

FINAL REPORT ON THE LAND TITLE & FORESHORE BOUNDARIES OF CARTWRIGHT/RAM ISLAND AND GARDINERS ISLAND, RESPECTIVELY, BY STEVE RUSSELL BOERNER, REAL PROPERTY CONSULTANT, TRUE DILIGENCE SOLUTIONS LLC, APRIL 12, 2019



Photograph taken of Gardiners Island by author, April 2016



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I. INTRODUCTION:

In September 2018 I was retained, as an independent researcher, by the Trustees of the Freeholders and Commonalty of the Town of East Hampton, N.Y., to investigate both the land title and littoral boundary of Cartwright/Ram Island, located in the shoals immediately south of Gardiners Island.

As an archivist in the East Hampton Library Long Island Collection for over thirteen years, I am intimately knowledgeable of this vast, comprehensive collection, which includes numerous Gardiner family and East Hampton Township material, both manuscript and published. Four years ago, I assisted the Town of East Hampton Town Clerk's Office with their important municipal records, dating back to 1649, which culminated in an arrangement of said material to be placed in the said Long Island Collection, whereby myself and my colleagues systematically cataloged and digitized said material. In my estimation, 90-95% of the *historic* municipal records of said township are now available in the Collection. Additionally, I have over 18 years of land surveying experience, both in the field and with land records research. I have successfully managed and consulted on similar cases, including beach rights/title, submerged lands title, school district boundaries establishment, and title reconstructions back to aboriginal ownership. All of these cases involve deep archival research, a sound grasp of colonial history, geography, laws and land tenure practices, which I have made a continued study of.

II. GLOSSARY OF TERMS (FOUND IN OR RELEVANT TO THIS REPORT):

Archipelago – an area of water studded with many islands or with a group of islands; also, such a group of islands.¹

Beach - the belt or zone along the shore usually with a gentle slope toward the water; occupied by unconsolidated material, moving sand, or shore drift. The zone from the waterline to the place where there is a marked change in material or physiographic form, or to the line of permanent vegetation (usually the effective limit of normal storm waves). See *shore*.²

¹ Shore and Sea Boundaries...by Aaron Shalowitz, L.L.M., U.S. Department of Commerce, Coast and Geodetic Survey, 1962.

² Definitions of Surveying and Associated Terms, American Congress on Surveying and Mapping, revised edition, 2005.

Channel - 2. the deepest line of navigation; main channel.³

Custom - a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates.⁴

Foreshore - 1. the sloping part of a beach between the high water and low water marks. 2. The part of the shore, lying between the berm and the ordinary low water mark, which is ordinarily traversed by the uprush and back rush of the waves as the tides rise and fall. 3. The portion of the bank or shore lying adjacent to and sloping gradually to the water, which is covered between high water and low water.⁵ (*see also*: foreshore).

Hummock - a rounded knoll or hillock (including in waters).⁶

Island - a body of land extending above and completely surrounded by water at mean high water.⁷

Islands forming part of a land form - islands that are so situated with respect to a characteristic land formation, such as a headland, which but for the intervening water areas would be part of such formation.⁸

Jus Privatum - 2. the right, title, or dominion of private ownership.⁹

Jus Publicum - 2. the right, title, or dominion of public ownership; esp. the government's right to own real property in trust for the public benefit.¹⁰

Neck (of land) - a narrow piece of terrain or sea, such as an isthmus, channel, or peninsula.

Reef - a submarine elevation of rock or coral forming a menace to surface navigation. It may or may not be uncovered at low tide and may or may not be connected to the shore.¹¹

³ Definitions of Surveying and Associated Terms, American Congress on Surveying and Mapping, revised edition, 2005.

⁴ Black's Law Dictionary.

⁵ Definitions of Surveying and Associated Terms, American Congress on Surveying and Mapping, revised edition, 2005.

⁶ Merriam-Webster Dictionary.

⁷ Definitions of Surveying and Associated Terms, American Congress on Surveying and Mapping, revised edition, 2005.

⁸ Shore and Sea Boundaries...by Aaron Shalowitz, L.L.M., U.S. Department of Commerce, Coast and Geodetic Survey, 1962.

