

# Beach Walking and the Public Trust Doctrine

Christopher Dunagan

[July 25, 2010 at 10:40 pm](#)

DannyBoy,

I reviewed numerous State Supreme Court decisions and conferred with several lawyers before writing my [story](#) about the Public Trust Doctrine in Washington state. After reading your comment, I read [Caminiti v. Boyle](#) once again.

As I said in my story, none of these cases resolve the question of whether a member of the public may walk across private tidelands during normal circumstances.

One of the best reviews that leans toward greater public use was written in 1991 by Ralph W. Johnson and associates, [The Public Trust Doctrine and Coastal Zone Management in Washington State](#). But even Johnson acknowledges that much remains unresolved by the Supreme Court.

Read the unpublished Washington State Court of Appeals case [Brennan v. Bainbridge Island](#) for an interpretation that concludes that a person does not have the right to cross private tidelands:

“... This language suggests that our Supreme Court did not contemplate pedestrian passage over tidelands. Accordingly, while recognizing the right under the public trust doctrine of ‘navigation, commerce, fisheries, recreation, and environmental quality,’ we affirm the trial court’s dismissal of the Larsons’ claims to pedestrian travel over privately-owned tidelands when not covered by water.”

Since the case was not published, it sets no precedent and cannot be cited in future cases.

Finally, here’s a 2006 law review article that argues forcefully against the logic of the Brennan decision: [Enjoys Long Walks on the Beach: Washington’s Public Trust Doctrine and the Right of Pedestrian Passage Over Private Tidelands \(PDF 152 kb\)](#). But the author still concedes that the Supreme Court has not resolved the issue of walking on the beach.

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## [\*Beach-walkers are still waiting for a legal answer\*](#)

[Christopher Dunagan](#)

For 30 years, I’ve wondered about the Public Trust Doctrine and whether you and I have a right to walk across private tidelands throughout the Puget Sound area.

On a few occasions, I’ve written about the general principles of the Public Trust Doctrine, but last week I dug a bit deeper and came up with a story published in [Tuesday’s Kitsap Sun](#).

I’ve received a lot of nice comments about my balanced approach to the story. That’s much appreciated, given the contentious nature of this subject. As of this writing, the story has received 75 comments from readers. The discussion got so heated at one point that someone asked Kitsap Sun editors to call a halt to the debate. Comments are still coming in, and things have calmed down.

Please take a moment and weigh in with your opinion in the poll over in the right-hand column of this blog. Also, feel free to comment here, or join the discussion on the story itself.

So, do average citizens have the right to walk across someone's private tidelands? As I explain in the story, this question cannot be answered today, because our state Supreme Court has never ruled on the subject. The Public Trust Doctrine certainly provides for a public right to float across private tidelands in a boat and to take fish and other creatures in conformance with state law.

Shellfish are another issue, however, since the state recognizes that these embedded creatures belong to the property owner in most cases.

The vast majority of waterfront property owners I interviewed for this story said they would not object to someone crossing their tidelands, provided the person does not cause any damage along the way. Some commenters added that people also should not pick up anything on the beach. Now this is another unanswered question for me, and perhaps one of you has the answer: Do beach-walkers or even people in a boat have the right to pick up something that washes in with the tide?

I seem to recall that visitors are not allowed pick up driftwood or other natural items that may be habitat for critters, which are generally protected under state law. But if a man-made item washes ashore, such as a glass float, does the property owner have a greater right to claim the object than someone walking along the beach? I don't know, but perhaps this is one of these unresolved issues — such as where someone may walk legally.

Assistant Attorney General Joe Panesko, who has been researching the Public Trust Doctrine for an upcoming article, pointed out that some commenters seem confused about where property rights end on the shoreline. It is not a simple issue in Washington state.

As Joe describes it, the state once owned all the tidelands and still owns the vast majority of bedlands, which are below the extreme low-tide mark. Between 1899 and 1911, tidelands sold by the state went from the ordinary high tide line down to the mean low tide line. In 1911, the state changed the definition of tidelands to extend all the way down to extreme low tide.

The state also sold a separate category of lands for the cultivation of oysters under two 1895 laws, the Bush Act and the Callow Act. Most of these lands were identified with legal descriptions that included "metes and bounds" instead of tidal elevations. Perhaps because of imprecise surveys, some of these lands still go down below extreme low tide. (This relates to recent stories about "trespass" by shellfish growers. (See [Water Ways, June 24.](#))

Panesko tells me that a big challenge for tideland owners is that legal descriptions on deeds have become muddled as property has changed hands over the years.

