

WATER BOUNDARIES

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1 ☐ **DISCLAIMER**

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

I. NO AREA OF PROPERTY LAW IS MORE DIVERGENT IN ITS APPLICATION THAN THE LAW DEALING WITH WATER BOUNDARIES

Generally speaking, property law is about as vanilla as the law gets. The law dealing with water boundaries is the exception to that general rule.

3 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"[This Court has] said that the 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 in the lands under them within their respective jurisdictions. It was also remarked that, upon the question, how far the title of the owner of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution. *St. Anthony Falls W&P Co. v. St. Paul Water*, 168 U.S. 349 (U.S. 1897)

4 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"In *Goodtitle v. Kibbe*, the decision of this court in *Pollard v. Hagan*, was referred to and affirmed, and it was said that, by the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of the navigable rivers between high and low water mark, and that after such admission Congress could make no grant of land thus situated."
St. Anthony Falls W&P Co. v. St. Paul Water, 168 U.S. 349 (U.S. 1897)

5 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the States to decide as to the character and extent of the riparian rights of owners upon navigable waters within such States."
St. Anthony Falls W&P Co. v. St. Paul Water, 168 U.S. 349 (U.S. 1897)

6 ☐ **JEFF'S 10 COMMANDMENTS**

ON WATER BOUNDARIES

"It was also remarked that, upon the question, how far the title of the owner of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution."

St. Anthony Falls W&P Co. v. St. Paul Water, 168 U.S. 349 (U.S. 1897)

7 ☐ JEFF'S 10 COMMANDMENTS ON WATER BOUNDARIES

II. WATER BOUNDARIES ARE UNIQUE WHEN COMPARED TO OTHER BOUNDARIES

Water boundaries are unique to almost all other boundaries that the land surveyor is familiar with in that—under most circumstances—they will move to follow the water that they are associated with.

8 ☐ JEFF'S 10 COMMANDMENTS ON WATER BOUNDARIES

"The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain."

New Orleans v. The United States, 1836 U.S. LEXIS 468, 118, 119 (1836).

9 ☐ JEFF'S 10 COMMANDMENTS ON WATER BOUNDARIES

"Unlike upland boundaries, water boundaries are ambulatory. The water boundary is a concept that must be applied by observation of the river, lakeshore, or ocean beach and other tidal water bodies. The actual survey work merely approximates the infinite indentations of riverbanks, channels, or shorelines."

Sec. 8-3. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

10 ☐ BOLLAY v. CAL. STATE LANDS COMMISSION

California Court of Appeals

193 Cal.App.4th 103

March 1, 2011

11 ☐ JEFF'S 10 COMMANDMENTS ON WATER BOUNDARIES

III. THE LAND SURVEYOR SHOULD NEVER ATTEMPT TO "NAIL-DOWN" A WATER

BOUNDARY IN TIME AND SPACE

Because water boundaries are ambulatory in nature, any attempt to identify them in terms certain rather than in term "more or less" is a mistake. A mistake often made by the land surveyor.

12 ☐ **THE WATERFRONT LOTS**

13 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"As to boundaries by streams or highways, it is laid down by Chancellor Kent, as the general rule, 'that a grant of land bounded upon a highway or river, carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent.'"

Brophy v. Richeson, 36 N.E. 424 (Ind.1894).

14 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"As to streams and highways, then, the rule seems to be that if the stream or highway, simply and without modifying words, is named as the boundary, the title is taken to the middle of the stream or highway, provided the grantor's title extend so far; but if the bank, or edge, or low-water mark, or high-water mark, of the stream, or the edge or line of the highway, or other clearly defined line along the stream or highway, is given as the boundary, then the title will not be carried beyond the boundary so defined."

Brophy v. Richeson, 36 N.E. 424 (Ind.1894).

15 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The supreme court has stated: 'Where a party conveys a parcel of land bounded by water, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot.'

Marsh v. Carlson, 390 N.W.2d 897 (Minn.App.1986).

16 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"A grant bounding on a stream or on tide water will be held to carry all the land owned by the grantor, in the absence of anything to show an intention not to do so. If the grantor owns to the thread of the stream, the grantee will also do so."

Bowie v. Western Maryland RRT Co., 104 A. 461 (Md.App.1918)

17 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"In most of the states in which the question has arisen, the owner of land bordering on the water has been regarded as entitled to sever the right of reclamation and wharfing out from the land to which it originally appertained, so as to vest it in a person having no interest in such land. This he may do either by a transfer of the land retaining the right, or by a transfer of the right retaining the land. The effect of such a severance is obviously to subject the land to the possibility of losing its right of access by reason of the exercise of the right of reclamation."

Williams v. Skyline Dev. Corp., 288 A.2d 333 (Md.App.1972)

18 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"We conclude, as we have already stated, that, in our opinion, the right to erect bulkheads to fill or wharf out and other riparian rights may be severed from the fast land and alienated like other rights of property."

Williams v. Skyline Dev. Corp., 288 A.2d 333 (Md.App.1972)

19 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"We will now consider the proper construction of the Boinis Deed, the provisions of which, as a recorded deed in the chain of title of the owner of Lots 270 through 276, are binding on the owner. Inasmuch as the Boinis Deed conveyed the seven lots by reference to a recorded plat—i.e., the plat of Addition "A"—that plat became incorporated as part of the deed. In the event of ambiguity in the terms of the deed in regard to a description of a right of way, its location, as shown on the plat will prevail."

Williams v. Skyline Dev. Corp., 288 A.2d 333 (Md.App.1972)

20 ☐ **MAGNUSON
v.
COSSETTE**

Minnesota Court of Appeals
707 N.W.2d 738
January 17, 2006

21 ☐ **A RIVER RUNS THROUGH IT**

22 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

IV. PROPERTY LAW IS GENERALLY DETERMINED BY STATE LAW NOT FEDERAL LAW

"The guiding legal principles are not in dispute. Where there is no controlling federal

legislation or rule of law, questions involving ownership of land are determined under state law, even where the Government is a party."

