# The Federal Land Rights Series - Does the presence of federal land always implicate the federal Quiet Title Act in the riparian boundary context?

***[This article is lovingly dedicated to the memory of Aaron Graham of Oregon, a young BLM surveyor whose life was cut tragically short by cancer at the age of 44 in 2017. Aaron understood the value of professional education and he made a substantial educational contribution to the land surveying profession, by sharing his outstanding knowledge with both his colleagues and students. He was truly a credit to our profession and he will long be fondly remembered by those who were fortunate enough to know him.]***

In a prior edition of this series of articles, we conducted an initial exploration of some of the most interesting parameters and aspects of the federal Quiet Title Act (QTA) from which we learned, not surprisingly, that some variance exists in the judicial implementation of that federal statute (FN 1). In subsequent editions we have examined both federal case law and federal statutory law in the context of submerged land, noting that federal statutes such as the QTA can play a key role in the resolution of riparian scenarios involving boundary and title conflicts of various kinds (FN 2) suggesting that the operation of the QTA should be properly understood by all land rights professionals. As we have also observed in reviewing federal litigation involving land rights, conservation easements have become a popular tool for land preservation, and the title research which is typically associated with the creation of such easements very often results in the discovery of previously unknown or long dormant and unaddressed boundary and title issues, producing controversy arising from the presence of public and private interests in such protected properties. Pursuant to that theme, here we will look on as one property owner's decision to implement the conservation easement alternative brings serious boundary issues generated by historical river movement to the forefront, resulting in a dispute between private parties which in turn triggers a sequence of federal and state level litigation that ideally illustrates the adverse consequences awaiting those who neglect to address boundary issues in a timely manner. Thus in this edition we will focus on the significance of understanding the legal implications of the presence of a federal interest, and in so doing we will observe how a federal land rights presence can substantially impact the litigation options which are available to private parties who elect to seek judicial boundary and title resolution. As we will also have occasion to note, ongoing uncertainty over the proper use of the QTA, among both land owners and the legal community, clearly remains problematic, highlighting the importance of recognizing the legal limitations of the divergent forms of action which are available to property owners seeking to resolve such issues under the law as it stands today.

In this instance, our historical saga takes place in the northwestern portion of Washington, and it begins, as is typically the case whenever boundary issues appear, with the original survey of the public domain, which was conducted by the US General Land Office (GLO) in 1873 in the relevant area, 16 years prior to the arrival of statehood in Washington (FN 3). Whatcom County, which stretches eastward from the Pacific Coast toward the mighty North Cascade Mountains, just south of the Canadian border, had already been in existence for about 2 decades by the time the original GLO survey work was done in this area, bringing homesteaders and other early settlers the opportunity to acquire title to legally defined land units by obtaining federal patents. The Nooksack River pursues a highly circuitous course through this landscape, winding its way

westward from the western slopes of the majestic and perpetually snow covered Mount Baker to the sea, and of course that river's presence was duly noted by the GLO surveyors, through whose work it became a boundary monument, being depicted as such on numerous GLO township plats. Although the GLO had no reason and no intention to ascertain or determine the river's navigability status, its presence as a prominent feature of the landscape merited the creation of riparian lots in those sections lying along the river, revealing to viewers of the relevant GLO plats that it comprised both a benefit and a burden to the lands through which it passed. Several such GLO lots were platted in a certain township, situated about 7 miles south of the aforementioned international boundary and about 14 miles upstream from the mouth of the river, identified as Township 40 North, Range 2 East, of the Willamette Meridian, which contains a bountiful quantity of wonderfully productive farmland. While the Nooksack River forms an especially beautiful and particularly valuable component of the ecosystem in Whatcom County, as an ambulatory boundary monument it also holds the potential, like all other such wandering streams which have been adopted as boundaries of federal origin, to become a source of devilish problems for the owners of the properties which it penetrates or adjoins.

