Boundary Law Issues in Washington

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A Brief History of Boundary Law

Boundaries are closely tied to the progress of civilization. When land ownership or boundaries are disputed, progress is stifled, development slows and investment stagnates.

Records of individual tracts and parcels were introduced by the Egyptians. As an arid country, Egypt is dependent on the Nile River for its existence. Prior to the development of irrigation, the yearly flooding of the river was relied upon to sustain life. Since initial records of ownership were based on actual surveys and the annual flooding obliterated the landmarks and caused considerable conflict and confusion between neighbors, extensive retracements and resurveys were required. Because surveys were costly and time consuming, duplicate records were placed in the provincial archives where tax records were maintained, and in the royal treasury. The ancient Greeks worshipped the god Terminus, the Protector of Boundaries. Boundaries were stones or stumps with marks carved into their surface: the terminal or end point of a line.

Showing faith in Terminus was said to bring peace to communities and stability to its boundaries. In fact, the Greeks celebrated the central role of boundaries with the Festival of Terminalia on February 23. Landowners met at common boundary stones, placed a garland of flowers, feasted on cakes and honey and sacrificed a pig or a lamb.

Later, as the Roman Empire rose to prominence, the Romans appropriated the goddess and made her into a God. Rome's founding included the erection of a temple to Terminus on one of the seven hills. Rome spread a lasting influence over Europe and from Africa to the Middle East. As the strength and influence of the empire faded, breaks in its influence and control became evident. The British Isles was a remote province of a dying Roman Empire. Invaders from the north landed and brought death and destruction to a once prosperous land. By the fifth century,

England was under control and domination of a mixed group of Anglos, Saxons, Jutes and Danes. Islands of control and conflict emerged, with each an entity unto itself.

Modern English development of boundaries probably started in 1066 when William of Normandy, a.k.a. William the Conqueror, gained the crown of a defeated England by right of conquest. William and his Normans brought England efficient administration, a sense of order, and legal minds and principles. One of his first acts was to establish a strong central government with himself as its king. William considered all lands his personal property and all individuals his possessions as tenants or subtenants of him. Land tenure became the foundation of his feudalism. He considered the natives as primitives who would not accept his changing their common ways.

Both the King and the tenants needed land for survival. For the tenant, it meant food; for the King, it assured his tenure on the throne. Land was power. Life was cheap. A transgressor would receive a more severe sentence for the destruction of property than for the destruction of life.

Each tenant owned only those rights that were granted by the King. Possession, tillage and water were but a few. In 1086, William had gained such power that he desired to have an accounting of his wealth. He directed that five justices from each shire (county) inventory all the real and personal property. In concept and execution, his inquest was nothing more than a revival of the old Roman institution of census taking. The results were collected in two volumes that became known as the *Domesday Book*. The names of landowners with their described lands, the value of the land and livestock, the number of servants, and details of property were all included. While William was in control, lesser possession or tenure was assured. It is from this time that the modern statements: "*Possession is 9/10ths of the law*" and "*A man's home is his castle*" find their meaning.

The early nomadic tribes of Europe and Asia and Native American tribes of the United States had no concept of individual land ownership. Land was held for common usage of all members of the tribe, and no specific form of ownership was recognized.

Well-defined and delineated boundaries are required to limit the extent of territorial claims between and within nations. Boundaries in and of themselves function as dividing lines, starting with property lines between contiguous neighbors or farms that are guarded by a simple fence separating them, and extending to national and international boundaries identified by legal treaties and guarded by armies.

Source of Boundaries in Washington

"A 'boundary' is the dividing line between two parcels of land. The boundary lines comprising the four sides of a piece of property are identified by various descriptive elements, such as monuments, courses and distances, area, or by a combination of such elements."[1]

The boundaries of a given parcel of land are usually established by survey and included as the legal description in the instrument of conveyance. This description may take different forms. A metes and bounds description starts at some agreed point, reaches the land to be described, and then circumscribes it by a series of "calls," each of which describes a line by the direction ("bearing" or "course") and the "distance" between that line's beginning and ending points (metes), or refers to natural or manmade monuments (bounds), or a combination of the two. This

method is used when the subject parcel is not part of a recorded subdivision or plat, or is so situated as to make it impractical to describe by range, township and section.

The other common method of description is reference to a recorded plat or subdivision, by lot and/or block and recording number. Where a plat shows lots separated by dedicated streets, the longstanding rule in Washington is that such a conveyance creates a rebuttable presumption that the grantor intended to convey to the center of the street.[2] In *Christian v. Purdy, 60 Wn.App.* 798, 808 P.2d 164 (1991), for example, a landowner laid out a subdivision in the middle of his tract of land, dedicating a road along the edge of the subdivided part and abutting the unsubdivided part. The court held that the grantees who abutted the road, the lot owners in the subdivision on one side, and a grantee of the unsubdivided remaining land on the other side, each owned to the center of the road.

This rule rests on the presumption that a grantor would not ordinarily intend to keep title to a narrow strip of land half the width of the street. The presumption is rebutted, however, when the conveyance is by a metes and bounds description and one side coincides with the edge of the street.[3] Where the street in question has been vacated and the vacation made of record, a conveyance by lot or block does not carry to the center of the former street.[4] The same rules would appear to apply to conveyances of land bordering private road easements and or railroad easements.[5]

Surveys

A comprehensive discussion of surveys is beyond the scope of this writing, but some basic concepts are necessary to provide context for a discussion of general boundary principles. In the state of Washington, all land descriptions derive from one of a series of surveys known as "Government Surveys," conducted prior to our statehood. All land titles in Washington originated in a federal patent or grant, and since the land descriptions in these patents and grants were necessarily based upon a federal government survey, the government surveys provide the original source of all Washington land descriptions.

