IN THE SUPREME COURT OF OREGON

SEA RIVER PROPERTIES, LLC, an Oregon limited liability company,

Petitioner on Review,

v.

LOREN E. PARKS, an individual,

Respondent on Review. 61094

LOREN E. PARKS, an individual,

Third-Party Plaintiff,

H. ROBERT RILEY and GENEVA RUTH RILEY, both individually and as Trustees of the H. Robert Riley Trust and Geneva Ruth Riley Trust; DONALD LEE RILEY and LEE ANN RILEY, husband and wife; DAVID ROBERT RILEY and CATHERINE LOU RILEY, husband and wife,

Third-Party Defendants.

Tillamook County Circuit Court Case No. 062011

Court of Appeals Case No. A145896

Supreme Court Case No. S061094

RESPONDENT'S BRIEF ON THE MERITS AND SUPPLEMENTAL EXCERPT OF RECORD

Petition for Review of the Decision of the Court of Appeals
on appeal from the judgment of the Circuit Court for Tillamook County,
Honorable Rick W. Roll, Judge.

Court of Appeals Opinion Filed: December 5, 2012
Author of Opinion: J. Brewer

August 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. INTRODUCTION

Respondent Loren E. Parks ("Parks") owns property originally platted with the Pacific Ocean as its western boundary. Parks also owns the tidelands lying "west of and fronting and abutting" the property. This appeal arises from litigation to quiet title to new land that formed by accretion to the west of Parks' property as a result of the construction of the Nehalem Jetties (the "Disputed Property"). Petitioner Sea River Properties, LLC ("Sea River") owned the property south of the Disputed Property and claims that it is the owner by virtue of a mechanical application of the law of accretion to riparian lands.

The trial court found that Sea River's predecessor owned some portion of the Disputed Property because the land accreted from the south to north starting at Sea Rivers' property, making Sea River's predecessor the "upland owner." Nevertheless, the trial court held that Parks owned the Disputed Property now by means of adverse possession.

The Court of Appeals agreed that Parks was the owner of the Disputed Property without ruling on the adverse possession issue. The Court of Appeals determined that accretions to existing tidelands belong to the owner of the tidelands, and Parks, not the Petitioner, owned the tidelands upon which the Disputed Property formed. The Court of Appeals further ruled that Petitioner's claim to accretions north of its property's fixed northern boundary would be a

lateral extension in front of Parks' riparian property, blocking his littoral access to ocean frontage.

Parks requests that this Court affirm the Court of Appeals' ruling that he is the owner of the Disputed Property by virtue of his deed record and the law of accretion. Parks, in the alternative, asks that if this Court does reverse the Court of Appeals ruling that it nevertheless affirm the trial court's judgment that Parks is the legal owner of the Disputed Property by way of adverse possession.

II. STATEMENT OF THE CASE[1]

A. Questions Presented

1. Under Oregon law, accretions to existing tidelands belong to the owner of the tidelands. Parks, through his predecessors, owned by grant from the State of Oregon "all tidelands west of and fronting and abutting" Lot 4, Section 17. The Disputed Property formed as a result of accretions to a tidal sand bar directly west of Lot 4, Section 17. Petitioner owns by quitclaim deed accretions to Lot 1, Section 20—a government lot which has the ocean as its western boundary and the section line between Section 20 and Section 17 as its fixed northern boundary. Did

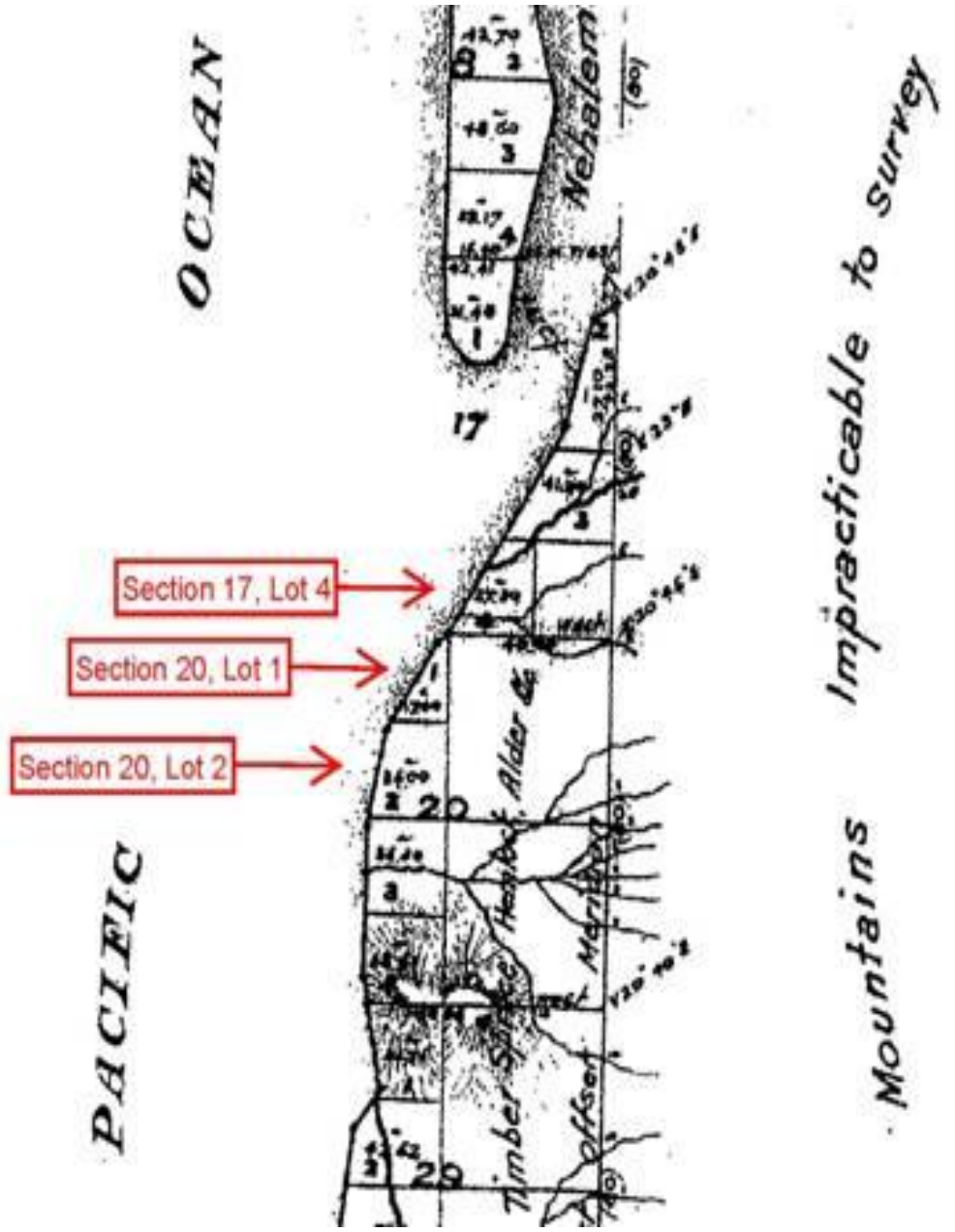
[1] Parks accepts Sea River's statements regarding the proceedings below and nature of relief sought. Parks disagrees with Sea River's statement that the Nehalem River was the "riparian boundary" of Lot 4, Section 17 and each of its assignments of error. Petitioner's Brief at 1, 5.

the accretions north of the section line, which formed the Disputed Property, belong to Parks' predecessors?

2. Under the doctrine of lateral accretion, a property owner may not claim accretions that extend laterally beyond a fixed property line if allowing the claim would cut off the adjacent property owner's riparian access. Parks, through his predecessors, owned "all tidelands west of and fronting and abutting" Lot 4, Section 17, a government lot that had at all times the Pacific Ocean's high-water mark as its western boundary. Can Petitioner own the Disputed Property if it formed as a result of accretion that began on Petitioner's upland property at Lot 1, Section 20 but then crossed that lot's fixed northern boundary and ran adjacent to Lot 4, Section 17 blocking it (and its tidelands) from the Pacific Ocean?

