

# Survey of Illinois Public Waters Law

Continuing Legal Education Presentation  
by Robert Mool  
IDNR Legal Counsel

# Survey of Illinois Public Waters Law

## I. Introduction

# Public Waters

What you may think of...



# Public Waters

What you will think of...



# Public Waters

What you may think of...



# Public Waters

What you will think of...



# Issues we will cover

- Public Waters
  - Statutory Definition of Public Waters
  - Public Water Rights
  - What Waters are Public
  - Bed Ownership
- Common Law Issues
  - Riparian Rights
  - Non Public Water Access Rights

# Survey of Illinois Public Waters Law

## II. Public Waters



# A. Concept in Statute:

## Rivers, Lakes and Streams Act 615 ILCS 5

- Sec. 5. *The Department of Natural Resources shall upon behalf of the State of Illinois, have jurisdiction and supervision over all of the rivers and lakes of the State of Illinois, wherein the State of Illinois or the people of the State have any rights or interests ...*
- Sec. 7. *It shall be the duty of the Department ...to have a general supervision of every body of water within the State of Illinois, wherein the State or the people of the State have any rights or interests, whether the same be lakes or rivers, and ...to exercise a vigilant care to see that none of said bodies of water are encroached upon, or wrongfully seized or used by any private interest in any way, except as may be provided by law and then only after ... and to jealously guard the same ...*

## B. Public Water Rights

- *“wherein the State of Illinois or the people of the State have any rights or interests”*
- Navigation
  - Personal
  - Commercial
  - Historical Context
- RLSA Sections 5, 8, 9,10, 11 and 12 all specifically address navigation.

## B. Public Water Rights (cont'd)

- Fish Code (515 ILCS 5) Sect 5-20:

*Sec. 5-20. Taking aquatic life on private property. Any person taking or attempting to take aquatic life by means of any device within waters other than public waters of the State shall first obtain the consent of the owner or tenant of the premises where the taking is done or attempted to be done.*

- This statutory provision recognizes that the public has the right to fish on Public Water. No requirement to obtain any permission. Consistent with old common law rights.

## B. Public Water Rights (cont'd)

- Rights not granted
  - Access to the Public Water from Land
    - Why?
    - Compare to Interstate to understand
  - Portaging
    - Compare to Interstate to understand
  - Hunting
  - Use of Ice

# C. Public Waters Designation

## Short Answer

- RLSA Sec. 5

*...and shall make a list by counties of all the waters of Illinois, showing the waters, both navigable and non-navigable, that are found in each county of the State, and if the same are lakes, the extent of the shore lines and the amount, extent and area of the water surface; and in a like way, if the same are rivers, and specifying whether the same are navigable or non-navigable, and whether they have or have not been meandered.*

- Public Waters Administrative Rule 17 IAC 3704

- Appendix A
  - Legislatively Approved
- Three Kinds – See Three Introduction Paragraphs
- Practical Application of Statutory Duty
  - Only Public Waters Listed
  - Balance are Non-Public
  - Not Listed by County
  - Never Resurveyed since 1800s

# C. Public Waters Designation

## Long Answer

- RLSA Sec. 18

*Wherever the terms public waters or public bodies of water are used or referred to in this Act, they mean all open public streams and lakes capable of being navigated by water craft, in whole or in part, for commercial uses and purposes, and all lakes, rivers, and streams which in their natural condition were capable of being improved and made navigable, or that are connected with or discharged their waters into navigable lakes or rivers within, or upon the borders of the State of Illinois, together with all bayous, sloughs, backwaters, and submerged lands that are open to the main channel or body of water and directly accessible thereto.*

- Public Waters Rule Sec. 3704.20

*"Public Bodies of Water" or "Public Waters"  
All lakes, rivers, streams and waterways which are or were navigable and are open or dedicated to public use including all bayous, sloughs, backwaters and submerged lands connected by water to the main channel or body of water during normal flows or stages.*

# C. Public Waters Designation

## Long Answer (cont'd)

- Common Law

- **Schulte v. Warren., 75 N.E. 783,785 (Ill. Sup. Ct. 1905)**

“In this state the public have an easement for the purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil, and the question whether these waters are navigable depends upon the question whether they are of sufficient depth to afford a channel for useful commerce. In some states, where the lumber interest has been regarded of first importance, the courts have held that waters which are capable of floating logs are navigable; but ... this court declined to adopt such a rule...”