Government surveys use a rectangular system, which utilizes baselines and principle meridians as the basis for all legal descriptions. Meridians run true north and south, and base lines run true east and west. Washington is covered by one survey, adopted in 1851. In this survey, the meridian is known as the "Willamette Meridian" (abbreviated "W.M." in land descriptions), and the base line is sometimes called the "Willamette base line." The meridians and base lines run at intervals of six miles, forming "townships" of 36 square miles each. These townships, in turn, are divided into 36 one-mile square sections, then further divided into quarter sections. Stakes or monuments mark the section corners. A "monument" is a permanent natural or artificial object on the ground. Natural monuments may include objects such as mountains, streams and trees. Artificial monuments consist of marked lines, stakes, roads, fences or other manmade objects.[6]

Surveyors who conduct government surveys, or who do survey work based upon them, are guided by *The Manual of Surveying Instructions for the Survey of the Public Lands of the United States* (1973), prepared by the Bureau of Land Management. The Washington Administrative Code requires that the Bureau of Land Management Manual be followed in the subdivision of sections and in the reestablishment of lost government survey corners.[7]

It is a well know fact, of which courts have taken judicial notice, that the government surveys were seldom correct.[8] Nevertheless, a point that has been located on the ground on a government survey is conclusive, and these surveys are not subject to collateral attack despite evidence of substantial error.[9] Therefore, despite the sometimes questionable accuracy of the government surveys, they are to be followed, absent proof of fraud.[10]

Occasionally, the monuments that could be used to find or establish boundary lines have been lost or obliterated. A monument is said to be "lost" when its location is not known and cannot be established by evidence. A party who contends that a monument is lost has the burden of proof on that fact.[11] An "obliterated" monument is one where, although there may be no physical trace remaining, its location can be reconstructed by evidence.

"Meander lines" are straight-line segments run by surveyors, which approximate the curving boundary of land lying along the edge of a body of water. The lines are straight simply because it would be difficult or impossible to survey and describe the irregular edge of a body of water. In the original government surveys, the purpose of meander lines was to allow mathematical computation of parcels of land the Government intended to convey. Importantly, a meander line is not the boundary of the uplands bordering on a body of water. The actual shore of the body of water is the boundary. The rule is well established that a deed that describes land as running to a meander line is presumed to convey to the actual water boundary.[12]

Riparian Rights and Waterways as Boundaries

Subject to ownership or rights of the Federal Government, the state of Washington owns title to all of the waters within the State, together with all tidelands and the beds and shores of all "navigable" waters, both tidal and fresh.[13] Navigable waterways are those that are suitable for commercial navigation or that could be made so with reasonable improvements.[14] All tidal water, where the tide ebbs and flows, is "navigable," whereas bodies of fresh water may be either "navigable" or "nonnavigable."

Under Washington law, the term "riparian" is used to refer to a property owner whose land has at least one boundary that is the shore of a body of water. Riparian land may be bounded by tidal water or by a freshwater river, stream, lake, or pond. Ordinarily, a riparian owner takes title by an instrument that describes his land as going "to" or "along" a named body of water. The land of a riparian owner is referred to as the "upland," and the riparian owner is referred to as the "upland owner."

Because navigable waterways are generally owned by the State, whereas as non-navigable waterways are generally owned by the adjoining upland property owners, the distinction between navigable and non-navigable waterways is of obvious importance from the standpoint of boundaries. However, it should be kept in mind that the state's title to the shorelands of navigable waterways is alienable, and in many cases the state has conveyed the title to the so-called "beach rights" to the adjacent upland owners, who have preference rights to purchase shorelands in locations where the state decides to sell them. The shorelines of non-tidal waterways are owned by the upland property owners to the high water mark.[15]

Whether water is navigable is a question of fact, based upon the facts of each case. For example, evidence that a river or lake was used for commercial transport by boats, barges or rafts tends to establish navigability.[16] On the other hand, evidence that a body of water is too shallow for

regular commercial use and has not been used for commercial purposes, but rather has been used regularly only for recreational purposes, establishes that it is not navigable.[17] Although to be navigable, a given body of water must be capable of regular navigation, it is sufficient to show that navigation is possible only seasonally, provided it is capable of navigation in its natural state (i.e. not simply because of artificial dredging or improvements).[18]

The "bed" is the land under the water beyond the "shorelands," (also called the "tidelands" on tidal water) or the "beach." Generally speaking, the shorelands lie between uplands and beds. On tidal water, tidelands extend between the line of "mean high tide," sometimes called "ordinary high tide," and the line of "extreme low tide." [19]

Measuring the line of "mean high tide" is not a simple matter, and there is more than one way to do it. One general method is to make a mathematical calculation of surface levels from United States Coast and Geodetic Survey figures, striking the mean of all "high tides" over a complete tidal cycle of 18.6 years. The other general method is to measure the "vegetation line," which is the line impressed upon the shore by salt water, where upland vegetation begins to grow. Vegetation, however, is not visible in some locations.[20]

A conflict exists between the method used by the United States Supreme Court and that used by the Washington Supreme Court to establish the mean high tide line. In *Borax*, the U.S. Supreme Court adopted the mathematical-calculation rule.[21] The courts in Washington, on the other hand, have adopted the vegetation line as the point of mean high tide.[22] Consequently, as to federally owned uplands and uplands whose private ownership is derived from a federal patent, the mathematical rule applies[23], and as to state owned uplands or privately owned uplands derived from a state deed, the vegetation rule applies.

On fresh water, shorelands lie between the lines of ordinary seasonal high and seasonal low water.[24] Shoreland designations are not likely to be significant on nonnavigable freshwater bodies, since the State of Washington does not claim the shorelands or beds, which normally are owned by the adjoining riparian owners, but shorelands may be significant on tidal water or navigable freshwater bodies, since the state owns the beds.

