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IN THE SUPREME COURT FOR THE STATE OF ALASKA

FRED S. HONSINGER, et al.	)	
	)	
Petitioners,	)	
	)	
vs.	)	Superior Court
	)	
STATE OF ALASKA, et al.,	)	No. 1JU-73-210 CIV.
	)	
Respondents.	)	Supreme Court No.
	)	
	)	

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PETITION FOR REVIEW

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Filed this \_\_\_ day of November, 1980  
in the Supreme Court for the State  
of Alaska.

ROBERT BACON  
CLERK OF THE SUPREME COURT

By: \_\_\_\_\_  
Deputy Clerk

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## STATEMENT OF JURISDICTION

Petitioners seek review under Rules 23 and 24 of the Alaska Rules of Appellate Procedure of an Order dated September 29, 1980, entered by the Honorable Thomas B. Stewart, Presiding Judge of the Alaska Superior Court, First Judicial District. The Order was accompanied by a separate Memorandum of Decision. (The Order and Memorandum of Decision are attached hereto as Appendices F and G.)

The Order granted a motion by the State of Alaska (defendant below and respondent herein) to "establish the law of the case" regarding the applicability of the law of accretion where submerged lands gradually and imperceptibly become uplands through the natural process referred to as "glacio-isostatic uplift." The State's purpose in filing the motion was to determine in advance of trial whether the plaintiffs could be denied the benefit of the general accretion rule if the State proved that the accreted lands in dispute became exposed above the line of mean high tide by glacio-isostatic uplift, rather than by retrocession of the sea, alluvial deposition or some other natural process. The effect of the Order, unless reversed on this interlocutory appeal, will be to trigger a lengthy and expensive trial to resolve these complicated factual questions regarding the natural causes which accounted for the lands in dispute.

A motion for reconsideration of the Court's Order was timely filed pursuant to Rule 77(n) of the Alaska Rules of Civil Procedure. Since no action was taken on that motion by the Court, it was therefore denied sub silentio by operation of Rule 77(n) on October 30, 1980. The Alaska Supreme Court has jurisdiction over this Petition for Review under and by virtue of Rules 23 and 24 of the Alaska Rules of Appellate Review.

### INTRODUCTION; REASONS WHY INTERLOCUTORY REVIEW SHOULD BE GRANTED

This quiet title action was filed in 1973 by the owners of homestead lands in Juneau to resolve a controversy which had

arisen with the State of Alaska over the ownership of certain uplands situated between the original seaward boundary of the homestead lands and the present line of mean high water. It is undisputed that the petitioners own the upland homestead parcel.

After years of preliminary skirmishing, the parties entered into a stipulation to the effect that "if the property in dispute in this action was formed by the process of accretion, it would inure to the littoral owner." Stipulation dated May 5, 1979, ¶ 3. (Appendix A). Paragraph 4 of the Stipulation recites the State's contentions that:

[T]he land at issue in this proceeding was formed entirely, or substantially, by the geological phenomenon of isostatic rebound [referred to by the Court as "glacio-isostatic uplift"] and that, unlike accreted lands, lands formed entirely, or substantially, by isostatic rebound do not inure to the benefit of the shoreline owner.

If the State's legal contention regarding this supposed exception to the general rule of accretion were rejected, then no fact question would be presented, no trial would be held, and judgment would be entered quieting title in favor of the petitioners. The effect of the Court's ruling in favor of the State is to require that there be a trial to determine if possible how the disputed land came into being. The State will seek to prove through scientific data and expert testimony that the disputed land emerged from the sea in place by the process of glacio-isostatic uplift; the plaintiffs will seek to rebut that contention. It can be predicted that the trial of this fact question will be extremely expensive for both parties, and time-consuming for the Court.

Review now could eliminate the need for a trial. On the other hand, if review is postponed then whatever the result of the trial, an appeal and a cross-appeal are almost certain. It is extremely unlikely that a trial could eliminate the need for this Court to review the Superior Court's recent ruling.

In his Memorandum of Decision, Judge Stewart stated that "the issue is essentially one of first impression, with

potential in its resolution for relatively wide-ranging economic and social impact in a glaciated, tidal region such as this northern portion of Southeastern Alaska." Appendix G, p. 2. The State refers to this case as "a precedent of extraordinary magnitude. . . affecting title to perhaps millions of acres of newly emerged lands." Appendix E, p. 2. There can be absolutely no doubt that this issue will require resolution by the Alaska Supreme Court, if not in this case then in another. No economy in the use of judicial resources would be effected by deferring review in this case until appeal from final judgment.

Under Rule 23(d) of the Alaska Rules of Appellate Procedure, interlocutory review is to be granted where the issue presented by the lower court's order "involves a controlling question of law," and "an immediate and present review of such order or decision may materially advance the ultimate termination of the litigation." This criterion is clearly met in the instant case. "Undue or extraordinary hardship will result from the requirement that petitioner participate in a trial" and "injustice will or might result unless an immediate review of the decision below is granted." City of Fairbanks v. Schaible, 352 P.2d 129, 131 (Ak. 1960).