B. Statement of Facts

The history of the properties at issue begins in the 1850's, when the federal government commissioned a survey and subdivision of Oregon's coastal property according to the Public Land Survey System ("PLSS"). The PLSS system of townships, sections, and government lots is used to describe property now in private ownership. The original 1858 PLSS survey, which first created or "platted" the properties at issue in this appeal—Lot 4 in Section 17 ("Lot 4") and Lots 1 and 2 in Section 20 ("Lots 1 and 2")—is depicted, in excerpt, below:



See Ex. 201.

As shown in the above image, Lots 1 and 2 are situated in the northwest portion of Section 20. The northern border of Lot 1 is the section line between Sections 17 and 20 (the "Section Line"). Lot 4 is situated in the southwest portion

of Section 17 and the Section Line is its southern border. The Pacific Ocean, not the Nehalem River, is the western boundary for all of these lots.

1. Sea River's Chain of Title

Sea River bases its claim to the Disputed Property on a quitclaim deed that it obtained shortly before filing this lawsuit; that deed purports to convey title to "natural accretions" to Lots 1 and 2 of Section 20 that are situated within property in Section 17 that is described in Parks' deed. (*See* SER 8-10 (Sea River's quitclaim deed)) & SER 5-7 (Parks' bargain and sale deed). Sea River's claim is wholly dependent upon Robert Riley's ("Riley") chain of title. Riley's chain of title contains a series of deeds with inconsistent legal descriptions.

For purposes of Petitioner's appeal, it is sufficient to recognize that both the trial court and the Court of Appeals concluded that Riley's chain of title was limited to property in Section 20 and did not include the Disputed Property. (ER 73) ("The Court concludes that the Sea River chain of title to lots in Section 20 is established by this record."); ER 99 ("Because the Disputed Property was never included in the direct chain of title to Lots 1 and 2, section 20, [Sea River's] claim, if any, must derive from the principles governing the ownership of accreted property."). Sea River concedes that those conclusions are now beyond review. Petitioner's Brief at 8.

2. Parks' Chain of Title

By an 1883 deed the State of Oregon granted to Parks' predecessor William Hiatt "all the tide lands lying west of and fronting and abutting upon" Lot 4 of Section 17. (ER 11; ER 93). Title was later transferred by Wright Blodgett Company to Hawley Pulp and Paper Company by quitclaim deed granting "interest . . . of, in and to tide lands fronting on" Lot 4 of Section 17. (ER 17). In 1989, Mr. Parks bought from Times Mirror (successor to Hawley Pulp and Paper Co.) Lot 4 of Section 17, including "[a]ny and all tidelands fronting and abutting Government Lot 4, in Section 17." (ER 18; ER 29; ER 93-94).[2]

The trial court and the Court of Appeals concluded that Parks' chain of title to Lot 4, Section 17, and the Lot 4 tidelands was established in the deed record. (ER 73; ER 96).

3. The Disputed Property

a. General Location of the Disputed Property

Sea River's claim to the Disputed Property is based on its quitclaim deed purporting to convey "all the natural accretions" to Lots 1 and 2 that are situated within property in Section 17. The location in which Sea River claims those accretions is *somewhere* between Section Line and the Nehalem River jetty and

[2] Petitioner has never disputed that Parks acquired title to the 1883 grant from the State of Oregon to William Hiatt as it relates to lot 4, section 17.

west of Lot 4, Section 17 as shown *generally* on the map in Exhibit 680 in the area identified as 56-20, and depicted in the following map and image:.

(*See* Ex. 680).

(*See* Ex. 714). The Court of Appeals has effectively described the history of the formation of the land. (ER 91-95).

b. Historical Ownership and Use of the Disputed Property

Since 1989, Parks engaged in the following ownership activities with respect to the Disputed Property:

- In 1981, Publishers (Parks' predecessor) and the City of Rockaway Beach (the "City") executed a license agreement allowing the City to "occupy and use" a portion of the Disputed Property for the same purposes outlined in the lease in exchange for an annual license fee. Ex. 609. Publishers at all times maintained its claim of ownership of the Disputed Property and took steps (successfully) to keep Riley off that property. (ER 26-27). In 1990, after Parks purchased the property, the City paid Parks the annual license fee due under the agreement for the City's *use and occupation* of the Disputed Property. Ex. 611. The City later disputed the obligation to pay Parks pursuant to the license agreement; when the City refused to pay, Parks filed a complaint against the City for trespass in 1994. (Exs. 615-617 & 621). To settle the litigation, the City paid Parks $1,000 in exchange for dismissal of Parks' lawsuit and execution of a Waterline and Water Well Easement for the City's continued use and occupation of the Disputed Property. (Ex. 621).

- From 1981 through 2007, Parks' son and granddaughter walked around the Disputed Property when they stayed at Parks' beach home across the street. They walked trails and along the ocean and river on the Disputed Property and had several "wiener/marshmallow roasts" on the Disputed Property next to the jetty. From 1981 through 2007, they used the Disputed Property in this manner anywhere from two to three times a year up to five to eight times a year. (ER 57-58; SER 23-29).

- Parks also walked along the ocean and river on the Disputed Property, collected firewood, and he cleared one of the roads on the Disputed Property so he could drive his truck there and collect firewood. (ER 65; SER 29-32).

- Parks gave permission for the Port of Nehalem to regularly access the Disputed Property to keep its channel markers visible from the ocean. The easement has been in effect and used continuously since June 6, 1998. (Ex. 622).

- Parks granted an easement for access through the Disputed Property to the Tillamook PUD. That easement has been in effect and used continuously since 1998. (Exs. 623, 627 and 628).

- Parks paid all of the property taxes on the Disputed Property from 1989 to the present. (Ex. 630).

At various times, Riley, 3&3 LLC, and Sea River offered to purchase the Disputed Property from Parks to pursue their plans for development. Parks refused their offers, choosing to preserve it as undeveloped beach property for public use. (Tr. at 1508, 1511-12, 1534, 1554-55).

III. SUMMARY OF ARGUMENT

The laws of riparian accretion are not a sword by which the cunning litigant can expand his landholdings over a neighboring riparian landowner. Rather, the rule that an owner of property that is bordered by a body of water becomes owner of accretions to that riparian border is a shield meant to protect each riparian owner from losing access to the water.

All accretions to tidelands belong to the owner of the tidelands as a matter of law. Parks, through his predecessors, owns the tidelands lying "west of and fronting and abutting" his riparian property. Sea River's own experts testified that the Disputed Property first existed as tidelands. Accordingly, the accretions to the tidelands which formed the Disputed Property belong to Parks. Sea River failed to allege, much less offer evidence to establish, any competing ownership of those tidelands. Additionally—regardless of whether Sea River's "upland owner" theory of accretion is superior to the tideland owner's claim to tideland accretions—Sea River cannot claim the alleged accretions in the Disputed Property area after they

cross the fixed northern boundary line of its property. Allowing such a claim would cut off Parks' ocean access, and the Pacific Ocean has always been the western boundary of the Parks property.

In the alternative, even if this Court reverses the ruling of the Court of Appeals, the finding by the trial court that Parks adversely possessed the Disputed Property is supported by substantial evidence. It is not necessary to remand to the Court of Appeals to rule on that issue.

IV. ARGUMENT

The Court of Appeals ruled in favor of Parks on two distinct grounds, both of which are sound. First, accretions to existing tidelands belong to the owner of the tidelands, and Parks, not the Petitioner, owned the tidelands upon which the Disputed Property formed. Second, Petitioner's claim to accretions north of his property's fixed northern boundary would be a lateral extension in front of Parks' riparian property, blocking his littoral access to ocean frontage. None of Petitioner's arguments undermine the Court of Appeals' ruling, which should be upheld on both grounds.

A. Accretions to existing tidelands belong to the owner of the tidelands, and Parks, not the Petitioner, owned the tidelands upon which the Disputed Property formed.