When upland owners own shorelands, the side boundary lines of each owner's shorelands extend outward from the end of his upland sidelines, across the shoreland, to the low-tide line. This generally works well on a straight beach that runs more or less parallel to the seaward boundaries of a line of adjoining upland parcels. Where the shore curves, however, it would not work to run side lines perpendicularly, since they would cross over one another. To solve this problem, the court in *Spath v. Larsen* held that, when upland owners own shorelands on a concave bay or cove, each will own that portion of the shorelands on the bay or cove that is proportional to his portion of upland ownership on the entire bay or cove.[25]

The conveyance of a parcel "to" or "along" either side of a non-navigatable stream is presumed, absent clear language in the deed or clear parol evidence to the contrary, to convey title to the "thread" of the stream, which is the deepest point in the main channel.[26]

On a nonnavigable pond, the riparian owners are presumed to own the shorelands along with a pie-shaped portion of the bed, extending from the ends of their upland sidelines to the center of the pond.[27] Where a pond is an irregular shape, the "center" is to be determined based upon a formula.[28] Each riparian owner around a nonnavigable pond, however, has the right to make

reasonable use of all the water for fishing, boating, swimming, and other similar activities.[29] When there is a call in the conveyance of riparian property to a meander line, the presumption is that it was the intent of the grantor to convey title to the actual line of high water or mean high tide on a navigable body of water or to the thread or center on a nonnavigable body of water.[30] While not impossible, it requires strong evidence of a contrary intent to overcome this presumption.[31]

Accretion, Reliction, Erosion and Avulsion.

Waterways present a unique problem from the standpoint of boundary law because they are subject to movement and change, which may occur slowly or in some cases very rapidly. The basic common law principles are that a gradual, imperceptible movement of a water boundary changes the boundary of land that bounds upon it, whereas a sudden or "avulsive" change does not change the boundary.[32]

"Accretion" is the gradual and imperceptible accumulation of land by natural causes out of the sea or a river, usually caused by a silting up of soil that extends out from the shore or a gradual uplifting of the shoreline by geological forces. With a stream, accretion along a shore may be caused by silting up or by a gradual movement of the entire stream. Erosion is a gradual subtraction of dry land. "Reliction" is the opposite of accretion. It is the gradual exposure of land due to the permanent recession of a body of water. Thus, when an entire stream gradually moves its location, accretion will occur on one side and reliction on the other, and the boundary shifts with it.[33] The policy underlying accretion rights is to preserve the riparian rights of the upland owner, who would otherwise lose those rights if he lost his water boundary due to accretion.[34]

However, in *Hughes v. State*, the Washington Supreme Court held that an upland owner on tidal waters was only entitled to accretions that had occurred before statehood, since to give all accretions to her would decrease the amount of tidelands and beds owned by the state.[35] On appeal, the United States Supreme Court reversed on this point, holding that questions about title to lands originally granted by the Federal Government were federal questions. The Court then applied the common-law rule that accretions go to the adjacent upland owner.

The question raised is whether the United States Supreme Court's holding applies to lands ceded to the state by the Federal Government at statehood and later conveyed by the state to upland owners. Under the state supreme court's reasoning in *Hughes*, it would seem to follow that upland owners whose titles originate from a state deed would have accretions that had attached to the state's lands before the grant, but not afterwards. In any event, there seems to be one rule of accretions for lands originally granted by the Federal Government and another rule for lands granted by the state.

"Avulsion" is the sudden shifting or change in the bed or course of a stream due, for example, to a flood, a logjam, or a river's breaking through a bend, causing it to suddenly abandon its channel or to suddenly wash away one of its banks.[36] As noted above, the rule is well settled that an avulsive movement does not cause a change in the boundaries of the upland owners, which remain where they were before the movement, whether on a navigable or nonnavigable stream.[37] Consequently, water boundaries are permanently lost if a stream moves suddenly and completely away from its original bed.[38]

Uncertain Boundaries

Where the legal description of a boundary is uncertain or ambiguous, the courts will fix its location by resorting to the best evidence available.[39] Evidence may include other deeds made as part of the transaction, or a recorded plat referred to in a subsequent deed. Where the evidence conflicts as to the validity of a monument used in the original survey, the court may find the boundary based upon a modern survey. Although the construction of a deed is a matter of law, it is based upon the grantor's intent, which is an issue of fact. Intent is to be gathered from the language of the deed, if possible, but when necessary, the court may resort to the circumstances surrounding the transaction.[40] Thus, parol evidence is admissible to explain latent ambiguities in a legal description as well as the meaning of the words used in the description.[41]

Where the boundary is in dispute, or the original boundary has become lost or obscured, and cannot be established by reference to an existing survey, monuments or other landmarks, the adjoining landowners may resolve the matter by agreement using the procedures set out in RCW 58.04.007. The statute requires that the affected owners establish a boundary in a written agreement that includes appropriate legal descriptions and a survey map recorded in accordance with the survey recording act, RCW 58.09. Further, the agreement must be signed and acknowledged by the parties in the same manner as required for the conveyance of property by deed, and recorded in the county or counties in which the affected parcels are located.

If the affected landowners cannot agree to a point or line determining their boundary, either may bring suit under the statute, asking the court to determine the boundary:

58.04.020. Suit to establish lost or uncertain boundaries - Mediation may be required

(1) Whenever the boundaries of lands between two or more adjoining proprietors have been lost, or by time, accident or any other cause, have become obscure, or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of the adjoining proprietors may bring a civil action in equity, in the superior court, for the county in which such lands, or part of them are situated, and that superior court, as a court of equity, may upon the complaint, order such lost or uncertain boundaries to be erected and established and properly marked.

(2) The superior court may order the parties to utilize mediation before the civil action is allowed to proceed.

This statutory procedure is only to be used, however, when both landowners are uncertain about the true boundary.[42] Although the court ultimately determines of the location of the boundary at issue, the statute permits the court to establish an advisory panel of three commissioners, including at least one surveyor.[43]

Where one or more boundaries in a subdivision are platted incorrectly, RCW 58.17.215 provides a procedure for altering the subdivision to correct the mistake. However, this requires an agreement of at least a majority of the owners of lots in the subdivision. Where the alteration would violate a restrictive covenant, all of the lot owners in the plat or subdivision must agree. The process includes a public hearing, and the application is subject to the decisional authority of the municipal authority in which the subdivision is located.

Boundary Line Agreements.