⁹ Black's Law Dictionary.

¹⁰ *Ibid.*

¹¹ *Ibid.*

Riparian (littoral) boundaries - water boundaries, or boundaries formed by the sea or a river. The general rule is that riparian boundaries shift with changes due to accretion or erosion but retain their original location if brought about by avulsion or artificial causes.¹²

Shoal - a place where a sea, river, or other body of water is shallow. 2. A sandbank or a sandbar which makes the water shoal. A submarine elevation or knoll which is not rocky and on which there is a depth of water of six fathoms or less; can be a menace to surface navigation. 3. A rocky area on the sea bottom within soundings especially where fish abound.¹³

Shore - 1. the land bordering (usually) a large body of water; coast. 2. The part of a seashore between the low-water line, usually at the seaward margin of a low-tide terrace, and the upper limit of wave wash at high tide, usually marked by a beach scarp or berm; foreshore.¹⁴

Shoreline - 1. the line along the which the land surface meets the water surface of a lake, sea or ocean; the outline of the shore. 2. The zone of contact of a body of water with the land through wave action, both above and below the surface of the water. Not applicable on tidal flat or marshes which don't have an appreciable slope and are overflowed by the tides. Sea also *coastline*.¹⁵

III. AVAILABLE LEGAL & HISTORIC DOCUMENTS PERTAINING TO GARDINERS ISLAND, AND COMPARABLE EXAMPLES:

1. INDIAN PURCHASE OF ISLAND BY LION GARDINER, 1639:
2. CONFIRMATORY PATENT OF SAID INDIAN PURCHASE, BY JAMES FARRET (sic; also: FORRETT, ETC.), ON BEHALF OF WILLIAM ALEXANDER, EARL OF STERLING, 1640
3. PATENT OF NEW YORK COLONY GOVERNOR RICHARD NICOLLS, 1665
4. PATENT OF NEW YORK COLONY GOVERNOR FRANCIS LOVELACK, 1670
5. PATENT OF NEW YORK COLONY GOVERNOR THOMAS DONGAN, 1686
6. QUIT RENT OF 1714
7. LEASES OF GARDINERS AND RAM (CARTWRIGHT) ISLAND, 1915-1935
8. VOLUMINOUS ARCHIVAL MATERIAL PERTAINING TO THE GARDINER FAMILY, I.E. MANUSCRIPT ACCOUNT BOOKS PERTAINING TO ISLAND, CORRESPONDENCES, ETC.

Note: the abovementioned documents are a combination of published and early photostat copies of the original manuscripts.¹⁶ Upon careful examination of the specific language in them, none recite language to Ram Island (then so-called) as separate from Gardiners Island, the adjoining shoals on the north and south of the island, the foreshore, or littoral boundaries. The 1686 Dongan Patent provides the most comprehensive language, including the terms "beaches," "waters," "fishing," "harbors," etc.¹⁷

¹² Shore and Sea Boundaries...by Aaron Shalowitz, L.L.M., U.S. Department of Commerce, Coast and Geodetic Survey, 1962.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See: chain of title for Gardiners Island.

¹⁷ This is consistent with the numerous patents granted by the Dongan Administration to other municipalities (towns) and private individuals, the latter which includes manorial grants, including Gardiners Island. Their intent

The Indian purchase of Gardiners Island did not include language pertaining to the water boundaries, the interior features of the island (i.e. harbors, ponds, etc.), the adjoining shoals on the north and south of the island, and the small island later known as Ram Island (which may have been adjoining said southern shoal at time of said purchase).

Two letters from Lion Gardiner to his contemporary from Connecticut, John Winthrop Jr., in 1649 and sometime up to 1659, respectively, provide important clues as to the land tenure status on both Gardiners Island and adjoining East Hampton:

Letter from Lion Gardiner to John Winthrop Jr., April 14, 1649: "I heare you have gotten sheepe; if you have not a compleat English rame [ram] for them, I can lett you have one which will be a great advantage to you."¹⁸ In a letter from Lion Gardiner to John Winthrop Jr., circa 1650's, Gardiner relates how "how Miantaquit Sachem (Wyandanch) told him Winthrop was expected to retrieve sheep [at Montauk]..."¹⁹

The first letter is confirmation Gardiner had sheep husbandry on his island early, or even at commencement of his taking possession of island (unless needed time to clear woods for livestock pasturage). The use of natural physical boundaries, i.e. bodies of water, for livestock pens, or enclosures, was practiced throughout the early settlements.

