water. However, the above exception includes all such lands and any possible causes of changes in the location of the body of water.

The State of Washington owns the bed of a navigable body of water, whether it is a lake, river, stream, creek or ***slough***. This is true whether water forms a boundary of the property or whether the body of water covers or flows through the property. If the location of the water (whether or not it also constitutes a boundary) has shifted, a title insurer will not be able to determine the nature of the movement, nor whether the state may claim ownership to the old bed (likely if the change was avulsive) or the new bed (likely if the movement was gradual).

Reference to a river or stream as a boundary will usually run to the center (***thread***) of the stream (*see* "Non-Navigable Rivers and Streams" in §23.0 above), even if the bank is mentioned or the thread is not specifically so described. Thus, part of the riverbed would be included in the legal description of the insured land, whether the bed of the river is actually owned by the upland

owner (e.g., the river is non-navigable) or the State of Washington (for a navigable river).

A legal description often ties to water as a boundary, but may not mention water specifically. However, if the description references a ***government lot***, that fact would indicate possible water boundaries. Assessor's maps or surveys may also disclose water on or adjoining the land, particularly small creeks or lakes.

27.2 River, Stream or Slough Boundary

> ___. Any question that may arise due to shifting or change in the course of the *[insert the name of the body of water]* or due to the *[insert the name of the same body of water]* having shifted or changed its course.

This exception, shown in title commitments, policies and guarantees, deals with the issues of ***accretion***, ***reliction*** or ***erosion*** (*see* "Accretion, Reliction & Erosion" in §16.1 above) as well as ***avulsion*** (*see* "Avulsion" in §16.2 above). It applies when the legal description ties to either the bank or the ***thread*** of a river, stream, brook, creek, slough, or similar body of water. A title insurer will not make a determination as to whether the body of water is ***navigable***, but in any event it makes no difference whether the body of water is navigable or non-navigable.

It is a ***BOUNDARY*** exception, which means that it is similar to the *general exception* for *survey matters* (generally, matters relating to the boundary, location and area of the described land) that appears in *standard coverage* title insurance policies. However, even though it is similar to such an exception, it is not deleted based on the submission of a survey for an *extended coverage* title policy.

Some exceptions may specifically mention accreted or relicted land, or mention avulsive or artificial actions that might have caused changes in the body of water. However, the above exception includes all such lands and any causes of changes in the location of the body of water.

If two parcels of land are separated by a river (the legal descriptions of the two adjoining parcels of land would each be bounded by the river) and the location of the river changes, the boundaries of those parcels may or may not change, depending on the nature and suddenness of the movement of the water.

If the change in the location of the river is ***avulsive*** and/or man-made, the original location of the water may continue to also be the property boundary. *See* Diagram No. 6. In that case, the insured land might no longer touch the water. The water itself could be either farther away from the property or entirely within the property lines. However, if the change is gradual, then the boundaries of the parcels on either side of the river may shift with the movement of the river. *See* Diagram No. 5. (*See* "State of Washington Ownership" in §27.1 above for the exception relating to the possible effect of such movement of water lines on the ***TITLE*** to the insured land.)

Note that if there is more than one stream, slough or similar body of water, each must be named twice in the exception to avoid ambiguity about the applicability of each clause in the exception to each body of water.[105]

In either event, the exception means that the title policy does not insure the location of the boundaries of the insured land. The title insurer will ***not*** insure with respect to the exact location of the water, nor whether it has moved or might move in the future, nor finally, if it might have moved, the nature of the change.

27.3 Lake, Sound, Bay or Ocean Boundary

> ___. Any questions that may arise due to shifting or change of the line of high water of the *[insert the name of the body of water]* or due to the *[insert the name of the same body of water]* having shifted or changed its line of high water.

This is also a ***BOUNDARY*** (i.e., survey) exception. This exception also is not removed even for *extended coverage* title policies (which do not include a "general" exception for matters relating to boundary, location or area). In that sense, it is akin to deleting the general survey exception but including a special exception for one or more particular adverse matters disclosed by a survey, inspection or inquiry.

Again, some exceptions may specifically mention ***accreted, relicted*** or ***eroded*** land, or mention ***avulsive*** or artificial actions that might have caused changes in the body of water. However, the above exception includes all such lands and any possible causes of changes in the location of the body of water.

This exception is similar to the "shifting" exception for rivers (*see* "River, Stream or Slough Boundary" in §27.2 above) except that it deals with ***accretion***, ***reliction*** or ***erosion*** issues on other types of bodies of water.

Note that if the title insurer elects to include a reference to accreted, relicted or eroded land in the legal description, this exception must still be shown, since it deals with the location of the boundary of the insured land (and between different parcels of the insured land), which cannot be ascertained.

It would be shown whenever the land is bounded by the Pacific Ocean, Puget Sound, a lake, or similar body of water. It applies when the title company is insuring title to

1. ***uplands*** only,
2. ***uplands*** with ***submerged lands*** (including either ***tidelands*** or ***shorelands***),
3. ***submerged lands*** only, or, rarely
4. lands added by ***accretion***, ***reliction*** or ***erosion***.

Again, the legal description may not mention a body of water, but a reference in the legal description to a ***government lot*** would be one indication that there may be water boundaries.