An alteration or adjustment of a boundary between platted or unplatted lots, or both, that does not create an additional lot, tract or parcel is exempted from Washington's subdivision statute.[44] Thus, a lot line may be adjusted with the cooperation of the adjoining landowners through an application made to the municipal authority with jurisdiction. This is usually accomplished with the assistance of an experienced surveyor, who processes the application and prepares the necessary legal description of the before and after boundary line, along with new legal descriptions.

Although it is accepted in most, if not all, jurisdictions in the United States that individual landowners may modify their common boundaries without the benefit of written documents, there is no universal identification as to the legal requirements. Therefore, parties wishing to settle a boundary dispute by agreement should reduce the agreement to writing. A boundary agreement is essentially a contract for the conveyance of land. The preparation of a boundary agreement is similar to drafting a purchase and sale agreement or similar documents. The parties must meet the same capacity requirements required of grantors and grantees for deeds and real estate contracts, including, for instance, the requirement that any contract for the conveyance or encumbrance of community property be executed by both husband and wife.[45]

A boundary agreement must comply with the Statute of Frauds as it applies to conveyances and encumbrances by deed.[46] RCW 64.04.010 provides that every contract "creating or evidencing any encumbrance on real estate" to be by deed. RCW 64.04.020 requires every deed to be in writing, signed by the party bound thereby, and acknowledged, and must also contain an adequate description of the property.[47] The Washington decisions are unclear as to whether RCW 64.04.010 controls an agreement to convey real estate, although the consensus seems to be that the only element not required in a real estate purchase and sale agreement or other agreement to convey real property is the acknowledgement.[48] However, even though acknowledged signatures may not be required for a valid agreement, prudent practice would dictate obtaining acknowledgments and recording the agreement itself, or at least a memorandum of agreement if the agreement itself contains information the parties do not want to be part of the public record.

In addition, the drafter of the boundary agreement will want to consider and include certain basic provisions identified by the Washington decisions as required for a binding agreement that is enforceable in a suit for specific performance. These include consideration, an adequate description of the property, specification of total purchase price (if any), method of payment, and a procedure for obtaining possession and the delivery of a deed by the seller.[49]. The form of the deed to be given also needs to be considered (e.g., quitclaim deed versus statutory warranty deed), since even the smallest conveyance may raise questions of liens and encumbrances for which warranties are appropriate.

Moreover, an agreement between the landowners will not necessarily bind other parties, and may even have unintended, adverse consequences, for example, where a lender is secured by a deed of trust encumbering property, a portion of which is to be effectively conveyed to the neighbor under the agreement. For example, if owner A's property will be reduced in size by a boundary agreement with owner B, and owner A's property is encumbered by a mortgage, the risk is that the conveyance may trigger a due on sale clause in the mortgage. Owner B, on the other hand, runs a risk of a foreclosure by owner A's mortgage holder, which might divest owner B of the property he acquired in the transaction. Therefore, resolving these risks will often require

negotiations with the holders of prior liens or encumbrances on the affected properties. And, as always, another important consideration is title insurance. At a minimum, the party to whom property is conveyed will want to consider whether that property can and should be added to his or her owner's policy, or whether a new policy will be necessary, including any appropriate endorsements.

Lastly, the boundary agreement should address any governmental approvals necessary for the property boundary to be adjusted. The municipal procedures of cities and counties guide the approval of boundary adjustments, and therefore, the boundary agreement should be conditioned on the receipt of all necessary approvals and allocate the responsibility and costs of attaining them among the parties. The time required to obtain approval should also be considered, and in some cases a deadline set for approval, together with the consequences, if the deadline is not met. Where there are encroachments, for example, the agreement might provide that the encroachments must be removed if the boundary line is not approved by the date set out in the agreement.

The ability to adjust a boundary by agreement, and to get the necessary government approval, may be limited or even impossible, however, due to the location and configuration of the improvements on the respective properties, including, for example, onsite septic systems and drain fields, which cannot encroach within required setbacks. In these situations, or in other cases, where the parties simply wish to avoid the time and expense involved in obtaining governmental approval for a lot line adjustment, a "friendly" quiet title action could be filed, followed by the entry of a stipulated order setting the new boundary. Pursuant to RCW 7.28.260, a judgment in a quiet title action is conclusive as to the right of possession, and is binding upon all persons taking title or an interest after commencement of the action, provided a lis pendens has been filed. This procedure can be used where all parties with prior claims are also parties to the settlement, and where no adjustment to the parties' relative property tax liability is contemplated. If this procedure is followed, a survey should be recorded to show the new boundary and it should be referenced in the order, and the parties should coordinate with their title insurance companies to make certain that their insurance covers their newly defined property as reflected in the stipulated order.

Common Law Doctrines

There are four generally recognized legal doctrines, which together with adverse possession may allow boundaries to be adjusted by oral acts of neighbors or by their acts on the ground, contrary to the boundaries described in title documents. These doctrines are usually called "common grantor," "estoppel (in pais)," "parol agreement," and "recognition and acquiescence."

Adverse Possession

Adverse possession is the most commonly used doctrine in boundary disputes. The doctrine of adverse possession determines the relative rights of parties to property when the property originally belonged to one party, but has been possessed and used by another party for a long time. In other words, the doctrine looks to the behavior and relationship of the parties over time to determine who should own the land.