Accretion occurs where there is a *gradual* and *imperceptible* addition to property bordering water. *State By & Through McKay v. Sause*, 217 Or 52, 80

(1959). To meet its burden for an accretion claim, a party must show that the accreted property *first began* accreting to property owned by such party. *Bonnett v. State by and Through Div. of State Lands*, 151 Or App 143 (1997). Both the United States Supreme Court and the Oregon Supreme Court recognize that the owner of submerged land is the owner of dry land which subsequently forms on it. *City of St. Louis v. Rutz*, 138 US 226, 247 (1891) ("It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon."); *Fellman v. Tidewater Mill Co.*, 78 Or 1, 8 (1915) ("The rule is that the purchaser of tideland takes to the low-water mark, that afterwards he is entitled to follow that line to the utmost of its recession, and that he acquires title to the accretions which gradually form upon his original grant.").

A party cannot claim accretions that began accreting to other property—in this case, the tidelands designated as 1-5 feet above low water. *Gubser v. Town, et al.,* 202 Or 55, 72 (1954); *Bonnett*, 151 Or App at 150-51 (when accretion on tideland sand bar forming a north-to-south-growing sand spit crossed the southern boundary of upland owner's property, such further accretion was to the tidelands owned by neighbor south of fixed boundary).

Where property borders on water, "the boundary follows the water." *Sause*, 217 Or at 99. Thus, gradual and imperceptible deposits of sand, silt, and other

"newly made land" added to the shoreline of a property are "accretions" and all rights to such accretions belong to that property's owner. *Fellman*, 78 Or at 8; *Gubser*, 202 Or at 72. Accretion law applies only where a body of water is a property's legal boundary; movement of sediment across ***fixed boundary lines*** does not change or move the fixed boundary lines. *Bonnett*, 151 Or App at 152.

Where a property borders the ocean, the property owner (the "upland owner") owns to the ordinary high water mark of the shoreline, and the tidelands owner owns from the high water mark to the low water mark. *Sause*, 217 Or at 80; *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp*., 250 Or 612, 614 (1968). Accretions to the upland owner's property belong to the upland owner, whereas accretions to the tidelands belong to the tidelands owner. *Id*.; *see also Hardy v. California Trojan Powder Co*., 109 Or 76 (1923).

1. Parks owned the tideland upon which the accretions formed the Disputed Property; therefore, Parks owns the Disputed Property.

By virtue of an 1883 deed from the State of Oregon to his predecessor William Hiatt, Mr. Parks owns "all the tide lands lying west of and fronting and abutting upon" Lot 4 of Section 17. (ER 11; ER 93). That title was later granted by Wright Blodgett Company to Hawley Pulp and Paper Company by quitclaim deed granting "interest . . . of, in and to tide lands fronting on" Lot 4 of Section 17. (ER 17). In 1989, Parks bought from Times Mirror (successor to Hawley Pulp and Paper Co.) Lot 4 of Section 17, including "[a]ny and all tidelands fronting and

abutting Government Lot 4, in Section 17." (ER 18; ER 29; ER 93-94).[3] Pursuant to the plain language of the original tideland grant by the State of Oregon, Mr. Parks owns not only the tidelands abutting Lot 4, Section 17, but the tidelands "west of" the lot as well. Moreover, that construction of the language is consistent with the State of Oregon's express purpose in passing the Tidelands Act under which it sold the property to Mr. Hiatt. Accordingly, Parks' chain of title includes the sand bar previously located west of Lot 4, Section 17 and the Disputed Property that accreted upon it.

Oregon courts interpret deeds based on their plain language, giving effect to all of the language in the deed. *See, e.g.*, *Tipperman v. Tsiatsos*, 327 Or 539, 548 (1998). The Court of Appeals, in construing the legal effect of the deed records, acknowledged that the grant by the State of Oregon to Mr. Hiatt included "all the tide lands lying west of and fronting and abutting upon" Lot 4, Section 17. (ER 93-94). The court expressly recognized that the ownership of those tidelands was unified with ownership of Lot 4, Section 17 prior to Mr. Parks purchasing it. *Id*. The Court of Appeals further acknowledged that the record reflected no indication that the State of Oregon claims any interest in the Disputed Property. The Court of Appeals accordingly concluded that: "tidelands existed to the west of the southern

[3] Petitioner has never disputed that Parks acquired title to the 1883 grant from the State of Oregon to William Hiatt as it relates to Lot 4, Section 17.

channel of the [Nehalem] after it bisected Lot 4" and that "[t]he state had previously conveyed those tidelands to [Parks'] predecessor." (ER 102). The Court of Appeals' determination of the legal effect of the deed language is correct as a matter of law and should be affirmed.

A plain language analysis of the Oregon deed to Mr. Hiatt begins with the word "tidelands." The term "tidelands" applies "to lands ***covered and uncovered by the tides***, which the state owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high and low water mark." *Hardy*, 109 Or at 81 (emphasis added). Simply put, the sand bar west of Lot 4, Section 17 was "land covered and uncovered by the tides" and was, therefore, conveyed to Mr. Hiatt as "tidelands."

That reading is consistent with this Court's description in *Fellman v. Tidewater Mill Co.*, where the issue was the extent of "tideland" on the Siuslaw River and Bay granted by the state to a private party. *Fellman*, 78 Or at 7. In that case, an adjacent landowner drove pilings for a log boom across tideland in front of the plaintiff's property and up to the River's navigable channel. The State had granted the plaintiff "all tidelands fronting and abutting upon" the lots upland of the defendant's activity. This Court concluded that "the purchaser of tideland takes to the low-water mark, that afterwards he is entitled to follow that line ***to the utmost of its recession***." *Id*. (emphasis added). Notably, the State's grant of

tidelands ***expressly excluded*** a fifteen-acre tract known as "Tide Island" which lay in front of the property, but was separated by a channel. *Id*. at 4-6. The State would not have needed to expressly exclude "Tide Island" if a grant of "all tidelands fronting and abutting" the upland lots did not include the tidal sand bar on the other side of the channel. A sand bar that is uncovered at low-tide and is "in front" of state-granted tidelands is within the "utmost" of the low-water mark's "recession." *Id*. at 7. Accordingly, even if the State's deed language granting the tideland to Mr. Hiatt had ***only*** included the words "fronting and abutting," the sand bar separated from Lot 4, Section 17 by the channel formed by the Nehalem was nevertheless "in front" of the property and therefore conveyed. *Id*.

Of course, the deed from the State of Oregon to Mr. Hiatt in this case did not use only the language "fronting and abutting." The language of the grant vested in Mr. Hiatt "all the tide lands ***lying west of*** and fronting and abutting upon" Lot 4 of Section 17. (ER 11; ER 93) (emphasis added). Petitioner would have this Court rule that tidelands "fronting and abutting" means only that strip of land between the high-water mark and the ***first instance*** of the low water mark. Even if that construction were not directly controverted by this Court's definition of "tideland," such a construction necessarily ignores the phrase "lying west of." The rule of construction to avoid treating words as surplus is so fundamental that it needs no

citation.[4] Petitioner's construction of the deed language focuses exclusively on the meaning of "fronting and abutting," and grants no value to the phrase "lying west of." *See* Petitioner's Brief at 29-34. A plain reading of the sentence structure of the 1883 tideland deed is that Mr. Hiatt received title to "all tidelands lying west of" Lot 4, Section 17 ***and*** "all tidelands . . . fronting and abutting" Lot 4, Section 17. At best, Petitioner would argue that the phrase "lying west of" conditions the phrase "fronting and abutting" such that Mr. Hiatt was limited to tidelands fronting and abutting the west side Lot 4, Section 17. But that interpretation renders the phrase "lying west of" meaningless, as Mr. Hiatt's lots all had fixed boundaries to their north, south, and east; the land only fronted the tidelands to west.

Even if the plain language of the tideland deed to Mr. Hiatt were ambiguous, the intent of the State of Oregon—as stated in the Tide Lands Act—was not. The State acquired ownership of tidelands and submersible lands along navigable rivers at the time it became a state. *Bowlby v. Shively*, 22 Or 410, 415 (1892), *aff'd* 152 US 1 (1894). This Court recounted the language of the Tide Lands Act in *State Land Bd. v. McVey*, as providing:

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[4] "It is a rule of universal application that a contract must be construed as a whole and effect must be given, if possible, to ***every word*** and phrase, in it. This is one of the primary rules which is applicable not only to written contracts, but to writings generally. This rule is a so elementary [sic] and so well recognized that citation of authority is unnecessary and none will be cited . . . ." *Hardin v. Dimension Lumber Co.*, 140 Or 385, 389-90 (1932) (emphasis added).

