

**WATER BOUNDARIES--**  
**WHAT ARE YOUR RIGHTS AND LIABILITIES?**

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A. WATER COURSE AS BOUNDARY

Water courses, such as streams, lakes, rivers, seas and so forth, are frequently used as boundaries. Different rules apply to the different types of bodies of waters, as to how the boundary is ascertained. Different rules also apply to the ownership of the waters issue, discussed below under Riparian Rights.

1. Streams and Watercourses
  - a. Non-navigable

If the boundary between two properties is a non-navigable stream, the property runs to the “thread” or center of the main current. Each property owner would control essentially half. O.C.G.A. § 44-8-2; Outlaw v. Outlaw, 225 Ga. 100, 165 S.E.2d 845 (1969). This is presumed to be the intent of the deed unless otherwise is specifically stated. For example, if the deed states that the property line begins on

the west bank of the Chattahoochee River from there eastward, that intention will control, and the deed would convey the entire riverbed. Westmoreland v. Beutell, 153 Ga.App. 558, 266 S.E.2d 260 (1980).

b. Navigable

If the boundary is a navigable river or stream, the boundary line only extends to the low-water mark of the riverbed. O.C.G.A. § 44-8-5. The term "navigable stream" means a stream which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year. *Id.* Mere rafting of timber or transporting wood in small boats does not make a river navigable. Givens v. Ichauway, Inc., 268 Ga. 710, 492 S.E.2d 148 (1997) This provision is not applicable to ocean tidewaters, nor to any bay, estuary, or arm of the sea. Formerly, the law held that if the tide did not ebb and flow in the river, the boundary was the middle, but the Code changed that.

c. Moving Channels

If the current changes gradually, then the boundary line changes as well. O.C.G.A. § 44-8-2. On the other hand, if the channel changes suddenly, the boundary remains where it was. See the

discussion of accretion and avulsion, below.

## 2. Lakes and Ponds

### a. Boundary at edge

Lakes and ponds differ from streams in not have currents.

Therefore, the boundary line is considered the low water mark.

Boardman v. Scott, 102 Ga. 404, 30 S.E.2d 982 (1897). This is a

presumption, and may be modified by more explicit grants. The

Supreme Court considered the alternative in that case, and found it

unworkable to attempt to project lot lines into a lake.

### b. Temporary Ponds

If the pond is created by damming a stream, it is possible that the property underneath will continue to run to the former boundary.

See, Boardman v. Scott, supra. If the artificially pond has existed for many years, it can come to be considered permanent.

### c. Currents in Ponds and Lakes

Problems have arisen when there is a detectable current in a lake or river. In such cases, there is an argument to use the rule for streams, rather than the rule for lakes.

### d. Ownership of Bed

If a lake or reservoir is created on particular persons' property, those persons own the bed of the lake, and can fence it off and exclude others. Georgia Power Co. v. Baker, 830 F.2d 163 (11th Cir. 1987). Lanier v. Ocean Pond Fishing Club, Inc., 253 Ga. 549, 322 S.E.2d 494 (1984). The boundary would accord with the boundary of the submerged lands.

### 3. Ocean and Tidewaters

This category of boundary includes bays, estuaries, harbors, marshes, beaches, tidelands and the open sea. This boundary is the high-water mark. Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902). The general interpretation is that the area between high and low tide, including coastal marshes, is held by the state in trust for the public. That area is called the "foreshore" and is defined as the "strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide." Dorroh v. McCarthy, 265 Ga. 750, 462 S.E.2d 708 (1995). The State Department of Natural Resources determines the rights of coastal landowners for water access.

### B. RIPARIAN RIGHTS

Riparian rights refers to the rights of owners with property adjacent to

streams, lakes and other waters.