U.S. v. Doyle, 468 F.2d 633 (U.S.App. 1972)

23 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The question as to the extent of a federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law."

Borax v. Los Angeles, 296 U.S. 10 (1935).

24 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

V. WHEN IT COMES TO RIGHTS ASSOCIATES WITH WATER BOUNDARIES, FEDERAL LAW IS IMPLICATED AND IN MANY CASES CONTROLLING

"The congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territories or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or any particular State."

Article 4, Sec.3, Clause 2, *U.S. Constitution*. (a.k.a. the "Property Clause")

25 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The Federal court decisions for land title purposes may be restated as far as may be required for the first approximation of navigability as follows:

(1) Rivers and lakes that are navigable in fact are those that have a history of use as highways of commerce over which trade and travel were conducted at the time of statehood."

Sec. 8-35. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

26 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"(2) Rivers and lakes navigable in fact at the date of statehood are navigable in law.

(3) 'Navigable waters of the United States' are those to which congressional acts apply and they must interconnect to permit navigation to navigable waters in other States or countries. Navigable waters of the United States do not confer title to the soil under those waters to the United States."

Sec. 8-35. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

27 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"(4) 'Navigable waters of the State' are those navigable in law that does not interconnect with navigation in other States or countries. The navigable waters of the State include ownership of the soil under the waters."

Sec. 8-35. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

28 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"(5) Rivers and lakes in States that were undeveloped at the time of statehood will be navigable in law if they were susceptible of being used in their natural condition as highways of commerce, over which trade and travel could have been conducted, at statehood."

Sec. 8-35. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

29 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

VI. UNDER THE "EQUAL FOOTING DOCTRINE" NEW STATES ADDED TO THE UNION HAVE THE SAME SOVEREIGN RIGHTS AND JURISDICTION AS THE ORIGINAL STATES

"New states are entitled to the sovereignty and jurisdiction over all the territory within her limits ... to the same extent as the original states. To maintain any other doctrine, is to deny that a new states has been admitted into the union on an equal footing with the original states...."

Pollard v. Hagan, 44 U.S. 212 (1845).

30 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Before the American Revolution the Colonies as well as some individuals were awarded grants of land from the Crown. Occasionally the wording of these grants would include the ownership of the beds of bays and other navigable waters. The Constitution preserved all such rights held prior to Independence. Thus, in the original 13 Colony States, individuals or their grantees may own beds of navigable waters."

Sec. 8-36. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

31 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"After Independence each of the 13 new States owned the beds of all the navigable waters formerly owned by the Crown. Under the 'equal footing doctrine' new States are entitled to the same degree of sovereignty and jurisdiction over all the territory within their borders, subject to the common law, as the original States. Accordingly, the beds of navigable waters were reserved for the future States; they were not explicitly granted by the Federal Government or the Constitution."

Sec. 8-36. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

32 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."

United States v. Holt State Bank, 270 U.S. 49 (1926)

33 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations."

United States v. Holt State Bank, 270 U.S. 49 (1926)

34 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

VII. THE TERMS "RIPARIAN" AND "LITTORAL" HAVE MERGED TO THE POINT WHERE MAKING A DISTINCTION IS ALMOST MEANINGLESS

"Many cases and statutes use 'riparian' to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby 'riparian' means abutting a river or stream and 'littoral' means abutting an ocean, sea, or lake."

Stop the Beach Renourishment v. Florida DEP, 560 U.S. 702 (2009), at Footnote 1.

35 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"A littoral landowner is one whose land borders an ocean, sea, or lake.... Littoral landowners are similar to riparian landowners, whose land borders on a river or stream. Generally speaking, the special property rights of littoral and riparian owners are the same, and cases dealing with one type of waterfront landowner are freely applied when adjudicating the rights of the other."

Alexander Hamilton Life Insurance Company of America v Government of The Virgin Islands of The United States, 757 F.2d 534, 538 (3d Cir. 1985).

36 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

- Still other courts have attempted to hang onto the distinction even though they have trouble doing so.

37 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Modern usage distinguishes between 'littoral' and 'riparian,' with the former applying to seas and their coasts and the latter applying to rivers and streams. Our case law has not always precisely distinguished between the two terms. Consistent with our recognition that the common law of the sea applies to our Great Lakes, we will describe defendants' property as littoral property.
Glass v Goeckel, 703 N.W.2d 58, 61 (Mich. 2005).

38 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Although we have attempted to retain consistency in terminology throughout our discussion, we will at times employ the term 'riparian' when the facts or the language previously employed so dictate. For example, a littoral owner of property on the Great Lakes holds riparian rights as a consequence of owning waterfront property."
Glass v Goeckel, 703 N.W.2d 58, 61 (Mich. 2005).

39 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

- Finally, other courts have simply given up on the distinction.

40 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The term 'riparian rights' refers to the rights of owners of land abutting a stream, while the term 'littoral rights' refers to the rights of owners of land abutting the surface waters of a lake or the sea. Courts now commonly use the word 'riparian' when describing water rights in either context.
Wehby v Turpin, et al, 710 So.2d 1243 (Ala. 1998)

41 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

- For the purposes of this presentation, I will use the term "riparian" in either context, although, when appropriate a distinction may be made.

42 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

VIII. WATER BOUNDARIES MAY IMPLICATE BOTH COMMON LAW AND CIVIL LAW RULES

The common law (derived from English common law) and the civil law (derived from Roman Civil law) have different rules for dealing with water boundaries and riparian rights. There is some scholarly work that questions the origins of these rules. Nevertheless, for this presentation we will stay with the mainstream nomenclature.

43 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"One scholar has noted that the rule commonly referred to as the 'civil law rule' was not derived from either the civil law tradition of post-Roman continental Europe or

ancient Rome, but rather from decisions of Scottish courts in the nineteenth century, and that the 'common law rule,' which pre-dates the English common law, actually originated in Roman civil law. While we have no quarrel with the author's historical analysis, we choose to refer to the two rules by the names ascribed to them by other American courts."

Orr v. Mortvedt, 735 N.W.2d 610 (Iowa 2007), at Footnote 1.

