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Where Does the Beach Begin, and to What Extent Is This a Federal Question?

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WHERE DOES THE BEACH BEGIN, AND TO WHAT EXTENT IS THIS A FEDERAL QUESTION

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In Hughes v. State, *the Washington Supreme Court decided that the boundary between upland and tideland is the vegetation line as it existed in 1889. Its decision conflicts with an earlier decision of the Court of Appeals for the Ninth Circuit which followed the United States Supreme Court's decision in* City of Los Angeles v. Borax Consol., Ltd. *The decisions conflict both on criteria for locating the boundary and on its fixed or movable character. Underlying both questions are fundamental issues about the extent to which state or federal law provides the answers. After extensive analysis of these answers, Professor Corker concludes that unless the United States Supreme Court grants certiorari in* Hughes, *the confusion which has long characterized this field will continue.*

Professor Corker analyzes both the substantive and jurisdictional issues. While sharply critical of the Washington Supreme Court's techniques of decision, he argues that state law, either directly or as incorporated in federal law, must influence the ultimate decision if just and workable boundary rules are to result. His conclusion requires modification or rejection of the Borax *decision, which he asserts even the United States Bureau of Land Management has honored by a policy of conscious forgetfulness.*

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Courtesies extended to the writer by Assistant Attorney General Harold T. Hartinger, counsel for the State of Washington, and Mr. Charles B. Welsh, counsel for Mrs. Hughes, are gratefully acknowledged. Assistant Attorney General Jay Shavelson of the State of California, former colleague of the writer, rendered invaluable help in sharing his extensive experience.

INTRODUCTION

The Supreme Court of Washington in January 1966 answered both questions in our caption in a suit brought by Mrs. Stella Hughes to quiet her title to ocean front property on Washington's Long Beach Peninsula.[1] She had sued the state, which owns the beach[2] fronting her

[1] Hughes v. State, 67 Wash. Dec. 2d 787, 410 P.2d 20 (1966) (7-2 decision). The Washington Attorney General reported to the court that at the time of trial ten adjacent property owners had commenced suits against the state. Seven of these suits by formal stipulaton and three by verbal stipulation were to be concluded by the ultimate decision in *Hughes*. Brief for Appellant, p. 11.

[2] We wanted to use "beach" in our caption because this article relates to a decision of the Washington Supreme Court concerning the boundary of what everyone can agree is a beach. We were happy to find authority for doing so. ANGELL, TIDE WATERS 67 (2d ed. 1847), tells us that "shore," "strand," and "beach" are proper to designate "that space of land which is alternately covered and left dry, by the rising and falling of the tide. In other words, it is the space which is between the high and low-water marks."

The definitional problem is sensitive. Angell tells us that the 13th Chapter of St. Matthew inappropriately describes Jesus as addressing a multitude on the shore. Because it was a lake, without tides, "it could not properly be said to have a 'shore,' according to our legal understanding of that term; it has *'ripam,'* but not *'littus.'*" Angell's closer target from "quaint times" was CALLIS, READING ON THE STATUTE OF SEWERS 54 (2d ed. 1685). Callis had inappropriately quoted St. Matthew for the definition of "shore."

property, and had secured a judgment from the trial court determining that (1) the boundary of her upland property is the line of mean high tide established by the average of all high tides over an 18.6 year tidal cycle, and (2) her property includes all the land added by gradual processes of accretion. The Court of Appeals for the Ninth Circuit had so held in 1961 in a suit brought by the United States for the benefit of the heirs of Samson Johns, a Quinault Indian to whom the United States had patented the land after statehood, by trust patent with trust restrictions to expire in 1966.[3]

The Washington Supreme Court's answers were bad news to Mrs. Hughes. Reversing the judgment of the trial court, it told her in effect: Your property line is 561 feet— more than one-tenth of a mile—inland from where it would be if you were a Quinault Indian holding under a trust patent from the United States. The answer is not affected at all by the fact that original title to your land is also a patent from the United States, or that it was issued to your predecessor prior to statehood. Your boundary is not the line established by the average of all high tides; it is the line of vegetation. Furthermore, since the state owns all accretions added to the upland since 1889 when Washington became a state, your boundary is the vegetation line as it existed seventy-seven years ago. That is the way we read the Washington Constitution, of which this court, not the Supreme Court of the United States, is the ultimate interpreter.

On October 10, 1966, after receiving a petition for certiorari from Mrs. Hughes and opposition from the Washington Attorney General, the Supreme Court, without acting on the petition for certiorari, entered this order: "The Solicitor General is invited to file a brief expressing the views of the United States."[4]

In 1961 the Court of Appeals gave quite different answers to the questions in our caption when it decided the *Samson Johns* case,[5] in

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[3] United States v. Washington, 294 F.2d 830 (9th Cir. 1961), *cert. denied,* 369 U.S. 817 (1962). This case will hereinafter be referred to in text and textual footnotes as *Samson Johns.*

[4] 87 Sup. Ct. 82 (1966).

[5] United States v. Washington, 294 F.2d 830 (9th Cir. 1961), *cert. denied,* 369 U.S. 817 (1962). The *Samson Johns* litigation was initiated by complaint filed by the United States in 1951. Three opinions are reported [hereinafter identified in footnotes by report and page number]:

(1) United States v. Gas & Oil Dev. Co., 126 F. Supp. 840 (W.D. Wash. 1954). Judge George H. Boldt dismissed the complaint on the ground that the United States had no standing to sue because its earlier fee patent to Samson Johns made ineffective the cancellation of that patent and substitution of a trust patent. By what he recognized as dictum, he upheld the state's position on the merits, but discussed only the moving boundary and not the vegetation line issue.

which the United States was treated as owner of the upland patented in trust to Samson Johns. The United States District Court had determined the boundary between federally held upland and the state's tideland by applying Washington law, and had accurately anticipated the *Hughes* decision in determining what that law might be.[6] The court of appeals reversed, holding that Washington law is irrelevant. Following *Borax Consolidated, Ltd. v. Los Angeles*,[7] in which the upland owner derived title from a patent granted by the United States after statehood, the court of appeals held that federal law dictates (1)

(2) United States v. Washington, 233 F.2d 811 (9th Cir. 1956). The Court of Appeals reversed Judge Boldt's decision in an opinion which did not reach the merits.

(3) United States v. Washington, 294 F.2d 830 (9th Cir. 1961). This opinion reversed a second decision by Judge Boldt in which no opinion was published. By stipulation the case had been submitted on the evidence in the first trial heard by a master.

[6] On second trial, the district judge's first conclusion of law was that accretion since November 11, 1889, belonged to the state; his second conclusion was that accretion prior to that date belonged to the United States. His conclusion III was:

> The dividing line between the accretions forming subsequent to November 11, 1889, which belong to defendant, State of Washington, and those which had formed prior thereto is the line of ordinary high tide to the Pacific Ocean defined as that line which the covering water impressed on the soil as of that date by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes.

The judge's fourth and final conclusion of law: "A rule of property has been established in the State of Washington in accordance with these conclusions of law." Transcript of Record in Court of Appeal, pp. 50-51, 294 F.2d 830. The judgment entered recited the quoted language from Conclusion of Law III, but did not purport to describe the boundary thus established.

By contrast, the decision of the Washington Supreme Court in *Hughes* defines by legal description the line which the district judge had described only by formula. The mystery which we shall attempt to open up, but unfortunately cannot resolve, is how the verbal formula is converted to a legal description.

[7] 296 U.S. 10 (1935). This case will hereinafter be referred to in text and textual footnotes as *Borax*.

Five opinions are reported in the *Borax* litigation [hereinafter identified in footnotes by report and page number]:

(1) City of Los Angeles v. Borax Consol. Ltd., 5 F. Supp. 281 (S.D. Cal. 1933). Suit was brought by Los Angeles to quiet title to portions of Mormon Island claimed as tideland, which defendant claimed as upland under patent from the United States incorporating a federal survey. The court dismissed the complaint on the ground that the patent incorporating the survey line as boundary was a determination of the federal land department not subject to collateral attack.

(2) City of Los Angeles v. Borax Consol. Ltd., 74 F.2d 901 (9th Cir. 1935). Reversed district court's dismissal of the complaint on ground that the survey referred to in the patent established meander lines, which are not determinative of boundary. Directed that district court should determine location of mean high tide line as defined by Coast and Geodetic Survey.

(3) Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10 (1935). Affirmed circuit court's reversal of district court and direction to establish boundary according to Coast and Geodetic Survey.

(4) City of Los Angeles v. Borax Consol. Ltd., 20 F. Supp. 69 (S.D. Cal. 1937). City held estopped, under state law, by dealings with Borax Company.

(5) City of Los Angeles v. Borax Consol. Ltd., 102 F.2d 52 (9th Cir.), *cert. denied*, 307 U.S. 644 (1939). Affirmed decree of district court on the ground of estoppel.

that the upland-tideland boundary is the line of mean high tide, as defined by the United States Coast and Geodetic Survey, not the vegetation line, and (2) that all accretions (an issue not involved in *Borax*) belong to the upland patentee or his assigns.

The two decisions represent the irresistible force colliding with the immovable object. They cannot coexist unless—in what we would regard as less than the happiest of all possible outcomes—*Samson Johns* is restated to rest on the ground that the United States was the owner rather than the source of title.

The *Hughes* case is important. It is important to the people of Washington for whom the beach is a prime public resource. It is important to all who own land on the beach, whether it is upland patented by the United States or tideland bought from the state.[8] It is important to those who own land—upland or shore land—on inland navigable waters, because the Washington court came close to overruling its decision of twenty years ago that upland boundaries on navigable inland rivers move by accretion.[9] It is important to the people in every jurisdiction in the United States because it raises the question whether the issues are to be decided under state law by state courts, or are to be decided by the Supreme Court of the United States. Finally, *Hughes* is important in Washington because the supreme court took its construction of the Washington Constitution primarily from a "rule of property" created by a series of unreported superior court decisions contrary to and in disregard of the law earlier declared by the Washington Supreme Court. There may be a lot more law yet to come from that unexplored, and relatively unexplorable, source.

As the Washington Supreme Court saw its task, the problem was simple. The property line between the upland and the beach may be found by construing the words "the line of ordinary high tide" in article XVII, section 1 of the Washington Constitution, a provision unamended since Washington became a state in 1889:[10]

> DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including *the line of ordinary high tide,* in waters where the tide ebbs and flows, and up to and including the line

[8] Owners of tide and shore lands purchased from the state are equally affected by the decision, if they are not also owners of the adjoining upland. However, in Pacific County where the *Hughes* case arose, tidelands have not been for sale since 1901, and accretion lands have never been authorized by the legislature for sale. See note 198 *infra* and accompanying text.

[9] Ghione v. State, 26 Wn. 2d 635, 175 P.2d 955 (1946).

[10] First emphasis added.

> of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

The Washington court, on its own premises, started with one large advantage. It had identified words in an identified document to construe.[11] The federal courts had neither. However, neither the Washington Constitution nor the law applied in *Borax* and *Samson Johns* was written on a clean slate. The foundations of the common legal problem are the judicial creation of the United States Supreme Court more than 100 years ago.

In 1845, the United States Supreme Court decided, in *Pollard's Lessee v. Hagan,*[12] that the states either own or may by their laws determine ownership of lands underlying navigable waters.[13] This is an attribute of sovereignty in which the original states are successors to the British Crown. Later states are entitled to equal footing.[14] A

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[11] The distinction between interpretation and construction, more often ignored than recognized, is proposed by 3 CORBIN, CONTRACTS § 534, at 9 (1961):

> By 'interpretation of language' we determine what ideas that language induces in other persons. By 'construction of the contract,' as that term will be used here, we determine its legal operation—its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties. When a court gives a construction to the contract as that is affected by events subsequent to its making and not foreseen by the parties, it is departing very far from mere interpretation of their symbols of expression, although even then it may claim somewhat erroneously to be giving effect to the 'intention' of the parties.

Hughes is an exercise in construction.

[12] 44 U.S. (3 How.) 212 (1845).

[13] Justice Horace Gray's opinion in Shively v. Bowlby, 152 U.S. 1 (1894), is an invaluable synopsis of the development of federal law and its relationship to the divergent laws of most of the states.

The English law is comprehensively treated in HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA-SHORES OF THE REALM (1830); and MOORE, A HISTORY OF THE FORESHORE (1888). Moore's work contains, *inter alia,* his editions of LORD HALE, DE JURE MARIS, and HALL, *op. cit. supra.*

Moore announces his purpose to deal with the "unfairness of the arguments put forth by Mr. Hall" and his "unquestioned bias in favor of the Crown." *Id.* at xxvii. Moore's particular villain, however, is Mr. Thomas Digges. Prior to the time of Elizabeth I, "no idea of the *prima facie* theory of the ownership of the *jus privatum* of the foreshore existed in the mind of any man." Before Digges invented the theory, the King's rights were those of the lord of a particular manor, but the corrupt judges in the reign of Charles I seized on Digges' invention, and Lord Hale boldly stated it to be the law. *Id.* at xxxi-xxxii.

Dean Everett Fraser also pays tribute to the inventiveness of Thomas Digges, "engineer, surveyor, and lawyer," in *Title to the Soil under Public Waters,* 2 MINN. L. REV. 313 (1918). This learning confirms the writer's long-held suspicion that it is dangerous to permit an engineer to familiarize himself with law.

[14] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845):

> When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so

vigorous dissenting opinion survives to remind us that this rule, which is not expressly stated in the Constitution, has less universality or necessity, perhaps, than the law of nature and nature's God to which the declarers of our independence appealed.[15] However, the rule has been affirmed and reaffirmed, on several occasions with express application to the State of Washington.[16]

The seaward boundary of the states' domain was once thought to extend at least three miles from their coastlines, also on the basis of *Pollard's Lessee v. Hagan. United States v. California* disabused us of that notion in 1947.[17] Expectations of the states were partly restored by the Submerged Lands Act of 1953.[18] However, the 1947 decision, the 1953 legislation correcting the result of the decision, and litigation

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far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it.

Coyle v. Oklahoma, 221 U.S. 559, 570 (1911), holding that Oklahoma could not be prevented by its enabling act of admission from removing its capital from Guthrie to Oklahoma City before 1913, described *Pollard's Lessee* as a "controlling case." Justices McKenna and Holmes dissented.

[15] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).

Opinion of the Court was by Justice McKinley, dissent by Justice Catron. The Court's opinion rests heavily on reasoning of Chief Justice Taney's decision in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). Justice Catron could not satisfy himself how title to lands under navigable waters passed from the United States, which necessarily held title prior to statehood, to the newly formed state.

[16] A number of cases are collected in Justice Harlan's opinion for the Court in United States v. Louisiana, 363 U.S. 1, 16 n.12 (1959). Cases from Washington include: Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56 (1921); McGilvra v. Ross, 215 U.S. 70 (1909); Baer v. Moran Bros. Co., 153 U.S. 287 (1894); Mann v. Tacoma Land Co., 153 U.S. 273 (1894).

Pollard's Lessee v. Hagan, *supra* note 15, rates roughly seven columns in Shepard's Citator, compared to nineteen columns for Marbury v. Madison, 5. U.S. (1 Cranch) 137 (1803), through the 1964 supplement. In the 1943-1964 supplement, *Pollard's Lessee v. Hagan* was in the process of overtaking *Marbury v. Madison.*

[17] 332 U.S. 19 (1947).

[18] 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1962). Constitutionality was upheld in Alabama v. Texas, 347 U.S. 272 (1954). California's boundary was established in United States v. California, 381 U.S. 139 (1965), *rehearing denied,* 382 U.S. 889 (1965).

A lawyer's argument in behalf of the state against the United States or its patentee might be made from the court's resolution of one issue in the latter case. Is the baseline from which the state's seaward boundary under the 1953 act determined from the average of all low tides or the average of the lower of two daily low tides? The court chose the latter alternative, upholding California's contention as against a contrary recommendation by a special master before the Submerged Lands Act of 1953 passed. 381 U.S. at 175-76.

Mr. Justice Harlan's opinion on this point does not bear the earmarks of a declaration of a great and universal principle, but it does decide that "line of ordinary low-water" in a 1953 federal statute refers to the lower of two daily low tides. The words "line of ordinary high tide" in the Washington Constitution are sufficiently similar to suggest that it is equally reasonable to construe them as a reference to the average of the higher of the two daily high tides.

This alternative was not argued by the State of Washington in *Hughes,* and would be less generous to the state than the vegetation line which the Washington court adopted. A reversal by the Supreme Court in *Hughes* might leave it as a possible second attempt, more generous to the state than *Borax.*

over the federal legislation all involve low water line, with which we are not here concerned. Our concern is with the upland boundary.

There are two exceptions to the *Pollard's Lessee v. Hagan* rule: (1) Prior to statehood, the United States held lands beneath navigable waters in trust for the future states. During that period Congress could create vested rights in those lands.[19] However, Congress never did so by any general law.[20] (2) A vested right created by the laws of the nation ceding territory to the United States prior to the cession is recognized in conformity with treaties and statutes of the United States as well as the law of nations.[21]

Neither exception is important to the problems considered here. Nor are we concerned with the navigational servitude by which federal powers not related to title may be exercised.[22] *Hughes* and *Samson Johns* decided the boundary between uplands owned or conveyed by the United States and lands below the line of high tide which are owned or have been conveyed by the State of Washington.[23]

The *Hughes* and *Samson Johns* cases present three issues, identified

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[19] See Shively v. Bowlby, 152 U.S. 1, 28 (1894); Goodtitle v. Kibbe, 50 U.S. (9 How.) 470 (1850); Narrows Realty Co. v. State, 52 Wn. 2d 843, 846, 329 P.2d 836, 838 (1958).

[20] See Mann v. Tacoma Land Co., 153 U.S. 273, 283 (1894); Shively v. Bowlby, 152 U.S. 1, 58 (1894).

[21] *E.g.*, Knight v. United States Land Ass'n, 142 U.S. 161 (1891); San Francisco v. LeRoy, 138 U.S. 656 (1891).

[22] Navigational servitude cases may, however, involve fixing high-water mark. See Borough of Ford City v. United States, 345 F.2d 645 (3d Cir.), *cert. denied*, 382 U.S. 902 (1965), which employed a vegetation line test to establish the limit to which the United States may raise a river level without paying compensation for impairment of a municipal sewer system. Rivers and lakes require a factual determination of navigability for the purpose both of navigational servitude and title problems, but the ocean beach below high water is all treated as if it underlay navigable waters. Baer v. Moran Bros. Co., 153 U.S. 287 (1894).

The never-never land of the servitude is explored comprehensively by Morreale, *Federal Power in Western Waters: the Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963), to reach the undeniable conclusion that the absence of constitutional restraint permits Congress to perpetrate all sorts of outrages—most of which, we think, Congress is unlikely to attempt.

[23] In *Hughes* the issue was the boundary between federally-patented upland and state-owned tideland. The conclusions should be equally applicable to the boundary between federally-owned upland and tideland conveyed into private ownership by the state. However, if ramifications of the *Clearfield* doctrine (which determined that federal common law constitutes a penumbra determining certain rights relating to government checks, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)) create a distinction between land owned by the United States and land patented by the United States, see part III *C infra*, the same reasoning or lack of reasoning might permit or require different treatment of tidelands owned and tidelands patented by the state.

The Washington court calls its decision the "reaffirmance of a rule of property established by many prior superior court decisions ... and of the rule relied upon over the years in a myriad of land transactions *between individuals* and between the state and individuals." Hughes v. State, 67 Wash. Dec. 2d 787, 801, 410 P.2d 20, 28 (1966). (Emphasis added.)

here by the tag lines which label the three principal parts of this article:

(1) The vegetation line issue. Where is the boundary between upland and tideland? The Washington Supreme Court says that the boundary is "the line of ordinary high tide," "the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation."[24] In contrast, the court of appeals determined that the boundary is the line of mean high tide established by "the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years," and is located "where that unchanging elevation meets the shore."[25]

Wherever these two lines differ, as frequently they will, the Washington court's vegetation line will always, we think, be found inland from the line established by the average of the high tides. The difference may be substantial. In the *Hughes* case, the two lines, both established as of the present time, were separated by a horizontal distance of 386 feet.[26]

(2) The accretion issue. When is the boundary established? The Washington Supreme Court decided that "the line of ordinary high tide" is a fixed line, determined as of November 11, 1889, when Washington became a state. The court of appeals decided that the boundary is a line "as it exists at any particular time" except when movement has been caused by sudden avulsions.[27]

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[24] See 67 Wash. Dec. 2d at 799, 410 P.2d at 26.

[25] 294 F.2d at 834.

[26] Reasons for the difference between the two lines are discussed at text accompanying notes 39-41 *infra.* Our assertion that the vegetation line will always be inland, in the event of any divergence, is based on our own assumptions (a) that the vegetation referred to is of a type peculiar to the land, and (b) that inundation by sea water prevents the growth of such vegetation, even if inundation is less frequent than every day. Expert testimony to the contrary may be found in the *Borax* record contradicting the second assumption, but we nevertheless believe it a sound hypothesis. See note 89 *infra.*

[27] No question of avulsions was involved in *Hughes* or *Samson Johns.* In *Samson Johns* the Court of Appeals distinguished Barney v. City of Keokuk, 94 U.S. 324, 337 (1877), quoting the opinion to the effect that while it is "generally conceded" that riparian title attaches to gradual and imperceptible accretion by natural causes, title to "sudden accretions" is a question each state decides for itself. 294 F.2d at 832. "Sudden accretions," by the usual usage, is a contradiction in terms.

Terminology varies. We use "accretion" to describe the process by which land is gradually built up, and "erosion" to describe its opposite. "Reliction" is reserved for those instances where the water gradually recedes, exposing the land, a phenomonon that will probably occur on the ocean only when water is added to the polar ice caps or is exported to outer space. "Alluvion" is the soil deposited in the process of building up the land.

It has been suggested that "accretion" is not used by courts to describe movement of boundaries of land under water. 4 TIFFANY, REAL PROPERTY § 1221 (3d ed. 1939). This is not quite so. See Washington v. Oregon, 211 U.S. 127, 135 (1908).

"Tidelands" are lands alternately covered and uncovered by tides; "shore lands"

A fixed line, however such a line is defined and established, may be inland or it may be seaward of a moving line, depending on whether movement has been by accretion or by erosion.[28] In both the *Hughes* and *Samson Johns* cases, the movement had in fact been by accretion. In *Hughes,* the present vegetation line is 175 feet seaward of the 1889 vegetation line. The 1889 mean high tide line, as such a line was defined by the court of appeals, was not located in the *Hughes* case.[29]

(3) The source of law issue. To determine the boundary, the Washington Supreme Court simply construed the Washington Constitution. The court of appeals based its decision, following *Borax,* on federal common law.[30] The constitutional basis of the federal common law is the property clause;[31] the statutory basis is the plethora of federal statutes dealing with federal lands.

In fact, there are three source of law questions presented by these cases. The vegetation line and accretion issues raise separable problems. The third is whether *Samson Johns* can be severed from its roots in *Borax* and thereafter survive as a rule applicable only to property which the United States owns, as distinguished from property which the United States has patented.[32]

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are lands alternately covered and uncovered by water of rivers and lakes. "Upland" or "fast land" is all of the rest of the land not under water.

A fussy point at which confusion may arise: Both tide and shore lands have two boundaries, upland and on the water side. Movement by the physical phenomenon of accretion might conceivably cause one, neither, or both legal boundaries to move.

[28] The dissenting judges read the *Hughes* majority opinion as declaring that the boundary of the upland is fixed both against additions by accretion and subtractions by erosion. 67 Wash. Dec. 2d at 808, 410 P.2d at 32. See note 135 *infra.*

[29] Because the accretion and the vegetation line issues are separable, four separate boundary lines are possible, depending on the four possible combinations of answers to the two separate questions. Three of the four possible lines are located on the sketch incorporated in the court's opinion reproduced in part I *A, infra.* However, reversal of the decision by the United States Supreme Court on the vegetation line issue would not necessarily mean that the Washington Court would adhere to its decision on the accretion issue. The *Hughes* decision rests significantly on administrative construction and seventy-three superior court decisions which established *the* line adopted by the Supreme Court. A new line would find less support from these sources, even as to the accretion issue, than the line successfully urged by the Attorney General as the boundary established by these decisions and the Commissioner of Public Lands. *Cf.* The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied,* 323 U.S. 720 (1944), holding that a fact established in one suit is not conclusively established as a "mediate datum" in a second suit between the same parties.

[30] A separate concurrence in *Samson Johns* by Judge Richard H. Chambers records his belief that the line of title "ought to be decided by state law," but he felt that the "road sign" in *Borax* pointed the other way. 294 F.2d at 834.

[31] U.S. CONST. art IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory 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 of any particular State.

[32] The Washington Supreme Court in *Hughes* attempted such a distinction, 67 Wash. Dec. 2d at 803, 410 P.2d at 29.

I. The Vegetation Line Issue

The vegetation line, selected in *Hughes,* and the line of mean high tide, selected in *Borax* and *Samson Johns,* by no means exhaust the possibilities for determining the upland-tideland boundary. As a practical matter, however, the *Hughes* definition is likely to settle the matter in Washington unless the United States Supreme Court, on the basis of *Borax,* rejects *Hughes.* In Part III we shall inquire which court should have the ultimate choice. Here, we propose to identify as precisely as possible what each court decided, and to compare the two rules, assuming that each court properly exercised its jurisdiction.

