

# MDNR Law Enforcement Division

# **PUBLIC RIGHTS ON MICHIGAN WATERS**

## **MICHIGAN CONSTITUTION**

The State of Michigan is entrusted with protecting the natural resources of the state and its citizens through a specific provision within the Michigan Constitution.

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

*Mich. Constitution, Art IV, §52.*

The State is compelled to act to uphold and advance this constitutional provision.

## **INTRODUCTION**

The State of Michigan is surrounded by four of the five Great Lakes--the world's largest freshwater lakes. These Great Lakes constitute 90% of the country's fresh surface water, and about 20% of the world's fresh surface water. The Great Lakes are resources of vital national importance; utilized for manufacturing, shipping, drinking, recreation, and tourism. Michigan has approximately 3,288 miles of Great Lakes coastline, more than 10,000 inland lakes and ponds and is interwoven by a 35,000-mile web of freshwater rivers, streams, and wetlands. Accordingly, Michigan has more boat registrations than any other state in the country. It comes then as no surprise that disputes arise between those who wish to utilize these waters and those who own private land through which these waters flow.

The following document is offered as a guide to how water rights came to be and the current state of the law. This information has been compiled for convenience in answering common questions regarding water law in the State of Michigan. This material highlights the evolution of court decisions and legislative enactments dealing with water and related legal issues. The manual discusses the court's role in defining and shaping Michigan water law. The "floating log test," the "recreation-boating test" and other terms pertinent to water law are discussed and defined. The text also provides an overview of the applicable statutes enacted by the Michigan Legislature. A list of common questions and their answers has been included to provide easily accessible information regarding situations of frequent interest and discussion. Michigan's waters support numerous activities and uses. It is therefore imperative to discuss these uses as they relate to and interact with areas of water law. Accordingly, not only water, but such ancillary issues as fishing, boating, hunting, trapping, ownership, access, development and their related rights are discussed in varying detail.

The field of water law is complex and develops periodically through both legislative and judicial action. This manual is not, nor is it meant to be, an exhaustive or conclusive evaluation of the issue. This material is designed to provide the reader with a working knowledge and understanding of this complicated yet interesting area of Michigan law.

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The material in this report related to the status of water law in Michigan was updated on December 1, 1993, through the diligent efforts of Stephen L. Madkour, Thomas M. Cooley Law School. The report was editorially updated in April, 1997.

## **THE BIRTH AND HISTORICAL DEVELOPMENT OF WATER RIGHTS**

Primitive man's existence was primarily dependent upon game and fish. From the beginning of recorded history, kings and sovereigns, being the strongest power in the land, owned the game and fish as they owned all property. They were their own enforcement agents in protecting their rights.

When William the Conqueror imposed his rule upon England in the year 1066, the concept that all property was vested in the king crossed the English Channel. In 1215, King John of England surrendered many of the kingly prerogatives to his barons and nobles. Present concepts of land ownership and property rights in game and fish have their beginnings in this action.

With the American Revolution, the colonies confiscated the English crown property and many crown grants. By the Acts of Confederation, the ownership of land was ceded to the Federal Government. Virginia, New York, Maryland and Connecticut had claims to lands of the Northwest Territory. Virginia's claim to the Michigan area seems to have been the strongest, which may explain frequent references in the record of territorial jurisprudence to Virginia procedure, and interpretation to the common law of England.

At the close of the Revolutionary War, certain crown grants, including a few from the King of France, were recognized and patents were issued by the Federal Government. Grants of land were made as military bounty warrants to soldiers and sailors. The United States later established a definite land policy and large areas were conveyed to colonizers. These new owners displaced the sovereign, however they did not acquire ownership of the game and fish which passed to the states.

Game and fish, being migratory in their habits, disregard property boundaries and pass over the lands of many owners. If all land were owned by the state, the problem would be simple.

The landowner is conceded to have exclusive rights in the taking of game, either by hunting or trapping, upon his or her own property and in open seasons. This right, being a property right originating in ownership of land, may be sold or transferred. Thus, one may own the land but sell the right to take game. A parallel is the sale of mineral rights by the landowner who may continue to occupy and use the land, while mining by others is in progress.

## **MICHIGAN'S HISTORICAL DEVELOPMENT**

In Michigan, riparian owners on inland waters historically had title to the land under the water. It was, therefore, necessary to provide a legal avenue in which to convey rights to provide public fishing over private lands. The source of this right in Michigan is unique in that it is dependent in many instances upon the question of navigability of the water.

Under the English system, fishing rights could be a common right of all and also limited or restricted, as the privilege was acquired by prescription, grant or land ownership. Thus, the English common law does not govern the taking of fish as it governs the taking of game. Water is like air, owned by no one and yet owned by all. Therefore, no one can claim an exclusive right to take fish on the basis of water ownership. In Michigan, the right to take fish is shared by all, provided the water in which they are taken is public. Under the law of this state, although the riparian owner on an inland lake or stream owns the soil under the water, he does not own the navigable water, and he does not own the fish. So far as they are capable of ownership, they belong to the state for the benefit of the people.

By judicial decision in 1860, the title to the beds of inland navigable waters, both lakes and streams, was declared to be in the riparian owners. The title, allowed to be taken by the riparian owners, was subordinate to public rights, including the public right of fishing. In contrast, the title to bottomlands of the Great Lakes is held in trust by the State of Michigan.

For purpose of clarification, a riparian owner is simply one who owns land or property abutting water. Actually, a riparian is one who owns land contiguous to a river or stream, and one who owns lands contiguous to a lake is properly called a littoral owner. But in common practice, both are referred to as riparians.

The question is often asked: How did the State of Michigan acquire the duty to hold the soil beneath navigable waters in trust for public use? Virginia ceded the Northwest Territory to the Federal Government. Michigan, which was carved from this territory, took title to the submerged lands limited to the grant by Virginia and the Ordinance of 1787. This ordinance, being one of the laws of the Northwest Territory, and still of binding force in Michigan, provided that "[t]he navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor." Art. IV Northwest Ordinance 1787. Therefore, Michigan, upon admission to the Union, took title burdened with the aforesaid public trust. Michigan, either by legislative enactment or judicial decision, could in turn, surrender title to its submerged lands. The State, by judicial fiat in the case of Lorman v Benson, 8 Mich. 18 (1860), retained title to the bed of the Great Lakes, but surrendered title of the submerged soil of inland navigable waters to riparian owners. However, this transfer of title could not unburden such submerged land from the public right of navigation, fishing, and related uses as the State of Michigan could not convey to a private individual more rights than it originally took. It is significant that the title, which the state took to all navigable waters, was burdened with the common law trust for the benefit of the public.

## **WHAT ARE PUBLIC WATERS?**

### **THE "FLOATING LOG" TEST AND KEY DEFINITIONS**

It should be emphasized here that the terms "public" and "navigable" are synonymous; likewise are the terms "private" and "non-navigable." This is due to the fact that since 1787, prior to Michigan's admission to the Union, applicable law has stated as "public" all waters that are navigable and, as "private" all waters that are "non-navigable." Accordingly, the legal test used to determine "navigability" is the crux of the matter. The fact that a water is boatable, does not necessarily, in the opinion of the courts, make it navigable.

Public and private rights are controversial issues that have historically been determined by the courts. Michigan courts have repeatedly held that the public has rights in navigable water. These waters have been defined as any water which in its natural state is capable of and has been used for the purposes of commerce, travel and trade by the customary and ordinary modes of navigation. The floating of logs during the lumbering days was held to be an act of commerce. Consequently, any lake or stream used for this purpose would be considered navigable within the meaning of this term. Thus, the log floatation test has largely become the yardstick in Michigan to determine the "navigability" of a waterbody, that is, whether public or private.

Pursuant to the language of judicial decisions are the following key definitions:

#### **A. Navigable Inland Lake:**

A navigable inland lake is any lake which is accessible to the public via publicly-owned lands, waters or highways contiguous thereto, or via the bed of a navigable stream, and which is reasonably capable of supporting a beneficial public interest, such as navigation, fishing, hunting, swimming or other lawful purposes inherently belonging to the people. Bauman v Barendregt, 251 Mich. 67; 231 NW 67 (1930); Collins v Gerhardt, 237 Mich. 38; 211 NW 115 (1926); Kerley v Wolfe, 349 Mich. 350; 84 NW2d 748 (1957). But, if the littoral landowners of a "dead end" lake object, there are no public rights. Bott v Natural Resources Commission, 415 Mich. 45; 327 NW2d 838 (1982).

In this state, natural waters have been divided into two classes: (1) the Great Lakes; and (2) inland waters. Titles and rights in the latter were declared in Rice v Ruddiman, 10 Mich. 125 (1862), and in Turner v Holland, 65 Mich. 453; 33 NW 283 (1887), to be governed by the same rules of law, whether they were rivers, lakes, or ponds, and whether the lakes were large or small.

### **B. Navigable Inland Stream:**

A navigable inland stream is (1) any stream declared navigable by the Michigan Supreme Court; (2) any stream included within the navigable waters of the United States by the U.S. Army Engineers for administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States; (3) any stream which floated logs during the lumbering days, or a stream of sufficient capacity for the floating of logs in the condition which it generally appears by nature, notwithstanding there may be times when it becomes too dry or shallow for that purpose; (4) any stream having an average flow of approximately 41 cubic feet per second, an average width of some 30 feet, an average depth of about one foot, capacity of floatage during spring seasonal periods of high water limited to loose logs, ties and similar products, used for fishing by the public for an extended period of time, and stocked with fish by the state; (5) any stream which has been or is susceptible to navigation by boats for purposes of commerce or travel; (6) all streams meandered by the General Land Office Survey in the mid 1800's. Moore v Sanborne, 2 Mich. 520 (1853); Thunder Bay River Booming Co. v Speechly, 31 Mich. 335 (1875); Stofflet v Estes, 104 Mich. 208; 62 NW 347 (1895); Cole v Dooley, 137 Mich. 419; 100 NW 561 (1904); Sterling v Jackson, 69 Mich. 488; 37 NW 845 (1888); Collins v Gerhardt, 237 Mich. 38; 211 NW 115 (1926); Rushton ex rel Hoffmaster v Taggart, 306 Mich. 432; 11 NW2d 193 (1943); Diana Shooting Club v Husting, 156 Wis. 261; 145 NW 816 (1914); Muench v Public Service Comm., 261 Wis. 492; 55 NW2d 514 (1952); Nekoosa-Edwards Paper Co. v Railroad Comm., 201 Wis. 40; 228 NW 631 (1930); Lamprey v Metcalf, 52 Minn. 181; 53 NW 1139 (1893); Kelley v Hallden, 51 Mich. App. 176; 214 NW2d 856 (1974).