44 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"At common law there are two classes of navigable streams: 1. navigable streams in which the tide ebbs and flows; on these, the rights of the bank owners extend only to high-water mark. The bank below high-water mark, and the whole bed of the stream, belong exclusively to the public.

Cox v. State, 1833 Ind. LEXIS 8 (Ind.1833).

45 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"2. navigable streams where the tide does not ebb and flow; on these, the bank proprietors have right and title to the centre of the stream, as they have in the soil on which a public highway on land runs, but the public have a right of way in the stream, as they have in a public highway on land, and the bank proprietors cannot interfere with that right of way, nor can they obstruct the stream, or divert it from its use as a public highway, nor can they make any use of it inconsistent with the public right of way."

Cox v. State, 1833 Ind. LEXIS 8 (Ind.1833).

46 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The doctrines of the civil law were more uniform, and the rights of all riparian proprietors were the same, as it respected the ownership of navigable streams. There was no difference made between those navigable streams, where the tide did not ebb and flow, and those where it did."

Cox v. State, 1833 Ind. LEXIS 8 (Ind.1833).

47 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The exclusive right of the owner of the bank extended only to high-water mark, and the bank below high-water mark and the whole bed of the stream, belonged exclusively to the public, and no obstruction or diversion of the water was permitted."

Cox v. State, 1833 Ind. LEXIS 8 (Ind.1833).

48 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"The principles of the common law have been recognized in eight or ten of the states, but in several others the principles of the civil law, to a very considerable extent, have

been adopted. In this state, neither the principles of the common or civil law have as yet received any judicial sanction. The case now before us does not require us to pursue those easements and aquatic rights any further."

Cox v. State, 1833 Ind. LEXIS 8 (Ind.1833).

49 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Most jurisdictions appear to adhere to the so-called common law rule. Under this rule, the owners of the fee in land underlying the surface waters of a man-made, nonnavigable lake are entitled to the exclusive control of that portion of the lake lying over the land as to which they own the fee. Consequently, the owner of a portion of a lake bed has the right to exclude others, including any other owners of the lake bed, from using his property."

Wehby v. Turpin, 710 So. 2d 124 (Ala.1998).

50 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"Other jurisdictions have adopted the so-called civil law rule. Under this doctrine, an owner of land abutting or extending into portions of a lake, whether navigable or not, is, purely by virtue of riparian rights, entitled to the reasonable use and enjoyment of the entire lake."

Wehby v. Turpin, 710 So. 2d 124 (Ala.1998).

51 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

"In Maryland, by common law rule, title to all navigable waters and to the soil below the mean high-water mark of those waters is vested in the State as successor to the Lord Proprietary who had received it by grant from the Crown; and so it remains, unless it be included in some grant by the State, made prior to March 3, 1862."

Wicks v. Howard, 388 A.2d 1250 (Md.App. 1978).

52 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

IX. NAVIGABILITY IS "KEY" TO A WATER BOUNDARY DETERMINATION

Generally speaking, if the water body is navigable, the State owns the submerged lands and the boundary is at some water line (i.e. mean high tide, high-water, or low-water mark). Non-navigable submerged lands belong to the upland owner to some point (center of the stream, center of the lake, or some other property line). Waters influenced by the tide are considered navigable.

53 ☐ **JEFF'S 10 COMMANDMENTS
ON WATER BOUNDARIES**

X. THERE ARE FOUR "TYPES" OF NAVIGABILITY

- Navigability for Title. This is the type of navigability that most affects boundary work.

- Public v. Private Water Navigability. Also includes many surveying issues.
- Commerce Clause Navigability. Beyond the Scope of this Discussion.
- Admiralty Jurisdiction Navigability. Beyond the Scope of this Discussion.

54 ☐ DEFINITIONS

- Accretion: The gradual process of attachment to riparian or littoral land through deposition of sand, gravel or sediment from the action of contiguous waters is known as accretion. It is generally regarded as the opposite of erosion, a washing away of soil, and is distinguished from reliction, soil exposed through receding waters. The material deposited by accretion is known as alluvium. Though not as frequently used, the term alluvion refers to the act or process of accretion, these latter two terms being synonymous.

55 ☐ DEFINITIONS

Accretion:

"Accretion is defined as the grain-by-grain deposition of soil along the bank of a river. The term is applied both to the gradual and imperceptible deposition of material along the bank of a body of water and to the lands formed by this process. It is usually accompanied on the opposite side of the stream by the reverse process, erosion. Both accretion and erosion can affect land boundaries.

Sec. 8-76. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

56 ☐ DEFINITIONS

Accretion:

"The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

County of St. Clair v. Lovington & Wiggins, 90 U.S. 46 (1874).

57 ☐ DEFINITIONS

Accretion:

- Generally, where accretions to riparian land are caused artificially by strangers to the land the upland owner remains the beneficiary thereof. The courts have taken the position that one cannot artificially induce accretions to his own benefit.

58 ☐ DEFINITIONS

Accretion:

- However, if in the course of exercising riparian rights one causes, unknowingly and absent collusion, a deviation from "natural conditions" which results in accretive action to a downstream or upstream riparian parcel, the courts have allowed the benefit of the attached material to stand.

59 ☐ DEFINITIONS

Accretion:

- In Maryland there seems to be two laws with regard to accretions. If the accretions took place on or before January 1, 1972, then the Wetlands Act of 1862 is operable. After this date then the Wetland Act of 1970 is the operable statute.

60 ☐ **DEFINITIONS**

Accretion:

"The ambiguous phrase 'accretions . . . by natural causes or otherwise' led to uncertainty whether fast land created by artificial means belonged to the riparian owner. Ultimately, the Court of Special Appeals held unequivocally that 'the Act of 1862 contemplated no distinction between accretions formed naturally and those formed by artificial means.'" Quoting *Rayne v. Coulbourne*.

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

61 ☐ **DEFINITIONS**

Accretion:

"The Wetlands Act of 1970 initially provided that only natural accretion belonged to the riparian owner. ... Then, in 1973 the General Assembly entitled riparian owners in addition to their right to 'natural accretions,' 'to reclaim fast land lost by erosion or avulsion during their ownership of the land to the extent of provable preexisting boundaries,' but only as to 'fast land lost after January 1, 1972.'"