Following its generally westward course, at the time of the original survey of the aforementioned township, the Nooksack River ran more or less through the middle of Section 36, just north of the center of that section, before reaching Section 35, which forms the site of the controversy examined herein. Then just shortly after crossing the line between those sections, and entering the southeast quarter of the northeast quarter of Section 35, the river took a sharp bend, of roughly 90 degrees, and flowed essentially due south, but for only about a quarter of a mile, before taking another 90 degree turn, and proceeding virtually due west once again, across the north half of the south half of that section and onward into Section 34. As a result of the river's presence, the GLO township plat indicated, Section 35 contained only 572 acres of unsubmerged land, as opposed to the standard 640 acre size of a regular section. In addition, the river's presence resulted in the creation of 9 riparian lots in Section 35 by the GLO, beginning with Lot 1, which occupied the portion of the southeast quarter of the northeast quarter, and also the portion of the northeast quarter of the southeast quarter, lying northwest of the river. Thus the southeastern boundary of Lot 1 was formed by the 2 aforementioned bends in the river, but presumably unknown to anyone at that time, the seeds of future problems were already in place and growing, as the force of the onrushing stream was eroding the outer northwestern riverbank. Lots 2 through 4 in this section were each positioned along the north side of the river, all lying to the west of Lot 1, and Lots 5 through 7 were positioned directly opposite Lots 2 through 4, along the south riverbank, but none of these lots played any role in the forthcoming controversy. Lot 8 included the area which would have been the southeast quarter of the southeast quarter of Section 35, had the river not entered this section, along with the portion of the northeast quarter of the southeast quarter lying south of the river. Lot 9, the crucial final component of this scenario, was the last lot appearing on the 1873 GLO plat in Section 35, and it contained just 0.98 acres, representing the very narrow strip of land lying east of the east bank of the river in that section, directly north of the east end of Lot 8.

As one might well imagine, the creation of very small riparian lots by the GLO has frequently proven to be quite troublesome, and in fact the BLM, as the successor agency to the GLO, eventually came to recognize this, leading to the cessation of this federal practice during the late Twentieth Century (FN 4). Nonetheless, countless tiny riparian lots which were platted and thus legally brought into existence as distinct land units, such as Lot 9 in Section 35, still exist

in a great many locations throughout the west, and their presence has often become a source of concern for property owners. Since such lots are of only negligible size to begin with, they are highly subject to potential destruction through very minor intrusive river movement, and in numerous locations lots of this kind have been extinguished by that means, in some cases before being patented and in other cases after being patented. Just as potentially problematic however, tiny riparian lots also have the capacity to grow, potentially reaching enormous size, should the portion of any given river adjoining such a lot happen to migrate away from the lot, rather than eroding into the land comprising the lot, and this specific development serves as the basis for the litigation which we will see unfold herein. As an additional complicating factor, most people, including owners and grantees of riparian properties, do not fully understand the meaning or purpose of riparian lots, and therefore fail to comprehend the boundary principles which apply to such lots. Many riparian lot owners are unaware of the legal consequences of river movement, and some of them have never even looked at the GLO plat which defines the parameters of their title, so they have never considered the ramifications of their status as owners of riparian land. The typical innocent grantee of real estate, either wholly comprised of riparian GLO lots or including such lots, fails to grasp the legal implications of the seemingly inconsequential term "lot", which appears in the legal description of the property being acquired, thus they often mistakenly assume that they are acquiring a normal rectangular land unit, leading in some cases to great consternation and exasperation, as we will observe here, when they later come to recognize the legal significance of historical river movement.

The federal decision to honor substantial streams as boundaries, during the implementation of the Public Land Survey System (PLSS) undoubtedly seemed perfectly logical when the PLSS scheme was devised, late in the Eighteenth Century, being in complete accord with the time honored concept that major rivers represent ideal natural boundaries. This decision proved to be far more fateful however, than early federal decision makers, who resided in the Colonial States, could have realized, since they had no visibility or knowledge regarding the extreme instability of the major rivers that drain the western portion of our continent, such as the Missouri, the Colorado and the Snake, the chronic mobility of which would eventually produce a vast number of intense boundary disputes. As a direct result of the utilization of river boundaries as a fundamental aspect of the PLSS, river movement became a major issue for countless entrymen during the Nineteenth Century, as the western territories of the US, acquired by treaty and by conquest, were surveyed and populated, leading to the formation of our western states. Forces of nature, most notably including erosion, accretion, reliction and avulsion, would very soon begin to wreak havoc upon titles by distorting the platted boundaries of riparian properties, and by the end of that century the problematic nature of river boundaries was already quite apparent. In addition, general ignorance and mistaken assumptions regarding the legal consequences of river movement in the context of navigability produced confusion over both the presence and the extent of public and private titles along large sections of our major rivers, as most settlers either misunderstood riparian law or simply had no knowledge of the law, and such conditions persisted throughout the western settlement period, well into the Twentieth Century. In reality however, by operation of law river movement began to have a serious impact upon title to both public and private land throughout the western part of our country as soon as those regions were surveyed and platted, and in many areas platted lots which remained in federal ownership, due to going unpatented, were also impacted, planting seeds of boundary and title controversy which were destined to lie dormant for decades, before eventually emerging to produce litigation.

