

RIPARIAN LAW IN NEW YORK STATE

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Introduction

- Riparian Rights are rights of use
 - There is no absolute property interest can be acquired in flowing water
 - *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 NY 38 (1919)
 - As a right of use, subject to the right of the state and rights equal with theirs, in the owners on the opposite bank.
 - Riparian owners have the right to maintain the waterway for the purpose of reasonable use for which it was intended
 - *Nassau Point Lagoon Inc. v. Burrell*, 2017 Slip Op 32796 (Suffolk Co. 2017).

Introduction

- Riparian Owner has rights incidental to the their ownership of the uplands
- Riparian Rights cannot be impaired or diminished without due process and just compensation
- A Riparian Owner's right to the natural flow of water along its land is properly classified as "real property" equally with the land.
- A party can acquire an interest in the water flow separate and distinct from the land under the water.

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DEFINITIONS

The key to understanding Riparian Law

Littoral

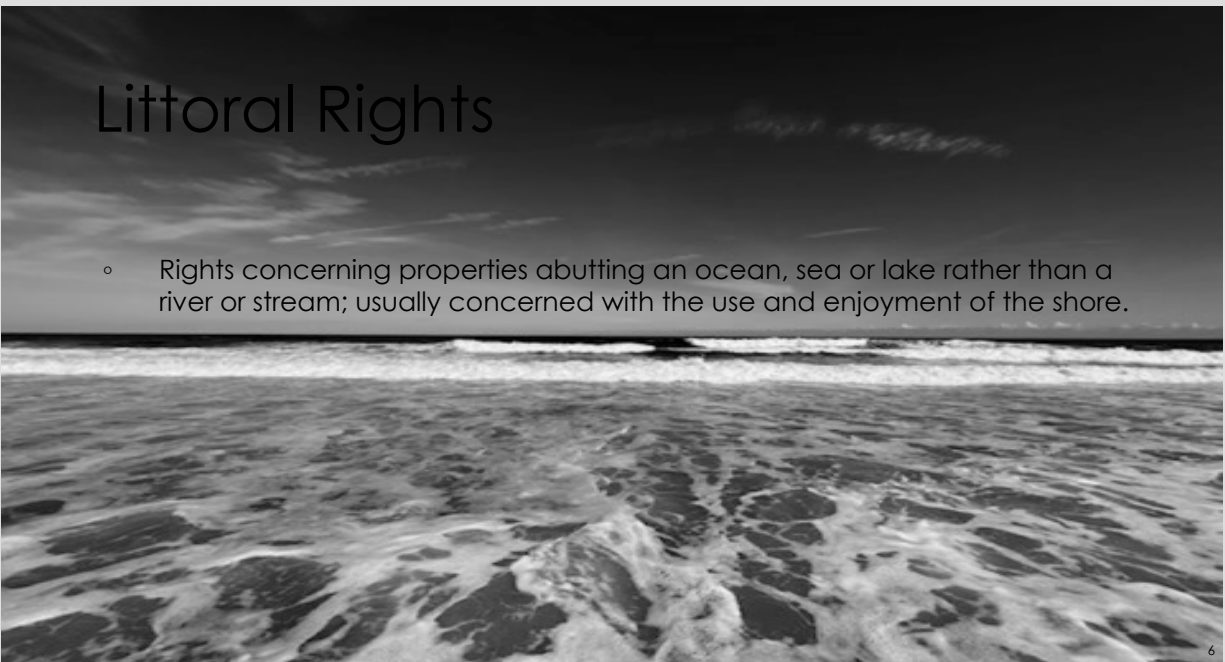
- Belonging to the shore, as of the sea and great lakes



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Littoral Rights

- Rights concerning properties abutting an ocean, sea or lake rather than a river or stream; usually concerned with the use and enjoyment of the shore.



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Riparian

- Belonging to or relating to the bank of a river or stream; of or on the bank.
- Land lying beyond the watershed of a stream is not riparian.



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Riparian Owner

- One who owns the land on the bank of a river, or one who is the owner of land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with the rivers.

