Accreted Tidelands,

A Special Situation for Southeast Alaska

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Prepared as a Supplement to:

A Private Landowner's Guide

to Voluntary Land

Conservation Options

in Southeast Alaska

Prepared by the Southeast Alaska Land Trust
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Please Note:

This paper is intended as a general guide to voluntary protection of private lands in Southeast Alaska. It is not meant as a substitute for legal or tax advice and should not be relied on as a sole source of information. Landowners wishing to protect land should consult advisors such as their attorney, tax accountant, or other professionals. Local and state government officials may also be able to provide useful advice to landowners.

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Introduction

The purpose of this paper is to help readers of the Southeast Alaska Land Trust's publication entitled, ***A Private Landowner's Guide to Voluntary Conservation Options in Southeast Alaska,*** understand a very special case of land ownership that is found in coastal Alaska to a degree that has not occurred in other states in modern times. This special situation involves tidelands that have been subject to dramatic post-glacial uplift and the land ownership implications that have resulted from that geologic event.

The Nature of Land Accretion in Alaska's Panhandle

Recently glaciated coastal areas of Alaska represent a special situation, compared to other states in the U.S. It involves the matter of "accreted tidelands." The University of Alaska's Geophysical Institute describes Southeast Alaska as one of the fastest rising regions on Earth. As coastal glaciers have retreated, the oppressing weight of ice has been reduced and the land has undergone "post-glacial rebound." For example, Sullivan Island, between Juneau and Haines, has risen more than 17.7 feet above sea level in the past 250 years. The Institute adds that another factor causing land uplift is the movement of the Earth's crustal plates in the vicinity of the Fairweather Fault where the Pacific and North American plates grind past each other, possibly compressing the crust and forcing it upward in places. A third, though far more subtle, contributor to rising tidelands is sediment deposited by coastal rivers and streams and stabilized by intertidal vegetation.

Accreted lands that remain subject to at least occasional tidal action fulfill a variety of important wetland functions. Wetlands tend to have high biological productivity and provide an abundance of microorganisms and invertebrates that fuel higher organisms in the food chain. Accreted wetlands provide valuable habitat for juvenile coho salmon and other fish, numerous species of resident and migratory birds, and mammals such as otter, deer, and bear.

Land that has been uplifted so much that it is no longer inundated by even the highest tides may assume upland characteristics and support pioneer communities of plants like grasses, fireweed, and eventually first-generation stands of young, open grown Sitka spruce. The proximity of these new upland habitats to adjacent wetlands makes them especially valuable for a variety of wildlife that thrive where wetlands and uplands meet. People enjoy not only the animals that accreted lands support but a sense of scenic open space as well.

Upland Owners' Right to Seek Title to Adjacent Accreted Land

Alaskans who own uplands adjacent to accreted tidelands have been successful in petitioning the State of Alaska for quiet title to these accreted lands. An underlying assumption has been that because those landowners' uplands abutted tidally influenced land at the time when the uplands were conveyed from the public domain to private

ownership, the present day owners of those uplands retain a right of access to adjacent tidally influenced land. During the decades since these uplands came under private ownership, accretion has in many places caused the mean high tide line (also referred to as mean high water) to shift seaward. On moderately sloping shorelines, this seaward shift may be only 10 to 20 horizontal feet, while on very low-gradient tidal flats, the shift may total hundreds of feet. In the words of William S. Brown, of the Alaska Department of Natural Resources' cadastral survey office, "Riparian or water boundaries are ambulatory boundaries in that the actual boundary is the water itself and the boundary between uplands and submerged lands moves with the water whether it be by erosion or accretion. This is a well established principle of law. In the case of accretions the upland owner has to go through the 'Quiet Title Process' in order for the court to make a decision that he is in fact the legal owner of the accretions and award good title."

Since the seaward property boundary of uplands is commonly considered to be the line of mean high tide, upland owners who have succeeded in gaining title to adjacent accreted land have been required by the state to accompany their petition for quiet title with a plat, prepared by a registered land surveyor, which indicates the location of the mean high tide line at the time when title to the accreted land is being sought.

Acquiring Quiet Title to Accreted Land and Attaching a Conservation Easement

As with other private lands, if a landowner wishes to provide long-term protection for the conservation values of their acquired accreted land, they may choose to enter into a conservation easement. For example, they could specify in an easement that commercial sand and gravel removal or erection of piling supported structures is prohibited. Then subsequent owners of this accreted land would be prevented from conducting these activities, even if government regulatory agencies might have otherwise permitted them to some degree.

Depending on site-specific circumstances, potential tax benefits resulting from a conservation easement on accreted land may be less than as is common for uplands. Even though the accreted land to which quiet title has been acquired from the state now lies above the mean high tide line, most, if not all of it, could still be periodically inundated by greater-than-mean high tides. In this case, it is likely that regulatory agencies would still consider them tidal wetlands and may limit the kinds of development that they would permit under their regulatory authorities. That could in turn limit the fair market value and therefore the difference in appraised values - without and with conservation easement restrictions in place.

On the other hand, given enough years of accretion, some former tidelands may cease to be inundated by periodic tides at all. In such cases, what was formerly considered wetland may now be considered upland and may, therefore, be subject to a greater range of development opportunities and have a higher fair market value in the absence of conservation easement restrictions. That would result in a greater difference between the appraised values - without and with - easement restrictions, and likely greater tax benefits.