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

62 ☐ **DEFINITIONS**

Accretion:

"Change brought about gradually through artificial means will result in either a gain or loss to the landowner, provided, of course, that statutory provisions are complied with. ... This understanding of the statutory term 'natural accretion' reflects the view of a majority of common law decisions that it is immaterial whether the deposits causing the new land derived from natural causes or had an artificial impetus so long as the deposits were gradual."

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

63 ☐ **DEFINITIONS**

Accretion:

"The cases cited in support of this proposition dealt with accretion caused by the artificial intervention of third parties, not the riparian landowner. Indeed, when construing the 1862 Wetlands Act as applicable to artificial accretion, the court emphasized the lack of the landowner's involvement or control."

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

64 ☐ **DEFINITIONS**

Accretion:

"Conversely, the general common law rule is that a riparian owner cannot claim title to land added by accretion as a result of creating by himself an artificial condition causing the reliction. 'It is settled that accretion may result from artificial causes,

provided that the party claiming the benefit did not himself cause the artificial accumulation.” (Citation omitted).

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

65 ☐ **DEFINITIONS**

Accretion:

“As we see it, the General Assembly did not intend to disentitle riparian owners of artificially accreted lands if the artificial accretion is gradual and if the riparian owner did not produce the artificial condition. But if the riparian owner intervenes in the environment to cause the accretion—and, it must be remembered, thereby deprives some other riparian owner of the accretion that would otherwise have occurred on the latter’s land—a statutory ‘natural accretion’ will not be found.”

Attorney General Opinion, 76 Op.Atty.Gen.Md. 307 (1991).

66 ☐ **DEFINITIONS**

- Erosion: The wearing or washing away of soil from the banks of a watercourse or shore of a lake through the water’s action is known as erosion. Sand, sediment and other materials are gradually dislodged, transported and re-deposited elsewhere. Erosion is generally regarded as being the opposite process of accretion (i.e., the gradual deposition or build-up of material from the action of water), wherein material is being removed rather than built up or added.

67 ☐ **DEFINITIONS**

Avulsion:

“An ‘avulsion’ is the sudden and perceptible change in a channel of a boundary stream with a new channel and remaining ‘fast’ land between, or a comparable change in some other body of water forming a boundary owing to natural causes or from the result of human activity. Water may continue to flow in both channels with resulting boundary movement but the process is complete when the flow in the old channel becomes stagnant under ordinary flow conditions of the river.”

Sec. 8-81. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

68 ☐ **DEFINITIONS**

Avulsion:

“Human-made channelization and rechannelization after the date of grant or statehood is generally treated as an avulsion.”

Sec. 8-83. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

69 ☐ **DEFINITIONS**

Avulsion:

“As a general rule an avulsion legally fixes land boundaries formed by riverbanks at position prior to the avulsion, within the limits of an avulsion.”

Sec. 8-90. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral

Survey, Denver, CO.

70 ☐ **DEFINITIONS**

Avulsion:

"It is settled law, that when grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary."

Nebraska v. Iowa, 143 U.S. 359 (1892).

71 ☐ **DEFINITIONS**

Avulsion:

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion."

Nebraska v. Iowa, 143 U.S. 359 (1892).

72 ☐ **DEFINITIONS**

Avulsion:

"The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied."

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)

73 ☐ **DEFINITIONS**

Avulsion:

- There is a presumption at law that the gradual processes of accretion and erosion have been operative on riparian land, unless evidence clearly indicates otherwise.

74 ☐ **DEFINITIONS**

Avulsion:

- In terms of a natural setting, there will invariably be evidence of unaltered improvements, undergrowth, vegetation or timber between the old (pre-avulsed) and new (post-avulsion) channels. This is a strong indicator for avulsion, which can further be substantiated through use of historical records and aerial or terrestrial photographs.

75 ☐ **DEFINITIONS**

Avulsion:

"While it is true, as counsel for defendant contends, that it is presumed that changes in river banks are due to accretion rather than avulsion, that rule does not apply where there is evidence of avulsive change. We think the evidence showing the age of trees lying between the former channel and the new channel precludes any

conclusion that the lateral migration of the river was slow and imperceptible. The witness Hamre, who was the Helena National Forest Supervisor, testified that the trees lying on the land between the two channels were 70 to 80 years in age and still growing."

Ramsey v. Spratt, 79 Mont. 158; 255 P2 96 (Mont.1964)

76 ☐ **DEFINITIONS**

Avulsion:

"Had the lateral migration of the river been gradual, the soil supporting the roots would have been washed out. Instead, this physical evidence demonstrates that those trees have remained strong since at least 1880 or 1890. The question is one of fact, and the trial judge found there had been an avulsive change. We feel there is ample and credible evidence to support that finding, and therefore, it will not be disturbed."

Ramsey v. Spratt, 79 Mont. 158; 255 P2 96 (Mont.1964)

77 ☐ **DEFINITIONS**

Avulsion:

"An avulsive change cannot be assumed to have occurred without positive evidence. When no such showing can be made, it must be presumed that the changes have been caused by gradual erosion and accretion."

Sec. 7-73. *1973 Manual of Surveying Instructions*, U.S. Dept. of Interior, Bureau of Land Management.

78 ☐ **STOP THE BEACH RENOURISHMENT
v.**

FLORIDA DEPT. ENVIR. PROTECT.

United States Supreme Court

2010 U.S. LEXIS 4971

June, 2010

79 ☐ **STATE v. GILL**

Alabama Supreme Court

66 So.2d 141

June, 1953

80 ☐ **RAYNE v. COULBOURNE**

Maryland Court of Special Appeals

500 A.2d 665

December, 1985

81 ☐ **DEFINITIONS**

- Reliction: Where waters of a watercourse or water body have gradually and imperceptibly receded, and previously submerged soil has been exposed as a result, such alteration is known as reliction. Generally, land that was once submerged and is now left dry as a result of relictive processes belongs to the riparian or littoral

owner from whose shore the water has receded.

