3 The Nature of Real Property

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Key Terms

- Metes and bounds
- Monument
- Course
- Point of beginning
- Compass bearing
- Natural monument
- Government survey
- Meridian
- Base line
- Range line
- Township
- Section
- Government lot
- Lot and block
- Air lot
- Datum
- Bench mark
- Reformation
- Adverse possession
- Attachment
- Boundary line agreement
- Recognition and acquiescence
- Doctrine of emblements
- Fixture
- Constructive annexation
- Annexor
- Trade fixture
- Appurtenance
- Riparian rights
- Appropriative rights
- Navigable waters
- Lateral support
- Subjacent support
- Rule of capture

Chapter Overview

This chapter will give you an overview of basic legal concepts regarding real property. You will learn how real property is described, what is (and isn't) included as part of the real property, and what rights accompany real property ownership. This information will help you understand the obligations of property sellers and agents in a real estate transaction.

Case Example:

In 1983, the Connall family put their property up for sale. They told their agent that the property had been surveyed before they bought it, and that it was five acres. They pointed out the property's boundaries to the agent. The agent later pointed out these same boundaries to potential buyers, the Hoffmans. Part of the property contained a corral, cattle chute, barn, and shed. These were important to the Hoffmans because they owned a horse and wanted to get involved with 4-H activities.

Shortly after the Hoffmans purchased the property, a neighbor told them that a recent survey showed that part of the corral, cattle chute, and horse shed were actually

18 to 21 feet on his property. The Hoffmans brought a lawsuit against the Connalls and the agent for misrepresenting the property's boundaries. *Hoffman v. Connall*, 108 Wn.2d 69, 736 P.2d 242 (1987).

Are the corral, cattle chute, barn, and shed part of the real property? Are the Connalls liable for misrepresenting the boundaries? Should the agent be held liable? Was the agent negligent in not verifying the seller's statements concerning the boundaries? How could the agent have discovered where the real boundaries were located?

After reading this chapter, you will be able to answer these and other questions concerning the nature of real property. The outcome in the case of *Hoffman v. Connall* is given below.

Land Description

Knowing where the boundaries of a piece of property lie is important to the seller, the buyer, and the real estate agent. Boundary problems are one of the most common causes of real estate lawsuits. When people buy property, they want to know exactly what they are buying and how much land is included.

Misrepresenting Boundaries

In *Hoffman v. Connall*, the case described above, the sellers and their agent were sued for misrepresenting the location of the property's boundaries. The Connalls were found liable, but the agent was not.

Seller's Liability. Although the outcome in a specific case may vary depending on its facts, Washington courts typically hold sellers (property owners) liable for misrepresenting the boundaries of their property. This is true even if the misrepresentation was innocent—in other words, even if the seller was simply mistaken, not intentionally deceiving the buyer. Sellers are presumed to know the character and attributes of the property they are conveying. If they give mistaken information about the boundaries, they can be held liable for that mistake.

Agent's Liability. Real estate agents representing sellers have a duty to avoid making misrepresentations to buyers (see Chapter 7). Even so, in Washington agents generally aren't held liable for innocent misrepresentations based on information provided by a seller. A seller's agent isn't expected to verify every claim the seller makes, so an agent who simply passes along incorrect information from the seller usually isn't liable to the buyer.

It's a different matter if the agent knew something that indicated the seller's claim might be false, but failed to investigate further. If anything suggests that the seller's statements may be incorrect, the agent has a duty to verify the information before repeating it to buyers.

In *Hoffman v. Connall*, the court decided there was no evidence to indicate that anything was wrong with the boundaries pointed out by the Connalls, so the agent had no reason to investigate further. Therefore the agent was not held liable to the Hoffmans. However, if the agent had reason to suspect that the Connalls were wrong about the boundaries, yet still did not investigate before repeating the information to the Hoffmans, the agent (as well as the Connalls) would have been liable.

To avoid liability for misrepresenting boundaries, sellers and real estate agents shouldn't claim to know the location of the boundaries with certainty. If buyers specifically ask, it's appropriate to point out where the boundaries are assumed to be, as long as the information is accompanied by a clear disclaimer. For example, the sellers or their agent might tell the buyers that these have been treated as the property lines, but a survey would be necessary to confirm their actual location.

Methods of Description

As you can see, it is extremely important to know a property's true boundaries. Documents such as deeds, mortgages, and purchase and sale agreements must contain complete and accurate descriptions. Ambiguous or uncertain descriptions are not legally adequate and will cause the instrument to be invalid.

There are many methods for describing property, but the three most commonly used systems of land description are:

- metes and bounds,
- government survey, and
- lot and block.

Metes and Bounds Descriptions

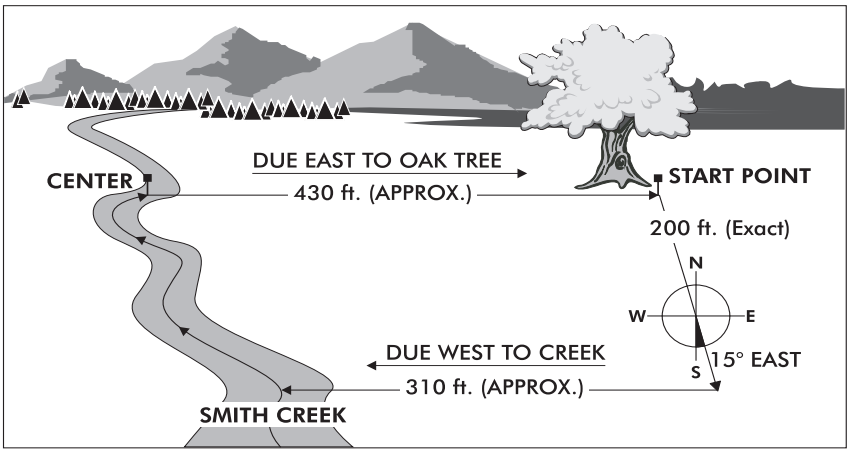
The metes (measurements) and bounds (boundaries) system is the oldest of the three methods of describing land. It was used by the original colonists as they settled in this country. This method is still frequently used in rural areas and is especially common in many eastern states.

The **metes and bounds** method of description identifies a parcel of land by describing its outline or boundaries. The boundaries are fixed by reference to three things:

1. **monuments**, which may be natural objects such as rivers or trees, or man-made objects such as roads or survey markers;
2. **courses** or directions, in the form of compass readings; and
3. **distances**, measured in any convenient unit of length.

A **metes and bounds** description gives a starting point and then proceeds around the boundary by describing a series of **courses** (compass readings) and distances. The description continues until the boundary has been described all the way around to the point of beginning.

Fig. 3.1 Metes and bounds description



A tract of land located in Spokane County, described as follows: "Beginning at the oak tree, thence south 15° east, 200 feet, thence north 90° west, 310 feet more or less to the centerline of Smith Creek, thence northwesterly along the centerline of Smith Creek to a point directly west of the oak tree, thence north 90° east, 430 feet more or less to the point of beginning."

Point of Beginning. A metes and bounds description always starts at some convenient and well-defined point that can be easily identified (such as the oak tree in Figure 3.1). The starting point is referred to as the **point of beginning** or **POB**. The point of beginning is always described by reference to a monument.

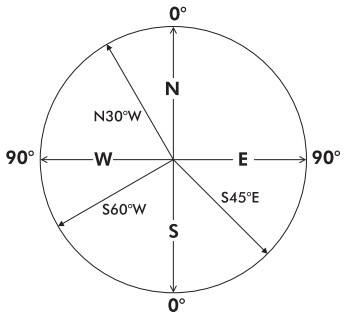
> **Examples:** "The SW corner of the intersection of 1st Street and 2nd Avenue," or "200 feet north of the old oak tree."

Note that the point of beginning does not have to be a monument itself; it must simply refer to a monument. In the second example above, the old oak tree is a monument, and the POB is 200 feet north of the tree.

Although older metes and bounds descriptions often refer to natural monuments such as "the old oak tree," present-day descriptions generally refer to government survey lines as monuments. This helps avoid problems that may occur if the original monument is moved or destroyed.

Compass Bearings. In a metes and bounds description, a direction is described by reference to a compass point. The compass directions are described in terms of the degree of deviation from north or south. Thus, northwest or 315° is written as north 45° west, since it is a deviation of 45° to the west of north. Similarly, south southeast or 157½° is written as south 22½° east, since it is a deviation of 22½° to the east of south. East and west are both written relative to north: north 90° east and north 90° west, respectively.