# C. Public Waters Designation

## Long Answer (cont'd)

- Common Law
  - **DuPont v. Miller et al., 141 N.E. 423 (Ill. Sup. Ct. 1923)**

“...the test has been whether or not the water in its natural state is used or capable of being used as a highway for commerce, over which trade and travel may be conducted in the customary modes of travel on water. The rule in this state is that the public have an easement for purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil. Whether such waters are navigable depends upon whether they are of sufficient depth to afford a channel for use for commerce.”



# C. Public Waters Designation

## Long Answer (cont'd)

- Common Law
  - **Votava v. Material Service Corporation, 392 N.E.2d 768, 771, (Ill. App. Ct. 2d Dist. 1979)**

“It is evident ... that the use of the quarry lake by the public was sporadic, clandestine and continuously challenged and never even approached the conditions requisite for a dedication of a private waterway.”

# C. Public Waters Designation

## Long Answer (cont'd)

- Common Law
  - **Central Illinois Public Service Co. v. Vollentine, 149 N.E. 580, (Ill. Sup. Ct. 1925)**

“The Sangamon River is a stream over which commerce cannot be carried on in the customary modes in which such commerce is conducted by water, and is therefore, not a navigable stream, and is not among the public waters of the state, nor can it be made navigable by mere legislation.”

# C. Public Waters Designation

## Non Appendix A Public Waters With Public Rights

- **Winnebago County Prescriptive Public Easement in Kishwaukee River**
- **Federal Lawsuit, People (ILL) v. USACE et al., Stipulated Judgment Order**
- **Vermilion River State Lease**
  - **State of Illinois Recreational Use of Leased Land Act (745 ILCS 67)**
- **Department of Natural Resources Sites**
- **Local Units of Government Sites**

# C. Public Waters Designation

## **Appendix A Additions** Public Water Ad Rule 17 IAC Section 3704.40

*When the Department obtains information sufficient to determine that a body of water is a public water, that body of water will be added to the list. Any person may petition for an order to add a body of water to the list when it can be shown that the candidate is or was navigable and is open or dedicated to public use. The petition shall contain the following information, when known:*

- a) Name of the body of water ... ;*
- b) Location ... ;*
- c) A statement on its past or present navigability; or, alternatively, a statement that it is a backwater lake or slough connected to or a part of a navigable body of water;*
- d) The legal authority or instrument by which ...water was opened or dedicated to public use;*
- e) If documentary evidence cannot be found, statements of persons living along ... water that:
  - 1) It is common knowledge that the water has always been open to public use, or*
  - 2) It is known that the riparian owners intended to dedicate the water to public use and a description of the information showing the intent to dedicate such as maps, plats, ... ;**
- f) Names of federal ... State ... or ... local government operating, maintaining or regulating public use of the body of water; and*
- g) Any maps, documents, or other data supporting the petition.*

# D. Public Waters Bed Ownership

## Illinois' Atypical Law

- **Illinois law treats ownership of the beds of public waters differently for lakes and for rivers**
- **Difference in both common law and RLSA**
- **Most states have laws different than Illinois which causes confusion**

# D. Public Waters Bed Ownership

## Lakes

- **RLSA**

*Sec. 24. Title to the bed of Lake Michigan and all other meandered lakes in Illinois, set forth in the 1962 Report of the Department of Public Works and Buildings, Division of Waterways, entitled "Meandered Lakes in Illinois", with Map Appendix, regardless of the location, size or shape is held in trust for the benefit of the People of the State of Illinois and the Department of Natural Resources is the agency designated as the trustee authorized to exercise administrative jurisdiction and control thereover in the execution of the powers and duties under this Act.*

- **Meaning of “meandered”**

- **Lakes are included in the Appendix A list.**

# D. Public Waters Bed Ownership

## Lakes

- **Brundage v. Knox, 117 N.E. 123 (Ill. Sup. Ct. 1917)**

Title to private property next to public water lake is to “the edge of [the lake] when free from disturbing causes.”

- This delineation of ownership boundary is different than some other states that delineate ownership at high water. Difference means beaches are public in some states but not in others, including Illinois.