The party claiming entitlement by adverse possession must establish that his or her possession is (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile and under a

claim of right. Such possession must have continued for at least the entire statutory period, generally 10 years.[50] The character of a party's possession is always a question of fact, and the claimant has the burden of proving all of the elements of adverse possession.[51] A successful claimant would require a court degree to obtain legal title as a matter of record; a court decree serves to establish a new chain of title for the adversely possessed parcel. Adverse possession is not available to obtain title from a governmental entity.[52]

The asserted boundary must also be well defined.[53]A fence is not required to establish a boundary; however, a wall or fence that purports to establish a boundary and excludes the abutting owner from using the disputed property constitutes a prima facie showing of possession.[54] A boundary fence that was placed in its location by mistake does not preclude an adverse possession claim so long as all elements of adverse possession are present.[55] However, a fence that was not erected as a boundary (for example, to contain a pasture) will not support a claim of adverse title, unless the use of the land was incident to a claim of ownership.[56]

The requirement of actual possession refers to more than simple use of the property; it requires physical occupation. The general principle is that actual possession involves possession of a character that a true owner would assert toward the land in view of its nature and location.[57] Actual possession is the principal means by which the courts determine that the record owner was on notice to take action to protect his or her rights. It is almost always a question of fact. Washington courts have held that the following uses of land claimed under adverse possession are indicative of ownership and go towards meeting the requirement of possession: erection of a fence[58]; tearing down a fence and planting grass in the disputed strip[59]; cutting grass up to a line[60]; constructing patios and maintaining flower beds[61]; and constructing and maintaining a structure partially on the land of another.[62] These acts would constitute possession and open dominion; these are acts ordinarily undertaken by owners in holding, managing and caring for their property. Some activities that have been held not to establish "actual" possession include: cutting grass alone[63]; having an old dilapidated fence in an unused strip[64]

Actual possession must be uninterrupted. A clear break in possession stops the time period.[65] If the prior owners began the adverse possession, successive possessors of the subject property can tack on the prior owner's period of possession, but only if there is "privity" between the prior owner and successive owner.[66] To establish privity, there must be a successive relationship between prior owners and present owners. Sale of property through contract, conveyance by deed, or acquiring the property at death may establish the privity requirement.[67]

In the past, the "hostility" element created some confusion in the case law, which the Washington Supreme Court put to rest in *Chaplin v. Sanders,* 100 Wn.2d 853 (1984). In *Chaplin*, the court eliminated any need for an examination of the claimant's "good faith" in asserting a claim. The hostility element is to be determined solely on the basis of the manner in which the claimant treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess the true owner of title is irrelevant. Therefore, one should be aware of relying on older cases on this point, since *Chaplin* overruled a prior line of cases holding that the adverse possession could only be asserted "under a claim of right" or "in good faith." Therefore, it does not matter if a claimant actually knew that someone else was the legal owner of land he claims, so long as his actions demonstrated he has treating the land as a true owner would.

In order for a use to be exclusive for the purposes of establishing adverse possession, a claimant's possession need not be absolutely exclusive; rather, the possession must be of a type that would be expected of an owner, under the circumstances.[68] In other words, other people may use the disputed land, but the claimant's use must be a use typical of an owner, and no other may use the land as an "owner" would.[69]

By definition, use and possession with the true owner's permission, cannot be adverse. Therefore, permission is commonly raised as defense to a claim of adverse possession. One standard defense tactic is to raise permission as an affirmative defense. Regardless of how the claimant treats the land, if the true owner gives the claimant permission to use the land, the hostility element is eliminated.[70] Permission does not have to be express, but can be inferred from the circumstances. *See, Cranston v. Callahan,* 52 Wn. 288 (1988).

Boundary by Parol Agreement

The law relative to boundaries is that title to real estate or real property or property interests cannot be transferred by verbal agreement or by parol means. However, where boundaries between conterminous owners or contiguous lands are unascertainable or in dispute, these owners may agree on a certain line or lines as their permanent boundary or property lines. Where this agreement is then followed by actual possession and occupation to that specific line or lines, these lines will be binding upon them, their successors and heirs in their title. These line or lines become binding, not on the principle that title passed by parol means, but for the specific reasoning that the owners have, by their consent, agreed to the limits or extent of their properties or land interests.

Under the doctrine of Boundary by Parol Agreement, an oral agreement between owners of adjoining properties fixing a dividing boundary, the location of which was disputed or uncertain, becomes enforceable when the agreed boundary is marked, for example, by a fence. *Johnston v. Monahan*, 2 Wn. App. 452, 469 P.2d 930 (1970). The four elements that must be proved, therefore, are[71]:

1. a bona fide dispute between the adjoining owners as to where their common boundary lies, or mutual uncertainty as to the true location of the boundary;
2. an express meeting of the minds arrived at by the owners to resolve permanently the dispute or uncertainty as to the true location of such boundary;
3. a physical designation of the permanent boundary on the ground; and
4. possession of their respective property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest, or alternatively, bona fide purchasers for value must take with reference to the boundary.

In *Piotrowski v. Parks,* for example, the court dismissed Piotrowski's quieted title claim to a strip of land lying between a fence and Piotrowski's true western boundary line. Parks and Piotrowski's predecessor, Sawyer, had been unsure of the precise location of their common boundary line, but thought they could come close, and wanted to save the cost of a survey. Therefore, they orally agreed to run a fence north and south on the same line as an existing fence lying south of their properties, which they believed had been surveyed. After the fence was built, they cleared the land on either side, and each kept cattle.[72] The court found the boundary agreed

upon by Parks and Sawyer met all of the criteria required to permanently establish a new boundary line by parol agreement.[73]

Boundary by Acquiesce and Recognition

Boundaries between two neighbors may be adjusted to conform to a line on the ground to which they have "long acquiesced." Thus, where a boundary has been defined in good faith by the then interested parties, and thereafter acquiesced in, acted upon, and improvements made with reference thereto, for a long period of time, the boundary will be considered the true dividing line and will govern the property rights of the adjoining land owners, and whether or not the line so established is correct becomes immaterial.[74]

Thus, when adjoining landowners occupy their respective holdings to a certain line for more than ten years, they are precluded from claiming the line is not the true boundary. This is based upon the theory that recognition and acquiescence for 10 years or longer affords a conclusive presumption that the line is the true boundary. The building of a fence is not enough; if there is no occupancy or use at all with reference to the line, then the doctrine of acquiescence fails. *Waldorf v. Cole*, 61 Wn.2d 251 (1963) (disputed area "apparently not used"). Recognition of a fence as the boundary line by both of the adjoining landowners is necessary.[75] It is not necessary, however, that structures must be built with reference to the line. Sometimes there have been structures in cases that have found acquiescence, but sometimes the acts of occupancy have been only landscaping or cultivation.[76] Whatever usage there is, it must be done with reference to the established line. However, the existence of an express agreement is not necessary under the doctrine of acquiesces.[77]

There is much overlap between the "acquiescence" doctrine and the "parol agreement" doctrine covered in the preceding section. The main practical differences are that the parol agreement doctrine requires an express boundary line agreement to settle a dispute or uncertainty, which the acquiescence doctrine does not require, and the acquiescence doctrine requires usage on the ground for ten years or more, which the parol agreement doctrine does not.