> That the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor or inlet of the same, and rivers and their bays, in which the tide ebbs and flows, within this state, ***shall have the right to purchase all the tide land belonging to this state in front of the lands so owned***.

168 Or 337, 351 (1942) (emphasis added) (quoting the Tide Lands Act as Amended in 1874 (General Laws 1874, page 76)). The statute's authorizing language states unequivocally that the State's purpose was to grant by deed to the upland owner "all the tide land belonging to this state in front of the lands so owned." *Id*. Unless the Petitioner doubts whether Oregon owned the tidal sand bar west of Lot 4, Section 17, that land was vested in Mr. Hiatt and, by subsequent chain of title, now Parks.

Petitioner makes three additional arguments as to why this Court should reject the Court of Appeals' conclusion that Parks owns the tidelands west of Lot 4, Section 17—each is easily resolved.

First, Petitioner argues that the "trial court properly found that the only tidelands owned by Parks' predecessor in 1911 were east of the Nehalem River, and the Court of Appeals should not have disturbed that finding." Petitioner's Brief at 29. The Court of Appeals did not improperly review the trial court's factual finding about the location of the tidelands *de novo*, as suggested by Petitioner. Rather, the Court of Appeals appropriately reviewed and reversed the trial court's ***legal*** conclusion as to the scope of "tideland" conveyed by Parks'

chain of title. *Tipperman*, 327 Or at 548 ("It is the duty of the court to declare the meaning of what is written in the instrument [creating an interest in real property].").

Second, Petitioner argues that this Court cannot know whether "between 1883 when the state first deeded tidelands to Parks' predecessor and 1911 when the accretion began" that "Lot 4 of Section 17 ever had anything but river tidelands fronting and abutting it." Petitioner's Brief at 32. The *Fellman* Court specifically addressed such an argument, stating that a "tideland" grant from the State of Oregon includes "all the tideland in front of the lots mentioned" and that it "extended the holdings under those deeds to low-water mark, ***wherever the same might be then or afterward***." 78 Or at 7 (emphasis added). The exact location or depth of the sand bar west of Lot 4, Section 17 at the time of granting is not determinative of the scope of the tidelands Mr. Hiatt bought from the State. He bought all of the State of Oregon's "tidelands"—***to the utmost of the low-water's recession***—west of Lot 4, Section 17 "wherever the same might be" in 1883 "or afterward." *Id*.

Third, Petitioner argues that the shifting of the Nehalem River south and between Lot 4, Section 17 and the tidelands to the west of it constituted an "erosion" of Lot 4's western border so that any property west of it was separated from it and "lost forever." Petitioner's Brief at 33, 36. Petitioner confuses two

distinct types of state ownership. In *Corvallis Sand & Gravel v. State Land Board*, this Court explained that state ownership of land has two categories, ownership in fee which is transferrable and public access rights, which are not transferrable:

> The decision, therefore, is based on the idea that the state has a Jus privatum in the tide lands, distinguishable from the Jus publicum, which it may sell so as to convey private interests therein; hence the phrase, by virtue of its sovereignty, was not intended to preclude any private use by the state's grantee which did not interfere with the public rights. These 'public rights' are the rights of navigation and fishery and the state has no authority to dispose of the submerged lands in such a manner as to interfere with these rights.

250 Or 319, 334 (1968), (quoting *Bowlby*, 22 Or at 417). As recognized by the Court in *Corvallis*, the State validly sold tideland rights under the Tide Lands Act to private individuals, thereby giving up its "Jus privatum" in the tidelands. *Id*. Petitioner confuses that right, held now by Parks, with the Jus publicum right of navigation over the channel between Lot 4, Section 17 and its tidelands to the west of the channel. Those rights are uniformly recognized by this Court as coexisting. *Id*. at 164 ("There is no precedent in this state for depriving a landowner of title to a portion of his land simply because a river suddenly flows over it.").

The Court of Appeals correctly ruled that the trial court erred in construing the Parks' deed record as including only the strip of tideland immediately adjacent to Lot 4, Section 17. This Court should affirm that ruling.

2. The accretions that formed the Disputed Property attached first to the tidelands west of Lot 4, Section 17, and cannot belong to Petitioner.

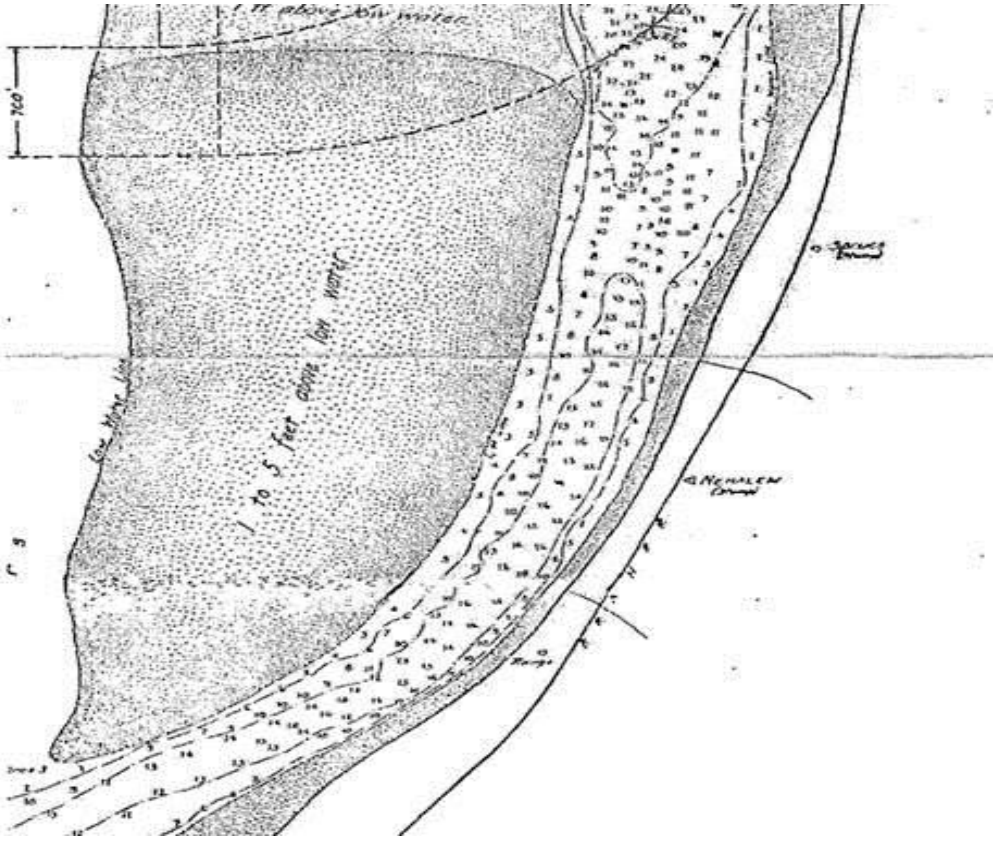
Even if this Court reversed the ruling by the Court of Appeals that Parks' title record includes the tidelands west of Lot 4, Section 17, that tideland—and the Disputed Property that accreted on it—would belong to the State of Oregon, not Petitioner.[5] As noted above, all accretions to tidelands belong to the owner of such tidelands, and tidelands themselves are not accretions. *Fellman v. Tidewater Mill Co.,* 78 Or 1, 7 (1915); *Bonnett*, 151 Or App at 150-151. Sea River failed to allege, much less offer proof of, ownership of the tidelands to which the Disputed Property first accreted. Sea River's Complaint alleges *only* that it owned the property south of Disputed Property:

> Plaintiff's predecessors in interest owned the real property [Lots 1 and 2] immediately to the south of the [Disputed] Property from which the [Disputed] Property accreted. The accretion of the [Disputed] Property over a period of more than 75 years in a northerly and northeasterly direction from the real property immediately to the south of the [Disputed] Property vested title in the [Disputed] Property to Plaintiff's predecessors in interest and, ultimately, to Plaintiff.