27.4 Lateral Boundaries of Submerged Lands

> ___. Any question that may arise as to the location of the lateral boundaries of the [tidelands][shorelands] described herein.

This is another ***BOUNDARY*** (i.e., survey) exception. It would be added as a special exception in all policies where ***tidelands*** or ***shorelands*** are included in the description, for example: "… together with the tidelands of the second-class adjoining." In addition, a description for a ***government lot*** may include submerged lands, even though not specifically mentioned, if the federal ***patent*** was issued prior to statehood.

It typically will not apply to the beds of non-navigable lakes to the extent that legal descriptions do not tie to the body of water or mention the bed of the lake, but are instead metes and bounds descriptions or platted lots. However, if the legal description mentions the body of water or includes "***lateral lines***" when not established by a platted subdivision or agreement between owners, the exception would be appropriate.

In most cases adjoining owners have not established the location of the lateral lines (e.g., the common boundary) between their adjoining ***submerged lands***. Assessor's maps or surveys will sometimes show upland lot lines projected into the water and thus apparently include a particularly delineated portion of tidelands or shorelands when the chain of title does not support it. However, a survey, assessor's map or similar information is not sufficient to establish these boundaries.

If the adjoining owners have mutually established the exact location of the boundary between their submerged lands (by written agreement and conveyance), the exception could be deleted. In addition, a plat (formal subdivision) might establish such boundaries. (*See* "Describing Lateral Lines" in §12.4 above *and also* "Platting Lateral Lines" in §15.3 above.)

The plattor must, of course, have had title to the tidelands or shorelands. If the developer does own them (and this must be separately confirmed independent of any recitals on the face of the plat), then the plat can divide those ***submerged lands*** among the lots within the plat. *See* Diagram No. 9. The plattor cannot, however, arbitrarily determine the outside lateral lines of the larger ownership area. This affects those lots on either end of the plat (unless, of course, the plattor had earlier established such exterior

lines by agreement and conveyance with the owner of those adjoining submerged lands).

One exception to this rule usually is when the state has platted tidelands or shorelands. The state plat can be relied upon for sufficiency of title and all boundaries for lots on either end as well as for interior lots. (*See* "State Tidelands and Shorelands Plats" in §15.1 above.)

Of course, it is possible that a plattor of privately owned tidelands or shorelands will have owned them but not included them in the plat, creating a severance of the ownership of the ***uplands*** from the abutting submerged lands. It is also possible that if they are included in the plat they might not be included within any of the lots, but rather reserved or dedicated to the lot owners or conveyed to an association of lot owners. In some cases the plat is silent as to ownership or use of the tidelands or shorelands.

Care should be taken, especially with older plats, when submerged lands are apparently included within the delineated boundaries of a platted lot as shown on the original plat drawing. In such cases submerged lands would be included with ***uplands*** portion of the platted lot, even though not specifically mentioned in the legal description of the lots created by the plat. Prior to platting, the description would probably be acreage followed by "…together with tidelands [*or* shorelands, *as applicable*] adjoining." However, after platting, the legal description used for individual lots fronting on the water normally do not make such reference. Nonetheless, the recital of "Lot 1" in a legal description would include everything within the lot lines delineated on the face of the plat (assuming, of course, that the plattor owned the tidelands or shorelands and included them in the plat). Other water related exceptions might also then apply.

27.5 Public & Private Riparian Rights

> ___. Any prohibition or limitation on the use, occupancy, or improvements of the Land resulting from the rights of the public or riparian owners to use any waters which may cover the Land or to use any portion of the Land which is now or may formerly have been covered by water.

Unlike the exception for state ownership discussed in "State of Washington Ownership" in §27.1 above, which relates to ***TITLE*** to ***submerged lands***, this exception relates to the ***USE*** of submerged (or formerly submerged) land described in the commitment or policy. It also applies when the insured ***uplands*** adjoin such land. It covers issues related to the ***Public Trust Doctrine*** (*see* "Public Trust Doctrine (Navigational Servitude)" in §21.0 above and "Navigation Rights (Navigational Servitude)" in §27.6 below). It applies to:

1. ***tidelands*,**
2. ***shorelands*,**
3. land between ***high tide*** and the seaward ***meander line*** if ***patented*** before statehood,
4. current or former lake beds, whether ***navigable*** or not,
5. current or former beds of rivers, streams or sloughs, whether ***navigable*** or not,
6. ***harbor areas*,**
7. ***uplands*** abutting such lands, and
8. ***oyster lands*.**

This is a very broad and important exception. It covers, among other things the right of downstream owners to the water that crosses upstream ***riparian*** land, and the right of the state to regulate uses of ***tidelands***, ***shorelands*** and adjoining ***uplands*** under the ***Shoreline Management Act***, the Growth Management Act (Chapter 36.70A RCW), and the Coastal Zone Management Program. Note that these programs address ***wetlands***, including submerged lands, but wetlands can include more than those submerged lands (and their boundaries) that impact title insurance.

This language will be added as a special exception in all policies covering the above-mentioned types of property (but not necessarily wetlands unless one of the above categories also applies). It does not make any difference whether the policy is issued with *standard coverage* or *extended coverage*.

Note also that the term "Land" is capitalized as a defined term in ALTA title insurance commitments and policies.

