

Center for Environmental Law & Policy

Articles in the press & press releases

FLETCHER'S LANDING

Articles in the press

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Policy group enters Fletcher's fray

▼ *The Seattle think tank hopes to use the suit as a legal test case.*

By **JIM THOMSEN**
Staff Writer

The end of the road is nowhere in sight for the numerous parties battling over the road end at Fletcher's Landing.

The latest twists in the tortuous path of what could become a landmark legal case over the public's disputed rights toward tidelands access are many:

- A judge with a possible conflict of interest;
- A principle with roots in ancient Roman law, and;
- An environmental group with an agenda extending far beyond the narrow gated path.

The next round will take place Jan. 7 in Kitsap County Superior Court, when members of a Seattle-based environmental policy think tank will seek the removal of Judge Terry McCluskey from the case.

In a hearing last month, McCluskey had ruled against the Center for Environmental Law and Policy, in its attempt to formally intervene in the case.

The motion was made so the organization could use the case as a legal fulcrum to implement the controversial "public trust doctrine," that supports public access to all Washington tidelands.

However, in comments reflected in the official court transcript, McCluskey added: "If we open this case to your side, sir, then I'm going to want to get into the case because I'm an upland owner."

As far as CELP officials were concerned, McCluskey had just given away a bias toward private tideland ownership.

"The judge's personal interests were used as a basis for denying (our) motion," Rob Caldwell, the center's lead attorney in the case, said.

"These actions are highly irregular, constitute bias, prejudice, abuse of discretion and deny (us) substantial justice."

The case originally was a dispute between the city of Bainbridge Island and several property owners in the Fletcher's Landing neighborhood, over ownership and access at the west-side road end.

It's taken on a substantially larger scale since then.

The city had filed suit against several Fletcher's Landing property owners in January, seeking the removal of a locked gate and permanent access, by way of "quiet title," to the path beyond that leads to the beach.

City officials believe that the historic public use of the site in the past, including a ferry dock in the 1920s and 1930s, constitute a "prescriptive easement" on the brambly, overgrown strip of land.

As Blair Burroughs, one of the city's attorney's put it: "Once it goes into public use, it can't be private."

Six property owners countersued in October, claiming that the city's action, if allowed, would constitute the taking of private property without compensation. They argue, simply, that their land titles include the tidelands of their beaches, and therefore they are the only ones entitled to enjoy them.

To back up their beliefs, in 1996 they installed a locked gate that remains in place today.

The Center for Environmental Law and Policy - whose members include islander Vince Larson, chair of the city Road Ends Committee that evaluated the site and recommended it for public use - jumped into the fray Nov. 1.

In several legal documents, Caldwell claimed that the group's intervention was justified because its interest - expanding the public trust doctrine - went well beyond that of the city.

Peter Eglick, attorney for the Fletcher's Landing neighbors, fired back.

"The civil rules do not allow the hijacking of litigation that will unduly complicate a case, even if it will serve the 'law reform' ends of a special interest group," he wrote. "The result would be the shifting of the focus of the litigation away from its original parameters into something far more complex."

McCluskey, in a Dec. 2 hearing, agreed. The center's motion to have McCluskey recused, however, indicates that the group is gearing up for a second attempt to intervene that could delay hearings on the original lawsuit well into next year.



Ryan Schierling/Staff Photo

A locked gate divides neighbors in the Fletcher's Landing area. An environmental policy group hopes to join the lawsuit over access to

the former ferry launch, as a test case to open up tideland access around the state.

Public trust – what is it?

▼ *Based in ancient law, it's the bane of property rights.*

By **JIM THOMSEN**
Staff Writer

Just what is the public trust doctrine?

Black's Law Dictionary defines it as a document that "provides that submerged and submersible lands are preserved for public use in navigation, fishing, and recreation ... (the) state, as trustee for the people, bears responsibility of preserving and protecting the right of the public to the use of the waters for those purposes."

How it's interpreted, though, is another matter altogether.

