Rembolt Ludtke

Of Threads and Centerlines: Riparian Boundary Disputes

Historical Background, Burden of Proof and Proof Issues, and Application

By David J. A. Bargen

skillful counsel | successful clients

We Find the Way®

Rembolt | Ludtke LLP





- Land that borders on rivers and streams
- Comes from Latin word "ripa," meaning "bank."
- "Littoral" land is land that borders on a seashore, with rules similar to riparian land
- The "fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land— [is] access to the water." Crandall v. Allen, 118 Mo. 403, 24 S.W. 172 (1893)
 - "We are familiar with the rule that entitles a riparian owner to access to the stream." Conkey v. Knudsen, 143 Neb. 5 (1943).
- Historically, access added value to land
 - Milling
 - Irrigation
 - Transport of goods
 - Navigation





- In Nebraska, riparian landowners own to the "thread" or "thalweg" of the river or stream
 - "The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. Anderson v. Cumpston, 258 Neb. 891 (2000).
 - "Thread" is "that portion of a waterway which would be the last to dry up." Id.





- Nebraska is unique, at least among states bordering Missouri River, in providing that title to riparian land runs to thread of river
- Other states, including North Dakota, South Dakota, Montana, lowa, Missouri, and Kansas, provide that the state owns the bed of rivers and streams
 - In Montana, North Dakota, South Dakota, and Missouri, state owns to the low-water mark (edge of water course)
 - In Iowa and Kansas, state owns to the high-water mark
 - "'High water mark' has a definite meaning in our law. It is coordinate with the limit of the bed of the water, and that, only, is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes." Payne v. Hall, 192 lowa 780 (1921).

Nebraska's Law Based on Different View of "Navigable"

- For about one year, between decision in Kinkead v. Turgeon, 74 Neb. 573
 (1905) and decision on re-hearing in 1906, Nebraska adopted majority view that state owned bed of rivers and streams
 - English common law stated that in rivers affected by tides (considered "navigable"), Crown owned the bed of the river; in rivers not affected by tides (considered "non-navigable"), riparian landowners owned to thread of river
 - In states adopting English common law, dispute arose over whether "navigable" should be defined as "affected by tides" or as "navigable in fact"
 - Some colonial courts and U.S. Supreme Court departed from English common law and held "navigable" meant "navigable in fact," and thus in all rivers/streams navigable in fact, state owned bed of stream
 - Decided English common law did not fit situation in United States, where many rivers in U.S. are navigable in fact for thousands of miles, and not just where they would be considered "arms" of the sea, such as in England



- Nebraska adopted this view in first Kinkead case, that "title to the beds of fresh-water rivers which are navigable in fact is in the state, and that the right of the riparian owner is bounded by the banks of the stream."
- On re-hearing, in 1906, Nebraska Supreme Court reversed itself and held, in part due to past practice in the state and in part due to original English common law, that riparian landowners own to thread of river or stream





- In states where state owns bed of river and riparian landowner owns to edge
 of river, riparian boundary disputes are often between private riparian
 landowner and state
- In Nebraska, where state does not own bed of river, riparian boundary disputes are between two private landowners because boundary is the thread of stream
- In Nebraska, boundary decisions may add land to one landowner at the expense of the bordering landowner, as opposed to adding land to one landowner at expense of state
 - May give rise to need for more careful application of rules
 - May give rise to need for some equitable balancing
 - "When the competition is, as it was in most of the English cases, between the State (King) and a private party and a decision is given for the private party no other private party is going to be harmed in order that the one might gain. But where we have two private parties in competition, to the extent that one will gain land formerly owned by the other, much more careful consideration should take place and some sort of equitable balance should be reached." Source: Robert E. Beck, The Wandering Missouri River: A Study In Accretion Law, 43 North Dakota Law Review 429, 452 (1967).

When Rivers Move, Boundaries May or May Not

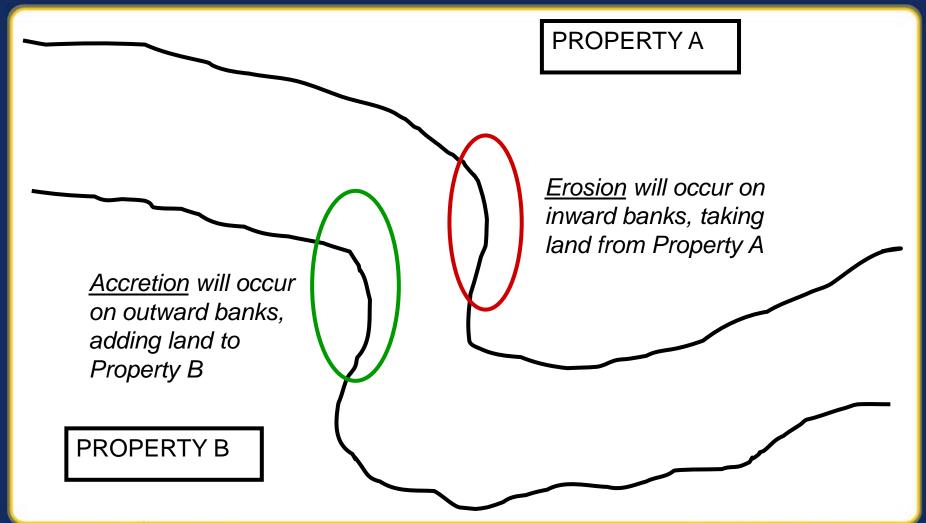
- Accretion: process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water
- **Reliction** (sometimes called "direliction"): the gradual withdrawal of the water from the land by the lowering of its surface level from any cause
 - Babel v. Schmidt, 17 Neb. App. 400 (2009)
- **Erosion**: loss of soil due to gradual encroachment of water
- **Avulsion**: a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream. *Anderson v. Cumpston*, 258 Neb. 891 (2000).
- Accretion and erosion generally occur in tandem: where one property owner loses by erosion, another gains it through accretion