Returning to the specific scenario outlined above, set upon the Nooksack River in Whatcom County, Washington, its noteworthy that many portions of that river have clearly experienced substantial river movement, so the locality in which the controversy examined here occurred is merely one of several such places where that river's behavior has significantly altered boundaries and titles. No historical details pertaining to the settlement, development and conveyance of the properties involved here are known, but all of the land in Section 35 was patented, presumably during the late Nineteenth Century, with the exception of Lot 9, which was never acquired by anyone. This seemingly insignificant fact would not rise to prominence until the Twenty-First Century, but as we will observe, its importance cannot be overstated, because the presence of federal land rights always casts a very long shadow, with potentially devastating consequences for those who overlook such a federal presence. As already noted above, because it happened to be platted on the inside of a major bend in a volatile river, this one acre lot, originally comprising nothing more than a sliver of land, hugging a short portion of the east line of Section 35, was ideally positioned to expand greatly in size, as the force of the water pushed the platted river channel westward subsequent to 1873, during the decades of the late Nineteenth Century and probably continuing into the early Twentieth Century. In addition, at an unknown point in time, presumably during the early or middle portion of the Twentieth Century, the northerly bend evidently became so acute, as the river was forced to turn ever more sharply to the south, that the portion of the original channel directly south of the north bend was abandoned by the river, and a new channel flowing through the southerly portion of Lot 1 was formed, about one eighth of a mile west of the river's platted location. The physical area originally identified as Lot 9 was thereby magnified in size, at the expense of Lot 1, but because no private party held any legal interest in Lot 9, and because the movement of the river was unknown to the federal government, no consideration was given to the legal ramifications of this river activity, setting the stage for future difficulties for those who would later acquire the impacted properties.

Riparian property owners frequently fail to react promptly to river movement, even when they realize that a given watercourse forms a boundary of their property, for a variety of reasons. Very often in remote areas river movement simply goes entirely unobserved, so land owners have no idea that the acreage to which they hold title is either expanding or contracting, while in other cases they notice the change, but they are unaware of its legal significance, or they have no idea how to address such issues, thus they take no timely action. Such a scenario unfolded in Section 35 during the Twentieth Century, as the land owners in that section evidently paid little if any attention to the river, and their disregard for the legal component of the river's activity was destined to victimize 2 subsequent grantees, named Vanderpol and Swinger, several decades later, as the Twenty-First Century arrived. Vanderpol acquired the eastern portion of Lot 8 in Section 35, along with the western portion of the southwest quarter of Section 36, by means of a typical warranty deed in 2002, but the evidence indicates that he was using that land, and perhaps occupying it as well, as early as the 1980s, presumably as a tenant farmer. The portion of Section 36 lying directly east of Lot 9, like Lot 8 in Section 35, consisted of productive farmland, and since no one had ever acquired Lot 9 there was nothing physically preventing the prior owners of the properties acquired by Vanderpol from using all of the land southeast of the river at any given time, thus they did so. The ground formerly occupied by the river, and the area directly west thereof, between the old and new river channels, apparently remained somewhat wet and less than ideal for use as cropland however, so the row crops which were planted in Section 36 by Vanderpol and his predecessors did not extend across the section line into that

area. Instead, the area containing Lot 9 and the formerly submerged land along its west side was used by them along with the land directly to the south comprising Lot 8 as pasture, and that area contained many substantial trees, giving it a park like appearance, while also indicating that at least a few decades, if not several decades, had passed since the river had moved to the west, long prior to Vanderpol's arrival on the scene.

Vanderpol may or may not have known that Lot 9 was unpatented land when he acquired his property in Sections 35 and 36, but even if he did know that Lot 9 was federal property, like most typical grantees he apparently felt entirely comfortable relying upon the established land use pattern outlined above, therefore he simply perpetuated it, using the same land area that his grantor had been using, in the same manner. Shortly after making his land acquisition in 2002 Vanderpol sold off all of his land in Section 36, retaining the eastern portion of Lot 8 in Section 35, but there is no indication that any surveys were done during that time period, so the exact location of the section line and the existence of Lot 9 may very well have remained unclear to him. Thus Vanderpol was evidently quite content with his small farm, occupying the eastern portion of Lot 8, with his farmhouse situated near the south end of his property, on the high ground far from the river, and presumably he felt like he had gotten a very good deal in 2002, since he also had complete use of all of the land lying southeast of the river bends in his section as an undisturbed pasture for his cattle, representing a substantial expansion of the property which was deeded to him. Although Vanderpol and his predecessors never had any reason to question or investigate the land rights associated with Lot 9, because no one ever asserted any rights to that area and no one ever tried to make any use of that land or prevent the ongoing private use thereof, that long standing peaceful situation was about to change, unexpectedly and dramatically, with the arrival of a newcomer, who had just enough knowledge of the law to bring conflict to this area. It may be worthy of note at this point that no controversy ever arose regarding the navigability status of the Nooksack River, and all of the private parties evidently viewed the relevant portion of that river as being legally navigable at all times, therefore no one ever made any claims expressly involving riverbed ownership. In addition, Washington never set forth any claim of title to either the originally platted riverbed or the relocated river channel, and there is no indication that anyone representing the state was ever alerted to the fact that the river's location had changed substantially over the preceding 130 year period.