The U.S. Supreme Court has upheld the doctrine, first set forth in Roman law in 533 A.D., when it was tested in several other states this century.

In Washington, the state's highest court took the 1971 Shoreline Management Act a step further by declaring the PTD as "the law of the state."

In effect, the court's ruling limited the rights of private property owners over tidelands beyond their beaches, precluding property owners from constructing a dock or any other "navigational hazard" without a permit from the city.

The ruling failed, however, to define any specific public right to set foot on such property.

Currently, landowners have the law on their side on trespassing

issues.

The Seattle-based Center For Environmental Law and Policy has leaped to the forefront on the public side of the doctrine debate in several legal disputes.

Its goal, as outlined in court documents in the Fletcher's Landing case, is to legally reinforce the idea that "where the state of Washington passed title to the land, the public still maintains a right ... for navigational, recreational and aesthetic purposes."

Chris Neal, a Fletcher's Landing resident and attorney who's both a plaintiff and defendant in the two lawsuits pending between the city and the property owners, said that objective strains too far.

"These groups want to change the law to extend the PTD so that it also prevents the waterfront owner from stopping people from walking

along the beach, as they currently can do," Neal said in an October interview.

Many people traverse local tidelands, however, regardless of "Private Property" or "Trespassing" signs.

Harvey Manning, author of "Walks And Hikes On The Beaches Around Puget Sound" and an interested party in the disposition of the Fletcher's Landing dispute, offered access-advocates advice in his text.

"Be of good cheer, have no fear. Do unto beach residents as you would wish done to you if you were one," Manning wrote.

"Should a resident burst from a house breathing fire, screaming 'Git off my beach!', remember that a soft answer turneth away wrath.

"You might politely ask which way he/she wishes you to git."

PTD v. PGD

(Public Trust Doctrine v. Private Greed Doctrine)

In 1995 my beach book, *Walks and Hikes on Beaches Around Puget Sound*, was issued with a stern warning from the publisher's legal counsel that "Mr. Manning's advocacy of civil disobedience... represents his own personal views and not the views of The Mountaineers." My dedication of the book was "for our leader, Benella Caminiti, and our legal counsel, Henry David Thoreau."

I received an invitation from the East Lake Washington Bar Association to discuss the Public Trust Doctrine. A few of the attorneys recalled having heard something about it in law school. None, however, had been among the 250-odd attendees at the day-long symposium sponsored on November 18, 1992, by the Shorelands Program of the state Department of Ecology, featuring Professor Ralph Johnson of the University of Washington School of Law and four other legal scholars, introduced by State Land Commissioner Brian Boyle.

To my East Lake audience of several dozen it came as news that in 1987 the Washington State Supreme Court had ruled, in *Caminiti v. Boyle* and *Orion Corporation v. State*, that the Public Trust Doctrine, as a tenet of the English common law, was the foundation of the constitution of the State of Washington and had all the force of statute law. The 250 who had been at the symposium were not surprised; I recognized among them every Privatizer-employed attorney I knew. They were there to keep an eye on the Enemy embodied in the common law, that they might better defend the Private Greed Doctrine (PGD) embodied in human nature.

A very effective job has been done suppressing widespread knowledge about the PTD. Even The Mountaineers, whose

first organized excursion was a beach walk, characterize the beachwalking described in my book that they reluctantly published as "civil disobedience." The sort of thing for which Thoreau was thrown in jail.

The PGD buys a lot of advertising space in — and editorial control of — the public press. But sometimes the existence of



the PTD sneaks through into plain view. The Center for Environmental Law and Policy (CELP) is currently involved in *City of Bainbridge Island v. Brennan, et al.*, a shorelines case that will be some years in the mills of the courts, rarely if ever with due press attention.