Fig. 3.2 Compass bearings



Compass bearings are given by reference to north or south.

Conflicting Elements. In a metes and bounds description, discrepancies sometimes occur between the various elements of the description. This is usually because the original surveyor made a mistake. For instance, if the description calls for a course of "320 feet in a northerly direction to the corner of the Smith farmhouse" and the Smith farmhouse is really in a northwesterly direction, there is a discrepancy that must be resolved. To help surveyors resolve problems like these, an order of priority for the various elements has been set up:

1. natural monuments (for example, "Sanders Creek"),
2. then man-made monuments ("Avondale Road"),
3. then courses ("south 8° east"),
4. then distances ("310 feet"),
5. then names ("the Holden Ranch"), and
6. then the area or quantity of acreage ("80 acres").

Example: A land description reads "east 380 feet to the midpoint of Sanders Creek." It is actually 390 feet to the midpoint of Sanders Creek. The reference to Sanders Creek takes precedence over the distance. The property will extend clear to the middle of the creek, not just 380 feet.

Government Survey Descriptions

A second method of land description is the **government survey** method. This method emerged after the American Revolution, when the federal government owned huge amounts of undeveloped land. Land speculators and settlers were moving into the territories, and Congress was anxious to sell some of the land in order to increase revenues and diminish the national debt. Since using the metes and bounds method of description for all of this property was not feasible, a new system called the government survey method was developed. This method of description is used mainly in states west of the Mississippi.

Fig. 3.3 Lines in a government survey grid

North/South lines	East/West lines
principal meridian	base line
guide meridians	correction lines
range lines	township lines
ranges	township tiers

This system of land description is also called the rectangular survey method because it divides the land into a series of rectangles or grids. Each grid is composed of two sets of lines, one set running north/south and the other east/west.

Meridians and Base Lines. The original north/south line in each grid is called the principal meridian. Each principal meridian is given its own name, such as the Willamette Meridian, which runs through the western part of Oregon and Washington. (See Figure 3.4.) The original east/west line in each grid is called a **base line.**

Additional east/west lines, called **correction lines**, run parallel to the base lines at intervals of 24 miles. Additional north/south lines—called **guide meridians**—are also established at 24-mile intervals. Because of the curvature of the earth, all true north/south lines converge as they approach the North Pole. Therefore, each guide meridian only runs as far as the next correction line. Then a new interval of 24 miles is measured and a new guide meridian is run. This is done to correct for the curvature of the earth, so that the lines remain approximately the same distance apart and do not converge. (See Figure 3.5.)

Fig. 3.4 Principal meridians and baselines in northwestern states

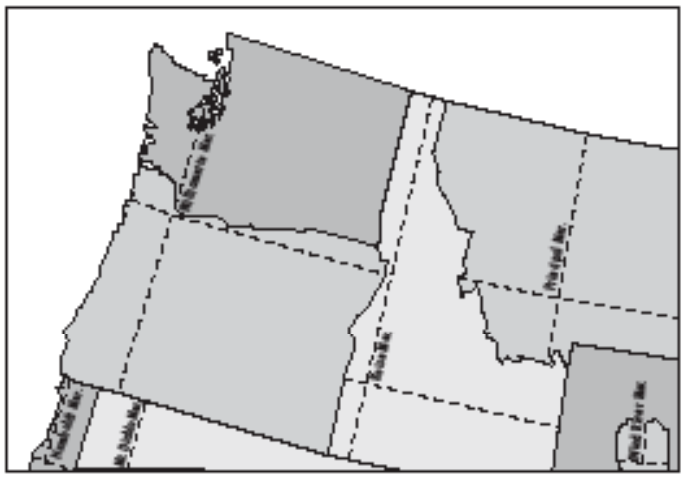
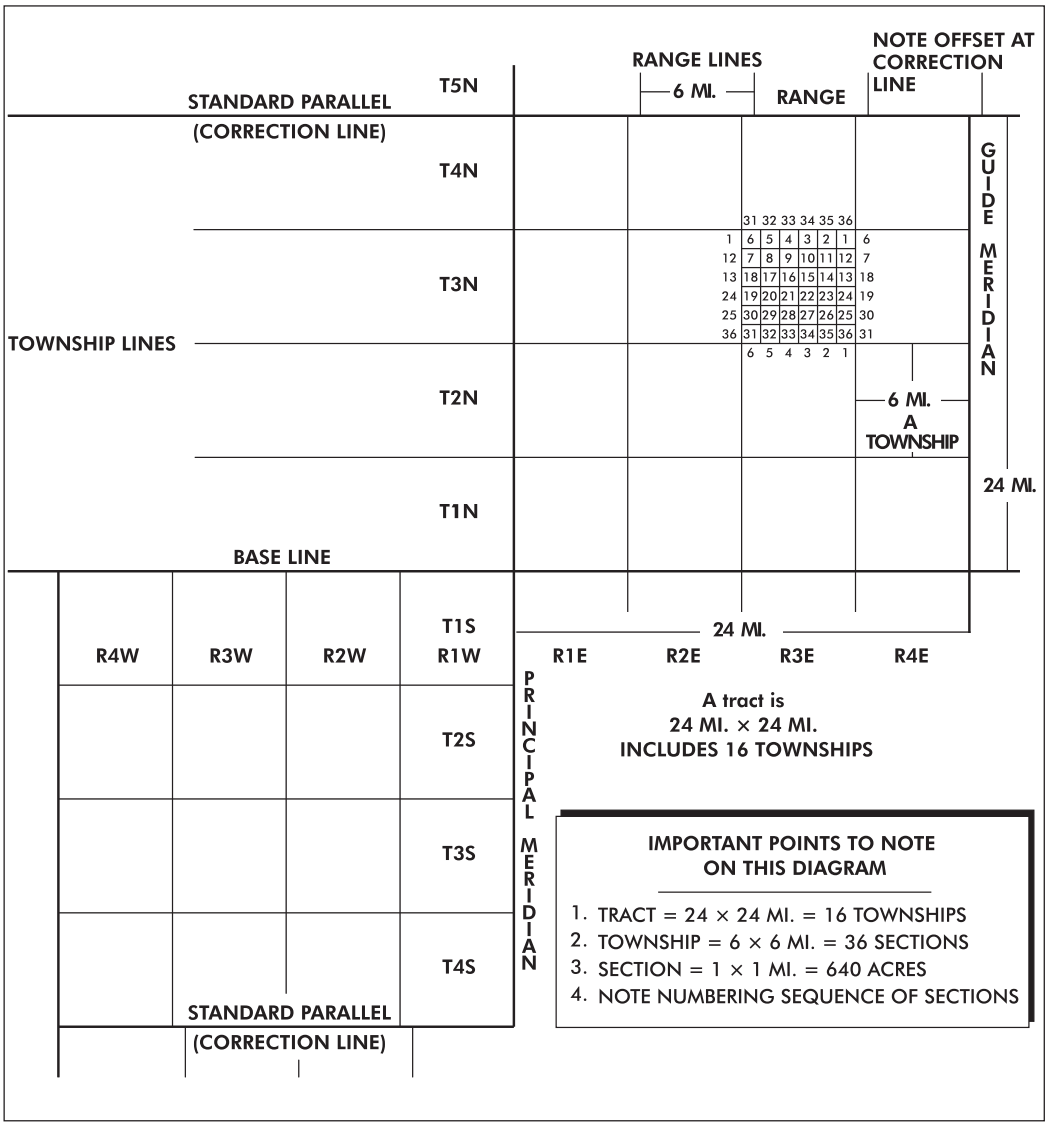


Fig. 3.5 Sections, townships, and ranges in the government survey system



The large squares created by the intersection of guide meridians and correction lines are further divided into smaller tracts of land by additional north/south lines running at six-mile intervals, called **range lines**. These range lines divide the land into columns called **ranges**. Additional east/west lines run at six-mile intervals from the correction lines and are called **township lines**. The east/west lines divide the land into rows or tiers called **township tiers**.

Townships and Sections. The square of land located at the intersection of a range and a township tier is called a **township**. It is identified by its position relative to the principal meridian and base line. (See Figure 3.6.)

> **Example:** The township located in the fourth tier north of the base line and the third range east of the principal meridian is called "township 4 north, range 3 east" or "T4N, R3E."