Exactly when Swinger became interested in land in the Nooksack region, leading him to acquire the southeastern portion of Lot 1 in Section 35, is unknown, but there is no indication that he ever had any interaction or communication with Vanderpol or any other local land owners prior to making his acquisition, so he appears to have been a stranger with no knowledge of local history, although its also possible that he may have inherited his land in Lot 1 from a deceased ancestor. A public highway crosses the southern portion of Lot 1 from east to west, but there are no bridges across the river anywhere nearby, so Swinger should have recognized that the land directly across the river to the southeast was in use by Vanderpol and that Swinger's part of Lot 1, all lying south of the highway, was bounded on the southeast by the river. Yet Swinger was apparently convinced, for unknown reasons, that his portion of Lot 1 included some of the land being used by Vanderpol on the opposite side of the river. Swinger may very well have been unaware of the existence of Lot 9, situated directly across the river from his land, as there is no indication that he ever saw the 1873 GLO plat depicting that lot, and since it had never been patented no other evidence of its existence appeared in any deeds, so he may have mistakenly believed that Lot 1 had always covered the entire southeast quarter of the northeast quarter of

Section 35. Its equally possible however, that Swinger was informed by his grantor about the historical westward movement of the river, so his belief that he held title extending to the east, beyond the river's contemporary location to the river channel of 1873, could well have been based upon his faith in the accuracy of what he had been told about the historical activity of the river. Nonetheless, in 2008 Swinger placed his land in Section 35 in trust, and for unknown reasons he subsequently ordered a title report, triggering research into the land rights associated with Lot 1, which provided Swinger with another perspective pertaining to his property boundaries. The full contents of the title report that was created for Swinger are unknown, but he took issue with it because it indicated that he did not hold clear title to any land southeast of the river, and it confirmed that he had no right of access to any land currently lying on the southeast side of the river.

After reviewing his title report, Swinger remained insistent that Lot 1 had never been reduced in size by any river movement and that he therefore owned land on Vanderpol's side of the river, so in 2011 he proceeded to file an action pursuant to that position against his title company, charging among other things that the company was liable to him for the apparent lack of legal access to the portion of his property lying southeast of the river. Presumably because Swinger had no idea that any federal interest was present within the relevant area, he filed this legal action in the state court system, rather than in federal court, and the action played out in the typical manner, being decided by a county judge, which suggests that no one participating in this case was either aware of, or had any concern about, the presence of federal land rights along a portion of the east bank of the river. Not surprisingly, the accusations set forth by Swinger, acting as his own attorney, were readily crushed by the legal team representing the title company, and in October of 2011 the county court dismissed Swinger's case, issuing summary judgment against him without any trial. In so doing, the county judge adopted the position, set forth by the title company, that the river formed the original southeasterly boundary of Lot 1 and that it had always remained the boundary thereof as it moved westward, upon finding that Swinger had presented no distinctly persuasive or convincing evidence proving that any of the river's movement was attributable to any specific act of avulsion. Quite ironically, evidence supporting Swinger's assertion that an avulsive event had occurred did in fact exist, and was readily obtainable, but due to his lack of knowledge of the resources which were available to him, he failed to bring the key information that would have supported his case into court, thus it was Swinger's lack of preparedness, stemming directly from his own ignorance, which dictated this adverse outcome for him. Having experienced this initial defeat, Swinger devised a new plan, by which he believed that he could leverage the land east of the river to his own financial benefit in a different manner, so in March of 2012 he allowed his opportunity to appeal this county court ruling against him to expire, but as we will see, that would prove to be another unwise decision on his part, which he would later regret (FN 5).

