ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioner on Review,

v.

LOREN E. PARKS, an individual,

Respondent on Review.

Tillamook County Circuit Court Case No. 062011

CA No. A145896

SC No. S061094

LOREN E. PARKS, an individual,

Third-Party Plaintiff,

v.

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.

PETITIONER'S BRIEF ON THE MERITS FOR REVIEW

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

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

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1. What is the basic law of accretion in Oregon?

Proposed Rule: When new land accretes, it becomes part of the upland property.

2. What is the basic law of tidelands ownership in Oregon?

Proposed Rule: An owner of tidelands owns the tidelands covered by his or her deed, between the ordinary high and low water marks. The location of particular tidelands at a given point in time is a question of fact.

3. How does the doctrine of lateral accretion affect the basic law of accretion in Oregon?

Proposed Rule: The doctrine of lateral accretion is an equitable exception to the normal law of accretion. It is relevant when two parcels of land border a body of water (such as the Nehalem River), and land accretes from one parcel laterally in front of the other parcel. The doctrine of lateral accretion may be applied to preserve both parcels' riparian frontage, typically by apportioning the laterally accreted land using the "perpendicular" method. However, the 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. The doctrine of lateral accretion does not apply in this case on the facts.

NATURE OF ACTION, RELIEF SOUGHT IN THE TRIAL COURT, AND NATURE OF JUDGMENT BY THE TRIAL COURT

This is a real property dispute regarding unimproved land in Nedonna, Oregon that formed by accretion in the early 1900s. Petitioner Sea River Properties, LLC ("Sea River") and its predecessor Robert Riley and family ("Rileys") filed suit in Tillamook County Circuit Court to quiet title to the disputed land, asserting ownership based on the deed record and the law of accretion. Respondent Loren Parks ("Parks") cross-claimed, asserting that he purchased the land from Publishers Paper Company ("Publishers") in 1989 or, in the alternative, adversely possessed it.

After a 14-day bench trial, the trial court found that the disputed land had accreted to property owned by Sea River's predecessors and therefore belonged to Sea River's predecessors. Sea River therefore would be the lawful owner, except that the trial court went on to conclude that Parks had adversely possessed the land sometime after 1989. The trial court entered judgment in favor of Parks on May 24, 2010, based on adverse possession.

Sea River appealed the adverse possession ruling, but the Court of Appeals never reached that issue. Instead, on cross-assignment of error by Parks, the Court of Appeals concluded that the trial court had misapplied the law of accretion and that Parks was the true owner under the law of accretion. The Court of Appeals accepted the trial court's factual findings on accretion as

binding, but it disagreed with the trial court's application of the law of accretion. This court granted review.

STATEMENT OF MATERIAL FACTS

The disputed property is approximately 40 acres of land in Nedonna, Oregon. (Tr 122; ER-8.) The ownership of this land has been disputed for decades but not litigated until recently due to the land being vacant and unimproved. (Tr 706.) The general location of the land is marked in yellow on the upper part of Exhibit 210. (ER-6-7; Tr 414-15.) Specifically, it is the upland north of Section Line Street, south of the south jetty of the Nehalem River, and west of the thread of McMillan Creek. (Tr 364-65.)

Sea River claims ownership of the disputed land as successor to Riley, who purchased a 285-acre parcel in 1944, while Parks claims ownership as successor to Publishers. (Tr 104-13, 878-80.) It is undisputed that Riley owned the land south of the disputed property, including Lots 1, 2, 3, and 4 of Section 20, and that Publishers owned the land north and east of the disputed property, including Lot 4 of Section 17. (Exs 23, 71.) Ownership of the disputed land is in question because it formed by accretion in the early 1900s and the parties have long disagreed as to who lawfully owns it.

I. HOW THE DISPUTED LAND CAME INTO EXISTENCE

Accretion is the gradual creation of new land at a riparian boundary as the result of natural forces such as water and wind. (Tr 341.)

Conversely, erosion is the gradual destruction of land by natural forces. (Tr 341, 357.) Accretion and erosion both occur constantly on the Oregon coast, and there is a specialized body of law that addresses the impact on property ownership of such natural changes to land. (Tr 357.)

The area now known as Nedonna has experienced substantial erosion and accretion over the past 150 years. (Tr 339-53, 490-91.) The federal government originally surveyed the area in 1858, using the rectangular system. (ER-1.) Under that system, land is platted in one-square mile sections (640 acres), divided into four quarter sections, and further divided into 16 quarter-quarter sections. (Tr 328-30, 1257-58.) Land is thereafter referenced by its location in the section, such as the "north half of the southeast quarter of section 20" (Ex 23) or "the northwest quarter of the northeast quarter of section 20" (Tr 494). Navigable water is a natural riparian boundary, so plat lines stop automatically upon encountering any navigable water, which results in irregular parcels that are given "lot" numbers for reference, such as "Lot 1 of Section 20." (Tr 369, 1257-58.) This case involves land and lots in Sections 17 and 20, Township 2 North, Range 10 West of the Willamette Meridian. (Ex 201.)

The map at ER-1 shows how the Nedonna area looked in 1858 when the land was originally surveyed, including the Section 20 lots owned by Sea River's predecessor and Lot 4 of Section 17 owned by Parks's predecessor.

Between 1858 and 1911, the Nehalem River moved significantly south, causing a substantial amount of erosion in Sections 17 and 20 and making the river the natural riparian boundary of most of the lots. (ER-10.) By 1889, most of Lot 4 of Section 17, all of Lots 1 and 2 of Section 20, and part of Lot 3 of Section 20 had been eroded away, as shown on the 1889 map (ER-2) and 1911 map (ER-3). (Tr 341, 357, 431-32, 490, 1864; Ex 237.) The erosion reached its maximum point around 1911, for which a good reference point is the railroad tracks shown on the 1911 map (ER-3) where the railroad company put rip-rap to protect against further erosion. (Tr 120-21, 348; ER-15.)

In 1911, the Nehalem River was 600 feet wide, up to 26 feet deep, and navigable by ships and large boats. (Tr 343-44, 589.) Due to the river's southern movement and the resulting erosion over the preceding decades, Lot 4 of Section 17 bordered on the Nehalem River. (ER-3; Tr 341, 431-32, 1864.) The trial court expressly found that Lot 4 of Section 17 was a riverfront lot on the Nehalem River in 1911. (ER-15-16; ER-75.)

Meanwhile, in 1910, the federal government began building the first of two jetties to contain the Nehalem River and make it safer for the passage of ships. (Tr 344-45, 1919; ER-15.) The beginning of the first jetty is shown on the 1911 map. (Tr 340.) The first jetty was completed by 1918, and the second jetty was completed by 1926. (Tr 1919; ER-18.) The jetties fundamentally changed the natural movement of water and sand in the area. (Tr

344-46.) Over time, particularly in the 1920s, a substantial amount of new land formed by accretion, including the land now in dispute. (ER-42-44; Tr 351-53.)

Both parties presented substantial expert testimony and evidence at trial regarding how the new land formed, with each party's experts testifying at great length regarding their credentials, methodologies, and conclusions. The parties presented two very different versions of the facts.

Sea River's experts testified that the new land had formed by accretion to Sea River's predecessor's property, accreting south to north and northeast until it eventually reached the centerline of the old southern channel of the Nehalem River, which is now the thread of McMillan Creek. (Tr 351-55, 364-65, 423, 486-95, 524-28, 542-44, 575-76, 592-93, 1799-1800, 1885-97; ER-73-74.) Sea River's experts testified that the accretion did not and could not have occurred north to south or east to west. (Tr 354-57, 592-93, 1780-1800.) The new land accreted south to north, with the leading edge being the high water line that continued to move south to north. (Tr 1885.) "It was slow and steady, building from the south to the north [and northeast]." (Tr 528.) It "started from the south." (Tr 488.)[1]

Parks tried to prove that the land had accreted east to west instead, beginning at Lot 4 of Section 17 and continuing until it reached Section 20.

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[1] The only land that did not accrete south to north, according to Sea River's experts, is a little land at the toe of the railroad slope that accreted east to west but is not in the disputed area. (Tr 346-47, 356.)

(ER-60-62; ER-74.) This was the key issue at trial on accretion. Parks's own expert admitted that, if the new land accreted from south to north, as opposed to east to west as he believed, then Sea River's predecessor would own the new land under the law of accretion. (ER-61.)

The trial court ultimately accepted Sea River's evidence and rejected Parks's. Having "taken considerable time to analyze the maps, expert testimony and arguments of the parties," the trial court found Sea River's evidence "more persuasive." (ER-74.) "Therefore, the Court accepts the testimony of [Sea River's] experts Larson and Reckendorff." (ER-74.)

As the Court of Appeals recognized in its opinion, the trial court's findings as to how the accretion occurred are supported by evidence and therefore binding on appeal. "Our dispute is not with the facts that the trial court found. Because there is evidence in the record to support them, we are bound by those facts." (ER-99-100.)

II. THE DEED RECORD

A. Sea River's Chain of Title

The trial court held, and the Court of Appeals agreed, that Sea River had established its chain of title. (ER-73 ("The Court concludes that the Sea River chain of title to lots in Section 20 is established by this record."); ER-11-40 (describing Sea River's chain of title in detail); ER-92 (stating that Sea River "owns the 'natural accretions'" to Lots 1 and 2 of Section 20); ER-94-95

(describing Sea River's chain of title, culminating in its acquisition of the "natural accretions" to Lots 1 and 2).)