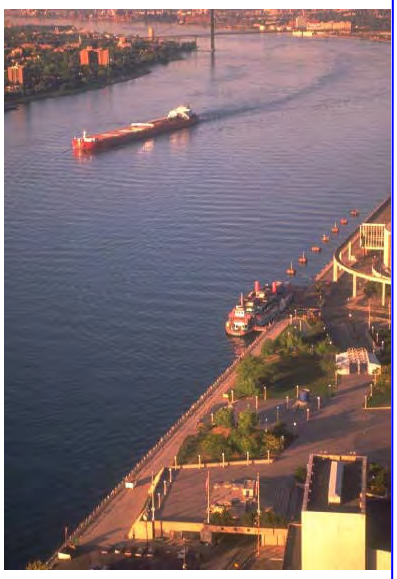
27.6 Navigation Rights (Navigational Servitude)

> ___. The right of use, control, or regulation by the United States of America in exercise of power over commerce and navigation.

A variation (although arguably "fisheries and the production of power" are encompassed by the term "commerce"):

> ___. Paramount rights and easements in favor of the United States for commerce, navigation, fisheries and the production of power

This exception also deals with the ***USE*** of the land. Even where the State of Washington owns the beds of ***submerged lands***, the United States may retain powers over ***navigation***. For example, the U.S. Army Corps of Engineers must approve dredging or improvements in tidal waters. *See* "Public Trust Doctrine (Navigational Servitude)" in §21.0 above.



This exception can be deleted only if the body of water has been adjudicated non-***navigable***. The question of navigability is one of fact, determined on November 11, 1889, the date Washington was admitted to the Union. It is not based on current appearances of navigability or non-navigability.

Again, the wording of the legal description may not refer to water, especially if a stream passes through the property, or when all or a portion of a lake is within the property but does not constitute a boundary.

27.7 Reservations

For deeds issued by the state after June 11, 1907:

> ___. Exceptions and reservations, including the exception and reservation of all oil, gases, coal, ores, minerals, fossils, etc., and the right of entry for exploring, opening, developing and working the same, etc., including the construction of improvements and the right to occupy the Land and providing that such rights shall not be exercised until provision has been made for full payment of all damages sustained by reason of such entry, all pursuant to statutes in effect as of the date of conveyance by the State, currently codified as RCW 79.11.210 as it may be amended or recodified, pursuant to the deed from the State of Washington recorded [*insert recording data*]. Provision has been made by the State or its successors or assigns, to pay to the owner of the land upon which the rights reserved under this section to the State or its successors or assigns, are sought to be exercised, full payment for all damages sustained by said owner

For deeds issued by the state after March 17, 1911 (this would be in addition to the above exception):

> ___. Right of State of Washington or its successors, subject to payment of compensation therefor, to acquire rights of way for private railroads, skid roads, flumes, canals, water courses or other easements for transporting and moving timber, stone, minerals and other products from this and other property, pursuant to statutes in effect at the date of conveyance by the State, currently codified as RCW 79.110.010, as it may be amended or recodified, pursuant to the deed from

the State of Washington recorded [*insert recording data*].

There are various rights (minerals, railways, flumes, waterways, etc.) reserved by the State of Washington in many conveyances of ***tidelands*** or ***shorelands***. They are provided for by statute and vary depending on the date of the conveyance. *See* "Reservations" in §11.5 above. (For similar matters relating to the determinable fee title of certain ***oyster lands*** conveyed by the State of Washington, *see* "Oyster Lands Reversions and Restrictions" in §27.12 below).

Exceptions to these matters are included in title commitments, policies and guarantees written on property when title is derived from the State of Washington, whether or not the deed included the statutory reservation language.

27.8 Permit to Build on State Owned Lands

___. Terms and provisions of any State permit to maintain improvements, including a dock and/or mooring buoy, on adjoining [tidelands][shorelands], and RCW 79.105.430, as amended.

This exception is appropriate when a private owner has permission to place a dock or mooring buoy on the adjoining state-owned lands, pursuant to RCW 79.105.430. (*See* "Permit Use of Non-Leased State-Owned Lands" in §11.4 above.) The permission would be in lieu of a lease of the abutting ***tidelands*** or ***shorelands***.

The statutory provisions are revocable for a number of reasons relating to use of the water covering the land. The state might also require that the improvements be moved. This exception would be shown whenever such improvements are disclosed, usually by an inspection or survey in connection with an *extended coverage* policy.

If there are such improvements but no permit, an exception for the encroachment of the improvements onto the state lands would be appropriate.

27.9 Water & Water Rights

___. Water rights, claims or title to water.

This exception relates to the ownership of water, e.g., the substance itself. Unless excepted from coverage, water would be included in a title policy definition of "Land." Because, in Washington State, water belongs to the public[106] and its use is regulated by the state, it is excepted from coverage. Title insurers cannot rely on available records to determine rights to use water.

This exception usually appears as a *general exception* in title insurance policies. It should also be added as a *special exception* in an extended coverage policy when it applies. However, it is not related to *standard coverage* or *extended coverage* and would show in all types of policies.

