Unfinished Business: Completing the mudmap on the riverbed – the legal lacuna in the tri-state area of the River Murray

by M M Park and I P Williamson


[This is a condensed and updated version of a paper “Writ on Water: closing the traverse in the tri-state area of NSW, SA, and Victoria” published in 52(1) Journal of Spatial Science 29-40 (June 2007).]

ABSTRACT

With the approaching centenary of the Victorian-South Australian border litigation, the necessity of restoring and maintaining river flows in the Murray-Darling Basin river system including the equitable allocation of rights to those flows, and the failure of the four states and the Commonwealth to agree on the future co-operative administration of the Basin, the authors offer their resolution of the ‘missing’ border in the tri-state area of Victoria, New South Wales, and South Australia in the locale of Mildura-Wentworth-Renmark where the three states abut. The resolution of the missing border is essential to the proper exercise of spatial or territorial jurisdiction. Although of small consequence for the past 150 years the time is approaching when this issue must be resolved: it is ‘unfinished business’.

INTRODUCTION

[1] The histories of the Victorian-South Australian, the Victorian-New South Wales, and the South Australian-New South Wales borders are well known and much written of. Following a series of articles in The Age newspaper on the Murray River which initiated an exchange of letters to the editor we offer our interpretation of the location of the borders between the three Australian states of Victoria, South Australia and
New South Wales, where these three states abut, that is, the tri-state area in the vicinity of Mildura, Renmark, and Wentworth.

[2] While the legally defined locations of the Victorian-SA, the NSW-SA, and the Victorian-NSW borders have been resolved, that of the Vic-SA-NSW border has not. This unresolved border links the resolved Victorian-SA, NSW-SA, and Victorian-NSW borders. Through neglect or other failure to maintain the physical manifestations (or markings on the ground), the Victorian-SA border is currently in need of re-establishment as was the case of the NSW-SA border which was successfully re-established in the 1980s. The failure of the respective state governments to maintain the physical evidence of the locations of the resolved borders is unrelated to the issue of the unresolved border linking the three states as discussed in this paper.

[3] The issue is best illustrated in the accompanying Figure 1 showing the tri-state region of the Victorian, NSW and SA states. On the left is the border running north-south between South Australia and Victoria as marked out on the ground by Wade and later completed by White in the late 1840s. This border is designated W at its northernmost point on the south bank of the River Murray and was marked by a cairn erected approximately one kilometer south of this position by White in 1850. It is generally accepted that this border is located approximately 3.5 kilometers West of its
intended position which was specified as the 141st meridian of longitude east of the
Prime Meridian (longitude 0° at the Greenwich Observatory). The intended location
of the eastern boundary of the colony of South Australia was specified in the imperial
statute empowering the creation of the colony in 1834 and the consequential 1836
Letters Patent creating the colony.

[4] Despite attempts by South Australia to have the border relocated to its intended
position both the High Court of Australia and the Privy Council upheld the actual
location as laid out on the ground. At the time of its marking the border was intended
to demarcate the two colonies of South Australia and New South Wales. The Port
Phillip District of the New South Wales colony was established as the independent
colony of Victoria by imperial statute in 1850 (effective 1851), the year following
White’s completion of the survey marking out the border.

[5] On the right is the SA-NSW border running north-south as located on the ground
by Todd and Smalley in 1868. Pursuant to evidence in the SA-Victoria border
litigation this border is shown as approximately one hundred metres east of its
intended location at 141° East. This border is designated T at its southernmost point
on the north bank of the River Murray.

[6] Also on the right of the diagram is the Victorian-NSW border (marked as M at its
westernmost point) running along the top of the southern bank of the River Murray as
specified by the imperial statutes of 1850 and 1855 and the interpretation of these
two statutes by the High Court in 1980.
The Victorian-SA border is displaced approximately 3.6 kilometres west of the NSW-SA border (as marked by Todd and Smalley in 1868) and the Victorian-NSW border. This distance is equivalent to approximately 13 kilometres measured along the riverfront or watercourse of the River Murray. This paper is concerned with the location of the border along the river between the points W, M, and T. It is the existence of this 3.6 kilometre east-west displacement between the SA-Victoria and SA-NSW borders that has created the anomaly of the unresolved Victoria-SA-NSW border along the River Murray between the points W, M, and T; if there were no displacement the three states would abut at point M with no necessity for a border joining the points W, M, and T.

