PDHonline Course L124G (1 PDH)

Riparian Rights

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2020

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Course Content

Background

Laws with respect to the claims of ownership of lands under bodies of water and waterways have its foundation in English common law. *U.S. National Water Commission, A Summary-Digest of State Water Laws, p.3, 1973.*

While England recognized a public interest in all waters affected by the ebb and flow of the tides, all fresh water inland lakes and streams above tidewater were classified as private waters in which the public had no rights. Thus, under English common law, the public's ownership interest extended only to the bed of the lakes and streams that were subject to the ebb and flow of the tide. *Barney v. Keokuk, 94 U.S. 324, (1876).*

Those bodies of water and waterways which were subject to the ebb and flow of the tide were considered to be" navigable waters" under English common law. The English crown owned the bed to the navigable waters in trust for the public use. The bed of non-navigable waters, (private), was owned by those who owned the land adjacent to or upon which the non-navigable water flowed.

As a result of the American Revolution, each state acquired absolute ownership of all land beneath their respective navigable waters which had been held by the English sovereign under the so called "public trust doctrine". *Shively v. Bowlby, 152 U.S. 1, (1894).*

New states admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and the land under them, within their respective jurisdictions. The title and rights of riparian or littoral owners in the soil below the high water mark are governed by the laws of the states, subject to the rights granted to the United States by the Constitution. *Skelton on the Legal Elements of Boundaries and Adjacent Properties, Second Edition, (1997).*

Navigability

In determining riparian ownership it is important for the land surveyor to determine whether the waterway is navigable or non-navigable. Basically the surveyor needs to determine if the waterway is navigable- in- law or navigable- in- fact. Tidal waters are generally considered navigable-in-law, if said waters can serve some useful commercial purpose. This is according to the Federal definition.

Navigable-in-law is based on the English common law definition of what waters were considered navigable and include only those waters, which are tidal.

Navigable- In-Fact pertains to whether or not the waterway has ever been used for trade or commerce, or other valid purposes under state law. Also, a determination of whether or not the waterway is susceptible to the use of the public applies. A great deal of time often results in research in order to determine this type of navigability. In non-tidal waters, navigability for title purposes generally is a question of navigability-in-fact.

In the United States a general rule is that riparian owners along tidal, navigable waters own to the high water mark. This also applies where the water is tidal but not navigable. However along navigable, non-tidal rivers the laws of the state you are in would apply.

Along non-tidal, non-navigable waters, the riparian owners generally hold the title to the bed. Along tidal or navigable waters the title to the bed in generally held by the state for the benefit of the public.

In tidal waters, navigability for title purposes appears to be not always based on navigability-in-fact. In some states public ownership appears to extend to submerged lands subject to the ebb and flow of the tide, regardless of actual navigability. For example, in Louisiana, Maryland, Mississippi, New Jersey, New York and Texas, State ownership extends to all waters subject to tidal ebb and flow, but in California, Connecticut, Florida, North Carolina and Washington, public ownership is based on navigability-in-fact. *Maloney and Ausness 1974.*

Boundaries in Streams

The most common case involving non-sovereign water boundaries is that involving a stream as the boundary between two parcels of land. In such cases where the deeds of the premises call, “to the stream”, the center of the main stream would be the boundary. This is called the thread of the stream. When there are multiple channels, then the main channel would form the boundary. This is called the thalweg. It is the deepest part of the channel. This type of boundary would shift if the thread of the stream shifts with time, unless such a shift is due to avulsion.

Boundaries in Lakes

Rights associated with water that is not flowing are called “Littoral”. Generally land beneath non-sovereign lakes are owned by the surrounding upland owners. When all the deeds call “to the lake”, each owner has title to a center point. This creates a complicated boundary problem since there is a lack of a main channel and a lake is rarely perfectly round. Where the description in the conveyance uses language such as “to the shores” or “along the shore”, then title to the lands underwater is not conveyed. Similarly where the description in the deed makes reference to features on dry land, such as the bank, shore,

or margin of the body of water, title to the lands underwater is not conveyed. *Geneva v. Henson 195 N.Y. 447 (1909).*

Changing Boundaries

Gaining Land

Accretion:
This is the gradual, imperceptible process of accumulation of land by the depositing of material from the water. Alluvion is the term for the material that has been deposited.

Reliction:
This is the gaining of land from the water. It is an increase of the land by the permanent withdrawal of the sea or river. It is a slow and imperceptible recession, and the recession must be permanent.

The right of the riparian owner to the alluvion or the land created by reliction is a basic riparian right.

Generally, the person claiming the benefit of accretion must be the one who proves it. The key elements in identifying this process are that it takes place gradually and imperceptibly. It should not be noticeable to an observer while it is taking place.