(SER 34).

[5] Notably, the State is not a party to this litigation and has not at any point claimed ownership of the tidelands west of Lot 4, Section 17. In fact, even after the ruling by the Court of Appeals that "[t]he state had previously conveyed those tidelands to [Park's] predecessor," the State has elected not to file any briefing in this case. (ER 102).

The uncontroverted evidence at trial was that any accretions in the Disputed Property first existed as tidelands that neither Sea River nor its predecessors owned.[6] Based on a 1911 survey reflecting the condition of the property prior to construction of the Nehalem River jetty (*see* the area identified as "1 to 5 feet above low water" in the image below), ***all three of Sea River's expert witnesses*** agreed that the Disputed Property (which is at the Northern end of the map shown below) existed as "tidelands" in 1911.



[6] It was also undisputed that Parks (and his predecessors) own all tidelands fronting and abutting Lot 4. The Lot 4 Tidelands were conveyed to Parks' predecessors by deed from the State of Oregon to Hiatt in 1883 as discussed *supra*. (ER 30, fn 18; SER 1-2).

(SER 4).

Ronald G. Larson, Sea River's surveyor, confirmed that the area from which the Disputed Property accreted was tidelands in 1911:

> Mr. Crew: In looking at the tidelands here, this darkened area right here, from a surveyor's point of view, would that be considered land?
>
> . . . . .
>
> Mr. Larson: No, that's actually the area that would be bounded by the area indicating low water line. And it is above that because the indication is one to five feet above low water. So that area right there I would describe as a sand bar, but more technically, tidelands.

(SER 13).

> Ms. Walker: I'm showing you what was marked Plaintiff's Exhibit 202, which was the 1911 survey by the Corps of Engineers. I believe it was your testimony yesterday that this area shown in a dark gray area marked one to five feet above low water constituted tidelands. Is that correct?
>
> Mr. Larson: Correct.

(SER 17).

Wesley Greenwood, a geologist retained by Sea River, also confirmed that the Disputed Property constituted tidelands:

> Ms. Walker: On Exhibit 212, is it correct that all of this area from the old or 1911 river channel to that frontal dune area would be considered tidelands until the vegetation was established to the point that tides no longer crossed over the property?

> Mr. Greenwood: Well, that's the definition. You'd have to; yes.
>
> Ms. Walker: Do you know, based on your investigation, when that property would no longer be considered tidelands?
>
> Mr. Greenwood: No. No. . .

(SER 19-20).

Frank Reckendorf, a geologist, similarly testified that the Disputed Property constituted tidelands in 1911, as documented by his report:

> Ms. Walker: So your report is referring to this area –
>
> Mr. Reckendorf: That's correct.
>
> Ms. Walker: – showing land in existence at one to five feet above low water at the time this report was prepared?
>
> Mr. Reckendorf: That is correct.
>
> Ms. Walker: And this area that we've just described, would that be considered tidelands?
>
> Mr. Reckendorf: Legally that's – because it's within the tidal zone. Geologically it was part of the spit.
>
> Ms. Walker: When we use the term tidelands, is it accurate to say that this area marked as one to five foot above low water would sometimes [be] submerged under water and sometimes not?
>
> Mr. Reckendorf: That's the way I have it labeled on the map.

(SER 21-22).

Sea River's claim to the alleged accreted property is analogous to the plaintiff's claim in *Bonnett*. In both cases, the alleged accretions began forming on tidelands that were not owned by the plaintiff. In *Bonnett*, the Court of Appeals determined that the property in dispute belonged to the State of Oregon as the owner of the tidelands on which the accretions first formed. *Bonnett*, 151 Or App at 150-51. As in this case, the plaintiff in *Bonnett* (unsuccessfully) argued that he acquired title to the disputed area when the former river bed dried up, thereby "attaching" the accretions to his property. The court disagreed:

> The land in question did not arise next to Lot 1 *but on [ocean] tidelands* on the opposite side of the former river bed from it. To the degree that the water receded from its former channel, it did so after the new land came into existence. At the time of the 1878 survey [the government survey creating Lot 1], the land on which the new land later arose belonged to the state. Thus the new land formed on the state's land, not by accretion to plaintiff's land.

Id. at 150 (emphasis added).

In short, the Disputed Property existed as tidelands (at 1-5 feet above low water) *before* the alleged accretion occurred. As the Court of Appeals stated, that tideland "was owned by someone" and "[t]he deposits of additional sand did not alter that ownership." (ER 100). The Court of Appeals was correct to rule that ownership of those tidelands was vested in Parks. (ER 102:8-11). Even if this Court had a basis to reverse that ruling, Sea River cannot prevail because neither

Sea River nor its predecessors owned those tidelands to which the alleged accretions first formed. Thus, under no circumstances can Sea River own the Disputed Property based on accretion law.

B. Petitioner's claim to accretions north of its property's fixed northern boundary would be a lateral extension in front of Parks' riparian property, blocking his littoral access to ocean frontage.

A primary tenet of accretion law is that ***the owner's access to the water*** must be preserved. *State By & Through McKay v. Sause*, 217 Or 52, 80 (1959) ("Various reasons have been assigned by the courts for the doctrine of gradual accretion, [the] more cogent reason . . . is the desirability of keeping riparian property riparian."). Accretion law preserves a property's water border so that riparian property remains riparian. Specifically, an upland owner's property will expand as accretions re-establish the high-water mark further towards the body of water that is the legal boundary of the riparian property. *Bonnett*, 151 Or App 143. However, under the lateral accretion exception, a property owner ***may not claim accretions that extend laterally beyond a fixed property line*** if allowing the claim would cut off the adjacent property owner's riparian access. *Id*. at 152; *Hudson House, Inc. v. Rozman*, 82 Wash 2d 178, 183-84 (1973). There have been two cases in the Pacific Northwest where, as the result of the redirection of a river's outlet to the Pacific, a long sand spit has grown by accretion parallel to the former ocean shoreline. Those cases are *Bonnett* and *Hudson House, Inc.* In both cases,

the courts ruled that the standard approach to ownership of accreted lands—that they belong to the upland from which the first dry grain of sand attached above the high-water mark—did not apply. *Bonnett*, 151 Or App at 152-53; *Hudson House*, 82 Wash 2d at 183-84.

1. The lateral accretion doctrine: *Hudson House* and *Bonnett*.

In *Hudson House*, the Respondent (Hudson House) owned the property at the base of the accreted, north-growing sand spit. Hudson House prevailed at trial quieting title to the entire accretion, having argued that because the new dry land grew from the north end of his upland property, he was the owner of those accretions. *Id*. at 181. The State of Washington (and others) appealed on the basis that its state park—which had formerly been ocean-fronting—had been cut off from the ocean by the accretion as illustrated in the following map which is appended to the opinion:

The Washington Supreme Court began by rejecting the application of the typical "upland owner" formula for determining ownership of the accretion:

> At the outset, *Hughes v. State*, 67 Wash 2d 799 (1966) . . . might seem to establish the law herein. The facts, however, are substantially different. In *Hughes*, the upland owner claimed lands extending 561 feet from east to west, being accretions directly in front of or west of the upland . . . . In *Hughes* there was no river, no odd shaped accretion, but only an accretion directly in front of plaintiff's property.

Id. at 181-82. Simply put, the accretion at issue in *Hudson House*, did not grow the upland owner's property in the direction of a riparian boundary, so that simple formula does not apply. *Id*. Rather, the Court surveyed cases nationwide for examples of similarly irregular accretive land masses cutting off adjacent riparian owners and concluded that the same reasoning that justifies the "upland owner" formula—protection of a riparian property owner's access to water—demands a different legal rule. The Washington Supreme Court ruled that in such instances, the lateral accretion will belong to the property that would otherwise be cut off from access to the water:

> From the cited cases, the rule can be ascertained to be that the owner of waterfront property should be protected in the maintenance of access to the water. That is often, in fact generally, the greatest value of the property and the rules are directed to the protection thereof. In those cases where a substantial accretion is built up in front of property, ***even if separated by a stream*** or other natural barrier, the accretion will belong to the [laterally adjacent] property.