#### FACTUAL BACKGROUND

This case calls into play the rules of law which apply where land increases in area, gradually and imperceptibly, along the margin of a water body. Such an increase is commonly referred to as "accretion." See, 65 C.J.S., "Navigable Waters," § 81(a), p. 250, and authorities cited therein at footnote 36. Accretion occurs in one of two distinct ways: either (1) new land is created by the deposit of soil or sand where none existed before, or else (2) fast land (i.e., land in place) which has been submerged becomes exposed above the line of mean high water. These two processes -- the creation of new land ("accretion," in the more limited meaning of that term) or the exposure of land theretofore submerged ("reliction") -- are subject to the same

rule concerning title.<sup>1/</sup> The new land becomes the property of the adjoining littoral owner so long as its exposure or creation is gradual and imperceptible. This rule applies irrespective of whether the land is exposed by reliction or is created by accretion. See, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 325 (1973); 65 C.J.S., "Navigable Waters," § 82(1) and cases cited therein; 5A Thompson on Real Property, §§ 2560, 2563.

There are many different natural processes or occurrences which, independently or in concert, can cause accretion or reliction. Accretion can occur as the result of wave or tidal action eroding the material on a shoreline and moving the resultant sand or silt to another location, by the transport of silt or glacial outwash by river from upland areas to coastal areas, or by other means. It can occur on a tiny scale (as with an eroding creekbed) or on a grand scale (as with the Mississippi River delta). Reliction is also variously caused. It can be the result of the gradual retirement or retrocession of a water body adjoining a stationary land mass, or it can be caused by the gradual emergence of that land mass in relation to a stationary water body.

This is believed to be the first case in which a court has suggested that the applicability of the law of accretion and reliction should depend upon the particular hydrologic or geologic process involved. Thus, the case marks the first occasion upon which litigants who agree that the addition of the new land was gradual and imperceptible have been required to marshal evidence concerning these complex physical science questions.

"Glacio-isostatic uplift" may be defined as the gradual rise of the earth's crust which occurs when the downward pressure exerted by a glacial ice mass diminishes. It is based upon the

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<sup>1/</sup> The former phenomenon is always referred to as accretion. The latter phenomenon is sometimes distinguished from the former by the term reliction. In Schafer v. Schnabel, 494 P.2d 802, 806 (Ak. 1972), this Court used the term "accretion" in the more limited sense to refer to new lands created by the deposit of alluvium, as distinguished from the exposure of fast lands by reliction.

theory of "isostasy," which posits that all portions of the earth's crust rest upon a viscous mantle in a state of equilibrium. A change in mass at any given location produces a corresponding change in the pressure exerted at that location upon the viscous mantle which supports it, with the result that the equilibrium is adjusted. This in turn causes various portions of the crust to emerge or subside. This phenomenon of localized emergence or subsidence of the earth's crust in response to local changes in pressure exerted by the earth's crust upon the mantle is called "isostatic adjustment." Areas of the earth's land mass are almost always either emerging or subsiding, gradually and imperceptibly, due to this process of isostatic adjustment.

Eustatic change is a companion phenomenon, involving the fluctuation of the absolute sea level due to changes in the number of molecules in the sea, or to volumetric expansion or contraction due to an increase in the temperature of the sea, or to local change caused by a net flow of sea water from one region to another. Eustatic change and isostatic change occur simultaneously in a gradual and imperceptible manner, together, effecting changes in the relative sea level throughout the world.

Because of these processes, the relative sea level along the earth's coast lines will never be static. Isostatic and eustatic changes, sometimes complementary and sometimes offsetting, are constant on both global and local scales. The complex interaction of these geological processes, accompanied by the ambiguous nature of so much of the physical evidence from which their incidence is inferred, makes it virtually impossible for scientists to determine to any reasonable level of certainty what absolute changes in the position of the land mass or of the sea level have occurred or precisely which natural processes are responsible for those changes.<sup>2/</sup>

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<sup>2/</sup> A lengthy discussion of these physical processes and their interrelationships is contained in the "Plaintiffs' Memorandum in Opposition to State's Motion to Establish Law of the Case" dated October 5, 1979, filed in the Superior Court. This discussion contains substantial references to the literature on the subject. See Appendix D, pp. 5-10.

## ARGUMENT

### I.

TITLE TO LANDS ACCRETED DUE TO GLACIO-ISOSTATIC UPLIFT  
IS GOVERNED BY THE GENERAL RULE APPLICABLE  
TO ALL ACCRETION AND RELICTION.

The State's argument rests on two legs. First, it argues that the policies which have historically been cited in support of the general rule of accretion do not apply where the new land is created by glacio-isostatic uplift. Second, it argues that contemporary political support for the retention of the coastal margin in public ownership warrants abrogating the general accretion rule in the case of glacio-isostatic uplift.