Islands within a body of water are often the result of accretion. Title to them generally belongs to the owner of the bed from which it is formed.
Where riparian owners do not own to the bed of the stream, islands formed in the bed are owned by the state.

Where the location of the boundary of lands adjoining a watercourse is the shore or bed of the waterway, and the shore line is gradually and imperceptibly changed by accretion, reliction or erosion, the shore line, as either extended or decreased, remains the boundary line of the adjoining land. The owner of the adjoining riparian land acquires title to all additions and extensions to his land by means of accretion and reliction. *Hempstead v. Little, 22 NY 2d 432 (1968).* The facts of the ownership of the bed of the watercourse do not change this general rule.

Even if the state is considered to own the bed of a stream, in most jurisdictions the riparian owner may acquire land by accretion.

Losing Land

Erosion:
This is the gradual eating away of the soil by the currents or tides. *Black's Law Dictionary.* It is the owner's responsibility to improve and protect his shoreline from erosion. It many cases when this is not feasible, in time the entire parcel may be lost to

erosion. The adjoining upland parcel then becomes riparian and acquires all the rights of the eroded parcel.

Submergence:
This is the disappearance of land under water and the formation of a more or less navigable body over it. *Black's Law Dictionary*

A riparian owner may lose title to land that gradually becomes eroded or permanently inundated with water. If the change is sudden, however, the title will not change.

Avulsion:
This is the removal of a considerable amount of soil from the land of one man, and the deposit of said land onto the land of another, suddenly and by the perceptible action of the water.

This is usually caused by the action of a flood. The suddenness of the event is not the sole criterion for avulsion to take place. In most cases the land lost must be identified on the opposite bank. In most cases, the inability to observe the removal of the land from one bank and placed on the opposite bank will preclude a claim of avulsion.

The court will generally presume that accretion or erosion has taken place. Avulsion can be very difficult to prove, especially if time has elapsed since its occurrence. The court will rely heavily on eyewitnesses or on the testimony of experts to determine if avulsion has taken place.

To establish title to lands, alleged to be lost by avulsion, the burden of proof is on the claimant to show that the land was lost by avulsion and not erosion. *Marba Sea Bay Corp. v. Clinton Street Realty Corp. 246 A.D. 764 (2nd Dept 1935), aff'd 272 N.Y. 292 (1936).*

Tides

Determination of Tidal Boundaries at a Site

In order to establish the mean high water line at a site, the surveyor needs to be equipped with the correct data and an understanding of what he is looking for. Mean High Water is defined as the arithmetic mean of the high water heights observed over a specific 18.6-year epoch.

The National Geodetic Vertical Datum of 1929 is the reference surface established by the National Geodetic Survey, and is the datum most frequently used by surveyors.

Formerly known as the Sea Level Datum of 1929, mean sea level was observed at 26 tidal stations in the U.S. and Canada and held as fixed. Since the 1929 readjustment, new leveling has shown that mean sea level at the tide stations did not truly describe a surface that would constitute a perfect datum.

In 1973 the name “Sea Level Datum of 1929” was changed to “National Geodetic Vertical Datum of 1929” to remove any reference to sea level and avoid any further confusion.

Despite this many surveyors still refer to elevations as mean sea level.

When determining boundaries formed by the level of the tide, it is important to distinguish between the survey datum and a local tidal datum.

Observations over long periods of time indicate that the sea level is generally rising. Along the northeastern coast of the United States, sea level has risen about 0.01 ft per year, based on observations made from 1940 through 1980. As a result of the rising sea level, the Mean High Water boundary is generally shifting inland.

Differences between NGVD 1929 and Mean Tide Level are evident when examining the published elevations of tidal benchmarks determined from tide observations and comparing them to elevations of the same benchmark referenced to NGVD 1929. In some area the difference can be as much as a foot.

The National Ocean Service indicates the relationship of NGVD to local tidal datums on tidal benchmark sheets.

The data for a tide station will only be valid for the vicinity of the tide station, and the surveyor must use good judgment in how far he tries to run with a computed elevation. Generally the data should be valid as far as the halfway point to the next tide station.

Locating the MHW line on a property first requires establishing a benchmark on the site. If a tide station is nearby then levels can be run directly from that benchmark. If NGVD benchmarks are nearby, then they can be used, provided that the correction for local tidal datums is known.

Once the benchmark on site is determined a level and a rod is used to find the contour of MHW along the shore. You may discover that the MHW line is a few inches under the water. This may occur since daily high water can vary as much as five feet between any two days in the course of a year. The elevation you are marking is a theoretical value based on a 19-year average so therefore it may not be coincident with the high water level on any given day.