It generally applies to:

1. agricultural, farm, orchard or similar land,
2. unimproved land,
3. ***riparian*** land (e.g., ***uplands*** covered by or adjoining water),
4. land that is served by a well or an impounded water facility, and
6. land supplied by water from a source other than domestic water service

An insured may request that the exception be deleted, particularly for extended coverage policies, or might ask for endorsement coverage. The ALTA has adopted endorsements (the ALTA 41.06 endorsement series) that can be tailored to address damage to specified types of improvements on the surface of the land (generally buildings and paved areas, in some cases specifically itemized) or to be constructed (referencing specific plans). Crops, landscaping, lawns, shrubbery or trees generally are not included in the endorsement's definition of "improvement." In addition, the endorsements will have exclusions for such things as contamination, explosion, fire, flooding, vibration, fracturing, earthquake, subsistence negligence, etc.

The basic coverage is as follows (note the capitalized use of the defined terms "Land" and "Date of Policy" as taken from the current forms of most ALTA policies):

> The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of water excepted from the description of the Land or excepted in Schedule B.

Similar coverage is provided by the California Land Title Association as CLTA Form 103.5-6.

The deletion of the exception or the issuance of an endorsement is not automatic, and must be carefully underwritten. Recorded documents affecting the land must be reviewed to confirm that there are no extant water rights, or if there are such rights, that, at a minimum, the holder does not also have the right of surface entry. If an existing water right does not expressly deny surface entry, it must be relinquished by a recorded document.

Inspection and inquiry may also be necessary to determine the source of water service to the property and any evidence of water extraction for the benefit of others. A title insurer would normally not delete the exception or provide the endorsement unless it can be certain that there are no water rights affecting the insured land, or that if there are, that, among other things, the holder of such rights does not have the right of surface entry or indemnifies the insured.

Note also that the known existence of certificates of water rights (*see* "Certificates of Water Rights" in §27.10 below) will impact the availability of any endorsement. Although, in general, title insurers do not search state records for the existence of water rights certificates, if such are disclosed to the title insurer then endorsement coverage might not be available.

27.10 Certificates of Water Rights

As noted in "Water and Water Rights" in §27.9 above, title insurers do not affirmatively insure ownership of water rights. Water rights certificates issued by the State of Washington to individuals may have been recorded over the years, but are usually not shown as exceptions in policies covering either the property benefited or the property at the point of diversion (source of the water). However, these certificates may indicate easement rights in favor of the holder of the certificate, and an exception for such possible easement rights, as disclosed by the recorded certificate, may be shown for that reason, particularly when insuring the land at which the point of diversion is located.

In addition, the availability of the ALTA Form 41-06 endorsement series or the CLTA 103.5-06 endorsement described in "Water and Water Rights" in §27.9 above may be affected by the existence of such certificates.

27.11 Indian & Tribal Rights

> ___. Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes.

Most insurers include this exception in commitments and policies. The exception applies to any lands in the State of Washington that are or may be in or near an Indian reservation, whether wa-

ter covers or abuts the land or not. *See* "Tribal & Indian Rights" in §25.0 above.

27.12 Oyster Lands Reversions & Restriction

> ___. Conditions, restrictions, reservations, exceptions and reversionary provisions contained in the deed from the State of Washington for oyster lands recorded [*insert recording data*] and the Bush Act approved March 2, 1895, and in the Callow Act approved March 4, 1895, as amended.

This exception (in addition to other water related exceptions shown above) is appropriate in commitments, policies and guarantees describing any oyster lands in the State of Washington. The reversionary provisions might be deleted if the state has conveyed them to the owner of the oyster lands. *See also* "Oyster Lands" in §8.0 above.

27.13 Access to Tidelands, Shorelands or Islands

> ___. Notwithstanding Paragraph ___ of the insuring clause of the policy, the policy or policies will not insure against loss arising by reason of a lack of a right of access to and from the Land.

Applies to:

1. ***tidelands*** insured separately from adjoining ***uplands*** and not abutting a publicly opened road or street, nor having insurable access via an easement appurtenant over abutting land, and
2. islands, whether or not ***tidelands*** are included.

The lack of a right of access should be analyzed and an exception from coverage should be shown if necessary. Certainly small islands may not traditional access via public or open roads that typically provide pedestrian or vehicular access to privately owned land. The title insurer will analyze each situation to determine whether to limit access coverage to what is available (by boat or airplane, for example), or to except access coverage entirely. *See also* "Access" in §14.0 above and "Islands" in §17.0 above.

May 2015

Definitions

Accretion – The natural buildup of dry land (such as silt or sediment, called ***alluvion*** or alluvium) by gradual and imperceptible action of water forces. *See* Diagram No. 5.

Alluvion (alluvium) – The increase in the area of land due to sediment deposited on the bank of a body of water; land added by accretion. Also *alluvium*: clay, silt, sand, gravel or similar material added by ***accrertion.***

Aquatic Lands – In Washington, state owned ***tidelands***, ***shorelands***, ***harbor areas***, and the beds of ***navigable*** waters.[107] The term includes more than the **Submerged Lands** as that term is used in this document.

Avulsion – A sudden (***avulsive***) change in the course of a river or stream or the sudden inundation of land that may result from natural events or causes, such as a flood, landslide or earthquake, but that can also be caused by artificial (man-made) events, such as dam construction, dredging or filling. *See* Diagram No. 6. Title to the boundaries of affected uplands, tidelands and shorelands is generally unaffected.

