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The Honorable James W. Brooks
Commissioner
Department of Fish and Game

October 10, 1973

John E. Havelock
Attorney General

Title to lands created by accretion, relietion, avulsion, and isostatic rebound

By:
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You have indicated a need for the state to adopt a policy on this subject, especially in regard to the state's interest in newly created lands on the margin of estuaries and tidal flats.

It is uniformly the law in the United States that the creation of new lands at the edge of a body of water by a process which is not sudden vests title to the lands in the adjacent owner. It matters not if the creation or addition is very slow or fairly rapid so long as the change is not so sudden as to be plainly discernible and certain at the time it occurs. State of Arkansas v. State of Tennessee, 246 U.S. 158, 173 (1917); Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890). This is also the rule in Alaska. Schafer v. Schnabel, 494 P.2d 802 (Alaska 1972).

The reasons given for the rule are many, but the most compelling is that the rule protects a riparian's interest in his land by assuring him continuing access to the water. Schafer v. Schnabel, supra.

A state legislature or court could alter this rule if it chose to do so, Stevens v. Arnold, 262 U.S. 266 (1923), but not, it appears, so as to cut off accretion rights of federal patentees on their subsequent grantees, Hughes v. Washington, 389 U.S. 290 (1967). As to these latter, they would be entitled to compensation. This applies directly to the situation concerning the Juneau wetlands.

It may be argued that isostatic (or glacial) rebound is substantively so different from ordinary accretion or reliction that the general rule should not apply and that instead the rule of avulsion should apply. When avulsion occurs, that is, a sudden shift of waters from the old channel to a new or a sudden withdrawal of a lake or sea, the boundary does not change but rather remains where it was prior to the change in the body of water, State of Arkansas v. State of Tennessee, 246 U.S. at 173. And see: Shenill v. McShea, 356 F.2d 607, 610 (9th Cir. 1966). Waynor v. Diboff, 2 Alaska 230, 233 (1937).

Where, as in the Juneau wetlands, the new land appears to have been (and continues to be) formed by a combination of alluvial accretion and isostatic rebound, it would be difficult, probably impossible, to carry this argument. We would probably have to prove that the new lands were previously tidelands, that they rose through stages during a particular period, and that they were not formed by accretion, that they can be identified with some certainty as against the property owner's original lands, Jefferis v. East Omaha Land Co., 134 U.S. 178, (33 L. ed. at 878) (1890). Even this would not necessarily suffice. We would have to convince courts which plainly favor the law of accretion, Hughes v. Washington, 389 U.S. 290 (1967); Schafer v. Schnabel, 494 P.2d 802 (Alaska 1972), that our rule would be better. I suspect that the intermixture of accretion and isostatic rebound on the Juneau wetlands is too great to carry this burden, but perhaps the Department of Natural Resources can provide information to the contrary--at least as to some sites where alluvial deposits are absent or too slight to have been significant in the formation of new lands. Even then, however, the courts may well decide to apply accretion rules to isostatic rebound.

On the other hand, we may cut off a riparian's right to accreted (or rebound) lands if the state, as an intervening grantee-grantor, chooses to do so. See, e.g., Hughes v. Washington, supra. We could do this by specifically delineating the lands conveyed by the state as stopping at the high water mark, reserving in the state any and all rights to accreted lands and lands formed by isostatic rebound. The Director of the Division of Lands has this power now, AS 38.05.056. Because the law of accretion is generally sound as public policy, it would probably be imprudent to do this as a blanket policy. On the other hand, a policy for consulting with officials of the Department of Fish and Game and of local governments on particular facts so that areas of significance would be retained on a case-by-case basis would appear to be proper and sound.

In a related matter, it would appear that the lands formed by the uplift attendant to the Good Friday earthquake are state lands. Plainly no accretion occurred. The change was sudden and discernible. Biological succession on the new lands could make boundary determinations difficult, but that should not affect the law which should be applied. See, e.g., State of Tennessee v. State of Arkansas, 246 U.S. 158 (1917). Conversely, the state did not acquire title to lands that became submerged as a result of the earthquakes.

Accordingly, rather than the three-point proposal suggested in your memorandum, we would suggest an interagency program for identifying areas of interest or concern and for acquiring accretion and rebound rights where we do not have title and retaining (reserving) those rights where we do have title.

Your Department and the Departments of Natural Resources and of Highways would be the logical participants. The interest of DNR is self-evident. Highways should be involved because it is routinely involved in property acquisition near tidelands. If it acquires lands so as to cut off the adjacent owner from the tidelands with the state then becoming the adjacent owner, the state--and not the formerly adjacent owner--then possesses the rights to accreted and rebound lands. Highway location will be critical, therefore, in any program designed to acquire those rights.

We suggest that a meeting be arranged to discuss this further.

JER:RWP:ab

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