A. The Hughes Decision

An initial problem with the Washington court's *Hughes* decision is to identify what the court decided with respect to the vegetation line issue. The opinion is murky because sometimes the court uses the terms "mean high tide" and "ordinary high tide" as equivalents, sometimes in contrast, and sometimes with unascertainable meanings.

The Washington court said that *Borax* is not "apposite" for the following reason:[33]

> *Borax* . . . establishes the rule that *mean high tide* (the average height of all high waters through a complete tidal cycle) is the criterion for "ordinary high water." The case does not involve the question of accretion.

Although this distinguishes *Borax* on the issue *Borax* does not directly involve, it ignores *Borax* on the issue which *Borax* purports to decide—the vegetation line issue.

Reading only the opinion of the Washington court, and neither the *Borax* opinion nor the *Hughes* dissent, one might suppose that the Washington court had followed *Borax.* The *Hughes* opinion concludes by stating its holding in terms of "mean high tide":[34]

> In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The property line is the line of ordinary high tide, which we equate to *mean high tide* on that date.

The impression that the Washington court intended to define "mean high tide" precisely as *Borax* had defined the term, except for the matter of dates (1889 or the present), is fortified by other passages in the opinion. The opinion in *Hughes* quotes this passage from the

[33] 67 Wash. Dec. 2d at 802, 410 P.2d at 29. (Second emphasis added.)
[34] *Id.* at 803, 410 P.2d at 29. (Emphasis added.)

same United States Coast and Geodetic Survey publication which the *Borax* court employed in an earlier edition:[35]

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of high waters at that place over a period of 19 years. [Bracketed word supplied by the court.]

Immediately following this quotation from the Coast and Geodetic Survey, the court in *Hughes* identified the trial court's error:[36]

> In its finding of fact, the trial court stated: "mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore *as it exists at any particular time.*"

Since the italics were added by the supreme court, it might appear that only the italicized portion is designated as erroneous.

These passages, particularly when coupled with the court's holding quoted above, seem to indicate that the Coast and Geodetic Survey, the trial court, the United States Supreme Court, and the Washington Supreme Court are all of one mind about the definition of "mean high tide" and its application in determining the boundary between upland and tideland (except as to the matter of date). However, two further passages appear[37]—the first of which immediately follows the quotation of the trial court's finding—which seem to say: (a) that "mean high tide" and "ordinary high tide" are quite different; and (b) that the Washington court chooses the latter over the former.

> Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at a point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide."[38] The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "*ordinary*

[35] 67 Wash. Dec. 2d at 797, 410 P.2d at 26. The court's quotation is from MARMER, DEP'T COMMERCE, COAST & GEODETIC SURVEY, SPECIAL PUB. No. 135, p. 86 (rev. ed 1951). Both the first edition (1927) and the second edition of this work are by H. A. Marmer, Assistant Chief, Division of Tides and Currents, U.S. Coast and Geodetic Survey. The first edition provided the concepts employed by the court in *Borax*, 296 U.S. at 26-27.

[36] 67 Wash. Dec. 2d at 797, 410 P.2d at 26. (Emphasis by the court.)

[37] *Ibid.* (Emphasis by the court.)

[38] Compare the Attorney General's brief, quoted at text accompanying note 40 *infra*, which ascribes the 130-foot difference to waves, ocean swells, and seiches. (Footnote ours.)

high tide" in 1889, as defined by the state, and "*mean* high tide," as *presently* determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet....

* * * *

"Mean high tide" is measurable and determinable.

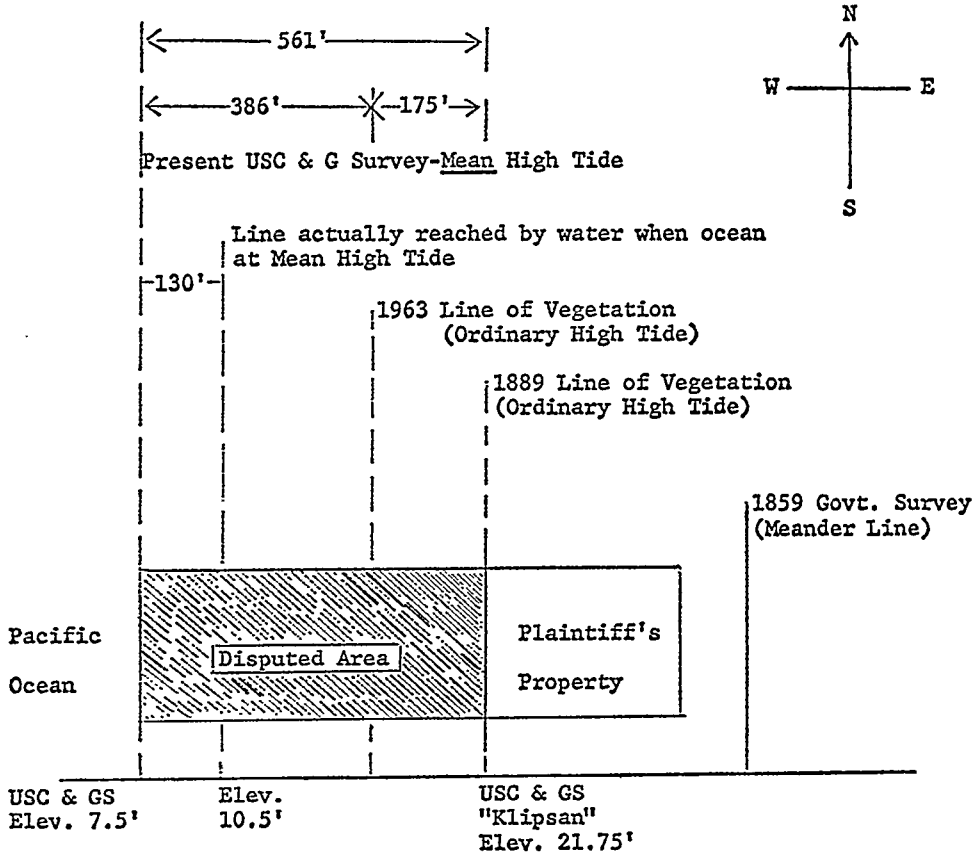
On the other hand, the "line of ordinary high tide" as used in article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word "ordinary" to be used in its everyday context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

The court concluded that the boundary is the vegetation line, that "line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation."[39] The relationship of this line to the lines of ordinary and mean high tide can be discovered only by resort to the sketch (reproduced on the following page) which the court helpfully provides, and the explanation found in the statement of facts in the Attorney General's brief.

A total of 561 feet separates the line which Mrs. Hughes sought to establish and the line accepted by the court. The sketch identifies the former as "Present USC & G Survey-*Mean* High Tide" and the latter as "1889 Line of Vegetation (Ordinary High Tide)." A horizontal distance of 130 feet and three feet in elevation (10.5 minus 7.5) are shown separating the most seaward of these lines from one labelled "Line actually reached by water when ocean at Mean High Tide." A horizontal distance totaling 386 feet separates the most seaward line from one labelled "1963 Line of Vegetation (Ordinary High Tide)."

The 386 feet is the distance that separates a boundary established by the *Borax* rule, adopted from the Coast and Geodetic Survey, and a boundary that might be established by the Washington court's vegetation line rule, were there no accretion issue in the case. Regrettably, the court leaves us with a wholly inadequate explanation of what accounts for this difference of 386 feet.

[39]See 66 Wash. Dec. 2d at 799, 410 P.2d at 26, quoting from Harkins v. Del Pozzi, 50 Wn. 2d 237, 240, 310 P.2d 532, 534 (1957).



The difference apparently consists of two components: (1) 130 feet is the difference between mean high tide, as defined in *Borax,* and the line actually reached by the water when the sea is at the mean high tide elevation. In other words, it is the difference between a line established at high tide by the plane surface of a waveless ocean, which does not exist in nature, and the line established by the waves which wash the shore at that elevation, where Mrs. Hughes' real estate is located. (2) The balance of 256 feet may be accounted for by a vegetation line determined by waves from tides which are higher than the 18.6 year average. This is not necessarily the average of the higher of the two daily high tides, but is fixed by the biological wisdom of plants which have not deposed to specify the precise frequency or intensity of sea water irrigation which makes the habitat unsatisfactory.

The writer has observed what is locally described as the "grass line" at the location of the Hughes property. It can be more appropriately

depicted on a large scale map by heavy crayon or water color brush than by the fine line of a pen. A single plant can be uprooted by hand. Whether one can be planted and nurtured at a lower elevation, the writer does not know. These questions are irrelevant, however, unless the court's decision on the accretion issue should be reversed or overruled, because the 1889 line of vegetation is not observable, and that is the line which turned out to have legal significance.

The Attorney General's statement of facts in his opening brief to the Washington Supreme Court accounts for the 386-foot separation somewhat differently and more clearly than does the court:[40]

> The *Del Pozzi*[41] "line of vegetation" rule gives the public 386 feet more tidelands than it could claim under the "mean high tide" rule. Three considerations explain this difference.
>
> First, when the U.S. Coast and Geodetic Survey makes its measurements of the tides, it eliminates irregularities in the sea level caused by larger waves, ocean swells, and seiches. In front of Mrs. Hughes' property, these phenomena add three feet of elevation to the sea level at all times. As a result, when the ocean is at the level of mean high water, the waters actually reach land at an elevation three feet higher and 130 feet further inland, than the *line* of mean high tide itself.
>
> Secondly, the line established on the ground under the *Del Pozzi* rule is undoubtedly established by the daily higher high tides, whereas the line of mean high tide is the averaging of the daily *higher* high tides with the daily *lower* high tides. Mean high tide is therefore a calculated elevation which is exceeded, on the average, of once every day even if large waves, oean swells, and seiches are ignored.
>
> Finally, the line of mean high tide, being calculated over the 19 year period, by definition ignores those changes in sea level which are of lesser duration. It likewise ignores the action of the water upon the ground. Where the beach is as at and open as in the areas we are now concerned with, it is only reasonable to expect the incoming tides to run up the land beyond the actual elevation of the sea itself.

The *Hughes* opinion leaves two major problems: (1) Why was the

[40] Opening Brief for Appellant, Statement of Facts, pp. 25-27, Hughes v. State, 67 Wash. Dec. 2d 787, 410 P.2d 20 (1966). (Emphasis in original.) Footnotes, which are citations to the record, are omitted.

The Attorney General, in his second assignment of error, *id.* at 28, precisely isolated the vegetation line issue: "The trial court erred in holding that the 386 feet of beach between the present line of mean high tide and the present line of vegetation is not a part of the public shore and beach reserved forever for the use of the people by chapters 105 and 110, Laws of 1901." By footnote he added this definition: "By 'line of vegetation' we mean the line of ordinary high tide as defined by this court in Harkins v. Del Pozzi, 50 Wn. 2d 237, 240, 310 P.2d 532 (1957)." See note 198 *infra* and accompanying text for further discussion of the Laws of 1901.

[41] Reference is to Harkins v. Del Pozzi, 50 Wn. 2d 237, 240, 310 P.2d 532, 534 (1957), and the language quoted at text accompanying note 45 *infra*. (Footnote ours.)

vegetation line selected as the boundary? (2) How did the court decide that the legal description quoted in the opinion[42] conforms to the line of vegetation in 1889?

The court made a substantial attempt to justify its vegetation line formula in terms of judicial precedent. The result of its effort is not impressive. The major reported judicial precedent cited for a vegetation line boundary is *Harkins v. Del Pozzi*,[43] a casual consideration of the issue at best.

In *Del Pozzi*, a superior court, whose decision was reversed on other grounds, had made a finding of fact that "the line of ordinary high water, salt water, or line of mean high tide as the same ebbed and flowed" in a particular location was impossible to determine from the time of statehood until 1910, but from 1910 until 1956, the "mean high tide line" had been located along the westerly boundary of a sandspit, "as more particularly shown in Defendant's Exhibit 35."[44]

The *Del Pozzi* court's quotation of the entire finding was followed by this paragraph:[45]

> No error is assigned to this finding, and hence, for the purpose of this action, the line of ordinary high tide is as established by exhibit No. 35. [Citation omitted.] The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951).

If the first quoted sentence is taken at face value—and there is no reason not to do so—the second sentence is unnecessary to the decision and hence dictum. A more serious deficiency is pointed out by Judge Hill's dissenting opinion in *Hughes*.[46] *Driesbach v. Lynch* is an Idaho case involving Lake Pend Oreille. It had little to do with tides.

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[42] The court quoted the legal description from the answer and cross complaint of the state, 67 Wash. Dec. 2d at 789, 410 P.2d at 21:

> Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104,683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1°14'05" 3412.79 feet to a point whose Y coordinate is *432,727.18* and whose X coordinate is 1,104,610.10, referred to said coordinate system.

By apparent error, the Pacific Reporter reproduces the number which we have italicized as 432.727.18, providing an illustration why every law library should maintain, if at all possible, both official and unofficial state reports.

The Washington Coordinate System is established by WASH. REV. CODE ch. 58.20 (1958). It constitutes a system of legal description, and of course has no bearing on how the described line was in fact determined.

[43] 50 Wn. 2d 237, 310 P.2d 532 (1957).

[44] *Id.* at 240, 310 P.2d at 534.

[45] *Ibid.*

[46] 67 Wash. Dec. 2d at 806, 410 P.2d at 31.

Whatever the court meant in 1957 when it decided *Del Pozzi*, it took it back in 1958 when it copied into a footnote a definition from *Words and Phrases* of "ordinary high tide": "the usual or ordinary high-water mark, the limit reached by the "neap tides," those tides which happen between the full and change of the moon twice in every 24 hours . . . ."[47] Although the court in *Hughes* accurately labels its 1958 definition as dictum, it gives no reason for preferring a 1957 dictum to one in 1958. Neap tides are contrasted with spring tides, and because the neaps are lower, a neap tide average would be less generous to the state's tideland claim than an average of all tides.[48]

Words and Phrases, in contributing the 1958 neap tide definition, cited a California decision[49] which applies a dictum delivered in *Teschemacher v. Thompson*[50] by Stephen J. Field while Chief Justice of the California court. Although Justice Field reaffirmed the neap tide rule in an opinion he wrote for the Supreme Court of the United States,[51] the rule was rejected in *Borax*.[52] The neap tide rule, although ambiguously stated by Field[53] and uncertain in application, is more

[47] Narrows Realty Co. v. State, 52 Wn. 2d 843, 844 n.3, 329 P.2d 836, 837 n.2 (1958), citing 30 WORDS & PHRASES 253 (perm. ed. 1940).

[48] MARMER (1927 ed.), *op. cit. supra* note 35, at 3, in his first edition explains "neap tides":

> At times of new moon and full moon the tidal forces of moon and sun are acting in the same direction. High water then rises higher and low water falls lower than usual, so that the range of the tide at such times is greater than the average. The tides at such times are called "spring tides," and the range of the tide is then known as the "spring range."
>
> When the moon is in its first and third quarters, the tidal forces of sun and moon are opposed and the tide does not rise as high nor fall as low as on the average. At such times the tides are called "neap tides," and the range of the tide then is known as the "neap range."
>
> It is to be noted, however, that at most places there is a lag of a day or two between the occurrence of spring or neap tides and the corresponding phases of the moon—that is, spring tides do not occur on the days of full and new moon, but a day or two later; likewise, neap tides follow the moon's first and third quarters after an interval of a day or two. This lag in the response of the tide is known as the "age of phase inequality" or "phase age" and is generally ascribed to the effects of friction.

See also MARMER (rev. ed. 1951), *op. cit. supra* at 5.

[49] F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62 (1915). This case was cited in *Borax*, 296 U.S. at 26 n.5, among the list of California cases which the Supreme Court found "unnecessary to review." The most recent expression of a California appellate court reaffirms the neap tide rule, and does so by express reference to the California cases collected in note 5 of the *Borax* opinion. People v. William Kent Estate Co., 51 Cal. Rep. 215, 219 (Dist. Ct. App. 1966).

[50] 18 Cal. 11, 21-22, 79 Am. Dec. 151, 154 (1861). The dictum is quoted in note 75 *infra*.

[51] San Francisco v. Le Roy, 138 U.S. 656, 671-72 (1891). See text accompanying note 124 *infra*.

[52] 296 U.S. at 26.

[53] Field stated, see text accompanying note 124 *infra*, that the boundary was the neap tide line *and* the line of vegetation, a physical impossibility in some, if not all, cases. The neap tide line, by definition, is always below the line established by the average of all high tides; in *Hughes*, the vegetation line is 386 feet above the average of all high tides.

generous to the upland owner than the *Borax* rule for which Mrs. Hughes contended.[54]

Another more venerable, but even less convincing, authority than *Del Pozzi* is cited by the court in support of its vegetation line conclusion: "In Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151 (1901), this court had already considered the line of vegetation and the line of mean high tide to be the same."[55] This characterization of *Gosser* is not wholly accurate. In *Gosser,* the court refers to several boundary lines shown on a plat reproduced in the opinion. Two such lines are described as "the mean high-tide line and the line of vegetation." However, in speaking of another, the court says, "The line 6-7 in the plat is practically along the line of vegetation, and is the mean high-tide line."[56] "Practically" is a troublesome word because it indicates that there is a difference, although slight. In any event, it appears that the boundary between upland and tideland was not in controversy in *Gosser.*[57]

An even earlier Washington decision, *Baer v. Moran Bros. Co.*,[58] was not cited in *Hughes.* That decision gave apparent approval to the neap tide rule, characterizing "lands over which the high monthly tides flowed, but not the ordinary daily tides" as upland.[59] Borrowing ambiguity from Justice Field, however, the same opinion also seems to support a vegetation line rule.[60]

From this discussion, it is clear that there was no clear and controlling precedent available to the court in *Hughes.* The reported cases provide little support for the *Hughes* result. Despite its citation of authority, the court seems to have relied primarily on the boundary established in seventy-three unreported suits, affecting 322 private ownerships, instituted against the state to establish what the court in *Hughes* describes as "this boundary."[61] In each instance, the state prevailed; in none was an appeal taken. Concerning their determina-

[54] 30 WORDS & PHRASES (Supp. 1966, at 100) now has two inconsistent definitions, from Washington cases, of "ordinary high tide": *Hughes,* and the 1958 dictum from Narrows Realty Co. v. State, 52 Wn. 2d 843, 844 n.3, 329 P.2d 836, 837 n.2 (1958), which *Hughes* disowned. No definitions from *Borax* or *Samson Johns* are included in this section of *Words & Phrases.*

[55] 67 Wash. Dec. 2d at 799, 410 P.2d at 27.

[56] Shelton Logging Co. v. Gosser, 26 Wash. 126, 129, 66 Pac. 151, 152 (1901).

[57] See *id.* at 131, 66 Pac. at 153.

[58] 2 Wash. 608, 27 Pac. 470 (1891), *aff'd,* 153 U.S. 287 (1894).

[59] *Id.* at 614-15, 27 Pac. at 472.

[60] *Ibid.* The court, in discussing San Francisco Sav. Union v. Irwin, 28 Fed. 709 (C.C.D. Cal. 1886) (opinion by Justice Field), *aff'd per curiam,* 136 U.S. 578 (1890), seems to agree with Justice Field that vegetation can grow on soil submerged only by the higher spring tides.

[61] 67 Wash. Dec. 2d at 802, 410 P.2d at 26.

tions of the vegetation line issue, the Washington Supreme Court tells us:[62]

> Following the decision of this court in *Harkins v. Del Pozzi,* [citation omitted] the superior court judgments entered thereafter further described the 1889 line as the "line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established.

Superior court judgments, unreported and unappealed, are not usually given great weight as judicial precedents. The *Hughes* court's use of them may be explained by the court's indication that the judgments merely started to use a new explanation, beginning in 1957, to describe the determination of "the line which had already been surveyed and established." The weakness and confusion of the reported precedents, however, lead one to wonder what the *Hughes* court thought had been the basis for establishing the line.

It is apparent that the boundary fixed in *Hughes* had been surveyed and established, because the court gives its precise legal description.[63] Regrettably, however, the court tells us nothing about the survey, when, and more particularly how, it was made, under what statutory authority, or what were and whence came the instructions to the surveyors who made it.[64] We are informed that it was made in 1949—before the *Del Pozzi* decision—under the direction of the Commissioner of Public Lands.

The most authoritative explanation of the practice of the Commissioner of Public Lands we have discovered is contained in the printed record of the *Samson Johns* case.[65] Frank O. Sether, an Assistant Commissioner of Public Lands, testified for the State of Washington in 1954, three years before the *Del Pozzi* decision. His testimony is both more pertinent and more informative than the Idaho Supreme Court's consideration of the non-tidal waters of Lake Pend Oreille.

Mr. Sether testified that he was not an engineer. He had served in various capacities in the Washington Department of Lands for three

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[62] *Id.* at 799, 410 P.2d at 27.

[63] See note 42 *supra.*

[64] See text accompanying note 220 *infra,* where the statement of the executive officer of the State Lands Commission of California is quoted. He explains why he cannot, from information available, determine where a mean or neap high tide line used to be for purposes of complying with a court's direction to fix "an average, mean, or ordinary line of the shore."

[65] Transcript of Record in Court of Appeal, pp. 99-116, 294 F.2d 830.

months short of thirty-four years. He had worked on all court cases affecting his office, and on all legislative matters. He had received training in the interpretation and application of the laws of the State of Washington from his predecessor, a Mrs. M. H. Tamblyn, Secretary of the Board of State Land Commissioners, and from a Mr. Doane, chief engineer. Mrs. Tamblyn had remained with the Board until her resignation nine months after Mr. Sether was first employed. She had worked in the office since 1898.

Mr. Sether described the practice of the Commissioner in this passage from the *Sampson Johns* Transcript of Record on appeal to the Court of Appeals:[66]

> Q. You are familiar too, I presume, with the fact that some of these so-called accretions have been built up since this State became a member of the Union, is that correct?
>
> A. Yes. We take the position that the accretions that have been built up since the—since November 11th, 1889 belong to the State of Washington. [402]
>
> Q. And that was the date the State was admitted to the Union.
>
> A. Admitted to the Union. [403]
>
> Q. And what has been the historical interpretation of the meaning of "ordinary high tide line" or of "high tide line", you'd say?
>
> A. Well, we—
>
> Mr. Heidlebaugh: If Your Honor—
>
> A. —we consider the high tide line in disposal of tidelands as being approximately the line where vegetation ceases. [412]
>
> Q. Has that been the interpretation of what is meant by the "line of ordinary high tide" as applied by the office—
>
> A. Yes.
>
> Q. —down through the years?
>
> A. That's right.
>
> Q. As being the line where vegetation ceases to grow, is that correct?
>
> A. That's correct.
>
> Q. Now, that line as situated in 1889, when we became a State, is the historical application of the Constitution and these laws as it applied to this area of land, is that correct?

[66] *Id.* at 103-04, 114-16. The bracketed word "omission" indicates our own omission from that printed record. Bracketed page references to the transcript are retained from the original.

A. That's right. [413]

[Omission.]

Q. Now, Mr. Sether, one more question. Has it always in the history of the department of Public Lands of the State of Washington—has it always been determined that the line of ordinary high tide is the line where vegetation ceases to grow?

A. That's our— [462]

Mr. Heidlebaugh: Well, I'll object to that line of testimony

A. —office interpretation

The Master: Just a minute with your answer

Mr Heidlebaugh: There's been no showing there's been any necessity to make such a determination Your Honor.

The Master: I believe he can testify as to the practice of his office, in the administration of these affairs.

A. (Continuing) We are—

The Master: I want to preserve his objection, too, in the record. Let the witness testify there about the practice of the department is and was [*sic*].

A. (Continuing): We are selling tidelands at all times, and we have to fix prices on them, and we send people out to examine them, and we consider that the line where vegetation ceases is the approximate location of the line of ordinary high tide and in fixing prices, we fix prices on lands from that point out to the line of extreme low tide. So, that in every instance there is a determination as to where that line of ordinary high tide is.

Q. What was your answer relative to the historical [463] application of the words "line of ordinary high tide" as meaning?

A. Approximately the line of where vegetation ceases to grow.

Q. What do you mean by "approximately"?

A. Well, it's—we—it's pretty well marked there. It might vary a few feet one way or the other, but it's—

Q. What line might vary?

A. The line where vegetation ceases to grow.

Q. Well, is it true or is it not true that the two terms mean the same historically?

A. Yes. They do, yes. [464]

So far as appears from the printed record, Mr. Sether was neither cross-examined nor contradicted. His testimony with respect to the practice of surveying a beach was generally substantiated by two witnesses who had earlier testified.[67] However, the critical question—how does the State of Washington determine where the vegetation line was located in 1889?—was not asked.

Hughes decided that the boundary is the line of vegetation as of 1889. Why this line was chosen remains unclear. How it is to be determined is even less clear. Although the court quoted the precise legal description of the boundary line in front of Mrs. Hughes' property, it leaves us with no idea how to find similar boundaries in the rest of the state. By contrast, the *Borax* opinion not only defined the boundary line, but also leads us to the Coast and Geodetic Survey publications, which provide a method for locating the line upon the ground applicable to all tidelands.