Each township measures 36 square miles. A township is divided into 36 sections, which are each one square mile (640 acres). The sections are always numbered 1 through 36 in a specified sequence. (See Figure 3.7.) Parcels of land smaller than sections can be identified by reference to sections and partial sections. (See Figure 3.8.)

> **Example:** "The northwest quarter of the southwest quarter of section 12, township 4 north, range 3 east," or "the NW ¼ of the SW ¼ of section 12, T4N, R3E."

Grid systems are identical across the country, so it is necessary to include in the description the name of the principal meridian that is being used as a reference. (Since each principal meridian has its own base line, it is not necessary to specify the base line.) The county and state where the land is situated should also be included, to avoid any possible confusion. Thus, a complete description of a township would be T4N, R3E of the Willamette Meridian, Clark County, State of Washington.

Government Lots. Because of the curvature of the earth, the convergence of range lines, and human surveying errors, it is impossible to keep all sections exactly one mile square. Government regulations provide for any deficiency or surplus to be placed in the north and west sections of a township. These irregular sections are called **government lots** and are referred to by a lot number. Government lots can also result when a body of water or other obstacle prevents an accurate square-mile section from being surveyed. (See Figure 3.9.)

Lot and Block Descriptions (Recorded Plat)

In terms of surface area, more land in the United States is described by the government survey method than by any other land description system. However, in terms of number of properties, the lot and block or recorded plat system is the most important land description method. It is the method used most frequently in metropolitan areas.

Fig. 3.6 Township 4 North, Range 3 East

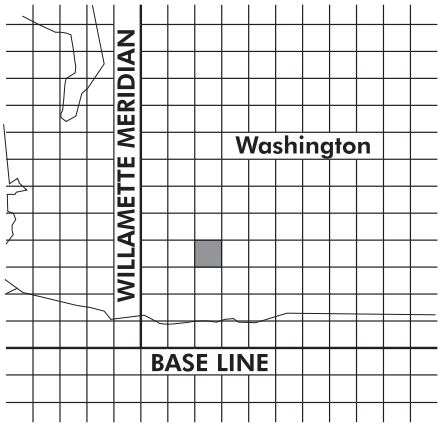


Fig. 3.7 A township contains 36 sections, numbered in this sequence

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Fig. 3.8 A section can be divided up into smaller parcels

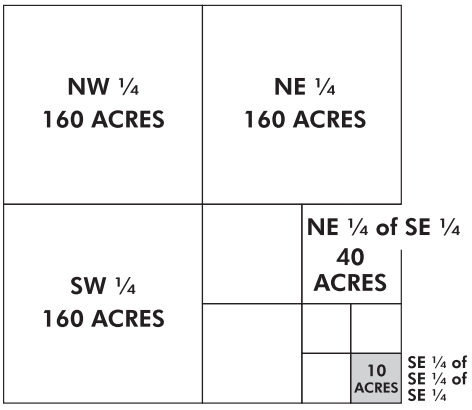


Fig. 3.9 Government lots

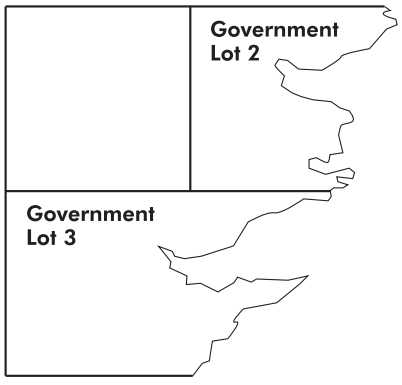
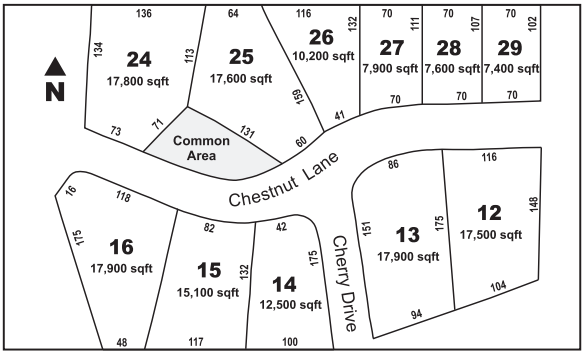


Fig. 3.10 Plat map



Under this system, land is described by reference to lots and blocks (groups of lots surrounded by streets) that are mapped out by a surveyor on a subdivision **plat** (map) that is subsequently recorded in the county where the land is located. After the map is recorded, any reference to one of the numbered lots on the specified plat will be a sufficient legal description of the lot. (See Figure 3.10.)

> **Example:** A lot and block description might read as follows: Lot 2, Block 4 of Tract number 45, in the city of Everett, county of Snohomish, state of Washington, as per map recorded in Book 22, page 36, of maps, in the office of the recorder of said county.

Since a detailed description of the lot is already on file in the recorder's office, that description may be incorporated into any legal document simply by reference. However, that is not usually done in Washington. Typically, a complete legal description is included in each document. Referring to an attached legal description, but failing to actually attach it, can be a costly error.

Case Example:

The Lees signed a purchase and sale agreement for a home in Bellevue. They made a $50,000 earnest money deposit with John L. Scott Realty. No legal description was attached to the agreement. However, there was a pre-printed provision stating: "Selling Licensee, Listing Agent or Closing Agent to insert, attach or correct the Legal Description of the Property."

The Lees subsequently sought to rescind the purchase and sale agreement after expiration of the financing contingency, but the seller wouldn't agree to return the earnest money. In litigation, the Lees argued that the lack of a property description meant that the contract wasn't enforceable. The seller claimed that a copy of the deed bearing a legal description had been faxed to the buyers. However, the seller couldn't provide a fax cover sheet or other evidence of this transmission.

The court ruled in favor of the buyers. The lack of a property description was fatal; there was no contract and the purchase money had to be refunded. *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 189 P.3d 253 (2008).

Plat maps frequently contain a wealth of information above and beyond the detailed description of property boundaries. Other information that may be listed includes:

- measurements of area,
- locations of various easements,
- right-of-way dimensions,
- location of survey markers,
- proposed streets, blocks, and lots of the subdivision,
- records of conditions and restrictions applying to the land,
- topographical details such as elevation, and
- school sites and recreational areas.

However, examination of a plat map is not a substitute for a thorough title search and should not be treated as such.

Air Lots

Not all real property can be described simply by reference to a position on the face of the earth. Some forms of real property, such as condominiums, also require description in terms of elevation above the ground. When describing the location of a condominium or other airspace, you can't simply measure the height from the ground, because the ground is not a stable and exact legal marker.

The United States Geodetic Survey and most large cities have established datums and bench marks as legal reference points for measuring elevation. A **datum** is an artificial horizontal plane, such as sea level. A **bench mark** is a point whose elevation has been officially measured relative to a datum. For example, a bench mark may be a metal or concrete marker, often placed in a sidewalk or other stable position.

Example: A metal disk located in the sidewalk at the corner of Oak and Elm streets has the following words engraved on it: "Bench Mark No. 96, seventeen feet above River City Datum."

Surveyors use the datum or a bench mark as a reference point in describing air lots.

Example: A surveyor plotting a condominium unit on the 16th floor of a new building being built on Elm Street calculates that the floor of the unit will be 230 feet above the sidewalk. He therefore shows in his survey that the floor of the unit is located 247 feet above the River City Datum as established by Bench Mark 96, because Bench Mark 96 is 17 feet above the datum.

Description Problems and Disputes Between Neighbors

A discussion of land description would not be complete without reviewing some of the problems that arise with land descriptions and their possible solutions. Some typical problems that might occur are:

- incorrect descriptions,
- indefinite or ambiguous descriptions,
- omission of part of the description,
- adjoining owners disagreeing over boundary lines, and
- modern surveys that don't match the original survey lines.

These problems can often be cured or resolved by:

- correcting the description,
- possession,
- recognition and acquiescence,
- a boundary line agreement,
- the common grantor theory, or
- litigation and a court decision.

Correcting the Description. When an error occurs in a land description, the problem can often be solved simply by having the party who transferred the property give a new deed with the correct description. When this is not possible, a court order can be obtained to correct the description. This is called a **reformation**.

Possession. Sometimes a description problem or boundary dispute can be resolved by possession.

> **Example:** John Thompson owns property in Lincoln County and Spokane County, and both pieces of property are referred to as the "Thompson Ranch." Thompson conveys property to Maria Alberti. The deed identifies the property as the "Thompson Ranch," but does not specify which county the land is located in.
>
> Such a description is legally insufficient. However, if Alberti occupies the ranch in Lincoln County, the deed could be held valid, since her possession of the Lincoln County ranch makes it obvious which ranch was referred to in the deed.