The trial court and the Court of Appeals therefore both turned to the next question—whether the disputed land actually belonged to Sea River's predecessor—which depends on the law of accretion. (ER-96 ("[W]hether plaintiff's chain of title included any of the disputed property depended on the extent to which it was entitled to that property under accretion principles.").) If the accretions were owned by Sea River's predecessor, they were lawfully transferred to Riley and ultimately Sea River.[2] If not, they could not be.

The trial court concluded that Sea River's predecessor did own the disputed accretions, while the Court of Appeals concluded that she did not. (ER-91; ER-99-102.) On review, this court will decide which is correct under Oregon law. Regardless, given the current posture of the case, Sea River's deed history is no longer relevant. Sea River's chain of title is established at this point. (ER-73; ER-92; ER-95.) It is also established at this point that the

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[2] It is undisputed that Riley acquired any accretions to the Section 20 lots when he purchased his property in 1944. No one has ever suggested his predecessor kept the accretions for herself. *See Kingsley v. Jacobs*, 174 Or 514, 149 P2d 950 (1944) (treating conveyance to bank as conveyance to thread, the true legal boundary for non-navigable stream, absent evidence the grantor actually intended to reserve the difference); *see also, e.g., Montana Dep't of State Lands v. Armstrong*, 251 Mont 235, 239, 824 P2d 255, 258 (1992) ("[A]ccreted lands pass with riparian property unless excepted or reserved."); *Crow v. Johnston*, 209 Ark 1053, 1059, 194 SW2d 193, 196 (1946) ("We have many times held that title to land carried with it all accretions formed or made prior to the conveyance, as well as after, though not mentioned in the deed of conveyance.").

accretion occurred south to north. (ER-99-100.) At trial, Sea River argued that changes in the deed language over time corroborated how the land in Section 20 was changing on the ground, including that new land was accreting south to north,[3] but this issue is no longer relevant since the direction of the accretion is now established for purposes of review.

B. Parks's Chain of Title

In 1989, Parks purchased Lot 4 of Section 17 (and part of Lot 3 of Section 17) from Publishers, which was selling off its remaining holdings in the area. (Exs 71, 692-695.) Parks owned a vacation home nearby, and a local realtor thought Parks might be interested in buying the land, which was wild and unimproved. (Tr 879.) He was. (Tr 914.) Publishers initially indicated that it was selling 56 acres but later changed the legal description to simply refer to lot numbers, and it would only provide a bargain and sale deed. (Ex. 71; ER-28-30; Tr 895-97.) Parks paid $75,000 cash for part of "Government Lot 3," all of "Government Lot 4," and any "tidelands fronting and abutting Government Lot 4." (Ex 71.) Parks obtained title insurance but his policy expressly excluded accretion claims. (Ex 73.)

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[3] The trial court agreed with Sea River that language changes in the deeds were intentional. (ER-73.) The Court of Appeals's description of a certain 1926 agreement suggests it may think otherwise (ER-94), but this is a non-issue because it expressly accepted the trial court's findings that the accretion occurred south to north, with or without corroboration from the deed record.

As with Sea River, the trial court (and the Court of Appeals) concluded that Parks had established his chain of title but that whether Parks actually owned any of the disputed land turned on the law of accretion. (ER-73; ER-99.)

III. THIS LITIGATION

Robert Riley attempted to resolve the ownership of the disputed land at various times over the years, but no one actually sued to quiet title to it until 2006, when Sea River sued to quiet title in its favor, and Parks counter-claimed to quiet title in his favor. (TCF 1, 6, 9.) In addition to claiming ownership by deeds and accretion, both parties claimed adverse possession in the alternative.

The case was tried to the bench over 14 days in 2007-08, and the trial court issued its opinion in 2010. (ER-9; ER-86.) The trial court concluded that Sea River's predecessors owned the disputed land under the law of accretion. (ER-9-76.) As such, Sea River would be its lawful owner, except that in the final pages of the opinion the trial court concluded that Parks had adversely possessed the land at some point after 1989. (ER-81-83.) The trial court therefore entered judgment in favor of Parks on May 24, 2010, based on adverse possession. (ER-85-89.)

Sea River appealed the ruling on Parks's adverse possession claim, and Parks cross-assigned error to the ruling on deeds and accretion. The Court

of Appeals never reached Parks's adverse possession claim. (ER-103 n 5.) Instead, it affirmed on the alternative ground that the trial court misapplied the law of accretion. (ER-91.) That is the issue now on review.

SUMMARY OF THE ARGUMENT

This case presents three questions regarding what the law of accretion is and should be in Oregon. The Court of Appeals recognized that it was bound by the trial court's accretion findings, which were supported by evidence. The Court of Appeals disagreed with the trial court, however, as to basic principles of accretion law and the doctrine of lateral accretion. In the process, the Court of Appeals not only reached the wrong result but created an untenable approach to accretion law that is inconsistent with prior caselaw.

When new land forms at a riparian boundary through the process of accretion, the owner of the upland property to which the accretion occurs is the lawful owner of the accreted land. This is the fundamental tenet of the law of accretion. At trial, both parties sought to prove that the new land in dispute had accreted to their predecessors' property. Sea River presented evidence that the new land had begun accreting at its predecessor's property and proceeded south to north and northeast, while Parks presented evidence that it had begun at his predecessor's property and proceeded east to west. The trial court ultimately agreed with Sea River's evidence and found "that the accreted

property initially attached to Lot 1 in Section 20 and grew north and east until it became contiguous with Lot 4 in Section 17."

Based on its factual findings, which the Court of Appeals has recognized as binding, the trial court correctly concluded that the owner of Lot 1 of Section 20 was the lawful owner of the disputed land, as the owner of the upland to which it accreted. The Court of Appeals disagreed, however, holding that whoever owned the *tideland* that had previously existed in the area before the accretion occurred was the lawful owner of the accreted land, rather than the upland owner.

The Court of Appeals's ruling either misunderstands the evidence or misunderstands the nature of tidelands, but in either event it creates untenable law. Accretion always occurs at a riparian boundary, where sand and soil deposit along the shore or bank creating new upland (land above the ordinary high water mark) where previously there was submersible land (such as tideland) or submerged land. That is the definition of accretion. As new upland forms, the ordinary high water line necessarily moves, shifting the boundary of any adjacent submersible or submerged lands. That does not make the owner of the submersible or submerged lands the owner of the new upland. To the contrary, under this court's prior caselaw, it is the *upland* owner who owns the new upland. The trial court's conclusion that Sea River's predecessor

owned the disputed land, as the owner of the upland to which it accreted, should have been upheld.

As for the doctrine of lateral accretion, which is an exception to the normal rule of ownership of all accretions to one's property, that doctrine does not apply in this case. The doctrine is relevant when new land accretes from one person's property laterally in front of another person's property such that it cuts off the neighboring property's access to the body of water that is its riparian boundary. In this case, when the accretion to Section 20 began, the riparian boundary of Lot 4 of Section 17 was the Nehalem River, and it remains today the remnant of that river channel (now part of McMillan Creek). The accretion to Section 20 did not occur laterally to Lot 4 of Section 17's riparian boundary. Parks wants ocean access, but the doctrine of lateral accretion cannot be used to give Lot 4 a different riparian boundary on a different body of water than it had before the accretion began. Lot 4 has not bordered the Pacific Ocean for nearly 150 years, due to erosion that occurred long before any accretion to Section 20 began. Nor is the doctrine relevant to tideland owners (as the Court of Appeals suggested), only upland owners. The doctrine simply does not apply in this case.

Moreover, in any event, the doctrine would not apply as the Court of Appeals applied it. When it is necessary to divide laterally accreted land, the typical rule is to draw a line perpendicular to the new shoreline, running to

where the two parcels met on the old shoreline immediately before the lateral accretion occurred. It is not appropriate to simply extend existing upland property lines. That approach is almost universally rejected by courts applying the doctrine of lateral accretion. Again, the doctrine does not apply in this case, but the proper methodology should be recognized.

ARGUMENT

I. STANDARD OF REVIEW

The only issues on review are legal issues, subject to review as a matter of law. *S.M.H. v. Anderson*, 251 Or App 207, 208, 283 P3d 386 (2012). Quiet title is traditionally an equitable claim, but trial anew in equitable cases is now discretionary. ORAP 5.40(8). Parks did not request trial anew, nor did the Court of Appeals allow it. (ER-91.)

II. NEWLY ACCRETED LAND BELONGS TO THE UPLAND OWNER (FIRST QUESTION)

It is a basic principle of accretion law that new land formed by accretion is the property of the upland owner. The Court of Appeals's decision states but then upsets this long-standing rule. Sea River asks that the court reiterate and reinstate this fundamental tenet of accretion law.

A. The Nature of Riparian Ownership

There are three types of "land" relevant to surveyors and courts. "Upland" lies above the ordinary high water mark. "Submersible land" lies

between the ordinary high and ordinary low water marks, including tideland.[4] "Submerged land" lies below the ordinary low water mark. (Tr 347-49, 362.) ORS 274.005; *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*, 250 Or 612, 614-15, 443 P2d 205 (1968). Upland is often called "dry land" or just "land." Tideland is tidally influenced submersible land, so it is usually exposed at low tide but submerged at high tide and therefore always "wet." (Tr 485.) Coastal rivers frequently have tidelands. (ER-2-3; Ex 674.)