"I've seen many current deeds for waterfront properties that include tidelands but fail to articulate the exact tidal boundary of the tidelands," he wrote in an e-mail. "Also, as your article hints at, establishing the exact location of tidal boundaries on the beach really does require the sophisticated services of a competent surveyor. GPS devices don't help much with regard to tidal elevations."

While the Washington State Supreme Court has not defined the limits of the Public Trust Doctrine, courts in other states continue to address the issue. In some states, water resources and even habitat for wildlife are being included as holdings in “public trust.”

The case for beach-walking was nip and tuck for the shores of the Great Lakes in Michigan as recently as 2005. In *Glass v. Goeckel*, property rights advocates were delighted in 2004, when the Michigan Court of Appeals ruled that people could not walk along the beach unless their feet were in the water. (See [Michigan Land Institute, July 27, 2004.](#)) But about a year later, Michigan residents were back strolling the beach on dry land. (See [MLI, Aug. 2, 2005.](#))

It is, as they say, an evolving matter of law.

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*[The Legal Dilemma of Beach Walking](#)*

July 05, 2010

By Christopher Dunagan

When writer Bruce Barcott set out to hike the entire shoreline of Bainbridge Island last summer, he knew he would be walking on private tidelands owned by local residents.

He had no idea what shoreline homeowners might say to him as he traipsed — as inconspicuously as possible — across their property.

“This was one of the main intellectual puzzles I faced,” Barcott said. “Do I have a right to walk on the beach all the way around the island?”

Barcott was aware of the Public Trust Doctrine, an ancient legal principle invoked by many states to grant public access across privately owned tidelands. But he was also quite aware that the Washington State Supreme Court has neither affirmed nor denied a public “right of walking” on private beaches in Washington state.

“I only ran into one fellow who gave me a hard time about his property right,” Barcott recalled. “A number of homeowners I met actually believed that the shore and tideland was public property.

“I talked to some really interesting folks, some of them lifelong islanders,” added Barcott, who moved to the island two years ago. “It was a fantastic way for me to become acquainted with my new home here.”

After completing his series of day hikes that circumnavigated Bainbridge Island, Barcott wrote of his experiences in the [May issue of “Backpacker” magazine.](#) He included a Google Earth map with attached photos, videos and personal notations about the quest.

### **SHORELINE ATTITUDES**

In Kitsap County, the attitudes of shoreline property owners varies. Some people do everything possible to keep interlopers off their tidelands, while others wish more people could enjoy walking on the beach.

“I’ve always believed that anyone could walk on the beaches,” said Jerry Reitan, a shoreline property owner who lives south of the Hood Canal bridge. “I am violently opposed to shutting off the beach. It is the one place for people to walk and not get hit by a car or bitten by a dog.”

A nearby county road comes down to the beach, he said. It is a two-minute walk from his property and provides access for people to walk along the shore in his neighborhood.

Reitan is a board member for the Kitsap Visitor and Convention Center.

“Tourism is big business,” he said. “We should not try to scare people off.”

More than a dozen tideland property owners interviewed for this story said they don’t object to people walking across their beaches — but they want everyone to understand who owns the property and pays taxes on it.

“We own the property to mean low tide,” said Judith Anderson of Hansville, “ ... so technically people are trespassing. If they stay on the lower beach, that’s fine, but we are starting to have problems because of the county park.”

Some people walking down from Point No Point County Park have no respect for residents’ property rights or their personal privacy, Anderson said.

“I’ve had people walk up and sit in my beach chairs,” she said. “They bring their dogs and let them run up to our house. I say, ‘Excuse me, are these your dogs? This is my front yard.’ Some people get belligerent, and it doesn’t make me feel good to say it.”

Kitsap County Code requires that dogs be kept on a leash or under the immediate control of their owner. But Anderson and many other property owners say that seems to make no difference to some beach-walkers.

“I am resentful when people say someone is an old grump because they are trying to protect their property,” she said.

Russ Hauge, Kitsap County’s prosecuting attorney, says people who cause problems or damage property while walking on a beach may be charged with a crime. But it would be tough to prove a case of trespassing for someone simply walking across a beach.

To take action, a sheriff’s deputy would need to see a deed showing ownership, be able to see where the property lines run on the beach and be sure where the suspect was walking.

“If you have a picture of someone walking on dry land, that may prove the point,” he said, “but you’d better be sure he is on your property and not your neighbor’s.”

The key is to decide if a jury would find someone guilty “beyond a reasonable doubt,” he said, and that is assuming nobody raises the conflicted Public Trust Doctrine.