A boundary dispute may also be resolved by adverse possession. Under the doctrine of **adverse possession**, the claimants must show that they treated the property as if they owned it, in a way that could not escape the true owner's notice. Their possession of the property must be exclusive, actual, open, notorious, hostile, and uninterrupted for a period of ten years. If the adverse possessor is acting under color of title or has paid all taxes on the property, the time limit is only seven years. (Adverse possession is discussed in more detail in Chapter 9.)

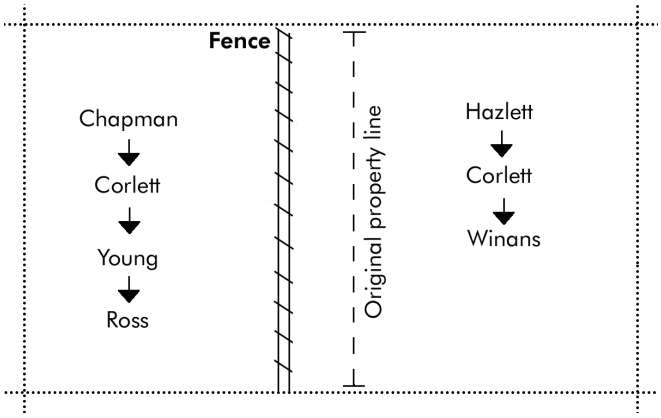
Recognition and Acquiescence. Another method of resolving a boundary dispute is called **recognition and acquiescence**. A claimant must show that the boundary is well-defined and has been acquiesced to (accepted or treated as the boundary) for ten years. This method is similar to adverse possession, except that possession is with the true owner's acquiescence instead of being hostile.

Boundary Line Agreement. Parties may also simply agree on a boundary. For example, neighbors may agree to build a fence and have the fence serve as the boundary line. A boundary line agreement will become binding on the parties and all subsequent owners if it is put in writing and signed and acknowledged in the same manner as a deed. The boundary line agreement must use legal descriptions and include a survey map that has been filed in the county where the land is located.

Common Grantor. If a common grantor has clearly designated a boundary, that boundary will be binding on all subsequent owners of the property, even if it was not the true or original boundary.

Case Example:

In 1957, the Corletts purchased a piece of property. In 1958, they bought the neighboring piece of property and built a fence on what they thought was the boundary line between the two properties. In 1970, the Corletts sold the west parcel to the Youngs, and in 1977, the Youngs sold it to the Rosses. Then, in 1978, the Corletts sold the east parcel to the Winanses.



The Winanses had a survey done that showed the fence was not the true property line. The Winanses brought a quiet title action to establish the fence as the property line. The Rosses wanted the original boundary line to be upheld.

The court found that the new boundary (the fence) was established by a common grantor. (Remember that the Corletts originally owned both pieces of property and they put up the fence.) When the Corletts sold the west lot to the Youngs, it was with the understanding that the fence was the boundary. Thus, the court found that the

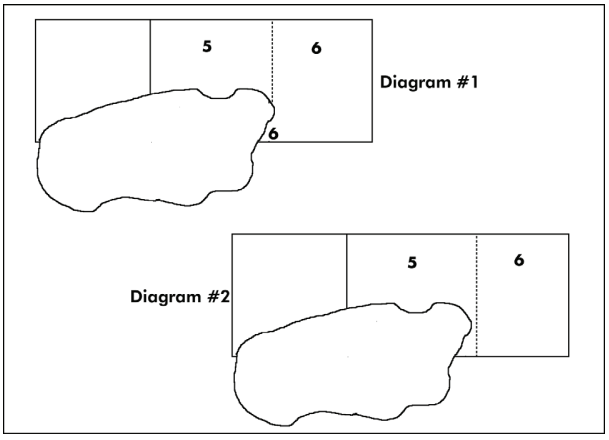
Corletts and the Youngs had agreed on a new boundary. Visual inspection of the property showed a fence that was clearly meant to be the dividing line. Therefore, the new boundary designated by the common grantor became the true boundary for all subsequent purchasers. *Winans v. Ross*, 35 Wn. App. 238, 666 P.2d 908 (1983).

Court Decision. Problems often arise in connection with the government survey method of land description. When much of the West was originally surveyed, the surveyors worked under harsh conditions, with inadequate tools and equipment by today's standards. Errors were frequently made. When these errors are discovered, the court normally attempts to maintain the line as intended by the original surveyors.

Case Example:

Two parcels of land were designated government lot numbers 5 and 6. They were established as government lots because of the presence of Crescent Lake. The Wicks owned lot 5, and the Ericksons owned lot 6. The original official government plat was produced in 1857 and showed that the lake crossed the north/south line between the lots, as shown in diagram number 1.

A more modern survey showed that the lake was actually 51 feet from the north/south line, as shown in diagram number 2. In a lawsuit concerning ownership of the chunk of property below the rim of the lake, the Wicks attempted to establish that their lot failed to close at the lake and actually continued on past the rim of the lake. They argued that the piece below the rim was actually part of their property.



The court stated the intent of a new survey should be to ascertain where the original surveyors placed the boundaries, not where modern surveyors would place them. Therefore, the Wicks' lot should close at a point as near as possible to the one shown on the original government survey. The Wicks did not own property beyond that point, regardless of how a modern survey team would divide the property today. *Erickson v. Wick*, 22 Wn. App. 433, 591 P.2d 804 (1979).

Attachments

You are involved in a real estate transaction. Because the lot has been recently surveyed, you have a clear idea exactly how much property is being conveyed. But the legal description of the lot does not mention the house and garage built on the property, nor the lovely rose garden and collection of gardening tools. Are these included in the sale?

Whenever there is a sale or transfer of land, it is important to be able to distinguish between real property (which is included in the sale) and personal property (which can be removed by the seller). Buyers and sellers, landlords and tenants, owners and creditors often disagree about whether an item is personal property or part of the realty. These disagreements can lead to lawsuits.

> **Example:** A buyer sues a seller because the seller took the built-in washer and dryer with him and the buyer assumed they were included in the purchase price.

When there is a conflict like this, the real estate agent may end up paying for the disputed item out of her own pocket to keep the peace. Thus, it is important for all of the parties (seller, buyer, and agent) to know what things are included in the sale of the real property.

Most people automatically think of the land itself when they hear the term "real property." But real property is more than just rocks and dirt. Things attached to the land (like buildings and fences) and things growing on the land (like trees and shrubs) are called **attachments**, and they are considered part of the real property.

There are two main categories of attachments:

- natural attachments (such as trees and crops), and
- man-made attachments (fixtures).

Natural Attachments

Natural attachments are things growing on the property. There are two types of natural attachments:

- naturally occurring trees and plants; and
- plants grown and cultivated by people.

Traditionally, different legal rules applied to these two types of natural attachments, but those distinctions have largely been eliminated. Both types are considered part of the real property, and they will be included in a sale of the land unless they're specifically excepted from the sale in the purchase and sale agreement. Once they have been severed from the land, natural attachments are personal property.

> **Example:** Standing timber growing on the land is considered part of the real property. However, once cut (severed from the land), it becomes personal property.

Personal property is governed by a different set of rules than real property. Washington has adopted a statute called the **Uniform Commercial Code (UCC)** to deal with the sale of goods. The UCC defines crops as goods and governs their sale.

Under the UCC, crops that are specifically identified in a contract may be considered personal property even before they are actually severed from the land. This is referred to as **constructive severance**.

> **Example:** Farmer Beardsley sells the timber on his east 40 acres to a lumber company. The contract provides that the trees are to be cut. The lumber company owns the trees from the date of the contract, and the trees are considered personal property, even while they are still attached to the land.

Doctrine of Emblements. A special rule called the **doctrine of emblements** applies to crops planted by tenant farmers. If the tenancy is for an indefinite period of time, and the tenancy is terminated (through no fault of the tenant) before the crop is ready for harvest, the tenant has the right to re-enter the land and harvest the crop.

> **Example:** For several years, a farmer has been renting a large field from his neighbor. They have a year-to-year lease; it is automatically renewed each June until one of the parties gives the other notice of termination.
>
> In April, the neighbor tells the farmer the lease will end in June because she's planning to sell her land. The farmer has the right to enter the property in the autumn to harvest the crops he planted, even though the lease has ended.

