

**RIPARIAN LAW  
PART 2**

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**WATER AND  
WATERCOURSE  
BOUNDARY LINES**

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**Navigable Tidewater**

- Title is in the State (unless root title is in a private person) subject to the reservation and stipulation that such streams shall forever be and remain public highways.
- Subject to the power of the United States to regulate interstate commerce
  - Lewis *Blue Point Oyster Cultivation Co., v. Briggs*, 198 N.Y. 287 (1910) aff'd 229 U.S. 82 (1913)

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### Title to the High water mark

- Landowners who adjoin tidal waters have title to the high water mark
- the public has the right to use the land between the high water mark and the low water mark
- When the tide is out the Public and the Riparian Owner can cross over the foreshore regardless of who owns the foreshore
  - Tiffany v. Town of Oyster Bay, 234 N.Y. 15 (1922)

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### State owned tidal waters

- Private upland owners only own to the mean high water mark when the call is the "shore" of state owned tidal waters
- The Foreshore can have separate ownership, or the private owners may also own the foreshore.
- Where adjoining upland landowners have title to the low water mark of tidal waters, they may enjoin trespassers on the foreshore

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### Non-tidal State owned waters

- Where a lake or pond is held in public ownership, the boundary line between the public proprietor and the owner of the adjacent upland is usually the low water mark
- Granger v. Canandaigua, 257 N.Y. 126 (1933)




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### Specific Bodies of Water

- Ownership in the State:
- The Great Lakes (usually, depends on root title)
- Oneida Lake
- Cayuga Lake
- Lake George
- Canandaigua Lake
- Onondaga Lake
- Otsego Lake
- Keuka Lake

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### Specific Bodies of Water

- Private Ownership:
- Lake Placid
- Hemlock Lake
- White Lake
- Copake Lake
- Cromwell Lake or Hazard's Pond
- Tripp Pond
- St. Mary's Pond or Silver Lake
- Brandt Lake
- Mill Pond in Guilderland, NY

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### Land under navigable fresh water streams

- Excepting the boundary rivers and the Mohawk and Hudson Rivers
- The presumption is that ownership is in the State and the burden is on the landowner to rebut the presumption by demonstrating their title by conveyance, grant or by prescription.
  - *Douglaston Manor v. Bahrakis*, 89 N.Y.2d 472 (1997) [Little Salmon River]

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## Navigable Fresh Water Streams

- Private Land under navigable fresh water streams
- Rule for apportioning the lands underwater to the adjoining upland owner is that each owner takes in proportion to his or her line on the margin in front of his or her upland, according to straight lines drawn at right angles between the side lines of his or her land on the shore and the centerline of the water.

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## Apportionment of underwater lands as between littoral owners

- Each littoral owner takes title to the center or thread of the lake or pond in proportion to his or her line on the margin in front of his or her upland in straight lines drawn at right angles between the sidelines and the centerline of the lake.

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## Surveying Principals to resolve access disputes

- Navigation law section 32 prohibits interference with access to a navigable body of water
- Office of General Services has regulations on how to resolve interference caused by docks, wharfs etc. erected by riparian owners

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# Surveying Principals to resolve disputes

9 NYCRR Part 274  
Apportioning out the riparian or littoral rights

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## PERPENDICULAR METHOD

Establishing the offshore lateral lines between the riparian/littoral zones by turning 90 degrees to a base line is referred to as the perpendicular method. This can be done from a baseline established between headlands in a cove and applying the proportionate method. The baseline can be the thread of a stream, or river and in some cases the general trend of the shore such as the Long Island Sound. Nevertheless, the riparian/littoral zone is established along a line perpendicular to the baseline and extending the same to intersect the property line at the shoreline.