82 ☐ **DEFINITIONS**

Reliction:

“‘Reliction’ comes from the Latin word for relic. It is the long continued and gradual uncovering of land caused by the recession of a body of water. Relicted land is treated in the same manner as accreted land insofar as its survey is concerned.”

Sec. 8-84. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

83 ☐ **DEFINITIONS**

Emergence: “‘Emergence’ is the process of uncovering of the bed of a water body, the opposite from submergence. It is synonymous with the term reliction. Emergence is generally accomplished by changes in the OHWM of the water body or the uplift of the upland. This is different from ‘accretion,’ which is the gradual forming of upland caused by the deposition of fine material on the bed of a water body.”

Sec. 8-85. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

84 ☐ **DEFINITIONS**

Submergence: “‘Submergence’ is the process of covering of upland with rising water, the opposite from emergence. This change usually is accompanied by changes in the OHWM of the water body or the depression of the upland. This is different from ‘erosion,’ which is the eroding of upland by water action, causing the area to be covered with water.”

Sec. 8-86. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

85 ☐ **DEFINITIONS**

Re-emergence: “‘Re-emergence’ is the process by which land is submerged by water, followed by the reappearance of the same soil by the process of (1) withdrawal of water or (2) elevation of terrain, and not by accretion. The first change is accompanied by changes in the OHWM of the water body. The second change is not accompanied by changes in the OHWM of the water body.”

Sec. 8-87. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

86 ☐ **DEFINITIONS**

Re-emergence:

“Re-emergence is not the formation of a new feature in the same location of a previous feature; that is the process of accretion, to either the island or mainland, or to the bed of the water body. Both of these processes have been called ‘reappearance.’”

Sec. 8-87. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral

Survey, Denver, CO.

87 ☐ **DEFINITIONS**

Re-emergence:

"Where the root cause of emergence is a very slow elevation of terrain, as in isostatic rebound of the earth's crust in arctic regions due to melting glaciers and the removal of that weight, the boundaries may move as the OHWM moves, the change is generally treated as accretion."

Sec. 8-87. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

88 ☐ **DEFINITIONS**

Re-emergence:

"Where the root cause of the emergence is sudden uplift of terrain accompanied by earthquake, or a channel straightening project, the change is generally treated as an avulsive."

Sec. 8-87. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

89 ☐ **DEFINITIONS**

Re-emergence:

- Another concept of re-emergence has to do with the movement of a waterway that eliminates a parcel and then movement back in the opposite direction causes the parcel re-appear.

90 ☐ **DEFINITIONS**

Re-emergence:

- One rule that is utilized is known as the "once riparian, always riparian" rule. This once-upland parcel then becomes riparian and remains so (unless also wholly extinguished), while the former riparian parcel remains permanently extinguished.

91 ☐ **DEFINITIONS**

Re-emergence:

- The second rule recognizes re-emergence and, in so doing, dictates that a remote, upland parcel owner can only accrete out to the limit of his former common boundary with the adjoining riparian owner. Any accretion beyond this point constitutes re-emergence of the previously extinguished, former riparian adjoiner.

92 ☐ **DEFINITIONS**

Re-emergence:

- The federal government has historically held to the re-emergence rule where federal lands are involved. Probably the most notable case in support of this is *Towl v. Kelly and Blankenship*, 54 I.D. 455 (1934). Federal lands which have eroded and subsequently been restored have been reclaimed by the government under the *Towl* ruling.

93 ☐ **DEFINITIONS**

Re-emergence:

- Generally, case law across the country has been consistent that a parcel cannot re-emerge on the other side of the watercourse.

94 ☐ **DEFINITIONS**

- High Water Line (H.W.L.): The H.W.L. is that line which delimits the river bed from its banks. It is the point to which the water rises at its average or mean highest stage annually.
- The H.W.L. is neither a straight line nor at a constant elevation. It can best be described by envisioning the line along each bank created by the intersection of a falling (flowing) "plane" of water with the sinuosities of the bed and banks which confine it to its course.

95 ☐ **DEFINITIONS**

- Low Water Line (L.W.L.): The low-water mark of a river is the point to which the water recedes at its lowest state.
Water Laws of Alabama, Geological Survey of Alabama, Bulletin 89

96 ☐ **DEFINITIONS**

- Thalweg: Or talweg, is an ambulatory line often used to designate the division line between opposite nations or political subdivisions along navigable rivers and lakes. The word comes from the German word for "valley way." The thalweg follows the line of usual navigation in a river, not necessarily the deepest channel, used by boats of maximum tonnage on their downstream passage. The line of deepest water often occurs close to one bank. The geometry of the thalweg can be determined by observation of river traffic or from charts used by river pilots.
Sec. 8-70. 2009 Manual of Surveying Instructions, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

97 ☐ **DEFINITIONS**

- Thread: Has various definitions depending on the source considered. In many cases it is considered synonymous with "medial" or a line between the two banks. In other words, the centerline of the stream. Other definitions consider the thread to be the middle of the channel, which may or may not coincide with the centerline of the stream.

98 ☐ **DEFINITIONS**

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of the stream.

99 ☐ **DEFINITIONS**

Apportionment:

- An important concept associated with riparian rights is the projection of partition lines out into non-navigable waters, the apportionment of riparian rights out into navigable waters and the partition of accretions.
- For lack of a better terms, these partition lines will be referred to as Riparian Boundary Lines.

100 ☐ **DEFINITIONS**

Apportionment:

- In many cases the deed of conveyance answers the question as to the projection of riparian boundary lines out into non-navigable waters.

101 ☐ **DEFINITIONS**

Apportionment:

- Generally, the call "to the river" or "to the stream" is automatically a call to the center of the river or stream in a non-navigable situation. If the waterway is navigable, the call will automatically terminate at the OHWM or OLWM, as the case may be.

102 ☐ **DEFINITIONS**

Apportionment:

- As long as the waterway remains relatively stable, the problems are relatively minor. With movement due to accretions, then partition of the accretions becomes the issue. We'll look at that in a moment.