For example, *Mullally v. Parks* involved a dispute over the location of the southern boundary line of Lot 3, owned by *Mullally*, which lay north of Lot 4, owned by Parks. A boundary line for Lot 3 had been established by Mullally's predecessor, Schomoe, in 1920, based upon his own amateur survey. Schomoe then left some of the trees along the boundary in place, and planted ornamental trees in the same vicinity. He blazed a trail around the perimeter of his property, including the southern boundary, and constructed a split rail fence running 100' along a portion of the boundary. The owner of Lot 4 cleared his land of its second growth fir, maple and alder up to the line established by Schome and by 1939, a barbed wire fence ran westerly of the rail fence along the north side of the clearing on Lot 4.[78]

In 1946, a survey procured by Parks showed Schomoe's survey line was between 20' and 25' south of where it should have been. Until that time, none of the previous owners of Lot 4 had made any claim to property lying north of the line established by Schomoe.

On appeal, the court found ample evidence from which to conclude a boundary line between the two Lots had been established and acquiesced in for a period of over twenty years by the respective property owners concerned, and that improvements had been made with regard to the

line. Therefore, the trial court's judgment quieting Mullally's title to the disputed strip of land north of the Schomoe survey line was affirmed.[79]

Estoppel In Pais

Estoppel is an equitable doctrine based upon the principle that a person shall not be permitted to deny that which has once been solemnly acknowledged. Estoppel requires proof by clear and convincing evidence of three elements: (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party in reliance on such admission, statement or act; and (3) injury to the other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.[80] The party claiming estoppel must have the right to rely on the action or statement, and must show they were actually misled.[81]

As applied to boundary law, it is clear that the property owner who is to be estopped must have made some kind of "representation" to his neighbor that indicates the boundary is where it is not or that induces or invites the neighbor to make improvements over the true line.[82] On the other hand, the person who is estopped need not have had superior knowledge of the boundary or have knowingly made a false representation. It is sufficient if a "representation" is made and that it turns out to be misleading. In *Burkey v. Baker,* 6 Wn.App. 243 (1971), for instance, the defendant mistakenly told plaintiff that the boundary was within a foot or two of a line of trees, but there was no suggestion that the defendant knew the statement was false or had superior sources of information.

For an estoppel, it is not necessary for the acts in reliance to have existed for the 10 year period of limitations or any particular period, but rather only long enough for some reliance to have occurred, for instance, for improvements to be made. Estoppel may be used, not only defensively, but also affirmatively, to obtain a decree that the true boundary is adjusted.

Common Grantor

The common grantor doctrine is set out as follows by the *Winans* court[83]:

A grantor who owns land on both sides of a line he has established as the common boundary is bound by that line. The line will also be binding on grantees if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale. The common grantor doctrine involves two questions: (1) was there an agreed boundary established between the common grantor and the original grantee; and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as the true boundary?

Thus, it is necessary to prove (1) that an agreed boundary was established between the common grantor and the original grantee and (2) that a visual inspection by a subsequent purchaser would indicate that the legally described line was no longer functioning as the true boundary.[84] A parol agreement changing the location of a boundary is valid with respect to a boundary established by the grantor when the grantee took title in reliance on the boundary line as so established.[85]

For a line to be established under the common grantor doctrine, grantor and grantee must, as the court said in *Thompson*, sell and purchase with reference to the line and have a "meeting of minds" as to where the line is.[86] However, it is not necessary to prove the existence of any

formal, specific or separate agreement between the grantor and the grantee as to the boundary line, rather a meeting of the minds can be shown by the parties manifestations of ownership following the conveyance.[87]

The parties need not install or erect any kind of new improvement, like a fence, or hedge, to mark the line, but the courts have never said some kind of marker is not required. Frequently, the parties have adopted some object that already existed on the ground. For instance, in *Atwell v. Olson,* 30 Wn.2d 179 (1948), the parties strung wire between two pre-existing stakes to mark their agreed boundary. In *Fralick v. Clark County, supra,* the grantor and grantee adopted a waterfall on a creek to mark one end of their boundary.

The existence of objects to mark the line becomes more critical to the determination of whether a boundary fixed between grantor and the original grantee binds their successors in title. It is clear that their successors are bound only if they have notice of the line when they acquire title.[88] Obviously, actual notice as a result of the successor's being told of the line or having it pointed out to him will satisfy the requirement. In most cases, however, if there is notice, it is constructive notice provided by the fence or other "marker" that designates the boundary and perhaps by signs of occupancy up to the line.[89]

Conclusion

The science of boundary law is based upon tracing the original title and the legal description therein. The art of boundary law begins when title is clouded or when the legal description of the property boundary is questioned. The preceding overview of the elements of boundary law in Washington state is intended only to provide the practitioner a starting point from which to begin their investigation. Other sources to consult include the following:

- C.J.S. Boundaries §§ 1 et seq.
- West's Key No. Digests, Boundaries K1-3.
- Washington Practice, Volume 18.
- Volume V, Washington Real Property Desk Book, Sec 70
- F. Clark, *Law of Surveying and Boundaries* § 5.08 (5th ed. W. Robillard & L. Bouman eds. 1987)

Kenneth W. Hart - Speaker, Boundary Law Issues in Washington Seminar, August 2003.