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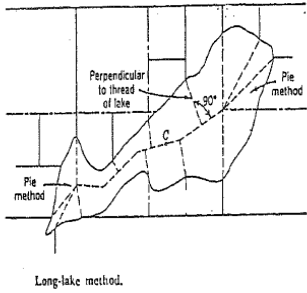
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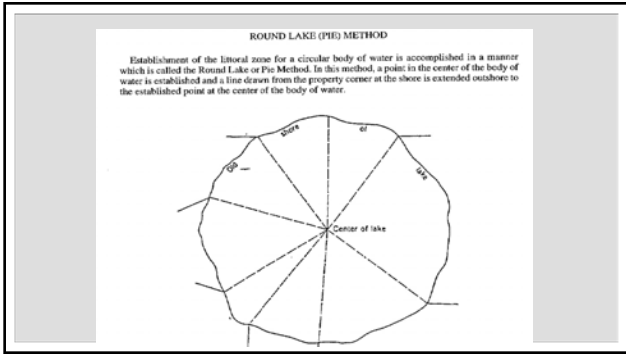
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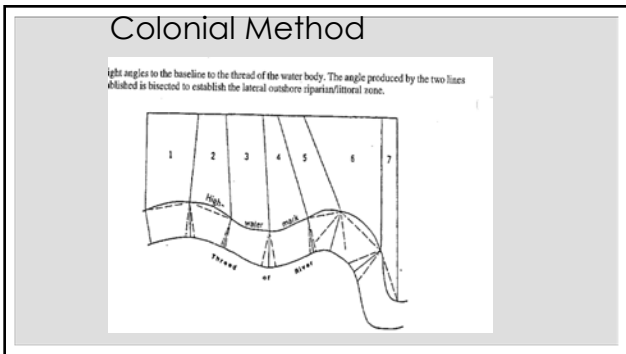
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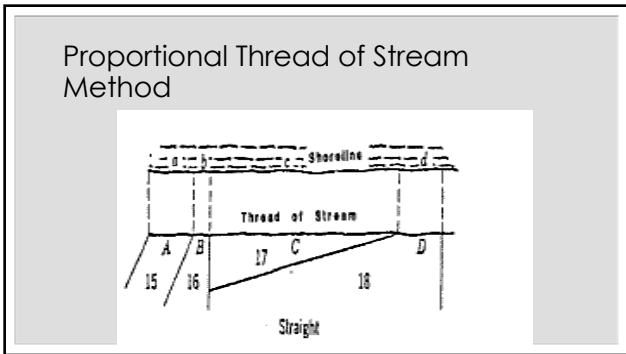
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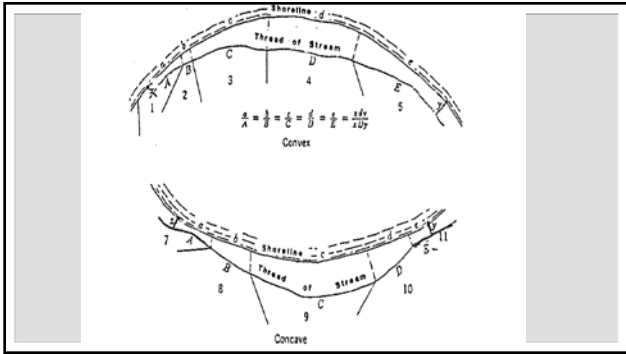
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### Practical Location

- When the parties have made improvements and there seems to have been long acquiescence to their location and placement into the water.




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### Mapping Requirements

- NY Real Property Law Section 334 Maps to be filed; penalty for nonfiling
- 5. In case the lands sought to be shown upon the subdivision map are contiguous to the navigable waters of the state and have frontage on such waters, such map shall show the extension of the littoral property line or lines of such lots, plots, blocks, sites or units from the intersection of said line or lines with the high water mark into said navigable waters of the state. Such map shall show sufficient data to define the location of the riparian/littoral area associated with such lots, plots, blocks, sites or units.

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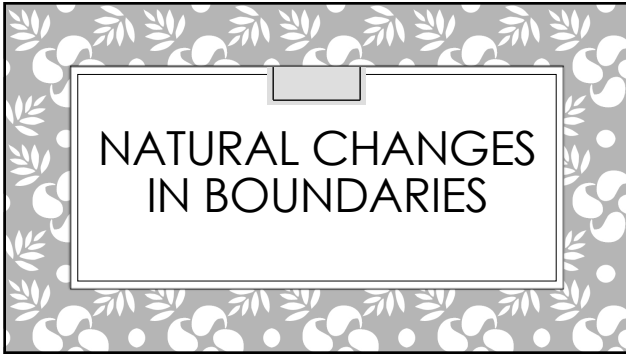
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Natural Changes in Boundaries

- **Accretion**
- Definition: the increase of riparian land by the gradual or imperceptible deposit by water of solid material whether mud, sand or sediment so as to cause that to become dry land which was before covered by water.
- Change so gradual as not to be perceived in any one moment, only after a long lapse of time.
- Mulry v. Norton, 100 N.Y. 424 (1885)

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Natural Changes in Boundaries

- Alluvion: the result of accretion
- NOT TO BE CONFUSED WITH
- Avulsion: alteration of the shore by sudden and violent elemental action
  - In re City of Buffalo, 206 N.Y. 319 (1912)




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### Natural Changes in Boundaries

- Reliction or Dereliction
- Definition: is an increase of the land by gradual an imperceptible withdrawal of any body of water or previously submerged lands which becomes exposed by the gradual recession of water.