103 ☐ **DEFINITIONS**

Apportionment:

- The apportionment of riparian rights out into navigable waters is often encountered where piers and boat docks are encountered. Many times these issues are address by state statute.

104 ☐ **DEFINITIONS**

The owner of riparian lands upon navigable waters in the State of Alabama may install in front of their respective riparian lands wharves, docks, warehouses, sheds, tipples, chutes, elevators, conveyors and the like for receiving, discharging, storing, protecting, transferring, loading and unloading freight and commodities of commerce to and from vessels and carriers, and may use their riparian lands in connection therewith and dredge out and deepen the approaches thereto, and may charge and collect reasonable tolls for the use thereof. All such structures are to be subject to such lines and limitations as may at the time of making such improvements be laid or placed by any authority of the United States, or of the State of Alabama, who may have

authority to control harbor and pier lines.

Sec. 33-7-50, Code of Alabama, 1975.

105 ☐ **DEFINITIONS**

Apportionment:

- The apportionment of riparian rights out into navigable waters is often encountered where piers and boat docks are encountered. Many times these issues are address by state statute.

106 ☐ **WICKS v. HOWARD**

Maryland Court of Special Appeals

388 A.2d 1250

July, 1978

107 ☐ **NAVIGABILITY FOR TITLE**

Defined

Navigability For Title Means “Navigable In Fact”

- It is generally recognized that tidally influenced waters are navigable in fact. Early on, the federal government claimed all of the submerged lands below the low tide line, leaving the state only the lands between the low tide and high tide lines.

108 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

“The purpose of the Act was to restore to the states ownership of the submerged lands seaward of their coastlines and within their respective boundaries which the Supreme Court in 1917 held the federal government had paramount rights in, rather than the states.”

Shalowitz, Aaron L. J.D., *Tidal Boundaries – The Borax Case Revisited*, reprinted in “The Curt Brown Chronicles,” by Michael J. Pallamary, 2011.

109 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

“The 1953 *Submerged Lands Act* (SLA), 43 U.S.C. 1301 et seq., (1) essentially confirms States’ equal footing rights to tidelands and submerged lands beneath inland navigable waters, and (2) establishes States’ title to submerged lands, including the tidelands, beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States.”

Sec. 8-43. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

110 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

"For inland waters the Act defined the term 'lands beneath navigable waters' as 'all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter ...

Sec. 8-43. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

111 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

"... up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction. The Act granted each State the ownership of all lands below the OHWM including the mineral estate.

Sec. 8-43. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

112 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

"There were some exceptions: any lands ceded to the United States whose title was determined under State law all lands acquired by eminent domain, purchase, gift, cession, or acquired as a proprietary interest; all lands filled in, built up , or otherwise reclaimed by the United States for its own use ...

Sec. 8-43. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

113 ☐ **NAVIGABILITY FOR TITLE**

Defined

Submerged Lands Act of 1953

"[such as] ... all lands withheld prior to statehood by the United States for the benefit of Indians; all structures and improvements constructed by the United States in the exercise of its navigational servitude; and all lands explicitly withheld by the United States prior to statehood."

Sec. 8-43. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

114 ☐ **NAVIGABILITY FOR TITLE**

Defined

Other Navigable Waters

Ordinarily a conveyance document, usually a patent, issued by the BLM and its predecessor the GLO conveys title to the patentee down to the OHWM on navigable rivers and lakes. A riparian owner on one side of a meandered nonnavigable river is conveyed title to the medial line of the stream or to the center of a meandered

nonnavigable lake. A patent to a littoral owner conveys title down to the line of MHT on tidal waters.”

Sec. 8-40. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

115 ☐ **NAVIGABILITY FOR TITLE**

Defined

Other Navigable Waters

“Each of the 50 States that came into the Union thus acquired ownership of the beds of the navigable waters within their boundaries, subject to the Federal navigation servitude. The lateral extent of that ownership was to the OHWM on each side of the inland water body. Because each State has the legislative power to dispose of or otherwise control ownership of these beds, and have treated them differently, there is some variety among the States as to current ownership.”

Sec. 8-41. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

116 ☐ **NAVIGABILITY FOR TITLE**

Defined

Other Navigable Waters

“Some States have granted the entire beds of their waters to the upland owners, disclaiming all ownership; some have granted the upland owners the banks down to the low water mark instead of the OHWM; some States kept the ownership of the beds of large lakes but granted the beds of the rivers to the upland owners. Any claim to the bed must involve an examination for the possible effect of the law of the State in which it is located.”

Sec. 8-41. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

117 ☐ **NAVIGABILITY FOR TITLE**

Defined

Other Navigable Waters

“The title and rights of riparian owners in areas below the OHWM of inland navigable bodies of water are governed by State law rather than Federal law. The title and rights of littoral owners in areas below the line of MHT of tidelands are also governed by State law rather than Federal law.”

Sec. 8-42. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

118 ☐ **NAVIGABILITY FOR TITLE**

Defined

- The early cases of *Martin v. Waddell*, 41 US 367 (1842) and *Pollard's Lessee v. Hagan*, 44 US 212 (1845), established that all new states entered into the Union on a equal basis with the original 13 colony states, having the same “rights, sovereignty and jurisdiction” over “the shores of navigable waters and the soils

under them." These cases and others that followed established that the new states own the beds of the waterways that are subject to the ebb and flow of the tide.

119 ☐ **NAVIGABILITY FOR TITLE**

Defined

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States."

Illinois Central Railroad v. Illinois, 146 US 387 (1892)

120 ☐ **NAVIGABILITY FOR TITLE**

Defined

- Beyond the point where the tide ebbs and flows, "navigability in fact" becomes an issue of interpretation.

121 ☐ **NAVIGABILITY FOR TITLE**

Defined

"Here [in the United States] the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing."

The Daniel Ball, 77 U.S. 557 (1870).

122 ☐ **NAVIGABILITY FOR TITLE**

Defined

"But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity."