- Re-emergence: where landowner's land is completely covered with water, then re-emerges by reliction or avulsion; in states that recognize doctrine, landowner may reclaim the land; Nebraska does not recognize reemergence
 - "The erosion of a river which cuts entirely across riparian land and into the land of an adjoining owner operates to destroy the title of him whose land was originally riparian and he may not reassert his title if the river reverses its traverse wanderings and new land is formed within what were his original boundaries." Wemmer v. Young, 167 Neb. 495, 514 (1958)

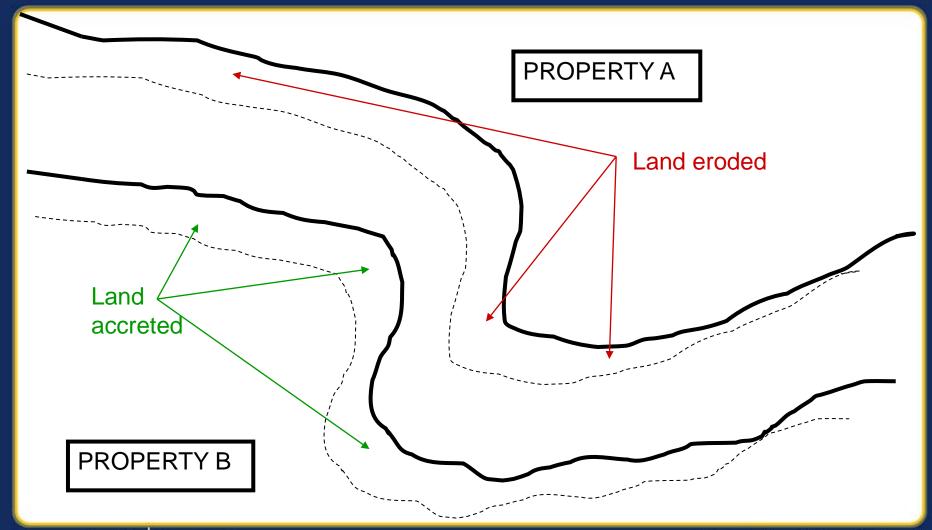
Accretion/Erosion





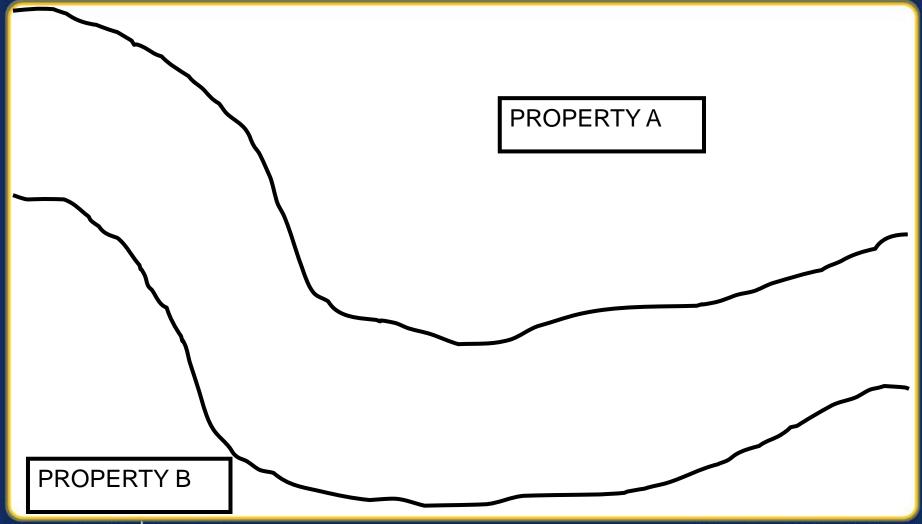
Accretion/Erosion





Avulsion





Avulsion



PROPERTY A

Sudden change in channel, due to natural or third-party man-made causes

Old bed is dry

PROPERTY B

Basic Rules



- Accretion/reliction: "Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel." Anderson v. Cumpston, 258 Neb. 891 (2000).
- **Avulsion**: "When a stream which forms the boundary between two parties **suddenly abandons** its old bed and seeks a new one, such change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein." *Id*.
 - "Avulsion is a change in a stream that is violent and visible and arises from a known cause, such as a freshet or a cut through which a new channel has formed." Babel v. Schmidt, 17 Neb. App. 400 (2009) (quoting Conkey v. Knudsen, 141 Neb. 517 (141 Neb. 517 (1942)), vacated on other grounds 143 Neb. 5 (1943).
 - "Avulsion is the sudden and rapid change in the course and channel of a boundary river." Conkey v. Knudsen, 143 Neb. 5 (1943).
 - Was Court establishing type of proof required, or just trying to distinguish avulsion from accretion? Have been treated by courts in Nebraska as elements of proof
 - "Suddenly"
 - "Visibly"