1. Generally

Georgia's law of riparian rights is a natural flow theory modified by a reasonable use provision. In other words, every riparian owner is entitled to a reasonable use of the water in the stream, as it flows naturally across his property, subject to the disturbances caused by other owners' reasonable use of the water before it gets to him. Riparian proprietors have a common right in the waters of the stream. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584 (1980). The natural flow cannot be diverted to, for example, create a new watercourse, but irrigation is a reasonable use.

The question of water rights, that is, the right to use the water, is distinct, from the right to go on the water and boat, fish or swim. Owners with property bordering on a watercourse generally have a right to reasonable use of the water itself, but not necessarily a right to go on the water.

Non-riparian owners (i.e., owners owning land not adjacent to the water) can acquire the rights to water from riparian land, and water from riparian land can be used on non-riparian land (land not adjacent to water).

Pyle v. Gilbert, supra.

## 2. Rivers and Streams

For non-navigable streams, the boundary line, as discussed above, goes to the thread of the stream. The owner on either side of a non-navigable river would therefore own the riverbed out to that point, and would have not only the right to use the water, and the riverbed, but would have the right to exclude others from passage, fishing, swimming and boating.

For navigable waters, the riverbed is considered in general to belong to the public, because the boundary is only to the low-water mark. At common law, grants of land from the state bounded on rivers above tide-water, or where the tide does not ebb and flow, were to the thread of the river. O.C.G.A. § 44-8-5, providing that where the river is navigable, the rights of the owner of adjacent land extend only to the low-water mark of the riverbed, became effective with the adoption of the Code of 1863, and therefore does not apply to grants that predate that Code. Parker v. Durham, 258 Ga. 140, 365 S.E.2d 411 (1988). Hence, as a practical matter, many navigable grants run to the center of the stream, but the public still has a right of passage. Such owners could prevent the taking of minerals from the

riverbed, or from fishing the stream, however. Even in a latter day navigable stream situation, the owner can prevent fishing down to the low water mark--requiring the fisher to use a boat.

### 3. Title to Islands

Islands in streams and rivers have to be considered carefully, by looking at the original grant. If the grant predates 1863, see above, then it can be read as going to the thread or center of the current, and that may encompass an island on that side of the centerline of the main current.

Whether the island is connected at low water to one side affects its ownership as well. Johnson v. Watson, 157 Ga. 349, 121 S.E. 229 (1930)

### 4. Title to Underwater Minerals

The right to mine soil, sand, gravel, minerals and other valuables from the bed of a river, stream or lake belongs to the owner of the bed. In the case of a non-navigable stream, or a navigable stream which grant predates 1963, therefore, ownership is split between the two adjacent property owners. Rockefeller v. First Nat'l Bank of Brunswick, 213 Ga. 493, 100 S.E.2d 279 (1957).

### 5. Lakes, Ponds and Submerged Lands

#### a. Lake and Ponds

The boundary owner has rights to use the water, but not to boat, fish or swim, because he has no rights to the bed of the lake. Those rights belong to the owner of the bed of the pond or lake, who has an action in trespass against one who fishes, boats or swims without permission. Lanier v. Ocean Pond Fishing Club, Inc., 253 Ga. 549, 322 S.E.2d 494 (1984). However, if the grant of land convey the entire pond or lake, or all property surrounding the lake, that property owner owns the entire bed. That owner has the right to fish, boat and swim on the lake. Lanier v. Ocean Pond Fishing Club, supra.

b. Permanency

Permanency of the pond is relevant, because if it has just been created by damming a stream, each side's owners can claim the boundary to the middle. If it has long existed, the more common rule can said to apply, absent clearer deeds. The practical advice when creating a lake, is to properly reflect the intent of ownership on the deeds, whether it includes some specific portion of the bed, based on the prior lines, whether it includes some common interest in the bed, as might be wise in a subdivision, or whether it is merely the boundary.

## 6. Tidal Areas

Ownership in tidal areas (beaches, marshes, estuaries, bays, harbors, etc.) extends only to the high-water mark, and the State has the right to the foreshore. A 1902 Act granted to adjoining landowners the exclusive right to harvest shellfish (e.g., oysters) from the foreshore in navigable tidewaters.