Michigan's approach to the issue of defining navigability has progressed little in the 120 years since Moore, *supra*, the earliest and still most influential case, was decided. Navigable waters in this state have been divided into two classifications: (1) strictly navigable; and (2) floatable (the latter sometimes termed navigable in a limited or qualified sense). Strictly navigable waters are those capable of use for valuable boat or vessel navigation, i.e., public highways under English common law. Floatable waters, as in Moore, are those suitable, in their natural condition, for the floating of logs. Once it is established that a water is to be included in either classification, public rights attach.

The right to public use of navigable lakes and streams includes the right of trespass upon the submerged soil, but does not extend to the uplands of riparian owners while in such waters, or in entering or departing from them.

It follows, therefore, that the numerous citations supporting the test of navigability on rivers is also applicable to lakes. The determination of navigability and non-navigability is a civil process.

In a 1968 expression of the Michigan Supreme Court on the question of navigability, In re Martiny Lakes Project, 381 Mich. 180; 160 NW2d 909 (1968), the import of Justice Black's majority opinion stated that

navigable waters are divided into two distinct classes; namely those navigable in a qualified sense and those unqualifiedly navigable. The court held that streams navigable in a qualified sense were "small streams which by common law belong to the public for the purpose of floatation and fishing" as compared to larger streams which are navigable in the more enlarged meaning of the term, unqualifiedly navigable, i.e., streams which in their natural condition are adapted to valuable boat or vessel navigation (vessels of 10 or more gross tons).

Many are confused concerning the true interpretation of this decision. Justice Black was subjected to considerable unjustified abuse and criticism, but his rationale is deemed correct and in keeping with earlier court decisions, viz., Moore v Sanborne, Rushton ex rel Hoffmaster v Taggart, Collins v Gerhardt supra, and Giddings v Rogalewski, 192 Mich. 319; 158 NW 951 (1916).

Some years ago, the United States District Court in Grand Rapids, in the celebrated Pine River, Osceola County case Ne-Bo-Shone Association, Inc. v Hogarth, 7 F. Supp. 885 (W.D. Mich. 1934), established a new precedent. Judge Raymond stated:

It is difficult to see why the right to navigate should include, as an incident thereto, the right to take fish. It is the view of this court that the right to take fish is not an incident of navigation, but a right arising from the fact that the waters, in which the right is claimed, are public waters. Both rights arise from the fact that the waters are public, not private. The rights coexist. Neither finds its source in the other.

This opinion may have forestalled many cases of dispute which otherwise would later have reached the courts. However, until this precedent is more firmly established, the rule requiring navigability, which has long been accepted, would seem to be the surest determination of the public or private character of a lake or stream.

Those watercourses located within Michigan which have been declared navigable by either the Michigan Supreme Court, United States Army Corp. of Engineers or through Legislative enactment are identified within the Appendix of this document.

## **THE BLURRED DEFINITION OF NAVIGABILITY**

### **THE RISE AND FALL OF THE RECREATIONAL USE TEST**

The greatest controversy today in defining "navigability" is whether recreational uses should be a determining factor. Unfortunately, Michigan courts have rendered sundry and often diverse rulings defining navigability. The Department of Natural Resources (DNR) is uniquely interested in the definition as the DNR is often the object of the public's inquires regarding the navigable status of variable lakes and rivers. For more than a century the test for navigability has been--and remains--the log floatation/commercial use test. However, recent cases have concluded that, today, public recreation has greatly displaced commercial uses. Therefore, the argument goes, for the waterways to best serve the public--as is the historical intent of the law--recreational uses should be considered in the determination of navigability.

The Michigan Court of Appeals in Kelley v Hallden, supra, concluded that recreational uses alone could support a finding of navigability. The Court affirmed a trial court's judgment enjoining landowners from interfering with the passage of boaters and waders on the St. Joseph River.

The question before the court was whether the St. Joseph River is navigable where it flows through defendant's property. The landowners argued that, since no evidence was submitted that the river section

in question was ever used for commercial transportation or log floating, the river was not navigable at that point. The State contended that recreational uses alone can support a finding of navigability.

The court in their deliberations rejected the former definitions of navigability fixed by reference to activities, such as log floating, which no longer play a significant role in the utilization of Michigan's waterways, in favor of a concept that the navigability of a stream or river should depend upon the uses to which waterways are currently susceptible. This latter concept is supported by Moore v Sanborne, *supra*. The court did not dwell on the distinction between strictly navigable and floatable streams, recognized in Moore, but stated that once it was established that a stream is found to be included in either classification, public fishing rights attach. Notwithstanding that the public's right to fish in the river was not established in the trial court, nor was evidence submitted by which the court could find the river to be navigable in either a limited or strict sense, the court held that recreational uses alone could support a finding of navigability.

The broad underlying principle of Moore--that a watercourse's navigability is a function of its public usefulness and value--convinced the court that the Michigan definition of "navigable waters" must be expanded to include those waters which are suitable for public recreational use.

The Michigan Court of Appeals concluded by stating: "We therefore hold that members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." Hallden at 181. "Capable of being navigated by oar" is deemed to include navigation by canoe as well as by rowboat.

Had it not been subsequently overruled, Kelley v Hallden would have established a landmark decision in the annals of navigability litigation in Michigan. But in 1982 Hallden was overruled by the Michigan Supreme Court in a trio of cases. The Supreme Court rejected the recreational-boating test and cited "the need for a comprehensive legislative solution."

Bott v Natural Resources Commission, Nicholas v McDaniel, and Attorney General ex rel Department of Natural Resources v Nicholas, 415 Mich. 45 (1982) were heard together and argued before the Supreme Court in January of 1980. It was almost three years before an opinion was issued on December 8, 1982. The Bott trio is, today, the controlling legal decision on navigability in the State of Michigan.

In the Bott case, the Supreme Court forwarded three main premises:

1. Changes in property law should be avoided whenever possible. Countless acres have been purchased and great expenditures have gone to improve properties in reliance upon property rules of law "fully established" and maintained for over sixty years.
2. Adopting a recreational use test would result in no "significant" addition of waterways subject to public use but would subject certain otherwise private waters not only to the "quiet" sport of fishing but also the "intrusive and jarring" activity of boating and water recreation. Bott at 66. These activities may render the property unfit for the private landowners use as a refuge and retreat as well as decrease the private character of the property and thus its commercial value. Such an imbalance of public benefit and private burden amounts to a taking by the State without just compensation, especially in light of the long enforced property laws that have induced the extensive reliance of these otherwise private riparian landowners.
3. "The importance that society attaches to the various public values, like the importance society attaches to the need for expanded recreational uses, cannot be gauged by this court with accuracy." Id. at 74. "Faced with an uncertain societal consensus, an inability to compensate riparian owners for the loss of a

valuable right, and the need for a comprehensive legislative solution, we believe that this court is not an appropriate forum for resolving the competing societal values which underlie this controversy." Id. at 86. In essence, the Supreme Court extended an express request of the Legislature to resolve the controversy over the definition of the term "navigability."

Thus, the recreational use test adopted in Kelley v Hallden has been overruled by the Bott cases and the commercial use/log floatation test continues as the controlling legal test of navigability.

## **THE PROBLEM (AND SOLUTION) AS VIEWED BY THE DEPARTMENT OF NATURAL RESOURCES**

There is presently a great deal of uncertainty regarding the public or private character of most of the State's streams, particularly the smaller streams. This is due to the fact that the old, but current, test by which streams are established as public (the floatability of logs) is fast becoming unprovable. The old rivermen are gone and can no longer testify that these streams were so used. Although the public need that created this public right may have been floatation of logs, a different need has arisen over the past sixty years. There should now be written into the law a means of determining the public/private character of a stream without need for judicial determination every time a dispute or the need to make an administrative ruling arises.

A statutory determination of a "navigable stream" is urgently needed to clarify the fishing, boating and recreational rights of the public, as well as provide criteria of navigability, and direction to state agencies in the implementation of existing laws and regulations. The State and the Michigan public believe it is needed.

The public or private status of a stream to date has been determined only by judicial action. Streams where such determinations have been made represent only an infinitesimal number of the state's total streams. No state agency can, under present conditions, satisfactorily respond to public inquiry as to their rights pertaining to streams, except in the limited instances where litigation has resulted in Supreme Court decisions declaring the stream public or private. Most of this problem could be resolved through legislative actions.

Enactment of a statutory definition would augment both 1994 PA 451, Part 315, Dam Safety, MCL 324.31501 et seq; and 1994 PA 451, Part 301, Inland Lakes and Streams, MCL 324.30101 et seq; and: (1) preclude costly and time-consuming litigation to ascertain the public or private character of streams; (2) expedite control of unauthorized dams, dredgings and diversions which (a) despoil stream habitat and fishing by raising water temperatures and siltation, (b) block migration of spawning fish, (c) deny lawful passage to wading and boating fishermen, and (d) diminish the quality and quantity of water delivered to downstream riparians; (3) permit ready removal of fences across navigable streams intended to prevent fishing access; (4) clarify and permit dissemination to the public, upon inquiry, a listing of those streams in which they have the right of fishing and boating; and (5) last, but not least, clarify, and thus protect, the vested property rights of landowners in non-navigable streams of which their control is now uncertain due to absence of adequate standards.

## **WHAT HAS BEEN DONE BY THE DEPARTMENT OF NATURAL RESOURCES?**

In 1969, the DNR proposed legislation to statutorily define a navigable stream. The bill, H.B. 2377, was introduced by Representatives Snyder, Anderson, Smit, et al. The bill as amended in the Committee on Marine Affairs read:

WHENEVER THE PHRASE "NAVIGABLE STREAM" OR "PUBLIC STREAM" IS USED IN ANY EXISTING OR FUTURE STATUTE, THE TERM SHALL MEAN ANY WATERCOURSE WHICH IS NOW OR HAS IN THE PAST PROVIDED, OR IS CAPABLE OF EITHER OF THE FOLLOWING:

- (A) TRANSPORTING ANY BOAT, CANOE OR CRAFT OF ANY KIND FOR ANY PURPOSE WITH 1 OR MORE PERSONS ABOARD,
- (B) FLOATING OR TRANSPORTING LOGS,
- (C) PROVIDING A PUBLIC FISHERY WHEN THE EXERCISE OF SUCH IS ACCOMPLISHED WITHOUT TRESPASS UPON THE UPLANDS OR RIPARIAN OWNERS.

A WATERCOURSE, OTHERWISE NAVIGABLE OR PUBLIC, SHALL NOT BE BARRED FROM THIS CLASSIFICATION NOTWITHSTANDING THERE MAY BE NATURAL OR ARTIFICIAL OBSTRUCTIONS WITHIN ITS REACHES WHICH NECESSITATE PORTAGES AROUND SUCH OBSTRUCTIONS.