Bedlands – Commonly used term for those permanently submerged lands not otherwise designated as ***tidelands***, ***shorelands*** or ***oyster lands***, and not available for sale by the state.

Bulkhead Line – Under federal law, the seaward limit on where a person can fill without an Army Corps of Engineers permit. It is often located at the same place as the ***inner harbor line*** established under state law. *See* Diagram No. 3.

Erosion – The wearing away of dry land by the gradual action of water from natural causes. *See* Diagram No. 5.

EQUAL FOOTING DOCTRINE – The principle that all states admitted to the Union have equal status to the original 13 colonies with respect to, among other things, title to ***submerged lands***.

ESTUARY – That area (also called a ***slough***) where a river flows into a larger body of water, usually Puget Sound or the Pacific Ocean, and where the water is brackish because of the mixture of fresh and salt water due to the ebb and flow of the tide. Islands may be present in an estuary. *See* also "***slough***."

EXTREME LOW TIDE – The line below which it might reasonably be expected that the tide will not ebb, which is lower than either ***mean lower low tide*** (the average of all daily lower low tides) or daily lower low tide. It occurs only during certain seasons of the year. Outer boundary of ***tidelands*** conveyed by the state between 1911 and 1971. *See* DIAGRAM NO. 4.

FEDERAL PATENT – The instrument by which the United States conveys title to public lands. *See also* **PATENT**.

FIRST-CLASS SHORELANDS – Non-tidal lands on a navigable lake or river in front of the corporate limits of any city between the line of ***ordinary high water*** and either (1) the ***inner harbor line*** within one mile on either side of the city limits or (2) the ***line of navigability*** within two miles and outside one mile on either side of the city limits. *See* DIAGRAM NO. 3.

FIRST-CLASS TIDELANDS – Tidal lands on a navigable body of water in front of the corporate limits of any city between the line of ***ordinary high tide*** and either (1) the ***inner harbor line*** within one mile on either side of the city limits or (2) the line of ***extreme low tide*** (or ***mean low tide*** for properties conveyed by the state prior to 1911) within two miles and outside one mile on either side of the city limits. *See* Diagram No. 3 and Diagram No. 4.

GOVERNMENT LOT – Fractional sections in government surveys, often, but not always, based on large bodies of water. *See* DIAGRAM NO. 1 and DIAGRAM NO. 2.

HARBOR AREA – The area between the ***inner harbor line*** and ***outer harbor line*** within city limits. It may be leased by the state for navigation and commerce purposes but never sold. *See* DIAGRAM NO. 3. (*See also* "Leases by the state or Port District" in §11.1 above.)

INNER HARBOR LINE – The line established by the state marking the seaward limit of ***first-class tidelands*** or ***first-class shorelands*** within city limits and within one mile on either side of those city limits and as established by the state. *See* DIAGRAM NO. 3.

LATERAL LINES – Boundary lines between adjoining parcels of ***submerged lands***, extending from a point on the line of ordinary high tide or line of ordinary high water to a point on the outer limit of the submerged lands. Must be apportioned by common owner(s) of the submerged lands by plat or conveyance. *See* DIAGRAM NO. 7, DIAGRAM NO. 8 and DIAGRAM NO. 9.

LINE OF NAVIGABILITY – A line beyond which the water is deep enough for commercial navigation. Outer boundary of ***shorelands*** conveyed by the state (*see* WAC 332-30-106(33) although sometimes also informally referred to as the outer boundary of ***tidelands***. Exact location undetermined unless and until fixed by the DNR. It is the same as the ***inner harbor line*** if that line has been fixed by the state. *See* DIAGRAM NO. 3.

LINE OF VEGETATION – Sometimes, although not technically correct, referred to as the boundary between ***uplands*** and ***shorelands*** or (less commonly) between ***uplands*** and ***tidelands***. *See* also ***ordinary high water*** and ***ordinary high tide***. *See* DIAGRAM NO. 4.

LITTORAL – Belonging or pertaining to shore. littoral land is land bordering an ocean, sea, or lake, contrasted with ***riparian*** land bordering a river or stream, although the term riparian is often now commonly used for both types of land.

MEANDER LINE – A line run by the government for the purpose of defining the sinuosities of the shore or bank of a body of water and as a means of ascertaining the quantity in adjoining fractional sections (***government lots***). It is not an indication of ***navigability***. It is also not a boundary unless (1) it is seaward of ***uplands*** that were ***patented*** by the federal government prior to statehood or (2), rarely, when specifically intended as such by description. *See* DIAGRAM NO. 2.

MEAN HIGH TIDE – See ***ordinary high tide***.

MEAN LOW TIDE – The average of all daily low tides over a period of 18.6 years. Outer bounda-

ry of ***tidelands*** conveyed by the state between 1895 and 1911. *See* DIAGRAM NO. 4.

NAVIGABLE/NAVIGABILITY – Used, or susceptible of being used in its ordinary condition, as a highway for commerce, over which trade and travel are or can be conducted in the customary modes of trade and travel on water. All water is presumed by title insurers to be ***navigable*** unless adjudicated otherwise.