## C. FLOOD PLAINS

Flood plains do not raise a boundary problem, but they can impact title issues. Not until relatively recently had Georgia Courts considered the issue as to whether location of a property in a flood plain was a defect on the title. The Supreme Court concluded that a difference exists between economic lack of marketability, which relates to physical conditions affecting the use of the property, and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership. One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable. The Court concluded that although location of part of the property in a flood plain may affect its market value, it does not affect the marketability of title to the property, and therefore is not a title defect. Chicago Title Ins. Co. v. Investguard, Ltd.,

215 Ga.App. 121, 449 S.E.2d 681 (1994).

As an aside, since flood plains are indicated on public flood maps, and since the existence of a nearby or adjacent creek is notice of a potential for flood, it is extremely difficult to prove a fraud claim against sellers who fail to reveal the flood-prone nature of their property. That is because a party cannot show justifiable reliance when he does not check available information. Howard v. McFarland, 237 Ga.App. 483, 515 S.E.2d 629 (1999).

#### D. ACCRETION, AVULSION AND EROSION

##### 1. Accretion

Accretion is the process of growth or enlargement by a gradual buildup, and in boundary law, the relevant concept is the increase of land by the action of natural forces. The gradual accretion of land, and the gradual change of the water's thread, can change the boundary line. O.C.G.A. § 44-8-2. James v. State, 10 Ga.App. 13, 72 S.E. 600 (1911).

The gradual accretion of sand between an island and the mainland, to the point where it connects to the mainland, would vest title in that island with the adjoining property owner. Similarly, to the extent accretion alters the thread of a current to go around the other side of an island, the ownership

would change.

The gradual accretion of land by the effect of tides and so forth, is treated the same way--to the extent it moves the high water mark further out, it adds property to the adjoining landowner. Cherry v. Hopkins, 254 Ga. 260, 328 S.E.2d 702 (1985).

## 2. Avulsion

Avulsion is a sudden cutting off of land by flood, currents, or change in course of a body of water. Relevant to boundary disputes is when the change in the flow of a watercourse separates land from one person's property and joins it to another's property. Avulsion leaves the boundary in the center of the former channel, even if no water is flowing therein. James v. State, supra.

Avulsion in a coastal area, of course, simply destroys property and moves the boundary, as there is no opposite bank to gain.

## 3. Erosion

Erosion is the gradual diminution of property, and is essentially accretion in reverse. To the extent the thread of the current moves gradually, the boundary line moves. This would occur at the bend in the river, as one side accreted sand and the other side, absorbing the force of the river, eroded

away.

Erosion in a coastal area, to the extent it moves the high tide area back (for example, after a hurricane), can be said to move the property line back. Of course, the state can acquiesce in efforts to restore destroyed beaches and move the high tide area further out.

Man made erosion is a different story. If an upper riparian landowner alters the watercourse to cause damage and erosion to another landowner, he can be liable in nuisance and trespass.

#### E. WETLANDS

Wetlands do not impose traditional water boundary issues, in that wetlands are essentially treated like any other property. If the issue is marshy areas that experience a tide, that property is property of the state. If the issue is an extremely swampy area that is completely on one parcel, that owner would have the rights to the use of the water and the bed. A more complex issue might result from a situation where the boundary is a very watery swamp that divides several property owners. Of course, if a current could be determined, as sometimes occurs, then the river boundary law could be logically applied. The difficulty would come depending on the description in the deed. If the deed referred only to the boundary of a river

swamp, it would be difficult to determine what was meant.

It is doubtful that any current could be discerned, in which case it would likely be treated as a lake. Of course, as a side note, with any wetlands, the Federal Clean Water Act and other acts will apply and constrict what actions can be taken. That level of federal control probably explains the dearth of cases disputing the land in swamps, which can no longer easily be drained and filled.