[1] *DD & L, Inc. v. Burgess*, 51 Wn.App. 329, 753 P.2d 561 fn. 3(1988)
[2] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986) (dictum);*Turner v. Davisson*, 47 Wn.2d 375, 287 P.2d 726 (1955) (dictum); *Bradley v. Spokane & Inland Empire R.R.*, 79 Wash. 455, 140 P. 688 (1914); *McConiga v. Riches*, 40 Wn.App. 532, 700 P.2d 331 (1985) (private road).
[3] *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986).
[4] *National Bank of Tacoma v. Johnson*, 137 Wash. 452, 241 P. 458 (1926).
[5] *Roeder Co. v. Burlington Northern, Inc.*, supra, (dictum as to railroad); *McConiga v. Riches*, 40 Wn.App. 532, 700 P.2d 331 (1985) (private road).
[6] See. *DD& L, Inc. V. Burgess*, 51 Wn. App. 329, note 3 (1988).
[7] *WAC 332-130-030(1).*
[8] *Martin v. Neeley*, 55 Wn.2d 219, 347 P.2d 529 (1959).
[9] *Kalin v. Lister*, 27 Wn2d 785 (1947); *Greenblum v. Gregory*, 160 Wash. 42, 294 P. 971 (1930) (county surveyors may not change government survey); *Puget Mill Co. v. North Seattle Improvement Co.*, 120 Wash. 198, 206 P. 954 (1922) (court may not correct supposed error in location of government survey monument); *See also, Staaf v. Bilder*, 68 Wn.2d 800, 415 P.2d 650 (1966) (lines actually marked on ground prevail over field notes and maps).
[10] *Squire v Greer*, 2 Wash. 209 (1881).
[11] *Martin v. Neeley*, 55 Wn.2d 219, 347 P.2d 529 (1959).
[12] *Harris v. Swart Mortgage Co., 41 Wn.2d 354, 249 P.2d 403 (1952); Thomas v. Nelson, 35 Wn.App. 868, 670 P.2d 682 (1983); Myers v. Harris, 10 Wn.App. 706, 519 P.2d 1307 (1974).*
[13] *Strand v State*, 16 Wn.2d 107 (1943); *Washington State Constitution, Article XVII, Section 1; RCW 90.03.010.*
[14] *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943); *Proctor v. Sim*, 134 Wash. 606, 236 P. 114 (1925); *See also, Pitship Duck Club v. Town of Sequim, 315 F. Supp. 309 (W.D. Wash. 1970).*
[15] *See, Puyallup Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir., 1983).*
[16] *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955); *Strand v. State, supra* (regular floating of logs considered as an act of navigability).
[17] *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943).
[18] *Kemp v. Putnam, 47 Wn.2d 530, 288 P.2d 837 (1955).*
[19] *Wash. Const., Art. XVII, § 1; Spath v. Larsen, 20 Wn.2d 500, 148 P.2d 834 (1944); Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539 (1891); Wilson v. Howard, 5 Wn.App. 169, 486 P.2d 1172 (1971); Also see generally, Corker, Where Does the Beach Begin, 42 Wash. L. Rev. 33 (1966).*
[20] *See Corker, Where Does the Beach Begin, 42 Wash. L. Rev. 33, 65-72 (1966), for discussion of the problems of measuring mean high tide.*
[21] *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935)
[22] *Hughes v. State, 67 Wn.2d 799, 410 P.2d 20 (1966); Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957).*
[23] *Wilson v. Howard*, 5 Wn.App. 169, 486 P.2d 1172 (1971).
[24] *Harper v. Holston*, 119 Wash. 436, 205 P. 1062 (1922); *Van Siclen v. Muir*, 46 Wash. 38, 89 P. 188 (1907).
[25] 20 Wn.2d 500, 148 P.2d 834 (1944).
[26] *Parker v. Farrell*, 74 Wn.2d 553, 445 P.2d 620 (1968); *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950); *Knutson v. Reichel*, 10 Wn.App. 293, 518 P.2d 233 (1973).
[27] *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968); *Botton v. State*, 69 Wn.2d 751, 420 P.2d 352 (1966); *State ex rel. Davis v. Superior Court*, 84 Wash. 252 (1914); *See also, Island County v. Dillingham Development Co.*, 99 Wn 2d 215 (1983).
[28] *Snively v. Jaber*, 48 Wn.2d 815, 296 P.2d 1015 (1956).
[29] *Bach v. Sarich, supra; Snively v. Jaber, supra; See also,, Petition of Clinton Water Dist. of Island County, 36 Wn.2d 284 (1950).*
[30] *Harris v. Swart Mortgage Co.*, 41 Wn.2d 354, 249 P.2d 403 (1952); *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950); *Myers v. Harris*, 10 Wn.App. 706, 519 P.2d 1307 (1974).
[31] *Erickson v. Wick*, 22 Wn.App. 433, 591 P.2d 804 (1979).
[32] *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769 (1971); *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946); *Hirt v. Entus*, 37 Wn.2d 418, 224 P.2d 620 (1950).
[33] *United States v. State*, 294 F.2d 830 (1961) (accretion upon uplands owned by Federal Government); *Hudson House, Inc., v. Rozman*, 82 Wn.2d 178, 509 P.2d 992 (1973) (accretion on ocean uplands); *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., supra* (accretion and reliction on navigable river); *Ghione v. State, supra* (accretion and reliction on navigable river; lands owned by state); *Glenn v. Wagner*, 199 Wash. 160, 90 P.2d 734 (1939) (accretion and reliction on river; irrelevant whether navigable); *Harper v. Holston*, 119 Wash. 436, 205 P. 1062 (1922) (accretion and reliction on nonnavigable stream).