Hudson House, 82 Wash 2d at 184 (emphasis added). As further support for its ruling, the court expressed concern about the equity of its riparian property law without establishing a doctrine for lateral accretions:

> The ***incalculable mischiefs*** that would follow if a riparian owner is liable to be cut off from access to the water, and Another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts.

Id. at 183-84 (emphasis added), (quoting *Lamprey v. Metcalf*, 52 Minn 181, 197 (1893)). Accordingly, the *Hudson House* court held that the State of Washington had quiet title in "all of that portion of the accretion which lies north of the westerly extension of the southern boundary line" of the state park's government lot. *Id*. at 995-96. In support of its decision to apportion the accreted property by laterally extending the property lines of the adjacent riparian government lots, the *Hudson House* court cited the same method used in nearly identical situations by the Supreme Court of Wisconsin and the Supreme Court of Maryland. *See id.* at 183, citing *Rondesvedt v. Running*, 19 Wis 2d 614 (1963); and *Warring v. Stinchcomb*, 141 Md 569, 582 (1922).

In *Bonnett*, the plaintiff-appellant (Bonnett) owned property that had a western boundary of the Pacific Ocean at its confluence of the Siuslaw River. 151 Or App at 145. The river ran north and northwest parallel to the ocean and in front of Bonnett's property. On the other side of the channel was a sand bar, a significant portion of which would probably be dry at low tide. *Id*. at 146. The ocean shore ran from the south east to the northwest where it fronted the Bonnett's property before resuming a due north orientation at a property referred to as Northpoint, which was north of Bonnet's property. Following the redirection of the Siuslaw to a more southerly channel (first by natural causes, then by the construction of the Siuslaw jetties), a sand spit grew by accretion over several

years from where it attached at Northpoint towards the south following the tidal sand bar on the west side of the former channel of the Siuslaw. The sand spit eventually grew south across the front of Bonnett's property, cutting Bonnett's property off from the Ocean, trapping the water in the former river channel, and forming a seasonal lagoon between the sand spit and the bluff forming the West side of Bonnet's property. Eventually the lagoon filled with sand and, later, vegetation forming a large tract of new land to the west of Bonnett's property.

Bonnett made two arguments in support of quieting title to that land for himself. First, he argued that the typical "upland owner" formula applied to him as the land accreted in front of the riparian boundary of his property. *Id*. at 148-49. As discussed above in section III.A, the Court of Appeals rejected that argument, concluding that "the land in question did not arise next to [Bonnett's property], but on tidelands on the opposite side of the former river bed from it" and accretions to tidelands belong to the tideland owner—in that case the State of Oregon. *Id*. at 150.

Bonnett's second argument was identical to the argument made by the State of Washington in *Hudson House*: Quieting title to the "upland owner" of the property from which the sand spit grew—Northpoint—would cut off Bonnett's riparian access to the water. The *Bonnett* court concluded that situation was not

possible because—under the doctrine of lateral accretion—Northpoint's ownership of the accretion could not extend below his southern fixed property boundary:

> [T]he owner of the land around Northpoint ***could not follow the accretion beyond the extended southern boundary of his lot***. That land, like all of the other government lots along the bluff, has a meander line only as its western boundary. The other three boundaries of the lot are ***fixed lines*** that did not, and do not, have a riparian location. Thus, ***only the western boundary of the lot is subject to movement as the result of accretion***, reliction, or erosion. Courts generally refuse to allow one riparian owner to extend its property laterally in front of other riparian owners simply because land began accreting laterally from the first owner's land.

151 Or App at 152 (emphasis added) (citing, inter alia, *Hudson House*, 82 Wash 2d at 178). A corollary to the court's conclusion that the accretions west of Bonnett's property were vested in the State as tideland owner was the ruling that when the "new land passed a boundary that did not in itself include riparian rights" the "Northpoint owner . . . did not have an absolute right to ***follow*** the new land beyond the fixed southern border of his land." *Id.* at 153 (emphasis added).

2. The lateral accretion doctrine prevents Sea River from "following" the accretion north past its fixed northern lot boundary—the section line between Sections 20 and 17—because it would cut off Parks' ocean shoreline.

By virtue of Parks' predecessors' ownership of the tidelands west of Lot 4, Section 17, they enjoyed the littoral rights of tideland ownership, including ownership of accretions and access to the water. *Fellman*, 78 Or at 7 (tideland

owner's littoral rights include "title to the accretions which gradually form upon his original grant" as well as "deep water access" to ocean); *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 250 Or 612, 637 (1968) ("We have finally come to the conclusion that when the state has leased or conveyed the tidelands bordering on tidal waters the riparian rights are lodged in the tidelands owner or lessee.").[7]

Robert Riley, Sea River's predecessor, owned Government Lots 1 and 2 in Section 20, and Parks owns Government Lot 4 in Section 17 and the tidelands west of that lot—all of which is directly to the north of Lots 1 and 2 in Section 20. According to the original 1858 US Government Survey, each of these government lots has three fixed boundaries and *one* western riparian boundary, the Pacific Ocean. (Ex. 201). Lot 1 of Section 20 and Lot 4 of Section 17 share a ***fixed boundary line***: the Section Line between Section 17 and Section 20, running west to the Pacific Ocean. (Ex. 201).

The central issue for this Court to decide is, when the new land accreted from the south to the north along the tidelands forming the western edge of the old Nehalem river channel, did Sea River's predecessors' ownership "follow" the

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[7] Petitioner's proposition of law that a "tideland owner is not a 'riparian owner'" is made without citation. *See* Petitioner's Brief at 43. That proposition of law ignores more than a century of Oregon case law on tideland ownership rights and the purpose of the Tide Lands Act.

newly accreted land past the section line dividing Section 20 and Section 17? If this Court, like the *Bonnett* court, and the Washington, Maryland, Wisconsin, Mississippi, and Minnesota Supreme Courts recognizes the doctrine of lateral accretion as the law of its state, then Sea River's predecessors' ownership of the accreted land could not have "followed" the newly accreted land past the section line separating Section 20 from Section 17. As the line of the northward-growing sand spit crossed the section line, ownership by Sea River's predecessors would have at that moment began to impinge on the littoral rights of Parks' predecessors from their tidelands west of Lot 4, Section 17. *Bonnett*, 151 Or App at 152; *Fellman*, 78 Or. at 7. That was the ruling of the Court of Appeals and should be affirmed. (ER 102)

Even if Petitioner prevails upon this Court to conclude that under the "upland owner" formula Sea River has a claim to the accretions on the tidelands west of Lot 4, Section 17 that is superior to Parks', that claim would cut off Parks' littoral access from the upland western boundary of Lot 4, Section 17. In that case, Parks would be in the same position as the State of Washington in *Hudson House*. Prior to the formation of the sand spit which laterally traversed the riparian boundary of Parks' predecessors' property, Lot 4, Section 17 was an ocean front property. The 1911 survey map establishes that the sand bar of the tidelands west of Lot 4, Section 17 was "1 to 5 feet above low water," but was below the high

water mark. (ER 3-4). At all times prior to the formation of the laterally accreting sand spit, during higher tides the Pacific Ocean's waves would lap upon the upland shore of Lot 4, Section 17. (*See* testimony of Experts described in above section II.A.2 with unanimous agreement that ocean covered sand bar and abutted Lot 4, Section17 at fuller tides).

Sea River argued that the ocean-front character of Lot 4 was somehow destroyed, eroded, or replaced by the Nehalem River, which transformed ownership of the ocean tidelands to "river tidelands."[8] This revisionist history of Lot 4 lacks any basis in fact or law. Lot 4's ocean boundary cannot be destroyed or eroded by the Nehalem River because the Nehalem River is not—and never was—Lot 4's legal boundary. Lot 4 was created or "platted" by the 1858 government survey (Exs. 201, 653), which established its legal boundaries. According to the 1858 Survey, Lot 4 has three fixed boundaries and ***one*** riparian boundary: ***the Pacific Ocean***.[9]

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[8] Sea River does not cite any law (because there is none) to support a conclusion that the Nehalem River somehow "destroyed" the oceanfront boundary of Lot 4 such that Lot 4 "ceased being riparian property." Instead of law, Sea River and the trial court relied *solely* on Mr. Larson's "application of fundamental surveying principals" to one map—the 1911 Survey—to prove that the Nehalem River "destroyed" Lot 4's ocean boundary. (SER 15-16).