To fall within this rule, the crop must be produced annually, by the labor and industry of the farmer. For example, if the crop is wild mushrooms, which were not planted or cultivated by the farmer, the rule does not apply. If the crops are an annual product of perennial plants, such as apples or blueberries, the right to re-enter and harvest applies only to the first crop that matures after the tenancy has ended.

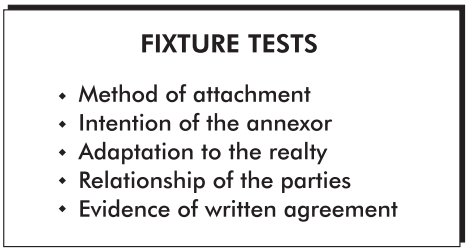
Fixtures

Fixtures are man-made attachments. They are items that were once personal property, but are now attached to the real estate in such a way that they are considered part of the real property. For instance, a pile of lumber and a batch of nails are considered personal property. But are they still personal property if they are used to build a barn?

Whether a particular item is a fixture or personal property is a question that real estate agents deal with constantly. Earlier, we referred to a dispute over a built-in washer and dryer. Are these items fixtures? What about a tool shed? A freestanding swimming pool? A swing set?

To avoid controversy, the real estate agent should discuss these kinds of items with the parties, making sure that each person knows what is and is not included in the sale. Of course, to be able to do this, the agent must know what is normally considered a fixture and what is normally considered personal property.

Fig. 3.11 Fixture tests



The courts have developed a series of tests to apply in deciding whether an item is a fixture. A court will consider the method of attachment, the intention of the annexor, adaptation of the item to the realty, the relationship of the parties, and whether there is a written agreement.

Method of Attachment. When an item is permanently attached to the land, it becomes part of the real estate. An attachment is considered to be permanently attached when it is:

- permanently resting on the land (like houses and barns and other buildings),
- affixed to the land by roots (as with trees and shrubs),
- embedded in the earth (like sewer lines or septic tanks), or
- attached by any enduring method (such as by cement, plaster, nails, bolts, or screws).

Genuine physical attachment (called **actual annexation**) is not absolutely necessary for an item to be considered a fixture.

> **Example:** An outbuilding on the Parkers' property is simply resting on the ground, without any foundation. Even so, it is considered to be a fixture, part of the real property.

An item may also be considered a fixture if it is enclosed within a room or building in such a manner that it cannot be removed without dismantling it or tearing down part of the building.

Constructive annexation. Some completely movable items are regarded as so strongly connected with the property that they are considered fixtures, even though they are not actually attached to the realty. This is called the **doctrine of constructive annexation**.

> **Example:** A firm that manufactures widgets sells its main processing plant. The widget-making machine weighs four tons and is bolted to the floor. It is clearly a fixture. The key to turn on the widget-maker and the specialized tools used to repair the machine, though easily moved, are also considered fixtures.

The doctrine of constructive annexation also applies to items that have been temporarily removed for servicing or repair, such as built-in appliances.

> **Example:** Mr. Adams sells his house to Mr. Brown. At the time of the sale, the built-in dishwasher is at a repair shop. The dishwasher is still considered part of the sale, and its ownership transfers to Mr. Brown at the time of the sale.

Intention of the Annexor. The method of attachment test can be rigid and may lead to inconsistent results. Therefore, the courts have decided that the intention of the annexor is a more important test. (The **annexor** is the person who placed the item on the property.) This test asks this question: "Did the annexor intend the item to become part of the realty or to remain personal property?" If the annexor intended the item to become part of the realty, then the item will generally be considered real property. Conversely, if the annexor didn't intend the item to become part of the real property, the item will be considered personal property.

There must be objective evidence of the annexor's intent; the secret intent of the annexor does not control. Each of the other tests (including the method of attachment) is viewed as objective evidence of the annexor's intent.

> **Example:** A property owner installed a birdbath by embedding it in concrete. This permanent method of attachment is evidence that she intended the birdbath to become part of the realty. Even if the owner claimed she always intended to take the birdbath with her when she moved, a court would be unlikely to rule that it is personal property.

Adaptation to the Realty. When an item is essential to the use and operation of the property, or was designed specifically for use in a particular location, such as pews in a church, it is probably a fixture.

> **Example:** Computers placed in a general purpose office building are normally considered personal property. However, components of a computer system housed in a specially built computer facility have been held to be fixtures.

Relationship of the Parties. When attempting to determine intent, a court considers the relationship of the parties, such as landlord-tenant, seller-buyer, or owner-creditor.

> **Example:** If a tenant screws a lamp fixture into the wall, it is generally assumed that she intends to take the lamp with her when she moves. Items installed by a tenant are usually personal property; both the landlord and the tenant would expect the tenant to remove the item.
>
> However, if an owner installs a similar lamp fixture, it is generally assumed that he is attempting to improve the property, without thought of removing the lamp later. A lamp installed by an owner would probably be considered a fixture, and a buyer could assume that it would stay with the property.

Trade fixtures. A tenant who installs items for the purpose of carrying on a trade or business usually intends to remove the items at the end of the lease. Such items are called

trade fixtures. The general rule is that trade fixtures may be removed unless there is a contrary provision in the lease or the trade fixtures have become an integral part of the property.

Case Example:

Hahn ran an auto painting business in a building leased from the Whitneys. When Hahn left, he removed a furnace that the Whitneys claimed was a fixture. Hahn had installed the furnace to help dry paint and keep the employees warm. The court determined that this was a trade fixture that could be removed by the tenant. *Whitney v. Hahn,* 18 Wn.2d 198 (1943).

If the trade fixture has become an integral part of the property, but the tenant wants to remove it anyway, the tenant has the duty to restore the property to its original condition or compensate the owner for any damage caused by removing the fixture.

Example: A tenant installed refrigeration units in a grocery store. Removing the units created a hole in the roof, ceiling, and wall. The tenant was required to repair the damage to the leased premises.

Allowing tenants to remove trade fixtures encourages efficiency in business. Tenants are more likely to install new equipment if they know they can take the equipment with them when they leave. Trade fixtures that are not removed when the tenant leaves automatically become the owner's property.

A rule similar to the trade fixtures rule applies to items installed by agricultural tenants for the purpose of farming the land. Certain farming equipment and items such as small tool sheds or prefabricated henhouses are called **agricultural fixtures** and may be removed by the tenant farmers when they leave the property.

Written Agreement. Regardless of any of the previously discussed considerations, if there is a written agreement between the parties stipulating how a particular item is to be treated, a court will respect and enforce the written agreement.

Example: A seller planned to take certain shrubs from the property when she left. She informed the buyer of her intention and included a statement in the sales agreement specifying which shrubs she intended to remove. The written agreement allows her to remove the shrubs even though they would normally be considered part of the realty.

Case Example:

Frank Montgomery leased some property from a realty company. The 15-year lease provided that upon its expiration, Montgomery could remove all the structures he had placed on the premises. Montgomery placed a cabin on the property. Although a cabin would normally be a fixture, in this case the cabin was considered Montgomery's per-

sonal property because of the specific agreement in the lease. Although this is a New Mexico case, Washington law also recognizes that a written agreement supersedes all other considerations. *Garrison General Tire Service, Inc. v. Montgomery*, 75 N.M. 321, 404 P.2d 143 (1965).

Manufactured Homes. Traditionally, a mobile home or manufactured home was classified as personal property until it was permanently attached to land (for example, by mounting it on a foundation), at which point it became a fixture—part of the real property. Today, Washington has a title registration system for manufactured homes, similar to the one used for motor vehicles. In order for a manufactured home to become real property, it must go through a procedure called **title elimination**. This eliminates the registered title, and the home becomes part of the real property it is located on.

Secured Financing and Fixtures. A special problem with fixtures may arise if they were purchased with secured financing instead of cash. For example, when an appliance is purchased on credit, the creditor often takes a security interest in the appliance. This gives the creditor the right to repossess the appliance if it isn't paid for. In a real estate transaction, the buyer and the buyer's lender need to know whether any of the appliances or other fixtures are still subject to a creditor's security interest.

Article 9 of the Uniform Commercial Code governs secured financing for personal property, including items that will become fixtures. To establish a security interest in an item that will be a fixture, the creditor must have the borrower sign a security agreement that specifies the terms of the loan, and then must also file a brief document called a **financing statement** with the county recorder's office. The financing statement gives constructive notice to the public that a security interest exists in the item. Any later purchasers of the real estate are put on notice by this filing. If the secured creditor hasn't been paid in full, the item could be repossessed.