That there exists a 3.6 kilometre “dog-leg” between the Victoria-SA and NSW-SA borders is a curiosity recognized by the Melway Street Directories and the Telstra White Pages. It was not recognized in The Age Special 4-page Report “The Murray-Darling River System” where the large-scale map of the Murray-Darling System shows the two borders as one continuous line running north-south, without the east-west displacement of 3.6 kilometres between the two. We suggest that a similar supplement, if published by (say) The Adelaide Advertiser, would have shown the “dog-leg”. It may be that South Australians, having “lost” the 3.6 km strip of land (stretching from the Murray River to the Southern Ocean) to their Victorian cousins, are more sensitive to and conscious of this border anomaly.

WHY IS THIS ISSUE OF INTEREST?

The issues of climate change, long-term drought, and water-stress have recently assumed greater importance as their effects have become more noticeable. Politically, the change of state government in Victoria in 1999 was brought about in part by an
independent member motivated by his concern at the deterioration in the flow of the Snowy River. More recently we have seen proposals for the Commonwealth to acquire jurisdiction over the Murray-Darling Basin from the states of Queensland, NSW, SA, and Victoria. The recent election to the Commonwealth Senate of an independent from South Australia has seen the expression of opinion by that Senator-elect that he will attempt to influence government policy prior to the commencement of his term of office because the issue of the flow of the River Murray (including Adelaide’s water supply) is urgent and cannot await his formal ascension to the Senate.

[10] Apart from satisfying idle intellectual curiosity there exists the need to attribute jurisdiction with regard to the allocation of water and other commercial rights, the licensing and administration of tourism and recreational facilities, the provision of search and rescue services and the supervision of health and safety issues, and the enforcement of the civil and criminal law. The 1840s agreement between NSW and SA was founded on the need to determine territorial jurisdiction and the undefined 13 kilometre riverfront still awaits a determination of territorial jurisdiction more than 160 years later: it is unfinished business. Today we have the technical means of locating (within metres) and extracting (within minutes) an injured person to an appropriate medical facility. What we lack is the means of quickly determining the responsible authority and its territorial jurisdiction with respect to a particular spatial location. We have the ability to home in precisely on a specified location but are unable to determine under which authority that location resides.

[11] This issue was recently raised in the Tim Flannery-John Doyle ABC television documentary wherein Doyle suggested the solution lay in whether the local public
Figure 3: SA and NSW share jurisdiction over the 13 km watercourse according to the \textit{ad medium filum aquae} rule.

POSSIBLE SOLUTIONS

[12] Option 1: the 13 kilometres of the Murray R downstream from T and M lies wholly within SA jurisdiction. Thus, the northern border of Victoria continues as the top of the southern bank from M to W and the SA-NSW border extends south from T to M. Currently, SA government fisheries officers enforcing that state’s fishing regulations exercise de facto jurisdiction over this section of the river.\textsuperscript{15} This and other options are shown schematically in the accompanying simplified schematic Figures 2 to 5.

Figure 2: Option 1 confers SA with sole jurisdiction over the whole breadth of the 13 km watercourse from T and M downstream to W.

[13] Option 2: the unresolved 13 kilometres of the river are shared between NSW and SA pursuant to the \textit{ad medium filum aquae} rule ("to the thread or centreline —thalweg — of the stream").\textsuperscript{16} Dunn comments that this “bizarre outcome … from a strict interpretation of
existing law [is] it seems the most likely”. This option (Figure 3) would see a 13 kilometre protruding “finger” of width half the breadth of the river extending westward from NSW at point M. Thus the Victorian-NSW border would continue along the top of the southern bank from M to W. From this point the NSW-SA border lies in a northerly direction to the midstream of the river and from there, generally in a south-easterly direction (along the thread of the River), to a point in midstream on the north-south line joining T and M. The NSW-SA border then lies northward to T and beyond. If this border is correct then it follows that the Privy Council was in error when it concluded in its judgment that “… Victoria alone is directly interested in the question of the Wade and White boundary. The present colony of NSW has no interest in it”.