Riparian property is innately different than non-riparian property. Non-riparian boundaries are fixed, such that the size, shape, and character of a parcel of non-riparian land are very unlikely ever to change. That is not true of riparian property. As this court has explained, "all riparian owners" are subject to "the possibility of gain or loss" of their property, being on the one hand "entitled to whatever should be gained from the sea by alluvion or dereliction,"[5] while on the other hand "their title [is] liable to be lost by the advance of high-water-mark, so as to bring the strip reserved within the ebb and flow of the tide." *State Land Bd. v. Sause*, 217 Or 52, 69, 342 P2d 803 (1959).

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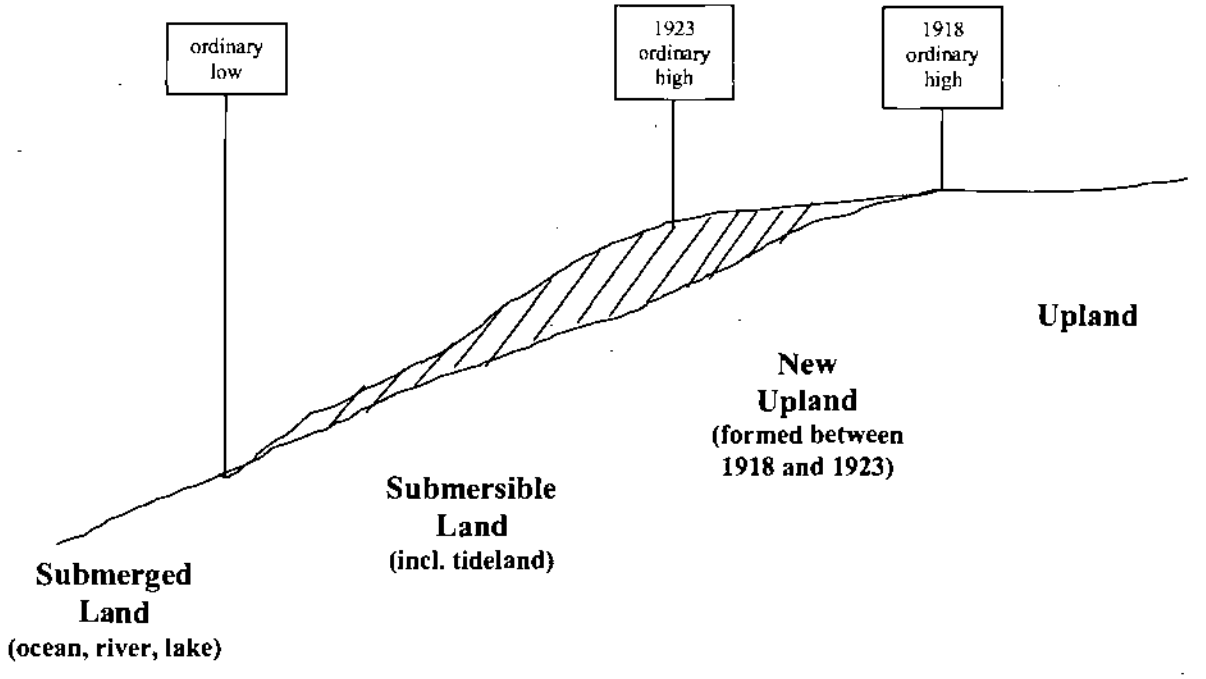
[4] Submersible land does not have to be tidal, *see* ORS 274.005, but, when it is, it is typically referred to as "tideland."

[5] "Alluvion" and "dereliction" are each forms of accretion. Alluvion is the gradual build-up of new land at a riparian boundary by deposition of soil or silt by wind and wave action (as in this case), while dereliction is the gradual emergence of new land by subsidence of water. *Webster's Third New Int'l Dictionary* 59, 607 (unabridged ed 1971). The processes are different, but "the terms are often used interchangeably," and accretion law applies to both. *Hanson v. Thornton*, 91 Or 585, 590, 179 P 494 (1919).

This is why a riparian owner's "right to all additions to his land which are effected by accretion" is a "valuable" right. *Gubser v. Town*, 202 Or 55, 72, 273 P2d 430 (1954). It "is an inherent and essential attribute" of the riparian owner. *Bonnett v. State*, 151 Or App 143, 149, 949 P2d 735 (1997), *quoting California ex rel. State Lands Comm'n v. U.S.*, 457 US 273, 284, 102 S Ct 2432 (1982).

B. The Process and Law of Accretion

The following is a simple illustration of the formation of new land by accretion. In this illustration, sand or silt has gradually been deposited in the hash-marked area over a five-year period, causing new upland to form and the ordinary high water mark to move. The ordinary low water mark has stayed the same in this illustration but could also move depending on the circumstances.



The legal question is: who owns the new upland that formed by accretion between 1918 and 1923?

The answer should be the upland owner. This is the universally accepted common-law rule, which Oregon has always followed. *E.g.*, *State Land Bd. v. Corvallis Sand & Gravel Co.*, 283 Or 147, 154, 160-67, 582 P2d 1352 (1978) (recognizing "that a riparian owner is entitled to accretions which become a part of, and enlarge, his land" and that this "well-recognized right to accretions is a riparian right [that] is not dependent upon ownership of the adjacent bed"); *Sause*, 217 Or at 99 (stating that accretions "go to the upland owner," whether entirely natural or spurred in part by human activity such as jetty construction); *Hoff v. Peninsula Drainage Dist.*, 172 Or 630, 638-39, 143 P2d 471 (1943) (stating that "the right to accretions" is one of the "riparian rights of owners of lands adjacent to navigable waters"); *Hanson*, 91 Or at 590 (discussing the law of accretion, which is derived from the Roman law that "ground which a river hath added to your estate by alluvion becomes your own by the law of nations"); *Druian v. Dep't of Revenue*, 13 Or Tax 170, 173 (1994) ("Under common law, land formed by gradual accretion is owned by the upland proprietor."); *see also*, *e.g.*, *Hudson House, Inc. v. Rozman*, 82 Wash 2d 178, 185, 509 P2d 992, 996 (1973) ("Accretions belong to the property to which

attached, except in highly unusual circumstances.");[6] Annotation, *Right to Accretion Built Up From One Tract of Land and Extending Laterally in Front of Adjoining Tract Without Being Contiguous Thereto*, 61 ALR 3d 1173 (1975) ("It is a general and ancient principle of real property law [that] title to deposits gradually and imperceptibly formed by accretion vests in the littoral or upland owner against whose shores or banks the alluvion is formed.").

Indeed, the common law principle that an owner of upland is entitled to any accretions to his or her land is so well-established that it is part of the lay definition of "accretion":

> the increase or extension of the boundaries of land or the consequent acquisition of land accruing to the owner by the gradual or imperceptible action of natural forces (as by the washing up of sand or soil from the sea or a river or by a gradual recession of the water from the usual watermark): accession in which the boundaries of land are enlarged by this process.

Webster's Third 13 (emphasis added); *see also Black's Law Dictionary* 22 (8th ed 2004) (defining "accretion" as "[t]he gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river or on the seashore").

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[6] Accretion is often described as "attaching" to upland property. For example, Larson described accretion as the "build-up of material attached to a piece of property, whether that's a result of wind or rain or deposition" (Tr 341) and the significance of accretion as "[w]ell, that usually attaches to a property, and so that adds to the property, and obviously that makes the property larger" (Tr 342).

This is why accretion cases invariably turn on how the new upland formed, in particular where it began, which is "strictly" a fact question. *Strasbaugh v. Babler Bros., Inc.*, 220 Or 35, 37, 348 P2d 448 (1960) (stating that determining whose upland the disputed land accreted to is "strictly a factual [problem]"). The accretion "must begin upon the land of the party who claims the newly made land, and not upon some other place from which it may eventually extend until it reaches the claimant's." *Gubser*, 202 Or at 72. In most cases, both parties claim the accretion began at their property.

This court's decisions in *Strasbaugh* and *Gubser* are a good example. In both cases, new land formed by accretion in the area between a river island (owned by the state) and a riverfront lot (owned by a private party). *Strasbaugh*, 220 Or at 38-39; *Gubser*, 202 Or at 57-59. Both sides claimed that the accretion had started on their land. *Strasbaugh*, 220 Or at 38-39; *Gubser*, 202 Or at 72. The state won in one case, and the private party in the other. In *Strasbaugh*, 220 Or at 38-39, the court found that the accretion had begun at the island and proceeded to the riverbank, from which it followed that the owner of the island owned the accretions. In *Gubser*, 202 Or at 68-73, by contrast, the court found that the accretion had begun at the riverbank and proceeded to the island, so the owner of the riverbank lot owned the accretions.

In this case, Sea River and Parks fought vigorously at trial to establish how the disputed land formed. Sea River argued and presented

extensive evidence that the new land accreted to its predecessor's property, continuing toward the north and northeast until it eventually reached the stream bordering Lot 4 of Section 17; while Parks argued and presented evidence that the new land accreted to his predecessor's property, continuing west and southwest towards Sea River's predecessor's property. The trial court ultimately found Sea River's evidence "more persuasive" and "accepted the testimony" of Sea River's experts that the disputed land "accreted from government Lot 1, Section 20 to the north and east." (ER-73-74.)