> **Example:** Dave Roberts owns an office building that is mortgaged to State Bank. He purchases a central air conditioning unit and has it installed on a concrete slab in back of the building. He buys the air conditioner on credit, and the seller files a financing statement to give notice of its security interest.
>
> Dave defaults on his payments to the bank and to the air conditioning company. Normally, a central air conditioner would be considered a fixture, and upon default ownership of the air conditioner would pass to the bank along with the office building. However, since a financing statement has been filed, the air conditioning company can repossess the air conditioner.

In a real estate transaction covered by title insurance (see Chapter 9), the title report should list any unexpired financing statements for fixtures that are part of the property being purchased. Creditors holding a security interest in fixtures are commonly paid off when the real estate transaction closes.

Appurtenances

Once you know the boundaries of the property and what items are included in the sale, you must become familiar with the property rights that transfer with the property ownership.

One of the best ways to understand real property and its accompanying rights is to imagine property as an **inverted pyramid** with its tip at the center of the earth and its base extending out into the sky. A property owner has rights to the surface of the land within the property's boundaries, plus everything under or over the surface that falls within the pyramid. This includes rights to oil and minerals beneath the surface, plus certain air and water rights.

An **appurtenance** is a right or interest that is associated with a piece of real property. Examples of appurtenances are the rights to use air, water, and minerals in or on the land. When real property is sold or transferred, these rights are normally transferred along with the property, but they may be sold separately or limited by past transactions. When you are involved in a real estate transaction, it's important to be aware of these rights and how they can be limited.

Air Rights

According to the inverted pyramid idea, a property owner's rights would theoretically extend to the upper limits of the sky. However, through the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, Congress declared that the federal government has complete control over U.S. airspace.

Use of Airspace. Although the federal government has placed restrictions on air rights, property owners still have the exclusive right to use the lower reaches of airspace over their property, so long as they do nothing to impede or interfere with normal air traffic. In addition, property owners have the right not to be harmed or damaged by use of the airspace above their property.

> **Example:** The classic example is an airport built near a chicken farm. The noise of the airplanes flying at low altitude over the chicken farm causes the chickens to stop laying eggs. If the farmer can prove that he has suffered actual harm, he may be able to recover damages for trespass in his airspace.

Sale of Airspace. A property owner may sell rights to the airspace above the property separately from the surface land. As population increases and real estate prices rise, the sale of airspace has become more common, especially in large metropolitan areas.

> **Example:** The New York Central and New Haven railroads had tracks running across real estate in a prime location. They sold rights to the airspace above the tracks for an enormous sum. The purchasers acquired the airspace plus a surface easement necessary for the construction and support of buildings. The Park Avenue Development (a large development of commercial buildings) was subsequently built above the tracks.

> **Example:** In 2005, to prevent possible blocking of views, the developers of Seattle's Four Seasons Hotel and the Harbor Steps building jointly purchased the air rights above an old theater on First Avenue.

Water Rights

Because water is a vital resource, it has been the source of much legislation and litigation in the United States, particularly in the arid parts of the West. Questions arise as to ownership of water, the right to use water, and ownership of a lake or stream bed.

The two main types of water rights are riparian rights and appropriative rights.

Riparian Rights. Riparian rights arise on properties that are bordered or crossed by water, or contain a body of water within their boundaries. Under the riparian rights system, every landowner who has land touching the water (riparian land) has an equal right to use the water.

All riparian owners may use the lake or stream for swimming, boating, or other recreational purposes. They also have the right to take water for domestic uses such as drinking, bathing, and watering a garden. However, a riparian owner may not take so much water that it lowers the level of the lake or diminishes the quantity or velocity of the stream's flow, affecting the other riparian owners. Also, a riparian owner may not divert water for use on non-riparian land (land that does not adjoin the body of water).

> **Example:** Davis and Carleton both own property along Blueberry Creek. Davis, the upstream owner, also owns a field across the road from the creek. He decides to turn the field into a commercial rice paddy. He diverts so much water from the creek to his non-riparian field that there isn't enough water downstream for Carleton's legitimate domestic uses, such as watering her garden. A court could prohibit Davis from using the water in this way, because it is being used on non-riparian land, is not a domestic use, diminishes the flow of water, and interferes with Carleton's right to use the water.

The common law of England recognized riparian rights, so the riparian rights system became law in the American colonies and eventually throughout most of the United States, including the Washington Territory (before Washington became a state). The riparian system is still used to a greater or lesser extent in many parts of the country. However, as water rights and water law became a more significant issue, many western states, including Washington, moved away from riparian rights to a system of appropriative rights.

Appropriative Rights. Under the system of appropriative rights—also called the **prior appropriation system**—the right to use water in a way that diminishes the normal quantity is established by obtaining a water permit from the state government. The permit holder is authorized to take or divert water from a certain lake, river, or sea for the purpose (the beneficial use) specified in the permit application. The water does not have to be used on land adjoining the body of water that it was taken from.

Under the prior appropriation system, if two or more parties have appropriation permits for the same body of water, first in time is first in right. This means that the party who obtained a permit first can use the full amount of water authorized in the permit, even if this leaves too little water for those who obtained permits later.

> **Example:** Continuing with the previous example, now suppose that instead of relying on riparian rights, Davis applies for a permit to use the amount of water necessary to turn his non-riparian field into a rice paddy. The permit is granted because an experiment

to determine the feasibility of growing rice in this area is considered a beneficial use of the water. Davis will be allowed to divert the amount of water specified in his permit, even if that diminishes the normal flow of the creek, and even if (during a drought, for example) that leaves too little water in the creek for those who hold permits issued after Davis's permit.

Washington's Water Code (RCW 90.03) establishes prior appropriation as the dominant water law of the state and specifies the procedure for obtaining an appropriation permit. In Washington, the prior appropriation system applies to underground water as well as surface water.

Disappearance of Riparian Rights. When the Water Code was passed in 1917, it provided that any existing riparian rights that were not put to a beneficial use would be lost. Later case law established 1932 (15 years after enactment of the code) as the date by which unused riparian rights had to be put to use or else would be forfeited. Landowners who were exercising their riparian rights and putting the water to a beneficial use retained those rights.

Example: In 1915, Shoemaker and Bertoldo each purchased a piece of property that bordered on Houseman Lake. When they acquired their properties, they automatically acquired riparian rights to the lake water. Shoemaker and Bertoldo both use the lake for fishing and swimming, and Bertoldo also uses water from the lake to water his garden.

It is now 1932 and the legal deadline has passed, so unused riparian rights have been forfeited. Bertoldo can still take water from the lake to water his garden; but if Shoemaker wants to start a garden and use lake water for it, he will have to apply for a permit. Shoemaker has lost his riparian rights because he was not using them. Now he cannot use any of the lake water in a way that would diminish the quantity unless he obtains a permit. (Note that he can still use the water for recreation or transportation.)

In 1967, a new provision in the Water Code required that all claims to water rights not already certified by the state had to be recorded by July 1974. This meant that any riparian rights (any water rights that were not granted under the permit system) had to be recorded. Riparian owners did not have to get permits; they simply had to record a document claiming their rights. Any water rights not claimed in this way were deemed relinquished.

Example: Returning to the example above, suppose it's now decades later and Bertoldo's granddaughter has inherited his property on Houseman Lake. She still uses water from the lake, but she fails to record her water rights claim before the 1974 deadline. As a result, she loses the right to take water from the lake for domestic purposes. Now if she wants to use the lake water for her garden, she will have to apply for a permit.

As a result of this rule, unless a riparian landowner's water rights were recorded before the 1974 deadline or a permit has been granted, the only rights the owner has to water bordering his property are rights that do not diminish the quantity of water. Those rights include boating, swimming, and other recreational or aesthetic uses. Additional water rights may only be acquired through compliance with the permit system.

In addition to imposing the recording requirement, the 1967 legislation also provided that under certain circumstances a right to take water will be relinquished after five years

of nonuse. That rule applies both to riparian landowners and to permit holders under the prior appropriation system.

Navigable Waters. The question of whether or not a body of water is **navigable** is significant because it affects ownership of lake beds, riverbeds, seabeds, and beaches. The Washington Supreme Court has stated that for a particular body of water to be considered navigable, it must be "capable of being used practically for the carriage of commerce."