NAVIGATIONAL SERVITUDE – Refers to the right of the federal government to exercise regulatory powers over ***navigable*** waters. *See* also "Public Trust Doctrine (Navigational Servitude)" in §21.0 above and the exception in "Navigation Rights (Navigational Servitude)" in §27.6 above.

NEAP TIDE – Occurs twice a month, when the difference between the high low tide and low tide is the least (the smallest rise and fall); caused when the gravitational pull of the moon (which is normally the principal influence on tidal action) is counteracted by the sun.

ORDINARY HIGH TIDE – Also known as ***mean high tide***. The average elevation of all high tides over a period of 18.6 years. Boundary between ***uplands*** and ***tidelands*** on ***navigable*** waters. Sometimes referred to as the ***line of vegetation***, although the latter term is not technically the same. *See* Diagram No. 3 and Diagram No. 4.

ORDINARY HIGH WATER – The visible line of the bank along non-tidal waters. Sometimes referred to as the ***line of vegetation***, although the latter term is not technically the same. Boundary between ***uplands*** and ***shorelands*** on ***navigable*** waters. *See* DIAGRAM NO. 3.

OUTER HARBOR LINE – The outer boundary of the ***harbor area*** within city limits and within one mile on either side of those city limits and as established by the state. The area beyond cannot be given, sold, or leased by the state. *See* DIAGRAM NO. 3. (*See also* "Leases by the State or Port District" in §11.1 above.)

OYSTER LANDS – Submerged land, usually between ***mean high tide*** and ***mean low tide***, leased or conditionally deeded (subject to a reversion to the State of Washington) for the cultivation of oysters or other shellfish. See "Oyster Lands" in §8.0 above. Deep water clam harvesting can be below ***extreme low tide***.

PATENT – The instrument by which the United States conveys title to public lands. *See also* ***federal patent***.

PIERHEAD LINE – Under federal law, the seaward limit where private open-pile structures can be placed with a permit from the Army Corps of Engineers. It is often located at the same place as the ***outer harbor line*** established under state law. *See* DIAGRAM NO. 3.

PUBLIC TRUST DOCTRINE – The theory under which the government, for the benefit of the public good, controls and regulates water, ***submerged lands***, ***wetlands*** and lands covered by or abutting water. *See* "Public Trust Doctrine (Navigational Servitude)" in §21.0 above and also ***navigational servitude***.

RELICTION – The permanent uncovering or exposure of lands formerly covered by waters. *See* DIAGRAM NO. 5.

RIPARIAN – Belonging or pertaining to lands abutting a stream or river (and generally used also with respect to lands abutting all water, e.g. even ***littoral*** lands).

SECOND-CLASS SHORELANDS – All ***shorelands*** not classified as ***first-class shorelands***, e.g., those lying beyond two miles outside city limits. *See* DIAGRAM NO. 3.

SECOND-CLASS TIDELANDS – All ***tidelands*** not classified as ***first-class tidelands***, e.g., those lying beyond two miles outside city limits. *See* DIAGRAM NO. 3.

SHORELANDS – Public lands, bordering on shores of a ***navigable*** lake or river covered by water, not subject to tidal ebb and flow. Available for sale by the state until 1971, available for lease after 1971. (*See* "Leases by the State or Port District" in §11.1 above.) After 1983 some

shorelands on navigable lakes having "minimal public value" may be sold to the abutting ***uplands*** owner. *See* also ***first-class shorelands*** and ***second-class shorelands***.

SHORELINE MANAGEMENT ACT – An act regulating land use of ***submerged lands*** (including ***tidelands*** and ***shorelands***) and ***uplands*** 200 feet inland from these areas, as well as ***wetlands***. Most development in such areas requires a substantial development permit.

SLOUGH – (1) A muddy or boggy wetlands area that is continually wet but not always with standing water in all areas, and that may be unconnected with any other body of water. It continues to be a part of a river or stream if located along its course, albeit as a slow moving portion of the channel. (2) That portion of the mouth of a river or stream, also called an ***estuary***, where it empties into a larger body of water (usually Puget Sound or the Pacific Ocean), and where the water is brackish because of the mixture of fresh and salt water due to the ebb and flow of the tide. Islands may be present in a slough. *See* also "***estuary***."

SUBMERGED LANDS – Land that is covered by water some or all of the time. On ***navigable*** bodies of water, ***tidelands*** or ***shorelands*** are public lands, some of which have been conveyed by the state between 1895 and 1971, or leased after 1971. (*See* "Leases by the State or Port District" in §11.1 above.) Submerged lands under non-***navigable*** rivers or streams are owned by the ***uplands*** owner to the ***thread***; those under non-***navigable*** lakes are owned by upland owners. ***Lateral lines*** (boundaries) are determined by mutually agreed apportionment. *See* DIAGRAM NO. 7 and DIAGRAM NO. 8. The term in the context of this document does not include all ***wetlands*** or state ***aquatic lands***.

THIRD-CLASS TIDELANDS – ***Tidelands*** that were not classified as either ***first-class tidelands*** or ***second-class tidelands*** between the years 1890 and 1897. *See* "Third-class Tidelands" in §5.3 above.