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Riparian Rights

- Riparian rights are such as grow out of the ownership of banks of streams and not of the ownership of the bed of the stream.
- The distinction between tide waters and fresh, or between public and private waters, is not necessarily a material consideration in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of land contiguous to the water, and are the same whether the proprietor of such lands owns the soil under the water or not."
- *Squaw Island Freight Terminal Co. v. Buffalo*, 273 NY119 (1937)

Riparian Rights

- The rights of the owners of lands on the banks of watercourses relating to the water, its use
- Sometimes also the ownership of soil under the stream, and
- the right to claim ownership of accretions and relictions
- Rights of flowage and ponding rights (to construct and use a dam) and rights appertaining thereto



Riparian Rights

- Limitations: Whether or not a use or detention of the water is reasonable is a case by case determination.
- Depends upon:
 - The capacity of the stream
 - The uses it has been put and
 - The rights of other owners on the stream have.
- United Paper Board Co. v. Iroquois Pulp & Paper Co. 226 NY 38 (1919).



Riparian Rights

- The right of access to the navigable part of the body of water in front of their property
- An easement of access over the foreshore and to the navigable portion of the water.
- For the purpose of loading and unloading boats, drawing nets and the like, which includes wharfing out, without creating a nuisance to navigation
- Whatever might be held to be necessary for the practical enjoyment of the right of access for such purposes
- Subordinate to the right of the public to use the water for navigation
- Foreshore may be used unless it has been appropriated by the government to some superior and lawful public use.
- Subject to the rules the legislature may impose for the protection of public rights in the navigable waters
- *Trustees of Brookhaven v. Smith*, 188 N.Y. 74 (1907)

Riparian Rights

- The right to use the water of a flowing stream which may be severed from the riparian land by grant, condemnation, relinquishment or prescription.
- Owners of such property might release it or grant it to another or restrict or reserve it as owners to specified uses or places.
- *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 NY 38 (1919)



Riparian Rights

- An easement of access may be narrowed by the landowner see *Lewis v. Young*, 92 N.Y. 443 (1998)
- An easement cannot be severed from the land it is appurtenant to
- IN CONTRAST:
- Riparian access cannot be constricted or reduced.
- The Riparian Owner is entitled to pass across the foreshore along their **entire frontage**. *Tiffany v. Oyster Bay*, 234 N.Y. 15 (1922)
- Riparian rights can be severed from the land they are appurtenant to.

Riparian Rights - Severance

Riparian rights are classified as "real" property in the common law

When the riparian right is separated from the riparian land, it becomes an incorporeal hereditament. See *NiMo Power Co. v. Culter*, 109 A.D.2d 403 (3rd Dept 1985)

What is an *incorporeal hereditament*?
An intangible right derived from real or personal property.



Riparian Rights - Severance

Incorporeal means: unable to be physically seen or handled, without form, intangible.
Hereditament means: it can be passed down by inheritance, any kind of property that can be inherited

COMPARE:

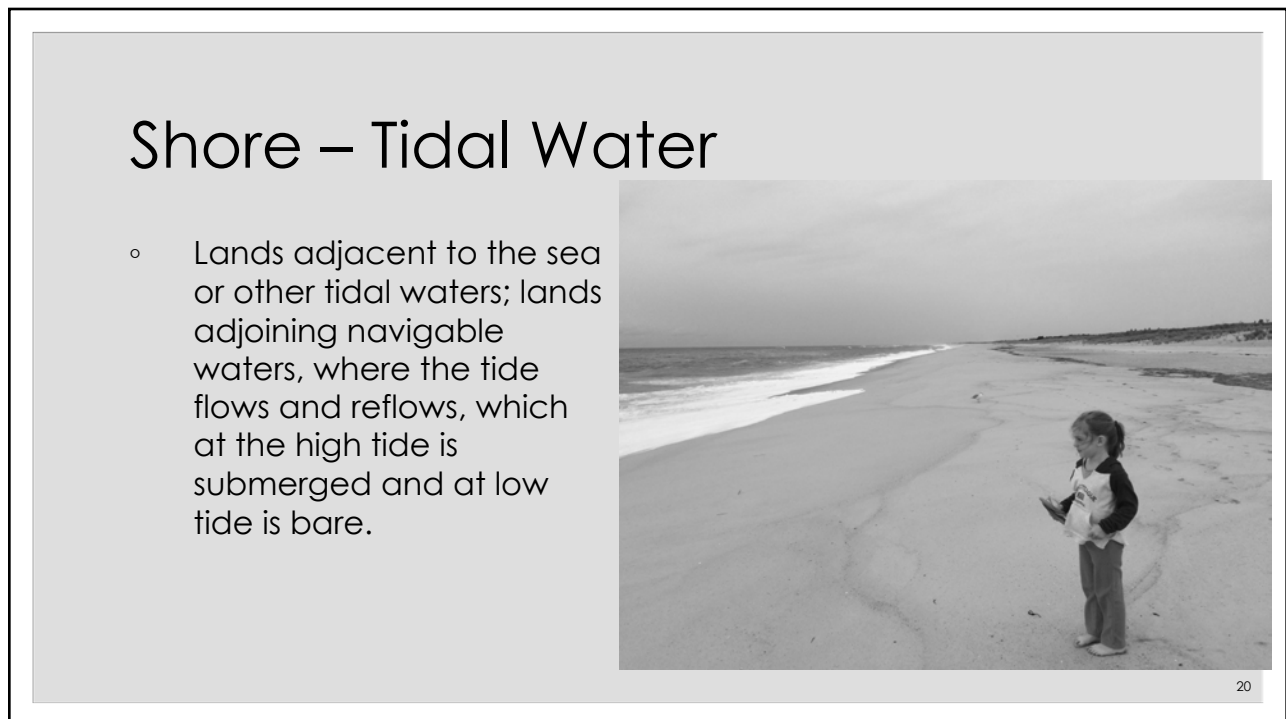
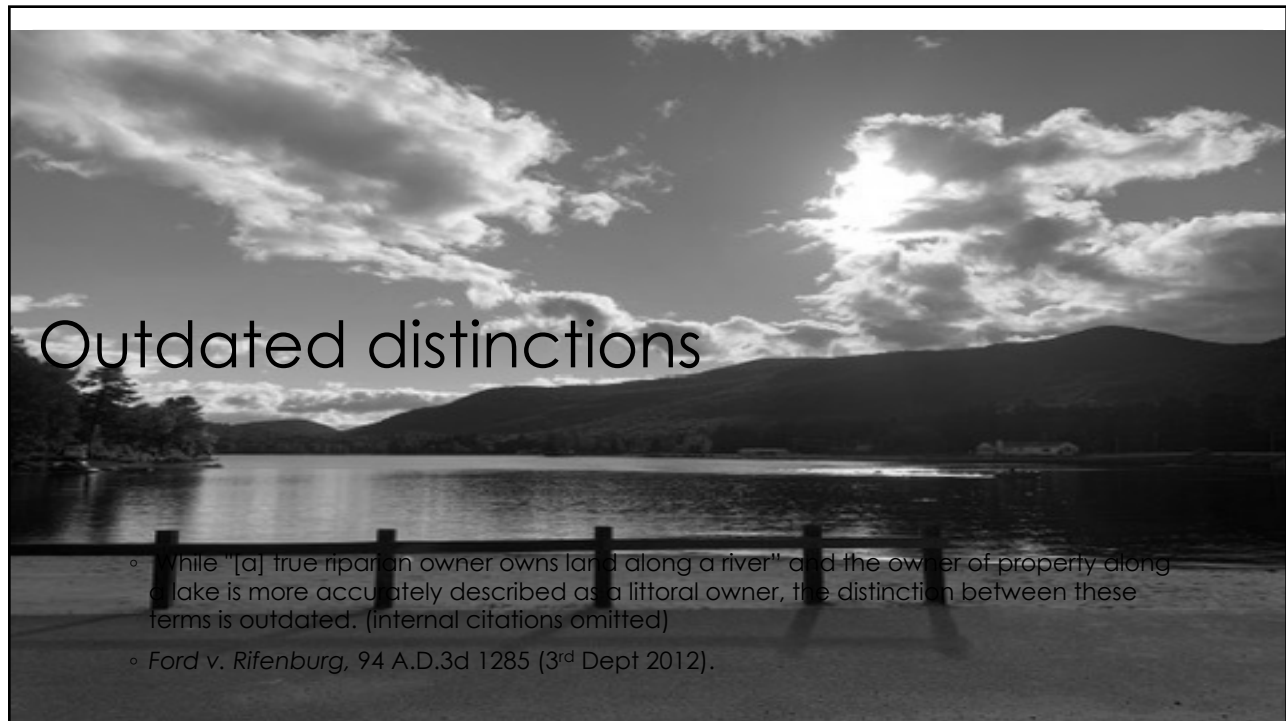
A *corporeal hereditament* means a tangible part of the property, like minerals, coal, timber, stone, houses, buildings etc.