- "Violently"
- "Rapidly"

"Known cause"

Basis for Accretion Rule



- Gifford v. Yarborough, 130 Eng. Rep. 1023 (H.L. 1828):
 - A certain piece of land, consisting of 450 acres, by the slow, gradual, and imperceptible projection, alluvion subsidence, and accretion of ooze, soil, sand, and matter of slowly, gradually and imperceptibly, . . . Deposited . . . In, upon and against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the Crown or to the owner of the said demesne lands? . . . We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached. . . . Such a custom is reasonable as regards the rights of the King, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence. There is a great difference between land formed by alluvion and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived; little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly and leaves a larger space of land uncovered. When the authorities relative to these subjects are considered, this difference will be found to make a material distinction in the law that applies to derelict lands and so such as a are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion will be hard enough or sufficiently wide to be used...

Basis for Accretion Rule



- beneficially by anyone but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them, and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide the owner of the adjoining lands may render them productive. Thus lands which are of no use to the King will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz. by occupation and improvement. Locke in a passage in his Treatise on Government, in which he describes the grounds of the exclusive right of property, says: 'God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to that command subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property which another had not title to, nor could without injury take from him.' This custom is beneficial to the public. Much land which would remain for years, perhaps for ever, barren, is in consequence of this custom rendered productive as soon as it is formed. . . . The original deposit constitutes not a tenth part of its value; the other nine-tenths are created by the labor of the person who has occupied it, and, in the words of Locke, the fruits of his labor cannot, without injury, be taken from him. The existence of this custom is established by legal evidence.
- Independent Stock Farm v. Stevens, 128 Neb. 619 (1935): Nebraska Supreme Court characterized the opinion in Gifford as "the leading case upon this subject of accretion."

Possible Bases for Accretion Law

NIN'

- Accession to land
 - Owner of land also owns additions to it
- River or stream is a natural boundary and best way to mark boundary, so boundary follows the river
 - Allard v. Curran, 41 S.D. 73 (1918)
- De minimis non curat lex ("The law concerns not itself about trifles")
 - Slow, imperceptible additions generally result in little accumulation year-to-year
- Productivity theory
 - Land should be put to productive use, so give it to landowner who is in best position to do so—the adjacent landowner
 - Gifford v. Yarborough, 130 Eng. Rep. 1023 (H.L. 1828)
- Custom?
 - Alluded to in Gifford
- Compensation
 - "The owner takes the chances of injury and of benefit arising from the situation of the property. If there can be a gradual loss, he must bear it; if a gradual gain, it is his." County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68-69 (1874).
- Preserve right of access to water

Source: Robert E. Beck, The Wandering Missouri River: A Study in Accretion Law, 43 North Dakota law Review 429, 432-39 (1967)

Bases for Accretion in Nebraska



- Compensation? Not a good basis because in Nebraska, state does not own bed of rivers; thus, gain of land by one private owner is loss to another
- Custom? Maybe—appears to be some of the basis for Nebraska Supreme Court adopting doctrine that state does not own bed of river, in Kinkaid v. Turgeon, 74 Neb. 573 (1906)
- Productivity? Probably. This is the primary basis in Gifford v. Yarborough, 130 Eng. Rep. 1023 (H.L. 1828), and Nebraska Supreme Court approvingly referred to Gifford in Independent Stock Farm v. Stevens, 128 Neb. 619 (1935).
- Preserve right of access to water? Probably. In Conkey v. Knudsen, 143 Neb. 5 (1943), in case of dividing accretion land between two owners on the same bank, Court approved of procedure to divide the new bank created in the same proportions the landowners owned of the old bank, then draw a straight line from the prior point of division on the old bank to the new point of division on the new bank.
 - "Defendants argue for an extension of the section line boundaries and an equal division of accretion acreage. They complain of the fact that the plaintiff acquires a total of 403 accretion acres since the time of the original 1863 survey and the defendants are left with only 137 acres. . . . There are many rules for the division of land accreting to a shoreline. But, one basic principle is that no regard is necessarily to be paid to the direction of preexisting side lines between contiguous proprietors, the reference is ordinarily entirely to the shoreline." Swanson v. Dalton, 178 Neb. 55 (1964).
 - This rule may be tempered by language in *Conkey*: "Extensions of the boundaries in the usual manner would [in this case] cause overlaps and confusing claims. A general rule cannot be followed in dividing accretions under all conditions. All of the surrounding circumstances must be considered in applying any rule of division." 143 Neb. 5, 12.



When River Moves, Which Law Applies? Accretion vs. Avulsion



- If accretion applies: Landowner who gains land wins
- If avulsion applies: No change in boundary

Presumption of Accretion?