The second letter tells us the original undertakers of East Hampton Township too undertook livestock husbandry, including sheep, from the beginning, or very early, pasturing on Montauk Peninsula; in my opinion, these two documents combined indicate Ram Island was used exclusively by Lion Gardiner to keep rutting male sheep, or rams, separated from the sheep at times, and the town proprietors had use of the mainland, including Montauk, for their livestock needs.

Since I commenced this investigation, I've done comparative analyses of many other contemporary Indian purchases, and more specifically, islands that attained the same manorial status as Gardiners Island. In the case of Indian conveyances of land for townships on the mainland of Long Island, N.Y., the consistent language in them recites the littoral boundaries as "from sea to sea," or "from bay to sea." These descriptions absolutely included the respective foreshores, as is proven repeatedly by continued use and regulation of and by their respective owners (in most instances municipalities, or towns) *for their own inhabitants*.²⁰

In the case of Indian conveyances of islands, none of them recite littoral boundaries; as was the case with the conveyances of sections of the Long Island mainland, the foreshore was

was absolute ownership of the geographic features within their boundaries, with gold and silver mines excepted for the king.

¹⁸ From "Lion Gardiner and his Descendants, : 1599-1890, edited, with notes critical and illustrative, page 33.

¹⁹ [Letter from Lion Gardiner to John Winthrop concerning sheep at Montauk, N.Y., corn and salt delivery] / East Hampton, N.Y., [circa 1650's]. Wyandanch was dead by 1659.

²⁰ The published volumes of town records for every Long Island, N.Y. township, including East Hampton, are replete with examples, including strict regulation of drift whale harvesting, fishing, seaweed gathering, etc.

included. Hence, as an island is obviously surrounded by water, no descriptions were provided.²¹

In addition to studying the *use and regulation* of foreshores found in official and unofficial records, we must now turn to later documents pertaining to islands for evidence of both smaller adjoining islands and foreshore ownership and regulation:

Fishers Island, in Suffolk County, N.Y., was purchased from the Native Americans by John Winthrop Jr., who left it to his two sons, Fitz-John and Wait Winthrop. In 1705 the two brothers leased it to George Havens and his son, George Havens Jr., both of Shelter Island, N.Y., for a term of 7 years.²² This detailed lease is not only important for historic details of the island, i.e. where the buildings were, species of trees, precise numbers of heads of livestock (all of which said Havens were to care for), but for the purposes of this investigation, provide important evidence as to title of the adjoining lands under water, the adjacent smaller islands, and the foreshore rights upon the main island and said smaller ones. To quote:

“Reservations: Reserving and excepting out of the above demised premises, unto ye said John Winthrop & W.W. [brother Wait Winthrop] excepting [rights remaining with lessors, said Winthrop brothers] also all wrecks of the sea, whales or other great fish, wh[ich] shall happen to come, or be driven, on such island; together with liberty at all times for hunting, fowling & fishing on said island, in any of the coves, creeks or ponds belonging to it. With free liberty of egress & regress [ingress & egress] ...”

“All the hamachs [hummocks] are likewise intended in the reservations above.”

The abovementioned hummocks include the small islands known today as North Dumpling and South Dumpling.²³ At the time of this lease Fishers Island had manorial status. The specific language pertaining to the various bounties of the sea, i.e. shipwrecks, cargo, whales [a valuable commodity], and fish [likely indicating both cast upon the foreshore and beaches and harvested *from* the foreshore and beaches] are critical evidence as to ownership and appurtenances contemporarily. As I have cataloged, indexed, abstracted literally thousands of land records for Long Island, from Indian purchases to present date, I can attest leases usually provide greater detail to respective properties than conveyances (i.e. sales, gifts, exchanges, etc.). The 1915 lease of Gardiners Island,²⁴ 208 years after this Fishers Island one just discussed, is no different:

²¹ As was the case with the above townships, use and regulation of island foreshores was with the respective owners, or inhabitants.