# D. Public Waters Bed Ownership

## Rivers

- **RLSA**

- Excluded from Section 24
- Silent

- **Common Law**

- **Middleton v. Pritchard, 4 Ill. 510, 1842 WL 3804 (Ill. Sup. Ct. 1842)**

Middleton sued Pritchard for cutting trees on island in Mississippi River west of his land by claiming ownership of island. Issue was whether Middleton owned bed / island.



# D. Public Waters Bed Ownership

## Rivers

- **Washington Ice Co. v. Shortall, 101 Ill. 46, 1881 WL 10685 (Ill. Sup. Ct. 1881)**

Shortall sued Washington Ice Co. for removing ice from the DesPlaines River. Shortall owned both sides of the river at this location and claimed ownership of the bed under the river and the right to the ice frozen thereover. Issue was whether Shortall owned the bed of the river.

- Adopted English common law approach
- “Navigable in Law” v. “Navigable in Fact”
- Illinois has private bed ownership under navigable waters

# D. Public Waters Bed Ownership

## Rivers

- **St. Louis v. Rutz, 138 U.S. 226 (1891)**
- **Fruin Colnon Corp. v. Vogt, 500 F.Supp. 606 (Southern Dist. Illinois 1980)**
  - The question whether a riparian owner holds the fee to the middle thread of a navigable river' bed is governed by the law of the states.
  - Under Illinois law, riparian river bed ownership extends to middle of the main channel of [navigable rivers] the Mississippi.
  - Under Illinois law, Navigable river bed ownership is presumed absent a clear statement in deed to the contrary.

# Survey of Illinois Public Waters Law

## III. Common Law Issues

# A. Riparian Rights

- Specific rights that accrue to owners of land bordering on a stream or river.
- Owners of property bordering lakes have similar rights, but the term is most often applied with respect to rivers.
- Riparian rights generally apply irrespective of whether the stream or river is Public or Non Public. However, riparian rights may not be exercised inconsistently with the public's public water rights.

# A. Riparian Rights

- What rights are Riparian Rights?
  - Primarily the right to use the stream or river for water supply, both private and commercial.
  - The right to use for transportation, including building infrastructure such as docks and wharfs.
  - The right to use for drainage.
  - The right to use for recreation.
  - The right to the use of natural quantity (subject to the reasonable use of others)
  - The right to the use of natural quality (subject to the reasonable use of others)

# A. Riparian Rights

- How are Riparian Rights Interpreted?
  - **Evans v. Merriweather, 4 Ill. 492 (1842)**
    - Seminal Illinois case wherein Supreme Court adopted riparian rights for purposes of river and stream usage, rejecting prior appropriation approach.
    - Prior appropriation approach -- general principle is that water rights are unconnected to land ownership, and can be sold or mortgaged like other property. The first person to historically use a quantity of water from a water source has the right to continue to use that quantity of water for that purpose. Subsequent users can use the remaining water for their own beneficial purposes provided that they do not impinge on the rights of previous users. This approach is the basis for Western water law.

# A. Riparian Rights

- How are Riparian Rights Interpreted?
  - **Evans v. Merriweather, 4 Ill. 492 (1842) (cont'd)**
    - Riparian Rights Approach – *“Each riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one.”*
  - **Okaw Drainage Dist. v. National Distillers and Chemical Corp., 882 F.2d 1241 (7<sup>th</sup> Circ. 1989)**
    - *“... each riparian owner is entitled to make a reasonable use of the river, with what is ‘reasonable’ depending on the balance between his own needs and those of the other riparian owners.”*

# A. Riparian Rights

- Who has Riparian Rights?
  - **Bouris v. Largent, 236 N.E.2d 15 (3<sup>rd</sup> Dist. Ill. App. Ct. 1968)**
    - *“The riparian right of access to a body of water depends on whether the property touches the water thereby enabling access to the water to be gained without going over property of others. Such right of access does not depend upon ownership of or title to the submerged land. Consequently such right is not affected by description of the property unrelated to the body of water. It is only necessary that the description of the property include or encompass the shore line.”*



# A. Riparian Rights

- Who has Riparian Rights?
  - Rivers, Lakes and Streams Act, Section 18
    - Statutory Exception to the common law Riparian Property ownership requirement for river or stream water use.
    - *“The Department of Natural Resources may grant, subject to the foregoing provisions of this Section, a permit to any person, firm or corporation, not a riparian owner, to use the water from any of the public bodies of water within the State of Illinois for industrial manufacturing or public utility purposes, and to construct the necessary intakes, structures ... in, under, or on the beds of such bodies of water to obtain the use of such water or to return the same, provided, however, that such use shall not interfere with navigation.”*