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### Natural Changes in Boundaries

- Erosion
- The gradual and imperceptible wearing away of the soil by natural causes, such as current or tide.
- Michelsen v. Leskowitz, 55 NYS 831 aff'd 270 A.D. 1042 (1946)




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### Natural Changes in Boundaries

- Submergence
- The gradual disappearance of soil under the water and the formation of a more or less navigable body of water over it.
- Mulry v. Norton, Supra




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### Natural Changes in Boundaries

- Where the location of the margin or bed of a stream or other body of water is imperceptibly changed or shifted by accretion, reliction or erosion, the margin or bed of the stream or body as so changed remains the boundary of the tract, which is extended or restricted accordingly.
- The Landowner gains or loses ground accordingly
- *Mulry v. Norton*, 100 N.Y. 424 (1885)

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### Natural Changes in Boundaries

- Where the land is submerged, the riparian owner can reclaim the land when it re-emerges by natural (accretions) or man made means (fill).
- However, land lawfully reclaimed loses its character as foreshore and the easements and servitudes to use it are extinguished. See *Tiffany v. Town of Oyster Bay*, 234 NY 15 (1922)

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### Natural Changes in Boundaries

- Where the land is lost by erosion, the title passes to the owner of the water
- Where the land is increased by accretions, the title passes to the owner of the land
- When the land is lost by avulsion, title is not lost to the owner of the water and by reclaimed by filling, the boundaries do not change. *Mulry v. Norton*, *Supra*

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## Natural Changes in Boundaries

- Avulsion:
- The sudden pushing back of the shoreline by violent action of the elements which is perceptible at the time it occurs.
- Title is not lost by avulsion, and may be reclaimed
- Party asserting it has to prove it was Avulsion, and not erosion which lead to the loss of land

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## Natural Changes in Boundaries

- The Riparian Owner becomes the owner of accretions even when influenced by man made structures erected by others
- However the riparian owner may not participate in the erection of an artificial condition causing the accretions. *Mulry v. Norton, Supra and In re Hutchinson River Parkway,*

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## Natural Changes in Boundaries

- Apportionment of Accretions:
- A riparian owner who influences and creates an artificial condition on purpose to cause the accretion or reliction will not benefit from the rule
- However a good faith improvement that changes the normal pattern of accretion would allow the landowner to claim the accretions due to man made structures.

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### Natural Changes in Boundaries

- Apportionment of Accretions:
- Generally the frontage will be conserved so that each has the same amount as they used to have, proportionally
- A riparian owner cannot claim accreted lands beyond the point where such accession began to be made adjacent to the property of adjoining owners.

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### Natural Changes in Boundaries

- Accretions as appurtenances:
- Title to the Accretions will pass to subsequent owners by virtue of the appurtenance clause even if not specifically referenced in the deed.

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### Boundaries that are Fixed

- Where the deed or other muniment of title permanently fixes the boundary line of land conveyed to a certain point, so it is not changeable by the high water mark, accretions outside the boundary do not belong to the grantee
- *Trustees of Freeholders & Commonality of East Hampton v. Kirk*, 84 N.Y. 215 (1881)[call to the cliff in the deed rather than the shore was a fixed line that did not make the grantee a riparian owner who could claim the accretions in front of their property]

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### Boundaries that Move

- Where the deed calls to the centerline of the river or stream the boundary is *ambulatory*, or moves.
- The call indicates that the owner of the uplands is afforded access to half of the water course, wherever it may be
- Calls to the shore are also ambulatory, move when the high water mark moves
- Calls to the "average southerly line of beach grass" was also determined to be ambulatory. See *Macklowe v. Trustees* 34 Misc. 3d 1237(A) (Sup. Ct. Suffolk Co., 2012)

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### FILLING OPERATIONS

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### Reclaiming Land

- Land filled by Riparian Owner
- Generally allowed so long as it doesn't interfere with navigation or commerce.
- If the filling is authorized under the law, the newly created land belongs to the Riparian Owner
- If the filling occurs without authorization, the upland owner who filled has no rights to the newly created land, although their riparian rights would remain intact

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## Reclaiming Land

- Examples:
- Filling up a bay on a navigable river by cutting down the banks and filling beyond the high water mark does not give rise to title by accretion. *Saunders v. NY Cent. & H.R.R. Co.*, 144 NY 75 (1894)
- Boat house and pier built on soil deposited after dredging a navigable river were expressly permitted by the US gov. and impliedly permitted by NYS gov. the structures were legal and the owner was entitled to compensation for their taking. *Moyer v. State*, 56 Misc. 2d. 549 (Cl. of Claims 1968)

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## Reclaiming Land

- Filling by the municipality or State
- The filled in area belongs to the State or municipality if the fill is to aid in navigation or commerce
- If the filling is wrongful, the fill belongs to the abutting riparian owner. *Steers v. Brooklyn*, 101 N.Y. 51 (1885)

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## Reclaiming Land

- Access over the filled land:
- Riparian owner's rights are not impaired by the filling in of the shores of a navigable river, they still have a right of access to the water as a highway abutting their property, subject to the right of the state to improve navigation and commerce. *Sage v. City of New York*, 154 NY 61 (1897).