B. The Borax Decision

Borax arose when the City of Los Angeles, grantee of tidelands by acts of the California legislature, sued the Borax Company in a state court to quiet the city's title to tideland adjacent to Mormon Island, a valuable and litigation-prone bit of real estate in Los Angeles harbor.[68] Borax Company, which deraigned title to the island under a federal patent issued in 1881, removed to the United States District Court.[69] The district court dismissed the complaint after the city's evidence showed that the land claimed by the city lay above the federal survey line referred to in Borax Company's patent. The court held that the federal survey was a determination of what constituted the public

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[67] Charles Pierce, Captain and Supervisor of the Northwest District, United States Coast and Geodetic Survey, testified that the storm water line and the line of vegetation were identical and marked the margin of the beach condition. Transcript of Record in Court of Appeal, pp. 95-96, 294 F.2d 830. Thomas A. Tillman, cadastral engineer for the Bureau of Land Management, testified that the line of vegetation was used in locating the meander line of the beach. *Id.* at 85-87.

[68] Chronology of the *Borax* litigation is set out in note 7 *supra*.

In Dominguez de Guyer v. Banning, 167 U.S. 723, 724 (1897), Justice Harlan described Mormon Island as less than one acre "at mean high tide" and "about 18.88 acres" at mean low tide. The survey of 1880, by W.H. Norway, contract surveyor for the General Land Office, showed an average of 18.88 acres surveyed, an illustration of the wisdom of the rule that meanders are not established as boundaries. The survey in *Borax* is discussed, 74 F.2d at 902.

[69] Grounds stated by Borax Company for removal were diversity of citizenship and a controversy under laws of the United States, identifying the act of California's admission, 9 Stat. 452 (1850), and the federal laws under which Mormon Island was surveyed and patented. Record in United States Supreme Court, pp. 14, 22-23, 27, 296 U.S. at 10.

lands by the land department of the United States, and not subject to collateral attack.[70]

On appeal to the Ninth Circuit Court of Appeals,[71] this decision was reversed on the ground that a meander survey, according to a long line of United States Supreme Court cases, does not purport to establish boundary.[72] Judge Curtis Wilbur's opinion declared that the boundary was "the shore line of Mormon Island and not the traverse lines of the patent" which incorporated the survey.[73]

Although no attempt was made to locate the shore line, an attempt was made to define it. Judge Wilbur, who wrote the opinion and was a former member of the California Supreme Court, quoted[74] the dictum from Justice Field's opinion for the California Court in *Teschemacher v. Thompson*[75] which had originated a neap tide rule in California.

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[70] 5 F. Supp. at 282.

[71] 74 F.2d 901 (9th Cir. 1935).

[72] Cases are collected in the opinion, 74 F.2d at 902. Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1869), is perhaps the leading case.

Meander lines can be made boundaries if state law makes them so and they are seaward of the high tide line that would otherwise be the boundary. In Washington, a meander line is a boundary if seaward of the line of ordinary high tide, and title extending to the meander line was initiated prior to statehood. Narrows Realty Co. v. State, 52 Wn. 2d 843, 329 P.2d 836 (1958). The decision results from an early construction of article XVII, § 2 of the Washington Constitution validating federal patents to tideland prior to statehood. Illogical, the rule treats as patented that which the United States law determines was not covered by patent, but it is a federally permissible illogic and well settled. See Washington cases collected in Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56, 63 n.1 (1921).

Meander lines may also have evidentiary significance:

> While government meander line surveys may be considered as evidence of the actual high water lines, as they existed at that time, they are not conclusive as to the actual waterline as it existed then or later.

Mood v. Banchero, 67 Wash. Dec. 2d 822, 826, 410 P.2d 776, 779 (1966) (opinion by Langenbach, J. pro tem., who did not participate in the *Hughes* decision rendered the same day).

[73] 74 F.2d at 902.

[74] *Id.* at 905.

[75] The dictum from Teschemacher v. Thompson, 18 Cal. 11, 21-22, 79 Am. Dec. 151, 154 (1861), is as follows. Only the portion shown in italics was quoted by Judge Wilbur, 74 F.2d at 905.

> We are satisfied that the verdict is not justified by the evidence. No instructions were given as to the meaning of the language, "usual high water mark," and the jury evidently fixed it at the limit which the monthly Spring tides reach—tides which occur only at the full and change of the moon. The term "usual," employed by the Court, is ambiguous. *The limit of the monthly Spring tides is, in one sense, the usual high water mark; for, as often as those tides occur, to that limit the flow extends. But it is not the limit to which we refer when we speak of "usual" or "ordinary" highwater mark. By that designation we mean the limit reached by the neap tides; that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours.* Yet the jury, from want of proper instruction, must have taken a different view, and considered the language as referring to the limit which the monthly Spring tides attained, or else have acted, in rendering their verdict, in mere caprice, as there was no evidence before them, so far as the record discloses, that the neap tides ever covered the land in controversy. (Lord Hale's Treatise De Jure Maris, 26; *Lowe v. Govett*, 3 Barn. & Adol. 862; Angell on Tide Waters, Ch. 3; Hall on Rights to the Sea.)

The Borax Company contended that if the survey line was rejected, the neap tide rule should be adopted to define the shore line. The court, however, rejected the neap tide rule on the ground that it was not supported by *Hall on Rights to the Sea,* which Field had cited, and that it would not provide a definite or fixed boundary.[76]

Instead the court said that the line "is the boundary between tillable land or land available for agricultural purposes and land so frequently covered by the sea that it is useless for agricultural purposes."[77] Although this would seem to describe a vegetation line, the court decided that the line should be determined by the average of all high tides measured over the 18.6 year cycle, as described in the Coast and Geodetic Survey's *Publication No. 135.*[78]

The following passage makes it abundantly clear that the court did not mean that the line should be determined by the actual line of vegetation:[79]

> The appellant [city] ... contends for the rule that the boundary line between the tidelands and upland is determined "by definite mark upon the ground which has been left by the tide." This rule as to definite mark is applicable to the highwater line of streams but not to a boundary line of tidewaters.[80]

As support for the decision, but without citation of authority, and we believe contrary to fact,[81] Judge Wilbur wrote: "This mean high tide line is the one usually referred to by the United States government in its patents and in the work of its various departments delimiting the boundary between the upland and the tideland."[82]

From Judge Wilbur's opinion, it is not clear whether the definition

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[76] 74 F.2d at 905.

[77] *Ibid.*

[78] *Id.* at 906. Publication No. 135 is cited at note 35 *supra.* As demonstrated in *Hughes,* there may be considerable divergence between the mean high tide line, as determined by the Coast and Geodetic Survey, and the vegetation line, as determined by the presence of plant life. See sketch in part I *A supra.*

[79] 74 F.2d at 904.

[80] The opinion cites no authority for the statement as to streams. Two provisions of California statutes provide little basis for the statement:

CAL. CIV. CODE § 670: "The state is the owner of all land below tidewater, and below ordinary high-water mark, bordering upon tidewater within the State; of all land below the water of a navigable lake or stream...."

CAL. CIV. CODE § 830: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

[81] For quotations from Bureau of Land Management instructions, see text accompanying note 124 *infra;* note 128 *infra.*

[82] 74 F.2d at 906.

of shore line was intended to be read as a pronouncement of federal law or as a restatement and clarification of California law by a former member of California's highest court.[83] When the United States Supreme Court affirmed the Ninth Circuit court's opinion, it affirmed Wilbur's definition of shore line as a pronouncement of federal law.[84]

The Supreme court granted certiorari on petition of the Borax Company. Basically, two issues were presented to the Court:

1. Was the trial court correct in holding that the federal meander line is the boundary of Borax Company's land?

2. If not "is 'ordinary high water mark', which defines the boundary between upland and tideland, determined

(a) by the physical marks impressed by the waters upon rocks, earth and vegetation; or

(b) by the line of the neap tides in accordance with the decisions of the California Supreme Court . . .; or

(c) by a contour representing the line of mean high tide, which is .8 foot higher than the mean of the neaps."[85]

The major controversy in the Supreme Court, as below, was whether the 1880 survey determined the boundary of the property patented to Borax Company's predecessor in 1881.[86] Our concern over *Borax* is with the issue which assumed somewhat secondary importance: What was the boundary if not the meander line established by the survey?

On this issue, the Borax Company urged the Court to reject the mean high tide line adopted by the Ninth Circuit in favor of the lower

[83] Judge Wilbur wrote of the *Teschemacher* dictum, quoted in note 75 *supra*, 74 F.2d at 905:

> While Justice Field in the above quotation would seem to indicate that the neap tides were all the tides between the full and new moon and inferentially exclude from the definition of neap tides the spring tides occurring approximately at the time of the new and full moon, the quotation is merely a rough statement of a rule which must be more accurately defined in fixing a definite line of demarcation.

Judge Wilbur's concern with Justice Field's accuracy, and his emphasis on California cases indicate that he may have regarded the inquiry as controlled by California law, instead of by federal law as derived from California, English or other cases.

[84] See 296 U.S. at 26-27.

[85] Quotation is from "Questions Presented" in Borax Company's Petition for Certiorari, p. 5.

[86] See 296 U.S. at 16-21.

Justice McReynolds, dissenting, *id.* at 27, cites Knight v. United States Land Ass'n, 142 U.S. 161 (1891), as compelling affirmance of the district court's decree of dismissal. That case held that a federal patent, issued in confirmation of rights under a Mexican grant which Congress had charged the federal land department to determine, was not subject to collateral attack in the courts. The Chief Justice's *Borax* opinion for the court distinguished the *Knight* case on the ground that the survey and patent in that case "related to land which, albeit tideland, had been the subject of a Mexican grant made prior to statehood." 296 U.S. at 19.

neap tide line which appeared to be the rule of decision by the California courts.[87] The Borax Company argued strenuously that the Supreme Court's decisions contemporaneous with the 1880 survey also had adopted the neap tide line as the rule of decision.[88]

Alternatively, the Borax Company urged adoption of a vegetation

[87] The California courts are still attempting to apply the neap tide rule. In People v. William Kent Estate Co., 51 Cal. Rep. 215, 219 (Dist. Ct. App. 1966), a California District Court of Appeals made this distinction for guidance of the court below on a second trial:

> The figures of the United States Coast and Geodetic Survey were the only evidence as to height of ordinary high water. As pointed out, these were based on an average of all high tides. The California rule, however, uses the average of all high neap tides (see California decisions cited in Borax, Ltd. v. Los Angeles *supra*, 296 U.S. 10, 26, fn. 5; Carpenter v. City of Santa Monica, supra, 63 Cal. App. 2d 772, 784-5). Neap tides are those occurring when the moon is in its first and third quarters, and the high neap tides are somewhat lower than the high spring tides occurring at times of new moon and full moon (Borax Consolidated, Ltd. v. City of Los Angeles, *supra*, 296 U.S. at p. 24 ...). It may well be that available data will correlate the datum here used and the average of all high neap tides. But there is no evidence on that issue, or upon the crucial question of the difference on the ground which would be made by application of the latter figure at this particular point of the coast line. This issue should be covered by evidence. If it shows that the difference is negligible, or that it cannot be determined, the federal standard may be the only evidence.

In a petition for hearing by the California Supreme Court, the California Attorney General urged adoption of the *Borax* rule on the following grounds: (1) the *Teschemacher* rule is unclear since it is not apparent from the opinion whether neap tides are tides which occur on only two days a month, or include tides during a longer interval; (2) it makes very little difference; (3) *Teschemacher* purports only to follow the common law, of which *Borax* is a better expression; (4) later California cases, including one listed with *Teschemacher* in note 5 of the *Borax* opinion, have abandoned the neap tide rule; (5) data are inadequate for application of the neap tide rule; (6) confusion and inequity would result from one rule applicable to land patented by the United States and another to land patented by the state or patented by the United States in confirmation of Mexican grants; and (7) the rule proposed by the district court "would deprive the public of lands which are covered by tidal waters during the entire month, with the exception of but two days" on the assumpton, see 1 SHALOWITZ, SHORE AND SEA BOUNDARIES 93 (1962), that the neap tide rule describes tides on only two days each month. Petition for Hearing after Decision in District Court of Appeal, pp. 20-29. The petition was denied by the California Supreme Court on July 6, 1966. In short, *Borax* is more favorable to the state's claim to tidelands than the competing neap tide rule. A California decision relied on by the California Attorney General utilizing Coast and Geodetic Survey data but without reference to *Borax* is Swarzwald v. Cooley, 39 Cal. App. 2d 306, 103 P.2d 580 (1940).

[88] United States Supreme Court cases relied upon by the Borax Company are San Francisco v. Le Roy, 138 U.S. 656, 672 (1891); Shively v. Bowlby, 152 U.S. 1, 58 (1894); Knight v. United Land Association, 142 U.S. 161, 186, 215 (1891) (Field, J. concurring). Counsel reported they could find "no previous Federal decisions which adopt mean high tide line as the boundary in preference to the physical high water mark." Brief in Support of Petition for Certiorari, p. 51. Counsel described this as "a Federal question" upon which "the decisions of this court are uniform." *Id.* at 50.

Juxtaposed was the Borax Company's inconsistent argument that the California neap tide rule was incorporated by state decisions binding on federal courts as a construction of CAL. CIV. CODE §§ 670 and 830, quoted in note 80 *supra*. *Id.* at 53.

These California Code sections specify "ordinary high-water mark" as the boundary between upland and state-owned tidewater lands. It is hard to attach great significance to the statutory word "mark" because on a navigable lake or stream "where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark." CAL. CIV. CODE § 830. Low water does not leave much physical mark.

line which, it argued, the evidence placed seaward of the mean high tide line.[89] Federal surveying practice in 1880, Borax contended,

For the California Attorney General's effort to define "low-water mark," see 43 OPS. CAL. ATT'Y GEN. 291 (1964) (Anthony M. Summers).

[89] The printed record, while unsatisfactory as a source of information about vegetation on Mormon Island, may for that very reason have persuaded both the court of appeals and the Supreme Court to turn to the apparently clear and certain methods offered by the Coast and Geodetic Survey.

The following passage from the cross-examination of David E. Hughes, an engineering witness called by the City of Los Angeles, gives the record's flavor. It should be read with the decision of the district court on second trial in mind: that mean high tide elevation including seiche was 5.1 feet, excluding seiche, 4.7 feet. Record in Supreme Court, pp. 333-36, 339:

> That he did not have any personal familiarity with the Mormon Island region prior to 1900; that he did not know the condition of the Island in 1880 at the time of the Norway survey and that at the time he first saw the Island it was not a rocky island in any respect but was a sort of a soft land except a little ridge in the south part which was a little sandy and covered by prickly grass; that he was familiar with the early practice in the Land Department relating to surveys, knew what instructions were given in those times; that his knowledge went right back into the 80's; that it was the established practice of the Land Department in surveying areas to establish as high water mark an actual mark as it appeared on the land where the line could be ascertained or located; that the line had to be somewhat imaginary where there were no physical marks on the ground; that the instructions and practice were to follow the physical marks on the ground so far as there were any; that when there was not any physical mark on the ground, the practice was to carry the line across from one visible mark to the next visible mark if there didn't seem to be either hollow or hummock between; that it was the practice to the Land Department to establish as high water mark the real mark to be traced by the surveyor and was not an invisible line to be determined by spirit leveling; they did not use a spirit level at all; they were not required to; the practice required the surveyor to determine the high water mark from a line on the ground such as a line of vegetation if it existed; that meant high land vegetation; that he did not remember whether the custom and practice of the Land Department at that time recognized the propriety of running the high water mark across the mouths of small sloughs; that his attention was first brought to that in the Knight case as he studied it years later; the case of Knight v. United Land Association, and that he was taught in the engineering corps in the '90's that the high water mark meant the higher highs; that he had been instructed to use the higher highs as representing high water mark in connection with building structures and that he had no other instructions with reference to any other type of work; that if high water mark was the mean of the neap tides the glasswort would grow down to about that line on an elevation of approximately 4.3 feet above the datum plane of mean lower low water; that he himself considered the mean of the neaps, as referred to in the court decisions, to be 4.3 above the datum plane, whereas the mean of all the highs was 5.1 and of the higher highs 5.8, according to his computations, and that the glasswort grows down to approximately 4.3 feet above that datum plane and in some places a little below that, and it grows as high as twenty feet above the same datum plane;
>
> Q And you also know, do you not, that in sheltered places the glasswort, the dividing line between the glasswort and this rice grass that you spoke of, is higher than it is in places that are not sheltered?
>
> A No, I can't say that I know it. I don't know that I had thought about that.
>
> Q I will have to refresh your memory then from your deposition. Do you recall a published debate between you and Mr. Von Gelder, relative to what should be treated as the dividing line between tide lands and upland?
>
> A I do.
>
> Q And do you recall that in your part of that, you made this statement which is found at page 477, line 18 of your deposition: 'In localities which I have observed, there is a marked difference between the straight sea grass on sheltered tide land and the crinkled salt grass on the marsh land, and the change occurs at an elevation which corresponds better with the mean of the higher high water

would place the survey line at the vegetation line; the two were mutually consistent and below the mean high tide line.[90]

The Supreme Court affirmed Judge Wilbur's decision, holding that: (1) location of the boundary presents a federal question to which California statutes and decisions are not relevant;[91] and (2) there was no error in the direction to determine the boundary based on mean

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than with the mean of all the highs.' Do you recall that statement in your publication?

A No, I do not. I could refresh my memory. I have a copy of that in my pocket.

* * * [Omission in printed record.]

Q This document that you handed me, I think, was the one I was referring to. This was published in April, 1910, being a pamphlet of the Association of Engineering Society.

A Yes, I recognize it.

Q Will you look at page 250, please?

* * * [Omission in printed record.]

A The quotation is correct.

Q BY MR. ASHBURN: At that time you believe that to be the case, did you?

A Yes. I was thinking about a different harbor.

THE COURT: Different what?

A Different harbors; the height to which the grass grows, or the depth to which it grows. It was different in a sheltered harbor from what it was in a large wind-swept harbor. The plane of mean high water is a plane attained by the averaging of the high waters and that is all it is, and the mean lower low water plane is merely the average height of the lower low waters....

Some lawyers and engineers contended at the time that the lowest high tides of the month, what are today called neap tides, are the limits or partition between proprietary lands and public lands of states. Others contended that it was the average of all highs. While others, including myself, contended that inasmuch as many of those highs were not in fact high, a still higher line should be chosen, namely, 5.8.

THE COURT: Then, do I understand that opinion varied between this 4.3 and 5.8?

A Yes.

[90] The Borax Company expressly argued that spring tides do not interfere with vegetation. Brief in Support of Petition for Certiorari, p. 55; Brief on Behalf of Petitioners, p. 105. Justice Field in San Francisco Sav. Union v. Irwin, 28 Fed. 708 (C.C.N.D. Cal. 1886), *aff'd per curiam*, 136 U.S. 578 (1890), was apparently convinced that this was true in the San Francisco Bay area.

After Justice Field had passed from the scene, a federal district judge expressed doubt about whether upland vegetation will grow on soil submerged only by the spring tides. Sawyer v. Osterhaus, 212 Fed. 765, 775 (N.D. Cal. 1914):

> I say this with due deference as to what was held as to the lands involved in San Francisco Savings Union v. Irwin. I cannot know what the evidence was in that case, but am circumscribed by what was shown in this; and, moreover, the respective situations of the tracts involved in the two cases are in some essential respects quite different, and especially as to the effect of the flow of the salt tides. The lands in the Savings Union Case were undoubtedly, from their situation, affected largely by fresh waters from the streams which partially surround them, while the present premises were, until leveed, wholly subject to the tidal action of the waters of the bay, which daily flowed over them back and forth between San Pablo Bay and Mare Island Straits, completely submerging them at its highest flood, and largely so at its ordinary state. Lands so situated cannot be classed as swamp and overflowed; they are tidelands ....

[91] The state statute which is declared irrelevant, 296 U.S. at 26, defines the boundary in terms of "ordinary high-water mark," (CAL. CIV. CODE § 670, quoted in note 80 *supra*) but the only state statute cited and quoted by the Supreme Court, 296 U.S. at 12 & n.1, is an uncodified legislative grant from the state to Los Angeles

high tide as described by the United States Coast and Geodetic Survey.

The Court, in an opinion by Chief Justice Hughes, first declared:[92] "The tideland extends to the high water mark." For this proposition the court cited two cases involving inland lakes (one of them non-navigable)[93] and *Shively v. Bowlby*,[94] involving the Columbia River at Astoria. In *Shively*, the court had described tidelands as "lands under tidewaters ... incapable of cultivation or improvement in the manner of lands above high water mark."[95]

After citing these three cases, the Court in *Borax* proceeded to define "high water mark":[96]

> This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter.[97] ... But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell v. Catterall*, 5 B. A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay is named as a boundary, the line of ordinary highwater mark is always intended where the common law prevails." *United States v. Pacheco*, 2 Wall. 587, 590.

Blundell v. Catterall,[98] defining the shore as the area covered by the "flux and reflux of the sea at ordinary tides" is not clear. Is winter not an "ordinary" phenomenon? Are tides limited to ocean phenomena caused by astronomic influences, or do they include other wave and water movement?

The statement from *United States v. Pacheco* is no more helpful in

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which speaks of "mean high tide." Probably the only significance of this is to California lawyers who are unlikely to find *Borax* in their annotations to the Civil Code. Those who find *Borax*, on the other hand, may not find Civil Code § 670.

[92] 296 U.S. at 22.

[93] *Ibid.* Cases cited were: Hardin v. Jordan, 140 U.S. 371 (1891) (non-navigable Wolf Lake, between Indiana and Illinois); McGilvra v. Ross, 215 U.S. 70 (1909) (navigable Lake Union in Seattle).

[94] 152 U.S. 1 (1894).

[95] *Id.* at 57.

[96] 296 U.S. at 22-23.

[97] Concerning the distinction between civil and common law, *compare* Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (1958), *with* Rudder v. Ponder, 156 Tex. 185, 293 S.W.2d 736 (1956). See Winters, *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEXAS L. REV. 523 (1960). (Footnote ours.)

[98] 5 B. & Ald. 268, 292, 106 Eng. Rep. 1190, 1199 (K.B. 1821). The issue which divided the court was not the location of the shore, but the right of way of the public over the shore to bathe. Best, J., took judicial notice that bathing machines are essential to the health promoting practice. However, "decency must prevent all females, and infirmity many men, from bathing, except from a machine." *Id*, at 279, 106 Eng. Rep. at 1194. The majority concluded against the existence of the public's right to cross the shore owned by the lord of the manor, whether in a bathhouse on wheels or on foot.

itself. However, the opinion was written by Field whose opinions both before and after *Pacheco* incorporated the neap tide rule.[99] If the passage from *Pacheco* quoted in *Borax* is put into context, it is clear that Field intended no departure from his view that "ordinary high-water mark" is a vegetation line or physical mark fixed by the neap tides.[100]

The decision which comes closest to supporting the *Borax* Court's conclusion that highwater mark at common law is to be determined by the average of all high tides, is *Attorney General v. Chambers*,[101] a decision by Lord Chancellor Cranworth in 1854. Almost two pages are devoted to this case in the *Borax* opinion.[102] The Lord Chancellor found the question of the tideland boundary "very obscure" with "very little of modern authority." Lord Hale had given no absolutely decided opinion, but "leaned strongly" against the Crown's right to land covered only by spring tides. In *Blundell v. Catterall*, "the flux and reflux of the sea at ordinary tides" had not been defined.

Faced with this uncertainty, the Lord Chancellor attempted to state a principle from which a rule could be drawn:[103]

> In this state of things, we can only look to the principle of the rule which gives the shore to the Crown. That principle I take to be that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are *for the most part dry and maniorable;* and taking this passage [De Jure Maris, p. 26] as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is for the most part not dry or maniorable.

From Lord Hale's principle (emphasized in the quotation), Lord Chancellor Cranworth deduced the rule that the boundary is "the line of the medium high tide between the springs and the neaps."[104]

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[99] The *Teschemacher* dictum by which Field shaped the California law is quoted in note 75 *supra*. Field's *San Francisco v. LeRoy* decision, incorporated in the *Manual of Surveying Instruction* (1947), of the Bureau of Land Management, is quoted at text accompanying note 124 *infra*.

[100] In United States v. Pacheco, 68 U.S. (2 Wall.) 587 (1864), the United States appealed from a decree confirming a Mexican grant bounded on the west by San Francisco Bay. The Supreme Court affirmed, declaring that it made no difference whether the civil law or common law was applicable. If Justice Field's opinion is read against the background of his other opinions for the Supreme Courts of California and the United States, it is apparent that *Pacheco* is an affirmation of the neap tide rule which *Borax* held to be irrelevant to the federal question. See note 75 *supra* and text accompanying note 124 *infra*.

[101] 4 de G. M. & G. 206, 43 Eng. Rep. 486 (Ch. 1854).

[102] 296 U.S. at 24-25.

[103] 4 de G. M. &. G. at 217-18, 43 Eng. Rep. at 490. (Emphasis added.)

[104] *Id.* at 217.

"Maniorable" is an interesting word, not found in the second or third editions of Webster's unabridged dictionary or in current editions of Black or Bouvier's legal dictionaries. The Oxford English Dictionary lists it as: "erron. form of Manurable."[105] "Manurable" is defined: "Of land: That can be worked or cultivated."[106] It is illustrated by a quotation from Lord Hale, *De Jure Maris:* "For the most part the lands covered with these fluxes are dry and manurable."[107]

How Lord Chancellor Cranworth drew his rule from Lord Hale's principle is more obscure than the word itself. We doubt that his rule actually conforms to his principle. How frequently must the water of the sea wash the soil to render it incapable of ordinary cultivation? We would suppose that the answer might depend on a variety of variables including climate, soil, crops, and salinity of the water.[108] Unfortunately, he presents us with nothing but a not very plausible assumption that the land above the line of medium high tide between the springs and the neaps *is* capable of cultivation.[109]

Despite its prolonged discussion of *Attorney General v. Chambers,* the Court in *Borax* did not adopt as the boundary the medium high tide between the springs and the neaps. Instead, *Borax* prescribed the average of all high tides measured over an 18.6 year cycle.[110] The reason for its choice may perhaps be found in the convenience and certainty promised by the Coast and Geodetic Survey's technology and publications, but the Court does not tell us.