²² [Seven-year lease of Fishers Island by John Winthrop (Fitz-John), esquire, of New London in the Colony of Connecticut in New England, and (his brother) Wait (Still) Winthrop, of Boston, in the Province of Massachusetts in New England, to George Havens Sr. and his son, George Havens Jr., yeomen, both of Shelter Island, N.Y., October 3, 1705], East Hampton Library Long Island Collection.

²³ [Map of] Fisher’s Island, New York, after a map drawn in 1882; adjacent to North Dumpling and South Dumpling is “Flat Hummock.”

²⁴ [Lease of Gardiners Island and Ram Island, respectively, both in East Hampton Township, N.Y., by Lion Gardiner, of said Gardiners Island, to Clarence H. Mackay, of Roslyn, North Hempstead Township, N.Y., January 1, 1915]. East Hampton Library Long Island Collection.

“... also the large ponds and creeks and the lands under the waters of the same and also the sole and exclusive right to shoot and remove therefrom on Gardiner’s [sic] Island and Ram Island all the male deer that have horns and all manner and kinds of game, birds and wild fowl ...”

Shelter Island, also in Suffolk County, N.Y., too was given manorial status when owned exclusively by the Sylvester brothers. This island contains several necks, or peninsulas, of land adjoining it, including a Ram Island. In the early 20th century, Shelter Island Township requested quitclaim deeds to the lands under water around Shelter Island from Sylvester heirs, evidence of an understanding or knowledge that said lands under water (which would include the foreshore) were very likely owned and covered by the manorial status, even into the 20th century.²⁵

Off Martha’s Vineyard is the chain of islands collectively known as the Elizabeth Islands, all formerly under the jurisdiction of New York Colony (today all of them are in York County). In a 1682 mortgage for 3/4th of the island of Naushon, the following description is provided:

“Know all men by these present that I Thomas Mayhew.....three quarters of one of Elizabeth Islands commonly called Kataymuck [sic] lying between Marthas [sic] Vineyard Sound and Monument Bay which said three quarters to take beginning at the river at the eastern end of said island....*a certain neck of land to the said island adjoining commonly called Oaktimmy [sic] being part of the three fourths aforesaid, lying at the eastern end of said island and often parted or severed from it at high water.*²⁶

Starting with New York Colony Governor Richard Nicolls in 1662-5 through Governor Fletcher in 1694, Letters Patent were issued (compulsorily) to the respective Long Island municipalities and manors (the latter granted said manorial status by these same Patents at varying times). The Governor Thomas Dongan Patent issued to East Hampton Township in 1686 was a comprehensive document which identified every geographic feature of the town, i.e. beaches, and confirmed title and custodianship of them with the newly created ruling government body of the Town, the Trustees of the Freeholders and Commonalty. To reiterate more precisely, all land_upland, littoral, and lands under water *not already owned privately* was vested with the said Trustees *for all inhabitants, both Freeholders and Commonalty*. Thus, the beaches, lands under water, and roads were common to all *townspeople* (marshlands were allotted out to Proprietors).

In the same year the Dongan Administration also issued a Patent to Gardiners Island, granting it manorial status. The critical consideration here is this manorial status erected the island_entirely privately owned_into its own municipality, akin to nearby East Hampton Township, N.Y. Said Patent contained nearly identical language to the East Hampton Patent; germane to this investigation, it identified the beaches as vested in the title of the island’s proprietor, John Gardiner.

From 1686 through 1788, Gardiners Island was its own municipality, i.e. could have its own court, religion, etc., when, in the spirit of the Revolution and anti-British sentiment, it

²⁵ Records of the Town of East Hampton, Long Island, Suffolk Co., N.Y., Volume VI, Addendum, pages 651-660, published in 1926.

²⁶ Early History of Naushon Island, by Amelia Forbes Emerson, pages 96-97, privately printed in 1935.

dropped its manorial status and became a part of East Hampton Township, N.Y., paying a large percentage of taxes since that time. But the first New York State Constitution (1777), Article 35, declared:

“all grants of lands within this State, made by the King of Great Britain, or persons acting under his authority, after the 14th of October, 1775, shall be null and void; but that nothing in this constitution contained shall be construed to affect any grants of land within this State, made by the authority of the said King or his predecessors, or to annul any charters to bodies-politic by him or them, or any of them, made prior to that day.”