The Superior Court properly regarded this question as one of first impression. It noted that the issue was susceptible to resolution in favor of the littoral owners "on substantial grounds" (Appendix G, p. 3), and it tacitly acknowledged that a ruling in the State's favor would in effect constitute judicial legislation. Appendix G, p. 5. It addressed the State's argument as a policy question: Would it be "better" for these new lands to be owned by the private littoral owner or by the public at large? Basing its holding upon the mistaken premise that a ruling against the littoral owner would result in retention of all uplift accretion lands in public ownership, the Court ruled in favor of the State.

- A. Applicability of general accretion principles in reliction cases does not depend upon the specific natural cause of the reliction.

The actuating physical cause of a reliction has never been taken into account in determining whether the littoral owner takes title to the new land. In Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), for example, land previously submerged under the Colorado River had emerged as a result of a federal rechanneling project. The adjacent private landowner claimed the new land under the doctrine of reliction, but the State refused to recognize that claim because the physical agency which caused the reliction was not a natural alteration of the river's course.

The Supreme Court confirmed prior holdings to the effect that accretion due to artificial causes passes to the littoral owner in the same manner as if it were naturally caused. 414 U.S. at 327. To the same effect is Coastal Industrial Water Authority v. York, 532 S.W. 2d 949, 952 (Texas 1976), involving the analogous issue of who owns land which has become submerged due to gradual subsidence . . . result of non-natural causes such as the removal of underground water. Citing the Bonelli case, the Texas Supreme Court stated:

We place no significance upon the relation between artificial and natural causes of this phenomenon. . . . There is no reason to apply a different rule for the effects of subsidence simply because of the activities of cities and industries over which these landowners have no control.

Thus, the criterion for determining whether or not title passes to the littoral owner in a reliction case is not the kind of physical action which creates the new land or causes it to emerge; the criterion is simply whether its creation was "gradual and imperceptible." Courts have consistently recognized the littoral owner's title to new lands emerged along the sea-coast irrespective of the particular natural process by which those lands came into being. Whether the new land became exposed due to a drop in the absolute surface level of the water body or due to a rise in the absolute surface level of the land mass is irrelevant. Reliction has always been regarded as "the gradual withdrawal of the water from the land by the lowering of its surface level from any cause." Ziemba v. Zeller, 86 N.W. 2d 190, 193 (Neb. 1957) (emphasis added); Garrett v. State, 289 A.2d 542, 545 (N.J. 1972). For centuries all newly emerged lands have been subject to the same rule of accretion, under which title inures to the littoral owner if they came into being "gradually and imperceptibly." Until this case, it has never been felt necessary to determine by trial which particular natural process (or combination thereof) was the specific physical cause of the

gradual and imperceptible change.<sup>3/</sup>

- B. The policies underlying the general accretion rule, whereby title inures to the littoral owner, apply with equal force in the case of glacio-isostatic uplift.

Courts have recognized three policies as the underpinnings of the general rule that accreted lands belong to the littoral owner. These policies apply with equal or greater force to uplift accretion lands.

Retention of access. For most parcels abutting upon a water body, the riparian character of the parcel is its "essential attribute" and most valuable feature. Bonelli Cattle Co. v. Arizona, supra; Schafer v. Schnabel, supra, p. 807; 56 Am. Jur., "Waters," § 478, p. 895. This is particularly true in the case of coastal lands in Alaska because there is often no inland transportation infrastructure. The rule giving title to new land to the littoral owner reflects a judgment that when the owner's equities are balanced against those of the public at large, preservation of the riparian character of the owner's property weighs more heavily in the balance. The logic of this policy applies with equal force whether the newly exposed land is the product of deposition of alluvion, withdrawal or subsidence of the adjoining water body, or land emergence caused by tectonic forces.<sup>4/</sup>

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<sup>3/</sup> The impetus for the State's assertion of a claim to the lands whose title is disputed in this case appears to be a stray footnote in the Alaska Supreme Court's decision of Schafer v. Schnabel, 494 P.2d 802, 806, n. 16:

Reliction involves an increase in the amount of exposed land beside a body of water, but properly refers only to situations where the water itself has receded.

No authority was cited by the Court for this dictum, and an examination of the briefs filed by the parties in Schafer discloses that this issue was never raised by the parties. In fact, the law is clearly contrary to this suggestion contained in the Schafer footnote.

<sup>4/</sup> In this respect, it can be seen that the Court's criticism of the "preservation of access" policy as a rationale for the accretion rule (Appendix G, p. 4) does not support its holding; if the policy carries any weight at all as a basis for the general rule of accretion, it certainly should carry at least as much weight as a basis for applying the accretion rule in the specific case of uplift accretion lands.

Countervailing risk of loss. A second policy consideration is the "risk of loss/benefit of gain" rationale, or what the U.S. Supreme Court referred to in Banks v. Oden, 69 U.S. 818, 821 (1865), as the "principle of natural justice." This holds that the littoral owner, being forced to bear the risk that he may lose his property to the adjoining water body by erosion, rise in the water level or tectonic subsidence or depression, should therefore be entitled to enjoy any offsetting gain due to such processes. Waynor v. Diboff, 9 Ak. Rpts. 230 (D. Ak. 1937).