Large bodies of water like Puget Sound, Lake Chelan, and the Columbia River are obviously considered navigable. With smaller lakes or rivers, navigability can be a more difficult question. In some cases whether a particular body of water is navigable can be determined only when there is a lawsuit concerning the issue and a decision is rendered by the court.

In the U.S., the navigable waterways in each state are owned and managed by the state government (subject to federal regulation of navigation). Each state government holds its navigable waters in trust for the benefit of the public. When a parcel of land borders on an ocean, sea, or navigable lake or river, the landowner's property usually ends at the ordinary high water mark or high tide line. The strip of shoreland or tideland beyond that point, as well as the land that's always submerged, is generally owned by the state government. The state used to convey title to shorelands and tidelands to private parties, but that practice ended in 1971; now private parties can only lease them from the state. (Earlier conveyances weren't invalidated by this change, however.)

There is a public easement for right-of-way on all navigable waters, which means that the public has the right to use the waterways for transportation. The public also has the right to make reasonable use of the surface of the water (for swimming and boating, for example) unless specifically prohibited. Landowners who own property bordering navigable waters may also apply for an appropriation permit that would allow them to take a specified amount of water for a designated beneficial use.

Non-navigable Waters. If a small lake is completely within the boundaries of one landowner's property, the landowner owns the lake bed. If a non-navigable lake or stream is bordered by properties owned by different landowners, ownership of the lake bed or stream bed is generally divided by tracing lines from each property boundary to the center of the lake or stream. Each owner has title to the parcel of the lake bed or stream bed adjoining their land. Each also has the right to the reasonable use of the entire surface of the lake or stream for purposes such as swimming and boating.

Case Example:

A developer attempted to erect an apartment building over a portion of Bitter Lake, a small, non-navigable lake in Seattle. Even though there was no question that the developer was building only on the portion of the lake bed it owned, the court required the building to be removed because it interfered with the rights of the other landowners around Bitter Lake to make reasonable use of the surface of the lake. *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968).

Mineral Rights

A landowner generally owns all minerals located in or under her property. Minerals are considered real property until they are extracted, at which point they become personal property. A landowner may sell mineral rights separately from the actual land. This type of sale is sometimes called a **horizontal division**. The right to own and use the surface property is divided from ownership of or rights to the subsurface minerals. The four main methods of dividing mineral rights are:

1. **Mineral deed**—A mineral deed transfers all rights to the minerals, and also grants the rights necessary to conduct mining operations to obtain the minerals. This usually includes the rights of access, development, processing, and transportation.
2. **Mineral reservation**—A mineral reservation is similar to a mineral deed, except that the owner sells or transfers the surface property and retains the mineral rights for himself.

Case Example:

Burlington Northern Railroad sold property to the Weyerhaeuser Company but retained the mineral rights for itself. The deed specifically reserved to the railroad "all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land. . ." Weyerhaeuser purchased the land and all of its accompanying rights, except the mineral rights, which were kept by the railroad. *Weyerhaeuser Co. v. Burlington Northern, Inc.*, 15 Wn.App. 314, 549 P.2d 54 (1976).

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3. **Mineral lease**—Under a mineral lease, the lessee is given the right to mine and has title to the minerals obtained, but the lessor retains a future right in the minerals. The property owner is usually compensated by royalty payments based on a percentage of the value of the extracted minerals.
4. **Mineral rights option**—A mineral rights option grants the right to explore for the presence of minerals. After exercising this option, the mining company would then decide whether or not to lease or purchase the mineral rights as stated in the option agreement.

Support Rights

A landowner has the right to the natural support of the land provided by surrounding land. **Lateral support** is the right to support from adjacent land. This right applies not only to land, but also to improvements such as buildings, so long as the added weight of the improvements is not the cause of the problem. To make a case for a violation of lateral support rights, the slipping and sliding of the soil must occur because of the soil's own weight and not because of the superimposed weight of improvements.

Example: Smith and Jones own property next to each other. Smith builds a house on his property. There is no problem with soil slippage. A few years later, Jones decides to level his property before building. He brings in bulldozers and removes several feet of soil near Smith's property line.

The soil on Smith's property begins to slide. This destroys expensive landscaping, and several cracks develop in the foundation of Smith's house. Jones may be liable for the damage to Smith's property, since his bulldozing removed vital lateral support.

Subjacent support is the right to support from the underlying earth. This right is significant when the property is divided horizontally and rights to underlying minerals or oil and gas are transferred to someone else. The underlying owner may be liable for damage to the surface property caused by excavations in the supporting earth.

Oil and Gas Rights

Washington does not produce large quantities of oil or natural gas. However, when the issue arises, Washington follows the non-ownership theory, which holds that underground oil and gas are not subject to ownership, because of their migratory nature. Under this theory, a property owner cannot actually own the oil or gas until it is pumped to the surface, where it becomes personal property.

Oil and gas in their natural states lie trapped under great pressure beneath the surface of the earth. However, once an oil or gas reservoir has been tapped, the oil and gas begin to flow toward the point where the reservoir was pierced by the well, since this is the area of lowest pressure. By drilling a well, a property owner could theoretically drain an oil or gas reservoir that lay beneath his own property and beneath several neighbors' property as well.

Rule of Capture. Once oil or gas has been pumped to the surface, it is governed by the **rule of capture**. This rule specifies that if a property owner drills on his own land, he owns all of the oil or gas produced, even though it may have migrated from under a neighbor's land.

This rule stimulates oil and gas production. If the neighbors want to protect their interests in the oil or gas that lies beneath their property, they must drill offset wells, in order to keep all of the oil or gas from migrating to one well. The outcome is that more oil or gas is produced in a shorter amount of time because more wells are drilled.

Since landowners usually do not have the necessary skill, experience, or equipment to drill for oil or gas themselves, they often enter into lease agreements with oil or gas companies who drill the wells and extract the oil or gas. There is no standard lease form, but oil and gas leases generally include an initial cash amount paid for granting the lease, a specified lease term, a method by which the lease term may be extended if necessary, and the amount of royalties to be paid to the landowner based on the amount of oil or gas actually extracted.

Conclusion

As you can see, a sale or other transfer of real property involves much more than just the land. You need to know where the property boundaries lie, what natural attachments and fixtures are included, and whether any rights that are ordinarily appurtenant to real property have been severed. Knowing how real property is described and what rights go along with real property ownership will help you avoid some of the problems that commonly arise in real estate transactions.

Case Problem

The following is a hypothetical case problem. Most of the facts are taken from a real case. Based on what you have learned from this chapter, make a decision on the issues presented, and then check to see if your answer matches the decision reached by the court.

The Facts

Henry Timm rented a house from his brother from 1948 through 1972. During that time he made many improvements to the home. Upon his brother's death, the house was put up for sale and advertised as "remodeled." Timm participated in the arrangements for the sale and knew that it was being advertised as remodeled.

When the house was sold, Timm moved out, taking with him:

1. a kitchen sink and cabinet combination installed to modernize the kitchen,
2. an exhaust fan constructed in a wall to replace a window,
3. two baseboard heaters, and
4. carpeting attached to the floor by nailing strips and staples.

A dispute developed over whether or not these items were fixtures that should have remained with the house. At the trial, Timm said that he considered these items his personal property and always intended to take them with him. However, he had never previously expressed this intention.

The Question

Which of the items listed above, if any, would be considered fixtures?

The Answer

In the case of *Kane v. Timm*, 11 Wn. App. 910, 527 P.2d 480 (1974), the court found that all of the items were fixtures except for the baseboard heaters.

Consider all of the tests used to determine whether an item is a fixture. The intention of the annexor is the most significant test. Although Timm said that he always intended to take these items with him, he had not previously expressed this intent. A secret intent cannot govern; there must be objective evidence of intent.

The kitchen sink and cabinet unit were installed to modernize the kitchen. This implies an intent for the items to remain in the kitchen. Remember also that Timm knew that the house was advertised as "remodeled." If the updated items were removed, it could hardly be considered remodeled.

The exhaust fan was built into the wall to replace a window. So constructed, it was specifically adapted to this particular realty.

The carpet was attached by nailing strips and staples, fairly permanent methods of attachment. The baseboard heaters were probably resting on the floor, with no actual attachment to the property.

As to the relationship of the parties, although Timm was renting the property from his brother, he lived on the premises for 24 years—longer than many people live in homes they own. It is likely that when Timm improved the property, he intended the improvements to remain with the property.