So, while Gardiners Island joined East Hampton municipally, it retained its land rights and privileges. The same held for other manors in Suffolk County, N.Y. However, what makes Gardiners Island unique in this respect, unlike the other two island manors, Fishers Island and Shelter Island, respectively, is that Gardiners Island is still privately owned *in its entirety*. The Gardiner family, in close to 400 years, never conveyed any part of Gardiners Island to a private or corporate entity (aside from the U.S. Government for an ill-fated lighthouse at the northern tip of the northward shoal in the 1850's). They are the *sole* upland owner. Access to any part of the island can only be achieved by water, not by any adjoining privately owned parcel without the same status. As a result of this private ownership of the foreshore, the public's right to it is limited to navigational emergencies.²⁷ This is the very point of purchasing, retaining, maintaining and paying for the ownership of a *private* island.

IV. CARTOGRAPHIC EVIDENCE & CONSIDERATIONS:

The earliest *accurate* cartographic evidence delineating Gardiners Island and its immediate vicinity is the Robert Ryder “Map of Long Island,” circa 1675. Ryder was a surveyor, and this map is considered both relatively precise and accurate for its time. According to the map, Ram Island is shown as separate from Gardiners Island.²⁸ It's important to note here that Long Island itself is made up of numerous islands; a Dutch translation of the Algonquin name for Long Island is “Illant de Gebrokne Lant.”²⁹ Correspondingly, therefore, within each township and early manors on Long Island are, of course, numerous islands and other littoral features of varying names.

In 1797 the New York State Office of the Surveyor General requested every township statewide to prepare and submit a survey of their respective townships; this project likely greatly aided the 1802 map of New York State.³⁰ East Hampton dutifully obliged, preparing and submitting their town-wide survey, which included Gardiners Island and “other smaller islands.”³¹ In November 1797, a separate survey of Gardiners Island, its shoals, and Ram

²⁷ People v. Kraemer, 7 MISC. 2d pages 284-385 (Suffolk County, 1957).

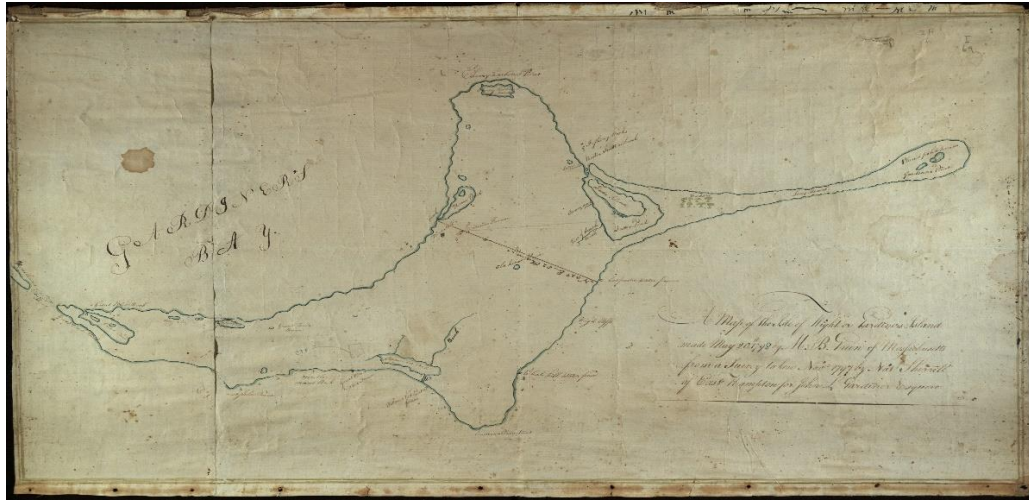
²⁸ A Map of Long Island by Robert Ryder, of about 1675.

²⁹ Long Island Gazetteer, page 173.

³⁰ Gentlemen, By an act of the Legislature, entitled "An act in addition to an act, entitled "An act for the further direction of the commissioners of the land-office, and for other purposes therein mentioned," passed the 28th March, 1797, it is enacted, "That it shall be the duty of the supervisor of each town ... to cause an accurate map to be made of the town ...