The State has vigorously argued that this policy does not logically apply to isostatic adjustment because it is not reciprocal, in the sense that there is no realistic possibility that any littoral owner would ever lose land to the sea as a result of this process. The scientific literature, however, is to the contrary. Isostatic adjustment produces subsidence as well as emergence. Other tectonic and eustatic changes interact with isostatic uplift and depression to either amplify or neutralize their effects. It is plainly incorrect to assert that the process cannot go both ways,<sup>5/</sup> and the Superior Court properly accorded very little weight to the argument.

The State also argued that the "risk of loss, benefit of gain" rationale has no application in the case of glacio-isostatic uplift because that process is, uniquely among processes causing reliction, region-wide rather than local in character. The Superior Court properly disregarded this argument. The fact of the matter is that tectonic changes and glacio-isostatic

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<sup>5/</sup> The State's argument on this point proceeds from the additional assumption that, in determining whether reliction "goes both ways," each possible physical cause of a change in the absolute position of the land mass or the absolute sea level should be separated out for independent consideration. For example, it notes that isostatic uplift only causes land to emerge, but does not acknowledge that isostatic adjustment causes both emergence and subsidence of the land mass. By this specious reasoning the State conveniently overlooks the fact that one process may be linked to another counteracting process, as glacio-isostatic uplift is usually accompanied by an offsetting eustatic rise. In fact, these dynamic processes are nearly all occurring simultaneously, and reliction is the product of their interaction.

Depression are not invariably regional in scale; they have been characterized by one scholar as "local changes having little effect beyond their immediate area of occurrence."<sup>6/</sup> Indeed, other natural processes which cause accretion, reliction or submergence are often less local than glacio-isostatic uplift.<sup>7/</sup>

Certainty and ease of determining title. The most important policy underlying the law of accretion and reliction is that, faced with a choice between two competing rules, courts should give preference to the rule which will impart greater certainty and stability to land title. As the United States Supreme Court noted in Hughes v. Washington, 389 U.S. 290, 293-94 (1967), a rule which gives the government or any other nonadjacent third party title to narrow strips of new land formed here and there by gradual and imperceptible accretive processes would engender costly and repetitious litigation about the location of the line of mean high water. Certainty and stability of land title are fostered by the rule whereby the adjacent property owner takes title to all nonavulsive newly exposed lands.<sup>8/</sup>

This concern for certainty and ease in the determination of title to new land created by accretion or reliction should have particular force in the case of lands created by

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<sup>6/</sup> Rice, Fundamentals of Geomorphology (Longman, 1977), p. 333. (Other authorities are discussed in detail in Appendix D at pp. 5-10.)

<sup>7/</sup> Eustatic sea-level changes occur both on a global scale and on the scale of ocean basins. Tectonic changes such as upwarping may be continental in scale. The entire Mississippi River delta is growing by alluvial accretion at the expense of riparian owners in Minnesota who derive no countervailing accretive benefit from the gradual erosion of their soil.

<sup>8/</sup> The one general exception to the law of accretion and reliction, which provides that lands formed by avulsion do not go to the littoral owner, is a reflection of this policy concerning certainty of land title and discouragement of repetitious litigation. Unlike land formed by gradual and imperceptible accretive processes, land created suddenly and perceptibly by avulsion is relatively easy to identify with certainty. This is the obvious practical justification for the Hawaii Supreme Court's decision rejecting accretion claims to lava extensions, State, by Kobayashi v. Kimring, 566 P.2d 725 (Hawaii 1977). The Superior Court erred in failing to recognize this distinction in relying on Kimring.

reliction due to glacio-isostatic uplift. The world's best earth scientists cannot agree on how to separately measure each of the interacting physical causes of the emergence of land along the coast line due to tectonic and eustatic changes. Clearly, certainty and ease of determining title are frustrated by the Court's ruling in this case.

C. The Court's expectation that uplift accretion lands will be maintained in public ownership as a result of its decision, which was the keystone of its holding, is mistaken in fact.

The Court's decision rests squarely upon its contemporary policy preference that glacio-isostatically uplifted lands remain in public ownership. See Memorandum of Decision, p. 4 (Appendix G). The Court was grossly mistaken in assuming that this would be the effect of its holding.

Denying uplift accretion land to the littoral owner will not necessarily result in vesting title to that land in the State. Moreover, it is almost certainly not true that all of the uplift accretion lands whose titles do vest in the State will remain in public ownership or that their natural sanctity will be preserved in perpetuity.

The reference date for identification of the tidelands which the State required under the Alaska Statehood Act is January 3, 1959. Lands which had emerged above the line of mean high water between the date on which the littoral owner or its predecessor took title from the federal government and January 3, 1959, would presumably belong to the federal government if they are denied to the littoral owner under the Court's decision. As federal lands, they would be available in appropriate circumstances for selection by the State of Alaska or by native corporations, for entry under the public land laws, or for inclusion in national monuments or other federal withdrawals or reservations. The effect of the special exception to the accretion rule which the Superior Court created in this case, therefore, will be to create enclaves of federal and private lands between littoral

owners' lands and the State's tidelands.<sup>9/</sup>

Secondly, the fact that the State of Alaska holds title to uplift accretion land obviously does not guarantee that that land will remain in public ownership or that the natural integrity of the land will not be disturbed by development or settlement. State "uplift accretion" land would be available for the acquisition of private mining rights initiated by discovery and location under state law. In many cases, the land could be claimed by municipalities under AS 29.18.201, et seq., and utilized for private economic development projects. There may even be areas of the state in which uplift accretion land has become available for "homesteading" under the State's open-to-entry program as a result of the Superior Court's ruling.