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## Reclaiming Land

- Street that originally reached the water will extend over newly created lands to reach the water. *City of New York v. Mazzella*, 50 AD3d 578 (1<sup>st</sup> Dept 2008).
- However, where a street only ran to the high water mark, it will not be extended to the water. *In re City of Yonkers*, 117 NY 564 (1890).

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## Dredging and Filling Operations

- Since 1899 the Army Corp of Engineers has had jurisdiction over actions with respect to US waters and have issued permits for Dredging and/or Filling
- Clean Waters Act affects those actions
- NYS DEC also has jurisdiction over what can be done in wetlands → many areas a riparian owner may want to fill are technically "wetlands"

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## CANAL LANDS

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## Chapter 199 of the Laws of 1910

- An Act to provide for the mapping of certain canal lands and the lands adjacent thereto belonging to the state, and making appropriation therefor.
- Section 1. The state engineer and surveyor is hereby directed to make the necessary surveys, field notes and manuscript maps of all such portions of the Erie, Oswego and Champlain canals that are not within the lines of the improved Erie, Oswego and Champlain canals, and of all the lands belonging to the state adjacent thereto or connected therewith on which the boundary line or "blue line" of any parcel of such land to which the state shall have a separate title shall be designated, together with the names of adjoining landowners.

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## Canal Law Article 1: Short title and definitions

- 8. "Canal Lands" shall mean all lands and waters forming a part of the canal system title to which was originally vested in the state, acquired by the state or which may in the future be acquired by the state for canal purposes.
- 9. "Blue Line" shall mean the boundary of canal lands owned by the state previous to the approval of chapter one hundred forty-seven, laws of nineteen hundred three.
- 10. "Old Canal Lands" shall mean canal lands lying within the blue line.

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## Blue Line Maps

- The Blue Line Maps basically show the State Lands that are associated with the Old Canal independent of the state lands appropriated for the Barge Canal. The Blue Line Maps are deemed presumptive evidence of the state's title to lands within the blue line




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### Blue Line Maps



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### NYS Constitution Today

- The Legislature is still Prohibited from selling, abandoning or otherwise disposing of canal lands
  - Article 15 Section 1 of the NYS Constitution
- EXCEPT those lands which were no longer useful or necessary for canal purposes
  - Article 15 Section 2 of the NYS Constitution

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### Canal Law Section 50

- In 1992 the Canal Corporation was given authority to abandon Canal Lands
- § 50. Authority to abandon canal lands
  - 1. Authority is hereby conferred upon the corporation to abandon any portion of barge canal lands, barge canal terminal lands, or old canal lands and appertaining structures constituting the canal system prior to the barge canal improvement, which have or may become no longer necessary or useful as a part of the barge canal system, as an aid to navigation thereon, or for barge canal terminal purposes.

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## Effect of Abandonment

- *Montfort v. Benedict*, 199 A.D.2d 923 (3d Dept. 1993).
- "...in 1981 the lands were declared to have been abandoned for canal purposes (L 1981, ch 741). Without any other sovereign or public purpose (see, *State of New York v Case*, 86 Misc 2d 43, 381 N.Y.S.2d 210), such abandoned property would be held in a proprietary capacity.
- When the Blue Line land in question was abandoned, there no longer existed a statutory prohibition to alienability; a prescriptive easement by adverse use became legally possible at that time.

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## CENTERLINE PRESUMPTION

*Knapp v. Hughes*, 19 N.Y.3d 672 (2012)

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## Knapp v. Hughes

- RULE:
- "It has long been established New York law that a conveyance of land on a pond or stream includes the land under the pond or stream, to the center of the water, unless a contrary intention is made clear. We reaffirm that principle in this case, and hold that its application does not depend on minor variations in the language of the conveyance."

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### Knapp v. Hughes

- FACTS:
- Defendants own land on the shore of Perch Pond.
- Both plaintiffs and defendants claim to be the owners of the land under the pond that is adjacent to defendants' waterfront land.
- Both thus claim to have the exclusive right to use that part of the pond for swimming, fishing and other purposes.

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### Knapp v. Hughes

- FACTS:
- the 1973 deeds [to Defendants] conveyed land "along the waters [sic] edge of Perch Pond" and "along the edge of Perch Pond."
- Plaintiffs, claiming under a 1993 deed by which the Furlanos conveyed their remaining waterfront property and "all remaining lands of Grantors," assert that the 1973 deeds conveyed only the land next to the water, not the land under it, and that all the submerged land once owned by the Furlanos passed by the 1993 deed to plaintiffs' predecessors in title.

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### Knapp v. Hughes

- DISCUSSION:
- Thus in *Gouverneur v National Ice Co.*, 134 NY 355, 364 (1892), in which we interpreted deeds conveying land "along Hinckley pond" and "along said pond" to include land to the pond's center, we said that "a boundary line described as 'along the shore' of a fresh-water stream does not extend the grant to its center"

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### Knapp v. Hughes

- DISCUSSION:
- And in *White [v Knickerbocker Ice Co.]*, where we held that a conveyance "along the south side of the Rockland Lake" conveyed land to the center, we said that a conveyance of land "by the shore" or "to the bank" (254 NY at 156 ) or "to the edge or margin of the lake" (id. at 158 ) would convey only shore land.