The bill passed the House on June 12, 1969, with only 5 dissenting votes. The bill, however, died in the Senate Committee on Conservation where it met opposition from certain private interest groups. The definition was deemed reasonable and included within its purview only those streams which have the natural qualities to be of capacity for beneficial public service and, therefore, navigable and subject to the state's paramount public trust.

Our reasons for deeming the DNR proposed definition as reasonable, constitutional and not offensive to those vested rights which riparians have in non-navigable streams:

The following arguments support definitions (A), (B) and (C), respectively, of our proposed definition.

- (A) The Ordinance of 1787 is part of the law of the state because it was specifically incorporated into the laws of the state when the state was established and because it constituted a compact between the territory and outside jurisdictions that even statehood could not destroy.

Article IV of the Ordinance of 1787 provides:

"The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, . . ."

It was framed without regard to the common law rule as to what constituted navigable waters and designed to extend over all streams capable of being used for any purpose of public utility. Moore v Sanborne, Lorman v Benson, supra, and Tyler v People, 8 Mich. 319 (1860).

It applied not only to ship and vessel navigation, but more generally to the passage of canoes and bateaux, which were then the chief means of conveyance. Moore v Sanborne, Lorman v Benson, supra; Burroughs v Whitwan, 59 Mich. 279; 26 NW 491 (1886); City of Grand Rapids v Powers, 89 Mich. 94; 50 NW 661 (1891).

The Ordinance of 1787 included with "navigable waters," portages or carrying places connecting navigable waters that were used by parties making long voyages in small boats by passing from river to river. Lorman v Benson, supra. But it did not dignify as a navigable water every little rill or brook whose waters finally reached the Mississippi or the St. Lawrence. This definition would allow recreational uses alone to support a finding of navigability.

- (B) The Michigan doctrine of navigability was developed by the Supreme Court 120 years ago in Moore v Sanborne, supra. In that case, the court adopted a rule of "capacity for use to meet public necessity" as the true test of a stream's navigable status, and declared navigable a small stream having a "limited

capacity for floatage." The rules and principles of the Sanborne case have been adopted and followed by the Supreme Court in subsequent cases.

The question of whether the public should be entitled to travel upon any given stream should consider relevant the question of whether the stream in its natural condition is able to transport a log, or is capable of sustaining travel by a customary mode of water transportation. The ability of a stream to transport a log was and should now be one of the yardsticks by which the character of a stream, whether public or private, is measured. Such streams were essentially our major highways, which no one had a right to block. They were streams that the people normally regarded as public and expected to be open to travel and other uses. This public expectation is still valid today and should be protected.

(C) In Rushton ex rel Hoffmaster v Taggart, supra, the Supreme Court ruled the South Branch of the Pere Marquette River as navigable, and accepted the trial court's statement describing the nature of the stream:

[T]his stream is concededly not navigable in the sense of commercial travel by any boat. There is a difference of opinion among the witnesses as to whether it is practical to use a boat on it in fishing. Many portions of it would carry a boat occupied by a fisherman, in others the occupant would have to get out, wade and push the boat, and in still others he would have to lift or carry it over obstructions or shallow places, at least during periods of normal water height.

It would appear from the foregoing that the proposed statutory definition is reasonable, within rules established by the Supreme Court, and in accord with the basic principles set forth in the Sanborne case that streams with a capacity for use "to meet the needs and necessities of the people" are public streams, thus allowing establishment of navigability by proof of use other than the historical commercial uses.

## **COMMON QUESTIONS FROM THE PUBLIC**

### **A. Rights of Riparians on Lakes**

It is not physically possible to fairly divide the surface area of a lake among the riparian owners in proportion to their land ownership, or by projection of their property boundaries which reach the water at varying angles. The courts have held, therefore, that all riparian owners share an equal right to a reasonable use of the entire surface area of the lake. Owners can build docks and make other improvements to facilitate the use of their property and the exercise of their rights, insofar as such improvements do not encroach upon the same rights of other owners. For instance, an owner could be restrained by legal action of other owners from fencing off a portion of the lake; making earth fills which encroach upon the water area; or by extending docks or buildings an unreasonable distance into the lake.

### **B. Fishing in Lakes - Rights and Regulations**

#### **1. Private Lakes**

Non-navigable lakes and streams have generally been construed to be private waters.

There are two kinds of private lakes. Those with a connection to public waters and those with no such connection. The fish in lakes having a connection with public waters by which fish can migrate to or from for any length of time at any season of the year are the property of the state and may be taken only in accordance with law. The riparian owner(s) may determine who shall fish but the fishing is regulated by law. Fish in private lakes, having no connection with public waters, are considered private property and not subject to legislative regulation which prescribes methods of fishing, closed seasons, creel limits and minimum sizes. However, persons possessing such fish off the premises from which taken, if contrary to law, could be subject to sanctions. Riparian owners may determine who shall or shall not fish in such a private lake. Those permitted to fish in any private lake enjoy the same rights and privileges as the permittee. Thus, in most all cases, the right to fish extends to the whole lake.

It is apparent, then, that the public has the right to fish in navigable lakes and streams if access is gained without trespass upon privately-owned property. However, the public can fish in non-navigable waters, too, but only with permission of the riparian owner.

**a. For the purpose of classifying to what extent the state or riparian owners may regulate the use and activity of a lake, the following illustrations are provided by OAG, 1931-1932, p. 295 (August 19, 1931):**

(i) A private lake of less than 250 acres with no inlet or outlet and not planted with public fish.

The riparian owners of private lakes not connected with other lakes or streams by flow of water in any season of the year so that fish may pass, may, by reason of their constitutional rights, take fish therefrom without restraint from legislative enactment. They may keep the public from fishing in said lake. Their lessees and licensees have equal rights.

(ii) A private lake of less than 250 acres with no inlet or outlet, but planted with public fish.

MCL 324.45101; MSA 13A.45101 applies in this scenario. This section reads as follows:

No person shall take any fish from any of the inland waters of this State, within which fish shall be planted at the expense of the people of this State or of the government of the United States, after the passage of this act, from which waters the public is excluded from taking fish: Provided, however, that this act shall not apply to any small inland lakes covering less than two hundred and fifty (250) acres in which fish may be so planted without the written consent of the persons who together own in fee simple the submerged acreage.

Under the provisions of this Act if the riparian owners of the private lake have not given written consent to the planting of the fish by State or national authorities, the riparian owners may take fish without restraint from any legislative enactment. If they have given written consent to such planting, the riparian owners cannot fish in this lake unless the public is also allowed to fish therein.

(iii) A private lake of less than 250 acres with either inlet or outlet not planted with public fish.

The right of the public to fish in this lake depends on whether the inlet or outlet and the lake is navigable. The true test as to whether an inland lake or the inlet or outlet to same is navigable or not, is whether the waters under consideration are capable of being used by the public as thoroughfares or highways for purposes of commerce, trade and travel by affording a common passage for transportation and travel by the usual and ordinary modes of navigation.

(iv) A private lake of less than 250 acres, with either inlet or outlet, but planted with public fish.

The public has a right to fish in such a lake if it is navigable. If it is not navigable and the riparian owners have not given written consent to the planting of fish, the public may be excluded. If it is not navigable and the owners have given written consent to the planting of such fish in this lake and still exclude the public, then under the statute MCL 324.45101; MSA 13A.45101, the riparian owners cannot take fish themselves.

(v) A private lake of more than 250 acres with no inlet or outlet and not planted with public fish.

The riparian owners, their lessees and licensees, have exclusive rights of fishing on such a lake.

(vi) A private lake of more than 250 acres with no inlet or outlet but planted with public fish.

Under the provisions of MCL 324.45101; MSA 13A.45101, the riparian owners of a lake planted with public fish are prohibited from taking fish from such a lake if the public are excluded. This is true even though the riparian owners have not consented to the planting of public fish.

(vii) A private lake of more than 250 acres with either inlet or outlet not planted with public fish.

If this lake, and either the inlet or outlet, are navigable the public has a right to fish therein. If this lake and neither the inlet nor outlet are navigable, the public can be excluded therefrom by the riparian owners.

(viii) A private lake of more than 250 acres with either inlet or outlet but planted with public fish.

If this lake and either the inlet or outlet are navigable the public has a right to fish. If the inlet or outlet are non-navigable, the provisions of MCL 324.45101; MSA 13A.45101, apply and the riparian owners are prohibited from fishing in said lake if the public is excluded.

**b. If the planting of fish in inland lakes from state or government hatcheries or at a public expense has any bearing on the classification of a lake or a determination of the public rights, what effect would any of the following have on the matter?**

(i) If fish were planted by persons other than the riparian owners without the consent of such owners?

The planting of fish by persons other than the riparian owners would not affect the rights of the riparian owners in either case unless the planting was done at the expense of the State or of the United States. The public could be excluded.

(ii) If the fish were planted by any riparian owner?

This would not affect the rights of the riparians, and the public could still be excluded.

(iii) If the fish were planted by any riparian owner who later disposes of his property to one who desires to treat the lake as a private lake, excluding the public from fishing thereon?

The lake would still be a private lake and the public could be excluded therefrom.

(iv) If fish were planted by a riparian owner which were supplied from State hatcheries upon application filed by such owner on which was stated the waters were open to public fishing but after building up the stock of fish in such lake, determined to treat the lake as a private lake and excluded the public therefrom?

In such case, the prohibitions of MCL 324.45101; MSA 13A.45101 would apply. The owner could exclude the public if the lake was less than 250 acres in extent, but if he did so, he would not be permitted to take fish therefrom himself.

**c. Assuming that a lake has been meandered or is touched or bordered by a public highway, is this situation any different where property is acquired by the state or local government for highway purposes by deed through purchase, gift or exchange but not established by public usage? Would the public have the right to enter upon the bordering waters as one of the riparian owners?**

In the case of Bawd v Willetts, 197 Mich. 512; 163 NW 993 (1917), a lake of 100 acres was entirely surrounded by a public highway so that the public could step into the waters of the lake or into a boat upon the surface of the lake from the highway, but inasmuch as the lake was not a public, navigable body of water, it was held that the public could be excluded therefrom. The court said:

"They can no more enter without permission the portions of the premises covered by water than they can invade the uplands of the riparian owners."

This doctrine was approved in Putnam v Kinney, 248 Mich. 410; 227 NW 741 (1929). It is the opinion of this Department that it is immaterial whether the highway was established by usage or acquired by purchase for highway purposes. If the lake is a privately owned non-navigable lake, the public cannot enter thereon from a highway without owners permission.