Although Vanderpol was not involved in Swinger's 2011 legal action discussed directly above, because Swinger had elected not to make Vanderpol a party to that action, Swinger inevitably had to deal directly with the rights of Vanderpol, since Vanderpol asserted ownership of all of the land lying south and east of the channel currently occupied by the river in the relevant portion of Section 35. Upon learning in 2011 however, during his action against his title company, that his title to the land lying between the modern river channel and the 1873 river channel was unclear and was deeply clouded, Swinger came up with an idea which he believed would enable him to monetize his clouded title to that area, despite its deeply flawed or

non-existent status, without any need for him to ever make any visible entry into that area. Swinger apparently either discovered or was informed in 2011 that he could enroll all or part of his property in a program that was designed to preserve agricultural land, which was administered by Whatcom County, so he proposed to devote all of his land lying east of the river to that program, in exchange for financial compensation, and the county evidently accepted his proposal. By this means, Swinger sought to extract as much economic profit as he could from the disputed acreage, without ever making any physical use of the land at issue, since he knew that taking physical possession of that area would certainly provoke Vanderpol to take legal action against him. Presumably Swinger hoped that Vanderpol would never realize that a conservation easement had been imposed upon the relevant area, but any hopes of that nature which Swinger may have had were rapidly dashed, as Vanderpol soon found out what Swinger had done, whereupon Vanderpol informed the county personnel in December of 2011 that he, and not Swinger, was the owner of the area in question, thereby notifying the county that no valid easement had been legally created in that location. Swinger was apparently aggravated and angered by Vanderpol's exposure of the legal fallacy upon which Swinger's conservation easement proposal was based, and refused to agree that he had no right to grant such an easement in the relevant location, so Vanderpol decided in May of 2012 to launch a legal action of his own, in an effort to fully resolve the matter.

Unlike Swinger's 2011 legal action, Vanderpol's 2012 action (FN 6) was properly filed in federal court, rather than in the state court system, as by this time Vanderpol had become aware that a federal interest existed in the problematic area lying directly east of the river bends in Section 35, thus Vanderpol's action acknowledged the presence of federal riparian land rights in that area by listing the US as a defendant along with Swinger. Vanderpol evidently hoped not only to resolve his controversy with Swinger by means of this action, but just as importantly from his perspective, he also sought a judicial determination of the location of the boundary between his Lot 8 and the federal Lot 9, recognizing that the river's movement had potentially expanded both of those lots, to some as yet undetermined extent. However, although this action which was commenced by Vanderpol under the QTA was accurately targeted and was earnestly intended to facilitate full judicial resolution of the title issues that had been generated by the river's impact upon Swinger's Lot 1, Vanderpol and his legal team were not fully cognizant of the vital jurisdictional parameters of the QTA, and as a result Vanderpol, like Swinger, was headed for trouble. The positions of the opposing parties were both clearly outlined, Vanderpol maintained that the river had migrated westward from its platted position of 1873 through erosion, and that there was no definitive evidence of avulsive river movement, so all of the land now lying east of the river was accretion to Lots 8 & 9, while Swinger continued to insist that the river had abandoned its 1873 channel at some unknown date, therefore the original platted channel remained the southeast boundary of Lot 1 and Vanderpol's property had not been enlarged by the river's activity. In an initial ruling delivered in August of 2012, while effectively framing the riparian title and boundary issues which had been presented for adjudication, the federal district court judge rejected Swinger's assertion that Vanderpol was seeking unjust enrichment. In so doing, the judge agreed with Vanderpol that those issues were within the parameters of the QTA, finding that QTA jurisdiction existed and allowing this federal action to proceed on that basis, but this most fundamental point of law would later become a central issue itself, as we will observe.

Having failed in his effort to induce the federal judge to silence Vanderpol, by throwing out Vanderpol's case on the grounds that Vanderpol's conduct amounted to slander of Swinger's title, Swinger, who once again represented himself, remained adamant that Lot 1 still extended eastward to the west bank of the platted river channel of 1873, yet he offered no specific evidence supporting his assertion that the river had moved westward avulsively rather than incrementally. Unlike Swinger however, Vanderpol had wisely obtained the assistance of a professional land surveyor, who testified that his view of the historical evidence suggested to him that the river had relocated itself, at least partially if not entirely, through erosion and accretion, which served the key purpose of placing a legal burden upon Swinger to bring forth some form of clear and distinct evidence to the contrary. In December of 2012, after noting that neither party had presented truly complete or convincing evidence regarding the historical changes undergone by the relevant portion of the river, the district court issued summary judgment in favor of Vanderpol, concluding that Swinger had failed to meet his burden of proof with regard to historical evidence of avulsive river movement (FN 7). In desperation, Swinger argued that Vanderpol should not be allowed to utilize adverse possession in support of his position, because Vanderpol had failed to assert ownership of the disputed area based on adverse possession with sufficient promptness. The court readily dismissed this argument however, pointing out to Swinger that the statutes of limitation which facilitate adverse possession never operate against one who holds physical possession of land, such statutes operate only against delinquent owners of record, who neglect to take any action to recover land in a timely manner, because those statutes were devised to protect land use, informing Swinger that his position with regard to adverse possession was entirely without merit. In reality, Swinger's view of adverse possession was not merely meritless, it was also moot, because Vanderpol had no need to rely on adverse possession in order to prevail over Swinger, since Swinger had never proven that any avulsive river movement had ever occurred, so this loss suffered by Swinger actually resulted solely from his failure to gather and present any satisfactory evidence of avulsion, which he could well have done.