It should follow, as the trial court held, that Sea River's predecessors owned the disputed land as owner of the *upland* property to which it accreted. The Court of Appeals even recognized this rule in principle in its opinion, stating, "When new land is formed by the process of accretion, the actual boundary moves as the waterway's course changes." (ER-99.) Nonetheless, the Court of Appeals proceeded to hold that the accretions to Lot 1 of Section 20 belonged to the owner of nearby *tideland*, rather than the upland owner, because the new upland formed in a geographic location where there had previously been tideland. (ER-99-101.)

The tideland issue is addressed further in the next section. In answer to the first question presented, however, Sea River asks that the court reiterate and reinstate the basic principle of Oregon law that new land formed by accretion belongs to the *upland* owner.

III. TIDELAND OWNERSHIP MOVES WITH THE TIDES, AND THE LOCATION OF PARTICULAR TIDELANDS AT A GIVEN TIME IS A QUESTION OF FACT (SECOND QUESTION)

In holding that the *tideland* owner owned the accretions to Lot 1 of Section 20, rather than the upland owner, the Court of Appeals applied non-riparian logic to tidelands and upset the basic law of accretion. The correct rule of law is that accretion moves the ordinary high water line and thereby moves tideland, and the upland owner owns the accretions, not the tideland owner.

A. The Court of Appeals's Decision

In 1858, Lot 4 of Section 17 was 27 acres, and Lots 1, 2, 3, and 4 of Section 20 together were 146 acres. (ER-1 (map with acreage notations).) By 1889, the vast majority of that land had been destroyed by erosion by the Nehalem River, and there was tideland in much of the area, as continued to be true in 1911 when the river reached its maximum point of erosion. (ER-2-3; ER-15-16; Tr 120-21, 341, 348, 357, 431-32, 490, 1864; Ex 237.)

After 1918, however, a substantial amount of new land formed by accretion to Sea River's predecessor's property. (ER-73-74; *supra* page 6.) Today, if one compares a current map with a 1911 map, it is immediately apparent that there is now upland in much of the geographic area where there was tideland in 1911 (ER-5), just as it is immediately apparent if one adds an

1858 map that there was upland in much of that area in 1858 (ER-1-3).[7] It does not follow that whoever owned the tideland north of Sea River's predecessor's property in 1911 owns the upland that exists in that area today, as is evident from the first question presented.

The Court of Appeals saw that, on the 1911 map, just before accretion to the Section 20 lots began, there was a significant tideland area north of Section 20.[8] (ER-100.) It then looked at the 2005 map and saw that there is now land in the same "place" that there were tidelands in 1911. (ER-100.) Comparing the two maps, the court concluded that whoever owned the tideland in 1911 must own the land that now exists in that area, regardless of how it got there. (ER-100).

As the court explained, "The foundation of our disagreement [with the trial court] rests on the character of the disputed property before the accretions occurred. As the [1911 map] indicates, the disputed property consisted mostly of tidelands when the construction of the Nehalem River jetties was underway." (ER-100.) "The disputed property existed as tidelands before the accretions commenced; accordingly, it was owned by someone. The

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[7] Most of the land that accreted after 1911 is located where original Lots 1 and 2 of Section 20 were located in 1858. That land was destroyed by erosion between 1858 and 1911. For convenience, the owners have always referred to the new land in that area by the old lot numbers. *Cf. Gubser*, 202 Or at 73 (explaining "new Lot 1" versus "old Lot 1").

[8] Rivers carry sediment, so there is virtually always a tidal sand bar near the mouth of a river. (Tr 343.)

deposits of additional sand did not alter that ownership." (ER-100.) The court reiterated this reasoning in its conclusion, stating:

> [T]he disputed property formed on existing tidelands. It therefore belonged to the owner of the tidelands. The source of the deposition that created the new land is not dispositive; the ownership of the land whereupon that new land was formed is the controlling consideration. It follows that the trial court erred in concluding that plaintiff and its predecessors previously owned the disputed property based on accretion.

(ER-101 (emphasis added).)

This view of the process of accretion is factually and legally incorrect, in general and in this case, and is inconsistent with Sea River's evidence and the trial court's findings.

B. Accretion Moves the Ordinary High Water Mark, and Tideland Moves With It

The forces that cause accretion are complex, but the general idea is that sand or silt is deposited at the edge of existing upland, causing new upland to form. *Black's Law Dictionary* 22.[9] When accretion occurs, sand or silt is not deposited evenly over an entire area thereby simultaneously raising the entire

[9] The term "accretion" technically refers only to new upland, although it is sometimes used loosely. *See Corvallis Sand*, 283 Or at 161-62 (stating that the "general principle" of accretion cases is that the water line moves and thereby enlarges the upland); *Hazen v. Herbst*, 244 Or 494, 498, 419 P2d 23 (1966) ("the land in question was added to plaintiffs' upland by the usual processes of accretion and reliction"); *see also, e.g., Mather v. State*, 200 NW2d 498, 503 (Iowa 1972) ("[N]o title by accretion occurs until the land surfaces above the water at the ordinary high water mark."); *but see, e.g., Fellman v. Tidewater Mill Co.*, 78 Or 1, 4, 152 P 268 (1915) (using term "accretion" to refer to rise in elevation within tidelands, in dispute between two tideland owners regarding ownership of tidal sand bar that was moving within the tidelands).

area like artificial fill, an avulsive event that does not affect ownership. *See Sause*, 217 Or at 99 ("a riparian owner cannot add to his property against the state by filling in the area adjacent to his property, either on the idea that such a change is sudden and therefore an avulsion, or on the idea that he cannot thus claim that to which he has no right").

New upland forms incrementally at the edge of existing upland, pushing out the ordinary high water line, as Sea River's experts testified occurred in this case. (*E.g.*, Tr 1885.) A substantial amount of new land may eventually form, but it does so inch by inch, and only when there is sufficient material and the necessary combination of natural forces not only to deposit the material at the edge of the upland but also to attach it there. (Tr 350, 353, 583-94, 1806-07.)

Thus, unlike an artificial fill situation, the new land is attached to and growing slowly from the existing upland, *moving* the ordinary high water line as it goes and *moving* the upland boundary with it. *Sause*, 217 Or at 69; *see also, e.g., U.S. v. Milner*, 583 F3d 1174, 1187 (9th Cir 2009) (stating that the boundary between tidelands and uplands is "ambulatory"; that "[t]he uplands owner loses title in favor of the tideland owner—often the state—when land is lost to the sea by erosion or submergence"; but that "[t]he converse of this proposition is that the littoral property owner gains when land is gradually

added through accretion [or reliction]"; and that "[t]hese rules date back to Roman times" and are the subject of many authorities and cases).

The entire purpose of the law of accretion is to designate who owns accretions that occur at a riparian boundary, and the law is that it is the upland owner. *E.g.*, *Sause*, 217 Or at 99. The Court of Appeals's ruling that it is the tideland owner cannot stand.

C. The *Bonnett* Decision

The Court of Appeals relied on *Bonnett* as its authority for the proposition that accretions belong to the tideland owner rather than the upland owner. *Bonnett* does not support that proposition.

Bonnett was a quiet title action brought by the owner of a riverfront lot. 151 Or App at 145. Plaintiff Bonnett sought to take title to new land that had formed between his lot and a spit in the river in front of his lot. *Id.* The trial court was unable to determine how the new land in front of Bonnett's lot formed, so it held that Bonnett had failed to carry his burden of proof and rejected his quiet title claim. *Id.* On *de novo* review, the Court of Appeals reviewed the evidence and found that the spit had originated at a place called "Northpoint," had grown south for a great distance until it eventually grew laterally in front of Bonnett's lot, and that that portion of the spit "island" then began accreting both west and east until its east side became contiguous with Bonnett's property. *Id.* at 148.

Having found that the new land in front of Bonnett's lot accreted from the spit, not from his own land, the Court of Appeals held that Bonnett did not own the accreted land and therefore affirmed the trial court's rejection of his quiet title claim. *Id.* at 153-54. This holding is entirely consistent with the fundamental tenet that upland owners are entitled to any natural accretions to their land. *Sause*, 217 Or at 99. This tenet applies equally to owners of islands as to owners of any other upland property. *Strasbaugh*, 220 Or at 38-39; 5 Op Atty Genl (1910-1912); *see also, e.g., Turner v. Mullins*, 162 SW3d 356, 364 (Tex App 2005) (holding that title to island vested in state upon its formation, after which state had the same right to accretions to the island as any upland owner).

There was a twist in *Bonnett* in that the property where the accretions began was actually a spit, not an island, but the court treated the spit as an island, reasoning that (1) it did not matter who owned the spit because the accretion did not begin at Bonnett's land and therefore did not belong to Bonnett, and (2) it would be unlikely that the Northpoint owner could make any claim to the disputed land because of the doctrine of lateral accretion recognized in other jurisdictions, which the court discussed in general terms. *Bonnett*, 151 Or App at 152.