Unfortunately, the convenience and certainty of the *Borax* rule did not have an opportunity for demonstration in the aftermath of *Borax.* On remand, the district court and court of appeals held that a boundary established by estoppel under California law precluded the City of Los Angeles from claiming to the line of mean high tide.[111] Even if

[105] 6 OXFORD ENGLISH DICTIONARY 125 (1933).

[106] *Id.* at 144.

[107] MOORE, HISTORY OF THE FORESHORE 393 (1888), reprints DE JURE MARIS and spells the word "mainorable."

[108] Sawyer v. Osterhaus, 212 Fed. 765, 775 (N.D. Cal. 1914), quoted in note 90 *supra.*

[109] See sketch in part I *A supra,* showing that vegetation in *Hughes* did not in fact grow anywhere near the line of "USC & G Survey—*Mean* High Tide," which approximates the line between the springs and the neaps. See note 110 *infra.*

[110] 296 U.S. at 26-27. The rule is taken from MARMER, DEP'T COMMERCE, COAST & GEODETIC SURVEY SPECIAL PUB. No. 135 (1927).

1 SHALOWITZ, SHORE AND SEA BOUNDARIES 96 (1962), says that "the line of the medium high tide between the springs and the neaps" is almost, but not quite, the Coast and Geodetic Survey definition which the Court applied. This useful two volume work is published by the United States Department of Commerce, Coast and Geodetic Survey.

[111] 20 F. Supp. 69 (S.D. Cal. 1937); 102 F.2d 52 (9th Cir. 1939), *cert. denied,* 307 U.S. 644. On the first appeal, the court of appeals had refused to consider the pleaded facts relating to estoppel "in view of the fact that the question was not presented to or considered by the trial court." 74 F.2d at 904.

estoppel had not been available, however, translation of the Supreme Court's formula to a line upon the ground would have been impossible without further significant refinement of that formula. Refinement has not been provided by the Supreme Court, either in the *Borax* opinion or since. The Supreme Court did not say what to do about seiche, although the evidence in the record dealt with the problem.[112]

In the opinions after remand, we find the first judicial recognition that the sea in Los Angeles harbor does not perform exclusively according to the astronomic forces producing what the Coast and Geodetic Survey denominates "tides."[113] The actual water level at mean high tide is 5.1 feet above low water datum; "tides" as the Coast and Geodetic Survey defines the term are only 4.7 feet above low water datum. The difference is attributable to seiche, a phenomenon produced by barometric or other influences, rather than by the gravitational attraction of the sun and moon which produces tides. In 1926, when the Coast and Geodetic Survey first became aware of the facts in Los Angeles harbor, it substituted the 4.7 figure for 5.1 to eliminate the oscillations in water level attributed to seiche.

In dictum, the district court decided to follow the Coast and Geodetic Survey's practice and the court of appeals appears to have agreed.[114] This decision would have had major consequences in establishing the disputed boundary if estoppel had not made the high tide line problem irrelevant. One inch of vertical rise in water level submerges acres of tidal flats like those of Mormon Island.

Why should seiche be ignored? Neither opinion after remand states a reason. The conclusion is particularly suprising because the opinion of the court of appeals after remand was written by Judge Wilbur, whose earlier opinion had stated a definition in terms of "tillable land." We would suppose that land regularly washed by seiche is no more

[112] Record on Appeal, pp. 397-409; Brief for Appellant, p. 17; Brief for Respondent, p. 85.

The state of the first record is probably not such that the Court would have been justified in deciding whether tide includes or excludes seiche. It was sufficient, however, that the Supreme Court should have realized the problem inherent in directing the court below to follow the Coast and Geodetic Survey.

[113] The seiche problem is dealt with at 20 F. Supp. 70-71, and 102 F.2d at 57-58. Any implication that it is peculiar to Los Angeles harbor is contradicted by WHEELER, A PRACTICAL MANUAL OF TIDES AND WAVES 167 (1906): "At Malta [for example] the irregular variations of the water in the sea inlets are often sufficiently great to completely mask the slight undulation of the lunar tide."

MARMER (rev. ed. 1951), *op. cit. supra* note 110, presents at page 42 a graph of the tidal curve at Mormon Island for January 10, 1951, illustrating the seiche which, there, is "practically a constant feature, although varying in amplitude throughout the year." *Id.* at 41.

[114] 20 F. Supp. at 71; 102 F.2d at 57.

"dry and maniorable," than land regularly washed by tide. Plants do not know the difference, and neither, prior to 1926, did the Coast and Geodetic Survey.

The decision to ignore seiche tells us something about the probable reasons why the court of appeals and Supreme Court turned to the Coast and Geodetic Survey in the first place. The temptation to follow the Coast and Geodetic Survey is strong, whatever it says about tides and related phenomena. The data, methods, and well written publications of the agency are readily available. Satisfactory alternatives are not available where vegetation has long disappeared.

It is also understandable why a court might be reluctant to spell out either the reason or extent to which the Coast and Geodetic Survey, an agency of the Department of Commerce, is the source of both the law and the facts for determining tidal boundaries. Since the agency has no responsibility for fixing boundaries, most of the conventional reasons for judicial deference to administrative expertise are lacking. Yet the agency has something approaching a monoply in recognized expertise. Some persuasiveness may be added to its conclusions by reason of the very fact that it is officially disinterested in the consequences flowing from use of its methodology and data.

The *Hughes* opinion is an interesting illustration of the prestigious nature of Coast and Geodetic Survey publications. The Washington court quotes them copiously.[115] Only a careful reading of the opinion and resort to the court's sketch reveals that "mean high tide" in the Survey's definition and "mean high tide" in what the court states to be its holding are widely different concepts.[116] Having departed from the Coast and Geodetic Survey's concepts, the court fails to provide any adequate substitutes of its own. The reasons for its rule, and how to apply its rule to locations other than the property of Mrs. Hughes, are never stated.

C. Borax versus Hughes—Which Rule?

Both the *Borax* rule (followed in *Samson Johns*)[117] and the *Hughes* rule are unsatisfactory in terms of fidelity to a principle supporting the rule. *Borax* follows the Coast and Geodetic Survey's methodology in fixing a boundary which separates the land dry enough to be maniorable from the land not dry enough to be maniorable. The methodology,

[115] 67 Wash. Dec. 2d at 796-97, 410 P.2d at 25-26.
[116] See discussion in text accompanying notes 34-39 *supra*.
[117] See note 5 *supra* and accompanying text.

however, employs a concept of a waveless ocean as fictitious as the legal dogma that any woman may produce children regardless of age and state of health. The *Borax* rule offers the prospect of greater certainty than a rule that must be adapted to varying conditions of plant life which depend on climate, soil, and countless other factors in addition to the behavior of the sea.

If there is to be a uniform rule, so that a clerk in the Bureau of Land Management in Washington can determine from a document the appropriate legal description of the real estate belonging to Mrs. Stella Hughes or the heirs of Samson Johns in the state of Washington, *Borax* comes much closer to serving the purpose than *Hughes*. However, *Borax* fails to distinguish between upland and tideland in terms of the uses to which upland and tideland are put.

The *Hughes* opinion might have persuasively demonstrated that the vegetation line more faithfully than the mean high tide line applies the criteria which Lord Chancellor Cranworth and the United States Supreme Court agreed should be controlling. Even in terms of certainty, vegetation line appears to be superior in some locations to mean high tide line. One can look at the vegetation and in many instances approximate a line. Not even the Coast and Geodetic Survey can be sure without great effort, as the history of Los Angeles harbor demonstrates, what is tide, what is seiche, and what is the product of a prevailing offshore wind.

If the Washington Supreme Court had attempted such a demonstration, it could hardly have avoided demonstrating also that its selection of a line fixed in 1889 frustrates the goals otherwise achieved by a vegetation line. Physical characteristics which differentiate upland from tideland are the characteristics of 1966, not 1889. Physical observation of a vegetation line of 1966 is easy; observation of the line of 1889 is impossible.

The question is nevertheless difficult because there is no agreement on the rationale of the rule giving states ownership or power to dispose of tidelands. The touchstone in *Pollard's Lessee v. Hagan*[118] is navigability. This in itself is a fiction which helps not at all in selecting a boundary. Navigability as the criterion would probably have resulted in a low-tide rather than a high-tide boundary.

Justice Catron's dissent in *Pollard's Lessee* noted the anomaly: "As a practical truth, the mud-flats and other alluvion lands in the delta of the river Mississippi, and around the Gulf of Mexico, formed of

[118] 44 U.S. (3 How.) 212 (1845).

rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance."[119]

The problem recurred some forty years later in litigation on Puget Sound,[120] by which time *Pollard's Lessee v. Hagan* had become an established rule of proprety. The holder of scrip which permitted its owner to locate a claim on federal "public lands" had selected 3,000 acres of what he claimed were mud flats shortly before Washington was admitted to statehood. He tried unsuccessfully to persuade first the Washington Supreme Court and then the United States Supreme Court that these could not be lands beneath navigable waters, and hence they were public lands of the United States subject to his claim.

The United States Supreme Court refused to judicially notice that the situation of the claimed lands was as alleged in the claimant's brief. But lest he or another litigant come back with a record proving a claim to tidal mudflats, which were not navigable, the Court thought of a better reason on which to rest the state's ownership or power to dispose of tidelands:[121]

> [Even] if the area ... was shown to be as great as stated by counsel in the brief, it would not change the fact that the land thus alternately covered and uncovered between the dry upland and navigable water is land which may be used in facilitating approach to the navigable waters from the upland, and is strictly within the description of "tide lands," and covered by the rule in respect to such lands.

This was inventive but not helpful. Any public land west of Chicago may be used, and much of it has historically been used, to facilitate approach to the Pacific Ocean. There is no particular reason, other than a rule of property, why the ocean is navigable for title purposes up to high tide line, but streams are segregated into navigable and non-navigable reaches.[122]

We are, however, dealing with real property titles, an area where precedent and reliance on precedent are more important than in any other area of the law. The *Hughes* court rested its decision on a rule of property. The difficulty in its decision is not with the concept of a rule of property, but with the materials from which this particular rule was discovered: an administrative decision, contravening the law declared by the Washington Supreme Court, affirmed by unreported

[119] *Id.* at 233.
[120] Baer v. Moran Bros. Co., 2 Wash. 608, 27 Pac. 470 (1891), *aff'd,* 153 U.S. 287 (1894).
[121] 153 U.S. at 288-89.
[122] See United States v. Utah, 283 U.S. 64 (1931).

superior court decisions, none of which became publicly visible until 1966, when the rule emerged as a constitutional construction applicable to the entire state. Moreover, it is not even a rule until it becomes clear how boundaries other than that of Mrs. Hughes' property can be determined. We do not learn from the *Hughes* opinion how and when her boundary was in fact surveyed and determined, much less the boundaries of tidelands in the rest of the state.

Nevertheless, it seems probable that in terms of precedent and practical reliance on precedent, a better argument can be made for a vegetation line than for a mean high tide line as defined by *Borax*. *Borax* was novel in 1935. Since 1935 it has had surprisingly small influence.

In 1947, the second decade following *Borax*, the *Manual of Surveying Instructions* published by the United States Department of the Interior, Bureau of Land Management,[123] defined tidelands. Its most specific definition was provided by quotation from Justice Field's opinion in *San Francisco v. Le Roy* in 1891:[124]

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tidewater flowed so continuously as to prevent their use and occupation. To render lands tidelands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tidewater over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied.

This definition is inherently ambiguous when applied to the facts of the *Hughes* case.[125] It states both the neap tide rule, which Justice Field had spelled out with greater particularity in *Teschemacher v.*

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[123] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES 379 (1947) [hereinafter cited as MANUAL].

The successor of *Manuals* of 1855, 1881, 1890, 1894, 1902 and 1930, the 1947 *Manual* followed *Borax* by eleven years. It is prepared "for the guidance of the employees of the Bureau of Land Management. To all others this surveying practice should be regarded as advisory, with no attempt to interpret State law respecting the survey of private property." 1947 MANUAL 2.

Instructions to federal surveyors are contained also in special instructions issued from time to time and are difficult to locate and identify. They are pertinent both to indicate what surveys and accompanying field notes purport to represent, and as administrative constructions. See Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305, 307 n.7 (1940); Kean v. Calumet Canal & Improvement Co., 190 U.S. 452, 499-50 (1902) (dissent); United States v. Otley, 127 F.2d 988, 1000 (9th Cir. 1942); Kleven v. Gunderson, 95 Minn. 246, 104 N.W. 4, 6 (1905). *But cf.* Niles v. Cedar Point Club, 175 U.S. 300, 307 (1899).

[124] 1947 MANUAL 379, quoting from 138 U.S. 656, 671-72 (1891).

[125] See note 53 *supra*.

Thompson,[126] and the vegetation line rule in terms not unlike those used in *Hughes*. Which line is the boundary where the vegetation line is 386 feet above the line of mean high tide and the neap tide line is an unascertainable distance below the line of mean high tide?

We shall never know how Stephen J. Field or his court in 1891 would have answered this question if disabused of the notion that neap tide and vegetation lines are the same. The important fact is that the Bureau of Land Management's instructions of 1947 are clear and express. Its instructions for meandering, applicable to both tidal and inland waters,[127] borrow authority from an Idaho decision:[128]

> All navigable bodies of water and other important rivers and lakes ... are to be segregated from the public lands at mean high-water elevation....
>
> ... High-water mark is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Raide v. Dollar, [34 Idaho 682], 203 P. 469 (1921).

The *Borax* case, significantly, is neither cited nor discussed. Perhaps it was overlooked, but this seems unlikely. Is it possible that civil engineers in the Department of the Interior are professionally and bureaucratically jealous of specialists of another discipline employed in another bureau under jurisdiction of the Department of Commerce? Or is it that surveyors could not accomplish their assigned tasks pursuing the methods directed in *Borax?* Certainly in attempting to do so they would encounter problems:

(1) Is seiche to be isolated from the tides, and if so how?

(2) When does a river become "tidal" for this purpose as it approaches the sea?

A slightly more recent publication issued in 1949 by the Bureau of Governmental Research Services, University of Washington, provides according to its title page, "Information for City Engineers, Surveyors, Civil Engineers, and Attorneys," with respect to boundaries.[129] This is what it says about the *Hughes* vegetation line problem identified with article XVII, section 1 of the Washington Constitution:[130]

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[126] See note 75 *supra*.

[127] 1947 MANUAL 232 makes it clear that meandering instructions apply to tidal waters.

[128] 1947 MANUAL 230-31.

[129] UNIVERSITY OF WASHINGTON BUREAU OF GOVERNMENTAL RESEARCH AND SERVICES, REPORT NO. 96 ON SURVEYS, SUBDIVISION AND PLATTING, AND BOUNDARIES, WASHINGTON STATE LAWS AND JUDICIAL DECISIONS.

[130] *Id.* at 28. (Emphasis in original.)

> Two terms in this section of special significance to the land surveyor are "ordinary high tide" and "ordinary high water." In view of the area of navigable water in the State of Washington, it is surprising that there seems to have been no definitive interpretation of these two terms by the State Supreme Court of Washington. In considering the *ordinary high water mark,* the United States Supreme Court has declared:
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> > "This line is to be found by examining the bed and banks and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed, a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."
>
> It would seem that this definition of "ordinary high water mark" also would apply to the line of "ordinary high tide."...

This quotation, which purports to be a declaration by the United States Supreme Court, is in fact from the concurring opinion of Justice Benjamin R. Curtis in *Howard v. Ingersoll.*[131] The problem before the pre-Civil War Court was to determine a boundary described as "along the western bank" of the River Chattahoochee in Georgia's act of cession to the United States of what later became the State of Alabama.[132] The court did not purport to state a universally applicable principle, but the case has nevertheless been widely cited with respect to the vegetation line as a water boundary.

Wholly aside from the accuracy of their legal scholarship books like the Bureau of Land Management Survey Instructions and the Washington Bureau of Public Affairs publication are relied on. The former,

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[131] 54 U.S. (13 How.) 381, 427 (1851).

[132] Howard v. Ingersoll, *supra* note 131, failed to settle the Georgia-Alabama boundary. The interstate adjudication, also a construction of the Georgia Act of Cession, took place some nine years later. Alabama v. Georgia, 64 U.S. (23 How.) 505 (1860). The Court said, *id.* at 515, that the bed of the river belonging to Georgia is:

> ... that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean state during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.
>
> The western line of the cession on the Chattahoochee River must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

How often must a flood or drought occur to lose its status as "extraordinary"? *Alabama v. Georgia* deserves to be immortalized for the laconic observation of Mr. Benjamin C. Howard, the reporter, who recorded that the evidence was all documentary, that the arguments "partook rather of the character of a diplomatic negotiation than a forensic dispute, and the reporter declines to attempt to abbreviate them in a law book." *Id.* at 510.

indeed, has independent status as evidence of an administrative practice by the cognizant federal bureau. Such books are materials out of which a rule of property may grow.

They do not help to establish the decision in the *Hughes* case as a rule of property, because neither publication is at all helpful in discovering a vegetation line of 1889. The Bureau of Land Management's publication advises: "When by action of water the bed of the body of water changes, high water-mark changes and ownership of adjoining land progresses with it."[133] A Washington decision is cited.[134]

A vegetation line as it exists today and a vegetation line as it existed in 1889 present quite different factual and perhaps quite different legal problems. For purposes of analysis we have isolated vegetation line from accretion issues, and our conclusion applies primarily to a vegetation line determined as of today.

We have concluded that *Borax* has the obvious advantage if a universal rule must be applied because vegetation is not universal. Even where vegetation is found, its type, characteristics, and distribution differ. However, if a universal rule is not demanded, other criteria favor a vegetation line boundary. The beach, in terms of most of the uses to which the beach is adapted, begins at the line of vegetation. There the upland ends. Even certainty and judicial convenience may be furthered by a vegetation line in many cases. Where vegetation provides a line clearly observable and clearly related to the sea, the boundary is visible, to both the trier of fact and the surveyor. Observation for a day is easier than observation for 18.6 years, or for a substantial period even if less than 18.6 years.

History and reliance on history also favor a vegetation line. So does the practice, which *Borax* did not purport to supplant, of establishing a vegetation line boundary on inland waters. The difficult distinction between inland and tidal waters is avoided.

If, however, we must seek the vegetation line in 1889 the advantages of a vegetation line are less clear. Perhaps it makes little difference which rule we employ in finding an 1889 line. We can guess about a line of mean high tide as readily as we can guess about a line of vegeta-

[133] 1947 MANUAL 231.

[134] Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922). Involved were private titles on the Yakima River, said to be non-navigable.

1947 MANUAL 370 makes clear that accretions to land formed after patent are not within the jurisdiction of the government.

The Washington Bureau of Governmental Research publication, *op. cit. supra* note 129, at 46-48, handles the accretion problem well by reference both to *Ghione,* discussed at notes 170-77 *infra* and accompanying text, and *Washougal,* discussed at notes 189-94 *infra* and accompanying text.

tion. Nevertheless, an 1889 line has no meaning in terms of the present criteria of what constitutes a beach or what constitutes upland. If the search is for an 1889 line, the vegetation line loses its major advantage.

II. THE ACCRETION ISSUE

Is the boundary between upland and tideland, however defined and located, a boundary which became fixed at the date of statehood or is it a boundary which moves as accretion and erosion cause that line to move? We limit ourselves, here, to examining the decisions as they relate to the issue of a fixed or moving boundary, reserving to part III the issues relating to source of law. In *Hughes,* the Washington Supreme Court held that the boundary became fixed on statehood.[135] In *Samson Johns,* the Court of Appeals held that the boundary is movable, irrespective of state law.[136] In *Borax,* the United States Supreme Court did not discuss the issue as accretions were not directly involved.

The court in *Hughes* distinguished *Samson Johns* on the ground that the United States was the owner, not merely the original source of title, of the land in question.[137] No such distinction was made in *Samson Johns.* The court of appeals treated its decision as controlled by *Borax,*[138] in which the United States was merely the original source of title, not owner of the upland. Federal law, controlling according to the court in *Samson Johns,* follows the common law in providing a boundary movable by erosion as well as by accretion.[139]

Although the Court in *Borax* did not discuss the accretion issue, it is clear that if the court below had fixed the mean high tide line, under the Court's definition, it would have established a moving boundary. The court of appeals, whose decision was affirmed by the Supreme Court, had noted an accretion issue, but had left the facts for determination

[135] 67 Wash. Dec. 2d at 803, 410 P.2d at 29. The dissent points out, *id.* at 808, 410 P.2d at 32, that the majority gave no consideration to the effect of a fixed boundary where there has been erosion instead of accretion. However, the majority's reliance, *id.* at 802, 410 P.2d at 29, on Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902), indicates that it probably intended that the upland-tideland boundary should be fixed against erosion as well as against accretion. The court quotes, 67 Wash. Dec. 2d at 802, 410 P.2d at 29, the following passage from *Washougal:*

> It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.

See text accompanying notes 187-92 *infra* for further discussion of the *Washougal* decision.

[136] 294 F.2d at 834.

[137] 67 Wash. Dec. 2d at 803, 410 P.2d at 29.

[138] 294 F.2d at 833-34.

[139] *Id.* at 834 & n.6 and authorities cited therein. See 3 AMERICAN LAW OF PROPERTY §§ 15.26-.33 (Casner ed. 1952); PATTON, TITLES §§ 300-05 (1957); 6 POWELL, REAL PROPERTY §§ 983-86 (1965); 4 TIFFANY, REAL PROPERTY §§ 1219-29 (1939).

by the district court, observing that "the effect of the shifting of that line [mean high tide line] on the rights to tideland and upland are well settled."[140]

It is paradoxical that in none of the three cases which are central to the accretion issue in Washington—*Borax, Samson Johns,* and *Hughes* —are the merits of the moving versus fixed boundary rule examined. In *Borax,* a moving boundary was assumed—whether by reason of federal or state law—once the Borax Company's claim to the federal meander line, as a fixed boundary, was rejected. *Samson Johns* followed *Borax* on the basis that federal, not state, law determines the boundary of the upland owned or granted by the United States,[141] and accretion is the established federal rule. *Hughes* applied a rule of state law derived principally from the practice of the Commissioner of Public Lands, affirmed by seventy-three unreported superior court decisions.[142]

The only Washington decision that fully reviewed the policy considerations is the *Ghione* case of 1946.[143] That decision in favor of the accretion rule is rejected in *Hughes,*[144] at least as to tidelands.

A. The Accretion Problem

The issue on the merits is worthy of fuller examination than it received in *Hughes.* The problem is not confined to the Long Beach Peninsula: accretion may occur wherever there are water boundaries. At common law and in most jurisdictions today, the boundary moves whenever physical movement is gradual and imperceptible. Ultimately, this must be based on a judgment that a fixed relation to the water body is more important than a fixed relation to the earth's surface.[145]

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[140] 74 F.2d at 907.

[141] Such authority as existed was contrary to the conclusion reached in *Samson Johns.* In Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956), the issue was whether land lost by erosion and subsequently reemerging belongs to the former owner or to the owner to whose land it is added by accretion. Plaintiffs were Indian nations, defendant a successor in interest to allottees of Indian land. The court applied the law of Oklahoma, which answered the question in favor of the plaintiff Indian nations: reemerging land belongs to the former owner. The court said, *id.* at 832:

> [E]ach state determines for itself questions relating to the loss of land by erosion. submerging, or avulsion, and questions concerning the acquisition of land by accretion.... In like manner, grants by the United States of public lands bounded by stream, made without reservation or restriction, are to be determined as to effect according to the law of the state in which the grant lies; and that general rule has application to the disposal of tribal lands of Indians under guardianship.

Cf. Chocktaw & Chickasaw Nations v. Cox, 251 F.2d 733 (10th Cir. 1958).

[142] See text accompanying notes 214-17 *infra.*

[143] 26 Wn. 2d 635, 175 P.2d 955 (1946).

[144] 67 Wash. Dec. 2d at 803, 410 P.2d at 29.

[145] An Arizona-California boundary compact provides a fixed boundary to replace what has been a movable Colorado River boundary, but it expressly leaves private

Various subsidiary reasons for an accretion rule have been stated. The least persuasive is usually identified with Blackstone: *De minimis non curat lex.*[146] The 175 feet added by accretion to the Hughes property since 1889 is not *de minimis*. Nevertheless, something can be said for Blackstone's reason. As of 1890, the addition was doubtless small. A six-inch strip separating a substantial tract from the water has no more than nuisance value—a detriment to an upland owner without concomitant benefit to the tideland owner, whether the state or its vendee. If six inches is *de minimis*, when does *de minimis* cease to be applicable?

Another reason for an accretion rule, recognized by Blackstone,[147] is that because the upland owner must sustain the loss from erosion or the costs of its prevention, he should have the benefit of any accretion. That an upland owner's boundary may be legally fixed against movement by erosion is only a partial answer. Even if one's ownership continues after the sea has claimed his land, the sea is nonetheless a destroyer. Moreover, the navigational servitude of the United States renders "ownership" of tide and submerged lands in some situations relatively meaningless.[148]

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titles and water rights unaffected by the change of land from one state to another. Nor does the compact purport to displace the effect of future accretion on private titles. See Arizona Laws 1963, ch. 77; CAL. GOV'T CODE § 176; Cal. Stats. 1963 ch. 859. The compact was approved by Congress August 11, 1966, Pub. L. No. 89-531, 80 Stat. 340.