In short, the Court was substantially in error to assume that the effect of its ruling would be to vest title to all uplift accretion lands in the State of Alaska and preserve their natural sanctity inviolate forever.

## II.

### THE COURT'S HOLDING SHOULD BE LIMITED SO AS TO HAVE PROSPECTIVE EFFECT ONLY.

The plaintiffs argued in the Superior Court that it would be improper to abrogate the general rule of accretion by creating a judge-made exception for glacio-isostatic uplift lands, unless the ruling were limited so as to have prospective effect only. See, Appendix II, pp. 5-9. There are four considerations which are to be weighed in addressing this issue. See, Plumley v. Hale, 594 P.2d 497, 503 (Ak. 1979). It is submitted that all four of those considerations militate strongly in favor of prospectivity in the circumstances of this case.

First, the legal question is clearly one of first impression, and the Court's ruling was not foreshadowed. There

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<sup>9/</sup> This could mean, for example, that a fish processing facility situated on a coastal Trade and Manufacturing Act grant acquired from the federal government during Territorial days could suddenly become landlocked by a strip of federal public land which has subsequently been selected by an ANCSA corporation or placed in a national monument by the effect of a "blanket" presidential proclamation.

can be no doubt that this new rule of law will take property owners throughout the State by surprise.

Secondly, it must certainly be true that there has been widespread justifiable reliance on the general rule of accretion among property owners whose lands may be affected by this case. Most have never heard of glacio-isostatic uplift; they presumably expect the general accretion/reliction rule to apply to any increase or diminution of area along their littoral boundaries.

As for the third consideration, "undue hardship," the Court's decision will have a grave impact upon property owners, sureties, lessees, contractors, predecessors in title who undertook warranty obligations, and other third parties. Ownership of substantial improvements constructed on uplift accretion lands will be in jeopardy. The same concern about title conflicts which warranted prospective ruling in the Katchemak Bay oil and gas lease case (Moore v. State, 553 P.2d 8, 28 (1976)), and the same concern for the stability of private contractual relationships which warranted prospectivity in Plumley, requires prospectivity in this case.

Fourth, petitioners submit that the stated purpose of the Court's new rule would not be substantially and unreasonably frustrated if that rule is given prospectivity of application. The vast majority of coastal acreage affected by this ruling is still owned by the State of Alaska or the United States. The Superior Court's public policy concerns case can be met for that vast coastal area if its ruling is confined to prospectivity. To the extent that the Court's policy concerns may also relate to the relatively minute amount of private lands involved, those concerns can be satisfied readily by other legal measures such as zoning, condemnation of development rights and other tools of land use control. The Court's decision visits an extreme and unnecessary hardship upon innocent private parties, in circumstances where the underlying policy concerns of its decision could be fully met by a prospective ruling coupled with the application of less intrusive measures.

CONCLUSION

The Superior Court has manufactured an exception to one of the most venerable common law rules in the Anglo-American legal tradition. It did so without benefit of any supporting case law or scholarly authority, in pursuit of a policy objective which, ironically, will not be met by the decision. Forcing the petitioners to proceed to trial without the benefit of interlocutory review would impose an unnecessary hardship upon them without effecting any countervailing benefit in judicial economy. Accordingly, the petitioners respectfully urge the Court to grant the petition for review.

RESPECTFULLY SUBMITTED this 10th day of November, 1980,  
at Anchorage, Alaska.

FAULKNER, BANFIELD,  
DOOGAN & HOLMES  
Attorneys for Petitioners

By: \_\_\_\_\_

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APPENDIX TO  
PETITION FOR REVIEW

- A Stipulation dated May 11, 1979
- B Motion To Establish the Law of the Case
- C Memorandum in Support of Motion To Establish the Law of the Case
- D Plaintiff's Memorandum in Opposition to State's Motion To Establish Law of the Case
- E Defendant's Reply Memorandum in Support of Motion To Establish the Law of the Case
- F Order dated September 29, 1980
- G Memorandum of Decision
- H Memorandum of Points and Authorities in Support of Plaintiff's Motion for Reconsideration



Official Business

# Alaska State Legislature

Senate

Judiciary Committee

Pouch V  
State Capitol  
Juneau, Alaska 99811

March 19, 1981

Mr. Craig Matkin, Director  
North Gulf Oceanic Society  
P. O. Box 156  
Cordova, Alaska 99574

Dear Mr. Matkin:

Thank you for your comments on SB 7.

If you wish to testify on this bill, the Judiciary Committee will be holding hearings on Friday, March 27, at 1:30 p.m. in the Butrovich Committee Room.