**d. Referring to MCL 324.45301 et seq.; MSA 13A.45301et seq. (ACT 451, PA 1994) [Fishing With Hook and Line] is the test of navigability as applied in Putnam v**

**Kinney, supra, applicable to all the lakes of the state where the only navigation is solely by small boats engaged in fishing or other pleasure on such waters?**

The test of navigability is the same in all cases. The definition followed in Putnam v Kinney, Collins v Gerhardt, Giddings v Rogalewski, Tyler v People, and Moore v Sanborne, supra, is the law of this State and has universal application. Lakes must afford a common passage for transportation and travel by the usual and ordinary modes of navigation. The fact that small boats can be used for fishing or other pleasure on an inland lake does not make that lake navigable in fact or law. It must be capable of being used for commerce of some kind. The test of navigability as applied to the Pine River in Collins v Gerhardt, supra, applies to inland lakes also.

**e. Has the public a right to enter upon inland lakes from tributary streams against the wishes of the riparian owner or owners, if such a stream is navigable as applied in the Collins v Gerhardt case?**

The public would have the right to enter the inland lake if the tributary and lake are navigable under this decision.

(i) What are the public's rights if the stream is not navigable as applied in Collins v Gerhardt, but is navigable for row boat or canoe?

Then the public would not have the right to enter an inland lake if only navigable by row boat or canoe. It would have to be navigable in fact and law under the definitions and decisions heretofore cited.

(ii) By wading either side of the stream?

If the stream is navigable, the public may wade up the stream and fish but cannot trespass on the uplands. The Recreational Trespass Act does allow access to the upland in the event passage in the stream is obstructed. If the stream is not navigable, the public can not wade up the stream, nor may they access by boat.

**f. Do riparian owners hold rights to the subsoil of the center of the lake, to water's edge at established or high water level, or within their property lines?**

In Bauman v Barendregt, 251 Mich. 67; 231 NW 70 (1930), the court stated the rules as to this question as follows:

"A grant of land 'along the shore of' or by equivalent words or other description, bounded by a natural water course carries title to the middle line of the lake or stream . . . ." (citing Hartz v Railway, 153 Mich. 337 (1908)).

In Hardin v Jordan, 140 U.S. 371, 391, 11 S.Ct 808, 35 L.Ed 428 (1890), the court said:

When land is bounded by lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side.

Under these decisions, the riparian owners own the subsoil of an inland lake to the center of the lake.

**g. Can a riparian owner fence off his property lines even tending into the lake or do all parties share equal rights to the entire surface area of such lake regardless of the size of their land holdings?**

All riparian owners share equal rights to the entire surface area of a private inland lake, and may fish or boat upon any part of it. It would be inconsistent with the long line of case law for a riparian owner to fence off his portion of the lake. A riparian may, however, build docks or wharfs that do not interfere with the reasonable use of the lake for boating and fishing. This rule applies to all lakes, whether meandered or not. It also applies if the surface of the lake were frozen.

## 2. Public Lakes

If public access to navigable water has been established, the public user enjoys the same use rights and privileges of the private littoral owners. Thus, the right to fish a public lake extends to the whole lake. In fact, a lawful user of any lake, be it by public access or permission, has the right to any reasonable use of the lake.

It is the enforcement rule of the DNR, based on many Michigan Supreme Court opinions, that state regulations regarding the taking of fish apply to both navigable (public) and non-navigable (private) waters. People v Collision, 85 Mich. 105; 48 NW 292 (1891).

It is only where a private body of water is entirely unconnected with other bodies of water that the fishing regulations do not apply. People v Conrad, 125 Mich. 1; 83 NW 1012 (1900). The theory behind this rule is that where fish are free to swim from place to place and to and from public waters, publicly stocked waters also, the public through the State has a substantial interest in the fish.

In People v Collision, supra, the theory was advanced that ownership of fish is in the public before they are caught, and that fishing is a privilege accorded by the state rather than a private right. In this case, defendant took fish in Gun Lake through the means of spears and jacks contrary to statute. Gun Lake is located in Barry and Allegan counties and connects through other waters to Lake Michigan. It was held that the fish in the lake were migratory and the property of the state, and as such the state could regulate the mode of catching. But where the fish are confined to a privately-owned lake or pond unconnected with other waters and whose owner has the exclusive right of taking them, this public interest does not exist. Marsh v Colby, 39 Mich. 626 (1878); Giddings v Rogalewski, 192 Mich. 319; 158 NW 951 (1916). The following are excerpts from American Law Reports, Annotated, 15 ALR (2d) 754, in which applicability of state fishing license laws or other public regulations to fishing in private lakes or ponds is discussed.

Generally speaking, private lakes or ponds are not subject to the regulatory power of the state wherein they are situated. Such a naked proposition, however, is hardly adequate to indicate exactly what lakes or ponds are included or not in the statutes designed to regulate the time and manner of fishing in waters within the state. The term 'private waters' for the purpose of application of the statutes presents the main problem to be considered.

The courts generally recognize that a lake or pond is not private so as to be exempt from regulation merely because the soil underneath the water is privately-owned. The main test appears to be whether the lake or pond involved is connected, either continuously or at intervals with other bodies of water, so as to permit fish to move to and from the two places, or whether the lake or pond is entirely isolated. Some statutes expressly provide that private waters are to be exempt from regulation, thus establishing by legislative fiat a result reached by the courts by construction of statutes not expressing such an exemption. But specifically exempt or not, it must be determined in each special instance whether the physical attributes of the lake or pond are such as to be deemed 'private' and thus beyond the scope of regulation.

In accordance with the above discussion, the view has been generally taken by most jurisdictions that fishing statutes do not apply to lakes or ponds privately owned and not connected with any stream or other waters of the state, and this is so even though the particular statute involved does not specifically exempt private lakes or ponds. In People v Conrad, *supra*, a conviction for violating the fish law was reversed, and a statute making it unlawful to take fish by certain means in any inland lake in the state was held inapplicable to a private lake having no inlet or outlet with other waters.

The Court stated: "If it were connected with other lakes and streams, so that fish might pass in and out of it, others than the owners would then have an interest in protection of the fish in the lake." On the other hand, where a lake or pond, although privately owned, is connected with other waters, either at all times of the year or at substantially regular intervals, most courts, including Michigan courts, have maintained that the public has an interest in the fish therein and that state statutes regulating the time and manner of fishing should apply to such lake or pond. People v Horling, 137 Mich. 406; 100 NW 691 (1904) (holding that the owner of a private lake containing fish which migrate to and from it at different periods of the year may not take fish therefrom contrary to statute); People v Lewis, 227 Mich. 343; 198 NW 957 (1924); People v Bridges 142 Ill 30; 31 NE 115 (1982); People v Doxtater, 27 NYS 481, Aff'd 147 NY 723 (1894).

#### Pertinent Attorney General Opinions:

Where a private lake and either its inlet or outlet is navigable in fact, the public could not be excluded from fishing thereon; however, if the waters were non-navigable, the public could be excluded, and in both circumstances a riparian owner is bound by the fishing laws. OAG, 1931-1932, p. 295 (August 19, 1931)

The general fishing laws of this state would govern fishing in a lake entirely enclosed by private lands, and which has neither inlet nor outlet connected with other bodies of public waters, where the public is permitted access via a boat livery or with permission of one or more of the riparian owners. OAG, 1959-1960, No 2553, p. 152 (August 5, 1959)

As indicated, whether a lake comes within the purview of the statute regulating fishing depends on whether the lake is connected with other waters so that fish can migrate to and from the lake for any length of time during any season of the year.

### **C. Indian Treaties and Fishing Rights**

Recreational boat owners are advised that certain Indian Tribes, by virtue of Treaty rights, have the right to subsistence and commercially fish in Michigan waters. This right is recognized and enforced by the State of Michigan and must be recognized and, not disturbed, by all persons.

The sovereign status of Indian tribes was acknowledged in the Constitution of the United States and has guided application of Indian treaty law ever since. Now known as the Supremacy clause, Article VI, clause 2, states that "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." In Michigan, the Supremacy clause has been invoked by state and federal courts to uphold Indians' rights to fish--a prerogative retained in the treaty of 1836 with the Ottawa and Chippewa in Washington, DC. The extent of treaty rights has been thoroughly examined by the courts. In the case of People v LeBlanc, 399 Mich. 31 (1976), the Michigan Supreme Court ruled that a Bay Mills Indian Community fisher needed no state license to fish commercially. In a similar case, United States v Michigan, 471 F. Supp. 192 (1979), United States District Court Judge Noel Fox further defined the treaty rights by ruling that the tribes and federal government had the exclusive right to regulate the treaty fisher and that the interest of State of Michigan was subordinate to that of the federal government. The dispute over these fishing rights worked a monkey wrench of sorts into the legal system. The case was then argued before the United

States Circuit Court of Appeals in Cincinnati, United States v Michigan, 623 F.2d 448 (6th. Cir 1980), only to be remanded back to the District Court.

Eventually, in 1985, after several years of discussion and litigation, the tribes, states and federal governments successfully negotiated a 15-year settlement that was signed by all parties and upheld by United States District Court Judge Richard Enslen. This agreement defined exclusive commercial fishing zones in the Great Lakes for state and tribal fishers that are jointly managed by the tribes and state. Upon expiration of the 15-year agreement, a new settlement ("The 2000 Consent Decree") was negotiated between 5 Michigan Tribes, the federal government and the state and was issued as an order by Judge Enslen in August of 2000. This Consent Decree defines the allocation and management of the fisheries within the 1836 treaty-ceded waters of the Great Lakes for the period 2002-2020. Implementation of the settlement is overseen by an Executive Council of three tribal chairpersons, the Director of the DNR, and the Deputy Under Secretary of the Interior. The Code of Federal Regulations also contains a formalized approach to dealing with off-reservation Indian fishing rights that were granted by treaty. 25 C.F.R. §249 (1993).

The issue of fishing on the Great Lakes is not only a legal question, but an ethical one as well. Ottawa and Chippewa bands have depended on Great Lakes fisheries since long before the coming of the Europeans. Their fishing rights were retained in 1820, 1836, and 1855, the years of the principal treaties with the federal government.

It has been 155 years since the crucial Treaty of 1836 was signed. As Judge Fox reminds us, "[t]he mere passage of time has not eroded and cannot erode the rights guaranteed by solemn treaties that both sides pledge on their honor to uphold." The State of Michigan upholds the treaty and recognizes the tribal rights declared in United States v Michigan, 471 F. Supp. 192 (1979). The DNR is committed to reducing conflicts between sports, tribal, and commercial fishers.

#### **D. Public Rights in Streams**

DNR field personnel receive many inquiries about the public's rights to fish in given streams. Typical questions include:

"May I wade in a stream while fishing without being in trespass?"

"What may or should I do when floating or wading down a stream and I encounter a dam or log jam or a fence that I can't cross while in the water?"