Contrast Durfee v. Duke, 375 U.S. 106 (1963), where the same distinction between accretion or avulsion determined both private boundary and the territorial boundary of the state, and hence jurisdiction of a state court. The Supreme Court held that the Nebraska court's determination of its own jurisdiction, which also determined the merits, was res judicata. Mr. Justice Black separately concurred, stating his understanding that the Supreme Court did not thereby decide the continuing effect of the Nebraska judgment should the United States Supreme Court or an interstate compact later establish that the disputed land was in Missouri.

[146] 2 BLACKSTONE, COMMENTARIES *262 (Lewis ed. 1898):

> And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

[147] *Ibid.* To the same effect is Mayor, Aldermen, and Inhabitants of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 717 (1836):

> 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.

[148] See Morreale, *Federal Power in Western Waters: the Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

This reason is more persuasive when applied to rivers, which move back and forth across a flood plain, than to tidelands. On the ocean shores, accretion or erosion is more likely to be a long-continued and one-way process.[149] It is not a compelling argument that McGillicuddy, whose land is located where accretion continues over centuries, should own those accretions because Jones, whose land is located where erosion is an equally uninterrupted process, is losing his real estate.

A more persuasive reason for an accretion rule is related to the difficulties of proof. Gradual and unnoticed movement of a water line leaves few traces in memory and even fewer enduring records. To establish where a boundary was located in 1889, even if a litigant wins, may be an expensive process. A less expensive rule both for litigants and the state, which provides the courts, is one which declares that the boundary is where the water line now exists—unless someone can establish that (a) the boundary used to be somewhere else, and (b) an avulsive change took place.[150]

Doubtless the most important consideration favoring an accretion rule is access to the water.[151] The dissenting opinion in *Hughes* persuasively points out that contact with the line of mean high tide "in many instances, may have been the reason for the acquisition of the property."[152] Language reflects the usual importance of access when a water line or body of water is described as "in front of" and not "behind" the upland.[153]

Considerations of access to the water have less weight in Washington than elsewhere. The Washington court early established[154] that the upland owner has no right of access to navigable water. Lack of a vested right to access, however, is not alone a persuasive basis for rejecting an accretion rule. "Vested rights" is merely a label for a legal conclusion. Even though we accept a conclusion that there are

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[149] 2 SHALOWITZ, SHORE AND SEA BOUNDARIES 359 (1964), declares that there are coastal regions, often lying between localities of erosion and localities of accretion, where the two phenomena alternate.

[150] See Sartori v. Denny-Renton Clay & Coal Co., 77 Wash. 166, 167-68, 137 Pac. 494, 495 (1913). Difficulties of proof are encountered whether a shift has been accomplished by accretion or avulsion. A presumption in favor of a present water line solves a part of the problem.

[151] See Lamprey v. State, 52 Minn. 181, 53 N.W. 1139, 1142 (1893), quoted in State v. Sturtevant, 76 Wash. 158, 169-70, 135 Pac. 1035, 1039 (1913).

[152] 67 Wash. Dec. 2d at 807, 410 P.2d at 32.

[153] *E.g.*, WASH. CONST. art. XV, § 1, providing for harbor lines to be established in navigable waters "within or in front of" city limits, and making related lands inalienable.

[154] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891); power of the state court to so decide was approved in Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56 (1921).

no vested rights, there may still be strong reason to protect expectations which are not vested.[155]

Access to water has been recognized in Washington law as an important although not a vested right. The upland owner is given a preferential right to buy shore and tidelands when the state disposes of them.[156] This right was provided by the legislature "to compensate, in some degree, the owner for the loss of the riparian right."[157]

Authority from the common law and from other states heavily favors an accretion rule.[158] The dissenting opinion in *Hughes* quotes this concession from the Attorney General's brief: "It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands that have become fast lands by slow and imperceptible accretion, but at least two other states have done so."[159]

The authority claimed for a fixed boundary must be discounted at least fifty percent. One of the two states is California, which in fact follows an accretion rule.[160] The other is Louisiana, which recognizes the accretion rule as to rivers (including tidal rivers) but not as to lakes or the ocean. The Louisiana rule, however, is based on the Code Napoleon which provides a fixed boundary for the ocean upland and has been construed to cover lakes.[161]

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[155] Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), may be cited for the vague but nevertheless reasonable proposition that vested rights in tide, shore, and submerged lands are never as vested as rights in lands wholly above water. The state of Illinois legislatively granted lands underlying the Chicago harbor to the railroad in 1869 and took them back in 1873. The decision was four to three, and hedged by limitations not much clearer today than in 1892, but the notion expressed in Justice Field's opinion for the Court is that a state may not irrevocably abdicate its governmental interest in the land subject to a public trust. *But cf.* Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915). The limits of such a proposition cannot be tested until the state legislatively seeks to take back that which it has granted.

[156] WASH. REV. CODE §§ 79.01.448, .484 (1958).

[157] State v. Sturtevant, 76 Wash. 158, 164, 135 Pac. 1035, 1037 (1913).

[158] See 3 AMERICAN LAW OF PROPERTY §§ 15.26-.33 (Casner ed. 1952); PATTON, TITLES §§ 300-05 (1957); 6 POWELL, REAL PROPERTY §§ 983-86 (1965); 4 TIFFANY, REAL PROPERTY §§ 1219-29 (1939).

[159] 67 Wash. Dec. 2d at 805, 410 P.2d at 30-31, quoting Brief of Appellant, p.36.

[160] Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 161 Pac. 975 (1916).

The Attorney General relied on Western Pac. Ry. v. Southern Pac. Co., 151 Fed. 376 (9th Cir. 1907), which construed CAL. CIV. CODE § 1014 (accretion rule applicable to "river or stream") to confine the accretion rule to inland waters. That decision still stands as the federal court's judgment that such a statute would be constitutional. However, the *Strand* case, *supra*, subsequently held that the accretion rule applies to ocean boundaries by virtue of California's statutory adoption of the common law.

Washington's adoption of the common law precedes statehood and is incorporated, as modified, in WASH. REV. CODE § 4.04.010 (1956). The statute does not appear to have been argued as a basis for Mrs. Hughes' claim to the accretion land.

[161] Zeller v. Yacht Club, 34 La. Ann. 837 (1882), is the Attorney General's other case. Construing the Louisiana code, based on the Code Napoleon, it held that a lake has a fixed boundary, like the upland-seashore boundary. This imported into Louisiana law a difficult problem: what is a lake? See State v. Cockrell, 162 So. 2d 361

B. Bases of the Rule Adopted in Hughes

The *Hughes* opinion does not deal with the policy considerations which have supported an accretion rule. Nor does it advance the opposing arguments which can be made in favor of a fixed boundary. These rest on the inconvenience and uncertainty of a boundary which is subject to the vagaries of nature, an ownership which natural forces may totally destroy.[162] Rather, the court explores a number of sources of law, some of which lend support to its conclusion and some of which do not.

These are the sources explored:

1. The Words of the Washington Constitution. The constitutional words are "the line of ordinary high tide, where the tide ebbs and flows." They do not say either 1889, as the state successfully contended on appeal, nor do they say "as it exists at any particular time," as the trial judge held. On their face, however, they tend to support the trial judge's decision. They are common law words. When not defined they should be given a common law meaning, unless an affirmative reason for some other meaning can be discovered.[163]

2. History of the Constitution's Adoption. The court recited at length the absorbing history of the constitutional convention, and the

(La. Cir. Ct. App. 1964), *cert. denied,* 246 La. 343, 164 So. 2d 350 (1964); Note, 39 TUL. L. REV. 611 (1965); Note, *Alluvion and Dereliction in Lakes,* 7 TUL. L. REV. 438 (1933).

The Roman law, the Civil law, Louisiana law, the Spanish law, and the Code Napoleon are all explored in Justice Holmes' opinion in Ker & Co. v. Couden, 223 U.S. 268 (1912). He concluded that accretion does not apply to the ocean in the Philippines. Justice McKenna dissented on the basis of an accretion rule founded on natural justice. *Id.* at 279.

[162] The dissenting opinion of Judge Mark A. Fullerton in Williams Fishing Co. v. Savidge, 155 Wash. 443, 450, 454-55, 284 Pac. 744, 746, 748 (1930), stated the case for certainty of a fixed line but did not face up to the hazard in that alternative:

> The purchaser may have acquired, at the time of his purchase, one tract of land, and now, by the action of the elements be the owner of an entirely different tract, or he may have had a valuable property at the time of his purchase and now have nothing of which he can devote to his private use. This was not the purpose of the constitutional reservation. It was intended to vest in the state title in fee to the tide and shore lands as they existed at the time of the reservation, and the state or its grantees owns them in fee, and the title to the specific tract is not changed by accretions or diminutions.

The initial decision in the case is reported at 152 Wash. 165, 277 Pac. 459 (1929). The final decision, which determined that Peacock Spit off the mouth of the Columbia River is capable of becoming part of and ceasing to be part of the mainland by accretion-like natural processes, is reported at 164 Wash. 50, 2 P.2d 722 (1931).

The Washington-Oregon Columbia River boundary is movable. Washington v. Oregon, 211 U.S. 127 (1908). An interstate compact approved by the Washington Legislature would give this boundary a fixed location. WASH. REV. CODE § 43.58.050 (1965). Compare the Arizona-California Compact, note 145 *supra.*

[163] See Fransen v. Board of Natural Resources, 66 Wn. 2d 672, 674-75, 404 P.2d 432, 433 (1965), for a recent expression of this principle applied to statutory construction. The adoption by Washington Territory of the common law, and contemporaneous

controversies over tide and shore lands. So far as the opinion discloses, however, and so far as can be discovered from the materials cited by the court, those controversies did not revolve around the question whether the line of ordinary high tide was to be fixed as of 1889.

Two indicators, neither very strong, point to recognition of a moving boundary rule by the framers. The constitutional convention was advised[164] of the decision of the United States Supreme Court in *Barney v. Keokuk*.[165] The decision had made clear prior to (1889) (a) that an accretion rule is generally followed in locating the high water line, and (b) inferentially that each state may decide for itself the applicability of such a rule. The convention, having used common law language, should have anticipated a common law result.

A second indicator touched on, but not evaluated, by the court is the concern of the early Washington legislatures with oyster beds.[166] Although the court might have judicially noticed that oysters cannot be grown in 1966 on what was tide or submerged land in 1889, but has since become upland by reason of accretions, it did not.

Finally, negative evidence is persuasive. If the constitution had declared in 1889 that the state claimed property to the line of vegetation as it existed on the date of statehood, there would have been a great scurry to preserve records of the location of that line. There is in fact no indication that either Mrs. Hughes' predecessor, or anyone else similarly situated, had cause to feel that November 11, 1889, had produced a great legal change in the definition of the upland boundary. The evidence in *Samson Johns* indicates that the Commissioner of Public Lands undertakes to find out where the 1889 boundary was located only when an occasion arises on which someone needs to know.[167]

3. Court Decisions: Ghione v. State. The Washington Supreme Court labels the concluding section of its opinion "Court decisions." To the most significant of these it gives the least attention.

In 1946, *Ghione v. State* adopted the moving boundary rule in a comprehensive opinion by Judge William J. Steinert.[168] The court

reenactment of that adoption in 1891, Wash. Sess. Laws 1891, ch. 17, might be treated as an additional reason for reading the accretion rule into the Washington constitution. See note 160 *supra*.

[164] JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 813 (Rosenow ed. 1962). The court cites to pages 809 *et seq.* of the *Journal*, 67 Wash. Dec. 2d at 792, 410 P.2d at 23.

[165] 94 U.S. 324 (1877).

[166] 67 Wash. Dec. 2d at 793, 410 P.2d at 24, citing Wash. Sess. Laws 1891, at 366.

[167] See testimony of Frank O. Sether quoted in text accompanying note 66 *supra*.

[168] 26 Wn. 2d 635, 175 P.2d 955 (1946). The state claimed both the original bed of

denied the state's claim to accretion lands on two navigable but non-tidal rivers. The course of one had been changed artificially; the other had ceased to flow when construction of the ship canal lowered Lake Washington in 1915.

The court in *Hughes* concedes that "read without reference to the particular facts before the court," *Ghione* seems to lend weight to respondent's argument in support of the [trial court's] judgment."[169] However, the court then says: "We have no quarrel with the decision as applied to the facts; we do not, however, deem it controlling of the instant case."[170] *Ghione* held that the "line of ordinary high water within the banks of all navigable rivers and lakes," referred to in the Washington Constitution,[171] is a line which moves with accretion.[172] The court in *Hughes* held that "the line of ordinary high tide, in waters where the tide ebbs and flows," words found in the same sentence of the constitution, means a line fixed in location as of 1889. The court in *Ghione* stated that the moving boundary rule applies to all navigable waters.[173] The *Hughes* opinion suggests no reason, rational or otherwise, for a distinction. The absence of any stated reason leaves doubt whether the *Hughes* holding can be limited to tideland boundaries.

The dissenting opinion says that the *Hughes* court "seeks to distinguish the *Ghione* case because it involved a river."[174] Maybe this is the distinction the majority had in mind when it said "facts," but several other facts might conceivably be involved—for example, that the river had been dried up when the Lake Washington ship canal substituted a new outlet for Lake Washington.

A rational distinction between *Hughes* and *Ghione* would require some articulated reason for applying a movable boundary rule to inland waters and a fixed boundary rule to tidal waters. An even more useful distinction would provide some basis for future decisions to determine, for boundary purposes, which waters are inland and which are tidal.[174a] The court's failure to distinguish *Ghione* except on "its

the rivers and the bed to which they had moved, an extreme position which invited judicial rejection.

[169] 67 Wash. Dec. 2d at 803, 410 P.2d at 29.

[170] *Ibid.*

[171] WASH. CONST. art. XVII, § 1.

[172] 26 Wn. 2d at 651, 175 P.2d at 965.

[173] 26 Wn. 2d at 645, 175 P.2d at 961.

[174] 67 Wash. Dec. 2d at 808, 410 P.2d at 32.

[174a] Wash. Sess. Laws 1927, ch. 255, § 141, at 547, provides:

> The commissioner of public lands is hereby authorized to locate in all navigable rivers in this state, which are subject to tidal flow, the line dividing the tide lands in such river from the shore lands in such river and such classification or the

facts," and the absence of any discoverable reason for distinction, leaves an unanswerable question: Did *Hughes* overrule *Ghione*?[175]

This kind of opinion writing ignores the reason that opinions are published: to advise judges, lawyers, and all who rely on the advice of lawyers what the law is. The uncertainty with respect to *Ghione* is particularly unfortunate because it applies to real property titles, where reliance on precedent is more important than in most other areas of the law.

4. Court Decisions: Pre-Ghione. The court invoked three pre-*Ghione* decisions in support of its conclusion that the tidal upland boundary became fixed in 1889:[176] *Eisenbach v. Hatfield,*[177] *Harbor Line Comm'rs v. State ex rel. Yesler;*[178] and *Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co.*[179]

The first two cases were decided within two years of statehood. Both are entitled, as the court said, to consideration as contemporaneous constructions of the then newly adopted state constitution. However, neither decision purported to decide the accretion issue presented in *Hughes.* They both provided a step in the rationale for *Hughes,* but a far shorter step than the stride taken in *Hughes.*

Eisenbach disposed of a claim to the exclusive use of tideland fronting the claimant's upland property on the ground that there are no riparian rights in navigable waters attaching to upland ownership.[180] As to the claimed right to future accretions, the court said:

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location of such dividing line shall be final and not subject to review, and the commissioner shall enter the location of said line upon the plat of the tide and shore lands affected.

Query whether this statute provides adequate standards for constitutional purposes to guide the commissioner in locating the line between tide and shore lands, and if so whether it confers upon the commissioner a power to make that determination for a purpose unforeseen and unforeseeable in 1927: to determine the line between lands subject to the *Ghione* moving boundary and the *Hughes* fixed boundary, both of which derive from article XVII, § 1 of the Constitution of 1889?

[175] There is reason to inquire: Could *Hughes* overrule *Ghione,* since whatever *Hughes* might have said about inland waters and what *Ghione* did say about tidal waters is in each instance dictum? This is a semantic quiddity involving definitions of "overrule" and "dictum." *Ghione* usefully indicated the ambit of that decision when it said it applies to both inland and tidal waters. *Hughes* casts doubt about the rule applicable to inland waters, but provides no basis even for conjecture on how that doubt may be resolved.

Query if the applicability of the *Ghione* rule to tide waters is appropriately described as dictum until a basis of distinction can be discovered. Certainly a decision applicable to the River Black is not dictum as to the River White unless a basis for distinction between the two rivers, other than their names, can be discovered.

[176] 67 Wash. Dec. 2d at 801-02, 410 P.2d at 27-29.

[177] 2 Wash. 236, 26 Pac. 539 (1891).

[178] 2 Wash. 530, 27 Pac. 550 (1891).

[179] 27 Wash. 490, 68 Pac. 74 (1902).

[180] 2 Wash. at 249, 26 Pac. at 542.

"We are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence."[181] The holding, most broadly stated, is the denial of a vested right to *future* accretions. *Hughes* and *Ghione* both required decision on the right to *existing* accretions.[182]

The rationale of the *Hughes* decision, insofar as it is based on *Eisenbach,* goes like this:

Major premise: Upland ownership carries no riparian rights in navigable waters.

Minor premise: The right to accretions is a riparian right. (And the burden of erosion a "riparian burden"?)[183]

Conclusion: Upland owners have no right to accretions in navigable waters.

Metaphysical distinctions can be drawn in defining "vested right."[184] The words have no fixed meaning independent of their context. The same is true of "riparian right." Concepts may be necessary, but the concept labelled "riparian rights" is too broad to be practically useful to resolve the accretion issue.[185]

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[181] *Id.* at 250, 26 Pac. at 543.

[182] The breadth of the distinction between what the court decided in *Eisenbach* and what it decided in *Hughes* is demonstrated by the *Eisenbach* court's quotation, 2 Wash. at 250, 26 Pac. at 543, from Taylor v. Underhill, 40 Cal. 471, 473-74 (1871):

> *The plaintiff, as a riparian owner, has also a right to accretions to his land,* and it is said that the claim of defendant will be a cloud upon his title to such accretions. But, as yet, there is no such property, and there may never be. He cannot ask the court to interfere in advance, and prevent a cloud being cast upon his title to that which may never have ["had" as quoted] an existence. [Emphasis added.]

The *Eisenbach* court describes this as a "more reasonable doctrine" than that of County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874), which declared that "the riparian right to future alluvion is a vested right." We add our own italics to that portion of the *Taylor v. Underhill* quotation which is diametrically opposite to the holding in *Hughes.*

[183] In 1915, the Washington court wrote in Hill v. Newell, 86 Wash. 227, 230, 149 Pac. 951, 952 (1915):

> This court held in the case of *Eisenbach v. Hatfield* [citation] that the state's title to the beds and shores of navigable lakes and streams is paramount and absolute, and that an abutting owner has no riparian or littoral right in the waters and shores of the stream.... The riparian right is a right to the use and accustomed flow of water. It is not a right in the bed of a stream *unless new land results from accretion, reliction or avulsion.* [Emphasis added.]

[184] See note 155 *supra.*

[185] It may be useful in shelving books, or in preparing chapter headings, to classify questions about rights to consume water, to pollute it, to swim, to fish, and to boat, with questions about ownership of land beneath navigable water. The questions are related. However, a doctrine which makes it impossible to answer a question about the right to consume water without necessarily answering a question about title to land beneath navigable water, or vice versa, is a monster of unreason.

Johnson, *Riparian and Public Rights to Lakes and Streams,* 35 WASH. L. REV. 580 (1960), demonstrates that generalization about "riparian rights" in Washington does not and should not dispose of the problems to which the generalization has been applied.

Harbor Line Comm'rs v. State[186] decided in the same year as *Eisenbach,* merely reaffirmed the conclusion that there are no riparian rights attaching to upland ownership.

The court found more solid authority in the third decision: *Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co.*[187] Plaintiff sued to remove a cloud from title to property on the Columbia River, claiming under a deed from the State of Washington granting it "shore land" described as "in front of, adjacent to, or abutting" a described federal meander line. Defendant claimed, under a donation patent from the United States of 1865, to the low-water mark. The meander line had been run above the line of high water because the bank had been perpendicular. Plaintiff prevailed in the trial court on the basis that the meander line was the upper boundary of the shore land.

The Washington Supreme Court reversed. High-water mark is the boundary, although the meander line may be "presumptive evidence" of the high-water mark. Since the meander line was above the high-water mark, the Washington rule that the meander line is the boundary of upland patented prior to statehood if below the high-water line was inapplicable.

The plaintiff also had an accretion claim:[188]

> It is not only shown that the meander line was originally run, if run at the place the trial court found it to be, above the line of high-water mark, but it is shown, as we have said, by uncontradicted evidence, that originally there were no shore lands at this point; that the line of high and low-water marks were practically coincident, differing only with the rise and fall of the river upon a perpendicular bank; and that such shore lands as may appear at that point now were caused in part by the erosion of the banks, and in part by the debris caught and held by the piling driven in constructing the old wharf erected by the appellant's grantors. This being true, the state had nothing at this place it could pass by a deed purporting to convey shore lands. *It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.*

The *Hughes* court quotes the emphasized portion of the passage just quoted.[189] It is the only prior holding in Washington which supports its decision. We find it puzzling because of the words which introduce

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[186] 2 Wash. 530, 27 Pac. 550 (1891).
[187] 27 Wash. 490, 68 Pac. 74 (1902).
[188] *Id.* at 499, 68 Pac. at 77. (Emphasis added.)
[189] 67 Wash. Dec. 2d at 802, 410 P.2d at 29.

the sentence just before that quoted in *Hughes:* "This being true . . . ." How much of the earlier recital is embraced by "this"? Vertical bank? Erosion artificially caused?

Conceivably, the fixed boundary rule stated was broader than *Hughes* because the old wharf had been built in 1880,[190] nine years before statehood. The bank may have lost its perpendicular character before 1889. Did the boundary become fixed against erosion even prior to statehood?

It would appear, in any event, that the language quoted in *Hughes* is contrary to the results under a usual accretion rule, unless the court intended to state a rule applicable only where changes had been artificially caused. The state owns the bed below the shore which is alternately covered and uncovered by water. Normally, erosion would—contrary to what the *Washougal* court said—enlarge the state's ownership.

Ghione did not cite *Washougal.* It is interesting that the Attorney General cited *Washougal* to the *Ghione* court,[191] but not on the movable boundary issue. Certainly *Washougal* is obscure. It devotes only the passage quoted to the accretion problem, cites no authority, and gives the issue none of the consideration to be expected in a case which set Washington law on a course different from that followed by most other states.[192]

Perhaps the most significant fact about *Hughes'* reliance on *Washougal* is that both *Washougal* and *Ghione* applied to rivers. In attempting to follow *Washougal* and distinguish *Ghione,* the Washington court attempted the impossible. These irreconcilables cannot—on this basis— be reconciled.

5. "Tideland Statutes Subsequent to Statehood in 1889." Under this heading,[193] the court treats statutes enacted in 1899, 1901, and 1929, very much as if its problem were one of statutory construction. However, the relevance of these statutes to construction of the constitution of 1889 is not expressly considered. The Washington legislature, under the due process clause of the fourteenth amendment, could not in 1899 or at any later date have determined retroactively that accretions formed since 1889 belonged to the state. Thus, the statutes are

[190] 27 Wash. at 495, 68 Pac. at 76.
[191] Brief of Respondent, p. 18, Ghione v. State, 26 Wn. 2d 635, 175 P.2d 955 (1946).
[192] Interestingly, authority cited by the *Washougal* court, 27 Wash. at 497, 68 Pac. at 77, on the effect of federal meander lines includes Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890), a leading case for an accretion rule.
[193] 67 Wash. Dec. 2d at 793, 410 P.2d at 24.

relevant at most as a legislative, and sometimes contemporaneous, construction of the constitution on an issue not within the legislature's jurisdiction.

a. The statute of 1899.[194] The court identifies this statute, enacted ten years after statehood, as "the first legislative recognition of accretion to tidelands."[195] In its current form, clarified but not substantively amended, this statute provides:[196]

> Any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold, by the state, shall belong to the state and shall not be sold or offered for sale until such accretions shall have been first surveyed under the direction of the commissioner of public lands, and the owner of the adjacent tide or shore lands shall have the preference right to purchase said lands produced by accretion for thirty days after the owner of the adjacent tide or shore lands shall be notified by registered mail of his preference right to purchase such accreted lands.

Since the statute deals with accretions added to the water side of tide and shore lands,[197] it does not apply to the accretion lands involved in *Hughes*. Furthermore, the statute applies only when the state sells or has sold tide or shore lands. No such sale had been made in the *Hughes* case. Sales in that county have been forbidden since 1901.[198]

The *Hughes* opinion rejects neither of the foregoing constructions of the 1899 statute, both of which were made in the *Ghione* opinion,[199] but it adds this exegesis:[200]

> We do not construe the statute in any sense to be a waiver by the state of its interest in tidelands. It is more logical to conclude that this is a legislative recognition of the state's claim to all accretion after 1889 whether the tidelands be sold or not. The statute is at least indicative of the legislative intent to claim accretion for the state under the limited circumstances identified.