- Other states have stated there is a presumption of accretion because accretion/erosion process more common than avulsive events
 - lowa: Dartmouth College v. Rose, 257 Iowa 533, 133 N.W.2d 687 (1965); Bone v. May, 208 Iowa 1094, 225 N.W. 367 (1929); Kitteridge v. Ritter, 172 Iowa 55, 151 N.W. 1097 (1915).
 - Kansas, Arkansas: Murray v. State, 226 Kan. 26, 38, 596 P.2d 805, 815 (Kan. 1979): "(W)hen land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a strong presumption, founded on long experience and observation, that the movement occurs by gradual erosion and accretion rather than avulsion." (quoting Pannell v. Earls, 252 Ark. 385, 483 S.W.2d 440 (1972)).
 - Mississippi: United States Gypsum Co. v. Reynolds, 196 Miss. 644, 18 So.2d 448 (1944).
- Common sense presumption; accretion/erosion a constant process, whereas, as defined, avulsion is much less common ("violent," "sudden," "rapid" change in channel)





- In Nebraska, *no presumption* of either accretion or avulsion:
 - "[Appellant] argues that there is a presumption of accretion if avulsion is not shown. However, we disagree that such presumption exists under Nebraska law" Babel v. Schmidt, 17 Neb. App. 400, 765 N.W.2d 227 (2009).
- Difference based on Nebraska rule that each landowner owns to thread of stream, with no state ownership in bed of stream?





- Same burden of proof for both accretion and avulsion:
 - "A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. The burden to show that the channel of the river changed by avulsion obviously would be the same." Babel v. Schmidt, 17 Neb.App. 400, 765 N.W.2d 227 (2009).





- Court in Babel squarely rejected notion that there is a presumption of accretion if avulsion is not shown.
- By the same token, succeeding to disprove accretion, coupled with failure of opponent to prove accretion, does not prove a change in channel was thus caused by avulsion
 - Babel v. Schmidt, 17 Neb. App. 400 (2009)
 - "This seems an apt point to recall that when asserting a real estate ownership or boundary claim, a party must prevail, if at all, on the strength of his own title, and not on the perceived weakness in the title of others."





- Evidence used to show accretion or avulsion
 - Type of vegetation
 - Soil composition
 - Elevation of land
 - Maps/charts
 - Lay testimony
 - Expert testimony
 - Surveyors
 - Hydrologists

Evidence of Accretion vs. Avulsion

- Evidence should be consistent with process of gradual and imperceptible deposits of alluvion
 - Elevation: Land is lower than surrounding land/banks
 - Age of Vegetation: Relatively recent ("pioneer") vegetation and trees
 - Willow trees
 - Soil Composition: Soil borings show alluvium deposits at a greater depth than surrounding land
 - Location: Land sits downstream from older land and upstream from main flow or river
 - Water flow is slower near downstream side of land, and thus more alluvion deposited on downstream side

- Evidence should be consistent with "sudden," "violent," "rapid" change in channel
 - Elevation: Land is higher than land known formed by accretion
 - Age of Vegetation: Trees, stumps, and markers older than that found on land known formed by accretion
 - Soil Composition: Soil borings show bedrock or similar long-term base
 - Location: Maps indicate a chute existed behind the land, or islands with trees periodically charted in channel
- Source: Laurie Smith Camp, Land Accretion and Avulsion, 56 Nebraska Law Review 814, 819-21 (1977).



Accretion—Meaning of "imperceptible"



- "Gradual and imperceptible"
 - Kanger v. Dyer, No. A-08-876, 2009 WL 781550 (Neb. App., Mar. 24, 2009):
 - Appellants argued district court erred in finding change in Elkhorn River channel was "imperceptible," and therefore by accretion, where witnesses had testified to:
 - observing changes in the river
 - observing and hearing bank fall into the river
 - Court cited Omaha Indian Tribe v. Wilson, 614 F.2d 1153 (8th Cir. 1980):
 - "Gradual and imperceptible does not mean change cannot be perceived, but only that the entire process, that is the accretion as well as the often rapid erosion, is not clearly perceptible as it is going on."
 - "No matter how 'rapid and great' is 'the abrasion and washing away,' or 'the dimunition,' of soil, the accretion (or reliction) of soil 'is always gradual and by the imperceptible deposit of floating particles of earth.'"
 - Court looked to expert testimony
 - On-site visit
 - Soil borings
 - Examined aerial photographs over 60 years' time
 - Vegetation patterns
 - Found no evidence of abrupt change in channel
 - "[E]stablished law in Nebraska demonstrates that, although aspects of the process may be perceived, such as the testimony relied on by [appellants] of visible erosion or audible crumbling of the river bank on occasion, a finding of accretion is supported when the entire process itself is not clearly perceptible."

Accretion—Meaning of "gradual"

- "The significance of the passage of time, obviously an important factor in determining whether avulsion occurred because of the requirement of 'suddenness,' is more equivocal with respect to accretion. For example, in the instance of the Missouri River, accretion has been described as being either rapid or gradual, but avulsion was said to be characteristically sudden and rapid." Babel v. Schmidt, 17 Neb. App. 400 (2009) (citing United States v. Wilson, 433 F.Supp. 57 (N.D. Iowa 1977)); Jeffrey v. Grosvenor, 261 Iowa 1052 (1968)).
- Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890)
 - Had applied accretion law to Mississippi River
 - Recognized unique movement of Missouri River, but held "although the changes on the Missouri river are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of [accretion] law."
- Substantial change in channel of Missouri River over course of one year ruled an accretion
 - Conkey v. Knudsen, 143 Neb. 5 (1943)