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### Knapp v. Hughes

- HOLDING:
- We conclude, however, that this and similar dictums were mistaken and should not be followed. The effect of a grant should not turn on such fine distinctions as that between "side" and "edge." To make a plain and express reservation of rights to underwater land, a grantor must do more than use the word "edge" or "shore" in a deed. He or she must say that land under water is not conveyed, in those words or in words equally clear in meaning. In the absence of an explicit reservation, a grant of land on the shore of a pond or stream will be held to include the adjoining underwater land, except in unusual cases where the nature of the grant itself shows a contrary intention.

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### Knapp v. Hughes

- RESULT:
- Defendants were the owners of the land underwater of Perch Pond as it adjoins their upland property.

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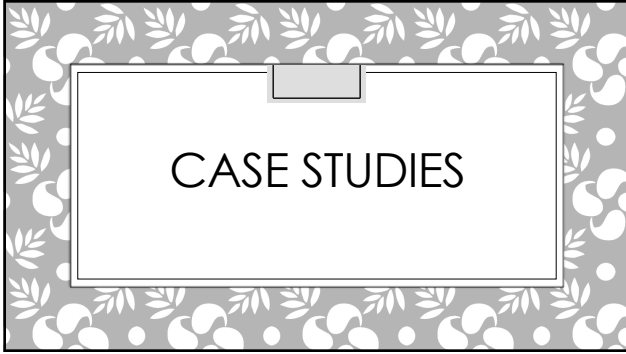
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Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- *Macklowe v. Trustees of the Freeholders & Commonality of the Town of East Hampton*, 34 Misc.3d 1237 (A) (Sup. Ct. Suffolk Co., 2012)
- *Steers v. Brooklyn*, 101 N.Y. 51 (1885)
- *Cramer v. Perine*, 251 N.Y. 177 (1929)

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Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- Boundary dispute regarding a peninsula of accreted land along the Little Salmon River near its outlet to Lake Ontario, in the Town of Mexico, New York
- Four surveys over time showed the changes to the shoreline
  - 1955 King Survey
  - 1965 Hackett Survey
  - 1986 Getman Survey
  - 1988 Venditti Survey

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### Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- The three properties in question were located near a 90 degree bend in the Little Salmon River
- The shoreline and centerline of the stream changed drastically over the years
- The disputed land, the peninsula, was outside of the deed descriptions of all three properties.

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### Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- Deeds:
  - Ludington was from the CL of Route 40, 490 Feet more or less to the low water mark of Salmon River, thence running along the low water mark 160 feet.
  - In 1965 Hackett measured 550 feet to the low water mark of Salmon River from the road
  - Marsden property measured 620 feet from CL of road to CL of Little Salmon Creek
- The Marsden and Ludinton BL was cotextensive on the same bearing, except that Marsden's BL ran to the CL of the creek

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### Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- Deeds:
- Marsden then merged his two lots and re-divided them, conveying one lot (lot 12) to Koehler
- The West lines of those lots were on the same bearing as the East line of Ludinton
- At the time of the re-subdivision by Marsden, lot 11 was partially underwater.
- The western boundaries of Lots 11&12 no longer correspond with the center of the River

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### Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- Supreme Court awarded most of the Peninsula to Ludinton, and a small amount to Marsden, finding that Lot 11 was not a riparian lot, so the Koehlers got no part of the peninsula.
- Appellate Division: preserved the water frontage in proportion to that of the lands initially conveyed.

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### Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- "The fact that the centerline and shoreline of the river have shifted west in relation to the Marsden and Koehler properties and south in relation to the Ludington property cannot have the effect of enlarging anyone's deed description. The changed shoreline merely results in more or less of a particular party's deeded property being currently under water. The deed boundaries remain the same and, thus, the deeds provide no basis for granting priority of title to any party, but merely establish reference points for dividing the disputed property pursuant to principles of riparian law."

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# Case Studies

- *Ludinton v. Marsden*, 181 A.D.2d 176 (4th Dept 1992)
- We find that the subject property is properly apportioned by drawing two lines from (and perpendicular to) the present centerline of the Little Salmon River to two points on the western boundary of lot 12.