In other words, the statute is inconsistent with a notion that ownership

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[194] Wash. Sess. Laws 1899, ch. 83.

[195] 67 Wash. Dec. 2d at 793, 410 P.2d at 24.

[196] WASH. REV. CODE § 79.01.492 (1956). The opinion quotes from the statute as enacted, Wash. Sess. Laws 1899, ch. 83, noting that reenactment made "a few minor changes" in the original.

[197] See Strand v. State, 16 Wn. 2d 107, 132 P.2d 1011 (1943); Ghione v. State, 26 Wn. 2d 635, 175 P.2d 955 (1946).

[198] Wash. Sess. Laws 1901, ch. 110; Wash. Sess. Laws 1929, ch. 78.

[199] 26 Wn. 2d at 650-51, 175 P.2d at 964-65. The *Ghione* court followed Strand v. State, 16 Wn. 2d 107, 129-30, 132 P.2d 1011, 1021 (1943), in declaring that the statute applies to accretion which occurs only after the state has deeded tide or shore lands.

[200] 67 Wash. Dec. 2d at 794, 410 P.2d at 24.

of accretion lands automatically follows the ownership of the lands to which the accretion is added.[201]

b. Public highway dedication statutes of 1901.[202] In 1901, the legislature in two separate statutes provided that two specified reaches of beach along the Pacific Ocean, including Pacific County where the Hughes property is located, should be a public highway forever open to the use of the public. "Highway," as the *Hughes* opinion points out, is not used to mean a road for automobile traffic, but a recreational area.[203]

The beach so dedicated is "between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be)."[204] On their face, these 1901 statutes appear to recognize the accretion rule, and much more clearly than the 1899 statute may have denied it. The words "ordinary high tide" are used in both the 1901 statutes and the constitution of 1889 to describe a boundary. The 1901 statute is express that the boundary these words describe is a movable line: "as such shore and beach now are or hereafter may be."

The court in *Hughes*, however, says that although the line described in the statute is movable, that line is not the line described in the constitution:[205] "The statute declares certain shore and tidelands a 'public highway forever.' It does not purport to reserve *all* state-owned tideland in the vicinity as a public highway." In other words, "ordinary high tide" in the 1901 statutes and "ordinary high tide" in the 1889 constitution mean different things: the statutes use the words to describe a movable line, and the constitution uses them to describe a fixed line. Different meanings of identical words are quite possible,

[201] Obenour, *Water Boundaries, Tide and Shore Land Rights*, 23 WASH. L. REV. 235, 244-45 (1948), calls this statute "the principal stumbling block to the solution of conflicting interests of waterfront property," and suggests that it may be unconstitutional. An upland boundary fixed as of 1889, and tide and shore lands with riparian rights, including the right to accretion (reversing *Ghione* but anticipating *Hughes*) would, he urges, protect property owners against all but the risks of erosion. *Id.* at 251-53. Mr. Obenour's work is a useful attempt to find a consistent rationale for law that has developed from piecemeal and somewhat random decisions. The "stumbling block" statute has received judicial attention only in cases which declare situations to which it does not apply, and in *Hughes* which finds it a source of principle of much wider application than the statute's terms.

[202] Wash. Sess. Laws 1901, ch. 105, applies to the Pacific Ocean from Grays Harbor north to the mouth of the Queets River. Wash. Sess. Laws 1901, ch. 110, applies to the area from Grays Harbor to the Columbia River. The former is partially codified in WASH. REV. CODE § 79.16.160 (1956), the latter in WASH. REV. CODE § 79.16.170 (1956). In 1935, the dedication was extended north from the Queets River to Cape Flattery. Wash. Sess. Laws 1935, ch. 54. This is partially codified in WASH. REV. CODE § 79.16.130 (1956).

[203] 67 Wash. Dec. 2d at 795 n.14, 410 P.2d at 24 n.14.

[204] The 1935 statute said merely "tidelands along the shore and beach," omitting the words "as such shore and beach now or hereafter may be," which appeared in the 1901 enactment. WASH. REV. CODE § 79.16.130 (1956).

[205] 67 Wash. Dec. 2d at 795, 410 P.2d at 24. (Emphasis in original.)

but it is extraordinary to find a statute so construed used to arrive at a construction of a constitution.

c. The 1929 authorization to sell accretion lands.[206] In 1929, the legislature authorized the Commissioner of Public Lands to sell land "lying above and on the land side of the highway reservations" established in the 1901 statutes.[207] The statute did not apply to land in Pacific County, where the Hughes property is situated, but it provides an indication of what the legislature in 1929 may have thought the 1901 legislature meant when it used the words "ordinary high tide" to describe the boundary of the dedicated beach.

If "ordinary high tide" in both the constitution and the 1901 statutes is a movable line, there is no tideland belonging to the state "on the land side of the highway reservations." And the Commissioner of Public Lands had sold some.[208] The dilemma is resolved by the court's construction which gives "ordinary high tide" two different meanings: a fixed line in the constitution, a moving line in the 1901 statute. This leaves the Commissioner with some accretion lands to sell.

The dissenting opinion discloses an unfortunate consequence of the court's construction.[209] That construction, wherever the coast is eroding, defeats the purpose of the 1901 dedication—to reserve to the public the beach wherever it may be located. If the landward boundary of the state's tideland is fixed by the constitutional provision, as *Hughes* holds, but the landward boundary of the dedicated highway moves inland with erosion, the beach will come to be located in an area which the state does not own and cannot dedicate to the public. The dissent describes the result:[210] "Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public, seemingly, would have to swim to enjoy its 'highway' and beach rights."

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[206] Wash. Sess. Laws 1929, ch. 78.

[207] Background of the 1929 act is apparently contained in an Attorney General's opinion in 1928 to the Prosecuting Attorney of Grays Harbor County, who had asked what to do about shacks occupied by clam diggers, beachcombers, moonshiners, and other undesirables in the accretion land consisting of waste sands formed by jetties at Grays Harbor. The Attorney General said this was all included in the "public highway" dedication, but could be abated as a public nuisance. 1927-1928 OPS. WASH. ATT'Y GEN. 779. The Attorney General's brief in *Hughes* says that the statute was a legislative response to this problem. Brief of Appellant, pp. 20-22.

[208] See Brief for Appellant, pp. 20-21:

> From 1929 to 1959 the State of Washington delivered over a hundred deeds under this enactment.... The greatest portion of the accreted lands from the north entrance to Grays Harbor to the Copalis River has been sold. Approximately 60 sales have been made in the Grayland area, south of the entrance to Grays Harbor.

[209] 67 Wash. Dec. 2d at 808, 410 P.2d at 32.

[210] *Ibid.*

Questions of construction of these statutes need detain us no longer. They reveal the absence of a clear and consistent purpose or principle entitled to receive weight as a legislative construction.[211] The Washington legislature could not in 1899, 1901 or 1929 have validly enacted: "The line of ordinary high tide referred to by Article XVII Section 1 of the Constitution of this State shall mean . . . ." Why should evidence of a confused and inconsistent legislative understanding of the constitution receive greater weight? The primary judicial function is to insure that statutes conform to the constitution, not to shape the constitution to conform to statutes.

6. "Administrative and Superior Court Interpretations" — A New Source of Law. This is another caption borrowed from the *Hughes* opinion.[212] The court says that the Commissioner of Public Lands has established that the boundary between upland property and state-owned land is "the line of ordinary high tide where it existed November 11, 1889." The court also recites that "over the years, 73 lawsuits affecting 322 private ownerships have been instituted against the state to establish this boundary."[213] None was appealed. All awarded the accreted lands to the state. The superior court judgments establish "a rule of property which has been relied upon and applied on many occasions when the state has sold tidelands pursuant to statutory authority."

We have been surprised to learn that "over the years" includes only years since the *Ghione* decision. The Land Commissioner's survey which the seventy-three judgments confirm to be the boundary also occurred after *Ghione*. *Ghione* did not overlook the superior court judgments. Rather the Land Commissioner and the superior court apparently overlooked or disregarded *Ghione*.

The Washington Supreme Court in 1966 follows the Commissioner and the seventy-three superior court decisions in preference to *Ghione*. In doing so, it adds nothing to the credibility of its own past or future

[211] The court quotes, 67 Wash. Dec. 2d at 796 n.15, 410 P.2d at 25 n.15, from a 1963 statute (Wash. Sess. Laws 1963, ch. 212) which it believes to be "the first legislative use of the terms 'line of vegetation' and 'mean high tide' as distinguished from 'ordinary high tide'":

> [T]hat portion of the public highway established by Laws of 1901, chapters 105 and 110 "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared *a public recreation area* and is hereby set aside and forever reserved for the use of the public." [Emphasis supplied by the court.]

On its face, the statute does not do much to clarify the moving boundary issue.

[212] 67 Wash. Dec. 2d at 798, 410 P.2d at 26.

[213] *Id* at 798-99, 410 P.2d at 26.

pronouncements about the law of Washington. It adds to the uncertainty of lawyers who must rely upon reported decisions of the Washington Supreme Court to advise clients about the law. Who can say what surprises may still lurk in unreported decisions which will constitute tomorrow's rule of property?[214]

The seventy-three unappealed judgments are res judicata, fixing the rights of the parties without regard to the *Hughes* decision. *Hughes* is unnecessary to protect a reliance interest of the parties. Perhaps there is a reliance interest by others not parties to the judgments,[215] but the court gives us no basis on which to answer that question. In any event, a rule of property should arise only from justifiable reliance. After *Ghione* in 1946 declared a moving boundary rule applicable to all navigable waters, reliance on a fixed boundary rule can hardly be called justifiable.

[214] Perhaps not a surprise, but nevertheless of substantial interest are judgments of the superior court of Grays Harbor County determining that the seaward boundary of accretion land sold pursuant to Chapter 78 of the 1929 laws is "a moving boundary which is the line of ordinary high tide as it now exists or may hereafter be." *E.g.*, Rohr v. Gordon, No. 49,113, Superior Court for Grays Harbor County, described as "Judgment between Plaintiffs and State of Washington, October 6, 1958." We have been told that this is a construction by the Commissioner of Public Lands and the Attorney General for all such classes of conveyance.

[215] Counsel for Mrs. Hughes explains the judgments in his brief to the Washington Supreme Court as follows:

> Counsel for respondent has represented plaintiffs in many of these actions and the westward location of these boundary lines in these instances was not as important as having a definite line wherever it may be. In past years water frontage in this area did not have sufficient value to justify appeals through the Washington courts and through the federal courts. None of these cases with two exceptions were adversary in character.

Brief for Respondent, p. 8. Judge Warner Poyhonen, who rendered the decision for Mrs. Hughes in the trial court, describes two of the judgments:

> One of the Superior Court cases in the exhibit is one of mine out of Grays Harbor County in '58. That is the Sunshine Mining Co. vs. Union Gas Development. I don't know if it is particular in point. I think all I had to do was decide where the line of vegetation had been on a certain date because under state law, title rested on the state permit and it was a factual question and neither party in that litigation was questioning the state's right or title or could they by reason of whatever rights they had, rested on those permits. I watched with considerable interest the Ocean Shores development. The lawsuit in Minard quiet title action involved several miles of ocean front. That didn't come before me. It was settled. Of course, that Superior Court decision established ownership in the State of Washington. I have never felt it was truly an adversary proceedings. What Minard did—he brought a lawsuit. I think part of the proceedings there was an effort to shut out some squatters out there, who probably had good title by adverse possession if Minard was owner of the property and probably had no rights if the land belonged to the State during all of those years. I don't want to go into the merits except this comment, if Minard owned the property actually, probably it wasn't a bad deal for him. Litigation through the Supreme Court of the United States might have cost him a lot of money. If there wasn't any question about the state's ownership, then it was state property beyond all question and the propriety of a sale of several miles of beach for $40,000 might be open to question.

Appendix to Petition for Writ of Certiorari to Supreme Court of the United States, pp. 30-31. Judge Poyhonen's decision was based on *Borax*.

C. *How Can the Vegetation Line of 1889 Be Discovered?*

The major problem in the *Hughes* case is not touched in the opinion. Based on the state constitution, the court declared a rule applicable to the entire state. The upland-tideland boundary is the vegetation line of 1889. How do we discover—how does anyone discover—where that line is?

The opinion contains the legal description of a line in front of Mrs. Hughes' property.[216] However, the connection between that line and the issues discussed in the opinion resembles the relation between the magician's "abracadabra" and the subsequent emergence of the rabbit from the silk hat. There is implicit the suggestion that the word produces the rabbit. But we have not observed the ectoplasm congeal into a rabbit, and we would not know how to duplicate the event.

We have quoted[217] Mr. Frank O. Sether's explanation of the vegetation line which was accepted by the United States District Judge in *Samson Johns*. His testimony was clear that the Washington Commissioner frequently determines where the 1889 vegetation line was. But so far as appears from the printed record (which only excerpts the actual testimony), Mr. Sether was not asked the crucial question: How do you find the 1889 line of vegetation?

A similar question was recently answered by a California official with similar responsibilities. He said, in effect: You can't get to the post office from here.

The occasion was a suit not unlike *Hughes*. The state sued to enjoin as a public nuisance a line of iron rails adorned by no trespassing signs erected by an upland owner on what the state claimed were public tidelands. The issue was the upland-tideland boundary. The trial court granted the relief sought, and declared that the upland-tideland boundary is "the ordinary high water mark of the Pacific Ocean as it may fluctuate naturally from time to time."[218]

An intermediate appellate court reversed. Sand deposited during the summers and washed away during the winters caused the described line to fluctuate as much as eighty feet annually. Such changes, the court said, "can hardly be gradual and imperceptible, and thus cannot meet the definitions of natural accretion and deliction [*sic*]."[219]

The court remanded for a determination of "an average, mean, or

[216] See note 42 *supra*.
[217] Text accompanying note 66 *supra*.
[218] People v. William Kent Estate Co., 51 Cal. Rep. 215, 217 (1966). See note 87 *supra*.
[219] *Id.* at 219.

ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line."[220] The Attorney General of California and the District Attorney of Marin County joined in an unsuccessful petition for hearing by the California Supreme Court in an endeavor to reverse the District Court of Appeal. They appended to their petition the following sworn declaration of the Honorable Francis J. Hortig, Executive Officer of the California State Lands Commission:

> I have broad experience and background in the problems of surveying coastal boundaries, and my official duties include the general supervision of such surveys throughout the State.
>
> The success of a concept of an "average, mean, or ordinary line of the shore" would be dependent upon the qualifications that:
>
> 1. Adequate records are available over a long period of time to fully investigate and analyze the history of the shoreline.
> 2. The shoreline is stable over a long period, and is neither prograding nor retrograding.
> 3. The shoreline is generally affected only by seasonal changes, and these changes are relatively uniform.
>
> Adequate records are generally not available to make studies of more than a small fraction of the California coast. The ability to determine former shoreline locations is dependent upon the abundance of historical records, primarily maps. In California, maps showing the shoreline generally come from:
>
> A. U.S. Coast and Geodetic Survey (formerly the U.S. Coast Survey).
> B. U.S. Geological Survey.
> C. Army Map Service.
> D. U.S. Army Corps of Engineers.
> E. State and Local governmental agencies.
> F. U.S. Bureau of Land Management (formerly the U.S. General Land Office).
> G. Private surveyors.
>
> Reviewing the available maps from these sources for a typical rural segment of the California coast, it is usually found that only about 4 or 5 maps show a given area of the shoreline, and those would usually come from sources A, B, and C. It would be fortuitous to obtain useful maps from sources D through G. The maps thus obtained would be deficient for the purposes of making the necessary comparative studies primarily in two ways. One limitation is that they would only show the shoreline at approximately 20 or 30 year intervals. The other shortcoming is the accuracy deficiency whereby the actual mean high tide line can be located with certainty to only within 33 to 100 feet or more of the

[220] *Id.* at 219.

indicated line. This lack of adequate maps makes it absolutely impossible to determine whether a beach, over along period of time, is advancing, retreating or is stable. Often the season of the year is not known for the background maps, and it is impossible to discern whether variations in different maps as to the location of the high tide line are caused by seasonal or long-term changes. Impracticality of fixing a line based upon a study of a short period of seasonal variations arises from the fact that many sections of the coast are undergoing long period changes, and in the absence of artificial corrections could change by several hundred feet within the next few decades. The available historical maps also usually show only the position of the mean of all the high waters, and do not provide the necessary information to permit an interpolation or extrapolation to determine the mean of only the neap tides. It does not follow, either, that present measurements of the beach profile could be applied as a correction factor to the old maps for the neap tide determination.

Mr. Hortig, a modest fellow except when duty compels him to be assertive about his qualifications, may read the *Hughes* opinion and infer that his counterpart in the State of Washington is more successful in reconstructing history than he has been. He will not find from the opinion, however, any hint of how the job is accomplished.

The unanswered question remains: Can the vegetation line of 1889 in fact be determined? If so, how?

III. The Source of Law Issue

We have thus far considered on their merits the two questions answered by the Washington Supreme Court when it decided that Mrs. Stella Hughes' upland boundary, under a title originating in the United States, is (1) the vegetation line (2) as that line existed on November 11, 1889. We now reach the third and overriding question: Did the Washington Supreme Court correctly decide that both answers are to be derived from construction of the Washington Constitution, a document on which the Washington Supreme Court ordinarily has the last word?[221]

[221] While the United States Supreme Court may of course declare a provision of a state constitution federally unconstitutional, it may in limited circumstances construe a state constitution contrary to the construction by the state's highest court. It did so in West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951), reversing a state court's decision which invalidated, on state constitutional grounds, the state's ratification of an interstate pollution compact. Whatever else may be said about this technique—and the concurring opinions said quite a bit in criticism—it is better than to create a hole in a state's constitution by declaring an essential provision invalid.

A decision by the United States Supreme Court in *Hughes* should go no farther than to hold the Washington constitutional provision unconstitutional as applied, leaving to the Washington court the first stab at the severability problem: *e.g.*,

The present inquiry presents two separate questions since the answer is not necessarily the same with respect to the vegetation line and accretion issues. A third question is common to both the first two: Is there a valid ground for distinguishing between federal ownership of the upland and non-federal ownership derived from a federal patent?

It is clear that the vegetation line issue presents a federal question. *Borax,* which the court of appeals thought controlled its decision in *Samson Johns,* states a proposition from which there can be no dissent:[222]

> The question as to the extent of this 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.

The boundary at issue in *Hughes* is a boundary between property granted by the United States and property owned by the State of Washington. If the laws of the United States and the laws of Washington conflict on location of that boundary, the supremacy clause resolves the conflict in favor of the federal right.[223] Were the State of Washington wholly free to decide where the boundary lies, the state could determine that it lies along the crest of the Cascade Mountains.

Decision that the boundary presents a federal question does not, however, dispose of the question whether state law generated by the Washington Supreme Court may be a source of federal law. A unani-

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would the *Hughes* decision remain applicable to establish the upland-tideland boundary of state school or swamp and overflowed lands conveyed into private ownership, although it is unconstitutional as applied to federally patented upland? Would an affirmative answer create an unreasonable classification void under the federal equal protection clause?

A federal ground of decision is suggested by the requirement of the Washington enabling act that the people "forever disclaim all right and title to the unappropriated public lands" within the state. 25 Stat. 676 (1889). In terms, however, the enabling act does not apply to the *Hughes* real estate, patented by the United States before statehood, and hence not, in 1889, "public lands."

[222] 296 U.S. at 22.

[223] U.S. CONST. art. VI, § 2.

"Source of law" is a phrase with inherent ambiguity. We use it in the second of the following contrasting senses:

(1) ". . . we find it to be clear that the *source* of the law governing the relations between the United States and the parties to the [FHA] mortgage here involved is federal. . . . Nevertheless state law is sometimes adopted to fulfil the federal policies involved." United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 382 (9th Cir.), *cert. denied,* 361 U.S. 884 (1959). [Emphasis in original.]

(2) James M. Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213, 221 (1934), urging that statutes of another jurisdiction may be sources of law sometimes more fruitful than appellate decisions of another jurisdiction. The Landis article is reprinted in 2 HARV. J. LEGIS. 7 (1965).

mous Supreme Court of the United States, less than a year prior to *Borax*, states this principle:[224]

> The construction of grants by the United States is a federal not a state question, [citations omitted] and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. [Citations omitted.] In construing a conveyance by the United States of land within a State, *the settled and reasonable rule of construction* of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.

Does the construction of the Washington Constitution presented by *Hughes* constitute a "settled and reasonable rule of construction" of the federal law? Is boundary—vegetation line or mean high tide line—"an incident" to the upland granted? Is the fixed or movable character of the boundary "an incident"?

Answers to these questions should determine whether the Washington Supreme Court had jurisdiction to decide the vegetation line issue as it did; they may determine its jurisdiction to decide the accretion issue as it did. The answers to both issues are not necessarily the same. Furthermore, the questions are not necessarily pertinent to the accretion issue. Where the United States has parted with all its interest in land before statehood, it is possible to argue that state law, *ex proprio vigore*, determines the legal consequences that flow from post-statehood events.

A. The Vegetation Line Issue: Source of Law

We find no escape from the conclusion that *Borax* and *Hughes* are irreconcilable. The mean high tide line of *Borax* and the vegetation line of *Hughes* are 386 feet apart, and so long as the United States Supreme Court adheres to *Borax*, the intervening 386 feet belong to Mrs. Hughes, not to the state of Washington.

One reading of *Borax* is that the Supreme Court rejected altogether the principle stated in *United States v. Oregon*[225] that state law may be a guide to the construction of federal grants. Another reading of *Borax* is that the location of the boundary of a federal grant is not what *United States v. Oregon* called "an incident to land"; it is the determinant of the ownership of the land itself. A third reading is that

[224] United States v. Oregon, 295 U.S. 1, 28 (1935). (Emphasis added.)
[225] *Ibid.*

California's neap tide rule is not a "settled and reasonable rule of construction." The third reading is the most difficult, because the *Borax* Court expressly refused to consider California statutes and decisions.[226] It refused to pass judgment on whether the California rule was either settled or reasonable.[227]

On any reading, *Borax* and *Hughes* conflict on the vegetation line issue. We say this with deference to the brave effort by the Washington Attorney General to distinguish the cases.[228] One ground of distinction he advanced is that *Borax* was merely paying deference to the views of the court of appeals on California law. The first *Wilbur* opinion, affirmed in *Borax,* can be read consistently with that view.[229] However, if this were the intention of the Supreme Court, the Chief Justice had unaccountable difficulty in finding appropriate words to say so. The Court made its view clear that California law was irrelevant.[230]

A second ground of distinction is based on the argument that there was no issue before the Supreme Court in *Borax* about the area above the line of mean high tide (as *Borax* used the term) and below the line of vegetation. The Attorney General told the Washington court that in *Borax* "the court believed that the 'physical marks' on the ground were below the mean high tide line of the tidelands in issue."[231]

We find no firm basis for any conclusion about what the United States Supreme Court believed about the location of the vegetation line or physical marks. The Court did not tell us. However, we would suppose that if a court holds that line X is the boundary, it must hold

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[226] 296 U.S. at 26.

[227] It is worthwhile to recall that Justice Brandeis reaffirmed "federal common law" as the source to resolve interstate disputes in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938), in an opinion for the Court delivered the same day as his opinion for the Court in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The reason for survival of interstate common law is that the Supreme Court is given the duty of decision and the law of neither state can be accepted as conclusive.

State law is a source of federal interstate common law, as it may be a source of federal law. "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand...." Kansas v. Colorado, 185 U.S 125, 146-47 (1902). State law is a primary source, nevertheless, of federal interstate common law. Wyoming v. Colorado, 259 U.S. 419 (1922).

A critical inquiry is why the *Borax* Court took its common law from English, Massachusetts, and New Jersey cases, 296 U.S. at 25, and refused to consider common law decisions of California, *id.* at 26 n.5.

[228] Opening Brief for Appellant, pp. 69-70.

[229] See note 83 *supra.*

[230] 296 U.S. at 26.

[231] Opening Brief for Appellant, p. 69. The Attorney General cites the summary of petitioner's brief, 80 L. Ed. at 10, and the Court's comments, 296 U.S. at 22, for this contention.

that line *Y* is not the boundary, regardless of who argued what alternative. There is little ambiguity in what the Supreme Court said on this subject. The boundary is the line established by the average of all high tides over the tidal cycle. The Court did not imply a qualification: "unless the vegetation line is inland from the line of mean high tide." If, on retrial, the district court had discovered a vegetation line 386 feet above the mean high tide line and issued a decree fixing the boundary at the vegetation line, we think it would have disregarded the Supreme Court's mandate.

Nevertheless, the Attorney General's argument opens a perplexing problem, unavoidable in appraising *Borax*. Whatever the United States Supreme Court may have thought about the location of the vegetation line with reference to the line of mean high tide, it was clearly aware that "neap tide" is below mean high tide. The definition of neap tide employed by the Court makes this clear.[232]

On principles which manifestly it was not the intention of the Supreme Court to alter, the states are free to establish any boundary *below* the high tide line, which marks the limit of what the states may claim. The *Borax* opinion expressed this principle when the Court wrote: "Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law."[233]

The Court cited for that statement *Barney v. Keokuk* which declared: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."[234]

The government's brief in *Samson Johns,* relying upon *Borax,* asserted the principle thus, with its own emphasis: "But while a State may thus *yield rights to* riparian owners, it may not *take from* riparian owners rights given to them by federal law."[235]

The paradox taxes credibility. The Supreme Court in *Borax* rejected a neap tide rule of state law, more generous to the government's patentee than the line of mean high tide which the Court adopted. Yet in the same decision, it reaffirmed with emphasis the unchallenged

[232] 296 U.S. at 23:
The range of the tide at times of new and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low as on the average." At such times the tides are known as "neap tides." "Tidal Datum Plane," U.S. Coast and Geodetic Survey, Special Publication No. 135, p. 3.