³¹ [A plot of the Township of East Hampton (N.Y.) including Gardiners and other small islands...made by East Hampton Township N.Y. government surveyors or appointed private surveyors, pursuant to New York State law

Island was also made.³² In other words, this survey, separate from the rest of East Hampton Township, N.Y., clearly demonstrates Ram Island and the shoals are a part of Gardiners Island. This survey was done by the town, pursuant to said NYS law, for Gardiners Island proprietor John Lyon Gardiner made a memorandum notation of it in his account book.³³ This is a critical point that the town prepared the survey of Gardiners Island, its shoals and Ram Island as its own survey, reflecting the private title and privileges retained by the Gardiner family protected by the aforementioned 1777 New York State Constitution:



(Courtesy of the East Hampton Library Long Island Collection)

This separate survey is yet another example of the careful due diligence exercised by the Gardiner family since their confirmatory deed of 1640, and continued to this present time with their posted “no trespassing” signs and notices in the local paper of record. The role of custom as pertaining to real property law requires usage of a *particular* property be ancient, exercised without interruption, peaceable and free from dispute, reasonableness, certainty, obligatory, and not inconsistent with other customs and laws.³⁴ As already observed, the Gardiner family has consistently defended their ownership, making the public aware of this known information.

The public records of East Hampton Township, N.Y., the numerous littoral court cases, published and unpublished histories, biographies and many other archival resources all lack evidence of public use and access to Gardiners Island and its adjoining shoals and Cartwright/Ram Island, aside from occasional trespass. The closest reference to the title and littoral boundary status of both Gardiners Island and Cartwright/Ram Island is from an

mandating every township statewide to make a map of their respective townships, including primary roads, geographic features, and place names, November, 1797].

³² [A map of the Isle of Wight, or Gardiners Island, made May 20th, 1798 : by M.B. Green of Massachusetts, from a survey taken November, 1797, by Nat Sherrill of East Hampton (Township, N.Y.) (employed by said township) for John L. Gardiner, Esquire, 1798].

³³ [Account book, or daily accounts, titled 'Day Book A,' comprised of daily account entries for Gardiners Island, East Hampton Township, N.Y., by John Lyon Gardiner, January 2, 1797 through December 25, 1801].page 67, December 2, 1797: entry: "Town of East Hampton Dr two men carrying chain 2 days surveying the island."

³⁴ Easements Relating to Land Surveying and Title Examination, Donald A. Wilson, 2013, pages 253-254.

editorial article in the “Addendum” section of the published East Hampton Town records, by editor Harry D. Sleight, Historian and Attorney-at-Law. In said article titled, “A Digest of Long Island Land Grants and sales,” written in 1926:

“Gardiner’s [sic] Island is a part of East Hampton Town, Suffolk County. But its foreshores and under water lands are differently held than in the town proper.... the sand bars at northwest end [Gardiniers Point] and southeast end [Ram/Cartwright Island/Shoals] extend nearly two miles each way, and now are greatly washed away and covered by high tidal water. But they were covered by the grant, and taken possession of by the grantee as part of ‘the physical structure of the island’ [quotes by author Sleight] as was all the foreshore together with all the lands from high water mark to the channels surrounding the island.”

Sleight continues:

“(NOTE: this claim has also been made for Shelter Island; I have yet to see the grant applying to Shelter Island specifically by Sovereign Province, General Assembly or State). No one may land at Gardiner’s [sic] Island without the consent of the Proprietor and all dock rights are possessed by him, and not by the commissioners of the Albany land office. These foreshore rights have been maintained at Gardiner’s Island by the Gardiners and respected by the Province and State for over 200 years.”³⁵

This article was written at a time when Long Island municipalities were once again assailed by powerful interests denying their ownership of their respective foreshores, dry beaches and lands under water.³⁶ The findings in this report are identical.