THREAD – The center of the main channel of a stream or river. This might be a median line or a line following the deepest or lowest points of the bed. The usual boundary between parcels abutting non-***navigable*** streams or rivers.

TIDELANDS – Public lands over which tidal water ebbs and flows. Note that this may include area at the mouth of a river or stream, including an ***estuary*** or ***slough***, although the dividing lines between ***tidelands*** and ***shorelands*** in most such cases have not been established by the state as required by statute.[103] Available for sale by the state until 1971, available for lease after 1971 (except on Pacific Ocean). *See* also ***first-class tidelands*** and ***second-class tidelands***) and *see* DIAGRAM NO. 4. *See also* "Leases by the State or Port District" in §11.1 above.

UPLANDS – The dry lands bordering a body of water, the outer boundary of which is either the line of ***ordinary high tide*** or ***ordinary high water***.

WETLANDS – Lands inundated or saturated with surface or ground water to support vegetation adapted to saturated soil conditions, which may or may not include ***submerged lands*** as that term is used in this document. *See* RCW 90.58.030(2)(h) and also *see* ***aquatic lands*** and the ***Shoreline Management Act***.

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(Indian Property Interests and Property Subject to Tribal Regulation); Volume 4, Chapter 8 (Adverse Possession, Boundary Litigation, Encroachment, and Trespass); Volume 5, Chapters 15 (Shoreline Management Act – Planning and Regulation), 16 (Coastal Zone Management and Watershed Planning), and 18 (The Public Trust Doctrine in Washington); and Volume 6, Chapters 11 (Water Rights) and 12 (State-Owned Public Lands).

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ENDNOTES:

[1] STATE CONSTITUTION, Article XVII §1
[2] *Pollard v. Hagan* 44 U.S. (3 How.) 212, 11 L. Ed. 565 (1845), and *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894)
[3] U.S. Dep't of Int., Bureau of Land Mgmt., MANUAL OF INSTRUCTIONS FOR THE SURVEY OF PUBLIC LANDS (2009)
[4] *The Official Federal Land Records Site*, DEP'T OF INT., BUREAU OF LAND MGMT., GEN. LAND OFF. RECORDS, http://www.glorecords.blm.gov/ (last visited April 28, 2015).
[5] WASH. CONST. art. XVII, §2; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 P. 278 (1908)
[6] *Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967); *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769, *cert. denied*, 404 U.S. 829 (1971)
[7] *Smith Tug & Barge Co.*, 78 Wn.2d 975; *Harris v. Swart Mortg. Co.*, 41 Wn.2d 354, 249 P.2d 403 (1952); *Thomas v. Nelson*, 35 Wn. App. 868, 670 P.2d 682 (1983); *Vavrek v. Parks*, 6 Wn. App. 684, 495 P.2d 1051 (1972)
[8] 25 Stat. 676 (1889)
[9] *Narrows Realty Co. v. State*, 52 Wn.2d 843, 329 P.2d 836 (1958); *Cogswell v. Forest*, 14 Wash. 1, 43 P. 1098 (1896); *Scurry v. Jones*, 4 Wash. 468, 30 P. 726 (1892).
[10] RCW 79.105.060(4), (18)
[11] *United States v. Washington*, 294 F.2d 830, 834 (1961) (applying *Borax Consol. Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935))
[12] *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944)
[13] RCW 79.105.060(4)
[14] RCW 79.115.020, .030
[15] *Sullivan v. Callvert*, 27 Wash. 600, 605, 68 P. 363 (1902) (discussing the Act of March 26, 1890, Laws of 1889-90 pp. 431-37)
[16] Sess. L. 1897, pp. 230, 248
[17] RCW 79.105.060(18)
[18] Laws of 1911, ch. 36
[19] Laws of 1889-90, p. 431 §4
[20] Laws of 1897, pp. 230,d 248
[21] RCW 79.105.060(17)
[22] *Kalin v. Lister*, 27 Wn.2d 785, 180 P.2d 86 (1947)
[23] *Spath*, 20 Wn.2d 500
[24] "Bush Act," Laws of 1895, ch. 24 (repealed 1935); "Callow Act," Laws of 1895, ch. 25 (repealed 1935); *see also* Laws of 1919, ch. 165 p. 486 (repealed 1935); Laws of 1927, ch. 255, §138 (repealed 1983)
[25] RCW 79.135.020
[26] RCW 79.135.110
[27] RCW 79.135.300
[28] RCW 79.135.130(1)
[29] *State v. Scott*, 89 Wash. 63, 143 Pac. 165 (1916)
[30] WASH. CONST. art. XV, § 1
[31] WASH. CONST. art. XV, § 1
[32] WASH. CONST. art. XV, § 1 & RCW 79.115.120 (harbor areas); RCW 79.125.200(3) (tidelands and shorelands)
[33] RCW 79.115.010
[34] RCW 79.120.010
[35] RCW 79.120.060
[36] WASH. CONST. art. XVII, §1
[37] RCW 79.125.200
[38] *See* RCW 79.125.200(4)(b)
[39] RCW 79.125.450