There is a blatant conspiracy of silence by the PGD. All the more reason, therefore, to hail the *Seattle Post-Intelligencer* for its full-page editorial Focus of January 26, 2000, and the author, Daniel Jack Chasan. Some of us have argued that the PTD has wider application than beaches and rivers and lakes, that it extends inland, upland, skyward. The following brief excerpts are, to the best of my knowledge, the very first local presentation of that argument in a

general-circulation publication:

"Our knowledge of constitutional language tells us that the forests are protected by a broader constitutional trust, which gives them the benefit of a legal principle called the public trust doctrine... Originally, the doctrine applied only to navigable waters, where it protected public rights to navigation and fishing. The Supreme Court has already extended it to... 'recreational purposes.' The court has explicitly left open the door to broader applications. Other courts have extended the doctrine to dry land and have expanded it to protect environmental quality, wildlife habitat, and aesthetic beauty..."

"...A broad public trust has always existed. Courts have ignored it, but they have not extinguished it. The trust is still there..." Professor Johnson warned the 1992 symposium that the 1987 rulings by the Supreme Court were not the coda but the overture; years and years of court decisions will be required to erect on the constitutional foundation of common law the structure of case law by which the PTD can establish a fair division of private property rights and public trust rights. The CELP is getting at it.

— HARVEY MANNING

Fletcher Landing

NORTHWEST

NW4 THE WALL STREET JOURNAL, NORTHWEST, WEDNESDAY, SEPTEMBER 29, 1999

Bainbridge, Locals Fight Over Road-End

By RACHEL ZIMMERMAN

Staff Reporter of THE WALL STREET JOURNAL
Who owns the end of the road?

That's an explosive question on Bainbridge Island, where homeowners and city officials are squabbling over a half-a-block-long strip of asphalt in the upscale Westhampton and Mountain View subdivisions that leads to Fletcher Bay. People who live in the scenic enclaves say the road-end, as islanders refer to such waterfront access paths, belongs to them and should be off-limits to other locals. To ensure that, the residents have padlocked the gate at the head of the path. The city of Bainbridge Island insists that the road-end belongs to the public, and is suing 20 property owners.

"This issue has become sufficiently contentious that we had to either give up or get a court to decide," says Lynn Nordby, Bainbridge Island's city manager.

The islanders aren't the only ones who have a stake. Environmentalists see the case as pivotal to their campaign for greater public access to all of Washington's waterfronts. "The public has an absolute right to walk on the beach," says Rob Caldwell, a lawyer with the Center for Environmental Law and Policy in Seattle. In this case, "where the state of Washington passed title to the land, the public still maintains a right...for navigational, recreational and aesthetic purposes."

The lawsuit, filed earlier this year in Kitsap County Superior Court, charges that the property owners are illegally blocking entree to the road-end. Blair Burroughs, a Seattle lawyer hired by the city, says Washington case law is clear: If a road has been used regularly by the public for more than 10 years, it is a public road. "Once it goes into public use it can't be private," Mr. Burroughs says.

The homeowners don't see it that way. Peter Eglick, a Seattle lawyer representing 12 of the homeowners, calls the claim of long-term public use "anecdotal" and describes the city's legal footing as "on the extreme low end of viability."

The homeowners note that when they bought their property on the west side of the island, they bought rights to the Fletcher Bay tidelands—by state definition, the terra firma covered by water during high tide and exposed during low tide. And since the road-end's sole destination is

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Bainbridge Island Sues Homeowners Over Road-End

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the tidelands, they argue, only people who own the tidelands should be able to use it.

The tidelands are "private property. It's on our deeds and it belongs to us," says Lisa Neal, a lawyer who bought a house in Westhampton with her husband, who is also a lawyer, in 1996. "Imagine if the city of Seattle decided your backyard is pretty and said, 'We're going to make it a park.' How would you feel?"

Actually, Seattle is in the throes of a comparable debate. On Monday, the city council voted 9-0 to charge some property owners for the use of public street-ends that lead to water, with the ultimate goal of removing private encroachments on all shoreline street-ends.

Sentimental Spot

On Bainbridge, the Fletcher Bay road-end, overgrown with blackberry brambles, has a fabled past. It leads to Fletcher Landing, which overlooks a small beach when the tide is low and offers spectacular views of Kitsap Peninsula and the Olympic Mountains. A concrete bulkhead, near what was once a ferry dock, is a favorite spot for sunset-watching.