Tan vegetation in the foreground is growing on very gently sloping accreted wetland to which the adjacent upland owners have received quiet title from the State of Alaska. The owners have since granted a conservation easement to the Southeast Alaska Land Trust. The terms of the conservation easement require that the accreted land the owners have acquired be managed in a manner similar to the way the state manages surrounding accreted land in the Mendenhall Wetlands State Game Refuge. The owners have exercised a right that was associated with their upland property and have done so in a way that will ensure maximum protection of important wetland values and functions in perpetuity. Photo: B. Baker

Basic Steps in Adjacent Upland Owner's Application to State of Alaska for Quiet Title to Accreted Land

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To facilitate state approval, it is suggested that the applicant submit the following information for initial review to: Cadastral Surveyor, Division of Mining, Land, and Water, Alaska Department of Natural Resources, 550 West 7th Ave., Suite 650, Anchorage, AK 99501-3576.

► Preliminary plat or map of the accreted area being claimed and depicting the current mean high tide level (including any intertidal sloughs that help delineate that level). Plat should also depict how it is proposed that accreted land be apportioned between the applicant and immediately neighboring upland properties. It is suggested that the plat be prepared by a registered land surveyor.

► Full copy of a plat showing the extent of the applicant's upland ownership.

Landowners are encouraged to contact ADNR's Cadastral Survey office at (907) 269-8523) to confirm what additional information may be needed in their site-specific situation.

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Cadastral Survey office reviews preliminary plat and provides any initial review comments it may have.

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Applicant has preliminary plat revised to address any ADNR Cadastral Survey office suggestions. ADNR's main concerns are likely to include establishment of the mean high tide line (mean high water), monumentation of state boundaries, and entering the plat into its records system.

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Applicant's attorney files with the Alaska Court System for quiet title action and includes the preliminary plat of the accreted land and the plat of the applicant's adjacent upland property. The applicant should also inquire of any applicable borough or city platting authority to determine what, if any, approvals will be needed from local government.

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Preliminary plat is subject to formal review and approval by ADNR in accordance with its Survey and Platting Standards (11 AAC 53). Based on ADNR's review and approval, the Alaska Court System decides whether to grant quiet title to the accreted lands.

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Applicant follows up with local borough or city platting authority to ensure that any local platting approval or other requirements are met.

To estimate how fair market values of accreted lands could be affected by land use restrictions in conservation easements, the Southeast Alaska Land Trust had appraiser Charles Horan conduct a benchmark appraisal of several representative private properties on Juneau's Mendenhall wetlands. He estimated values, both with and without assumed easement restrictions in place. The results of this analysis are available from the land trust office.

An adjacent upland owner seeking title to accreted land should check with the local borough or city platting authority to determine if its approval is required for any replatting associated with the quiet title action.

When Adjacent Accreted Land is in a State Game Refuge or Other Legislatively Designated Conservation Area

The accreted land situation becomes even more of a special case if the accreted land happens to lie within a legislatively designated area such as the Mendenhall Wetlands State Game Refuge in Juneau. The surveyed landward boundary of the refuge is much farther shoreward than the present-day mean high tide line. The result is that much of the accreted land to which an adjacent upland owner receives title may be gained at the expense of refuge acreage. In this case, a conservation minded landowner has some further options. One is to indicate that the purpose of their conservation easement is to ensure that the accreted land is managed in a manner consistent with the management of the adjacent state refuge. In writing the conservation easement, the owner may or may not wish to permit public access, and if they do grant such access, they can indicate the conditions under which access is to be allowed.

Acquiring Quiet Title to Accreted Land, Placing a Conservation Easement on it, and Deeding it Back to the State

A variation of the above approach is for the landowner to enter into a conservation easement for the accreted land and then deed it back to the state for inclusion once again in the refuge. As William Brown points out, "If a property owner has gone through the 'Quiet Title Process' and the court has awarded him good and marketable title to the accretions, he can then convey title to the accretions to another party subject to deed restrictions just the same as could be done with any other conveyance by deed." In the case of the Mendenhall Wetlands State Game Refuge in Juneau, the state's 1990 land management plan, prepared by the Alaska Department of Fish and Game, provides that the state "may acquire privately owned land by purchase, exchange or otherwise for inclusion" in the refuge. (The plan adds that the state may not acquire such land by eminent domain.) Under this scenario, the state would need to also be willing to accept the conditions of a conservation easement and might indicate a desire for an easement provision that ensures public access to the accreted land. The state's response to such a proposal would likely depend in large measure on the site-specific circumstances.

Even though the land would have originated from the refuge, temporarily been made a part of the adjacent upland owner's property, and then deeded back to the refuge,

it is still a good idea to check with the applicable borough or city platting authority to determine if there is any local government platting approval requirement.

Can a Landowner Deed Their Right to Seek Title to Adjacent Accreted Land?

Still another approach that some have asked about, again in the case of a state game refuge, is whether an upland owner could simply deed to the state whatever interest they may have a legal claim to – namely an unexercised right to seek title to adjacent accreted land. The idea here would be for the upland owner to convey to the state the right to seek title to the accreted land. The state of course would not actually need that right because it already owns the accreted land. The upland owner's purpose in conveying whatever accreted land right they may have would be to permanently put that right to rest so that no future owner of the upland could exercise it – especially for other than conservation purposes. As of this writing, the land trust is unaware of a situation in which this has occurred. Nevertheless, attorneys with whom the question has been discussed have not been able to find any reason why this could not be done. If it did prove to be a legally defensible approach, it would be a comparatively inexpensive option.

However, it would not ensure the protection "in perpetuity" that a conservation easement would. For example, in the absence of a conservation easement, there would be nothing to prevent the state from including the accreted land in question in a land exchange involving some other land elsewhere. Moreover, there is no indication that any such deed - of whatever someone has a legal claim to - would qualify for any tax benefits.