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6 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
7 IN AND FOR THE COUNTY OF SKAGIT

8 FRIENDS OF GUEMES ISLAND  
9 SHORELINES,

10 Plaintiff,

11 v.

12 KEVIN DUNCAN,

13 Defendant.  
14  
15

NO. 21-2-00234-29

COMPLAINT

16 **I. INTRODUCTION**

17 This lawsuit is being brought by Friends of Guemes Island Shorelines on behalf  
18 of its members, itself, and the public to protect the right to walk along the Guemes Island  
19 shorelines. Plaintiff seeks an order holding that the doctrine of customary use protects  
20 the right to walk below the ordinary high water mark of second class tidelands on  
21 Guemes Island. Additionally, or in the alternative, Friends of Guemes Island Shorelines  
22 seeks an order holding that a prescriptive easement protects the right to walk below the  
23 ordinary high water mark of second class tidelands on Guemes Island across the  
24 Defendant's property and, or in the alternative, that the right to walk below the ordinary  
25 high water mark of second class tidelands along Guemes Island shorelines is secured  
26 by the public trust doctrine.  
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## II. PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Friends of Guemes Island Shorelines is a Washington nonprofit corporation organized to protect the rights of its members, itself, and the public with respect to walking below the ordinary high water mark along Guemes Island's second class tidelands. Plaintiff's members include, but are not limited to Peter Knutson, Gary Curtis, Martin Floe, Mark Madden, and Forrest Nelson, all of whom own property and live in proximity to the Defendant on Guemes Island. These members, along with their family and friends, have exercised the right to walk below the ordinary high water mark along Guemes Island's second class tidelands, including the shorelines and tidelands along or adjacent to Defendant's property, for decades, and in some cases, for close to a century. Defendant, through his actions and conduct described herein, including through means of force and threatened violence, has precluded and continues to preclude Plaintiff's members, itself, and the public from exercising their right to walk below the ordinary high water mark along the Guemes Island shorelines.

2. Defendant Kevin Duncan owns property on Guemes Island that includes and runs along the Guemes Island shoreline. The property owned by Defendant is adjacent to and/or includes second class tidelands and is commonly referred to as 4142 Clark Point Road. Defendant, through his actions and conduct described herein, including through means of force and threatened violence, in or about 2020, has precluded and continues to preclude Plaintiff's members, itself, and the public from exercising their right to walk along the Guemes Island shoreline. The legal description of Defendant's property ("Property") according to Skagit County public records is:

LOT 4 OF SKAGIT COUNTY SHORT PLAT NO. 97-0059, APPROVED DECEMBER 24, 1997, AND RECORDED DECEMBER 30, 1997, IN VOLUME 13 OF SHORT PLATS, PAGES 79 THROUGH 81, UNDER AUDITORS FILE NO. 9712300090, SECTION 26, TOWNSHIP 36 NORTH, RANGE 1 EAST, W.M.; RECORDS OF SKAGIT COUNTY, WASHINGTON. EXCEPT SECOND CLASS TIDELANDS. SURVEY AF#201904240019

1           3.     The Court has jurisdiction over this action, wherein the relief Plaintiff  
2 seeks relates to the use of the Guemes Island shorelines and includes injunctive relief.  
3 Defendant owns land that is at issue within Skagit County and the Court thus has  
4 personal jurisdiction over Defendant. Venue is proper because the lands that are the  
5 subject of this action are on Guemes Island, Skagit County.

6                               **III.     FACTUAL ALLEGATIONS**

7           4.     In Opinion Number 27 of the Washington Attorney General, dated  
8 December 14, 1970 ("Opinion"), the state recognized the right of the public to use and  
9 enjoy the ocean beaches of the state for recreational purposes according to the doctrine  
10 of customary use.

11          5.     The Opinion recognized that in order to achieve the status of law based  
12 on custom, a custom can be established through showing a use that is ancient,  
13 continuous, peaceable, reasonable, certain, general, and not inconsistent with other  
14 customs or laws.

15          6.     The Opinion determined that the recreational use of Washington's ocean  
16 beaches was sufficiently ancient, continuous, peaceable, reasonable, certain, general,  
17 and not inconsistent with other customs or laws.

18          7.     The state concluded, accordingly, based on the doctrine of custom, that  
19 the public had a right to use Washington's ocean beaches for recreational purposes.

20          8.     The doctrine of custom applies to the shorelines of Guemes Island.

21          9.     The custom of walking along the Guemes Island shorelines is ancient, as  
22 walking along the shoreline precedes statehood and has been undertaken by settlers  
23 and members of native communities for centuries and enjoyed and appreciated by  
24 hundreds of residents and their friends and families.

25          10.    The custom of walking along the Guemes Island shoreline is and has been  
26 continuous and peaceable, until Defendant through means of force and threatened  
27

1 violence, precluded Plaintiff's members, itself, and the public from exercising their right  
2 to walk along the Guemes Island shorelines.