[14] Option 3: the unresolved 13 kilometres of the river are shared between Victoria and SA pursuant to the *ad medium filum aquae* rule. This option (Figure 4) would see the last 13 kilometres of the northern border of Victoria protruding into the Murray River to its thread. Consequently the “unclosed” remnant of the NSW border would see a continuation or extension of NSW’s western boundary from T to M. This extension of the western boundary would continue as the NSW-SA border from T to midstream and thence as the Victorian-NSW border from midstream to the point M on the top of the southern bank of the river. This interpretation is favoured by Wells in reliance upon Duncan who concluded that “the mid-stream position is deemed to apply to the 16 km of river
between 141° East and 140° 58´ East that forms part of the Victoria-South Australia border.20 A similar interpretation is offered by Curnow21 in reliance upon a comment by the Victorian Solicitor-General in 1974. Having been unable to unearth a memorandum of legal advice or formal opinion we have concluded that Curnow’s description of the Solicitor’s comment most probably refers to an informal oral communication. Similarly Curnow has neglected to identify the Solicitor-General with the office being exercised by Basil Murray QC until September 1974 when Daryl Dawson QC (later Dawson J of the High Court of Australia) was appointed to the office upon Murray being appointed to the Supreme Court of Victoria.

[15] Option 4: the 13 kilometre course of the Murray River downstream from T and M lies wholly within NSW jurisdiction. This is similar to option 2 although the protruding 13 kilometre finger has a breadth of the whole river. Thus, the northern border of Victoria continues as the top of the southern bank from M to W (see Figure 5). The rationale supporting this option would appear to be that NSW retains the whole of the river (pursuant to the 1855 Imperial Statute) and that impliedly SA is subject to the same statute.

[16] Upon SA and NSW agreeing to use the 1868 Todd-Smalley line as the border this agreement only applied to that land north of the River and left that part of the River over which NSW had previously exercised jurisdiction since the 1855 statute unchanged. We suggest that this option is extraordinarily far-fetched. Further, the

---

**Figure 5:** Option 4 confers NSW with sole jurisdiction over the whole breadth of the 13 km watercourse from T and M downstream to W.
preamble to this statute recites that doubts have arisen as to the Victorian-NSW border without reference to SA; and we submit that this wording is insufficient to displace the *ad medium filum aquae* rule as between NSW and South Australia.

[17] The remaining options (the 5th through to the 9th – see Figure 6) show all the remaining possible permutations available and include those we submit may be summarily dismissed as unsupportable in law. They include the questioned part of the river lying wholly within the Victorian jurisdiction (option 5) and the remaining possible permutations of shared jurisdiction over the questioned part pursuant to *ad medium filum aquae*. These options are beyond those described by Dunn and exhaustively represent all the remaining possible permutations.

[18] Clearly options 7 and 9 with an outlying area of Victoria unconnected to the main part of Victoria have no basis in reality, practicality, or law. We submit that options 6 and 8 are, to a lesser degree, similarly without rational basis.
[19] We have not here considered the possible interpretations requiring the boundaries to be projected at right angles to the middle thread of the River\textsuperscript{22} as illustrated in the accompanying Figure 7. We have taken this course because none of the three states, SA, NSW, and Victoria, have questioned the North-South border even where it meets the River at an angle and neither SA nor NSW questioned the North-South border where it meets and crosses the River Glenelg obliquely in their respective proclamations of the border in 1847 and 1849. Further, the boundary perpendicular to the thread of the stream is more suited to the balanced allocation of riparian rights between the individual landholders of smaller riverfront land parcels than territorial jurisdictional borders.\textsuperscript{23}

**Figure 7:** Where the boundary leading to a stream meets it obliquely, the extension is made, as a rule, by a line drawn perpendicular to the middle thread of the stream.