The latter portion of the court's decision, which is dicta, will be discussed later in connection with the doctrine of lateral accretion. As for

Bonnett's holding, however, it is unremarkable. In order to claim new land under the law of accretion, the plaintiff must prove that the accretion began at his property. *Id.* at 150-51. In *Bonnett*, the court found that the accretion began at someone else's property (the "island"), not Bonnett's (the riverfront lot), and therefore denied Bonnett's quiet title claim. *Id.* at 145, 153. In this case, the trial court found that the accretion began at Sea River's predecessor's property and therefore correctly concluded that it belonged to Sea River's predecessor.

Quoting the passage in *Bonnett* regarding the well-settled rule that the owner of the bed of a river owns any islands that form in the river, the Court of Appeals asserted, "Similarly, here, the disputed land formed on existing tidelands. It therefore belonged to the owner of the tidelands. The source of the deposition that created the new land is not dispositive; the ownership of the land whereupon that new land was formed is the controlling consideration." (ER-101.)

To the extent the court means to suggest that the accretion in this case began on an island, that is completely at odds with the trial court's findings, which the Court of Appeals recognized as binding. (ER-99-100.) All of the new land accreted south to north from the Section 20 lots, not in any other direction or from any other place. (ER-73-74.)

Conversely, if the Court of Appeals is interpreting *Bonnett* to mean that accretions belong to the owner of whatever submersible or submerged land

previously existed in the area, that is not what *Bonnett* held, nor would such a holding be reconcilable with this court's caselaw. *Bonnett*'s holding is founded on the existence of a separate upland property (the spit "island") from which the accretion occurred, not the fact that there used to be tideland or submerged land in front of Bonnett's property. *See id.* at 151 ("when an island forms in a navigable river and then grows by accretion to the bank of the river, the state owns both the former island and the accreted land").[10] If the mere fact of what used to be in front of Bonnett's property and who owned it was determinative, then it would have been irrelevant which direction the accretion occurred, which was in fact the primary issue before the court and the entire basis for its legal conclusion. *See id.* at 148 ("This description of how the land west of Lot 1 formed is the foundation for the legal conclusions that we reach."). Indeed, the law of accretion itself would be unnecessary if the rule was simply that new land goes to whoever owned what was there before. That is not the law.

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[10] In its concluding paragraph, *Bonnett* summarizes the three steps of its reasoning: (1) the state would own any island that formed on tidelands it owned; (2) the state would own any accretions to any island it owned; and (3) therefore the state owns the new land that accreted between the island and Bonnett's property "as the owner of the tidelands" (referring back to the first step). The third statement is potentially misleading but clear in context. Note also that the court assumes that an owner of river tidelands would own an island that arose in the river tideland area, which may or may not be true (the state might still have a claim as the owner of the bed), but this assumption was irrelevant in *Bonnett* because the state owned both the tidelands and the bed, and it is irrelevant in this case because there is no island involved here.

D. The Tidelands Fronting and Abutting Lot 4 of Section 17

The fact that the disputed accreted to Sea River's predecessor's property should have been determinative of its ownership, as the trial court concluded it was. The accretion did not begin at Lot 4 of Section 17 (as Parks argued). It did not begin on an island (there was no island). The disputed land formed by accretion to Lot 1 of Section 20 and therefore belonged to the owner of Lot 1 of Section 20, as a matter of law.

Because the upland owner is the lawful owner of accretions, it should not matter who owns any tidelands in the area. The ownership of certain tidelands in the Nedonna area is relevant to the Court of Appeals's reasoning regarding the doctrine of lateral accretion, however, so Sea River must address it. In short, the trial court properly found that the only tidelands owned by Parks's predecessor in 1911 were east of the Nehalem River, and the Court of Appeals should not have disturbed that finding.

1. Tidelands That "Front" and "Abut"

In Oregon, the state owns the beds of navigable rivers and lakes and all submersible lands (including tidelands), unless expressly deeded to someone else. ORS 274.025 (regarding submerged and submersible lands of all navigable streams and lakes); ORS 390.615 (regarding the shore of the Pacific Ocean from ordinary high to extreme low). The state is therefore the default owner of all tidelands in the state.

In 1883, the state deeded to one of Parks's predecessors all tideland "lying west of and fronting and abutting upon" Lot 4 of Section 17. (ER-11; Ex 234, SRP 1710.) "Fronting and abutting" is a common term in deeds. (Tr 359-60.) "Fronting" means facing. *Webster's Third* 914 ("to face or look toward" as in "the house fronts the street"). "Abutting" means touching. (Tr 358.) That is the technical meaning of "abutting" for surveying purposes (Tr 358-61), as well as the common meaning, and the definition the trial court used (ER-11).

> (*iv*) to touch (as of contiguous estates) along a border or with a projecting part <his land abuts on the road> * * * — used with on, upon, or against
>
> (*tv*) to border on : reach or touch with an end <two lots that abut each other>

Webster's Third 8.

It is unknown exactly what the tidelands "west of and fronting and abutting Lot 4 of Section 17" looked like in 1883. However, in 1889, they were river tidelands on the east side of the Nehalem River (ER-2; Tr 1867), which continued to be true in 1911 when the last survey was done before the accretion began (ER-3-4; Tr 357-62). Larson testified unequivocally on this issue, and the trial court agreed. (ER-11; ER-44; ER-68.) Specifically, on the 1889 and 1911 maps, Lot 4 is the small orange triangle on the east bank of the Nehalem River. (ER-2-4; Tr 1860-62.) On the 1889 map, the tidelands fronting and abutting Lots 2, 3, and 4 of Section 17 are indicated in blue, and, on the 1911 map, the tidelands fronting and abutting Lot 4 of Section 17 are outlined in

pink. (ER-2-4; ER-44; Tr 1866-68.) Both maps show the ordinary high and low water lines framing the marked tidelands. (ER-2-4; Tr 357-58.)[11]

Parks' predecessor in 1911 did not own any tidelands west of the Nehalem River because those tidelands did not "abut" Lot 4 of Section 17. The tidelands west of the Nehalem River were "absolutely not" part of the tidelands "fronting and abutting" Lot 4. (Tr 357-62, 1868-69, 1922-23; ER-2-4.) Tidelands separated from Lot 4 by a navigable river owned by the state could not and did not abut Lot 4. ORS 274.025 (state owns beds of rivers). "[W]hen that part of the shore to which plaintiff claimed title as tide land by deed of the state became submerged by the gradual shifting of the river, he lost all title thereto, and it became revested in the state." *Hume v. Rogue River Packing Co.*, 51 Or 237, 92 P 1065 (1907).[12] A 1979 letter from the Oregon Division of State Lands specifically refers to the tidelands adjacent to Lots 2, 3, and 4 of Section 17 as "Nehalem River tidelands." (Ex 674.) Indeed, Parks's own expert admitted that the tidelands west of the Nehalem River in 1911 did not "abut" Lot 4 of Section 17. (Tr 1444-46.)

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[11] On the 1911 map, all tidelands are shaded grey, the white area is the Nehalem River, the small numbers are water depths in the river, and the blue line is Larson's interpretation of the deepest part of the channel. (Tr 334, 491-92.)

[12] In *Hume*, there was subsequent dereliction, so the tideland owner (Hume) thereby gained new tideland as "accretions" at the border of the submerged land, analogous to an upland owner gaining new upland at the border of tidelands. *Hume*, 51 Or at 242-43. Significantly, Hume owned tidelands on both sides of the river, and at least some of his tideland deeds were metes-and-bounds deeds. *See id.* at 242.

2. The Tidelands West of the Nehalem River in 1911 Did Not "Front and Abut" Lot 4

The Court of Appeals should not have disturbed the trial court's finding regarding the location of the tidelands "fronting and abutting" Lot 4, which is supported by evidence. *Dep't of Human Res. v. Three Affiliated Tribes*, 236 Or App 535, 542, 238 P3d 40 (2010). The court's conclusion that Parks's predecessor owned some or all of the tidelands marked "1 to 5 feet above low water" on the 1911 map seems to be based on a mistaken factual assumption that those tidelands were normally joined with the tidelands fronting and abutting Lot 4 of Section 17, as well as a mistaken legal assumption that the southern movement of the Nehalem River was an insignificant event. "We are aware of no legal principle supporting the proposition that defendant's predecessors' ownership of those tidelands was lost merely because the river periodically came to divide them from the rest of Lot 4." (ER-102.)

There are several fallacies in this reasoning. First, there is no evidence that, between 1883 when the state first deeded tidelands to Parks's predecessor and 1911 when the accretion began to Section 20 that Lot 4 of Section 17 ever had anything but river tidelands fronting and abutting it. The first available map after 1883 is the 1889 U.S. Army Corps of Engineers map, which shows only river tidelands on the east bank of the river fronting and

abutting Lot 4. (ER-2; Tr 1867; Exs 237, 688B.) It is erroneous to assume that Parks's predecessor ever had rights to any tideland in the area marked "1 to 5 feet above low water" on the 1911 map.

Second, Parks's predecessor received a "fronting and abutting" tidelands deed from the state, not a "fronting" only deed or a metes-and-bounds deed. *See Merchant v. Smith-Powers Logging Co.*, 91 Or 442, 448, 178 P 939 (1919) (example of "fronting" tidelands deed); *Powell v. Schultz*, 4 Wash App 213, 481 P2d 12 (1971) (example of metes-and-bounds tidelands deed). At no time, in 1883, 1911, or now, have Parks or his predecessors had any claim to any tidelands except those that "front and abut" Lot 4 of Section 17.