Although Swinger had utterly failed to understand or appreciate the value and importance of assembling sound historical evidence supporting his position regarding river movement, of the kind routinely compiled by land surveyors while researching riparian boundaries, and by this point he had tasted defeat twice, in county court in 2011 and in federal court in 2012, for that reason, he was apparently smart enough to recognize that the 2012 ruling against him was fatally marred by a crucial judicial flaw. As the astute reader may have already noted, the federal presence was left unaddressed in the December 2012 district court ruling, and the riparian land rights held by the US were thus left unresolved, despite the fact that Vanderpol had included the US along with Swinger as a defendant when filing his federal action in 2012. Ironically, even though Swinger apparently never made any effort to coordinate with the BLM to determine the legal extent of Lot 9 pursuant to accretion, because he declined to acknowledge that any accretion had occurred, and Vanderpol did attempt to obtain resolution of the location of the boundary between Lot 8 and Lot 9 in the accretion zone through coordination with the BLM, the federal presence was destined to operate in Swinger's favor. The BLM was powerless to resolve the title and boundary issues raised by the substantial expansion of Lot 9 through coordination with Vanderpol alone, because Swinger also asserted title to the accretion zone, and such contention over the land lying between the modern and historical river channels could be resolved only as a matter of state law, thus the hands of the BLM were effectively tied, preventing the completion of any final riparian boundary agreement for accretion division

purposes between Vanderpol and the BLM. This scenario enabled Swinger to leverage the federal presence to his advantage, and he did so by appealing the 2012 ruling, requiring the Ninth Circuit to review the legal basis for the federal district court ruling against him. Because Vanderpol had filed his action under the QTA, the appellate court found, he had to prove that an authentic land rights dispute involving an assertion of title by the US existed, which he was unable to accomplish, because the BLM had never made any distinct or specific assertion of title to the land between the channels. Therefore, the federal Court of Appeals struck down Vanderpol's 2012 victory, on the grounds that the lower court had incorrectly determined that QTA jurisdiction was present, when in fact none existed (FN 8).

Vanderpol was thus handed a major setback by the Ninth Circuit, but his cause was not completely lost, because although he had made a serious error, in failing to recognize that he was incapable of proving that he was engaged in a title dispute with an agency or branch of the federal government, which forms an essential pillar necessary to support any QTA action, Swinger had also erred, in what would prove to be an even more devastating manner. Nonetheless in February of 2016, filled with renewed confidence following his appellate court triumph, and serving yet again, for a third time, as his own sole legal advocate, Swinger proceeded to directly challenge Vanderpol in the state court system, by filing a quiet title action against him. Observing however, that this new action filed by Swinger effectively amounted to a repetition of the case which he had brought into a Whatcom County courtroom 5 years earlier, when he had charged his title company with negligence and error in the preparation of his title report, as outlined previously herein, the county judge dismissed Swinger's 2016 action, informing him that his opportunity to litigate the boundaries of his property had passed. Unwilling to accept this decision, Swinger pressed on, bringing the matter to the Washington Court of Appeals, only to learn that he had indeed exhausted all of his legal options, as the appellate panel agreed that Swinger's contentions were unworthy of any further judicial attention (FN 9). The Court of Appeals held that Swinger had "a full and fair opportunity" to prove that avulsive river movement had occurred, during his first legal action in 2011, and his failure to do so at that time had foreclosed and resolved that issue on a permanent basis, contrary to his position. Therefore, any additional evidence pertaining to the river's historical activity, which Swinger may have gathered since 2011, was useless to him, because he had not presented it for judicial review when it was needed for that purpose, thus the Court of Appeals was required in 2016 to impose an estoppel upon him, pursuant to the time honored judicial concept of res judicata (FN 10). In effect, Swinger was judicially required to lie in a bed of his own making, and the fact that his land rights had been limited as a result of his own folly made no difference, he was simply left to live with the legal consequences of his own lack of diligence and timeliness in executing riparian boundary and title research (FN 11).