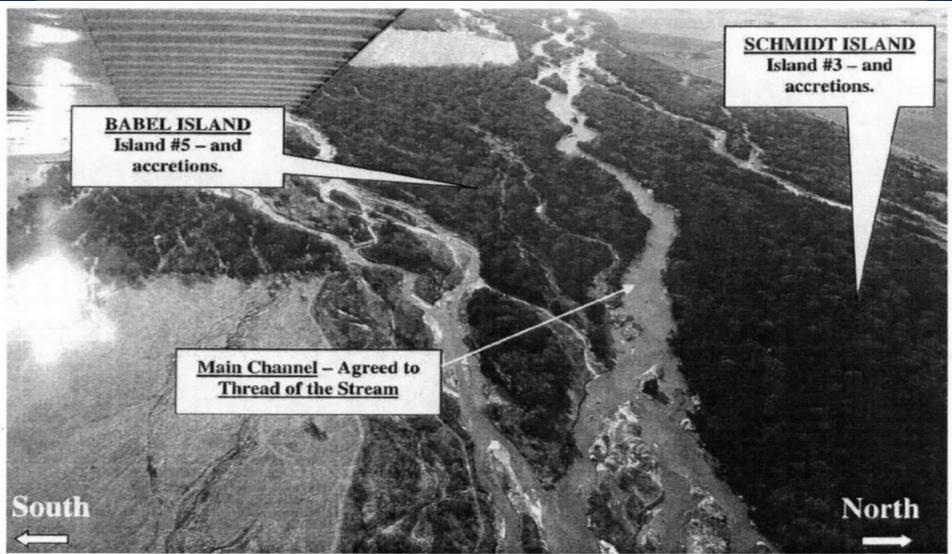
Avulsion



- Babel v. Schmidt, 17 Neb. App. 400 (2009)
 - Hallmarks of avulsion
 - Party admission that change in thread of river brought about suddenly by artificial structures and diversion
 - Based on photos and eyewitness reports, construction of diversion dam and dike shut off main channel (Ziemba v. Zeller, 165 Neb. 419 (1957)
 - Flash floods suddenly, violently, and visibly moved channel of river far north (Ingraham v. Hunt, 159 Neb. 725 (1955)
 - Evidence showed ice gorge created by spring floods changed course of river (Conkey v. Knudsen, 141 Neb. 517 (1942)
 - Sudden, violent, perceptible, known event

Babel v. Schmidt, Appendix A





Evidence of Avulsion

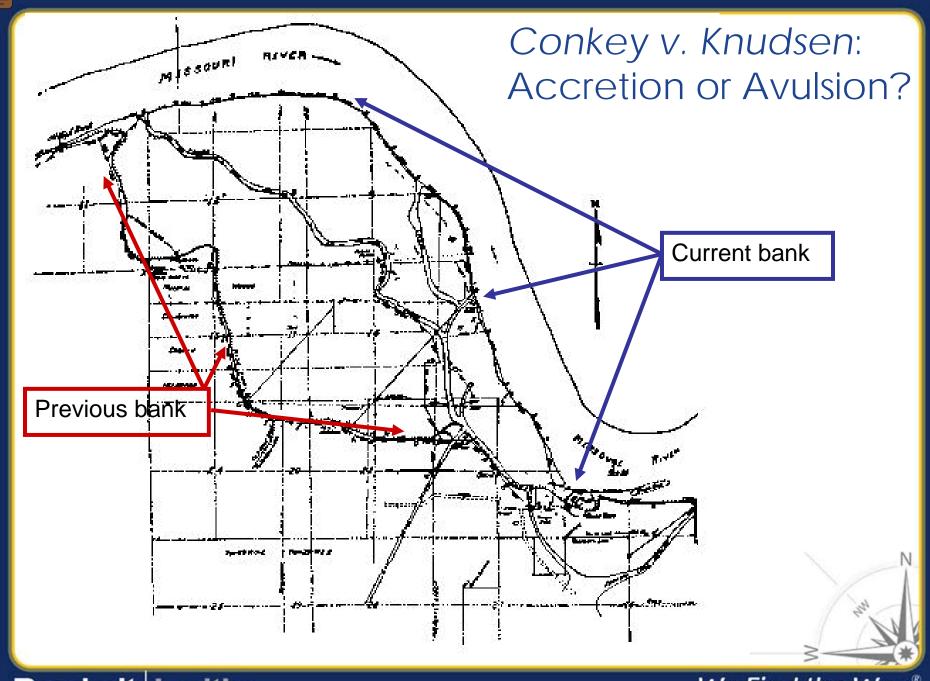


- Dispute over ownership of Island #5 by two different owners on opposite banks of river
- Parties stipulated to current thread being between Island #5 and Island #3
- Court accepted Schmidt's assertion that thread changed from channel south of Island #5 to current channel, but no proof it changed by avulsion so that boundary would remain in channel south of Island #5
 - No testimony regarding when soil patterns formed (similarities in soils of Island #5 and #3)
 - No evidence as to what caused "single episode" of channel change
 - "single episode" in soil science not proven to be same as avulsion, "which requires sudden and violent change
- No evidence of:
 - What avulsive event was
 - How and why it occurred
 - When it occurred (no particular day, month, year, or decade)
 - Compare, Hansen v. Melia, Case No. A-02-811, 2003 WL 21447557 (Neb. App., June 24, 2003): "The fact that the evidence did not pinpoint the exact time of the ice jam and the resulting avulsive change in the North Loup River [but only asserted it fell sometime between the 1930s and 1940s] is not fatal to [a claim of avulsion].... The North Loup River clearly changed its course at some point, and there is no credible evidence in the record to suggest that this change was not a direct result of an ice jam that occurred sometime between 1930 and the early 1940s...."
 - No witnesses to avulsive event
 - No historical record (which would help satisfy "perceptible" requirement for avulsive event)
- Showing that soils on each island are similar in composition "merely suggests the possibility of avulsion," but does not prove it.
- Court concluded Schmidt's failed to carry burden to show that avulsion caused change in thread of stream, and thus concluded boundary between the landowners was the stipulated current thread