Harvey Manning, a naturalist who wrote a guide to walking the beaches in the Puget Sound region, says his parents met at Fletcher Landing. "My mother was a teenage girl; my father was aboard the USS Mexico in Bremerton. They met at a beach fire," he says. "In my parents' day the beach was freely public. Nobody would think of barring the beach."

But nostalgia doesn't give people the right to trample on private property, Ms. Neal says. "The main problem everyone has is that there's no control over who uses it, when they use it and how they use it," she says. "If you want to go down there and see the sunset, you have to share it with people you don't know."

The road was created in 1899, when the Kitsap Board of Commissioners set its width at 40 feet and named it Kitsap County Road No. 105. Then, in 1911, Peter Erlandsen, who in 1898 had purchased a 32-acre tract that is now part of the subdivision, bought from the state the rights to the tidelands fronting his land, including those at the end of Road No. 105. Locals continued to stroll down the road-end, often venturing onto Mr. Erlandsen's tidelands. And from the mid-1920s until 1942, Kitsap Transportation Co. operated a ferry service from a dock at the end of the road.

When Mr. Erlandsen's property changed hands in 1947, the state granted the new owner "undivided interests in the tidelands adjacent to the road-end," according to the deed of record. And the city's argument is that because the public continued to regularly navigate the road-

end even after 1947, it became a de facto piece of public property.

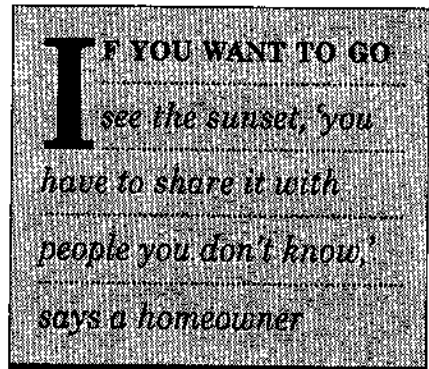
It wasn't until 1986 that property owners began to quarrel with that opinion. They installed a fence, though they left the gate unlocked, allowing locals to continue to amble down to the beach.

In 1996, a lock appeared on the gate. Unidentified locals hacked it off, but homeowners installed another. Now, though the lock is in place, people can still gain access to the road-end—and often do—by climbing over or wriggling through the fence.

Securing Access

The matter came to a head in 1998, when the city's Road-End Advisory Committee issued a report identifying 62 public road-ends on the island it said were vital resources and should be protected to ensure citizens' access to the waterfront. The committee suggested the city post a sign at the Fletcher Bay road-end saying, "public shore access," install a set of concrete steps or a ramp down to the water to enable the launching of small watercraft or kayaks, build a bench, and put up a safety fence across the end of the bulkhead.

Those ideas didn't go over well with homeowners. "Fletcher Bay was the most controversial road-end," says Vince Larson, a member of the committee. But he



says he and his colleagues are convinced they're right. "We think it's pretty obvious if a road runs to...the beach, it was intended to be used for people to go to the beach."

Mr. Caldwell, the Center for Environmental Law and Policy lawyer, agrees, and says the centuries-old public-trust doctrine ensures public access to the beach. "This is a classic example of where private property interests are clashing against broader public-interest concerns."

But Mr. Eglick, the homeowners' lawyer, says, "It's one thing to wave your arms and say 'public-trust doctrine.' It's another thing to make the case here."

He also questions the wisdom of the city's decision to go to court, "using public resources to litigate its way onto property it can't get politically."

Mr. Nordby, the city manager, says the city tried to resolve the matter, even hiring a professional mediator to try to forge an agreement. He says since that failed, litigation was the only option. And besides, he says, most islanders don't agree with Mr. Eglick. "We had calls saying the city should just go in with a bulldozer" to pave a clear route to the beach, Mr. Nordby says. "We've tried not to take that route."