Although Swinger was ultimately unable to prevail, he had perpetuated this controversy for several years, to the distinct financial detriment of Vanderpol, leading in 2016 to a judicial damage award in Vanderpol's favor, and in fully upholding that award the Court of Appeals reminded Swinger of the serious responsibility he had taken on by electing to proceed pro se, which had proven to be a disastrous decision on his part (FN 12). In addition to the land between the channels, Swinger sought over $50,000 in damages from Vanderpol, on the grounds that Vanderpol had prevented Swinger from obtaining that amount from Whatcom County, as compensation for the creation of a conservation easement covering the disputed area, and in addressing that point he accused Vanderpol of wrongdoing. Vanderpol maintained that he was

not guilty of any wrongdoing, when he informed the county in 2011 that Swinger was trying to create a legally bogus conservation easement, situated upon land which Swinger did not own, therefore he was entitled to over $10,000 in damages, and the appellate panel agreed. In so holding, the Court of Appeals notified Swinger that he was the one who was guilty of wrongdoing, rather than Vanderpol, and that his accusations of bad faith against Vanderpol held no merit, effectively applauding Vanderpol for revealing the scam which Swinger had attempted to pull off. The appellate court expressly confirmed, with reference to land rights on this occasion, that "information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government", while noting that the Washington Legislature has statutorily verified the right of all citizens to "make good faith reports to appropriate governmental bodies" whenever they observe such developments. In the eyes of the law, while justifiably defending his own land rights, Vanderpol had also performed a valuable public service, by preventing county funds from being wasted, so Swinger had no valid basis upon which to charge Vanderpol with wrongdoing, since Vanderpol had properly blown the whistle on Swinger's illicit plan to derive public funds from land to which he held no title. Thus Vanderpol emerged victorious, both financially and on the riparian title and boundary issues, despite the collapse of his own QTA action, because Swinger had severely bungled his avulsion case, making it unnecessary for Vanderpol to ever directly address or overcome any evidence of avulsive river movement in order to silence Swinger's boundary and title assertions.

Like a multitude of others who have acquired riparian property in various places throughout our country, with little if any knowledge of riparian boundary law, Swinger lost because he failed to comprehend that strong evidence is virtually always necessary to prevail in a title conflict of riparian origin on the basis of avulsion. Swinger's mistakes were highly typical of those made by unwary or poorly advised grantees of riparian properties, beginning with his failure to investigate the history of the land that he was acquiring before buying it. Had Swinger recognized that the land he intended to acquire had a problematic history from a boundary perspective, he could easily have taken appropriate steps to bring clarity to his acquisition, but his failure to take notice of the presence of genuine boundary and title issues resulting from historical river movement doomed him to eventual defeat. If Swinger had consulted a professional land surveyor with sound knowledge of riparian boundary principles and the value of historical evidence pertaining to river movement, prior to making his acquisition, he would have been well positioned to achieve victory, but because he neglected to do so he was destined to forge ahead in a state of ignorance, without the key advice and information he needed to succeed. An astute senior land surveyor, with experience addressing riparian boundary issues, could have gathered and assembled an impressive array of historical evidence including surveys, maps and photos, clarifying when and how the river's movement had occurred, which would have been quite convincing in court, and would therefore have been highly valuable to Swinger, as tangible support for his assertion that avulsion had taken place. Moreover, had he obtained such land surveyor input at the outset, Swinger would have known prior to investing in the subject property that a serious title conflict linked to riparian boundary issues existed, so he could have either required his grantor to resolve those issues before selling the land to him, or he could have simply bypassed this acquisition and selected another property, in order to avoid becoming engaged in what ultimately proved to be very costly and futile litigation. As Swinger learned, much to his regret, while GLO plats always represent one highly valuable form of boundary evidence, reliance upon a river boundary location shown on a GLO plat is unjustified, unless it can be definitively proven that any subsequent relocation of that river occurred by way

of a specific avulsive event, since a mere hint or suggestion of avulsion is legally insufficient.