Riparian Rights – the Head

- The Term "head" refers to the difference in height of the water behind the dam and that below the dam
- The "head" is not taxable real property based upon
 - how "real property" is defined in the Real Property Tax Law, but it is "real property" under the common law.
- The right to use the "head" involves the right of a riparian owner to a reasonable use of the natural stream over his premises, which includes the right to temporarily detain it by a dam to furnish power.

Riparian Rights – the Head

- In NiMo Power Co. v. Cutler there was a challenge to the assessment of the property owner that included the right to the additional head of the dam on the Sacandaga River
- The petitioner had conveyed to the District the land but had retained the right to 15 feet of "head."
- The reservation of the "head" severed that riparian right from the land and converted it to an incorporeal hereditament. The right to the additional "head" remained in riparian the landowner, but for the purpose of taxation was considered a "license" rather than "real property" and it was not taxable.



Shore Non-Tidal

- The edge of the water, where-ever it may be, the low water mark. *Stewart v. Turney*, 237 N.Y. 117 (1923).
- The Court in *Stewart* specifically avoided defining the low water mark as either being the mark to which the water may sink in extraordinary seasons or simply at its ordinary and usual low level.
- Usually where there is no vegetation or where the water leaves a distinct trace, either by of erosion, destruction of vegetation or other easily recognized characteristics

The Foreshore-Tidal Waters

- The land under the waters of the sea and its arms, between high and low water mark.
- 1) subject to the public's right of navigation and when the tide is out, the right of access to the water for fishing, bathing, and other lawful purposes to which the right of passage over the beach may be a necessary incident. Known as the *Jus Publicum*.
- 2) subject to the rights of the owner of the foreshore, to the oyster beds, to use the beach for navigation, commerce, fishing and bathing. Known as the *Jus Privatum*.
- 3) subject to the rights of the riparian owner to use of the foreshore for reasonable, safe and convenient access to the water for navigation, fishing and other uses commonly belonging to riparian owners.
 - *Tiffany v. Oyster Bay*, 234 N.Y. 15 (1922)

Tiffany v. Oyster Bay (1922)

- Cold Spring Harbor – 1677 Gov. Andros Patent conveyed to the Town of Oyster Bay
- Town was the owner of the foreshore
- Tiffany was the Riparian owner of the uplands
- Tiffany cleared out a ship wreck on the beach and added some fill
- The Town claimed the filled in area decided to build a bathhouse on it
- Lawsuits

Tiffany v. Oyster Bay (1922)

- Town's proposed project interfered with Tiffany's right as a Riparian Owner even though Tiffany could still access the water by going around the bath house
- Tiffany's fill was a trespass on the foreshore but that did not extinguish his Riparian Rts.
- Equitable merger does not occur when the owner of the uplands and foreshore is in the same person.



Shore Line

- Boundary of lands adjoining tidal waters is the line marked by the high tide or high water mark.
- Boundary of lands adjoining non-tidal, navigable waters is the line marked by the low water mark



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Thread of a River and Lake

- The thread of a river is the line formed equal distance from the shores, and is not to be confused with the center of the main channel which may be closer to one bank than to the other.
- The thread of the lake is the centerline which passes through the thread of the inlet and the thread of the outlet.
- Where there is no inlet or outlet, the thread passes through the center of the lake on its longest axis.
- The thread of a river or lake is determined at its ordinary and natural stage.

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Navigable vs. Non-navigable

- At common law, reference to a body of water as "navigable" was a reflection of the State's ownership of lands underwater.
- At common law, reference to a body of water as "non-navigable" was a reflection of private ownership of the lands underwater, even if the waters were "navigable in fact"

Navigable in Fact

- Streams or lakes are navigable in fact when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel are or may be.
- Navigable in its natural or unimproved condition affording a channel for useful commerce of a substantial and permanent characters conducted in the customary mode of trade and travel on water. A theoretical potential navigability or one that is temporary, precarious and unprofitable, is not sufficient but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.

Navigable in Fact

- "[A] river is, in fact, navigable, on which boats, lighters or rafts may be floated to market ...[Additionally,] the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks. It is not essential to the right, that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can, ordinarily, be carried safely, without such guidance If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported"
- ALC v. Sierra Club quoting Morgan v. King

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Navigable in Fact

Meaning:

- A navigable in fact waterway is a public highway
 - similar to how public highways can be fee owned or merely easements for public travel
- Subject to the public right of navigation, which includes portage on private lands
- Recreational use may be part of the navigability analysis.