### **AN ANCIENT PRINCIPLE**

The Public Trust Doctrine was first spelled out in Roman law: “By the law of nature these things are common to mankind the air, running water, the sea, and consequently the shores of the sea. ... All rivers and ports are public: hence the right of fishing in a port, or in rivers, is common to all men.”

The doctrine was passed down through English Common Law to the original 13 colonies and then to all the states of the union. The U.S. Supreme Court has upheld the general principle but has left interpretations to the states.

It is fairly well established that the Public Trust Doctrine applies to navigation, allowing a person to take a boat wherever the water goes. It doesn't matter that the boat may be floating over private property.

In Oregon, most tidelands remain in public ownership. But even where there is private ownership the Legislature has declared that the Public Trust Doctrine allows people to walk across private property so long as they cause no damage.

In California, the courts have extended public trust rights to protecting the natural resource values of the shorelines.

"The benchmark case (in Washington state) that opened the door to the modern era was *Wilbour versus Gallagher*," said Joe Panesko, an assistant attorney general for Washington state who is writing a legal treatise on the Public Trust Doctrine.

In that 1969 case, the state Supreme Court found that a property owner did not have the right to dump fill dirt into Lake Chelan in a way that blocked navigation — a right held by the public. The court also stated that such public rights extend to "fishing, boating, swimming, water skiing and other recreational purposes."

In a footnote, the court seemed to suggest that legislation was needed to prescribe when structures along the water were in the public interest. The Shoreline Management Act, approved in 1972, was designed to balance the public rights with shoreline development that serves both public and private interests.

A 1987 case, *Orion v. State*, found that while the Shorelines Management Act supports the Public Trust Doctrine, it does not replace it. The public retains intrinsic rights to use the shorelines, though the limits of those rights have never been fully defined.

"There are no clear answers in Washington state as to the right of walking on the beach," Panesko said. "The Public Trust Doctrine is a very sexy concept that everyone likes to talk about. You will find all kinds of articles positing all kinds of theories."

Tom Clingman, who deals with shoreline policies for the Washington Department of Ecology, said he is surprised that the [Public Trust Doctrine](#) has gone so long without resolution.

"I have had the sense that this will come to the fore, as it has in other states," he said, "but it has just hovered for a number of years."

Encouraging public uses of the shorelines has been a key provision of the Shoreline Management Act, yet the Legislature has never addressed the public use of private property. In 1969, the Legislature did declare it illegal for local governments to sell off any public roads that extended to the tidelands.

As local governments update their local shoreline master programs, they must identify these "road ends" as potential public access points, according to Clingman.

David Kimble, a Manchester resident known for his legal disputes over shorelines, has identified numerous road ends in his neighborhood that were left out of Kitsap County's [draft shoreline inventory](#).

A lawsuit that might have settled the Public Trust Doctrine with respect to walking rose out of a [dispute at Fletcher's Landing](#), a road end that runs down to Port Orchard Passage on

Bainbridge Island. The Washington State Court of Appeals ruled that the road, once a ferry landing, could not be blocked by property owners who had purchased the tidelands.

The public has the right to cross the private tidelands to get to the water, the court ruled. But — and here's the kicker — the Public Trust Doctrine did not grant anyone the right to turn right or left and walk farther down the beach.

"We were very frustrated by that ruling," said Vincent Larson, a party in the case who believed that people should be able to walk the beaches.

But Larson wasn't just frustrated by the court's finding. The Court of Appeals opted not to "publish" the case in the official record, which means that it cannot be cited or even mentioned in any other lawsuits.

When the state Supreme Court refused to hear the case, people were left with a limited decision about Fletcher's Landing and nothing more.

"It was an election year for two or three members of the (Supreme) Court," Larson said.

"They didn't want to stir up anything that would cost them votes. That is my personal guess about why they didn't want to make a decision on the case."

Larson said people walk by his waterfront home near Fletcher's Landing all the time, just as he had hoped the courts would allow. Other road ends are being cleared of vegetation and marked with signs to let people know they can at least get down to the water legally.

Barcott, the author who walked around the island, said he was fully aware of the case while walking in the vicinity of Fletcher's Landing — perhaps the only spot in the state where the Public Trust Doctrine has been decided.

"It really made me pull back a little," he said. "I crossed at low tide and kind of skirted across that area."

Join an ongoing discussion about all things water-related at the blog [Watching Our Water Ways](#).

*This story was changed from its original version to correct the title for Joe Panesko.*