The federal agency originally known as the United States Coast Survey was created in 1838 for the purpose of careful mapping of our nation’s coastline, primarily for navigational safety. This large mapping endeavor commenced on Long Island, and has been updated with regularity ever since. The various updated editions of the maps made for the East Hampton Township N.Y. vicinity consistently show the shoals and Ram Island adjoining Gardiners Island, along with their respective changes, a fact to be expected in a bay that’s an open arm of the sea.

In 1895 the United States Board on Geographic Names, a federal agency charged with standardizing place names on official maps (originally domestically, later to include foreign place names), endeavored to determine the origin of the name “Cartwright Island,” as opposed to the long standing “Ram Island” on all previous maps, including the aforementioned U.S. Coast Survey maps. Submitted affidavits by local men familiar with the area, including Gardiners Island proprietor John Gardiner, all stated it had been called “Cartwright Island” in their respective lifetimes, stating that Ram Island had long since “disappeared,” or submerged (now apart of the shoal system). After careful consideration of

³⁵ Records of the Town of East Hampton, Long Island, Suffolk Co., N.Y., Volume VI, Addendum, pages 651-660, published in 1926.

³⁶ In the 1920s the Long Island State Park Commission, led by Robert Moses, began acquiring title to Long Island beaches and lands under water. In the 1880s, with the coming of the railroad and industrial revolution wealth in pursuit of seaside homes, the same issues were raised, with new wealthy oceanfront homeowners given title to dry beach and dunes for next to nothing by the various Boards of Trustees of the Freeholders and Commonalty.

this possibility, I believe this to be a moot point; that the entire shoal system, including Ram and/or Cartwright Islands (if in fact two distinct islands), is part of the same land form with Gardiners Island. The naming, or renaming, of Cartwright Island, in no way reflects any conveyance out of Gardiners Island and its respective land forms.

V. OPINION ON TITLE TO THE FORESHORE AND LANDS UNDER WATER ON AND IMMEDIATELY ADJACENT TO BOTH ISLANDS AND SHOALS, AND ANY PUBLIC RIGHTS THEREON:

I have spent months carefully reading, and rereading, the numerous cases and legal, geographic and historic scholarship on the subject of the foreshore and lands under water. I will do my best to accurately summarize over one thousand years of this misunderstood, important topic:

Through the Saxon period (to the Norman Conquest, in 1066), grants of coastal lands absolutely included respective adjoining beaches and foreshores. This practice continued with the Norman Period (William the Conqueror), including control and use of the foreshore by its respective owners. The position that the foreshore and lands under water were vested in the Crown (Jus Privatum) was initiated by the despotic Stuart Dynasty kings, looking to line their coffers by forcing coastal property owners to pay for new grants. This unpopular position was challenged and defeated in English courts until the notorious Philpot decision, whereby corrupt judges under ruling King Charles I (later beheaded for this and other heavy handed practices) sitting on this case ruled in the Crown's favor. Thus began the concept of Crown ownership in the foreshore and lands under water.³⁷

This new "precedent" was carried over and carried out here in the new English colonies, including New York Colony. Regardless of its validity, the various Dongan Administration Patents issued to the various Long Island N.Y. towns and manors *included* both the foreshore and lands under water to its respective recipients. Numerous cases reflect this understanding.

The popularly held belief that the Public Trust Doctrine means the public at large has rights of access *on the soil under water* (including foreshore) *throughout New York State* is absolutely without merit on Long Island, N.Y. While this investigation pertains to an early (17th century) land grant and its clearly expressed rights and privileges, I must mention the fact that *after* the American Revolution, and all of its Democratic principles, the New York State Land Commissioner's Office has and continues (under the New York State Office of General Services) to make grants of land under water to adjoining upland owners, including the foreshore, *to the exclusion of public access*. An example of this is the 1988 decision (upheld) by the New York State Court of Appeals that the East Island Homeowner's Association (in Glen Cove, Nassau County, N.Y., on the Long Island Sound) can keep the public off its respective foreshore by virtue of an 1888 grant of land under water by the New York State Land Commissioner's Office to the island's then owner, Jennie Ropes.³⁸

³⁷ A History of the Foreshore and the Law Relating therto....by Stuart A. Moore, 1888.