- Conkey v. Knudsen, 141 Neb. 517 (1942)
 - Ice gorge on Missouri River substantially dammed up original channel, caused flooding, and forced waters to cut a new channel farther east
 - After flood waters receded, river flowed in new channel farther east
 - "The cause of the change of this river channel was definite and certain, and due to an ice gorge created by a spring flood. The change thus effected thereby was not gradual and imperceptible, but definite, sudden and certain as to time and extent."



Court Finds Avulsion, Then Reverses Itself and Finds Accretion

- Conkey v. Knudsen, 143 Neb. 5 (1943)
- Ice gorge obstructed channel of the river and caused waters to spread out, slow down, causing heavy deposits of alluvion
- As river gradually subsided, land appeared, and became accretions to land to the west
- "The fact that the river sought a different channel as the waters receded is not of itself sufficient to sustain a finding that an avulsion occurred."
- Court found there was a reliction, thus exposed land was accretion to the former west bank
- Thus, fact that there was a flood between the avulsive event and the change in channel, and gradual reliction of water, resulted in finding of accretion and not avulsion

"Exception" to Law Of Accretion and Avulsion

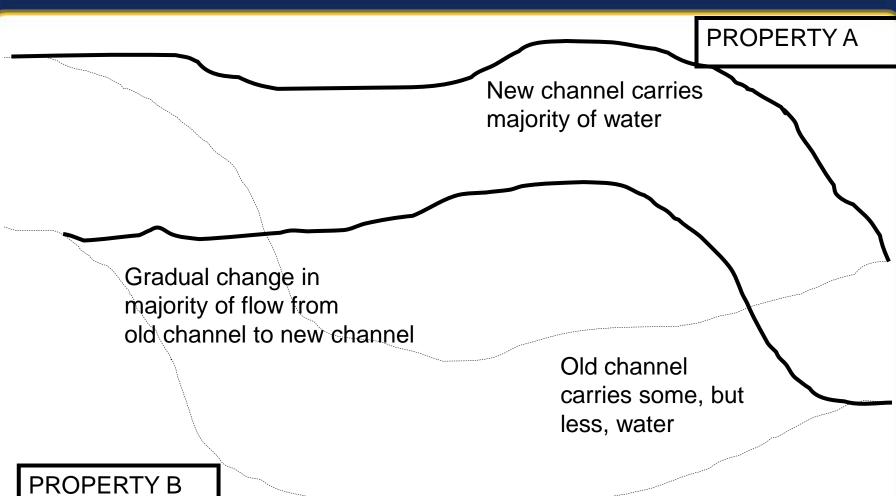
- What if thread of stream does not suddenly abandon old channel for new channel (avulsion), and does not gradually and imperceptibly move across intervening land to create a new channel (accretion), but creates a second channel where water flows in both old and new channel?
- Frank v. Smith, 138 Neb. 382 (1940)
- State v. Ecklund, 147 Neb. 508 (1946)
 - "[W]here a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream."
 - See also Durfee v. Keiffer, 168 Neb. 272 (1959).
- Same result as avulsion: no change in property boundary





Avulsion/Accretion Exception







- "The rule as to the ownership of accretion land remains the same, even though the processes of accretion are caused or accelerated by the construction work of third parties." Monument Farms v. Daggett, 2 Neb. App. 988 (1994)
- "The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto." Id.

Islands



- "An owner of land on shore, in the absence of restriction on his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands." *Krumwiede v. Rose*, 177 Neb. 570 (1964).
- "Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland."
 - Thus, land exposed by reliction or added by accretion between an island and the opposite bank (each owned by different parties) is owned by the island owner to the thread of the former channel, and by the bank owner to the thread of the former channel
 - Roll v. Martin, 164 Neb. 133 (1957): "Appellants contend, since they were and are the owners of land on Frazer's Island and the area involved was the bed of the river, that they are entitled to all accretions to their land on the island to the thread of the closed channel as a matter of right With these principles we find no fault and they are supported by the authorities cited." See also Burket v. Krimlofski, 167 Neb. 45 (1958).
 - Krumwiede v. Rose, 177 Neb. 570 (1964): "If . . . there is another owner of the island, then the ownership is split to the thread of the chute in which the accretion is taking place to both the island and the mainland.
 - Durfee v. Keiffer, 168 Neb. 272 (1959): "Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact."
- "Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of an island formerly under waters of the stream as far as the thread of the stream."
- "Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates."
 - Monument Farms, Inc. v. Daggett, 2 Neb. App. 988 (1994)







- Property boundary is the "thread" of the river, or main channel
- So how do you determine the "main channel" between two channels
- Show which channel has water running for a longer period (the one most likely to be the last to dry up)
 - Evidence of fish in channel
 - Eyewitness accounts of amount of water running in each channel; which channel runs dry throughout the year
 - Photographs of amount of water in each channel
 - Presence of vegetation in a channel over a period of time
- Amount of time a channel carries water is determinative factor
 - Schlondorf v. Breunig, Case No. A-04-1349, 2006 WL 2252949 (Neb. App., Aug. 8, 2006).
 - "The legal test to determine the thread of the stream looks to the last part of the bed to run dry. . . . While Appellants presented evidence that the north channel was swifter, was deeper, and carried more water than the south channel when both contained water, . . . The fact remains that the south channel contained water for a longer period."