## B. Accretion, Reliction, Avulsion

- Riparian Property Ownership Concepts
- Accretion
  - Accretion is the addition of land by gradual deposition of soil through the operation of natural causes in a river or lake to that already in possession of the riparian owner.
  - Bowes v. Chicago, 120 N.E.2d 15 (Ill. Sup. Ct. 1954)  
Bouris v. Largent, 236 N.E.2d 15 (3<sup>rd</sup> Dist. Ill. App. Ct. 1968)
    - Shore owner has riparian rights of accretion and of access to the water from the land.
    - Riparian right of accretion does not extend beyond the boundaries of property where ownership is in another.
  - Brundage v. Knox, 279 Ill. 450 (Ill. Sup. Ct. 1917)
    - Riparian owner is not entitled to accretions which he has caused by artificial means.

## B. Accretion, Reliction, Avulsion

- Reliction

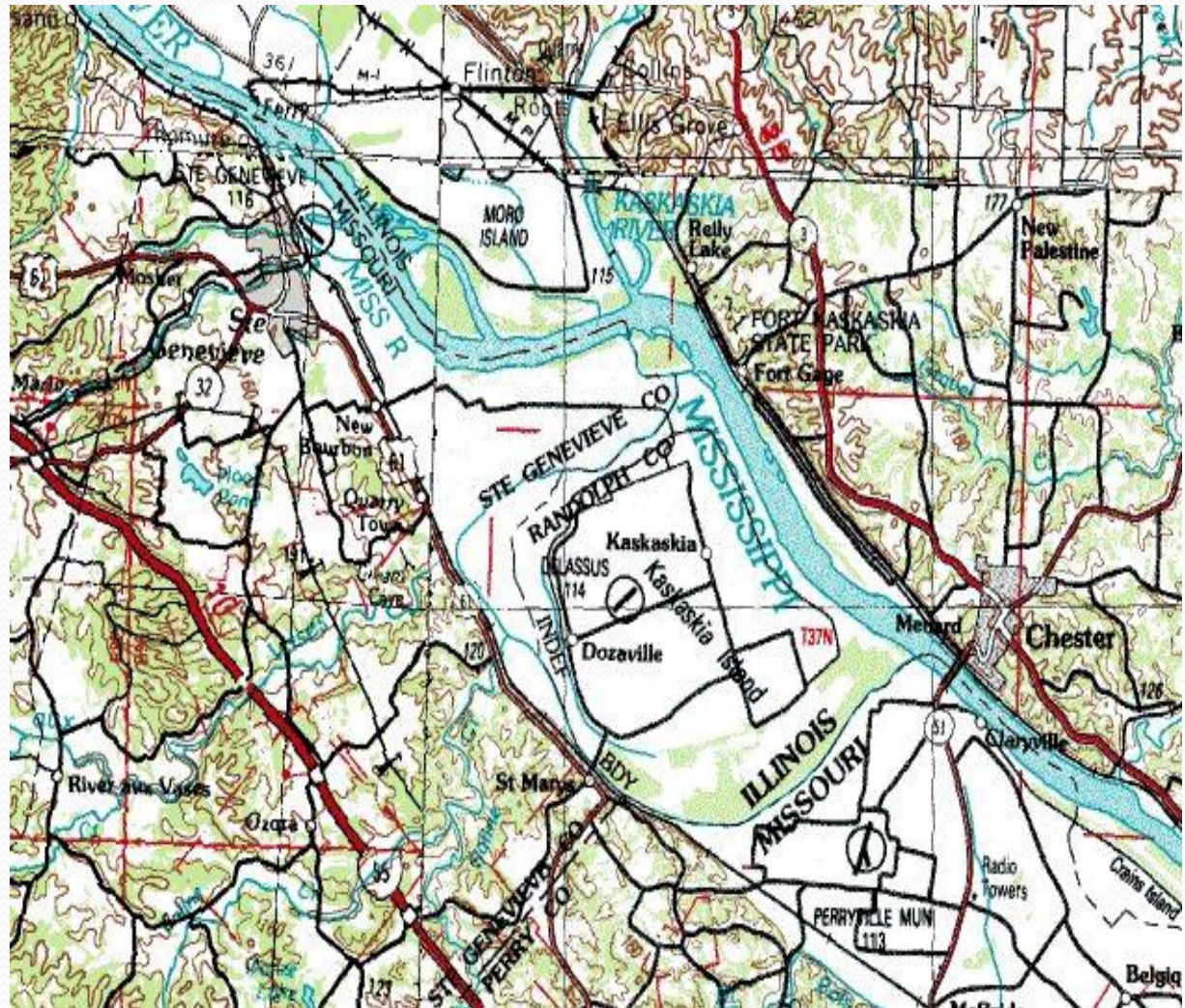
- Reliction is the process of gradual exposure of land by permanent withdrawal of a body of water.
- Hasselbring v. Lizzio, 773 N.E.2d 770 (3<sup>rd</sup> Dist. Ill. App. Ct. 2002) Considered a type of accretion. Same law applies.