Third, describing the Nehalem River as "merely" "periodically" dividing the tidelands from "the rest of Lot 4" (ER-102) misstates the evidence. The tidelands fronting and abutting Lot 4 were not "part of Lot 4"—they were patented separately, and it is unclear when a single owner came to hold both. (ER-17.) As for "dividing" the tidelands, even assuming arguendo that those two tideland areas were unified in 1883, a 600-foot wide and up to 26-foot deep navigable river gradually shifting position is not a "mere" event. It profoundly changed the landscape of the Nedonna area, including eroding away substantial amounts of upland, so it is hardly surprising if it also affected tidelands. The river's movement also was a legally significant event because it was gradual, not avulsive, as discussed in more detail *infra* Section IV(A).

Fourth, the Court of Appeals's own description of the relationship between the tidelands fronting and abutting Lot 4 of Section 17 and the tidelands marked "1 to 5 feet above low water" on the 1911 map demonstrates the correctness of the trial court's finding that the tidelands marked in the pink triangle on ER-3-4 were the only tidelands "fronting and abutting" Lot 4 of Section 17 when the accretion began. In the Court of Appeals's own words, the Nehalem River "divided" and "bisected" the tidelands west of the river from the tidelands east of the river and from Lot 4 itself. (ER-102.) That is apparent just looking at the 1911 map. (ER-3-5.) That which is "divided" does not "touch" and thus cannot "abut."[13] (Tr 358.)

The trial court's finding regarding the location of the tidelands fronting and abutting Lot 4 of Section 17 when the accretion began was factually supported and legally correct and should not have been disturbed.

IV. LATERAL ACCRETION DOES NOT APPLY AT ALL IN THIS CASE, AND IN ANY EVENT IT WOULD NOT APPLY AS THE COURT OF APPEALS APPLIED IT (THIRD QUESTION)

The doctrine of lateral accretion is an equitable doctrine that may be applied in appropriate cases to protect a land owner from losing his riparian boundary as the result of lateral accretion from another person's property. The doctrine does not apply at all in this case because, in this case, it is not lateral

[13] An analogy to upland may be useful, as it is more familiar than tideland. If two upland lots were divided by a navigable river owned by the state, both lots would "abut" the river, and no one would suggest the lots "abut" each other.

accretion from Section 20 that has changed the riparian boundary of Lot 4 of Section 17 but rather erosion by the Nehalem River between 1858 and 1911. Parks would like to invoke the doctrine of lateral accretion to change his riverfront lot to an oceanfront lot, but that is not how the doctrine works. The doctrine simply does not apply in this case.

When the doctrine of lateral accretion does apply, any apportionment of land must be done in the first instance by the trial court, and it typically should be done using the "perpendicular" method, given this court's prior caselaw regarding apportionment generally. Simply extending existing upland boundary lines is an improper method that is highly disfavored and should not be used.

A. Lot 4 of Section 17 Before the Accretion Began

1. The Fact and Law of Lot 4's Western Boundary

Before discussing the legal doctrine of lateral accretion, it is first important to understand as a factual matter the character of Lot 4 of Section 17 before the accretion began. The U.S. Army Corps of Engineer's detailed 1911 survey map (ER-3) shows the entire area now known as Nedonna as it appeared in 1911 when the Nehalem River reached its maximum point of erosion, the government began building the first jetty, and new land was just about to start accreting to Sea River's predecessor's property in Section 20. (ER-14-15; Tr 348.)

When it was platted in 1858, Lot 4 of Section 17 bordered on the Pacific Ocean, albeit notably close to the confluence with the Nehalem River. (ER-1.) By 1911, however, Lot 4 of Section 17 had been substantially eroded by the navigable Nehalem River, such that it was much smaller than it had been and was now bordered by the Nehalem River on its western side. Indeed, the 1911 map shows that all of the Section 17 lots and most of Section 20 bordered on the Nehalem River in 1911, as well as in 1889. (ER-2-3.)

It is established as fact that the erosion by the Nehalem River into Sections 17 and 20 occurred. (ER-1-4; ER-10; ER-15; Tr 341, 357, 431-32, 490, 1864; Ex 237.) *See Webster's Third* 772 (defining "erosion" as "land destruction and simultaneous removal of particles (as of soil) by running water, waves and current, moving ice, or wind"). Moreover, it is beyond dispute that land lost to erosion is lost forever, and no longer owned by whoever had owned it, as Parks's own expert admitted. (Tr 1454.) *Sause*, 217 Or at 69 (recognizing that "all riparian owners" are at risk of losing land to erosion); *Gubser*, 202 Or at 73 (in which platted "Lot 1" was destroyed by erosion when a river changed course); *see also, e.g., Younts v. Crockett*, 238 Ark 971, 972, 385 SW2d 928, 929 (1965) (in which platted "Lot 1" was largely destroyed by river erosion).[14]

[14] If new land subsequently forms in the same area by accretion or dereliction, the owner of the eroded lot may regain some acreage, but only if he owns the new land under the law of accretion, as Parks's own surveying expert readily admitted (Tr 1444-46). *Gubser*, 202 Or at 72; *see also, e.g., Yearsley v. Gipple*,

As a result of the river's erosion, the trial court expressly found that Lot 4 of Section 17 was a riverfront lot on the Nehalem River in 1911. (ER-15-16; ER-75.) The southern channel of the Nehalem River also was Lot 4's legal riparian boundary in 1911, as a matter of law, because of how the river came to be there. The river did not arrive in its 1911 position by sudden, avulsive movement. Rather, between 1858 and 1911, it eroded gradually into its 1911 location, creeping farther and farther south and destroying any land in its path. This is a critical distinction.

When a navigable river moves gradually, eroding land as it goes, the river necessarily becomes the new natural riparian boundary of whatever land it is eating into, regardless of what boundary the land had before; whereas, when a river moves avulsively, it has no effect on legal boundaries. *Corvallis Sand*, 283 Or at 162-65. If the Nehalem River had avulsed from its 1858 position into its 1911 position, the law would effectively pretend that the river never moved. *See id.* Parks's predecessor would not only own the upland in Lot 4 of Section 17 but would also own the new southern riverbed, while the state would continue to own the northern bed (even if it was dry), due to the special "avulsion" exception to normal rules of riverbed ownership. *Id.* at 162-

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104 Neb 88, 175 NW 641 (1919) (applying law of accretion, at each stage, where originally platted land eroded, new land accreted, new land eroded, and then dereliction occurred).

65; *Hume*, 51 Or at 243 (discussing normal rule that the state owns all navigable riverbeds, including any land "submerged by the gradual shifting of the river").

But the Nehalem River did not avulse into its 1911 position. Between 1858 and 1911, it moved slowly but surely into Sections 17 and 20, eroding away any land in its path. (Tr 344-45; ER-14-17.) The river would occasionally whip north in a storm, avulsively, but would then resume its movement south. (ER-14-17.) As such, the southern location of the river was its "true" location, legally speaking, while the occasional movements north were avulsive and therefore legally irrelevant. *Corvallis Sand*, 283 Or at 162-65.

The distinction between slow erosive movement and sudden avulsive movement as pertains to legal boundaries is not only recognized in Oregon but everywhere. As stated in Maryland, "[W]hen, as a result of gradual erosion, fast land becomes submerged," it "reverts to State ownership," but "[t]he rule applicable to gradual erosion is not applicable to an avulsion, defined as a sudden or violent change, which does not generally affect land boundaries." *Dep't of Natural Res. v. Mayor & Council of Ocean City*, 274 Md 1, 14, 332 A2d 630, 638 (1975). Similarly, the Florida Court of Appeals has described the legal effect of erosion versus avulsion of navigable rivers as:

> [E]rosion or submergence is accretion in reverse, and the imperceptible principle is applicable in distinguishing erosion from avulsion. In other words, where the loss occurs through avulsion, which is defined as the sudden or violent action of the elements, and the effect and extent of which is

> perceptible, the boundaries do not change. But where the sea, lake, or navigable stream imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the State.

Schulz v. City of Dania, 156 So 2d 520, 521 (Fla App 1963).

While Lot 4 may have had an unobstructed *view* of the Pacific Ocean in 1911, its legal boundary was the Nehalem River, not the ocean.[15] Riparian rights pertain to use of the body of water bordering or flowing through one's land, not one's view.[16] From at least 1889 until 1911, Lot 4 of Section 17 was a riverfront lot on the Nehalem River. (ER-1-2; ER-15-16; ER-75; Ex 688B.)

2. Lot 4 of Section 17 Is Subject to Erosion, Like Any Parcel of Land

When land is platted, boundary lines terminate upon encountering any navigable water. (Tr 369; ER-10.) Seas, lakes, and navigable rivers are all natural "obstacles" that create a natural riparian boundary, eliminating the need for a platted boundary, and making the lot irregular. *Barnhart v. Ehrhart*, 33 Or

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[15] In order to reach the Pacific Ocean, it would have been necessary to cross the Nehalem River. (ER-3.) Then, depending on the tides, it would have been necessary to either cross a large tideland area (if passable) or travel north or south on the river to a natural outlet to the ocean. (ER-3.)

[16] The general rule of riparian rights is "that owners of land bordering on a waterway have equal rights to use the water passing through or by their property." *Black's Law Dictionary* 1352. The riparian rights of owners of lands adjacent to navigable waters generally include: (1) the right of access to the water, (2) the right to build a pier out to the line of navigability, (3) the right to accretions, and (4) the right to a reasonable use of the water as it flows past the land. *Hoff*, 172 Or at 638.