I will include your letter in each committee member's file for their consideration.

Sincerely,

Patrick M. Rodey  
Chairman

PMR/ods

FEB 18 1981

JAY S. HAMMOND, GOVERNOR

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

February 12, 1981

The Honorable Bettye Fahrenkamp  
Chairman, Senate Resources Committee  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: SB 7, "Act relating to  
accretion, reliction, and  
erosion; and providing for  
an effective date"

Dear Senator Fahrenkamp:

This letter is in response to your inquiry of January 27, 1981, in which you requested our comments on SB 7, "An Act relating to accretion, reliction, and erosion; and providing for an effective date." The apparent intent underlying the proposed legislation is to codify the common law rules relating to accretion, reliction and erosion. At the present time, the vast majority of states have not codified the common law rules in this regard, primarily (we assume) because a significant body of case law has developed in the area and there is at least some possibility that an attempt at codification might work a change in the law, as expressed in those cases, even though the intent was merely to codify it.

In addition to the attempt to codify the common law, SB 7 addresses one geophysical process which is not currently addressed in common law, that of isostatic rebound (identified as "glacio-isostasy" in the bill), which is the gradual rising of the surface of the earth as glaciers recede. As is probably to be expected, this geophysical phenomenon has not been addressed to any great extent in judicial decisions since it occurs in relatively few locations in the world.

However, the effect of this phenomenon on land title where privately-owned lands abut water bodies currently is the subject of litigation here in Alaska in the case of Honsinger v. State, Civ. Action 1JU-73-210 (First Judicial District at Juneau). The case involves title to approximately 95 acres of wetlands abutting Gastineau Channel just south of the Juneau airport. In that case, the Honorable

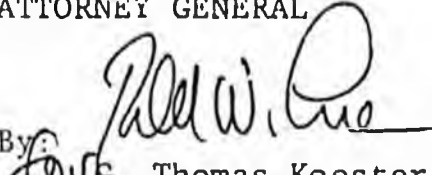
Thomas B. Stewart, presiding superior court judge, already has ruled that isostatic rebound does not have the same legal effect as accretion where the common law rule is that the property owner gains title to lands appearing as a result of accretion. However, Judge Stewart has ruled that the adjacent private property owner does not obtain title to new lands appearing as a result of isostatic rebound, and title to those lands which previously were below the line of mean high water (and therefore owned by the state) remains in the state. Under Judge Stewart's ruling, the state holds title to lands appearing as a result of isostatic rebound, not the private property owner.

The property owner in the Honsinger case has petitioned the Alaska Supreme Court to review Judge Stewart's decision. The court has not yet determined whether it will review the decision at this time rather than wait until the superior court action is completed (as is normally the case). However, as it stands at the present time, the law in the State of Alaska with respect to isostatic rebound (i.e., "glacio-isostasy") is that the land appearing as a result of that geophysical phenomenon is state-owned and does not inure to the private property owner. SB 7, as currently drafted, would have precisely the opposite result and therefore represents a change in the law as found by Judge Stewart. Accordingly, at this time, it would be inaccurate to view the proposed legislation as merely codifying existing law in the area since it clearly would be changing the law as announced by Judge Stewart in the Honsinger case.

We will let you know as soon as the Supreme Court makes a decision on Mr. Honsinger's petition for review. In the meantime, if we can be of further assistance, please contact us at your convenience.

Sincerely,

WILSON L. CONDON  
ATTORNEY GENERAL

By:   
THOMAS KOESTER  
Assistant Attorney General

GTK:dlm

cc: Keith Specking  
Office of the Governor

Arthur Peterson  
Assistant Attorney General

Tom Meacham  
Assistant Attorney General

Loni Levy  
Assistant Attorney General

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

FRED S. HONSINGER, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 STATE OF ALASKA, et al., )  
 )  
 Defendants. )

No. 1JU-73-210 Civil

MEMORANDUM OF DECISION

Plaintiffs in this case are upland owners of substantial acreage in an area within the City and Borough of Juneau commonly referred to as the "Mendenhall wetlands." It is an area of acknowledged economic and ecological value about which there are strong local public views relating to conflicting conservation and development interests. The issues in the case concern ownership of approximately 95 acres of land adjacent to that owned by plaintiffs which have emerged from tidelands' status to upland in the years between the time of the original federal homestead patent surveys of plaintiffs' land and the present. Those initial surveys were bounded on the seaward side by an established meander line delineating the reach of mean high tides. At present the meander line of mean high tide is markedly seaward of where it was in the original surveys, and the contest involves the "new" land between.

Whether this land belongs to plaintiffs or the defendant State of Alaska involves both factual and legal questions. The factual questions relate principally to what processes in fact physically caused the land to emerge from its previous tideland condition. The parties agree at least that the emergence could substantially involve a phenomenon labelled "isostatic rebound," or "glacio-isostatic uplift."

1 The crucial legal issue is whether, assuming the new land  
2 was formed by that geophysical process rather than by more  
3 ordinary alluvial depositions or by reliction (receding of  
4 the waters), such land should be held to belong to the  
5 upland owner or to the state.