[9] "Erosion" of riparian property is the result of the body of water that borders the property cutting into the former upland. *Sause*, 217 Or at 69. Because the western boundary of Lot 4, Section 17 was the Pacific Ocean the erosion that

(*continued on next page*)

Petitioner has urged this Court to write a new doctrine of lateral accretion for Oregon: "[T]he doctrine only may be used to preserve existing frontage on the existing waterway, not to gain frontage on a different waterway than existed when the lateral accretion began." Petitioner's Brief at 1. Such a rule would be the first of its kind in the United States and would prevent the doctrine of lateral accretion from being applied in most cases. In nearly every case where lateral accretion occurs, it is the result of the confluence of two bodies of water shifting sediment to form underwater barriers which cause a different body of water to form immediately in front of the riparian property that is being cut off from its former deep-water access. *See Bonnett*, 151 Or App at 152 (river channel in front of ocean-front property); *Hudson House*, 82 Wash 2d at 184 (river channel in front of ocean-front property); *Rondesvedt v. Running*, 19 Wis 2d 614 (1963) (lagoon in front of lake-front property); and *Warring v. Stinchcomb*, 141 Md 569, 582 (1922) (stream in front of bay-front property). Petitioner's proposed rule would relegate each of those properties' riparian rights to the lesser water-body. Petitioner's proposed rule would prevent this Court from applying the doctrine of lateral accretion in each of those cases.

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occurred between 1859 and 1911 was the result of a new high water mark of the Pacific Ocean, not the Nehalem River. *Id*.

Indeed, neither the *Hudson House* court nor the *Bonnett* court treated the navigable river channel between the riparian owners' property and the ocean as cutting off the riparian owner's littoral rights to the Pacific. *Bonnett*, 151 Or App at 152; *Hudson House*, 82 Wash 2d at 184. If either court had, it would not have needed to reach the question of whether the property had been cut off from such rights by the laterally-accreting sand spit. An upland owner's riparian boundary runs to the high water mark of the body of water. *Smith Tug & Barge Co*., 250 Or at 614-15. Therefore, Lot 4's legal riparian boundary at the time the north-moving laterally-accreting sand spit crossed the section line from Section 20 to Section 17 was the high water mark of the Pacific Ocean. For that reason, even if this Court did conclude that under the "upland owner" formula Sea River has a claim to the accretions on the tidelands west of Lot 4, Section 17, that claim must nevertheless fail under the doctrine of lateral accretion because it would cut off Parks' littoral access from the upland western boundary of Lot 4, Section 17 to the Pacific Ocean. *Bonnett*, 151 Or App at 152; *Hudson House*, 82 Wash 2d at 184.

3. Even if Parks did not already own the tidelands west of Lot 4, Section 17 and the Disputed Property that accreted to it, that property is his under the doctrine of lateral accretion regardless of the method of apportionment.

Courts applying the doctrine of lateral accretion extend existing fixed lot boundaries in a straight line towards and through the new land to apportion it. In *Hudson House*, the court extended the east-west southern boundary of the state

park to apportion it the part of the new accretion between the state park and the Pacific Ocean. 82 Wash 2d at 183. In doing so, the court cited the same method used in nearly identical situations by the Supreme Court of Wisconsin and the Supreme Court of Maryland. *Id*., citing *Rondesvedt v. Running*, 19 Wis 2d 614 (1963) (affirming circuit court's apportionment of lateral accretion by straight-line extension of fixed-boundary property line); and *Warring v. Stinchcomb*, 141 Md 569, 582 (1922).

Petitioner proposes that this Court adopt the "perpendicular method," which "involves drawing a straight line perpendicular to the new shoreline, from the point where the two parcels met on the old shoreline immediately before the lateral accretion began." Petitioner's Brief at 48-49. In this case, the apportionment is the same regardless of the method used because the boundary line between Lot 4, Section 17 (including its tidelands) and Lot 1, Section 20 was the east-west Section Line, which already runs perpendicular to the shore of the Pacific Ocean. *See Hudson House*, 82 Wash 2d at 183; *Rondesvedt v. Running*, 19 Wis 2d 614 (1963). Accordingly, under either apportionment method, the Disputed Property is north of the Section Line and should be apportioned in its entirety to Parks.

V. ALTERNATIVE ARGUMENT

Even if this Court reversed the Court of Appeals ruling that Sea River cannot own the Disputed Property under Oregon's accretion laws, it should nevertheless

affirm the Court of Appeals outcome by affirming the trial court's ruling that Parks adversely possessed the Disputed Property.[10] Although the Court of Appeals did not find it necessary to reach the issue, this Court has jurisdiction to review whether the findings by the trial court are supported by any substantial evidence and whether such findings are sufficient to support the judgment. *Hawkins v. Teeples and Thatcher*, 267 Or 151, 157 (1973).

A. There is ample evidence to sustain the trial court's ruling that Parks adversely possessed the Disputed Property.

Sea River concedes that Parks established the hostile and open and notorious elements of his adverse possession claim. (SER 48-49). There is more than sufficient evidence to sustain the trial court's findings on the remaining elements of Parks' adverse possession counterclaim: (a) actual, (b) exclusive and (c) continuous use based on an (d) objectively reasonable belief of ownership.

1. Evidence of Actual Use

Parks' predecessor, Publishers, entered into a Lease with the City of Rockaway Beach in 1979 authorizing the City to *occupy* and *use* the Disputed Property for purposes of maintaining its wells. (Exs. 607 & 608). In 1981, Publishers and the City executed a license agreement allowing the City to continue

[10] Respondent fully incorporates in this Respondent's Brief the arguments in his Court of Appeals briefing supporting affirmation of the trial court's ruling that he adversely possessed the Disputed Property.

to "occupy and use" the Disputed Property for the same purposes outlined in the lease in exchange for an *annual* license fee that increased over time. (Ex. 609).

After Parks purchased the property in 1989, the City paid Parks the amount owing under the license agreement for the City's *use* and *occupation* of the Disputed Property. (Ex. 611). Thereafter, the City disputed the obligation to pay Parks pursuant to the license agreement and Parks filed a complaint against the City for trespass in 1994. (Exs. 615-617 & 621). Parks and the City ultimately entered into a settlement agreement under which the City paid Parks $1,000 in exchange for dismissal of Parks' lawsuit and Parks' execution of a Waterline and Water Well Easement for the City's continued use and occupation of the Disputed Property. (Ex. 621).

In addition, from at least 1989 through 2007, Parks' son and granddaughter walked around the Disputed Property anywhere from two to three times a year up to five to eight times a year when they stayed at Parks' beach home across the street. They walked trails and along the ocean and river on the Disputed Property, and had several "wiener/marshmallow roasts" on the Disputed Property next to the jetty. (ER 57; SER 25-28). Parks also walked along the ocean and river on the Disputed Property, collected firewood, clipped twigs from branches in the trails, and he cleared one of the roads or trails on the Disputed Property so he could drive his truck there and collect firewood. (ER 65-66; SER 29-32).

Parks also contracted with the Port of Nehalem in 1998 allowing it to access and use the Disputed Property to keep its channel markers visible from the ocean. (Ex. 622). Parks granted an easement to the Tillamook People's Utility District for access through and use of the Disputed Property, which has also been in effect continuously since 1998. (Ex. 623). Moreover, Parks paid all of the property taxes on the Disputed Property from 1989 to the present. (Ex. 630).

The foregoing evidence establishes, as the trial court found, that Parks acted toward the property as would an average owner of rural property zoned for recreational purposes and subject to public use considering the reasonable uses and geophysical nature of the land. (Tr. at 1502). Sea River disagrees, and argues that there is insufficient evidence to sustain the trial court's finding of "actual use."