[233] 296 U.S. at 22.

[234] 94 U.S. 324, 338 (1877).

[235] Opening Brief for the United States, p. 16. (Emphasis in original.)

and unchallengeable proposition that the state need not claim for itself or its grantees land below the high tide line which marks the maximum of the state's ownership. We can conclude only that the Court did hold that the line of mean high tide established the boundary, but it did so in a decision so flawed with error that reexamination is demanded.

What conclusion should the Court reach as a result of that reexamination? Two possibilities consistent with *Hughes* are conceivable:

(1) Federal law uniformly requires the patentee's tidal boundary to be at the vegetation line.

(2) Federal law (a) embraces state law in determining a patentee's boundary, and (b) federal law incorporates the law of a state admitted subsequent to the federal patent.

We would reject the first possibility out of hand. If a federally compelled boundary is to be established in disregard of state law, the *Borax* line is better than the vegetation line, if for no other reason than that vegetation is a sometimes thing.

The second alternative involves three hurdles: (1) embracing state law in federal law with respect to the boundary; (2) doing so *nunc pro tunc* in the case of pre-statehood patents like that under which Mrs. Hughes claimed; and (3) determining that the vegetation line does not exceed the permissible limits established by a fair and rational federal law.

1. The First Hurdle. Factors favoring the incorporation of state law are persuasive. The major difficulty in establishing a boundary is not the formulation of a verbal formula, but the application of that formula to a line on the ground. *Borax* comes closest to a universally applicable verbal formula which will work even when there is no vegetation. Before it could be used, however, a decision would have to be made on the seiche problem. In addition, it is unlikely that the Supreme Court will concern itself with tideland boundary problems to the extent necessary to develop and maintain viable rules. Real property boundaries demand the maximum of legal certainty. "Certiorari denied" means merely that the Supreme Court will not decide the controversy today, but leaves the issues for decision on another day in another case between other litigants. Nor, since the problems are constitutional, can they be resolved either by act of Congress or of the state legislatures.

Problems of this type are best resolved by state courts with latitude to apply state rules. The decision should be influenced by practical

questions which are not susceptible of uniform answers. What are the characteristics which realistically distinguish beach from upland? A uniform federal rule, uninfluenced by conditions in each state, cannot provide a satisfactory answer. It is bad enough that an answer, flowing from the Washington Constitution, must be uniformly applied throughout a single state.

There is demonstrably no federal interest which demands a uniform upland-tideland boundary in fifty states. *Borax*, given a maximum application, does not purport to provide any such uniformity. Here are situations to which *Borax* does not apply:

a. Mexican or other foreign grants. A preliminary determination in *Borax* was whether Mormon Island was part of a Mexican grant. Had Mormon Island been included in a Mexican grant, California law would have been applicable.[236] This is anomalous, but well settled, and removes much of the California coastline from any compulsion of *Borax*.[237] One would suppose that where the boundary was established by treaty with Mexico, there would be not only one, but two reasons to treat its location as an exclusively federal question. Since state courts have freedom to shape the law where the boundary is the subject of both federal statutes and a treaty, one may well ask what compelling consideration deprives them of that freedom when only federal statutes are involved.

b. Non-federal uplands. Borax does not apply at all in the original states, or in Texas,[238] which had no federal public lands, except as the United States may acquire lands in such states. It does not apply to school lands, swamp and overflowed lands, or other uplands belonging to the state.

c. Exceptions in favor of the federally claimed right. States may yield their claims to upland owners, in whole or in part. Washington has done so by its judicial rule that the meander line is the boundary if seaward of the line of ordinary high tide and the patentee's right was initiated before statehood.[239]

d. Res judicata, estoppel, prescription, statute of limitations. These doctrines, mostly based on state law, may alter boundaries originally

[236] 296 U.S. at 15-16.
[237] See Carpenter v. City of Santa Monica, 63 Cal. App. 2d 772, 147 P.2d 964, 970-72 (1944) (hearing denied by California Supreme Court).
[238] See Luttes v. State, 159 Tex. 500, 324 S.W.2d 167, 192 (1958).
[239] See Narrows Realty Co. v. State, 52 Wn. 2d 843, 329 P.2d 836 (1958), and cases cited therein.

established by a *Borax* rule.[240] There has been no suggestion that state laws in these categories are inapplicable to land which has a history of federal ownership.[241]

e. Non-tidal waters. There is no analogue of *Borax* applicable to inland navigable waters.[242] The same rationale which rejects state law in determining the line of high tide would reject state law in determining the line of high water on non-tidal rivers and lakes. That no such rule has been developed on inland waters suggests strongly that none is needed on tidal waters.

2. The Second Hurdle. The second hurdle is a difficulty present in the *Hughes* case not encountered in *Borax*. The *Borax* patent followed

[240] In Kean v. Calumet Canal & Improvement Co., 190 U.S. 452 (1903), the Court refused to reopen the issue decided in Hardin v. Jordan, 140 U.S. 371 (1891). Mr. Justice Holmes' opinion for the Court observed, 190 U.S. at 460: "Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown."

[241] See City of Los Angeles v. Borax Consol. Ltd., 102 F.2d 52 (9th Cir.), *cert. denied*, 307 U.S. 644 (1939). Estoppel was based on state law.

[242] See Vermont v. New Hampshire, 289 U.S. 593, 605 (1933), characterizing *Howard v. Ingersoll*, discussed in text accompanying note 131 and in note 132 *supra*, as a "rule of interpretation." Compare Oklahoma v. Texas, 260 U.S. 606 (1923), where the Court applied the concept of *Howard v. Ingersoll*, but only after careful consideration of the appropriateness of the interpretation to the Red River, considered in the light of historical context and the physical situation.

Absence of any federal body of law applicable to interior waters is illustrated by a decision in 1940 by Assistant Secretary of the Interior, Oscar L. Chapman. State of Washington, 57 Interior Dec. 228 (1940). The Washington Commissioner of Public Lands appealed from the dismissal, by the Commissioner of the General Land Office, of the state's protest against the federal decision to survey islands in the Columbia River which were above tide water and claimed by the state.

The General Land Office held that the islands belong to the United States because they were above "ordinary high water mark" in the year of Washington's admission to the Union. The Washington Commissioner claimed they were under water at certain times of the year. The Assistant Secretary noted Washington decisions declaring the state's ownership of lands "up to the line of ordinary high water mark" but he was aware of no state decision that the state owns islands that "are at certain times of the year under water." Such a state decision would in any case not be binding on the Department of the Interior since the boundary, according to *Borax*, is a federal question.

The Assistant Secretary could find no clear definition of "ordinary high water mark" in the Washington decisions to resolve this federal question, but he found two state court decisions from Iowa and one from Oregon. He quoted, *id.* at 231, from Pacific Milling & Elevator Co. v. City of Portland, 65 Ore. 349, 133 Pac. 72, 78-79 (1913), which supplied this formula:

> The line of ordinary high water is the line to which the water rises in the seasons of ordinary high water or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character.

The stable character of the islands, their elevation and configuration, and geological structure established that the islands were above "the line of ordinary high water" at the date of statehood notwithstanding their omission from earlier government surveys. The Assistant Secretary affirmed the decision of the Commissioner of the General Land Office, subject to a further showing by the state within sixty days. He noted, however, citing *Borax*, that his determination did not preclude the state or its grantees from showing in judicial proceedings that the islands were not public lands of the United States.

statehood, but the *Hughes* patent preceded statehood. There was no state and hence no state law in existence at the date of the *Hughes* patent. An able writer has suggested that this is a conclusive objection to the incorporation of state law, and logically, much can be said for his view.[243]

However, we find nothing repugnant to any eternal verities in the notion that a federal patent may be construed by reference to future state law. True, at the date of a pre-statehood patent the future law is not a "settled and reasonable rule of construction" such as the Court referred to in *United States v. Oregon.* Nevertheless, the functional need for territorial and later state law to fill interstices is as great in one case as in the other. Federal recognition of changing state law has modern precedent to support it.[244]

3. The Third Hurdle. This brings us to what should be the critical questions: the nature of the vegetation line rule and the effect of its application when incorporated in what is necessarily federal law. We have presented in Part I our reasons for believing that a vegetation line rule is inherently reasonable because it most closely approximates the line one would draw if asked to divide the beach from the upland in terms of the uses to which each is put. Where nature has drawn this line by vegetation, the burden is heavy on whoever asserts he can do it better. A line fixed by average high tides of a non-existent waveless ocean is recommended only by greater universality and perhaps ease of application. If any choice is left to state courts, the vegetation line should be a permissible choice.

There is, however, a problem even if we accept the formula stated in

[243] Resort to the law of a future state to construe a federal patent may be a logical impossibility, but the United States Supreme Court has done the impossible. In Wear v. Kansas, 245 U.S. 154 (1917), the Court through Mr. Justice Holmes held that a pre-statehood patent to land adjoining the Kaw River in Kansas did not convey to the patentee, as against the state, the right to remove sand from the bed of the river which the Kansas Supreme Court was permitted to find, after statehood, navigable by the state test rather than by the federal test. The case was distinguished to the point of extinction in Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922), and consigned to uncited oblivion in United States v. Utah, 283 U.S. 64 (1931). The test for navigability for title purposes is now federal.

The course of the federal decisions from Hardin v. Jordan, 140 U.S. 371 (1891), to *Borax* is described by Bade, *Title, Points and Lines in Lakes and Streams,* 24 MINN. L. REV. 305, 310-27 (1940). Bade concluded, *id.* at 317 n.45, that the dissenting opinion in Kean v. Calumet Canal & Improvement Co., 190 U.S. 452, 461 (1903), had become the opinion of the Court in *Borax* with respect to the determination that the effect of a grant by the United States is a federal question. Opinions of the Court in *Kean,* Wear v. Kansas, *supra,* and Hardin v. Shedd, 190 U.S. 508 (1903), were all by Justice Holmes, who concluded in the *Kean* case that Hardin v. Jordan, *supra,* had been relied on too long to be challenged.

Professor Bade's view is unequivocal: "It would seem clear that state law can have no effect on grants made before statehood." Bade, *supra* at 317.

United States v. Oregon as applicable to the location of a boundary. Is the vegetation line a "settled and reasonable rule of construction" of a pre-statehood patent when announced by the Washington court in 1966? The objection to *Hughes* on this ground can be stated as a quasi-due process objection.

To illustrate the objection, let us assume that the vegetation line of Mrs. Hughes' property in 1889 was, as it is now, 386 feet above the mean high tide line as *Borax* defined the latter term.[245] If we assume that *Borax* correctly discovered the law, Mrs. Hughes' predecessor was the owner of a tract of land the moment before statehood with a 386-foot east-west dimension. The moment after statehood, the newly created state had become the owner of that tract. This transfer of ownership has the earmarks of a deprivation of property that not even Congress could expressly authorize or compel.[246]

One answer to this objection is that *Borax*, rather than *Hughes*, is

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[244] United States v. Sharpnack, 355 U.S. 286 (1958). Even the dissenting justices, Black and Douglas, conceded in this case, upholding the Federal Assimilative Crimes Act, that a delegation in which Congress determined the basic policy would be constitutional.

[245] See sketch in part I *A*, *supra*. The mean high tide line of 1889 was not located.

[246] See Tehan v. Shott, 382 U.S. 406 (1966), and Linkletter v. Walker, 381 U.S. 618 (1965), which raise the issue whether courts make or discover law. For views on the merits of prospective judicial decisions compare Comment, *The Prospective Decision—A Useful "Tool of the Trade,"* 38 WASH. L. REV. 584 (1963), with Mishkin, *The High Court, the Great Writ and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

In his opening *Hughes* brief before the Washington Supreme Court, the Attorney General cited, at 57-58, the *Washington Law Review* Comment, *supra*, for the following argument:

> We are mindful of the court's opinion in *Ghione v. State*. Nonetheless the court's opinion there concerned only rivers and streams. Insofar as that opinion may be deemed a modification of the *Eisenbach* doctrine, the opinion should not be given retroactive effect so as to disturb a rule of property that has been uniformly applied over a longer period of time to settle important private and public rights. Prospective overruling of past constitutional doctrine is a useful judicial tool [citing the *Washington Law Review* Comment, *supra*] which has been conscientiously justified [citing State *ex rel.* Wash. State Fin. Comm. v. Martin, 62 Wn. 2d 645, 384 P.2d 833 (1963)] and traditionally used by this court in the past. [Citing Miller v. Scarbrough, 108 Wash. 646, 651, 185 Pac. 625 (1919); General Mercantile Co. v. Waters, 127 Wash. 481, 221 Pac. 299 (1923); *cf. In re* McLean, 270 Fed. 348 (W.D. Wash. 1920).]

This argument suggests an interesting application of the prospective decision. One might suppose that *Ghione* overruled the "*Eisenbach* doctrine" in the context of accretion, retrospective as to rivers and prospective as to tidal waters. As noted in text accompanying notes 213-14 *supra*, *Ghione* preceded both the Commissioner of Public Lands' survey and the seventy-three superior court decisions which paid it no heed.

The ghost of Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864), may again take to the judicial playing fields. Justice Clark's opinion for the Court in Linkletter v. Walker, 381 U.S. 618, 624 (1965), noted that "as *early* as 1863 [term] this court drew on the same [Austinian] concept in Gelpcke v. Dubuque ...." (Emphasis added.) When the ghost appears, query which team will succeed in signing him up first.

the offender. The federal decision contemporaneous with the Washington constitution is *San Francisco v. Le Roy*,[247] which stated a vegetation line rule.[248] So, a bit more obliquely, did the Washington Supreme Court in *Baer v. Moran Bros. Co.*,[249] which was affirmed by the United States Supreme Court.[250] If a judicial decision can involve unconstitutional retroactivity, *Borax* is the offender.

To which the response might be that *San Francisco v. Le Roy* is the product of Justice Field's notion that vegetation line and neap tide line are one and the same thing, even though we know that on the *Hughes* real estate one is above and the other below the *Borax* line. Can we conjecture how Justice Field and his brethren would have resolved the problem if confronted by the record in *Hughes*, proving that neap tide and vegetation lines are in fact hundreds of feet apart?

The answer we prefer eliminates the need for conjecture. There is abundant basis for justifiable reliance on *San Francisco v. Le Roy*, the definition from which was incorporated in official instructions to Bureau of Land Management Surveyors as late as 1947.[251] There is good reason to deny to a state court the power to frustrate that reliance. At the same time, there should be no objection to a state court's decision which resolves the internal conflict in the federal precedent in favor of a vegetation line, neap tide line, or something intermediate.

The Supreme Court of Washington chose the vegetation line. It should be constitutionally permissible for it to do so. To substitute the judgment of the United States Supreme Court would be unfortunate unless that Court is prepared to devote substantial and continuing attention to what in essence is a local real estate matter.

B. The Accretion Issue: Source of Law

Samson Johns stated the accretion issue and its resolution in these terms:[252]

> No question of accretions was involved in Borax, the problem being the ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent. But the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this

[247] 138 U.S. 656 (1891).
[248] See text accompanying note 124 *supra*.
[249] 2 Wash. 608, 27 Pac. 470 (1891), *aff'd*, 153 U.S. 287 (1894).
[250] See text accompanying notes 58-60 *supra*.
[251] See text accompanying note 124 *supra*.
[252] 294 F.2d at 832.

> is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such title, "involves the ascertainment of the essential basis of a right asserted under federal law."

If we are correct that federal law should incorporate a state court's selection of the vegetation line, it should be even clearer that federal law should incorporate a state court's determination that the boundary became fixed in location on the date of statehood. We would emphasize "essential" in seeking "the *essential* basis of a right asserted under federal law." Obviously not all rights embraced in that bundle of rights which constitute ownership of real property can be determined by the federal grant. The legal consequences which flow from events occurring after the federal grant and after statehood should be for state law to determine. Determinations of appurtenant water rights are one example of deference to state law,[253] although there is a doctrinal dispute about whence come the rights.[254]

The court of appeals erred, we think, in classifying a right to accretions as an "attribute of title" beyond the influence of state law. A state can determine, we think, that future accretions belong to the state.[255] A line fixed against erosion provides at least some element of compensation for the loss of the expectancy. Compelling considerations of practicality demonstrate the error. If the *Samson Johns* conclusion is correct, and is applicable to land which the United States has conveyed, then neither Congress, nor a state legislature can provide a fixed boundary. Congress lost jurisdiction to do so when the United States parted with all that it owned; the state legislature never acquired

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[253] California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 147 (1935).

[254] See Corker, *Water Rights and Federalism*, 45 CALIF. L. REV. 604, 609 (1957); Morreale, *Federal-State Conflicts over Western Waters*, 20 RUTGERS L. REV. 423, 433-46 (1966).

[255] Oregon statutes claim for the state (a) the beds of all lakes meandered by United States surveys and (b) accretion or reliction since May 25, 1921. ORE. REV. STAT. §§ 274.420-.440 (1965). The Supreme Court rejected the first part of the claim—which in terms declares the lakes navigable and public—in United States v. Oregon, 295 U.S. 1, 27-29 (1935):

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control.... The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States.

The lakes in question being held non-navigable, validity of the statute insofar as it related to accretion was not determined; nor was the right in the lake bed of private persons, not parties to the action between the United States and the state.

such a power. Although the United States Supreme Court referred to the right to accretions as vested in *County of St. Clair v. Lovingston*, no such frozen rigidity as this can have been intended.[256] The United States or even a state can physically prevent the occurrence of future accretions without liability for compensation.[257] The state can clearly deny or permit, or permit on terms of its choosing, access to navigable water.[258] The right of access is, as we have seen, a major reason for an accretion rule.[259]

If the United States Supreme Court were ever to decide what the *Samson Johns* decision attributes to *Borax*, the Court would assume an impossible task. We may loosely refer to the accretion rule, but use of the definite article is unjustified. What accretion rule? The problems, variously resolved from jurisdiction to jurisdiction, are large. Their content is determined by conditions which physically vary from location to location. They vary with the passage of time which makes one solution appropriate in one century, another solution appropriate in another.

For example, how rapidly may a water boundary change and still be an accretion?[260] How are accretions apportioned where a water boundary, once straight, is now concave or convex?[261] Does accretion add to

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[256] 90 U.S. (32 Wall.) 46, 68 (1874):

> Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature.

The Supreme Court was meeting an argument that federal patents define plats of ground with fixed limits like Roman *agri limitati*. *Id.* at 53. The Court also declared that the new states have the same rights of sovereignty and jurisdiction over shores of navigable waters as the original ones. *Id.* at 68. The law of nature presumably extends to both original and new states.

[257] Miramar Co. v. City of Santa Barbara, 23 Cal. 2d 174, 143 P.2d 1 (1943). In an opinion by Justice Traynor the California court held that the city's breakwater which caused gradual washing away of the plaintiff's beach two and a half miles away, putting plaintiff out of the resort business, created no cause of action. Justice Carter vigorously dissented. *But cf.* Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921) (compensation allowed for erosion caused by public straightening of river channel).

[258] Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909), cited with approval in Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56, 64 (1921).

[259] See text accompanying note 151 *supra*.

[260] See Comment, 45 IOWA L. REV. 945, 950-52 (1960). This is a cogent and well-documented criticism of the assumption often made that all rivers conduct themselves in the same manner. The writer argues persuasively that the law should take into account the nature of the river. The same reasons dictate taking into account the divergent natures of ocean shores. See People v. William Kent Estates Co., 51 Cal. Rep. 215 (1966), discussed in notes 87, 218-20 *supra* and accompanying text.

[261] See Annot., 65 A.L.R.2d 143 (1959). See also Bade, *supra* note 243, at 327-47. Professor Bade's useful article demonstrates, but does not say, that state law *must* be an important source of whatever law resolves questions of apportionment.

The same problem is involved in apportioning tidelands purchased from the state described in the conveyance as "All tide lands of the second class, owned by the

the title of the upland owner whose property became riparian only by the process of erosion when the land is restored in the location which formerly belonged to someone else?[262] What happens when a gradually accreting island becomes linked to a gradually accreting mainland?[263] Is there a difference between accretions artificially caused and those naturally caused?[264] Must the answers be the same in a jurisdiction which treats the beach as public property and in a jurisdiction which does not?

These are not questions which are susceptible of uniform answers in every location in the United States. They are not questions which the United States Supreme Court can or should be expected to answer. The major problem of adjudication remains even after such questions are answered: application of the law to the facts. The state courts are closer to the facts. They may take judicial notice where the United States Supreme Court may not. They have time to devote to the task which the United States Supreme Court does not.

Even if the Supreme Court undertook the impossible, it would perform that function only in states and areas within states where title derives from the United States. Does nineteenth century history of federal ownership of the public domain in Washington provide a reason that Washington's real property law should differ from that in Texas or Massachusetts? Should history impose on some states a dual law of real property? Washington, no less than Massachusetts, should have the freedom to establish a consistent body of real property law.

The source of law for resolution of the accretion issue may be dis-

state of Washington, situate in front of, adjacent to or abutting" lands described by government survey. Spath v. Larsen, 20 Wn. 2d 500, 148 P.2d 834, 835 (1944).

[262] See Perry v. Erling, 132 N.W. 2d 889 (N.D. 1965), 79 HARV. L. REV. 442; Greeman v. Smith, 138 N.W. 2d 433 (N.D. 1965). Contrast Yearsley v. Gipple, 104 Neb. 88, 175 N.W. 641, 8 A.L.R. 640 (1919). *Cf.* Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied,* 383 U.S. 937 (1966) (Douglas, J. was of the opinion that certiorari should be granted).

[263] *Cf.* Williams Fishing Co. v. Savidge, 164 Wash. 50, 2 P.2d 722 (1931).

[264] See County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1864) (no difference); Carpenter v. City of Santa Monica, 63 Cal. App. 2d 772, 147 P.2d 964 (1944) (hearing denied by California Supreme Court) (there is a difference). In the latter case, California law under which the state owns artificial accretions, but not natural accretions, was held to be applicable because a Mexican grant was the origin of plaintiff's title. Query as to the result if the accretion had been to federally patented upland.

The scholarly opinion of Justice Raymond E. Peters (now of the California Supreme Court) disposed of the contention that *Borax* precludes application of the California rule. Justice Peters characterized *Borax* as deciding that "where title is deraigned from the United States ... the question as to the extent of the grant is to be governed by federal and not by state law." 63 Cal. App. 2d 772, 147 P.2d at 970-72. He assumed, without deciding, that the federal rule was otherwise as to artificial accretions. Federal cases were clear, however, that "as to patents confirmatory of Mexican grants the state and not the federal law controls." *Ibid.*

posed of on an alternative basis not available for disposition of the vegetation line issue. It may be unnecessary to resort to federal law at all. Once the land is patented, movement of the boundary after that date may depend exclusively on state law, and not merely on state law as a source of federal law. Prior to the effective date of the patent, the United States has a paramount interest in the property. After the patent, future events which determine whether the boundary moves are the subject of a paramount state rather than federal interest.

Hughes may be an unwise decision of the accretion issue. However, the responsibility to decide cases cannot be allocated among state and federal courts based on whether state courts decide cases wisely and well. If *Hughes* is in error, we nevertheless believe it is an error which the Washington court should be permitted to make.

C. Federal Ownership: Source of Law

One basis for distinguishing *Hughes* and *Samson Johns* is suggested in the *Hughes* opinion. In *Samson Johns,* the United States was treated as owner of the upland, whereas in *Hughes,* the United States was merely the source of title. Federal ownership, as distinguished from a federal source of title, might dictate a federal rule as to both vegetation line and accretion issues, but to no other property.

Clearly, the *Samson Johns* decision made no such distinction. *Samson Johns* was based squarely on *Borax,* where the upland owner merely derived title under a federal patent. Nevertheless, the possibility of a federal rule applicable only to federally owned property may prove irresistibly attractive. It offers a solution which makes federal law applicable where federal ownership makes the federal interest paramount; it makes state law applicable where the federal interest is only historic. It avoids the embarrassment of having a state statute deprive the United States of the right to future accretions to land which the United States owns. It also avoids the embarrassment arising from a conclusion that some private property in some states is beyond state legislative jurisdiction as to future accretions.

The *Clearfield* doctrine,[265] which originated in the discovery that federal law is applicable to federal checks, provides soil in which *Samson Johns* might grow if deprived of its roots in *Borax.* The *Clearfield* doctrine is sufficiently amorphous that confident prediction is impossible.[266]

[265] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[266] See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797

There are persuasive reasons, however, that a federal rule of real property boundaries, applicable only when the United States owns real estate, would be an undesirable solution to the *Samson Johns-Hughes* problem. Federal common law which was born in *Swift v. Tyson*[267] and expired in *Erie Railroad*[268] never applied to real property, and for very good reasons.

One reason, we think, relates to the necessity of certainty in real property titles. Federal common law is an eclectic composite of rules created by federal judges. Its content is uncertain until the Supreme Court speaks. What is the federal rule? We have seen that the federal land department in instructing its surveyors takes its instructions in significant part from state decisions.[269] It would add nothing but uncertainty if a federal court were free to reject a Washington decision applicable to Washington real estate in favor of an Oregon decision which supplies the ingredients of a federal rule.