On a navigable (public) stream, the public has the right to float the stream, to wade on the submerged soil and to fish therein, but this right does not extend to trespass upon the private uplands of abutting landowners. Part 731, Recreational Trespass, 1994 PA 451, MCL 324.73101 et seq., provides an exception to this general rule; a wading fisherman may enter upon the upland to avoid a hazard or other impediment obstructing passage within the stream. On a non-navigable (private) stream, the public can neither wade nor float. They should, as a matter of right, feel secure in making a portage around any dam or other obstruction in a navigable (public) stream unless physically prevented from doing so by the riparian owner. The banks of such a stream so far as they are necessary to the exercise of the right of passage and navigation are subject to the public easement.

Also, while it is beyond question that the riparian owner is entitled to be protected from any unnecessary intrusion upon his premises, it is equally certain that he cannot solely for the maintenance of an abstract right or even an exclusive possession, deny any member of the public navigating a stream the right to land on or cross his upland for emergency purposes. This does not apply to the use of the banks of streams in private ownership for rest purposes, however.

Trespass for emergency purposes to protect life and limb also will incur liability to the property owner for any damage that is done to the property under common law trespass.

Still another question remains for decision. Where does the stream end and the bank begin? What is the bed of the stream or the submerged land? Is it the land under the stream at flood stage? Normal high-water mark? Normal low-water mark?

Part 301, Inland Lakes and Streams, 1994 PA 451, MCL 324.30101 et seq; MSA 11A.30101 et seq, defines the limit between stream and bank as the "ordinary high water mark."

Ordinary high water mark means the line between upland and bottomland which persists through successive changes in water levels, below which the presence and the action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the soil and the vegetation. [MCL 324.30101(h)].

In Opinion No. 90, dated April 27, 1964; by Circuit Judge Allen C. Miller, for the County of Iosco, in Constan v Richter, the court discussed that testimony in this case disclosed the river varied as much as three feet, and stated that a decision on the foregoing points would seem to require evidence on the status of the vegetation; the angle of the river bank, whether gradual or sheer; the periods of time in which the adjacent uplands are submerged, and the like.

Judge Miller stated:

But it is clear that insofar as the clear riverbank extends, and within the banks of the river, a fisherman has the right to boat, to portage, wade and walk, even though at the particular minute there may not be water over the bed of the stream. The bed of the stream, of course, does not refer to the situation at flood stage, but to the definite bed of the stream as may be physically determined at the particular location by the vegetation and soil conditions then and there existing.

Judge Miller further stated:

Where an improvement has been artificially made, inhibiting fishing by wading where this was feasible in the natural state, such as digging of a deep hole in the river, the placing of a fence across it, or some other exercise of ownership by the riparian owner, some adjustment must be made to recognize and accommodate the public right. In other words, there should be some walkway provided so that the right to fish shall not be prohibited by indirection.

In brief, the court said that on a navigable (public) stream: (1) a fisherman or boater may float or wade in the stream or, if necessary upon the upland within the clearly defined banks of a stream without trespass; and (2) when an artificial obstruction prohibits wading or floating, an alternative route--a walkway--must be provided for the fisherman or boater.

It is presumed that where such a walkway is not provided by the riparian, the public may seek their own route provided it is subject to the principle of reasonableness.

It is quite clear that although a riparian owns the fee to the bed of a navigable (public) stream, his ownership is subordinate to the right of the public to the free and unobstructed use of the stream for navigation, fishing, swimming and other uses inherently belonging to the public. The riparian owner may not erect a fence or place a wire or other restraining feature so as to interfere with aforesaid uses by the public. Such placement is not only a restriction of and a hazard to navigation, but is a nuisance, as well as a deprivation of an inherent right of the public. Any member of the public who considers such interference as an invasion of his rights may initiate action in equity (civil suit) to abate the nuisance.

A trespass is the unlawful interference with one's person, property, or rights. (Black's law Dictionary, 5th ed., 1979). Part 731, Recreational Trespass, 1994 PA 451, MCL 324.73101 et seq., provides that an individual must first obtain consent from the landowner of a farm or farm area before entering the land, and a trespasser shall not enter other lands when those lands are either posted or fenced. Specifically, the Part states:

[A] person shall not enter or remain upon the property of another person, other than farm property or a wooded area connected to farm property, to engage in any recreational activity or trapping on that property without the consent of the owner, or his or her lessee or agent, if either of the following circumstances exists:

(a) The property is fenced or enclosed and the property is maintained in such a manner as to exclude intruders.

(b) The property is posted in a conspicuous manner against entry. The minimum letter height on the posting signs shall be 1 inch. Each posting sign shall not be less than 50 square inches and the signs shall be spaced to enable a person to observe not less than 1 sign at any point of entry upon the property.

(2) [A] person shall not enter or remain upon farm property or a wooded area connected to farm property for any recreational activity or trapping without the consent of the owner, his or her lessee or agent, whether or not farm property or wooded area connected to farm property is fenced, enclosed, or posted.

Ostensibly, farm land is treated differently within the statute because there is a presumption that farmland is privately owned. The boundary line of other lands may not be clearly distinguishable to a casual trespasser. Therefore, the Act mandates the posting or fencing of the property to serve as notice to would-be trespassers. The boundary line of a farm, on the other hand, is usually quite obvious. Consequently, consent of the owner or the lessee of the farm is required before the trespasser may enter upon the farm land. Part 731, Recreational Trespass, provides for two limited exceptions which allow a technical trespasser access to farm, fenced, or posted property. The first exception pertains to navigable watercourses flowing through or adjacent to private property and is contained in MCL 324.73102(3); MSA 13A.73102(3) as follows:

(3) On fenced or posted property or farm property, a fisherman wading or floating a navigable, public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, fence, or other exercise of ownership by the riparian owner.

Also, whenever such restraints are brought to the attention of the appropriate DNR Field Deputy, and following a confirming investigation, the DNR Deputy will notify the offending party that the barrier contravenes the public trust and must be removed, or a walking and portage route afforded the public. If cooperation is not secured, the Deputy will request the Attorney General to initiate injunctive proceedings or such other action as seen fit.

The same rationale cited for navigable streams should be applied to fences, wire, or other barriers placed in inland lakes. A private landowner may, however, place a fence or wire across a non-navigable (private) stream.

The second exception of Part 731, Recreational Trespass, does provide for access to private property under certain circumstances. The Part provides at MCL 324.731002, that:

(4) A person other than a person possessing a firearm may, unless previously prohibited in writing or orally by the property owner or his or her lessee or agent, enter on foot upon the property of another person for the sole purpose of retrieving a hunting dog. The person shall not remain on the property beyond the reasonable time necessary to retrieve the dog.

(5) Consent to enter or remain upon the property of another person pursuant to this section may be given orally or in writing. The consent may establish conditions for entering or remaining upon that property. Unless prohibited in the written consent, a written consent may be amended or revoked orally. If the owner or his or her lessee or agent requires all persons entering or remaining upon the property to have written consent, the presence of the person on the property without written consent is prima facie evidence of unlawful entry.

### **E. Trespass by Fishermen and Landowner Remedies**

Unlike a private lake where the right to fish, once granted, extends to the entire surface of the lake, the right to fish a non-navigable stream extends only along those bottomlands on which the angler has riparian rights or permission of the riparian. The right to fish also extends to all non-navigable streams where the State is riparian. Several remedies are available to the riparian owners of private streams when trespass occurs by fishermen.

#### **1. Recreational Trespass**

Criminal trespass for fishing without consent on a private lake or stream, whether wading, floating or fishing from the bank or shore, can be sustained under Part 731, Recreational Trespass, 1994 PA 451, MCL 324.73101 et seq., while on farm property, wooded area connected to a farm, or fenced or posted lands. Due to a loophole in the original act, this prohibition did not apply to the stream bank or shoreline along a public watercourse; however, a recent amendment to this Part eliminated this loophole. An additional ambiguity in the Part appeared to relieve trappers from compliance with the Part. It had been previously convincingly argued that the activity of trapping did not fall within the Part's language of precluded activities. The Part is applicable to "any recreational activity or trapping on that property without the consent of the owner.

The penalties for an infraction of Part 731, Recreational Trespass, are quite severe. First-time offenders of the Part are charged with a misdemeanor. Subsequent offenders are subject to having any hunting or fishing privileges within the state revoked. Any property, which the subsequent offender brings onto the property of another, is subject to seizure by a peace officer. This property may consist of the "instrumentality of the crime" which means "any property other than real property, the use of which contributes directly and materially to the commission of the crime." MCL 600.4701(b); MSA 27A.4701. The power of prosecution under the Part is vested in both the County prosecutor and the local city, village or township prosecutor. The court may order that the trespasser pay the costs associated with his or her own prosecution. Additionally, the trespasser is liable for restitution to the property owner for any damage to the property arising out of the trespass. These enforcement mechanisms apply equally to the angler as they would to the hunter, snowmobile or off-road vehicle operator.

#### **2. General Criminal Trespass**

Under certain circumstances, criminal trespass for fishing from the upland of a navigable stream or the shore of a public lake while on private property, or in other instances, can also be sustained in accordance with the General Trespass Act, MCL 750.552; MSA 28.820(1). This statute provides that:

[a]ny person who shall willfully enter, upon the lands or premises of another without lawful authority, after having been forbidden so to do by the owner or occupant, agent or servant of the owner or occupant, or any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or

service of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty of a misdemeanor and upon conviction therefrom shall be punishable by imprisonment in the county jail for not more than 30 days or by a fine of not more than \$50.00, or both, in the discretion of the court.

It is obvious, therefore, that criminal trespass under MCL 750.552; MSA 28.820(1) must be other than casual. In other words, prosecution cannot commence until (1) the landowner orders the trespasser off his land and the trespasser refuses, or (2) after having been earlier ordered to depart, the trespasser returns.

One of the foregoing conditions must be met to sustain conviction of an alleged fishing trespasser under MCL 750.552. Further, the aggrieved landowner must sign a complaint before a judge, and sanction of the prosecuting attorney obtained before a warrant can be issued.

### **3. Common Law Trespass**

A landowner may initiate civil action in a court of the county having jurisdiction against any person who enters his premises or lands without permission under common law trespass. This action is possible whether or not the lands are enclosed or posted. Common law trespass differs from the earlier mentioned statutory criminal trespass in a number of ways: it is not a statutory offense; it is a civil, rather than criminal, offense, and; refusal to depart, or returning after being ordered off is not an element of the offense. Mere entry without prior authorization constitutes grounds for a common law trespass. Specifically, the common law trespass may be used against a first-time trespasser who has never been forbidden by the landowner.