Sea River first cites *Talbot v. Cook*, 57 Or 535 (1911), to argue that "the mere casual cutting of the wood on the land and passing over it back and forth" is insufficient to establish actual use. (SER 37). But that is *not* the holding in *Talbot.* Rather, *without* opining expressly as to whether such conduct could constitute actual use, the court concluded that, "whatever her possession was," it was not "hostile" and the mere cutting of firewood and walking across the property was "not sufficient to constitute that open and notorious possession of wild and unenclosed land." 57 Or at 540. *Talbot* is inapposite because Sea River *concedes* that Parks established the hostile and open and notorious elements of his adverse

possession claim. (SER 48-49). In any event, the evidence of Parks' use summarized above, such as hiking, picnicking, granting easements and entering into contracts for others to use the property that were part of the public record, constitutes more use than occasional cutting of firewood.

In addition, Sea River suggests that the trial court places too much reliance on Parks' payment of property taxes. Contrary to Sea River's contention, the trial court did not rely on payment of taxes alone to establish actual use for Parks' adverse possession claim. As in *Knecht v. Spake*, payment of taxes must be given weight here because Parks engaged in actual use of the Disputed Property above and beyond payment of taxes and his continued claim is "evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." 218 Or 601, 612 (1959).

Sea River also argues that granting of easements is not evidence of actual use, but rather goes only to Parks' subjective belief. (SER 38). None of the cases Sea River cites support this proposition. Granting of easements *is* actual use because it is an act of actual ownership and control over the property that allows others, in exchange for a fee, to *occupy and use* the Disputed Property. (*See, e.g.,* Exs. 607, 608, 609, 621, 622, 623, 627, and 628). Licenses and easements are similar to leases which are well recognized as evidence of actual use in adverse

possession cases. *See, e.g., Lieberfreund v. Gregory*, 206 Or App 484, 491-92 (2006) (renting property established actual use by landlord even where property was vacant from time to time); *Harrell v. Tilley*, 201 Or App 464, 473 (2005) (renting arable land on property to others was evidence of actual use by landlord); *Quinn v. Willamette Pulp & Paper Co.*, 62 Or 549, 552, 555 (1912) (use by lessee of riverfront land to hold rafts of logs which were tied to trees inured to the benefit of the lessor to establish actual use); *Allred v. Allred*, 182 P3d 337, 343 (Utah 2008) ("[W]hoever is acting as landlord to the tenant is in actual possession of the property for the purpose of an adverse possession claim."). Parks' exercise of control through leasing or contracts with the City of Rockaway, Tillamook PUD, and the Port of Nehalem to allow their use is sufficient to sustain the trial court's findings on actual use of the property.

2. Evidence of Exclusivity

Sea River also contends that there is insufficient evidence to support the trial court's finding of exclusive use because Parks used the Disputed Property "the same way the general public does." (SER 40). Sea River is wrong. The general public did not pay property taxes; the general public did not contract with government entities for easements or licenses; the general public did not file a lawsuit against the City of Rockaway Beach for trespass; and the general public did not clear any roads on the Disputed Property.

3. Evidence of Continuous Use

Sea River's argument that the trial court lacked evidence upon which to find that Parks continuously used the Disputed Property also fails. Citing *Woolfolk v. Isler*, 37 Or App 687 (1978), Sea River appears to argue that since adverse possession must be proven by "clear and convincing" evidence, reasonable inferences based on circumstantial evidence are insufficient to establish continuous use. (SER 47-49). *Woolfolk* does not warrant reversal of the trial court's findings on continuous use. In *Woolfolk*, this Court said *only* that "factually such an inference is not here warranted" where for a period of four years the record showed that "none of the witnesses was aware of any use or occupation by anyone" despite evidence that cattle were pastured on the property before and after that period. 37 Or App at 692-693.

In any event, more recent case law makes clear that continuous use may be shown by direct and circumstantial evidence taken together. *See, e.g., Gilinsky v. Sether*, 187 Or App 160 (2003) (considering both direct and circumstantial evidence to determine that continuous use was established). Indeed, circumstantial evidence is a well-accepted method of proof *by itself* in all types of cases. Here, taken together, the above-described direct and circumstantial evidence provides ample evidence to sustain the trial court's finding of continuous use by Parks for a period of more than ten years.

4. Evidence of Objective Reasonableness

Sea River concedes (as it must) that, when Parks purchased his property, he had an objectively reasonable belief that he owned the Disputed Property.[11] Sea River contends, however, that—after Riley notified Parks of his claim—Parks' failure to investigate it somehow rendered Parks' belief "objectively unreasonable." (SER 51). As an initial matter, ORS 105.620(1)(b) does not require that Parks' honest belief must be objectively reasonable for the entire vesting period, but rather states only that his *honest* belief must continue for that entire period. Sea River concedes that Parks had an honest belief for the entire vesting period. (SER 51).

In any event, Sea River provides no reason to disregard the trial court's *factual finding* that Parks had an objective, reasonable basis to believe that he owned property that clearly falls within his deed and historical ownership, accepted by all of the outside world (except perhaps Riley from time to time). Whether an honest belief is reasonable "will depend on the circumstances of each case," and that "the size of the property in relation to the discrepancy, the nature of

[11] Parks paid $75,000 for the Parks Property, received a deed from the record owner describing his property with clear boundaries, and received a title insurance policy insuring his title from First American Title Company. Ex. 73. There was nothing to put Parks on notice that someone else might have a colorable claim to any portion of the property described in his deed.

the land, the experience of the parties, and what they had been told all bear on the reasonableness of the belief." *Stiles v. Godsey*, 233 Or App 119, 128 (2009). The trial court found Parks' belief to be objectively reasonable after reviewing voluminous evidence during the course of a lengthy trial. After Parks purchased the Parks Property, Riley wrote Parks a (somewhat confused) letter (Ex. 708), but Riley did not follow up regarding the assertions in that letter. Against the extensive evidence presented at trial, this letter provides no basis to disturb the trial court's factual finding of objective reasonableness on appeal.

B. The trial court also properly ruled that Parks owns the entire Disputed Property by way of adverse possession.

Sea River contends, in the alternative, that Parks can own only that portion of the Disputed Property that he actually possessed. Sea River Br at 40 (citing *Joy v. Stump*, 14 Or 361, 364 (1887). This argument provides no basis for reversal. First, Parks possesses the Disputed Property under color of title, not by a mistaken belief of ownership. *See* ORS 105.620(2)(a) ("color of title" means the "adverse possessor claims under a written conveyance of the property"). The boundaries for the Parks Property pursuant to his deed are *well-defined* in the deed and his chain of title, which clearly establishes the Pacific Ocean as the western boundary for the Parks' Property. Thus, Parks may claim the *entire* tract based on constructive adverse possession by successfully adversely possessing part of it. *See, e.g., Joy*, 14 Or at 364. Second, even if Parks' deed did not contain well-defined boundaries

(which it does), Oregon law is clear that he need only establish "use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited." *Allison v. Shepherd*, 285 Or 447, 452 (1979). The evidence summarized above shows that Parks used the undeveloped land in the same way as would an owner of such land.

VI. CONCLUSION

Parks respectfully asks this Court to affirm the Court of Appeals' ruling that the accretions forming the Disputed Property belong to Parks, not Sea River. Parks asks, in the alternative, that if it does find grounds for reversing the Court of Appeals decision, that this Court nevertheless affirm the trial court's ruling that Parks adversely possessed the Disputed Property.

DATED: August 14, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 10,985 words as determined by Microsoft Word ™.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that I electronically filed **RESPONDENT'S BRIEF ON THE MERITS AND SUPPLEMENTAL EXCERPT OF RECORD** with the Oregon State Court Administrator, Appellate Records Section, by using the appellate Electronic Filing System on August 14, 2013.

Participants in the case who are registered e-Filers with the Electronic Filing System will be served by the appellate Electronic Filing System.

I further certify that one of the participants in the case is not a registered e-Filer. I have mailed the foregoing **RESPONDENT'S BRIEF ON THE MERITS AND SUPPLEMENTAL EXCERPT OF RECORD** by First-Class Mail, postage prepaid, to the following participant:

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