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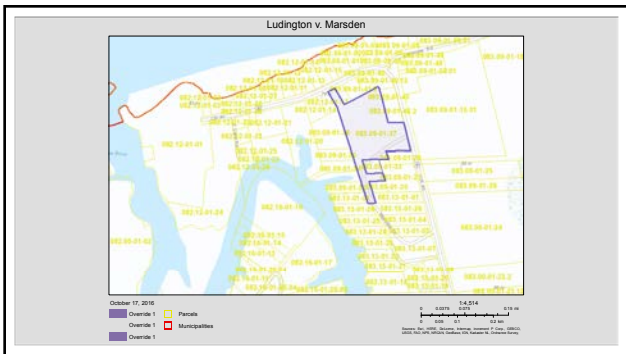
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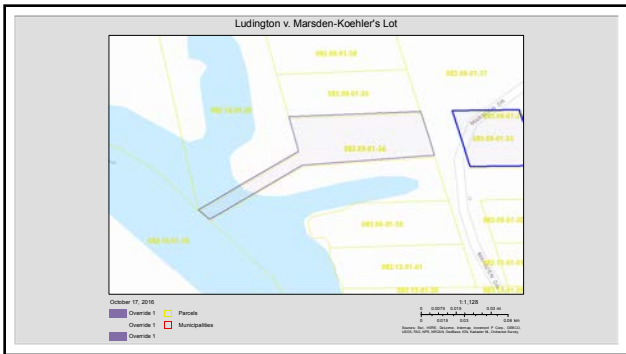
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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc. 3d 1237 (A) [Sup. Ct. Suffolk Co., 2012] aff'd 110 A.D.3d 944 [2<sup>nd</sup> Dept 2013] lv. to app. den. 22 N.Y.3d 861 (2014).




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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc. 3d 1237 (A) [Sup. Ct. Suffolk Co., 2012]
- ISSUE:
- Whether a natural object set forth in a deed description must be fixed and permanent or can it be ambulatory?

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc. 3d 1237 (A)
- FACTS:
- In 1900 the Town had conveyed by quit claim deed some of the foreshore to the Plaintiffs' predecessors in title to resolve boundary disputes that then existed along the beachfront known as South Beach
- The 1900's deeds called to a line along the average southerly line of beach grass
- By deed dated 1930, a specific distance of 385.5 feet to the grass line appears in a deed in Plaintiffs' chain of title.
- 80 years of recorded measurements of the grass demonstrates certainty and reliability over a reasonable period of time

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc.3d 1237 (A) (Sup. Ct. Suffolk Co. 2012) aff'd 110 A.D.3d 964 (2<sup>nd</sup> Dept 2013).
- ANALYSIS:
- The area of the parcel set forth in the 1992 deed to Plaintiff must fail since area has the lowest preference as a call and must yield to the natural object call.
- A grant of land bounded by or along a "beach" ordinarily is synonymous with "shore" or "strand" (citing to Trustees v. Kirk, Supra)
- BUT when a "beach" is made the boundary of the lands, other clauses in the deed and the situation of the lands granted may authorize a different interpretation

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc.3d 1237 (A) (Sup. Ct. Suffolk Co. 2012) aff'd 110 A.D.3d 964 (2<sup>nd</sup> Dept 2013).
- ANALYSIS:
- The call "THENCE along the said average southerly line of beach grass"
- Was a call to a natural monument that was visible and found with relative ease by the surveyors
- The Court average beach grass line maintains the degree of definiteness and visibility necessary for the designation as a call to a monument, notwithstanding the fact it is ambulatory as is the nature of the high water mark

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc.3d 1237 (A) (Sup. Ct. Suffolk Co. 2012) aff'd 110 A.D.3d 964 (2<sup>nd</sup> Dept 2013).
- ANALYSIS:
- The call "THENCE along the said average southerly line of beach grass"
- Was a call to a natural monument that was visible and found with relative ease by the surveyors
- The Court HELD the average beach grass line maintains the degree of definiteness and visibility necessary for the designation as a call to a monument, notwithstanding the fact it is ambulatory similar to a high water mark

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc.3d 1237 (A) [Sup. Ct. Suffolk Co. 2012] aff'd 110 A.D.3d 964 [2<sup>nd</sup> Dept 2013].
- ANALYSIS:
- the court dismisses the first and third causes of action which seeks a declaration that the south boundary of plaintiffs' property is the high water mark of the Atlantic Ocean and that their property retains its littoral rights. The deeds in question do not describe the boundary as the high water mark and the claim was abandoned by plaintiffs during the trial.

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### Case Studies

- Macklowe v. Trustees of the Freeholders & Commonality of the Town of E. Hampton, 34 Misc.3d 1237 (A) [Sup. Ct. Suffolk Co. 2012] aff'd 110 A.D.3d 964 [2<sup>nd</sup> Dept 2013].
- ANALYSIS:
- Moreover, while the plaintiffs continue to argue a claim of rights as littoral proprietors, the Court rejects same. Any accreted sand that extends the beach seaward is being added to the trustee beach lands between the high water mark and "the average southerly line of beach grass on the beach of the Atlantic Ocean." Since to be a riparian owner one must be an owner with a boundary on the ocean (see generally Thury v Britannia Acquisition Corp., 292 AD2d 373, 374, 738 NYS2d 82 [2d Dept 2002]), **plaintiffs cannot claim to possess littoral rights.**
- However, as inhabitants of the Town of East Hampton, the plaintiffs' possess the right of access to the waters of the Atlantic Ocean and the beach land owned by the Trustees.