Another reason relates to the desirability of making the United States, like every other land owner, subject to the rule that Blackacre's boundaries remain unaltered after its conveyance. If Blackacre is owned by the United States and is conveyed to *X*, *X* should have whatever boundaries were applicable to Blackacre before the conveyance. Otherwise, *Y*, owner of adjacent Whiteacre, has either an unjustified windfall or a cause for justifiable complaint, depending on whether the federal rule provides a more or less generous boundary than the state rule.

The facts of *Samson Johns* provide an illustration of why the United States must enjoy the same boundaries as its conveyees. Had the United States in that case delayed suit until after 1966 (when the restrictions in the trust patent expired), the heirs of Samson Johns would have been identically situated to the Borax Company and to Mrs. Hughes (except that the patent to her predecessor preceded statehood, a fact which we have urged should not have a controlling significance).

If federal ownership was the controlling distinction, the Samson Johns heirs were beneficiaries of a fortuitous decision that prompted

(1957); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1094-97 (1964).

Cf. Mason v. United States, 260 U.S. 545 (1923) (state statute applicable to determine damages for oil extracted from federal lands); Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956), discussed note 141 *supra*.

[267] 41 U.S. (16 Pet.) 1 (1842).

[268] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[269] See text accompanying notes 128 & 134 *supra;* State of Washington, 57 Interior Dec. 228 (1940), discussed in note 242 *supra*.

the United States to quiet its title before the trust restrictions in the Indian trust patent expired. Had the United States been reluctant to sue, the heirs could have done little more in their own behalf to stimulate federal action than to say please, or to write their Congressmen asking them to try to stir up the United States Attorney General. The fewer legal "rights" which depend for their existence on the exercise of fortuitous and uncontrollable governmental discretion, the better.

However, the tendencies of federal lawyers to treat federal property as different are strong. They are strengthened by institutional attitudes ingrained in branches of the federal service. These were exhibited dramatically in a recent controversy between the United States and the State of Utah over title to land exposed by the receding waters of Great Salt Lake.

The Salt Lake controversy revolves around competing claims to what may or may not be reliction land caused by the progressive drying up of the waters of Great Salt Lake. Most lakes have an inlet and an outlet and fluctuation of the lake surface is limited to a narrow range related to the elevation of the outlet. Great Salt Lake is the remnant of a vast inland sea and has no outlet. While its level has fluctuated greatly, the long-run trend of the surface is down, hastened in part because fresh water is intercepted and consumed before it reaches the lake. Surrounded by salt flats, the lake lacks physically defined banks. Even a modest decline in water level exposes thousands of acres of additional land.[270]

Since reliction land belongs to the upland owner, to the Department of Justice, the exposed land looks like reliction. Forty per cent of the surrounding land belongs to the United States. The private owners who hold the other sixty per cent naturally share that view.[271]

The controversy culminated, after several years, in an Act of Congress on June 3, 1966.[272] It calls for the establishment of a fixed

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[270] When the Mormon pioneers reached Great Salt Lake in 1847, its surface was at approximately 4,200 feet, and the water was 35 feet deep. Since 1847, the level has fluctuated between 4,211.5 feet elevation in 1872 to about 4,194.5 feet in November 1963. Its maximum surface area is 1,570,000 acres, its minimum area 600,000 acres less. S. REP. No. 1006, to accompany S. 265, 89th Cong., 2d Sess. 2-3 (1966).

[271] *Hearings on Salt Lake Meander Line, S. 265, Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs,* 89th Cong., 1st Sess. 21, 24 (1965).

[272] 80 Stat. 192 (1966). The United States is to convey according to § 2 by quitclaim deed "all right, title and interest of the United States in lands including brines and minerals in solution" lying below the meander line, expressly reserving to the United States all other minerals, § 3.

boundary[273] between state and federal ownerships. A conveyance to Utah of land below that boundary is to be made on two conditions: that Utah will convey to the United States its lands above the fixed boundary;[274] that Utah will either pay for what it receives (including negotiated land exchanges) or litigate over title to the land in controversy.[275]

Opposition to the bill came from two sources. After the Interior Department had come to recognize that a fixed boundary is a practical necessity in the administration of the federal resource,[276] the United States Department of Justice opposed it in intemperate terms as an "outright gift of an unassailable Federal title." Deputy Attorney General Ramsey Clark cited as the "unassailable" basis of this title the *Samson Johns* decision and an Interior Department opinion which

[273] Section 1 of the bill provides:

> The Secretary of the Interior shall within six months of the date of the passage of this Act complete the public land survey around the Great Salt Lake in the State of Utah by closing the meander line of that Lake, following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed area.

The survey of a portion of the lake was in 1883. S. REP. No. 1006, 89th Cong. 2d Sess. 6 (1966). Under Secretary of the Interior Carver testified that recovery of the shoreline as it existed at any time prior to a 1934 earthquake would be difficult. *Hearings on Salt Lake Meander Line, S. 265, Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs*, 89th Cong., 1st Sess. 127 (1965).

[274] Section 4 provides that conveyance by the state of Utah shall be upon express authority of an act of its legislature, but no reservation of minerals to the state is provided.

[275] Section 4 of the act provides that the price paid by Utah is to be "the fair market value, as determined by the Secretary, of the lands (including any minerals)" conveyed to the state, and the Secretary may accept "in lieu of money only, interests in lands, interests in mineral rights, including those beneath the lakebed, the relinquishment of land selection rights, or any combination thereof equal to the fair market value."

In § 5, Utah is given nine months either to request the Secretary of the Interior to determine fair market value, or to maintain an action in the Supreme Court to secure a determination of the right, title and interest of the lands conveyed to the state, and the price shall be determined in the latter event after conclusion of the suit.

Utah is given the right in § 6 to issue permits, licenses, and leases of the lands as soon as the agreement is made, without waiting until consideration or its manner of determination has been concluded. If the transaction then falls through, the United States succeeds to Utah's position with reference to the permits, licenses and leases.

[276] Under Secretary of the Interior John A. Carver, Jr. testified, *Hearings, supra* note 271, at 126, 127:

> Legal precedent based on the common law of riparian rights, as satisfying as it may be as demonstration in logic, is not helpful to an administrator seeking to know with exactitude the limits of his responsibilities in a situation like [that presented by Great Salt Lake.] ...
>
> As a practical matter, then, any line which the Congress would decide upon, based upon the level of the Great Salt Lake at any specific time up to the date of the enactment of this bill, would give an administrator the line he needs, but such a line for a date before 1934 could not be as accurately fixed as for a date since. That is simply because of the earthquake.

had indicated expressly that the issue is arguable. The opinion quoted Bureau of Land Management survey instructions which express the view that the accretion issue is resolved by state law, and the opinion further took pains to demonstrate that Utah law is in a wobbling posture.[277]

The other opposition came from private land owners. While there was never any effort to legislate away their claim to "reliction" land, they manifest deep concern about the effect of the legislation as a precedent.

The statute is a compromise. As enacted it "conveys" to Utah, but does not "confirm" the state's title as earlier drafts proposed,[278] thus avoiding any implication of congressional construction. For the private land owners, however, the legislation disclaims an effect on "any valid existing right or interests, if any."[279] "If any" is a thumb in the eye to the private owners. As enacted, the statute stoutly affirms that the United States has land to convey, that similarly situated private land owners may or may not have reliction land, and that Congress doesn't much care.

The legislation should not affect the issue whether private land owners have rights in the reliction land. Either they had or they did not have title to such land prior to June 3, 1966, and neither Congress nor

[277] Deputy Attorney General Ramsey Clark stated the position of the Department of Justice in a letter to the Chairman of the Senate Committee on Interior and Insular Affairs on June 18, 1965, S. REP. No. 1006, 89th Cong., 2d Sess. 17-18 (1966):

> If there were a real doubt as to the location of title to the relicted lands adjoining Great Salt Lake, this bill might be worthy of support as affording a practical and reasonable resolution of the problem. However, we cannot endorse an attempt at legislated compromise where the position taken by the Federal Government is clearly correct, and the proposed compromise would abandon that position and confer some benefit upon the proponents of an untenable theory.

His major citation, in addition to *Samson Johns,* is to the Department of the Interior's decision in State of Utah, 70 Interior Dec. 27 (1963). That decision is accompanied by an extensive analysis of the problem by the Director of the Bureau of Land Management dated 1961, 70 Interior Dec. at 31, which it affirms.

The "untenable theory" supporting Utah's claim to reliction land was sound doctrine in 1917 when the First Assistant Secretary of the Interior instructed the Commissioner of the General Land Office, 46 L.D. 68, 69 (1917):

> It must be held, therefore, that the ownership of all lands covered by the waters of [navigable] Owens Lake at the date of the admission of California into the Union was in the State of California, and that such of them as have been uncovered since that date are not in any sense public lands of the United States, and can neither be legally surveyed nor disposed of by the Federal Government, and that they did not, therefore, pass to the State under the swamp-land grant of September 28, 1850 (9 Stat. 519), and can not be patented to the state as such.

[278] 80 Stat. 192 § 2 (1966). See 112 CONG. REC. 4794 (daily ed. March 4, 1966); 112 CONG. REC. 7139 (daily ed. April 4, 1966); 112 CONG. REC. 10560 (daily ed. May 19, 1966), for earlier proposed drafts and discussion of them.

[279] 80 Stat. 192 § 2 (1966).

the state legislature could deprive them of title without compensation. Congress did not purport to do so. Nevertheless, statutes are a source of law, and of policy which shapes law, broader than the jurisdiction of the enacting legislature. A legislative recognition by both Congress and the State of Utah that a fixed boundary is a practical necessity is not helpful to the private claim to either present or future reliction. When the reliction claims of the private land owners reach the Supreme Court, if they are that fortunate, the history of the controversy furnishes a basis to predict that their case will be argued by their own counsel, not by the Solicitor General. The institutional zeal of the Department of Justice is stirred when federal ownership, not mere federal source of title is involved.

This prediction requires hedging. On October 10, 1966, just before this manuscript was released to the printer, the Supreme Court invited the Solicitor General to file a brief expressing the view of the United States in the *Hughes* case.[280] This request, prior to action on Mrs. Hughes' petition for certiorari, is significant. In *Borax*, no appearance for the United States was ever made.

The Solicitor General's brief, whatever he says, is likely to be a state document of importance. He is called upon to resolve initially a not unaccustomed dilemma, to decide to what extent he responds as the lawyer for a client who owns a lot of upland real estate, and to what extent as lawyer for a government with a troublesome problem in federalism.

In the former role, his choice is clear. Because it is hard to distinguish from *Samson Johns, Hughes* is not a helpful decision in maximizing the real estate ownership of the United States. He should ask that *Hughes* be reversed.

In the latter role, his choice is less clear. The United States government has small concern with either the accretion rule or the vegetation line rule where it has long ago parted with its entire interest in the upland. However, to permit *Borax* to be overruled or forgotten without a struggle might be a breach of duty to the client who owns real estate. It is the best case that client has, and to find a *Clearfield* rock on which *Samson Johns* may sit after *Borax* has been washed away is at best a chancy thing. Furthermore, it is not a matter which can be effectively argued in *Hughes*, where present federal ownership is not involved.

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[280] 85 Sup. Ct. 82 (1966).

Perhaps the Solicitor General can persuade himself that the *Borax* mean high tide rule and the accretion rule are so superior to the alternatives that the interests of the United States as an upland owner and the interests of everyone else are identical. If so, he may find that there is no conflict between his roles.

Whatever may be the appropriate view of the merits, it is hard to justify denial of certiorari. Denial would simply mean the continuation of an uncertainty which no one but the United States Supreme Court can resolve. Its most recent effort, in *Borax* in 1935, did not do the job.

IV. Conclusion

Our conclusion can be summarized in a sentence: There are no easy answers.

The paradox of *Hughes* is that the aspect of the decision easiest to defend on the merits, the vegetation line issue, is hardest to defend on the jurisdictional question. Federal law necessarily determines a federal patentee's boundary; the jurisdictional issue is how far that federal law may incorporate state law which determines that the tideland boundary is the vegetation line. The aspect of the decision the most difficult to defend on the merits, the accretion issue, is easiest to defend on the jurisdictional question. The decision determines that the boundary is fixed by the vegetation line as it existed in 1889, a fact unascertainable and not very relevant to 1966 conditions, even if ascertainable. However, state law, wise or unwise, should determine the legal consequences that flow from events which happen after the United States has parted with all it owns.

The hardest questions of all, however, are those which *Hughes* leaves with the legislature. Most of them will remain whether *Hughes* is affirmed, reversed or left in limbo by the United States Supreme Court.

First, what is the legislature's power? The decision on both vegetation line and accretion issues is a construction of the state constitution. The legislature cannot amend the state constitution, even though *Hughes* is based, in part, on acceptance of a construction of the constitution which the court attributed to the legislature. Furthermore, even the people cannot amend the constitution retroactively to deprive any person of property without due process of law, and purchasers of tideland surely have a constitutionally vested property right.

However, the decision as to where the beach begins should be made

legislatively. Ultimate answers rest on policy determinations which a court is not well-equipped to make. Facts on a record, supplemented to the extent judicial notice permits, do not provide an adequately informed answer, because those facts are largely confined to one piece of property in a particular location.

The legislature should be permitted to yield rights which the *Hughes* decision confers on the state, and nothing in article XVII section 1 of the constitution provides to the contrary. That section did not make tideland inalienable by the state. Conversely, the state can acquire rights for any public purpose upon payment of compensation. Where the beach has eroded, the tideland which *Hughes* gives to the upland owner can be acquired from any private person by purchase or condemnation. The legislature has power, in short, to do whatever in its judgment is necessary to protect and develop the beach as a public resource. *Hughes* affects only the cost, and hence perhaps the likelihood, of the state's doing so.[281]

What should the legislature do? This provocative sentence concludes the *Hughes* opinion: "All accretion subsequent to November 11, 1889 is owned by the state and may be sold or reserved as a public highway or public recreation area as the legislature shall determine."[282] We would hope that the legislature would reach a different judgment from that of its predecessors which disposed of tidelands. The importance of the beach as a public resource is hard to overstate. *Hughes* has served a desirable purpose in focusing attention on the problem.

If *Hughes* finally determines the issues for the State of Washington, it need not conclude even the issue of compensability. Mrs. Hughes and other upland owners were entitled to rely on *Ghione*. It is true that *Ghione* involved rivers and not the ocean, that what the court said about the ocean is dictum if a distinction between river and ocean can be found. Such a distinction would be hard to articulate, however, in an opinion which takes its vegetation line rule applicable to the ocean from Lake Pend Oreille in Idaho, and recognizes that reliance on real property boundaries requires that they be based on a rule of property.

[281] Whether for recreation or some other purpose, usefulness of the beach usually requires the acquisition of some upland. California acquisitions of land above the high tideline total about 165 miles out of approximately 1,500 miles of shoreline. Acquisitions of about 22,254 acres have cost $50,000,000. Letter of April 21, 1966 to the author from W. F. Grader, Deputy Administrator of Resources Agency of California.

[282] 67 Wash. Dec. 2d at 803, 410 P.2d at 29.

Compensability based upon reliance on something less than constitutional dogma has precedent. We would call attention to a great decision by the United State Supreme Court dealing with another problem of costs and compensability: *United States v. Gerlach Live Stock Co.*[283] In that case, the United States Department of Justice contended that the United States could acquire water rights for California's Central Valley Project without paying for them. The federal navigational servitude, they contended, makes navigable water a federal resource, which in effect already belongs to the government.

The Supreme Court avoided the constitutional issue, holding that Congress had not authorized the taking of water rights, compensable or not, without paying for them. Although the project was rendered more costly in dollars, *Gerlach* was a good decision because it probably read with accuracy the intent of Congress. It was a fortunate decision because it did not impose the cost of water rights on those who would have continued to enjoy them but for the project. It helped gain for the project the approval and satisfaction important to the success of any public undertaking, large or small.

The costs of conserving and utilizing the beach for the public benefit should be public costs. Constitutional concepts of what is property determine what the public must pay, but they do not necessarily determine the limits of what the public should pay.

We are not prepared to offer an opinion on what the public costs of developing the beach should include, even as limited to the Long Beach Peninsula. One relevant inquiry concerns the use to which the state puts the land in controversy, which the court decided belongs to the state. Preservation in its natural state, sale to commercial developers, or placing privies for the use of the public are all alternatives which *Hughes* offers to the state. The choice among them may provoke different degrees of enthusiasm among upland owners and local residents.[284]

Another relevant inquiry relates to the antecedents of *Hughes,* which

[283] 339 U.S. 725 (1950).

[284] The problem resolved by the courts is necessarily a problem of boundary. As resolved by legislation, a more imaginative decision is possible which may recognize that boundary is of secondary importance. The Submerged Lands Act of 1953, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1962), provided new boundaries for the states, but the problem calling for resolution was state versus federal rights to revenues from oil, which lies in subterranean pools not responsive to boundary-fixing decrees.

The pragmatic issue in *Hughes* and its aftermath is the disposition of 561 feet of what may or may not be beach. The upland owner's strongest equity is to compensation for anything which the state does to deprive that 561 feet of its status as open beach.

we cannot fully appraise. That decision appears to be primarily a ratification of a decision by the Commissioner of Public Lands, applied without much examination by the superior courts. The decision was made in disregard of the law earlier declared by the Washington Supreme Court. The process of its making had the lowest degree of public visibility until it emerged in 1966 as a rule which the Washington Constitution makes applicable to tidelands, and possibly to inland shore lands, throughout the state. We have listened to contradictory assertions about justifiability of the reliance on the Long Beach Peninsula where the facts were better known prior to 1966 than elsewhere in the state. Even a consensus on the Long Beach Peninsula that the Commissioner was more than generous to Mrs. Hughes and her neighbors would leave the *Hughes* decision a source of surprise to those in other parts of the state who may have relied on *Ghione*.

The Submerged Lands Act of 1953[285] compensated coastal states for their reliance on what turned out to be a mistaken view of *Pollard's Lessee v. Hagan*.[286] That act was passed after wrenching travail in the aftermath of *United States v. California*,[287] which set new seaward limits to the states' tidelands. To some, the submerged lands act is a giveaway; to others it remains as only partial restitution in the interests of justice.

On a smaller scale, *Hughes v. State* presents Washington with a similar problem.[288] Fact and opinion, jurisprudence and politics, are inextricably entwined in any answer to the question where the beach begins. The responsibility passed to the legislature and the people is more difficult than the Washington Supreme Court's decision. Although the United States Supreme Court may alter the nature of the legislature's problem, the beach will remain. With it will remain a responsibility, primarily in the state, for the wise handling of the upland owners' defeated expectations and for the wise use of a priceless resource.

[285] 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1962).
[286] 44 U.S. (3 How.) 212 (1845).
[287] 332 U.S. 19 (1947).
[288] We would leave no implication that the legislative solution to these problems adopted by Congress was necessarily a good model. The controversy related to oil. The solution was in providing new boundaries, although oil pools do not locate themselves in response to lawyers' boundaries. It might have been better to deal with oil revenues. An odd result of the statute is that somewhere beyond each state's seaward boundary there lies a federal area in which the law, for many purposes, is the fossilized version of the adjoining state's law as of August 7, 1953. 66 Stat. 462 § 4(2) (1953), 43 U.S.C. § 1333(2) (1964). See Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 37-43 (1953). The state statutes extant in 1953 are unrepealable by the state legislatures that produced them.

ADDENDUM

"MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE"

The Solicitor General responded to the Supreme Court's invitation of October 10 on November 14, 1966, with an eleven-page memorandum bearing the caption we have quoted. It is, as we predicted in type already set, a document of significance. It also contains reason for astonishment.

The *Hughes* decision by the Washington Supreme Court is characterized as having "held that federal law is inapplicable and that under the law of Washington the seaward boundary of ocean front property, at least when not owned by the United States, is fixed by the line of high tide on November 11, 1889—the date on which Washington was admitted to statehood."[289]

Immediately following that characterization, the Memorandum recites:[290]

> For petitioner, the practical consequence of the decision below is that the ocean front property which her predecessor in title obtained from the United States is now held to be some 560 feet inland. In the view of the United States, the case presents an important question of federal law, involving a source of serious friction in federal-state relations, which merits review by this Court.

Reason for astonishment is that the Solicitor General directs his analysis and argument exclusively to the accretion issue. The vegetation-line issue, which accounts for 386 feet of the 561 feet in controversy, is neither discussed nor recognized in the Memorandum except as it is implicit in the reference just quoted to "some 560 feet." We can only conjecture whether the Solicitor General failed to understand that the vegetation line issue was the major issue decided in *Hughes*, or intended to acquiesce so far as the Government is concerned in the state court's determination of that issue without saying so.

The memorandum directed to the accretion issue suggests reversal of *Hughes* based primarily on the *Borax* and *Samson Johns* decisions. The primary federal interest appears to be the interest of the United States as a real estate owner. The court is informed that Interior Department records (judicially noticeable?) "reveal that public *and*

[289] Memorandum for the United States as Amicus Curiae, at 2, filed pursuant to invitation in Hughes v. Washington, 87 Sup. Ct. 82(1966).
[290] *Id.* at 2.

acquired lands of the United States stretch along approximately 215 miles of the Washington coast (including Puget Sound and off-shore islands),"[291] and include holdings in custody of the Bureau of Sport Fisheries and Wildlife, the National Park Service, and the Bureau of Indian Affairs. Further, "[a]n additional 72 miles of coastline are presently being acquired for the National Park Service. As to acquired land, the United States presumably obtains no greater rights than those enjoyed by its grantors."[292]

The Solicitor General reads *Hughes* as holding that "in Washington, the United States lacks the power to convey property bounded by the line of mean high tide as that line may be gradually modified by natural forces."[293] He asserts that "the precise question considered by the courts below and presented by the petition [for certiorari] here is whether the physical limits of property conveyed under a federal patent can be altered by State law."[294]

The Solicitor General answers the issues as he thus frames them. The Supreme Court has already created a well developed body of principles, constituting federal common law, which resolve the controversy. A federal patent conveys "a vested right to an ambulatory seaward boundary" and the Washington Court "has purported to deny petitioner an attribute of title which the United States intended to convey." Finally, "the State's claim, insofar as it rests on an assertion of its sovereign title to tidelands, derives from and is measured by federal common law. This is so because its title to tidelands is based on its constitutional right to stand on an equal footing with other States."[295]

The Solicitor General does not deal with the extent to which the United States Supreme Court decisions creating federal common law purported to apply principles of state law, which the states are free to determine for themselves, nor the implications of a federally enshrined federal common law which may be unreachable by any legislative body.

The Solicitor General misstates the issue, we think, when he describes *Hughes* as deciding that the United States lacked power to prescribe the accretion rule which would apply to land it has

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[291] *Id.* at 3 n.l. (Emphasis added.)
[292] *Ibid.*
[293] *Id.* at 3.
[294] *Id.* at 6.
[295] *Id.* at 9.

conveyed until the end of time. The answer to that issue certainly favors the United States. The question which requires answer, however, relates to when, how, and whether the United States exercised that power.

Two brand new messages in the Memorandum may have far reaching significance:

(1) The equal footing argument, coupled with expression of concern about the boundaries of lands which the United States is acquiring in the State of Washington, identifies the federal contention as one which might be as applicable to Texas as to Washington.

(2) A footnote[296] indicates that in future litigation the United states as party litigant—and neither the State of Washington nor persons similarly situated to Mrs. Hughes—may be the big winner:

> It should be noted that the patent itself does not appear to have been put in evidence below. We assume, as the courts below assumed, that the patent in some appropriate way described a tract bounded on its seaward side by the line of high tide. We also assume that, between the time of the survey in which the tract was laid out and the time of the patentee's entry, there had not been such substantial accretion as to put the patentee on notice of the government's mistake in conveying a tract inequitably larger than those conveyed to other patentees where similar tracts were intended. See *Madison* v. *Basart,* 59 I.D. 415.

The Solicitor General's footnote must be read with reference to Under Secretary Chapman's decision in *Basart* in 1947, which stated a "well-established" exception to the rule that the water line and not a meander line is an upland patentee's boundary: ". . . if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within that meander line.[297]

The Washington court's sketch shows all of Mrs. Hughes' land to consist of accretion formed since 1859. How the *Basart* doctrine may be applicable to her real estate, if at all, is unclear. However, the Solicitor General's footnote serves no conceivable purpose other than to stake out a claim, on some state of facts, that neither Mrs. Hughes

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[296] *Id.* at 9 n.6
[297] 59 Interior Dec. 415, 421-22 (1947).

nor the State of Washington, but rather the Government of the United States, is the owner of the accretion land in dispute.

A firm prediction is that the *Hughes* litigation will ultimately terminate either in favor of Mrs. Hughes or of the State of Washington. The winner is now on notice that its claim is subject to one which may be asserted by the United States, which asks the Supreme Court to remember the *Basart* doctrine.

Basart is not particularly impressive, either as doctrine or as authority. Its adoption by the Solicitor General, however, is both impressive and portentous. The Solicitor General's Memorandum declares that a movable boundary is a fundamental and constitutionally protected right of a patentee from the United States, but weakens that position by a gratuitous footnote which adds, in effect: unless the United States is the owner of intervening accretion land.

The footnote assertion of a federal claim of ownership of accretion land, equivocal as it is, could be the first shot in a major legal war. If so, the firing of the shot rather than the modest caliber of the weapon employed, is the fact of major significance.