Meander and Mean Center Lines

- "The meander lines of [a] river as fixed by the original government survey are not boundary lines unless designated as such in the instrument of conveyance."
- "The mean center line of a river, determined by dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction."
- "We cannot . . . say that any rights of a riparian owner are established or supported by such a mean center line."
 - Hartwig v. Berggren, 179 Neb. 718 (1966)
- HOWEVER, courts can use equitable powers to set boundary at the mean line
 - Court may do so when there is no evidence to locate the thread, and it would result in the most equitable solution for the parties; such a result is not an acknowledgment that the mean line is the thread of the stream. *Montross v. Burks Ranch, Inc.*, Case No. A-03-1164, 2005 WL 1802412 (Neb. App., Aug. 2, 2005).





 "'A braided river or stream does not follow one deep thread, but covers a very large area and contains many channels which move around in its normal bed; such interoperative channels cross one another and are subject to rapid change.'" Edlund v. 4-S, LLC, 13 Neb. App. 800 (2005) (quoting Anderson v. Cumpston, 258 Neb. 891 (2000).





- What if a river does not have a "thread?"
- Boundary dispute between landowners owning land on opposite sides of north and south channels of Platte River
- Evidence:
 - Original government survey of 1869 established river's meander lines, from which geographical center line (mean line) was determined
 - Taxes had been assessed since 1962 to the geographical centerline
 - State surveyor testified that Platte River is a braided river with no defined "thread"
 - Platte River composed of sand, and water may flow above or below bed of river at different places
 - "This characteristic of the Platte river makes it very difficult, if not impossible, to determine the present location of the thread of the river."
 - Taxes assessed to the geographical centerline of Platte River because of difficulty in finding thread of river
 - Landowners have become accustomed to being taxed to the geographical centerline and have for many years acknowledged geographical centerline as property boundary
- District court decided it could not find thread of river, and decided case based on acquiescence and adverse possession
- Court found that Appellant had conceded in his pleadings that when land was first
 patented from the United States, the geographical centerline of the Platte River roughly
 corresponded to the thread of the river, which establishes initial thread of river





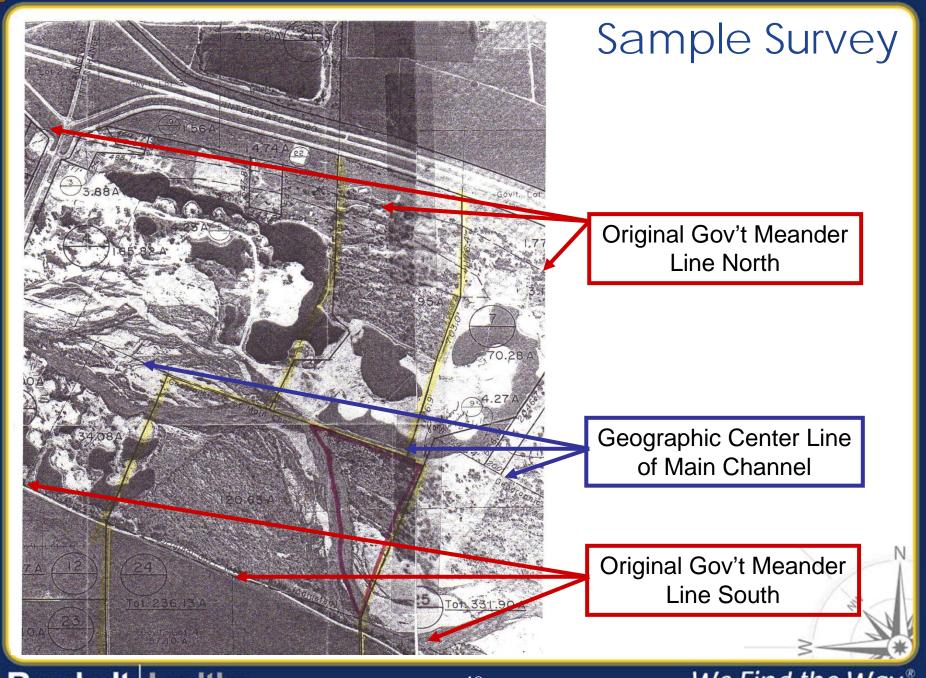


- A modified standard for avulsion?
- To examine whether property boundary had changed from the thread (geographic centerline), Court looked to whether accretion or avulsion law should apply
- Appellant had also admitted in pleadings that "artificial structures and diversions led to sudden reductions and shifts in the flow of the stream resulting in the Platte River becoming a braided stream with many small channels."
- Court held the admission of this "sudden" reduction and shift in the river meant avulsion law should be applied
 - Query: What about other elements of avulsion:
 - "Suddenly"
 - "Violently"
 - "Visibly"
 - "Rapidly"
 - "Known cause"
- Since Appellant admitted in essence that an avulsion occurred, no change in original boundary, which was geographical centerline

Anderson v. Cumpston



- Court also said evidence in case resulted in geographical centerline being boundary due to avulsion and equitable considerations:
 - Series of Darr bridges built on river caused flow of river to shift and flow in two channels
 - Construction of Kingsley Dam caused north channel to carry more water than south channel
 - Landowners in area long thought geographical centerline was boundary between properties
 - Nature of Platte River bed makes it impossible to find the thread (last part to dry up)
 - "Simply put, the establishment of the thread of the stream at anywhere but the geographical centerline would be, on the record before us, nothing but pure speculation and conjecture."