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### Case Studies

- Steers v. Brooklyn 101 N.Y. 51 (1885)

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## Case Studies

- *Steers v. Brooklyn*, 101 N.Y. 51 (1885)
- Steers was granted land by special act of the Legislature which vested him to title to half of Java Street and extending to the water line (subject to the public easement for highway purposes) and
- that he had the right to maintain a wharf in front of his property.
- Brooklyn then filled in a pier at the end of Java Street and collected wharfage.

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## Case Studies

- *Steers v. Brooklyn*, 101 N.Y. 51 (1885)
- The pier was considered an accretion and so much of it that was in front of Plaintiff's property was considered his



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## Case Studies

- *Steers v. Brooklyn*, 101 N.Y. 51 (1885)
- "Natural justice requires that such accretion should belong to the upland owner so that he will not be shut off from the water, and thus converted into an inland rather than a littoral owner. The same rule should be applied for the same reason where the soil in front of the upland has been wrongfully placed there by human hands. The wrong-doer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrong-doer, the accretion attached to his soil as an extension thereof."

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## Case Studies

- *Cramer v. Perine*, 251 N.Y. 177 (1929)
- Parcel of Land in 1888 a city block in the city of Buffalo
- Bounded by Yale Place, Princeton Place, Seneca Street and the Cazenovia Creek

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## Case Studies

- *Cramer v. Perine*, 251 N.Y. 177 (1929)
- Common grantor filed a subdivision map in 1888
- There were considerable accretions to the lots on Yale Place which had the Cazenovia Creek as a boundary by 1904 when the lots were conveyed by reference to the filed subdivision map
- These accretions were not within the lot lines of lots 86 and 87 of the map
- Lots on Princeton Place were then conveyed by reference to the map together with all right title and interest the grantor has to the Cazenovia Creek

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### Case Studies

- *Cramer v. Perine*, 251 N.Y. 177 (1929)
- Property owners on Princeton Place were claiming the accretions that adjoined the properties on Yale Place, effectively cutting them off from the water
- The street stopped before the creek and the end of the street got further and further away from the creek as more accretions were added, so bounding the land by the street made it seem that it no longer went west to the creek.

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### Case Studies

- *Cramer v. Perine*, 251 N.Y. 177 (1929)
- There are few cases in the books dealing with the division of accretions to land in blocks bounded by city streets. Such cases as there are, show that these circumstances may present ground for departure from ordinary methods of allocation. In proper case, division may then be made by prolonging the lines of the streets and the side boundaries in a direction parallel to these streets.

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## SURFACE WATER

The common enemy

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### Rule

- "It is well established that although an upland owner is not generally liable to a lowland owner for an in-creased flow of surface water resulting from re-grading or general improvements to his property, he may be liable if he collects storm water by means of pipes or ditches and discharges it upon neighboring property causing damage."
- *Zuff v. State*, 19 Misc. 3d 1131(A) (Ct. of Claims, 2006)

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### Liability for Divergence

- A landowner is liable for damages to an abutting owner when they intentionally divert surface waters by artificial means, such as by ditches, pipes and berms, onto another's real property.
- See *Tremblay v. The Harmony Mills*, 9 Bedell 598 (1902); *Osgood v. Bucking-Reddy*, 202 A.D.2d 920 (3d Dept 1994); *Cottrell v. Hermon*, 170 A.D. 2d 910 (3d Dept 1991); *Long v. Sage Estate Homeowners Association, Inc.*, 16 A.D.3d 963 (3d Dept 2005).

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### Liability for Divergence

- A party seeking to recover must demonstrate that the improvements caused the surface water to be diverted, "that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendant's property."
- *Cottrell v. Hermon*, 170 A.D. 2d 910, (3d Dept 1991).

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## Liability for Divergence

- If the party performed the improvement in good faith, in a proper manner they are not liable.
- See *Cottrell* supra at 911. [where defendant was not found liable for patio built on her property which cast the water towards plaintiffs property].