Adirondack League Club, Inc. v. Sierra Club et al., 92 N.Y.2d 591 (1998)

Friends of Thayer Lake, LLC v. Brown, 27 N.Y. 3d 1039 (2016)

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Navigable in Fact

Navigability Analysis:

- o The waterway's historical and prospective commercial utility
- o The waterway's historical accessibility to the public
- o The relative ease of passage
- o The volume of historic travel
- o The volume of prospective commercial and recreational use.

Friends of Thayer Lake, LLC v. Brown, 27 N.Y. 3d 1039 (2016)

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Navigable by Law

- o Based on English common law definitions of navigable waters; a river or stream in which the tide ebbs and flows; or as far as the tide ebbs and flows
- o In England their rivers are short and affected by the tides, so essentially all of their rivers and waters are owned by the sovereign, the Crown.
- o Non-tidal waters were considered "non-navigable" with title under them being held in the adjacent land-owner
- o This definition was abandoned as impractical by the NYS Courts.
- o Town of North Elba v. Grinditch, 98 A.D.3d 183



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Navigable by Law

- Where judicially determined to have state ownership, the waters are Navigable by Law.
 - Tidal waters
 - Boundary waters
 - Hudson & Mohawk Rivers
 - Certain major inland lakes based on size, character and history

Navigable Waters of the State

- Navigation Law Section 2(4)
 - “Navigable waters of the state” means “All lakes rivers streams and waters within the boundaries of the State and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on the boundaries of Nassau and Suffolk Counties”
 - This definition is only applicable to this statute and does not otherwise define the State's powers. See *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).



OWNERSHIP OF LANDS UNDER WATER

Ownership of Lands Under Water

- Depends on the history and paper interpretation of the chain of conveyance beginning with the source of title
- Title sources are usually either:
 - Original grants from State OR
 - Grants from colonial representatives of the British Crown

Ownership of Lands Under Water

- New York State derives its ownership in lands underwater based upon what was at the time defined as the state's navigable waters
- Even where the lands underwater are privately owned, if the waters are navigable, the public has an easement to use the watercourse or body of water for travel like other highways generally
 - This includes: "the privilege to make use, when absolutely necessary of the bed and banks, including the right to portage on riparian lands." *ALC v. Sierra Club*, 92 NY2d 591, 607 (1998).

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Ownership of Lands Under Water

- Determining ownership of lands lying under water:
 - Determine whether the particular body of water in question is navigable and if navigable:
 - whether the crown granted title to the lands, including the land under water to any private party or entity prior to the date when title to all the lands of the Crown vested in the State of New York

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Ownership of Lands Under Water

General Rule:

"Nontidal waters, with the exception of those that the courts have deemed to be owned by the State in its sovereign capacity are owned in a proprietary capacity by the riparian owners."

Town of North Elba v. Grimditch, 98 A.D.3d 183 (3rd Dept., 2012).



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Ownership of Lands Under Water

- Ownership of lands underwater is determined only by whether the body of water is *navigable in law*
 - Early English Rule that all waters which are affected by the tide are navigable and all others non-navigable **has not** been followed by New York Courts: See *Dolphin Lane Associates v. Town of Southampton*, 72 Misc 2d 868 (1971); *Trustees of Brookhaven v. Smith*, 188 N.Y. 74 (1907)
 - Notwithstanding the foregoing, most of the lands under NY's tidal waters are owned by the state, while tide-less fresh water MAY be privately owned.

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Ownership of Lands Under Water

In New York:

- Generally if the body of water may be put to public transportation and commercial use it is navigable.
- Navigability in Fact relates to the right to use waterway, not ownership of the fee
- Recreational use is part of the analysis
- See *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 168 (1998).

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Ownership of Lands Under Water

◦ In New York:

- Small non-navigable inland lakes and ponds:
 - Presumption that title is in the adjacent owners and that a grant of land adjacent to such bodies of water conveys title to the center thereof unless the description specifically excludes it
- RESULT: must go back to root title unless have judicial declaration as to ownership but even then your particular chain of title may prove differently

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Ownership of Lands Under Water

Absent an express and unequivocal intent to the contrary, the British Monarch and later the State, retained ownership of the fee to the bed of navigable in law waterways pursuant to the Public Trust Doctrine.