³⁸ Smith v. State, 153 A.D. 2d 737 (1989)

In the 1880's, Robbins Island, in Peconic Bay, Suffolk County, N.Y., was owned by a group of sportsmen, who applied for, and were granted, a belt of lands under water (including the foreshore) around the island. One must now consider why then, or at any point, proprietors of Gardiners Island never applied for the same or similar. The answer is because it wasn't necessary, by virtue of its much earlier, protected Patent.

The case law in New York State in regard to the Public Trust Doctrine interprets and limits said Doctrine to the federally protected right of navigation on water surfaces in New York State, and does *not* intend it to include rights on the soil in the foreshore or lands under water.³⁹

There are several excellent, thoughtful and thorough treatises on this confusing (and confused) subject, but I offer the following quotes from my preferred source on this topic, the authoritative legal Warren's Weed New York Real Property treatise, in chapter 77, "Lands Under Water":

(Part 1 – Introduction : 77-01): "The classification of land in NYS as land above or under water is the initial determinate of title to such lands. If land is below high water mark on a tidal or navigable water body, the State of New York **presumptively** (emphasis mine) had title to the lands under water. ***This presumption may later be rebutted to show that title has been conveyed to the upland littoral proprietor or another.***"

(77-02): "NYS early on recognized that the King of England created interests in land under water by colonial grants and patents. The first NYS Legislature recognized and confirmed these interests in governmental entities, **private individuals**, and corporations. These early patents continue to hold contemporary relevance and are important considerations in recent and recurrent litigations.

"The right to the **use** of land under water by the upland littoral proprietor is determined by the nature of title NYS has to such lands and whether the State **has expressly or impliedly consented to such use. In the first instance, the question is whether NYS has recognized a pre-existing title in the upland littoral proprietor, or whether it has granted title to the upland proprietor, or another. If NYS recognizes or confirms a prior grant of title, or has itself granted title to land under water, then the use of the land under water is subject to the same rights and restrictions as any other privately owned upland in NYS. The proprietor of such land under water may make any use of the land which is consistent with**

³⁹ See especially: *Blundell v. Catterall* (U.K.), p. 567: "the public have no common law right of bathing in the sea; and an incident thereto, of crossing the sea shore on foot, or with bathing machines, for that purpose...the plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing thereon with stake nets...the question in this case is, whether there is a common law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages, notwithstanding the part on which the right is claimed, is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake nets, and of driving these stakes into the soil...I am of the opinion there is no such common law right."

the police power regulations of the State, the Federal regulations of commerce [right of navigation], local zoning and others regulations.⁴⁰

VI. CONCLUSION:

While the original Indian purchase of Gardiners Island lacked detailed language in terms of its littoral boundaries, geographic features, and respective appurtenances, usage, possession and other factors for nearly 400 years demonstrate ownership of Gardiners Island in its entirety, i.e. its beaches, foreshores, shoals, adjoining (and interior) lands under water, and Cartwright/Ram Island.

Long use of and deciphering of the public and private records pertaining to East Hampton Township, N.Y., and Gardiners Island prove to me the absolute private ownership and usage of the areas in question. The court decisions and legal treatises confirm the geographic and historic facts here: that every real property parcel and its respective title and rights needs to be examined on a case by case basis. Because, as noted earlier, early Indian purchases, land grants and colonial confirmatory Patents were often vague, I have endeavored to provide clear, factual examples of similar islands, similar in geographic nature and in the same colonial time period. While I plan to make a continued study of this important topic, I do not believe any documentation or information exists that contradicts my findings.

One final, important point: to reiterate, every land title and boundary investigation must be taken on a case by case basis. My findings refuting the application of the Public Trust Doctrine pertain to *this* particular case, privately owned Gardiners Island and its adjoining shoal systems. I am in complete agreement with the assertion that on Long Island, N.Y., a unique place politically, with its dual system of government created by the early Patents (creating the Trustees of the Freeholders and Commonalty for most townships here), “mini public trusts” exist within the “Dongan towns (on the *mainland and interior water bodies*).” In the case of Gardiners Island, the beaches, foreshore and lands under water are common to the island’s proprietor. In the case of East Hampton Township, N.Y., the same from its beginning were owned by, regulated and held in trust for the town’s residents.

⁴⁰ Warren’s Weed New York Real Property, 5th edition.