Where no actual damage can be shown by such trespass, only nominal damage can be recovered against a person charged with common law trespass. Nominal damage are those which are awarded to a plaintiff whose interests are recognized and protected by the law, but who has suffered no consequential or pecuniary loss or damage, or a loss which is too difficult to measure. The court may award nominal damages of only 1 cent (\$.01) or it may be fifty dollars (\$50.00). However, the defendant-trespasser would probably have to engage an attorney to defend himself in court, which would prove costly, and thereby provide some vindication to the person whose property was invaded, notwithstanding the awarding of only nominal damages.

### **4. Liability of Property Owner**

A landowner whose lands are trespassed upon has limited liability in the event a trespasser is injured upon the property. Part 733, Liability of landowners, 1994 PA 451, MCL 324.73301 et seq., MSA 13A.73301 et seq., deals with the liability of landowners for the injuries to others. The statute states that:

[a] cause of action will not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

Consequently, if the trespasser is injured upon the property of another, the landowner is not liable for the injuries sustained by the trespasser unless the landowner was grossly negligent or engaged in wanton and willful conduct.

### **F. The Public's Remedy for the Deliberate Felling of Trees or Other Purposeful Impediments to Public Water Travel**

Occasionally, complaints are received about deliberate felling of trees, or placement of other waste materials in rivers that impede travel by boat or canoe. The following relief is possible.

MCL 230.4; MSA 9.334, provides in part:

Whoever shall willfully obstruct the navigation of any river or stream, which is now or may hereafter be declared a public highway, by felling any tree therein or putting into such river or stream any . . . other waste materials . . . shall forfeit for every such offense a sum not exceeding twenty-five (25) dollars.

This is not a "strict liability offense," but one of "mental culpability," which imposes upon the state the burden to prove that the offender did in fact intentionally fell the tree(s) or place other impediment in the waterway. Since a term of imprisonment is not provided as a penalty for this offense, prosecution is properly brought to court by service of a summons together with the copy of a complaint, the same as though it were a civil case.

Also, obstructions of navigable streams may be removed by county road commissioners, pursuant to MCL 247.171-.190; MSA 9.251-.270. OAG, 1930-32, p. 264 (July 13, 1931). Briefly, this act, MCL 247.172, in part, provides that encroachments, not removed within 30 days after service of an order by the road commissioner, shall subject offenders to a forfeiture of \$1.00 for each day after expiration of the order that the encroachment is not removed in an action of trespass, or the road commissioner may remove such encroachment at the expense of the person at fault.

Navigable canals through state-owned property leased to various individuals are a public highway and an obstruction thereon may be removed by county road commissioners or enjoined at the suit of lessees adversely affected by obstruction. OAG, 1941-42, No 21879, p. 548 (March 16, 1942). Michigan statutes do not authorize the DNR to remove obstructions from navigable streams.

### **G. Right to Take Game - Generally**

The right to take game is a private property right vested solely in the property owner. This is unlike the right to fish which arises by the establishment of public water through its use, as well as the waters capacity for use in transportation and travel, and from the fact that there is no private ownership in the fish or in the right to take fish from public waters. Being a private property right, the taking of game is lawful only with the permission of the property owner.

The picture is best summed up by example. The public has a legal right to fish from a boat during open season on public waters, but this right would not include the shooting of ducks from the same boat without permission of the riparian owner, even though the shooting season was open. This violates a property right.

### **H. Hunting and Trapping on Submerged Lands - Riparian Rights**

It has been well established in Michigan, that the owner of lands bordering on a navigable stream or lake, with the exception of the Great Lakes, owns the submerged lands to the thread of the stream, subject only to the easement of navigation which the public may have thereon, and that he also owns the ice covering the surface of the water over the submerged lands and any interference with these rights constitutes a trespass.

The right of trapping is a property interest and the riparian owner of lands has the exclusive right to trap. In an enforcement action against a trespasser the landowner is entitled to the remedies available under Part 731, Recreational Trespass.

### **I. Duck Hunting Rights in Public Waters**

The following information has been compiled to clarify several common misunderstandings and for convenience in answering frequently asked questions regarding waterfowl hunting rights and erection of duck blinds on public waters. Be aware that duck hunting is not only subject to the general laws of taking game but also the need for permission from any private landowner whose land is used for hunting.

## 1. Duck Blinds - Name and Address - Removal from the Water

Wildlife Conservation Act Order 3.401 provides:

No person shall erect on, anchor or attach to the bottomlands of the great lakes, lake St. Clair and the bays thereof or the connecting waters between the lakes, or any public inland lake or river, or in any lake which is not wholly owned by himself, his lessor or licensor, a blind or any other structure used or to be used in the hunting of migratory waterfowl, unless there shall first be affixed permanently to the exterior thereof the name and address of such person in legible letters of water insoluble material not less than 3 inches in height. No person shall affix a fictitious name or address or both to a blind or structure or remove or cause to be removed a name and address prior until the blind or structure is removed from the water.

(1) Any person who shall erect, anchor or attach such blind or structure on the bottomlands hereinafter described shall remove the entire blind including submerged supporting members within 15 days after the close of the waterfowl hunting season in each year. If not removed within that time the director may cause its removal or destruction and assess the costs of removal and storage, or destruction, against the person whose name is affixed to the blind or other structure, in addition to any other penalty provided.

(2) Nothing contained in this section shall be construed to deprive a riparian owner or his lessee or permittee on inland waters of his exclusive right to hunt over his subaqueous lands, nor shall the posting of the name and address of the person erecting a blind or other structure attached to bottomlands of the great lakes and lake St. Clair, used or to be used in the hunting of waterfowl, be deemed to constitute the exclusive privilege of hunting therefrom, or to reserve or preempt a shooting location for such person. An unoccupied blind attached to the bottomlands of the great lakes or lake St. Clair may be used by the first person to occupy the same.

The foregoing does not apply to any blind which, in its entirety, is erected landward of the water's edge.

## 2. Rights of Hunting

(i) **Inland Waters** - A riparian owner (owner of land abutting water) on an inland lake or a stream also owns the submerged soil fronting the upland to the center of the lake or to the "thread" of the stream. In some instances, however, where fee title to submerged lands may have been conveyed separately from riparian rights, a riparian may not have the exclusive right of fowling. The courts have held that when such fee title is conveyed separately from riparian rights, it must be specifically spelled out in the deed. In other words, the deed should indicate that "the party of the first part withholds from the party of the second part, and reserves to itself, the riparian rights attached to the submerged soil being conveyed." MCL 311.1; MSA 13.1321, as amended, reaffirms the common law and supporting Supreme Court ruling, St. Helen Shooting Club v Carter, 248 Mich. 376; 227 NW 746 (1929) that the owners of land and their lessees or licensees have the exclusive right of hunting waterfowl over the land. This right is vested solely in the landowner whether the land be upland or covered with water, or whether on navigable (public) or non-navigable (private) water.

(ii) **Great Lakes and Lake St. Clair** - The boundary line of riparian owners along the Great Lakes and Lake St. Clair is the ordinary high water mark as established pursuant to Part 325, Great Lakes Submerged Lands, 1994 PA 451, MCL 324.32501 et seq; MSA 13A.32501 et seq. The Wildlife Conservation Order has declared that the requirement of posting blinds erected on the Great Lakes and Lake St. Clair does not give exclusive hunting privileges to any person or preempt a shooting

location for such person. This is intended to deter commercialization of such blinds. The Order also provides that an occupied blind, attached to the bottomland of the Great Lakes or Lake St. Clair, may be used for hunting by the first person to occupy the blind.

The authority for this is that title to the submerged lands beneath the Great Lakes and Lake St. Clair is in the state, and the State of Michigan has a duty to make use of its proprietorship to the best interest of the public. Therefore, the provision of the statute that any person may make use of any blind erected on the Great Lakes or Lake St. Clair on a first-come basis is entirely valid. This provision is supported by Part 415, Public Shooting and Hunting Grounds, 1994 PA 451, MCL 324.41501; MSA 13A.41501, which sets aside the unpatented submerged lands on the Great Lakes and Lake St. Clair and the submerged lands belonging to the state on the Kalamazoo, Grand and Muskegon Rivers as a public hunting ground for all of the people, and provided, further that any person who shall occupy same in such manner as to deny this privilege shall be deemed a trespasser against the State of Michigan. Privately-owned lands on the Kalamazoo, Grand and Muskegon Rivers are not affected.

### 3. Locking of Blinds

Any person who erects a blind on the bottomland of inland waters owned by him, or on such bottomland of another with his permission, may lawfully lock the blind.

A person erecting a blind on the unpatented bottomlands of the Great Lakes or Lake St. Clair, which are owned by the State of Michigan in trust for all the people, may not lawfully lock such blind as ownership of the blind is not vested in the person who erects or occupies it. This is the only stand the State of Michigan can take, as it has an undoubted right and duty to make use of its ownership in the best interest of the public. If the state condoned any other usage, it would be reserving shooting locations for the exclusive use of a few individuals, as well as, possibly, aid and abet commercialization on state lands in that many such blinds would be rented to other hunters, which is contrary to the statutes of Michigan. No person has a right to force or order a hunter to surrender a duck blind he is lawfully occupying. This applies regardless of where the blind is located.

The erection or occupying of a blind attached to the bottomlands of another on inland waters is unlawful when expressly forbidden by the owner; or if requested to depart by the owner, the hunter erecting or occupying the blind refuses. Failure to so comply constitutes trespass within the purview of MCL 750.552; MSA 28.820(1). To effect issuance of a warrant for such trespass, the riparian owner or his agent must file a formal signed complaint before a magistrate.

### 4. Driving Ducks Away From Hunters

The Legislature, through passage of Part 415, Public Shooting and Hunting Grounds, 1994 PA 451, MCL 324.41501 et seq.; MSA 13A.41501 et seq., set aside the submerged and swamp lands belonging to the state for a public shooting and hunting ground. The Part provides that:

It shall be unlawful for any person or persons to willfully scare or drive wild ducks or other wild water fowl, or cause the same to be done, from or away from any person lawfully hunting the same within said park, for the purposes of depriving or attempting to deprive such person of any or all of his opportunities of shooting or hunting such wild duck or other wild water fowl . . . .

Specifically, this section applies to all swamp and submerged lands lying along the borders of Lakes Erie, Michigan, Superior, Huron and St. Clair, and along the shores of the Kalamazoo, Grand and Muskegon Rivers.

More recently, the Legislature has enacted MCL 324.40112; MSA 13A.40112, commonly referred to as the Hunter Harassment Law. This statute states that, with the exception of a peace officer in performance

of legal duties, "[a] person shall not obstruct or interfere in the lawful taking of animals by another person." A person who violates this section is guilty of a misdemeanor and a court, based upon the principles of equity, may enjoin the conduct of the offending person.