None of the items were trade fixtures, and there was no written agreement concerning them.

Chapter Summary

- Knowing the correct boundaries of a parcel of real property is important to the buyer, the seller, and the real estate agent. A seller may be held liable for innocently misrepresenting property boundaries. An agent will usually not be held liable for an innocent misrepresentation based on information provided by a seller; but the agent should make a reasonable effort to determine if the seller's statements are accurate.
- The three main methods of land description are metes and bounds, government survey, and lot and block. The lot and block method is the system used most frequently in metropolitan areas.
- The two types of attachments to real property are natural attachments and man-made attachments (fixtures). The tests used to determine whether an item is a fixture include: method of attachment, intention of the annexor, adaptation to the realty, relationship of the parties, and written agreement.
- An appurtenance is a right or interest associated with real property, such as air, water, oil and gas, and mineral rights. These rights are normally transferred along with the property, but they may be severed and sold separately.
- The use of water is regulated by one of two systems: the riparian rights system or the appropriative rights system. Prior appropriation is the dominant water law in the state of Washington. To acquire an appropriative right, you must obtain a permit from the government.

Checklist of Problem Areas

Real Estate Licensee's Checklist

- ❑ Any sale of property raises questions as to which items are fixtures. A real estate agent should be aware of which items the seller plans to remove and which will remain with the real property. The following are some items that often cause disputes:
  - carpeting (in general, unattached rugs are personal property, but wall-to-wall carpeting specially cut to fit the room and tacked to the floor is a fixture);
  - drapes and venetian blinds;
  - mirrors and chandeliers;
  - appliances such as refrigerators, stoves, microwave ovens, and air conditioners (the method of attachment is important here—a freestanding refrigerator or a microwave oven that can be removed by merely disconnecting an electric plug is generally personal property, but a built-in unit may be considered a fixture);
  - special landscaping such as expensive trees or shrubs;
  - play equipment such as swing sets and slides; and
  - birdbaths, sundials, or statues in the garden or yard.

- ❑ Most listing agreement forms and purchase and sale agreement forms contain a clause that lists included items. The pre-printed list of items is not necessarily the same on all forms, however. An agent should make sure that both the listing agreement and the purchase and sale agreement list the same items, so that problems don't arise later.

- ❑ If an agent has any reason to doubt a seller's statement regarding the size of the property, or if the seller is not sure of the exact boundaries of the property, the agent should proceed with caution. Some agents put a statement like "Buyer is to verify size of the property" in the MLS listing information, to protect themselves against inaccuracies in both the lot size and the size of the structures. If there are questions concerning the true boundaries of the property, the agent should recommend that the property be surveyed.

- ❑ An agent should check to see if all appurtenant rights (such as mineral rights or oil and gas rights) pass with the property, or if any rights have already been transferred or sold to another party, or if the seller plans to retain any appurtenant rights. (The title report will indicate whether any rights have been transferred to another party, if the seller isn't sure.)

Seller's Checklist

- ❑ Unless the property has been surveyed recently, a seller should not claim to know the location of the boundaries with certainty. Remember, a seller can be held liable for making an innocent misrepresentation to a buyer.
- ❑ If a seller wants to remove items that might be considered fixtures, a written list of excluded items should be incorporated into the purchase and sale agreement. It may also be advisable to simply remove certain items before showing the property. This way there can be no questions later about whether or not a particular item was meant to be included in the sale.
- ❑ If a seller wants to retain any rights that would ordinarily pass to the buyer (such as mineral rights), there must be a clear provision in the purchase and sale agreement and in the deed that severs these rights from the conveyed property.

Buyer's Checklist

- ❑ A buyer should ask where the boundaries of the property lie. If the agent or seller is uncertain, the buyer should consider requesting a new survey.
- ❑ A buyer should ask specific questions concerning whether or not certain items are fixtures that will transfer with the property, and then make sure that the purchase and sale agreement accurately reflects the parties' understanding concerning the fixtures.
- ❑ It's important for a buyer to know whether financing statements have been filed on any of the property's fixtures. (These would usually be listed in the title report.)
- ❑ A buyer also needs to know whether the air rights, mineral rights, and oil and gas rights are still appurtenant to the property, or if they have already been severed from the land and sold to another party.

Chapter Quiz

1. A portion of a metes and bounds description states "thence south 275 feet to the edge of the old gravel pit." A recent survey shows that it is actually 280 feet to the old gravel pit. The property:
   a. will end at 275 feet because distances take precedence over monuments
   b. will end at the edge of the gravel pit because monuments take precedence over distances
   c. will have to be resurveyed and a new description provided
   d. None of the above

2. Under the government survey method of land description, a township is divided up into how many sections?
   a. 12
   b. 20
   c. 36
   d. 42

3. New guide meridians are established at each correction line:
   a. because of the curvature of the earth, so that the lines don't converge
   b. because of the curvature of the earth, so that the lines don't convect
   c. because when the surveying was first begun, 24 miles was the largest interval they could survey
   d. Both a) and c)

4. A government lot:
   a. is a lot owned by the government
   b. is a parcel of land of irregular shape or size
   c. must be described using the lot and block system
   d. None of the above

5. The method of land description used most often in large metropolitan areas is:
   a. rectangular survey
   b. lot and block
   c. metes and bounds
   d. government survey

6. If the tenancy is terminated before a crop is ready to harvest, the tenant farmer has the right to re-enter the land and harvest the crop. This rule is known as the doctrine of:
   a. fructus industriales
   b. constructive annexation
   c. emblements
   d. appurtenance

7. Kirk Horton is in the process of selling his house to Susan Bianucci. At the time of closing, the dishwasher is at the repair shop. Under the doctrine of constructive annexation, the dishwasher:
   a. will not be considered part of the sale
   b. is a fixture that will be considered part of the sale
   c. will have to be conveyed under a separate contract since it was not actually present at the time of the sale
   d. None of the above

8. In determining whether or not an item is a fixture, the most important test is the:
   a. relationship of the parties
   b. adaptation to the realty
   c. intention of the annexor
   d. character of the item

9. Trade fixtures:
   a. are considered real property and cannot be removed by the tenant
   b. must be specified in the lease to be removable
   c. are generally removable
   d. None of the above

10. A candy maker has a two-year lease. The lease specifies that any improvements the tenant makes to the property will remain with the property and pass to the owner upon termination of the lease. The candy maker installs a marble counter to roll the candy on. When the lease is up:
   a. the candy maker may remove the marble counter because it is a trade fixture
   b. the candy maker may remove the counter because it is not a fixture
   c. the candy maker may not remove the counter because of the written agreement
   d. the candy maker may not remove the counter because he did not ask the owner if he could install it

11. Western Pacific Railroad has tracks that run through downtown Metropolis. Western Pacific owns the strip of land that the tracks are located on. Megacorp wants to purchase the airspace above the tracks to build a shopping complex. Which of the following is true?
   a. Megacorp must purchase the air rights from the federal government, since it has control over airspace
   b. Megacorp can purchase the air rights from Western Pacific Railroad
   c. Megacorp cannot purchase the air rights; unlike other appurtenant rights, they can't be sold separately from the land
   d. None of the above

12. Abe Harris owns two sections of property. One borders along Red Rock Creek, and the other section is across the road and does not adjoin the creek. Abe uses water from the creek to irrigate his crops on both sections of property. This use of the water:
   a. is illegal
   b. is legal since he has a riparian right to the use of the water
   c. is legal if he has obtained a permit giving him an appropriative right to the water
   d. None of the above

13. Alison Simmons owns property along a navigable river.
   a. Alison owns the section of the riverbed adjoining her property and running to the middle of the river
   b. The government owns and controls the riverbed
   c. Alison is not entitled to any use of the water since it is owned by the government
   d. Both b) and c)

14. Greg Majeski has horizontally divided his property and sold all the mineral rights to a mining corporation along with the necessary rights to obtain the minerals. This type of a mineral sale is called a:
   a. mineral deed
   b. mineral reservation
   c. mineral lease
   d. mineral option

15. In dealing with oil and gas rights, the rule of capture provides that:
    a. a property owner can only own the oil and gas captured from beneath her own land. Oil or gas that migrates from beneath a neighbor's land is owned by the neighbor
    b. a property owner who drills on her own land owns all of the oil or gas produced even though some of the oil or gas may have migrated from under a neighbor's land
    c. oil and gas remain real property even after being captured
    d. None of the above