The Daniel Ball, 77 U.S. 557 (1870).

123 ☐ **NAVIGABILITY FOR TITLE**

Defined

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The Daniel Ball, 77 U.S. 557 (1870).

124 ☐ **NAVIGABILITY FOR TITLE**

Defined

"The rule long since approved by this court in applying the constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water ...

United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

125 ☐ **NAVIGABILITY FOR TITLE**

Defined

"... and further that navigability does not depend on the particular mode in which such use is or may be had – whether by steamboats, sailing vessels, or flatboats – nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel useful for commerce."

United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

126 ☐ **NAVIGABILITY FOR TITLE**

Defined

- Just because a waterway is "susceptible" to being used for navigation does not mean that every small creek that a boat can be put into is "navigable in fact."

127 ☐ **NAVIGABILITY FOR TITLE**

Defined

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

The Montello, 87 U.S. 430 (1874).

128 ☐ **NAVIGABILITY FOR TITLE**

Defined

"Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river."

The Montello, 87 U.S. 430 (1874).

129 ☐ **NAVIGABILITY FOR TITLE**

Defined

"It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable....'"

The Montello, 87 U.S. 430 (1874).

130 ☐ **NAVIGABILITY FOR TITLE**
Defined

"The learned judge of the court below rested his decision against the navigability of the Fox River below the De Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted."

The Montello, 87 U.S. 430 (1874)

131 ☐ **NAVIGABILITY FOR TITLE**
Defined

"Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce."

The Montello, 87 U.S. 430 (1874)

132 ☐ **NAVIGABILITY FOR TITLE**
Defined

"If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars."

The Montello, 87 U.S. 430 (1874).

133 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

- Some courts have confused navigability for property title with commerce clause navigability and admiralty jurisdiction navigability. The distinguishing characteristic between these forms of navigability seems to be the condition of the water body at the time of statehood. This was cleared up in the SCOTUS case of the *United States v. Utah*:

134 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"The controversy is with respect to certain facts, and the sufficiency of the basis of fact for a finding of navigability, rather than in relation to the general principles of law that are applicable. In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States.

United States v. Utah, 283 U.S. 64 (1935).

135 ☐ **KAISER AETNA**

v.

UNITED STATES

SUPREME COURT OF THE UNITED STATES

444 U.S. 164; 1979 U.S. LEXIS 48

December 1979

136 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called 'navigational servitude' cannot simply be lumped into one basket."

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

137 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"It is true that Kuapa Pond may fit within definitions of 'navigability' articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude."

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

138 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"This Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its *Commerce Clause* authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access."

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

139 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"This is a case in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements."

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

140 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

141 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. ... It consequently is not the sort of 'great navigable stream' that this Court has previously recognized as being 'incapable of private ownership.'"

Kaiser Aetna v. U.S., 444 U.S. 164; 1979 U.S. LEXIS 48 (1979).

142 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"Under the Admiralty Jurisdiction or Commerce Clause, a water body may be improved to achieve navigability. Under the Property Clause, the issue is 'ordinary condition at the time of statehood.'"

Sec. 8-37. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

143 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"Artificial or natural changes subsequent to the date of Statehood do not bear on the subject of navigability for title purposes under the Property Clause. Such changes do affect navigability under the Commerce Clause or Admiralty Jurisdiction."

Sec. 8-47. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

144 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

- Some states have attempted to further define the character of a navigable body of water. These definitions will generally be subordinate to the Federal definition and cannot impair Federal commerce and admiralty jurisdiction.

145 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"Whether it is fitted for valuable floatage; whether the public, or only a few individuals, are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used ...

Blackman v. Mauldin, 51 So. 23 (Ala.1909).

146 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"... whether it was meandered by the government surveyors, or included in the surveys; whether if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of a case, it is to be remembered that the *onus probandi* is upon the party claiming that a stream above tide water is public."

Blackman v. Mauldin, 51 So. 23 (Ala.1909).

147 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"The line is described in complainants' deed as running 'to Autauga Creek, thence up Autauga Creek to a point,' etc. We consider Autauga Creek as nonnavigable because, being above tidewater, it is, prima facie, not a navigable stream. There is neither evidence nor contention that it is navigable. Briefly the law is that adjoining proprietors of land having a nonnavigable stream as a boundary line between them take each to the middle or thread of the stream."

Rollan v. Posey, 126 So.2d 464 (Ala.1961).

148 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

"Under common law principles, title to the bed of navigable waters, defined as the land beneath the mean high tide mark of these waters, rests in the state for the benefit of its citizens, by virtue of the state's succession to the rights and title of the Lord Proprietor who had received the land by grant from the Crown of England, unless title to the land beneath such waters had been expressly granted to a private person. Navigable water has traditionally been defined in Maryland as water subject to the ebb and flow of the tide."

Hirsch v. MD Dept. of Natural Resource, 416 A.2d 10 (Md.App. 1980)

149 ☐ **NAVIGABILITY FOR TITLE**
Differentiated

- Other states have simply defaulted to the Federal definition of navigability.

150 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"An examination of the Holt case and other Federal cases shows that under the Federal test a body of water to be navigable must be navigable in fact; that is, in its natural and ordinary condition it must constitute, or be susceptible of constituting, a highway of commerce for trade and travel."

Youngstown Mines Corporation v. Prout, 124 N.W.2d 328 (Minn.1963).

151 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

- Generally speaking, the determination of the character of a water body or river (or stream) above the ebb and flow of the tide, as "navigable in fact" for title purposes, must be determined by the courts.

152 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

- State courts can make this determination but because it is a Federal issue, they will be subject to appeal to the Federal Courts, possibly even up to the Supreme Court of the United States.

153 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

- Because the common law definition of navigability existed in Maryland before the Constitution, it passes muster under the Federal definition for that reason.

154 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

- For the land surveyors in most states, the determination of navigability is a situation similar to the adverse possession case. The *question is a legal one*, it is not a factual question. surveyor can certainly give an opinion on the issue but this opinion may have very little influence over the final determination.