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Ownership of Lands Under Water

- Attempts by early courts to expand the presumption of state ownership to navigable in fact waterways was later limited to the Hudson and Mohawk Rivers



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Ownership of Lands Under Water

In Summary:

the State owns, in its sovereign capacity, the land under:

- The "Marginal Sea" to a line three miles from the coast,
- The Great Lakes within the State's territorial jurisdiction
- Lake Champlain
- the St. Lawrence and Niagara Rivers
- the Hudson and Mohawk Rivers
- Coney Island Creek

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Ownership of Lands Under Water

In Summary:

the State owns, in its sovereign capacity, the land under:

- and certain major inland lakes, based on their size, character and history including:
 - Lake George (People v. System Props., Inc. 2 NY2d 330 (1957))
 - Cayuga Lake (Stewart v. Turney, 237 NY 117 (1923))
 - Canandaigua Lake (Granger v. City of Canandaigua, 257 NY 126 (1931))
 - Oneida Lake (Roth v. State of New York, 262 AD 370 (4th Dept. 1941))
 - Keuka Lake (Rogers v. South Slope Holding Co., 172 Misc. 2d 33 (Sup. Ct. Yates Co. 1997))
 - Lake Mahopac (Town of Carmel v. Melchner, 105 A.D.3d 82 (2nd Dept 2013))
- Excluding:
 - Lake Placid (Town of North Elba v. Grimditch, 98 A.D.3d 183 (3rd Dept 2012))
 - Copake Lake (Land & Lake Ass'n v. Conklin, 182 A.D. 546 (4th Dept. 1918))

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Ownership of Lands Under Water

- Other Exceptions may include:
 - a. Genesee River at mouth on lake Ontario
 - b. Allegheny River

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Ownership of Lands Underwater

- Case Studies:
 - *Douglaston Manor v. Bahrakis*, 89 NY2d 472 (1997)
 - *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998),
 - *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012),
 - *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)

Ownership of Lands Underwater

- Case Studies: **Navigable in Fact vs. Navigable by Law**
- Douglaston Manor v. Bahrakis, 89 NY2d 472 (1997)
- Salmon River in Oswego County
- Salmon River empties into Lake Ontario
- Douglaston owned a 1 mile section on both sides of the River, and Ten islands within the River
- Defendants (commercial fishing guides) navigated down river and fished on Douglaston's portion of the River

Ownership of Lands Underwater

- Case Studies:
- Douglaston Manor v. Bahrakis, 89 NY2d 472 (1997)
- Douglaston argued that fishing rights were exclusive it because it owned the lands underwater
- Defendants argued that the right of "navigation" included the right to fish and that the distinction between Navigable in Fact and Navigable at Law should be abandoned.
- Defendants wanted "Navigable" to be a generic term that would have allowed them to fish as if the State owned the fee to the bed of the river

Ownership of Lands Underwater

- Case Studies:
- Douglaston Manor v. Bahrakis, 89 NY2d 472 (1997)
- Douglaston traced title to the Macomb Patent, which did reserve Gold and Silver and 5 acres of land for highways, but did not reserve public fishing rights



Ownership of Lands Underwater

- Case Studies:
- Douglaston Manor v. Bahrakis, 89 NY2d 472 (1997)
- "[T]he easement of passage over navigable waters does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator"
- Justice Bellacosa, citing to *Smith v. O'Dell*, 234 NY 267, at 272.

Ownership of Lands Underwater

- Case Studies:
- Douglaston Manor v. Bahrakis, 89 NY2d 472 (1997)
- HOLDING:
- "Thus, this Court has maintained that the long-standing public easement of navigation in navigable-in-fact rivers does not sweep away or displace other rights accompanying the private ownership of the bed of a navigable-in-fact river, including that of exclusive fishery."
- Similar to the distinction between fee owned highways vs. an easement for highway purposes.

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)



Little Moose Lake
Sept. 22, 2012

Ownership of Lands Underwater



- South Branch of the Moose River
- Near Old Forge, NY
- Herkimer Co.
- ALC owns approximately 50,000 Acres
- Approximately 12 miles of the South Branch runs through their property.

Ownership of Lands Underwater



Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- **Facts:**
- In 1991, three people, two in canoes and one in a kayak traveled down the South Branch which required **several portages**.

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- **Facts:**
- The South Branch was last used for transporting logs in 1948
- There was a dispute whether artificial means (dams) were used to obtain sufficient water flow for logging drives between 1929 and 1948

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- ALC sued for Trespass.
- ALC argued that Navigable-in-fact meant that the river was practically useful for trade or travel, i.e. commercial purposes.
- Defendants argued that Navigable-in-fact included recreational uses.