3 11. The custom of walking along the Guemes Island shorelines is and has  
4 been reasonable, as ingress and egress along the Guemes Island shorelines for walking  
5 is an appropriate use of the shorelines.

6 12. The custom of walking along the Guemes Island shorelines is and has  
7 been certain because residents and their friends and families, in length and continuity,  
8 used the tidelands below the ordinary high water mark ("OHWM") for ingress and egress  
9 and because the land itself, as a practical matter, supports this recreational use.

10 13. The custom of walking along the Guemes Island shorelines is and has  
11 been general because its quality of use is and has been the same and without  
12 interruption, up until the Defendant began doing so in or about 2020.

13 14. The custom of walking along the Guemes Island shorelines is neither  
14 repugnant to, nor inconsistent with other laws.

15 15. The doctrine of custom applies to the Guemes Island shorelines and  
16 protects the rights of the public, including Plaintiff and its members, to walk along the  
17 Guemes Island shorelines for ingress and egress.

18 16. The public trust doctrine, like the doctrine of customary use, is also an  
19 ancient doctrine.

20 17. The public trust doctrine is a common law doctrine that recognizes the  
21 public right to use navigable waters in place for navigation and fishing.

22 18. The doctrine is believed to date back to Rome and was firmly ingrained in  
23 English and American common law.

24 19. Individual states have defined the limits of the lands held in public trust,  
25 and in Washington, the doctrine applies not only to navigation and fishing rights over  
26 navigable waters, but to related recreational activities and incidental purposes.

1           20.     Navigable waters means those waters, and their adjoining shorelines, that  
2 are subject to the ebb and flow of the tide and/or are presently used, have been used in  
3 the past, or may be susceptible for use to transport intrastate, interstate, or foreign  
4 commerce.

5           21.     The public trust doctrine protects public use of navigable water bodies  
6 below the OHWM.

7           22.     Article 17 of the state constitution vests authority in the state to hold full  
8 proprietary rights in tidelands and shorelands and thus the state may convey title to  
9 those lands not forbidden by state or federal constitution. This title interest is referred  
10 to as the state's jus privatum interest.

11          23.     However, the tidelands and shorelands are also held in trust for the benefit  
12 of the people. This title is referred to as the state's jus publicum interest.

13          24.     Accordingly, while the state may convey title to tidelands and shorelands,  
14 any right conveyed remains subservient to the public's right to use navigable waters.

15          25.     Defendant Kevin Duncan purchased property adjacent to or including  
16 second class tidelands on Guemes Island.

17          26.     Defendant purchased the property on or about August 24, 2018.

18          27.     Prior to the time Defendant purchased his property Plaintiff's members,  
19 Plaintiff, and the public exercised their right to walk along the Guemes Island shorelines  
20 and tidelands along or adjacent to Defendant's property.

21          28.     Even after Defendant purchased his property, Plaintiff's members,  
22 Plaintiff, and the public exercised their right to walk along the Guemes Island shorelines  
23 and tidelands along or adjacent to Defendant's property until in or about 2020, when  
24 Defendant used means of force and threatened violence to deter Plaintiff's members,  
25 Plaintiff, and the public from exercising their rights of ingress and egress.

26          29.     The means of force and threatened violence includes but is not limited to  
27 conducting surveillance activities and using aggressive verbal and body language to

1 confront individuals, and physically intimidating women as they exercised their right to  
2 walk.

3 30. The means of force and threatened violence includes but is not limited to  
4 body bumping an older woman, blocking her as she tried to escape, and when she took  
5 out her cell phone to record the encounter, physically grabbing the phone from her hand  
6 and throwing it in the water. Charges are currently pending against Defendant in Skagit  
7 County regarding this encounter, under case number C00067441.

8 31. As a result of Defendant's actions and conduct, Plaintiff's members,  
9 Plaintiff, and the public cannot exercise their right to walk along Guemes Island  
10 shorelines without fear for their life and safety.

11 32. As a result of Defendant's actions and conduct, Plaintiff's members have  
12 suffered harm and continue to suffer harm.

13 33. Friends of Guemes Island Shorelines ("FOGIS") is a nonprofit corporation  
14 that was formed in 2020.

15 34. FOGIS was formed for the purpose of protecting the rights of its members,  
16 itself, and the public with respect to walking along the Guemes Island shorelines.

17 35. The rights that FOGIS was formed to protect include walking below the  
18 OHWM along Guemes Island's second class tidelands.

19 36. The rights that FOGIS was formed to protect include walking along the  
20 shoreline and tidelands along or adjacent to Defendant's property.

21 37. Through this cause of action, FOGIS, on behalf of its members, itself, and  
22 the public, seeks relief that includes an order recognizing the right to walk along the  
23 Guemes Island shorelines.

24 38. Recognition of these rights can be accomplished through an order finding  
25 a prescriptive easement exists below the OHWM on the shoreline along or adjacent to  
26 Defendant's property, or finding that the Defendant's land was purchased subject to the  
27 doctrine of custom, and, or in the alternative, the public trust doctrine, both of which

1 secure the right of the public to walk below the ordinary high water mark of second class  
2 tidelands on Guemes Island.