- Avulsion

- Sudden and perceptible loss or addition to land by the action of water or a sudden change in the bed or course of a stream or river.
- Resulting change in channel works no change of boundary, which remains even though no water may be flowing in the old channel.
- Wall v. Chicago Park Dist., 37 N.E. 2d 752 (Ill. Sup. Ct. 1941) Destruction of land abutting lake by wind storm is avulsion.

## B. Accretion, Reliction, Avulsion

- Real World Case of Avulsion:
- Kaskaskia, Illinois
- Former State Capital (1818-1819)



PHOTOGRAPH OF THE OLD STATE HOUSE AT KASKASKIA—TAKEN A FEW MONTHS BEFORE IT WAS SWALLOWED UP BY THE RIVER

## C. Non Public Water Access Rights

- Who can boat where on private ponds, lakes, streams and rivers?
- Obviously not same answer as for Public Waters
- Issue arises from CPOs in the field called on to referee neighbor disputes / allegations of trespass
- Issue arises from calls to DNR from the public asking about “water law.”

# C. Non Public Water Access Rights

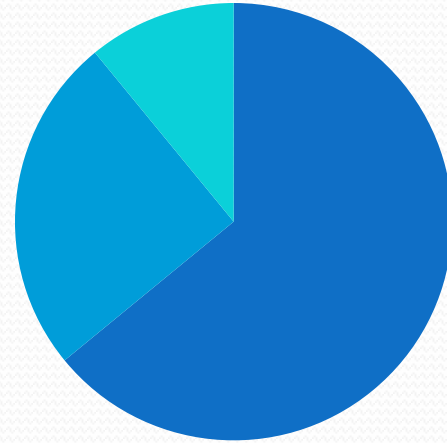
- Rivers

- Issue does not come up often because a non public river is almost always not navigable.
- Absent a dedication or prescriptive easement as previously discussed, non owners of riverbed have no rights to navigate.



# C. Non Public Water Access Rights

- Lakes
  - Issue does come up often because lakes are or have often been improved for navigability and sold to property owners as an amenity.



## C. Non Public Water Access Rights

- Lakes

- Beachum v. Lake Zurich Property Owners Association, 526 N.E.2d 154 (Ill. Sup. Ct. 1988)
  - Lake Zurich, a private lake with multiple bed owners. Beachum operated a boat rental business and brought declaratory judgment suit alleging right to use entire surface of lake rather than only the surface of the lake overlying her bed ownership.
  - “[W]here there are multiple owners of the bed of a private ... lake, such owners and their licensees have the right to the reasonable use and enjoyment of the surface waters of the entire lake provided they do not unduly interfere with the reasonable use of the waters by other owners and their licensees.”



# C. Non Public Water Access Rights

- Lakes

- Alderson v. Fatlan, 898 N.E.2d 595 (Ill. Sup. Ct. 2008)

- Water filled private quarry with multiple bed owners. Owners brought declaratory judgment suit alleging right to use entire surface of lake rather than only the surface of the quarry overlying her bed ownership.
- *“...Riparian rights do not extend to artificial bodies of water.”*
- However, *“This is not to say ... that riparian rights may never arise in land abutting an artificial body of water.”*
- Artificial-becomes-natural rule: *“...where the usage of the artificial body of water has long been settled, it may be appropriate to treat the artificial body as the legal equivalent of a natural one.”*

# Survey of Illinois Public Waters Law

## IV. Conclusion

# Conclusion

- Questions
- Thank you for listening