## **J. Boating and Boat Hoist Regulations**

### **1. General Boating Regulations**

The general boating regulations for Michigan are contained in 1994 PA 451, Part 801, Marine Safety, being MCL 324.80101 et seq., MSA 13A.80101 et seq..

### **2. Anchoring Boat on Riparian Owner's Subaqueous Land**

Under the law of Michigan, the riparian proprietors who own to the middle of the lake are subject to the right of other riparian owners to use the surface of the whole lake for boating and fishing.

In Paterson v Dust, 190 Mich. 679; 157 NW 353 (1916), it was held that, while a riparian owner's property rights to subaqueous lands are subject to an easement in the public for navigation purposes and are subject to the right to anchor as an incident to the right of navigation, nevertheless the right of navigation does not include, as an incident thereto, the right to anchor indefinitely off the riparian owner's premises and consequent impairment of the riparian owner's use and enjoyment of his property rights.

### **3. Submerged Lands of Great Lakes - Signs**

May signs be placed on submerged lands of the Great Lakes lying adjacent to swamp land grants? Circuit Judge P. J. Glennie, in opinion No. 5273 rendered January 6, 1966, in the Circuit Court for the County of Alpena, held that it would be unlawful for any person to place signs beyond the meander line delineated by the General Land Office survey, as swamp land grants are not grants of riparian rights and the meander line of such land grants is the lakeward boundary.

Through its holding in Brown v Parker, 127 Mich. 390; 86 NW 989 (1901), Michigan has construed the lakeward boundary of swamp patents as being the meander line, and the courts have further held that any conveyance to another by the State of Michigan of these lands, originally received from the Federal Government, must be so limited.

In no event shall any sign be placed lakeward of the ordinary high water mark.

### **4. Boat Hoists Along Great Lakes**

The title to the submerged lands beneath the Michigan waters of the Great Lakes is in the State of Michigan, and it is unlawful to place permanent structures on this submerged soil or the exposed soil between the ordinary high water mark and the water's edge without a permit.

The following generally prevails: A boat hoist placed in the water by a riparian in front of his upland is a permissible act if removed each fall, as a riparian has a right of access to navigable waters subject to the general public's right of navigation. However, a non-riparian, who contemplates doing so, should obtain permission of the riparian notwithstanding that fee title of the bottomland is in the state because, if the riparian's inherent rights to use of the water for bathing, wharfing to navigability, access to the water, etc., is interfered with by placement of a boat hoist, the riparian may initiate civil action to cause its removal.

## **K. Access to Public Waters**

### **1. Public Access Sites - Boat Liveries**

A private inland lake, which is capable of supporting a beneficial public interest, automatically becomes a public inland lake, when the State of Michigan becomes a riparian owner of land on the lake for the purpose of providing a public fishing site. The general fishing laws of this State govern all fishing in a private lake as long as public access thereto is permitted by one or more of the riparian owners. OAG,

1959-60, No. 2553, p. 152 (August 5, 1959). Access to a private lake via a boat livery makes it a public lake subject to the fishing laws of Michigan.

## 2. The Mooring of Houseboats on the Inland Waters

From time-to-time the mooring of houseboats on inland waters becomes a controversial problem. The Legislature, through enactment of MCL 123.591; MSA 5.2965(1), authorized County Boards of Commissioners, outside the corporate limits of cities and villages, to regulate, by ordinance, the location of houseboats on those portions of lakes, rivers, canals and waterways of the county under their jurisdiction.

Unquestionably, the county has the authority to prohibit, by ordinance, the mooring of a houseboat on an inland lake.

The owner of the bottom lands on which the houseboat is moored also has a cause of action for trespass. However, although it is a technical trespass it is strictly a civil matter. The riparian owner should consult the county for possible action by that entity or seek the counsel of an attorney.

## **L. Highway Access to Public Waters**

Some waters are touched or bordered by public roadways, most of which have been established by public use or by easement. Ownership of the land beneath such roadways remains with the private landowner. The public has merely acquired the right to use the land for roadway purposes, but not the right to pick the fruits, nuts, or crops alongside the roadway. These remain the property of the landowner. The courts have held the public has no right to enter a non-navigable lake or stream from a public roadway any more than to enter the orchards or uplands along such roadway.

However, the Michigan Supreme Court in Cass County Park Trustees v Wendt, 361 Mich. 247; 105 NW2d 138 (1960), ruled that whenever a highway actually and in the natural state of things contiguously borders or ends in navigable public waters, the public has a right of access from the highway by land to the highway by water. The court in so ruling did not differentiate between right-of-way owned in fee, granted by easement, or established by user. In fact, the Cass County Park case, where right-of-way was granted by easement, was not quite as simple as in most cases in that the evidence clearly illustrated that there was also a strip of land between the highway and the water's edge. It was established the strip had been used for public purposes, including the launching of boats, swimming, fishing and parking of automobiles, and that such use had been a constant one. Notwithstanding, the court additionally held that the right of public access to bodies of water bordered or skirted by public roads may be lawfully created by long continued use (prescriptive easement) even across such strip of intervening private property.

## **M. Back-Lot Owners' Rights**

Riparian rights accrue only to those who own land that adjoins a body of water. Such riparian rights include the right of access to the water; the right to install and use a dock; the right to use the entire surface of the body of water for boating and fishing; and other rights of general purpose value, such as bathing, domestic use, or any other "reasonable uses."

However, the grantee of an easement to the lake (often the back-lot owner who is not a riparian) may or may not be entitled to install and use a dock extending into the lake or to use the shore fronting the right-of-way for bathing, etc. This depends upon the terms of the easement granting the right-of-way. If the easement is granted in terms which clearly and specifically allow or deny this use, the language of the instrument creating the right will control. If the easement is granted in general terms (no reference being made to the installation of a dock or the right to use the upland shore fronting the way for bathing or other purposes) the uncertainty must be resolved by applying the general principles of law to the construction of ambiguous writings. "A person entitled to the use of an easement cannot materially

increase the burden upon the servient estate beyond what was originally contemplated." Thies v Howland, 424 Mich. 282; 300 NW2d 463 (1985) (citing Delaney v Pond, 350 Mich. 685, 687; 86 NW2d 816 (1957)).

Such easement grantee may, however, under any condition, bathe or swim in the water or use the entire surface of the lake so long as the grantee does not interfere with the reasonable use and enjoyment of the water by riparian owners. The use of the water by the grantee must be reasonable in itself, and the rights of other riparians shall not be unreasonably interfered with.

The criteria for determining reasonableness were set forth in Thompson v Enz, 379 Mich. App. 667; 154 NW2d 473 (1967) and were summarized by the court in Three Lakes Ass'n v Kessler, 91 Mich. App. 373; 285 NW2d 300 (1979), as follows:

First, attention should be given to the size, character and natural state of the water course. Second, consideration should be given the type and purpose of the uses proposed and their effect on the watercourse. Third, the court should balance the benefit that would inure to the proposed user with the injury to the other riparian owners. [*Id.* at 377].

In short, it can be said that if the easement does not specifically grant the right to use the shore for other than mere access to the water, a person who is not a riparian owner (but only the grantee of an easement) may not, without committing trespass, use the upland shore for other than access purposes unless the easement conditions have been adjudicated by a court of law.

#### **N. Possible Future Restrictions on Access to and Use of Public Inland Lakes**

The question of access to and use of a public inland lake was considered in Opal Lake Ass'n v Michaywe' Ltd. Partnership, 63 Mich. App. 161; 234 NW2d 437 (1972). The action was against a developer who proposed to grant access to the lake to all residents of a very large development by means of a lot fronting on the water. The trial court rendered an excellent opinion and granted an injunction against the builder. As the facts indicate, there were already public access sites on Opal Lake. The trial judge recognized the problems involved and indicated in his opinion that "potentially even the public site, as this court understands it, could be eliminated if they in turn force too great a use upon that lake which interferes with riparian use." This clearly represents the trend of authority in other jurisdictions throughout the United States, which, briefly, states that it is not the right of every riparian owner to permit limitless numbers of licensees to go upon a lake irrespective of the proportion of his shoreline ownership. The riparian owners of a lake and their lessees, licensees and invitees may normally use the surface of the whole lake for boating and fishing. However, if such use shall reach a point so as to interfere with the reasonable use and enjoyment of the waters by other riparian owners, these riparian owners may initiate civil action to limit the non-riparians access to, and use of, the lake.

Briefly, the number of persons a riparian owner may license will depend on the size of the lake, the nature of the use and all other relevant factors. The rules by which a court would govern in a civil action have been forcefully restated by the Michigan Supreme Court in Burt v Munger, 314 Mich. 659; 23 NW2d 117 (1946).

#### **O. Boundary Lines of Riparian Property Owners**

##### **1. Generally**

The Great Lakes and many of the large inland lakes and streams were meandered when the state was originally surveyed; that is, the survey line in general paralleled the water's edge and the water area was not included in the land description. The courts have held that the meander line is not a line of demarcation between public and private rights, but merely a line arbitrarily established by the survey to determine the area of land in government ownership. Therefore, as was previously discussed, the property line will likely run to the center of the watercourse.

## 2. Great Lakes and Lake St. Clair

The boundary line is the ordinary high water mark. The riparian owner controls the exposed soil between the ordinary high water mark and the water's edge and may, therefore, prevent the public from trespassing on this exposed soil if he so chooses. The public does, however, have a right of passage in any area adjacent to riparian land covered by water. OAG, 1977-78, No. 5327, p. 518, (July 6, 1978).

A riparian owner owns to the ordinary high water mark but controls and has exclusive use of the exposed soil between the ordinary high water mark and the water's edge. Donohue v Russell, 264 Mich. 217; 249 NW 830 (1933). The ordinary high water mark is set by statute through Part 325, 1994 PA 451, Great Lakes Submerged Land, MCL 324.32501 et seq.; MSA 13A.32501 et seq. Submerged lands above the ordinary high water mark are subject to the right of navigation.

## 3. Inland Lakes and Streams

Even though the property of a riparian owner extends only to the meander line or edge of an inland water, such owners exercise a proprietary interest in the abutting submerged soil. In other words, a riparian on an inland lake or stream, in effect, owns the submerged soil fronting his property to the center of the lake or the thread of the stream. On lakes, this ownership would be wedge or pie-shaped. It should be mentioned that, in the instance of meandered waters, the Legislature, way back in 1891, through enactment of MCL 307.41; now Part 453, 1994 PA 451, Fishing with Hook and Line, MCL 324.45301 et seq., MSA 13A.45301 et seq., secured to the public the right to fish in navigable or meandered waters. This, of course, does not give anyone a license to trespass on private property.