[34] *See, Hudson House, Inc., v. Rozman, supra.*
[35] *Hughes v. State* , 67 Wn.2d 799, 410 P.2d 20 (1966), reversed 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).
[36] *Parker v. Farrell*, 74 Wn.2d 553, 445 P.2d 620 (1968).
[37] *Glenn v. Wagner,* 199 Wash. 160, 90 P.2d 734 (1939).
[38] *Parker v. Farrell, supra.*
[39] *Cemetary Association v. Lotzgesell,* 173 Wash. 581 (1933).
[40] *Thompson v. Schlittenhart,* 47 Wn App. 209 (1987).
[41] *Vavrek v. Parks, 6 Wn. App. 684 (1972).*
[42] *Stewart v. Hoffman, 64 Wn.2d 37 (1964).*
[43] *Reed v. Firestack,* 93 Wash. 148 (1916).
[44] *RCW 58.17.040(6).*
[45] RCW 26.16.030.
[46] *Thompson v. Bain,* 28 Wn.2d 590 (1974); *Windsor v. Bourcier,* 21 Wn.2d 313 (1944).
[47] *Ecolite Mfg. Co., Inc. v. R.A. Hanson Co., Inc*., 43 Wn. App. 267 (1986).
[48] *See, Phillip v. Curtis,* 35 Wn 2d 844 (1950) (an agreement to convey real property acts as the acknowledgment.); *See also, II Wash. Real Property Deskbook* §§36.7, 37.17 (1986).
[49] *See, White & Bollard, Inc. v. Goodenow,* 58 Wn.2d 180 (1961); *Hubbell v. Ward,* 40 Wn.2d 779 (1952); *Hagensen v. Peterson,* 29 Wn. App. 721 (1981); *Ecolite, supra*
[50] RCW 4.16.020*; Teel v. Stading,* 155 Wash.App. 390, 393-394 (2010). *See Chaplin v. Sanders,* 100 Wn.2d 853 (1984); *Peeples v. Port of Bellingham,* 93 Wn.2d 766 (1980).
[51] *Scott v. Slater,* 42 Wn.2d 366 (1953).
[52] *Dunbar v. Heinrich,* 95 Wn.2d 20 (1980); *Commercial Waterway Dist. No.1 v. Permanente Cement Co.,* 61 Wn.2d 509 (1963)
[53] *Scott v. Slater, supra.*
[54] *See Wood v. Nelson,* 57 Wn.2d 539 (1961).
[55] *O'Brien v. Schultz,* 45 Wn2d 769, 778 (1954), *overruled on other grounds, Chaplin v. Sanders,* 100 Wn.2d at 861, n.2.
[56] *Taylor v. Talmadge,* 45 Wn2d 144, 149 (1954), *overruled on other grounds, Chaplin v. Sanders,* 100 Wn.2d at 861, n.2.provided.
[57] *Frolund v. Frankland,* 71 Wn.2d 812 (1967) (*overruled on other grounds, Chaplin v. Sanders,* 100 Wn.2d 861).
[58] (*Skoog v. Seymour,* 29 Wn.2d 355 (1947))
[59] (*Frolund v. Frankland,* supra)
[60] (*Mesher v. Connolly,* 63 Wn.2d 552 (1964))
[61] (*Krona v. Brett,* 72 Wn.2d 535 (1967))
[62] (*Draszt v. Naccarato,* 146 Wash.App. 536, 542 (2008))
[63] (*Wood v. Nelson,* 57 Wn.2d 539 (1961) dictum)
[64] (*Muench v. Oxley,* 90 Wn.2d 637 (1978)).
[65] *George v. Columbia & Puget SR. Co.,* 38 Wash. 480 (1905).
[66] *El Cerrito, Inc. v. Ryndak,* 60 Wn.2d 847 (1962).
[67] *Howard v. Kunto,* 3 Wn. App. 393 (1970).
[68] *Crites v. Koch,* 49 Wn. App. 171 (1987).
[69] *See also, ITT Rayonier, Inc. v. Bell,* 112 Wn.2d 754 (1989) (shared and occasional use did not rise to level of exclusive possession).
[70] *Crites v. Koch, supra.*
[71] *Johnson,* 2 Wn. App at 457; *Piotrowski v. Parks,* 39 Wn. App. 37, 691 P.2d 591 (1984).
[72] *Mullally,* 39 Wn.App. at 39-40.
[73] *Mullally,* 39 Wn.App. at 46.
[74] *Mullally v. Parks,* 29 Wn.2d 899 (1943).
[75] *Houplin v. Stoen,* 72 Wn.2d 131 (1967).
[76] *Lamm v. McTighe,* 72 Wn.2d 587 (1967) (clearing, berry bushes, mowing grass, occasional roadway); *Mullally v. Parks,* 29 Wn.2d 899 (1948) ("improvements"); *Egleski v. Strozyk,* 121 Wash. 398 (1922) (garden, growing hay); *Hanson v. Lee,* 3 Wn.App. 461, 476 P.2d 550 (1970) (garage shared by both neighbors, concrete driveway strips).
[77] *Lamm v. McTighe*, *supra*; *Piotrowski v. Parks*, 39 Wn. App. 37, 43-44, (1984).
[78] *Mullally,* 29 Wn.2d at 901-904.
[79] 29 Wn.2d at 907-908.

[80] *Arnold v. Melani*, 75 Wn2d 13, 147 (1968); *Thomas v. Harlan*, 27 Wn. 2d 512,518 (1947).
[81] *Magart v. Fierce*, 35 Wn. App 264, 268 (1983).
[82] *See Tyree v. Gosa*, 11 Wn.2d 572 (1941).
[83] *Winans v. Ross*, 35 Wn.App. 238, 240 (1983)(citations ommited).
[84] *Fralich v. Clark County*, 22 Wn. App 156, 160 (1978).
[85] *Thompson v. Bain*, 28 Wn.2d 590, 592-93 (1947).
[86] *Thompson v. Bain*, 28 Wn.2d at 592.
[87] *Winans*, 35 Wn. App at 241.
[88] *See generally Angell v. Hadley*, 33 Wn.2d 837, (1949); *Winans v. Ross*, *supra* (dictum); *Fralick v. Clark County*, *supra*.
[89] *Atwell v. Olson, 30 Wn.2d 179 (1948) (five-foot-high hedge); Thompson v. Bain, 28 Wn.2d 590 (1947) (fence); Winans v. Ross, 35 Wn.App. 238, (1983) (fence).*