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- **Issue:** Whether the South Branch of the Moose River was Navigable-in-fact.
- **General Rule:**
- "As a general principle, if a river is not navigable-in-fact, it is the private property of the adjacent landowner. If, however, a river is navigable-in-fact, it is considered a public highway, notwithstanding the fact that its banks and bed are in private hands." citing to *Morgan v King*, 35 NY 454 .

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- "[A] river is, in fact, navigable, on which boats, lighters or rafts may be floated to market ...[Additionally,] the public have a right of way in every stream which is capable, in its **natural state and its ordinary volume of water**, of transporting, in a condition fit for market, the products of the forests or mines, or of the fillage of the soil upon its banks." *Id.* Citing to *Morgan v King*, 35 NY 454 .

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- Thus, while the purpose or type of use remains important, of **paramount concern is the capacity of the river for transport**, whether for trade or travel.

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- "We only hold that such transport need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for travel or transport nevertheless remains the standard."

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- The Defendants had moved for summary judgment, which both the Trial Court and Appellate Division denied due to questions of fact about how navigable was the river. The Court of Appeals affirmed.
- In the Dissent, Justice Bellacosa said he would have granted summary judgment to the Defendants, that the river was navigable in fact as a matter of law.

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- "Summary judgment proofs have been assembled by the parties and intervenors and the submissions of various amici curiae. They amass comprehensive, excellent exhibits, unassailable documentations, experts' proofs and massive historical detail and tracings. The record is overflowing with impressive maps, photographs, documents and experts' affidavits and testimony, as well as the sworn statements of individuals who have studied the river and its history, including some who have recently navigated its full course. While I am able to satisfy myself that enough has been adduced here concerning the essentials to rule on this controversy, I emphasize that my view is based not merely on some single factor nor on the accumulated quantity of proof, but rather on the substantial record and on the substantive quality of all its features."

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- "Stare decisis aside in the long haul of history, the Law of Nature will ultimately determine whether the Moose River is navigable, no matter what litigants, lawyers, judges or juries may say on the subject."
- Justice Bellacosa's Dissent

Ownership of Lands Underwater

- *Adirondack League Club, Inc. v. Sierra Club*, 92 NY 2d 168 (1998)
- CASE DISPOSITION:
- Back to the trial Court in Hamilton Co., Hon. J. Sise
- Case Settled without determining Navigability
- 2000: Settlement Stipulation and Order
 - allows travel at certain times of the year,
 - by registered users and
 - travel must only be a day long in duration with use of banks and shore only as a part of travel, not for camping



Ownership of Land Underwater

Town of North Elba v. Grinditch, 98 AD3d 183 (Third Dept., 2012).

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- Lake Placid, Town of North Elba
- Defendants began building a boathouse without first obtaining a Building Permit from the Town
- **Issue:** Who has jurisdiction to regulate construction within/on Lake Placid? NYS or the Town?

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- Defendants contended that the Navigation Law pre-empts Local Land Use laws passed by the Town
- Trial Court did not reach the issue of ownership of the lands underwater and determined that the Navigation Law applied and the Town's action was meritless.
- Trial court ordered building permits to be issued and for a hearing for sanctions against the Town.

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- HOLDING:
- Navigation Law applies because Lake Placid is Navigable in Fact, but the Navigation Law only pre-empts local laws when the land underwater is owned in the State's sovereign capacity
- Lake Placid is not owned by the State, therefore the Town had jurisdiction to require building permits, the zoning code applied

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- ANALYSIS:
- The Test for determining whether an inland lake is owned by the State in its sovereign capacity is a practical one.
 - The Macomb Patent: 1,920,000 acres conveyed to Alexander Macomb
 - Nothing within the description that would lead to the conclusion that Lake Placid was included within it
 - The eastern boundary of the Macomb Patent is the western boundary of the Old Military Tract
 - The Old Military Tract: created by the Legislature in 1786, prior to the Macomb Patent, as bounty lands for Revolutionary War soldiers. L. 1786 Ch. 67.
 - Lake Placid was contained in the Old Military Tract, to which the State did not reserve rights to the lands underwater.

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- "This common-law meaning of "navigable waters" reflects the State's sovereign ownership of the land under water, as opposed to its proprietary ownership as a riparian owner. When the land under water is owned by the riparian owners, an inland river is "nonnavigable at common law" even though it may be considered "navigable in fact" in terms of its ability to support transportation."