Other Issues



Adverse possession

- Adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for 10 years
- "Title cannot be acquired by adverse possession without the simultaneous and continuous existence of each element of adverse possession for the required 10-year period." *Brandt v. Heil*, Case No. A-05-1189, 2007 WL 1191916 (Neb. App., April 24, 2007).
- "Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong." Burket v. Krimlofski, 167 Neb. 45 (1958); Hartwig v. Berggren, 179 Neb. 718 (1966)
- "Since title by adverse possession to an island in a river is superior to the claims of a riparian owner, it is unnecessary to decide assignments of error based on the claimed riparian rights of the river-bank owner." Id.
- No requirement that one who adversely possesses land to which accretions are added must adversely possess accretions in order to claim title to them; accretions become part of land adversely possessed. Burket v. Krimlofski, 167 Neb. 45 (1958)
- "Taxation of the land for a series of years to the person claiming it, and the payment of taxes by him are competent evidence tending to show ownership." Worm v. Crowell, 165 Neb. 713 (1958).

Other Issues



- Acquiescence
 - Neb. Rev. Stat. 34-301: Action in equity to settle property boundaries
 - As with adverse possession, statutory period required is 10 years
 - To claim a boundary line by acquiescence: (Madson v. TBT Ltd., 12 Neb. App. 773 (2004))
 - Both parties must have knowledge of the existence of a line as the boundary
 - Insufficient for one party to merely establish a line and take possession up to that line
 - Other party must assent, by words, conduct, or silence, to a line as the boundary
 - Not necessary that acquiescence be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line
 - Constructing a fence that is not on the property line does not constitute acquiescence in the ownership of property by the adjoining landowner

Celebrating 40 years

Rembolt Ludtke

David J. A. Bargen dbargen@remboltludtke.com

skillful counsel | successful clients

We Find the Way®

Rembolt | Ludtke LLP

Bibliography



- Robert E. Beck, The Wandering Missouri River: A Study In Accretion Law, 43 North Dakota Law Review 429, 452 (1967).
 - Excellent study of the basic doctrines of accretion and avulsion, their history, rationale, and application by various courts.
- Laurie Smith Camp, Land Accretion and Avulsion, 56 Nebraska Law Review 814, 819-21 (1977).
 - Helpful explanations of the kind of evidence typically needed to show either accretion or avulsion
- Richard S. Harnsberger and Norman W. Thorson, Nebraska Water Law & Administration (1984)
 - Important work on water law that is specific to Nebraska
- Cases:
 - Kinkead v. Turgeon, 74 Neb. 573 (1906) (establishing ownership to thread of river)
 - Wemmer v. Young, 167 Neb. 495, 514 (1958) (holding that re-emergence is not recognized in Nebraska)
 - Swanson v. Dalton, 178 Neb. 55 (1964) (describing method for dividing accreted shoreline between adjoining landowners)
 - Babel v. Schmidt, 17 Neb. App. 400, 765 N.W.2d 227 (2009) (holding there is no presumption of accretion or avulsion in Nebraska)
 - Conkey v. Knudsen, 141 Neb. 517 (1942) and Conkey v. Knudsen, 143 Neb. 5 (1943) (demonstrating difficulty in finding between accretion and avulsion)
 - State v. Ecklund, 147 Neb. 508 (1946) (explaining exception to accretion and avulsion rules)
 - Monument Farms v. Daggett, 2 Neb. App. 988 (1994) (accretion rules not affected by artificial work or structures built by third parties)
 - Krumwiede v. Rose, 177 Neb. 570 (1964) (holding that owners of land on shore own to thread, including islands on same side of thread of river)
 - Roll v. Martin, 164 Neb. 133 (1957) (explaining rule of division of accretions to islands and mainland)
 - Schlondorf v. Breunig, Case No. A-04-1349, 2006 WL 2252949 (Neb. App., Aug. 8, 2006) (explaining that time water runs in a channel is determinative factor in finding the thread of river)
 - Hartwig v. Berggren, 179 Neb. 718 (1966) (stating that meander and mean (geographic center) lines are not property boundary lines)
 - Anderson v. Cumpston, 258 Neb. 891 (2000) (explaining a braided river and statements regarding Platt River)
 - Adverse possession and acquiescence:
 - Burket v. Krimlofski, 167 Neb. 45 (1958)
 - Worm v. Crowell, 165 Neb. 713 (1958)

- Hartwig v. Berggren, 179 Neb. 718 (1966)
- Madson v. TBT Ltd., 12 Neb. App. 773 (2004)
- Brandt v. Heil, Case No. A-05-1189, 2007 WL 1191916 (Neb. App., April 24, 2007)



We Find the Way®