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## Liability for Divergence

- The rule applies between municipalities and private owners as well as between two private owners.
- *Zuff v. State*, 19 Misc.3d 1131(A) (Ct. of Claims, 2006)

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## Case Studies

- *Tremblay v. The Harmony Mills*, 9 Bedell 598 (1902)
- *Osgood v. Bucking-Reddy*, 202 A.D.2d 920 (3d Dept 1994)
- *Cottrell v. Hermon*, 170 A.D.2d 910 (3d Dept 1991)
- *Long v. Sage Estate Homeowners Association, Inc.*, 16 A.D.3d 963 (3d Dept 2005).
- *Zuff v. State*, 19 Misc.3d 1131(A) (Ct. of Claims, 2006)

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### Case Studies

- Tremblay v. The Harmony Mills, 9 Bedell 598 (1902)
- "the question presented on this appeal is whether the trial court erred in instructing the jury that if the defendant was negligent in maintaining a leader from the roof of a building so as to discharge water on the sidewalk by which ice was accumulated thereon and the walk rendered dangerous"

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### Case Studies

- Tremblay v. The Harmony Mills, 9 Bedell 598 (1902)
- "As between private owners, as long as one leaves his land in its natural condition he is not required to adopt measures to prevent the flowage of surface water from his premises on those of his neighbor, (internal citations omitted)
- But when he puts a structure on his land a contrary rule prevails, and he must take care of the rain or snow that falls thereon, except in case of extraordinary storms.
- Even when such an owner erects no structure he cannot 'collect the surface water into channels and discharge it upon the land of his neighbor to his injury.'

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### Case Studies

- Osgood v. Bucking-Reddy, 202 A.D.2d 920 (3d Dept 1994)
- Supreme Court found that defendant had altered the topography of her land to create ponds and had constructed and modified a ditch along her division line with plaintiff's adjoining lower property, which changes resulted in the diversion of surface waters onto plaintiff's property causing flooding and erosion.

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### Case Studies

- *Osgood v. Bucking-Reddy*, 202 A.D.2d 920 (3d Dept 1994)
- Appellate Division: "Here, credible testimony by plaintiff established that defendant directed a drainage ditch toward her property causing erosion. The flow of water from defendant's property caused a continuation of the ditch across plaintiff's property. Plaintiff's testimony also established that along another side of her lot, defendant built a retaining dam which caused the drainage water to back up across her property."

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### Case Studies

- *Cottrell v. Hermon*, 170 A.D. 2d 910 (3d Dept 1991)
- Plaintiff and defendant are the owners of adjoining townhouses located on Haystack Road in the Town of Clifton Park, Saratoga County.
- Plaintiff's townhouse is set back 13 feet farther from the road than is defendant's townhouse and it is approximately 1 1/2 feet lower in elevation.
- A 13-foot rear portion of plaintiff's home which abuts defendant's property is aligned with defendant's backyard concrete patio

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### Case Studies

- *Cottrell v. Hermon*, 170 A.D. 2d 910 (3d Dept 1991)
- Plaintiff... "submitted no proof in evidentiary form tending to establish that defendant maintained, repaired or altered the patio by using artificial means such as pipes, drains or ditches to divert surface water onto plaintiff's property. In this regard, we note that plaintiff's assertion that the patio itself constitutes "artificial means" is entirely inconsistent with the Court of Appeals' decision in *Kosoff v Rathgeb-Waish* (3 NY2d 583, *supra*)
- *Patio was not constructed in bad faith, therefore no liability for surface water diversion*

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### Case Studies

- Long v. Sage Estate Homeowners Association, Inc. 16 A.D.3d 963 (3d Dept 2005).
- Plaintiff's residence, located on a lot in the Village of Menands, Albany County, is abutted on its westerly side by two uphill parcels, one owned by third-party defendant St. Joan of Arc Church and the other by defendant Gary L. Greenhouse.

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### Case Studies

- Long v. Sage Estate Homeowners Association, Inc. 16 A.D.3d 963 (3d Dept 2005).
- Greenhouse built an extension onto an existing berm and planted 50 pine trees on top
- In the fall of 1996, during a severe rainstorm, portions of the berm washed out, plaintiff's property was flooded and tons of sand and silt were dumped onto his lot.
- Berm constituted artificial means, Greenhouse was liable

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### Case Studies

- Zuff v. State, 19 Misc.3d 1131(A) (Ct. of Claims, 2006)
- What this case involves, however, is consideration of what duty the State owes its neighbors. **It would appear to be simply unfair for the State to willy nilly discharge water across private land without permission**, and without any responsibility for assuring that water it sends across private property does not wreak havoc to anything in its path.

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### Case Studies

- *Zuff v. State*, 19 Misc.3d 1131(A) (Ct. of Claims, 2006)
- It is well established that although an upland owner is not generally liable to a lowland owner for an in-creased flow of surface water resulting from re-grading or general improvements to his property, he may be liable if he collects storm water by means of pipes or ditches and discharges it upon neighboring property causing damage.

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### Case Studies

- *Zuff v. State*, 19 Misc.3d 1131(A) (Ct. of Claims, 2006)
- Moreover, if collected storm water is discharged into an already existing natural water-course, liability will nonetheless attach if the resulting flow of water overburdens the receiving channel.
- State did not prove it had a prescriptive easement for the flowage.
- Court directed an immediate trial.

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THE END

Questions?  
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(312) 696-4112

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