274, 280, 54 P 195 (1898); *see also Bonnett*, 151 Or App at 149 ("[W]hen land borders a body of water, a grant of that land conveys to the edge of a navigable waterway or to the thread of a nonnavigable stream.").

The fact that Lot 4 of Section 17 was situated on the ocean when it was platted in 1858 did not guarantee that the ocean would always be its western boundary, especially given the close proximity of a major river. Plat maps represent an important moment in time, but they do not trump the laws of nature, which in turn are reflected in the laws governing erosion, accretion, avulsion, and the like.[17] Natural forces could theoretically alter any parcel of land, but, until relatively recently (as the government has made efforts to control water), it has been practically inevitable that land platted near a major body of water would change over time. That is even more so for land platted near the confluence of two major bodies of water, as Lot 4 of Section 17 was.

The practical and legal effect of erosion is perhaps more intuitive if one considers a parcel of non-riparian land. For example, consider the northwest quarter-quarter of the northeast quarter of Section 20, which was

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[17] It should be noted that the patents and deeds for Lot 4 of Section 17 have never called to the ocean. (Ex 234 at SRP1702 (1908 deed from state); ER-17 n 6 (1924 deed); Ex 71 (1989 deed to Parks). Nor was the meander line of the Pacific Ocean the legal boundary of Lot 4—the actual high water line was. (Tr 330, 422-23, 490.) Surveyors draw meander lines solely to calculate acreage, and they do not create a legal boundary, except in one rare circumstance where the surveyor omits to address a large amount of land between the meander line drawn and the actual high water line. *Barnhart*, 33 Or at 280.

platted in 1858 as a perfect 40-acre square located directly east of Lot 1 of Section 20 and directly south of Lot 4 of Section 17. (ER-1.) By 1889, erosion by the Nehalem River had entirely changed that parcel of land. Where it was once 40 acres (ER-1), it appears to be about 10 acres by 1889 (ER-2) and around the same in 1911 (ER-3). Where it was once square (ER-1), it became irregular (ER-2-3). Where its western boundary had once been fixed (ER-1), it became riparian (ER-2-3). Between a plat map and the forces of nature, nature wins, and the law reflects that.

Rivers do what they do, and all property is subject to the fact and the law of erosion. The 1858 plat map did not give Lot 4 of Section 17 a permanent guaranteed border on the Pacific Ocean, as Parks has argued throughout this case, any more than it gave the northwest quarter-quarter of the northeast quarter of Section 20 a permanent 40 acres of land with four fixed boundary lines. Rivers do what they do, and if they do it by erosion (as opposed to avulsion), legal boundaries change in the process.

B. The Doctrine of Lateral Accretion Does Not Apply Here

Having established the character of Lot 4 of Section 17 before the Nehalem jetties were built and accretion began, we turn then to the legal doctrine of lateral accretion. The doctrine of lateral accretion is an equitable doctrine. In those jurisdictions that have adopted it, the doctrine is relevant, generally speaking, when natural accretions to one riparian lot extend laterally

in front of another riparian lot such that the neighbor loses access to the water that was bordering his property before the lateral accretion began. *Rondesvedt v. Running*, 19 Wis 3d 614, 121 NW2d 1 (1963).

This court has never adopted the doctrine of lateral accretion. The Court of Appeals discussed the doctrine very generally in dicta in *Bonnett*, 151 Or App at 151-52, and then applied it in this case with almost no discussion. (ER-102.) *Bonnett* will be discussed later, as there is one aspect of that decision that requires clarification if the court intends to adopt the doctrine in Oregon. However, in this case, the doctrine of lateral accretion does not even apply, which must obviously be addressed first.

In 1911, immediately before the accretion to the land in Section 20 began, the western boundary of Lot 4 of Section 17 was the southern channel of the Nehalem River, which it had been for at least 20 years, probably longer. (*See supra* Section IV(A).) Fronting and abutting Lot 4 were river tidelands, identified in the pink rectangle on the 1911 map (ER-3-4). After the jetties were built, land began accreting to Sea River's predecessor's property in Section 20, starting in the south and continuing toward the north and northeast for many years, until eventually there was new land all the way to the jetty and the remnant of the southern channel. The doctrine of lateral accretion has no application to this scenario.

The Court of Appeals's explanation as to why it applied the doctrine in this case was that the owner of the tidelands fronting and abutting Lot 4 had a right to access the ocean from his tidelands, assuming that those tidelands used to be united with the tidelands west of the river. (ER-102.) As already discussed *supra* page 32, the latter assumption is factually unfounded, at least since 1883 when the state issued the patent for the tidelands "fronting and abutting upon Lot 4." More importantly, with respect to the doctrine of lateral accretion, that doctrine has no relevance whatsoever to tideland owners. Even the very general statement of the doctrine in *Bonnett* makes this clear. *See Bonnett*, 151 Or App at 152 ("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.") (emphasis added). A tideland owner is not a "riparian owner." Parks's predecessor did not own any tideland west of the Nehalem River in 1911, but, even if he had, there is no authority for a tideland owner to invoke the doctrine of lateral accretion.

As for Lot 4 of Section 17 itself, Parks's own lateral accretion theory has always been that Lot 4 is entitled to a permanent border on the Pacific Ocean based on the 1858 plat map. For the reasons already discussed *supra* Section IV(A), this is untrue. For at least 20 years or longer before the accretion began, Lot 4 was a riverfront lot bordering the Nehalem River, with a legal boundary of the Nehalem River, and with access to the ocean only by

crossing the Nehalem River. Parks cannot invoke the doctrine of lateral accretion as a means to change his boundary to the Pacific Ocean. Sea River's predecessor was the lawful owner of the accretions to her property, and she cannot be deprived of those accretions in order to give her neighbor a "better" riparian boundary on a different body of water. There is no authority or precedent for using the doctrine in such a way.

After the construction of the jetties, the large navigable river that bordered Lot 4 of Section 17 in 1911 decreased in size, becoming a smaller stream and eventually part of McMillan Creek, a nearby stream that changed course and took over the Nehalem River's southern channel after the jetties were built. (Tr 364-65.) From 600 feet wide and up to 26 feet deep in 1911 (Tr 343-44, 589; ER-3), the remnant portion of the Nehalem River bordering Lot 4 has grown smaller and smaller over time, such that McMillan Creek is still present but tiny compared to what once flowed there. (Tr 364-65.)

It is unknown when the river or stream bordering Lot 4 of Section 17 ceased to be "navigable," but at that time Lot 4's riparian boundary would have moved from the ordinary high water line to the centerline or "thread" of the stream. (Tr 490-92.) *See Kingsley v. Jacobs*, 174 Or 514, 523-24, 149 P2d 950 (1944) (stating that riparian owners take title to the center or thread of a non-navigable stream); *see also, e.g., Welles v. Bailey*, 55 Conn 292, 10 A 565, 566 (1887) (regarding navigable versus non-navigable rivers, "[t]he only

difference between the rights of riparian owners [] is that in a non-navigable river the title of the riparian proprietors extends to the middle of the stream, while in navigable rivers it extends only to the line of high water"). That is the only consequence of the stream getting smaller, in terms of Lot 4's legal boundary.[18] It may also be noted that the portion of Lot 4 with tidelands fronting and abutting it still has access to the Nehalem River over the river tidelands, as was the case in 1911. (ER-7.)

Lot 4 of Section 17 is bound by the thread of McMillan Creek because of the erosion that occurred in the late 1800s and early 1900s, not because of lateral accretion from Section 20 after 1911. There have been two major geological events affecting land in the Nedonna area in the past 150 years—the erosion period from 1858 to 1911, and the accretion period from 1911 to the present. (Tr 367-68.) Each event has its own legal significance, so the "before" and "after" picture for purposes of the doctrine of lateral accretion is 1911 and 2005, not 1858 and 2005.

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[18] Riparian owners cannot invoke the doctrine of lateral accretion to take title to accretions on the *opposite* side of a stream, just because the waterway has gotten smaller. The closest analogy is the many cases involving river islands. If party A owns a riverfront lot and party B owns an island in the river, the water channel between the two may be reduced and even eliminated by accretions from the lot, the island, or both, but the normal law of accretion still applies, without any recourse to the doctrine of lateral accretion, even if the result is the complete loss of the riparian boundary. Accretions from the island belong to the island owner, even if they render the riverfront lot non-riparian. *Strasbaugh*, 220 Or at 38-39; *Bonnett*, 151 Or App at 151-53.

In order for the doctrine of lateral accretion to apply in this case, it would be necessary to disregard the natural history of Lot 4 of Section 17, as found by the trial court, which is impermissible as those findings are binding at this point. (ER-99-100.) Parks's bid to use the doctrine of lateral accretion to obtain an ocean boundary that he did not have when the accretion began must be rejected. The Court of Appeals's "tideland" version of lateral accretion is also unsupportable. No "lateral" accretion occurred in this case, and the doctrine has no application here.