#### 3 IV. CAUSES OF ACTION

##### 4 A. First Claim: Customary Use

5 39. Plaintiff alleges and re-alleges every allegation as set forth herein.

6 40. Plaintiff's members, their families, friends, invitees, and members of the  
7 public have customarily and habitually walked along the shorelines of Guemes Island  
8 for recreational purposes.

9 41. The customary and habitual public use of the Guemes Island shorelines  
10 for walking is ancient, going back centuries, up through settlement, and continued  
11 through the present day.

12 42. The customary and habitual public use of the Guemes Island shorelines  
13 for walking has been continuous, and has been exercised peaceably and through  
14 peaceable means.

15 43. The customary and habitual public use of the Guemes Island shorelines  
16 for walking has been reasonable and appropriate.

17 44. The customary and habitual public use of the Guemes Island shorelines  
18 for walking is sufficiently certain, based on the length and continuity of the public's use  
19 of the shorelines by the numbers of people so using the area, as well as the character  
20 of the land itself, which is suited to walking for recreational purposes.

21 45. The customary and habitual public use of the Guemes Island shorelines  
22 for walking as a matter of right has been general; other than the Defendant, Plaintiff's  
23 members, Plaintiff, and the public are aware of no other individual landowner that has  
24 attempted to exclude the public from walking along the Guemes Island shorelines.

25 46. The customary and habitual public use of the Guemes Island shorelines  
26 for walking has vested rights according to the doctrine of custom.

1           47. The customary and habitual public use of the Guemes Island shorelines  
2 for walking is consistent with the state's recognition of the doctrine and its application to  
3 the seashore and ocean beaches in AGO 1970 No. 27 (Dec. 14, 1970).

4 **B. Second Claim: Prescriptive Easement**

5           48. Plaintiff alleges and re-alleges every allegation as set forth herein.

6           49. Plaintiff's members exercised their right walk below the OHWM adjacent  
7 to or including Defendant's property openly and notoriously.

8           50. Plaintiff's members exercised their right to walk below the OHWM across  
9 or adjacent to Defendant's property over a uniform route.

10          51. Plaintiff's members exercised their right to walk below the OHWM across  
11 or adjacent to Defendant's property for more than ten (10) consecutive years.

12          52. The exercise of Plaintiff's members' right to walk below the OHWM across  
13 or adjacent to Defendant's property was adverse to the owner(s) of land and occurred  
14 over a time when such owner(s) were able to assert and enforce such rights.

15          53. Plaintiff's members' right to walk below the OHWM across or adjacent to  
16 Defendant's property was not subject to permission or consent.

17 **C. Third Claim: Violation of Rights Secured by the Public Trust Doctrine**

18          54. Plaintiff re-alleges each and every allegation as set forth herein.

19          55. Defendant's actions and conduct described herein, including through  
20 means of force and threatened violence, has precluded and continues to preclude  
21 Plaintiff's members, itself, and the public from exercising their right to walk along the  
22 Guemes Island shorelines which are protected by the public trust doctrine.

23 **V. REQUEST FOR RELIEF**

24          56. Plaintiff respectfully requests that the Court enter judgment as follows:

- 25           (a) An order finding that the doctrine of customary use allows walking  
26 below the ordinary high water mark on second class tidelands  
27 along the Guemes Island shoreline;



- 1 (b) An order finding that a prescriptive easement exists in favor of  
2 Plaintiff, through its members, to walk below the ordinary high  
3 water mark across the shoreline that includes Defendant's  
4 Property;
- 5 (c) An order finding that Defendant's purchase of the Property was  
6 subject to the public trust doctrine and the rights of Plaintiff,  
7 Plaintiff's members, itself, and the public to walk along second  
8 class tidelands on Guemes Island below the ordinary high water  
9 mark;
- 10 (d) An injunction including preliminary or emergency orders as  
11 authorized by CR 65 enjoining Defendant from impairing access  
12 of Plaintiff, its members, and the public from walking below the  
13 ordinary high water mark of second class tidelands;
- 14 (e) An award of costs and expenses, including reasonable attorneys'  
15 fees, based on all applicable statutes and other grounds, including  
16 but not limited to the diversion of resources and frustration of  
17 purpose; and
- 18 (f) Awarding Plaintiff such further equitable, legal or additional relief  
19 as may be appropriate and just.

20 DATED: April 15, 2021.

21 BRESKIN JOHNSON & TOWNSEND, PLLC

22 By: s/ Brendan W. Donckers  
23 Brendan W. Donckers, WSBA #39406  
24 1000 Second Avenue, Suite 3670  
25 Seattle, WA 98104  
26 (206) 652-8660 Telephone  
27 (206) 652-8290 Facsimile  
[bdonckers@bjtlegal.com](mailto:bdonckers@bjtlegal.com)

*Attorneys for Plaintiff*