6 As may be noted from the chronologically-coded file  
7 number of this action, it has been pending resolution for  
8 many years. In large part the delay has been caused by  
9 genuine and extensive efforts by the parties to reach a  
10 negotiated settlement of the matter. In 1979 it became  
11 apparent that these efforts would not succeed, and defendants  
12 then moved to "establish the law of the case," based on a  
13 stipulation of counsel filed May 11, 1979. Counsel have  
14 prepared excellent and extensive memoranda of law, with  
15 supporting citations and reference materials, and the matter  
16 is before the court for decision on defendants' motion.

17 The issue is essentially one of first impression, with  
18 potential in its resolution for relatively wide-ranging  
19 economic and social impact in a glaciated, tidal region such  
20 as this northern portion of southeastern Alaska. The legal  
21 issue may be more succinctly stated as "whether the common  
22 law rule that accreted land inures to the littoral owner is  
23 applicable to acreage created by glacio-isostatic uplift."  
24 At least two cases previously before this court have raised  
25 the issues, and reference to them is appropriate in appreciating  
26 at least the incidence of concern with the legal effect of  
27 this geological phenomenon. The cases are Schafer v. Schnabel,  
28 494 P.2d 802 (Alaska 1972), and DeBoer v. State, No. 1JU-74-  
29 29 Civil. The latter case, because of jurisdictional questions,  
30 was subsequently litigated in the U. S. District Court for  
31 Alaska, as DeBoer v. United States and State of Alaska,  
32 470 Fed.Supp. 808 (1979). However, both cases were determined

1 on other issues, so that the question now pending was not  
2 resolved. The careful research of counsel has revealed no  
3 other reported decision in which the issue was raised or  
4 met.

5 It is not my intention in this statement of decision to  
6 analyze extensively the legal litany of the common law  
7 doctrines relating to rights of accretion and reliction.  
8 That has been done quite sufficiently in the memoranda  
9 submitted on the motion. The critical matter is simply to  
10 state a choice between the traditional law of accretion and  
11 the exception to it urged on defendants' behalf, and to  
12 state the reasons for reaching that choice. Though the  
13 issue is indeed close, and susceptible to resolution either  
14 way<sup>1</sup> on substantial grounds, my determination is in favor of —  
15 the State's position.

16 That choice is fundamentally made upon weighing of the  
17 policy considerations supporting the ancient common rule as  
18 against those in favor of an exception. In my view the  
19 balance favors a rule retaining public ownership of recently  
20 exposed tidelands. I am convinced the decision should be  
21 founded on equitable principles balancing between the competing  
22 interests, rather than upon equitably blind adherence to  
23 common law, however venerable simply from its age. This  
24 approach has recently been applied by the supreme court of  
25 Hawaii, in determining against the former littoral owner  
26 where access to the ocean was cut off by a lava flow forming  
27 new land. State by Kobayashi v. Zimring, 566 P.2d 725, 734  
28 (Ha. 1977). As also noted in that decision, other courts  
29 have found that though littoral access should be preserved  
30 where possible, that policy is not so sacred as to be inviolate  
31 and may have to be deferred in favor of other considerations.  
32 (See cases cited in Zimring, at p. 734.)

1           There are basically three policy reasons indicated as  
2 justifying the rule that lands formed gradually and imperceptibly  
3 should inure to the littoral owner. The first and most  
4 prominent of these is that the riparian character of the  
5 land may be its most valuable feature, and the owner should  
6 be allowed to retain that right to access to the adjacent  
7 waters that inured in the nature of the land as originally  
8 acquired. It is particularly with relation to this policy  
9 reason that it appears the public interest outweighs that of  
10 the private landowner. A policy giving large benefits from  
11 this widespread natural phenomenon, in effect gratuitously,  
12 to only a few does not appear equitable as against a policy  
13 spreading those benefits in equal measure to all of the  
14 people of the State. This is more especially true where  
15 there is such increasing public demand for recreational and  
16 public use, as well as for protection against destruction of  
17 the natural character of lands just such as these are.  
18 Under its duties as a trustee of the lands, the State will  
19 be obligated to protect the property and regulate its use.  
20 It may be presumed that this duty would be implemented by  
21 devoting the land to actual public uses, such as for recreation.  
22 And likewise presumably there could be no sale of the land  
23 unless it promoted a valid public purpose. The upland  
24 owners under this policy would share in the public access to  
25 the land and adjacent waters, losing only the private nature  
26 of the access held when their lands were originally acquired.  
27 Their right of access, held with the public, would be lost  
28 only if access is outweighed by some conflicting public  
29 interest use or if the land is sold in the public interest.  
30 (See generally Zimring, at p. 735.)

31           Plaintiffs have argued that such a public interest  
32 policy should be adopted by the legislature rather than by

1 the courts of this state, and have noted that legislation of  
2 this sort has been enacted in some states. E.g., Oregon  
3 Revised Statutes § 274.440. While certainly the legislature  
4 could and perhaps should properly act to regulate the interests  
5 here involved, that does not preclude the court from acting  
6 in the absence of a legislatively-determined policy. This  
7 follows logically from the fact that the traditional doctrine  
8 of accretion is no more than a court-determined policy  
9 itself based on equitable grounds.