[40] *See* Chs. 79.105, 79.115 and 79.125 RCW
[41] Ch. 79.135 RCW
[42] RCW 79.125.220
[43] RCW 79.125.400 (as to first-class tidelands and shorelands) and RCW 79.125.460 (as to second-class shorelands)
[44] RCW 79.105.210
[45] *See* Title 53 RCW regarding port districts
[46] RCW 79.105.420(1)
[47] RCW 79.105.420(2)
[48] RCW 79.115.150
[49] *See* Ch. 79.110 RCW
[50] RCW 79.125.200
[51] Ch. 90.58 RCW
[52] RCW 79.105.430
[53] Laws of 1907, Ch. 256
[54] Laws of 1911, Ch. 109
[55] RCW 79.11.210, RCW 79.110.010 and RCW 79.125.260
[56] The ALTA and ACSM (American Congress on Surveying and Mapping) have established survey standards for use by surveyors and title insurers. *See* "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys" (2-23-11) at *http://www.acsm.net/_data/global/images/ALTA2005.pdf*.
[57] RCW 79.120.010 and RCW 79.125.020
[58] The question of the applicability of those rules relating boundary changes to State-platted tidelands or shorelands has not been addressed by Washington courts, although the court in *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769, *cert. denied*, 404 U.S. 829 (1971) could have done so.
[59] The 2006 ALTA policy forms include an exclusion for "[a]ny law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to… the subdivision of land" or similar language.
[60] RCW 36.87.130
[61] RCW 35.79.035
[62] *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946); *Spinning v. Pugh*, 65 Wash. 490, 118 P. 635 (1911)
[63] *See*, e.g., *Hudson House Inc, v. Rozman*, 82 Wn.2d 178, 509 P.2d 992 (1973); *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 437, 38 P.2d 423 (1963); *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944)
[64] RCW 79.125.440
[65] *Ghione*, supra, 26 Wn.2d at 659
[66] *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769, *cert. denied*, 404 U.S. 829 (1971); *Ghione*, 26 Wn.2d 635; *Harper v. Holston*, 119 Wash. 436, 205 P. 1062 (1922)
[67] *Parker v. Farrell*, 74 Wn.2d 553, 445 P,2d 620 (1968)
[68] *Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967)
[69] *Strom v. Sheldon*, 12 Wn. App. 66, 527 P.2d 1382 (1974), *review denied*, 85 Wn.2d 1001 (1975)
[70] *Parker*, 74 Wn.2d 553; *Commercial Waterway Dist. No. 1 v. State*, 50 Wn.2d 335, 311 P.2d 690 (1957); *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950); *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915)
[71] *Strom*, 12 Wn. App. 66
[72] *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913); and *see* RCW 79.125.500
[73] *Newell v. Loeb*, 77 Wash. 182 , 137 P. 811 (1913)
[74] RCW 79.125.200 and .230
[75] RCW 79.125.010
[76] *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944)
[77] *Spath*, 20 Wn.2d 500
[78] *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 437–38, 378 P.2d 423 (1963)
[79] *Grill*, 61 Wn.2d at 438
[80] *Seattle Factory Sites Co. v. Saulsberry*, 131 Wash. 95, 229 P. 10 (1924), cited also in *Spath*, supra
[81] WAC 332-30-106
[82] Proctor v. Sim, 134 Wash. 606, 236 P. 114 (1925)
[83] *Proctor*, 134 Wash. 606
[84] *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955); *see also United States v. Holt State Bank*, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926)
[85] *Kemp*, 47 Wn.2d 530
[86] *Watkins v. Dorris*, 24 Wash. 636, 636, 64 P. 840 (1901); *see also Proctor*, 134 Wash. 606
[87] Chapter 90.58 RCW
[88] *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915)
[89] *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988)
[90] RCW 76.09.040(3)
[92] *Harris v. Hylebos Industries*, 81 Wn.2d 770, 505 P.2d 457 (1973)
Harris, at 777
[93] *Snively v. Jaber*, 48 Wn.2d 815, 296 P.2d 1015 (1956); *Spath*, supra; *Seattle Factory Sites Co. v. Saulsberry*, 131 Wn.2d 95, 229 P. 10 (1924)
[94] *Knutson v. Reichel*, 10 Wn. App. 293, 518 P.2d 233 (1973); *Bernhard v. Reischman*, 33 Wn. App. 569, 658 2d 2 (1983)
[95] *Botton v. State*, 69 Wn.2d 751, 743 n.1, 420 P.2d 352 (1966)
[96] *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968)
[97] *Snively*, supra; *Hefferline v. Langkow*, 15 Wn. App. 896, 552 P.2d 1079 (1976)
[98] *Bach*, 74 Wn.2d 575
[99] *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539 (1891); *Van Siclen v. Muir*, 46 Wash. 38, 89 P. 188 (1907)
[100] *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913), and RCW 79.125.500
[101] *Harris*, 81 Wn.2d 770
[102] *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970)
[103] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049, *reh'g denied*, 466 U.S. 954 (1984)
[104] *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part, rev'd in part*, 135 F.3d 618 (9th Cir.), *amended*, 157 F.3d 630 (9th Cir. 1998), *cer. denied*, 526 U.S. 1060 (1999)
[105] *Bernhard v. Reischman*, 33 Wn. App. 569, 658 P.2d 2 (1983)
[106] RCW 90.03.010
[107] RCW 79.105.060(1)
[108] RCW 79.125.010

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