155 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

Many factors come into play:

- Existence of a right prior to the Constitution.
- Previous court decisions.
- Federal and State agency decisions.
- Natural and ordinary condition at statehood.
- Historical uses.
- Mode of transportation at the time of statehood.
- Commercial uses, etc.

156 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"The *legal question of navigability* is determined by the facts in any particular case

and not from any action on the part of the surveyor. In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court stated: 'A legal inference of navigability does not arise from the action of surveyors in running meander lines along the banks of the river. Those officers are not clothed with the power to settle the questions of navigability.'" Sec. 8-52. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO

157 ☐ **NAVIGABILITY FOR TITLE
Differentiated**

"The results of litigation in State and local courts do not ultimately determine navigability for Federal title purposes affecting public domain lands. Federal courts have the exclusive jurisdiction to make these judicial navigability determinations. However, the surveyor will generally rely on State and local court rulings because the Federal courts look to previous findings of navigability that have been based on reasonably thorough studies."

Sec. 8-53. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO

158 ☐ **NAVIGABILITY FOR TITLE
Differentiated**

"Mere claims by State agencies that certain water bodies are navigable should be questioned as to the basis of such claims. Consultation with the appropriate State level agency is recommended as many States have made navigability studies. If the State agency's basis is reasonable, the determination should be accepted."

Sec. 8-53. *2009 Manual of Surveying Instructions*, U.S. Dept. of Interior, BLM Cadastral Survey, Denver, CO.

159 ☐ **NAVIGABILITY FOR TITLE
Differentiated**

- A 2005 Oregon Attorney General Opinion summarized the factors that need to be considered for a determination of navigability for title purposes under Federal and State (Oregon) law:

160 ☐ **NAVIGABILITY FOR TITLE
Differentiated**

"In summary, a waterway in Oregon is title-navigable under federal law if it was used or was susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade and travel on water at statehood. That a waterway must have been navigable in its natural and ordinary condition means that, at the time of statehood, the river must have been susceptible of being used as a highway for commerce."

Myers, Hardy, *Attorney General Opinion*, State of Oregon, April 21, 2005.

161 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"Navigability does not depend on the particular mode of commerce or the type of vessels that is used or that could be used, or on actual use. The use of the waterway need not be without difficulty, extensive, or long and continuous; and seasonal use of the river is sufficient to establish navigability."

Myers, Hardy, *Attorney General Opinion*, State of Oregon, April 21, 2005.

162 ☐ **NAVIGABILITY FOR TITLE**

Differentiated

"Evidence of actual use, or potential use, are both acceptable. If navigability is based on use by boats, the waterway must have allowed a "customary" boat of 1859 to float in areas or reaches that are continuous enough to make navigation practicable. For log drives, the drives may be done with difficulty but the river should lend itself to more than occasional use for that purpose."

Myers, Hardy, *Attorney General Opinion*, State of Oregon, April 21, 2005.

163 ☐ **PUBLIC v. PRIVATE WATERS NAVIGABILITY**

- Many states have defined public and private waters, and the application of either the "common-law rule" or the "civil-law rule" with respect to navigability and the riparian rights over the water.

164 ☐ **ANDERSON v. BELL**

Supreme Court of Florida
433 So.2d 1202
June 9, 1983

165 ☐ **DUVAL v. THOMAS**

Supreme Court of Florida
114 So.2d 791
July 17, 1959

166 ☐ **ORR v. MORTVEDT**

Supreme Court of Iowa
735 N.W.2d 610
July 20, 2007

167 ☐ **ISLANDS**

- Occasionally, islands become part of the equation when dealing with water boundaries.

168 ☐ **ISLANDS**

"English common law held that any islands in navigable waters belonged to the crown along with the waters themselves. Likewise on non-navigable waters, any island present on one side of the river belonged to the upland owner on that side."
Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

169 ☐ **ISLANDS**

"The exact definition of an island came up in an 1820 U.S. Supreme Court Case—*Handly's Lessee v. Anthony et.al.*, 18 U.S. 374. The Court declared that 'no land can be called an island of the Ohio, unless it be surrounded by the waters of that river at low water mark.'"

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

170 ☐ **ISLANDS**

"From this and other cases we learn that an island is defined as an upland area that is surrounded by water when the water is at a stage known as the ordinary high water mark (OHWM). Substitute 'low water mark,' depending on the state law."

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

171 ☐ **ISLANDS**

"Where a sand or gravel bar forms and later becomes an island as defined by the presence of trees and additional accretions, it is said to form 'out of bed' or 'on the bed.' Sand Island in the Columbia River was such a formation. The Court [in that case] said simply: 'If the island formed by gradual deposits in midstream, it is equally well settled under the common law that the island belongs to the owner of the river bed in the place where the island arose.'"

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

172 ☐ **ISLANDS**

"If an island in navigable water has never been surveyed or patented by the United States, the date the island formed may become very important. ... If the island has formed out of the bed after the date of statehood, the island could well belong to the state or other owner of the bed. As owner of the bed on which the island formed, the bed owner would have an excellent claim."

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

173 ☐ **ISLANDS**

"However, if the island formed out of the bed before the date of statehood, the United States Government or its grantees could claim the island. Before the date of statehood, a territory may have had an interest in the beds of the territory's rivers and lakes if they were held in trust for the future state. But if the island had formed before the date of statehood, the territory had no future claim to the island because it was land and not the bed of the river."

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

174 ☐ **ISLANDS**

The Island Rule:

"Because between two states may have been defined as the middle of the main channel (the thalweg), what happens when the river suddenly—or even slowly—changes the main flow from one side of an island to another? Does the island

suddenly become part of the other state? The island rule stated by the [Supreme] Court in *Davis v. Anderson-Tully* and *Uhlhorn v. U.S. Gypsum* is as follows:"
Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.

175 **ISLANDS**

The Island Rule:

"When the flow on one side of an island slowly diminishes until the opposite channel becomes the main channel, the state boundary or island ownership is fixed at the position before the change—just as in an avulsion."

Simpson, James A., *River & Lake Boundaries*, Plat Key Publishing, Kingman, AZ, 1994.