10 The second policy reason for the traditional rule  
11 relates to the notion of "natural justice" that the upland  
12 owner bears the risk of loss to his property from natural  
13 causes and therefore should enjoy the benefit of gain deriving  
14 from such processes. There may be some validity to the  
15 State's argument, which plaintiffs challenge, that the  
16 doctrine does not apply to glacio-isostatic uplift because  
17 that phenomenon in recorded human history has not had a  
18 reverse character. In other words, there is no countervailing  
19 risk of loss from this particular process. In my view, it  
20 is a more persuasive argument that even though this "natural  
21 justice" notion may have some merit, it is outweighed by the  
22 public interest concerns already expressed.

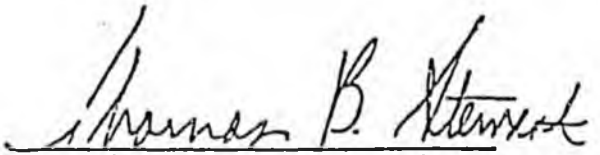
23 The third policy reason is that the traditional rule  
24 gives greater certainty and stability to land titles. It is  
25 argued that a rule which would give the State title to  
26 narrow strips of new coastal land formed by very gradual  
27 processes would engender litigation about the location of  
28 the line of mean high water. However, it appears highly  
29 unlikely that any such litigation would develop unless there  
30 were indeed valuable lands that had been identified and at  
31 least arguably created by the geologic process involved in  
32 this action. As for difficulties of proof relating to the

1 actual processes by which the new land was formed, these do  
2 not appear to be so complex or formidable as to outweigh the  
3 public policy interests that have been noted as basically  
4 determinative.

5 For the reasons indicated the defendant State's motion  
6 to establish the law of the case will be granted, and a form  
7 of order to that effect has been filed and entered.

8 DATED: September 29, 1980.

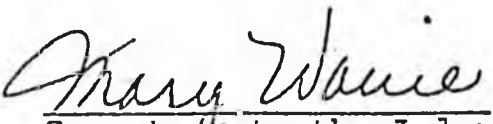
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Thomas B. Stewart  
Presiding Judge

CERTIFICATION

This is to certify that on the above date I mailed a copy  
of this Memorandum of Decision to:

Jonathan K. Tillinghast, Esquire  
Michael M. Holmes, Esquire

  
Secretary to the Judge

## Glacial rebound

# Bill aids landowners

By LORI EVANS

Empire Staff Reporter

When a glacier recedes and land appears, does that new land belong to the adjacent property owner or the state?

A Juneau Superior Court judge last fall ruled land rising as glaciers retreat — isostatic rebound or glacio-isostatic uplift lands — belong to the state.

But a bill introduced by Sen. Bill Ray, D-Juneau, would allow the property owner to claim that "new" land.

Thousands of acres could be affected in Southeast Alaska, as well as elsewhere in the state, where geologists say new land is rising from the sea as glaciers retreat. The land, usually beach frontage, is highly valuable to private owners, and much used by hunters, hikers, fishermen, picnickers and others who use public land.

Ray said Tuesday he thinks private property owners should have title to the new land. He described his bill as "an evening out process."

If the state gets land as it erodes from the property of private land owners, such as sand washed from a stream bank into a navigable stream bed, then property owners should get land that appears as the result of other natural forces, such as glacial retreats, according to Ray.



## ALASKA NEWS

"That's the balancing act," said Ray.

Ray said his bill was introduced at the request of constituents affected by Judge Thomas B. Stewart's ruling.

Common law holds that a property owner can claim land formed by accretion — the build-up of land by gradual action of natural forces such as silt or gravel deposits from rivers. At the same time, though, owners risk losing property through such natural causes as erosion.

Stewart ruled this notion of "natural justice" does not apply to isostatic rebound "because that phenomenon in recorded human history has not had a reverse character." In other words, property owners do not bear the risk of loss from glacier action.

In his decision, Stewart also said there is

a public interest involved in making waterfront property public.

"A policy giving large benefits from this widespread natural phenomenon, in effect gratuitously, to only a few does not appear equitable as against a policy spreading those benefits in equal measure to all of the people of the state. This is more especially true where there is such increasing public demand for recreational and public use, as well as for protection against destruction of the natural character of lands such as these are," wrote Stewart.

He added that adjacent property owners do not lose their right of access to the land when it is in the state's hands.

He also said that since the land would be controlled by the state there would be no sale unless it were for a "valid public purpose."

Stewart admitted, too, that the "... the issue is indeed close, and susceptible to resolution either way on substantial grounds...."

His decision came in a case involving title to approximately 95 acres of wetlands about 2.2 the Gastineau Channel south of the Juneau airport. The property owners are Fred S. Honsinger and Ted Smith. They have petitioned the Alaska Supreme Court to review Stewart's decision.