Neglecting to seek research assistance from a licensed land surveyor was certainly not the only error made by Swinger however, and his errors compounded themselves, eventually placing him in a hopeless position, despite the existence of evidence upon which he could have prevailed. Swinger's title report clearly alerted him to the presence of riparian title issues, stemming from historical river movement, thereby informing him that substantial boundary ambiguity afflicted the subject property, yet rather than focusing on learning what had historically transpired, which would have prepared him for litigation, he chose to attack his title company, although he was unprepared to do so successfully. Thus his decision to view his own title report negatively, rather than properly treating it as important advisory information, set in motion a sequence of events which made it impossible for him to secure any title to the contested ground between the old and new river channels. In reality, as we have seen, Swinger's original 2011 action had no chance of success, because it was filed without regard for a relevant federal land rights interest, comprised of Lot 9, yet his failure to bring forth any convincing evidence during that futile action sealed his fate, leaving him with no open legal avenue down which to subsequently proceed, as he finally discovered much to his chagrin in 2016. Although Swinger was presumably a competent attorney, due to his apparent unfamiliarity with riparian title issues he was unable to see that he needed to partner with a professional land surveyor, familiar with riparian boundary issues, to compile the essential materials he needed to make his case. Had he realized that partnering with a boundary expert represented his best path to success, this story could well have played out quite differently, potentially becoming a successful avulsion case, and forming a fine example of the positive results of interdisciplinary professional collaboration. In the end, Swinger learned the great legal significance of historical boundary evidence the hard way, after enduring the legal tribulations outlined here, but that knowledge came to him too late to operate to his benefit in 2016, because his own prior evidentiary shortcomings had become matters of record, legally disabling his ability to ever secure his purported riparian title to the area in contention. As has often been wisely noted, "a little knowledge is a dangerous thing", and as it turned out Swinger had enough knowledge of riparian land rights to effectively paint himself into a corner, but not enough to get himself out of that unfortunate predicament.

Footnotes

1) See "Does every issue generated by the presence of an easement constitute a title issue?" published by Multibriefs for NSPS News & Views in September of 2015, for a review of several cases potentially signifying an emerging Circuit split over exactly what conditions or circumstances are required to trigger QTA jurisdiction.

2) See "Contrasting boundaries of title and boundaries of jurisdiction in the context of the federal Submerged Lands Act" published by Multibriefs for NSPS News & Views in April of 2016.

See also "Can ignorance of federal law carry implications that are powerful enough to effectively negate certain aspects of state law?" published by Multibriefs for NSPS News & Views in July of 2016.

See also "Examining adjudication pertaining to federal title interests beyond the federal Quiet Title Act" published by Multibriefs for NSPS News & Views in January of 2017.

All of these articles are available in pdf form at no charge through an internet keyword search.

3) The 1873 GLO township plat, depicting the conditions in the relevant area at the time of the original survey, can be readily obtained using the plat search feature which is provided on the website maintained by the Oregon/Washington office of the BLM, go to www.blm.gov/or/landrecords.

4) Refer to Section 3-81 of the BLM Manual of 1973 for a discussion of the factors involved in federal lot creation, including the modern perspective on proper acreage limitations.

5) No citation is available for this Whatcom County court case, since it never reached the appellate level.

6) See Vanderpol v Swinger, United States District Court for the District of Western Washington, ruling dated 8/8/12 (2012 WL 3887161).

7) See Vanderpol v Swinger, United States District Court for the District of Western Washington, ruling dated 12/17/12 (2012 WL 6590864).

8) See Vanderpol v Swinger, United States Court of Appeals for the Ninth Circuit, ruling dated 11/10/15 (622 Fed Appx 642).

9) See Swinger v Vanderpol, Court of Appeals of Washington, Division One, ruling dated 12/27/16 (2016 Wash App Lexis 3075).

10) The phrase "res judicata" substantially means that any given matter or issue has been judicially placed at rest, having been authoritatively resolved and placed in repose through due process of law, so that particular matter or issue is no longer subject to disturbance through redundant litigation.

11) The result reached by the Washington Court of Appeals leaves Vanderpol with a clouded title and uncertain acreage, due to the interaction between his property and the adjoining federal property during the process through which the accretion zone that comprised the disputed ground was physically formed by the river's movement. However, this formal elimination of Swinger from the legal equation paves the way for Vanderpol and the BLM to collaboratively reach and implement an accretion division agreement, finally defining the exact location of the boundary between Lot 8 and Lot 9 within the area between the historical and contemporary river channels, independently and without any interference from others, should they deem it appropriate or necessary to do so.

12) The phrase "pro se" means to act in one's own favor, and in the judicial context it refers to any individual who elects to personally advocate and argue his or her own legal position before a court, rather than obtaining the assistance of legal counsel for that purpose. Most pro se litigants are attorneys, who are qualified to represent themselves and therefore feel confident that they need no assistance in presenting their case, but those who are not attorneys can and do also sometimes choose to act pro se. The results achieved by pro se litigants are, not surprisingly, quite poor, they rarely prevail, and in many instances the insufficiency of their knowledge of the law is exposed, to their great embarrassment, as illustrated by the outcome which Swinger experienced here.

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