C. Some of the Dicta in *Bonnett* Regarding the Doctrine of Lateral Accretion Is Inaccurate

This court has not addressed the doctrine of lateral accretion. Prior to this case, the only court to consider it has been the Court of Appeals in *Bonnett*. As previously discussed, *Bonnett* was a quiet title action by the owner of a riverfront lot (Bonnett), in which the court held that Bonnett had failed to prove that the new land in front of his property had accreted to his property, finding instead that it had accreted to an "island" in the river, although the accretions eventually reached his property and rendered it non-riparian. *Bonnett*, 151 Or App at 145-54.

Bonnett does not appear to have invoked the doctrine of lateral accretion on his own behalf in *Bonnett*. *See id.* at 151-54 & n 7. The court discussed the doctrine in dicta, however, as one response to Bonnett's assertion

that, if the location where the accretion began was controlling, then it would follow that the entire spit belonged to the owner of Northpoint, which Bonnett argued "could lead to unacceptable consequences." *Id.* at 151.

The court viewed plaintiff's concerns as "overstated." *Id.* First, the court noted, it was irrelevant who owned the spit because the accretion did not begin at Bonnett's lot in any event. *Id.* Second, most courts would apply the doctrine of lateral accretion to cut off Northpoint's ownership before it reached the area where Bonnett's lot was located. *Id.* The court stated that it need not consider the particulars of Oregon law on this issue, as its point was merely that few courts would allow the Northpoint owner to make a claim to the portion of the spit in front of Bonnett's lot. *Id.* at 152 n.9.

The irony of the discussion of lateral accretion in *Bonnett* is that, in trying to keep its discussion at the most general level, the court failed to fully understand how the doctrine actually applies. The court discussed the doctrine as if it were relevant to a potential ownership dispute between the state and the Northpoint owner. *See id.* at 151. In fact, the only parties to whom it might be relevant would be Bonnett and the Northpoint owner. Only riparian owners who share a common riparian boundary may invoke the doctrine of lateral accretion. *See id.* at 152. The state would have no way to invoke the doctrine of lateral accretion against the Northpoint owner.

Bonnett's suggestion that courts applying the doctrine of lateral accretion do so by extending existing property lines also is mistaken. That is not how laterally accreted property is divided, as addressed in the next section. Although the discussion of lateral accretion in *Bonnett* is dicta,[19] *Bonnett* is the only prior published case in Oregon that discusses lateral accretion at all, making it important to clarify these points.

D. When the Doctrine Does Apply (Which It Does Not Here), Merely Extending Existing Property Lines Over Laterally Accreted Land Is Improper and Highly Disfavored

Bonnett suggests that courts in other jurisdictions typically apply the doctrine of lateral accretion by simply extending existing property lines over the newly accreted land. *See Bonnett*, 151 Or App at 152-53. That is not the case. While that approach may be appropriate in rare cases, on a specific kind of facts, that is not the normal approach to dividing laterally accreted property. The court should reject any such approach under Oregon law.

The most common method of apportionment of lateral accretion, when the doctrine applies, is the "perpendicular" or "right angle" method. This 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

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[19] *Bonnett*'s discussion of lateral accretion was relevant only to a hypothetical dispute between the state and the Northpoint owner regarding ownership of the spit. The only claim actually before the court was Bonnett's quiet title claim, making this discussion dicta. *See Bonnett*, 151 Or App at 145, 151 n 7, 154.

lateral accretion began. *See, e.g., Tennant v. Recreation Dev. Corp.*, 72 Mich App 183, 189-90, 249 NW3d 348, 351 (1976) (applying perpendicular method, as the "majority" rule among courts that have considered the doctrine of lateral accretion); *Bliss v. Kinsey*, 233 So 2d 191 (Fla App 1970) (applying perpendicular method); *Reichert v. Ellis Ferry Co.*, 184 Ky 150, 211 SW 403, 404 (1919) (same); *O'Neal v. Rollinson*, 212 NC 83, 192 SE 688, 690 (1937) (same); *Rondesvedt*, 19 Wis 2d at 618, 121 NW2d at 4 (same).

Although this court has never addressed the doctrine of lateral accretion, it has used the "perpendicular" method to apportion water frontage for other purposes, so it would be appropriate to adopt it for lateral accretion as well. *See Tauscher v. Andruss*, 240 Or 304, 401 P2d 40 (1965) (using perpendicular method to apportion moorage rights); *Columbia Land Co. v. Van Dusen Inv. Co.*, 50 Or 59, 63, 91 P 469 (1907) (similar); *see also* OAR 141-082-0280(6) (adopting perpendicular method to subdivide areas of submerged and submersible lands for state leasing purposes).

Another method that some courts use is the "proportional" method, in which the new bank or shorefront is apportioned proportionally based on the relative bank or shore frontage that each lot had immediately before the accretion began. There is more caselaw on this method involving division of land or water access rights for reasons other than lateral accretion, but courts that use this method for other purposes might use it for lateral accretion as well.

See, e.g., Nord v. Herrman, 1998 ND 91, 577 NW2d 782, 786-87 (1998); *Solomon v. Sioux City*, 243 Iowa 634, 641-42, 51 NW2d 472, 477 (1952); *Doebbeling v. Hall*, 310 Mo 204, 219, 274 SW 1049, 1054-55 (1925). Courts may also use a variation on one of these methods if necessary to account for an unusually shaped riverbank or the like. *Allen v. Wood*, 256 Mass 343, 350, 152 NE 617, 620-21 (1926).

What courts almost never do is simply extend existing upland property lines. Such an approach is inequitable and contrary to the purpose of the doctrine, which is not to share the new upland (which rightfully belongs to the person to whose land it accreted) but rather to protect existing water frontage from encroachment by neighboring landowners (even though it requires depriving the neighbor of some of their lawful accretions). *See, e.g., Tennant*, 72 Mich App at 186, 249 NW2d at 349.

"A common principle which pervades all modes of division is that no regard is paid to the direction of the side lines between contiguous owners, but the reference is solely to the shore line." *Nord*, 577 NW2d at 786 (emphasis added and internal quotation marks omitted); *see also Solomon*, 243 Iowa at 642, 51 NW2d at 477 (stating that extension of existing upland lot lines is "an improper method" of apportionment); *Bliss*, 233 So 2d at 191 (rejecting mere extension of common boundary line); *Crandall v. Allen*, 118 Mo 403, 24 SW 172, 175 (1893) (advocating apportionment "without regard to the side lines of

the upland"); *O'Neal*, 212 NC at 83, 192 SE at 690 (stating that apportionment is done "without regard to the direction of the dividing lines of the upland parcels"); *Spath v. Larsen*, 20 Wash 2d 500, 524, 148 P2d 834, 845 (1944) (stating that pre-alluvion boundary lines "should be disregarded" when apportioning alluvion).[20]

For example, for illustration purposes, if Parks had offered evidence to establish that his western boundary followed the Nehalem River into its northern channel after the jetties were built (which he did not do), such that the western boundary of Lot 4 of Section 17 was the current northern channel of the Nehalem River rather than the old southern channel (which is contrary to what the trial court held), then the doctrine of lateral accretion would typically be applied as follows. Starting at the point where the two properties met immediately before the lateral accretion began (which would probably be the southwest corner of Lot 4 of Section 17 or thereabouts[21]), draw a straight line perpendicular to the current shore of the Nehalem River (which is effectively the south jetty). Under this method, Sea River would still own most

[20] In another Washington case, *Hudson House*, 509 P2d at 992, the court used a diagonal line as to one set of parties (Quigg/Close and Rozman), and it used an unknown methodology with respect to another party (the state) which it described as a westerly extension of a certain line but omitted to explain where that line was located relative to the various parcels or why it was using that line.

[21] Lot 4 of Section 17 and original Lot 1 of Section 20 shared a single boundary point when platted (not a boundary line), which point was destroyed by erosion in the 1800s. (ER-1.) New Lot 1 does not have any actual defined legal boundary with Lot 4 of Section 17.

of its lawful accretions, but the northeastern-most part of the disputed land would be transferred to the owner of Lot 4 of Section 17.

The doctrine of lateral accretion does not apply in this case because of the facts of this case as already discussed, but, to the extent the court opines on the doctrine, lateral accretions should typically be divided using the "perpendicular" method, which method this court has previously recognized.

CONCLUSION

For all of the foregoing reasons, the Court of Appeals's decision should be reversed, the trial court's rulings on deeds and accretion affirmed, and the matter remanded to the Court of Appeals to decide whether Parks adversely possessed the disputed land (the subject of Sea River's appeal), which matter has already been briefed to the Court of Appeals but was not decided due to the Court of Appeals's decision on accretion (the subject of Parks's cross-assignments of error).

DATED this 3rd day of July, 2013.

Respectfully Submitted,

TONKON TORP LLP

By

Attorneys for Petitioner on Review
Sea River Properties, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that Petitioner's Brief on the Merits is proportionately spaced, has a typeface of 14 points or more, and contains 13,685 words.

Dated this 3rd day of July, 2013.

Robyn Ridler Aoyagi

CERTIFICATE OF FILING AND SERVICE

I certify that on July 3, 2013, I filed the original and 7 copies of **PETITIONER'S BRIEF ON THE MERITS FOR REVIEW** with the Appellate Court Administrator at the following address:

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Supreme Court Building
1163 State Street
Salem, OR 97301-2563

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I further certify that on July 3, 2013, I served two true copies of **PETITIONER'S BRIEF ON THE MERITS FOR REVIEW** on the following parties at the addresses set forth below:

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