Ownership of Lands Underwater

- Case Studies:
- *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- The Navigation Law §30 applies to Lake Placid but only to the extent of regulating navigation, not to the extent of regulating building structures upon the waters.
- The purpose of the Navigation Law is to protect Riparian Rights and Navigation on the body of water including the regulation of vessels.
- The Navigation Law is not a permitting statute and does not regulate the mode and manner of construction unless generally the construction interferes with Riparian Rights or Navigation.

Ownership of Lands Underwater

- Case Studies:
 - *Town of North Elba v. Grimditch*, 98 A.D. 3d 183 (3rd Dept 2012).
- THIS CASE OVERTURNS:
 - *Mohawk Valley Ski Club v. Town of Duanesburg*, 304 AD2d 881 (2003)
 - *Higgins v. Douglas*, 304 AD2d 1051 (2003)
 - To the extent these cases suggest that the Navigation Law displaces local land use laws on navigable waters that are not owned by the State in its sovereign capacity.



Ownership of Land Underwater

Friends of Thayer Lake, LLC v. Brown

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- Plaintiffs are owners of thousands of acres of property in the Town of Long Lake, Hamilton County
- The land was conveyed by the State to Benjamin Brandreth in 1851 and has remained privately owned by his descendants.

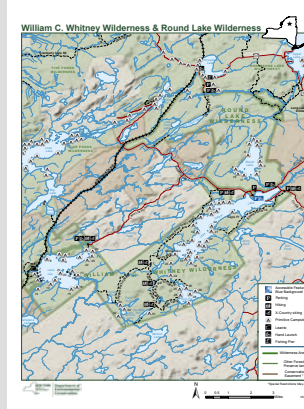
Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- Plaintiffs property is bordered on the north by the William C. Whitney Wilderness Area which was acquired by the state in 1998
- Within the wilderness area is a canoeing waterway known as the Lila Traverse, between Little Tupper Lake and Lila Lake

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- DEC constructed a 0.8 mile carry so as to avoid using Plaintiffs' property
- NYS & DEC now contend that the carry is not necessary because the watercourse is navigable in fact
- In 2009 Phil Brown canoed through and published an article. Plaintiffs sued him for trespass.

Ownership of Land Underwater



Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- Brown saw and photographed Plaintiffs no trespassing signs, continued past into Mud Pond, across the 40 Acre body of water and into Mud Pond outlet.
- The first 500 feet of Mud Pond outlet consist of rapids, which Brown avoided by removing his canoe and portaging for 0.1 miles on a trail maintained by Plaintiffs for their own use.

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- Justice Garry, together with Peters and Lynch (3 justices)
- Justice Rose dissented, joined by Lahtinen (2 justices)
- 3-2 Split of the judges of the Appellate Division is an automatic appeal to the Court of Appeals

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- Appellate division focused on evaluating “the evidence of the waterway’s actual practical use or evidence for practical use.”
 - Narrow, shallow character of the waterway was discounted
 - That ONLY a canoe could traverse the narrow, winding waterway was discounted

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
 - Exclusively Private use, and no commercial use ever was discounted
 - That Plaintiffs had cleared substantial obstructions over the years to keep it possible for their use was discounted
 - Remote nature of the waterway was discounted
 - Necessity for the use of the waterway was discounted
 - Public access connecting to the waterway was credited, notwithstanding the distance to said public access

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 126 A.D. 3d 22 (3rd Dept 2015)
- The Appellate Division affirmed the Supreme Court which found the waterway "navigable in fact" because it had been traveled by Brown.



Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- "...the parties have presented conflicting or inconclusive evidence with regard to a number of material questions of fact and the inferences that they wish to be drawn from those facts. The record was not conclusive with regard to, for instance, the waterway's historical and prospective commercial utility, the waterway's historical accessibility to the public, the relative ease of passage by canoe, the volume of historical travel, and the volume of prospective commercial and recreational use."

Ownership of Lands Underwater

- Case Studies:
- *Friends of Thayer Lake v. Brown*, 27 NY3d 1039 (2016)
- "...Collectively, these factual assessments present material considerations that, left unresolved, permit more than one conclusion to be drawn concerning the waterway's practical utility. (internal citations omitted) As material question of fact remain, neither party has demonstrated prima facie entitlement to summary judgment, and the competing evidence must be weighed and the credibility of the witnesses must be assessed by a factfinder."

Break