### **P. Diversions of Water from a Lake or Stream**

Flowing water, like light and air, are "publici juris." Each riparian owner has an equal right to the use of water. Riparian owners do not have a property ownership right in the water itself, but simply a right to use the water, without impairing it, as it passes along. There is no statute which makes unlawful a diversion or extraction of water from a lake or stream, nor is there any statute authorizing any state agency to control such removal. A "diversion," as the term is applied to watercourses, is the taking of water from a stream, lake or pond and not returning it so that another riparian can use it.

A bill (H.B. 2434) was introduced in the 1967 Legislature proposing to make unlawful the diversion of water in excess of 50 acre feet per year from a public lake or stream without a permit from the Water Resources Commission. The Department of Attorney General, in analyzing the bill, held that it would be unconstitutional if enacted into law. The Legislature, apparently, in cognizance of this, killed the bill in committee.

Since there is no statutory law regulating diversion or extraction of water, the common law doctrine of reasonable use on inland waters must prevail. By common law, riparian owners (owners of property abutting a lake or stream) may, as a property right, make reasonable use of the water even though such use may, to some extent, prejudice other lake or stream owners by impairing the quantity or quality of the water.

However, Michigan courts have generally held that both diversion or extraction of water for non-riparian use is wrongful, at least insofar as it may cause injury to or interfere with riparian owners' primary right to the water. This is true whether the water diverted or extracted is: (1) used by a riparian upon his own non-riparian lands; (2) supplied to non-riparians by a riparian owner; or (3) permission is granted by a riparian owner allowing non-riparians to have access to the watercourse to take water for use elsewhere.

Michigan courts have held that an appropriation of water for non-riparian use without compensation to riparians is wrongful and unconstitutional. Although a riparian owner has no right to divert riparian water to non-riparian land, he may do so where the water is abundant and no possible injury could result to a lower riparian owner.

As a general rule, a non-riparian owner is not entitled to claim riparian rights. A mere appropriation of water from a stream is, until title is obtained through prescription, a trespass as against the rights of the riparian owner. "Prescription" is a process in which the right to use another's property is acquired through open and continuous use.

There are numerous complaints of both riparian and non-riparian owners extracting water to fill man-made lakes, for irrigation, mining, excavation, drilling and other purposes. Complainants should be advised that if injury to property values and other damage can be supported as substantial and continuing, they may have cause for court action. However, if the relief sought is disproportionate to the damage sustained, the courts usually will not interfere in any civil proceedings. Where the amount diverted upon non-riparian lands was so small as to cause no injury to the present or future use of the lower riparian or other riparians, if it is a lake or pond, it has been held that the diversion, though for uses unconnected with the enjoyment of riparian rights, was not actionable.

The Department, through the Attorney General, may choose to get involved as an intervening plaintiff or as a friend of the court, amicus curie, in proceedings initiated by aggrieved riparians if investigation should disclose that the water removal is detrimental to the public trust in fish or game, or the rights secured to the public in navigable waters.

In 1982, the States and Canadian Provinces contiguous to the Great Lakes signed an agreement. The signers jointly resolved that they "object to any new diversion" and that "no future diversions be considered until a thorough assessment . . . takes place." The agreement also "strongly urged" (1) their respective federal governments to get involved; (2) the appointment of a task force for recommendations; and (3) other measures to insure the protection of the Great Lakes.

In 1985, the issue of Great Lakes water diversion exploded. Nine bills dealing with water diversion were introduced in the Michigan Legislature. Also a Great Lakes Charter was signed by the States and Provinces contiguous to the Great Lakes. It included stronger language of resistance to diversions of Great Lake's water than the 1982 agreement.

The prognosis is that the legal force of any and all agreements to prevent water diversion is minimal if such diversions are considered a matter of national importance. Article 1, § 8, Clause 3 of the United States Constitution states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations , and among the several States, and with the Indian Tribes; . . ." This clause is commonly known as the Commerce Clause and has been applied and interpreted to give Congress unfettered control of any "articles of commerce." Cooley v Board of Wardens, 12 How. 299, 13 L.Ed. 996 (1852). State regulations that interfere with the free transport of articles of commerce across state lines will be held as impermissible restraints upon commerce unless the state can demonstrate legitimate reasons for the restraint. Pike v Bruce Church, 397 U.S. 137, 90 S.Ct 844, 25 L.Ed 2d 174 (1970). The Supreme Court has ruled that water is an article of commerce and, as such, is subject to commerce clause protection. Sporhase v Nebraska, 458 U.S. 955, 102 S.Ct 3456, 73 L.Ed 2d 1254 (1982). Consequently, Congress may preempt State control by calling diverted Great Lake's water an "article of interstate commerce" or otherwise finding the matter of national importance.

### **Q. Races and Time Trials with Conventional Motor Vehicles on the Frozen Surface of a Public Lake**

A perusal of the pertinent statutes discloses there is no lawful authority by which races may be conducted with conventional motor vehicles on the frozen surface of public lakes.

The Michigan Motor Vehicle Code, MCL 257.626; MSA 9.2326, provides that "Any person who drives any vehicle upon a highway or a frozen public lake, stream or pond or other place . . . in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." MCL 257.626a; MSA 9.2326(1), prohibits operation of any vehicle upon any highway or any other place open to the general public in a speed or acceleration contest or in a drag race. MCL 257.626b; MSA 9.2326(2) states that careless or negligent driving upon a frozen lake, stream or pond constitutes a civil infraction.

The Michigan Supreme Court, in Parsons v DuPont De Nemours Powder Co., 198 Mich. 409 (1917), held that frozen, navigable (public) lakes are public highways. A public inland lake is defined as any lake which is accessible to the public via (1) public-owned lands, (2) waters or highways contiguous thereto, or (3) the bed of a navigable stream which may be used for navigation, fishing, hunting or other lawful purpose and is reasonably capable of supporting a beneficial public interest.

The public has the right to use a navigable (public) stream or lake in its fluid state for navigation purposes and in its frozen state for the purpose of traversing its surface, with due regard to the rights of riparian owners and other members of the public. However, the State of Michigan as trustee of a public trust for the benefit of the people holds all of its navigable waterways and the lands lying beneath them for the public use of navigation, fishing and such other use inherently belonging to the public. The State's power to control, regulate and utilize such waters, whether in a fluid or frozen state, within the terms of this public trust doctrine, is absolute except as limited by the paramount supervisory power of the Federal Government over navigable waters.

Acts of the State with regard to its navigable waters are considered to be within public trust purposes whenever, for the benefit of the people, the necessities of navigation, including travel on the ice, commerce, safety, etc., should demand it.

Because courts have held that navigation by boat on fluid waters and travel by whatever means on frozen public waters are synonymous public rights, participants in time trials and drag racing cannot ground their immunity from regulation in the right of navigation, as this is a public right, the abridgment of which they will suffer no damage different in character from that to be suffered by the general public.

Part 801, Marine Safety, 1994 PA 451, MCL 324.80101 et seq., MSA 13A.80101 et seq., in general terms, provides for the conducting of regattas, boat races or other trials on any waters of this state under permit. The scope of this Part is generally applied to the regulation of motorboats and vessels and is, therefore, not applicable to vehicles operating upon the ice.

We must conclude that there is no legislative authority that compromises or contravenes the mentioned provisions of the Michigan Vehicle Code prohibiting speed contests and drag races by conventional motor vehicles on the navigable waters of the state.

It is pointed out that such contests or races are not unlawful on private inland lakes or private land areas where the public is excluded.

Part 811, 1994 PA 451, MCL 324.81101 et seq., MSA 13A.81101 et seq., provides for the use of Off-road Recreation Vehicles upon frozen water surfaces. While the statute does not specifically state that such uses are authorized, it does specifically prohibit a municipality from adopting a local ordinance which "restricts operation of a vehicle on the frozen surface of public waters." The statute additionally empowers the DNR to adopt special rules governing the operation of off-road recreation vehicles on the frozen surface of public waters.

## **R. Fish Shanties - Structures on Ice**

Fishing houses, shanties and structures placed on the ice for purposes of fishing are regulated under Part 465, Fishing Shanties, 1994 PA 451, MCL 324.46501 et seq., MSA 13A.46501. A person placing or using a shanty upon the frozen surface of a public body of water must permanently affix their name and address on the shanty in legible English using readily visible letters and numerals not less than 2 inches in height. The name and address may not be placed on a piece of material which is then affixed to the shanty. The DNR policy is that tents or other temporary shelters, which are removed each day and not left unattended on the ice, do not require the affixing of name and address. Shanties placed upon the frozen surface of waters in the Upper Peninsula must be removed by midnight on March 31, or earlier if ice conditions become unsafe. Shanties placed on the frozen surface of waters in Emmet, Cheboygan, Presque Isle, Charlevoix, Leelanau, Antrim, Otsego, Montmorency, Alpena, Benzie, Grand Traverse, Kalkaska, Crawford, Oscoda, Alcona, Manistee, Wexford, Missaukee, Roscommon, Ogemaw, Iosco, Mason, Lake, Osceola, Clare, Gladwin, Arenac, Oceana, Newaygo, Mecosta, Isabella, Midland, or Bay counties must be removed by midnight on March 15, or earlier if ice conditions become unsafe. Shanties placed on the ice in any of the remainder of the state must be removed by midnight on March 1, or earlier should the ice become unsafe. Shanties may be used after the above dates but must be removed at the conclusion of each day's fishing activity. Local units of government are prohibited from regulating ice shanties.

Neither the DNR nor other governmental unit is charged with responsibility for the removal of abandoned shanties; however, this does not preclude removal by a governmental unit or representative of the DNR when deemed appropriate. State law allows a governmental unit to either remove or provide for the removal of shanties left after the fixed dates specified above. A person convicted of failure to remove a shanty, in addition to criminal penalties, would be assessed 3 times the cost incurred by the governmental entity in removing or providing for removal of the shanty.

### **S. Salvage of Submerged Logs**

Many procedural steps are required before one may legally recover a submerged log from a lake or stream. MCL 426.101; MSA 18.241 requires logging companies to mark their logs and to register that mark in the County Clerk's office.

Logs that have sunk in streams and lakes are legally the property of the owner of the log mark or of his or her heirs. To obtain legal rights to the logs, one must purchase the "mark" or ask the court to declare them abandoned.

### **T. Great Lakes Submerged Lands**

Part 325, Great Lakes Submerged Lands, 1994 PA 451, MCL 324.32501 et seq; MSA 13A.32501 et seq, empowers the DNR to grant, convey, or lease certain unpatented bottomlands of the Great Lakes. The Part imposes a statutory duty upon the State to protect for the public trust the submerged lands of the Great Lakes. The Part covers "all of the waters of the Great Lakes within the boundaries of the state." The purposes of the Part are numerous: it establishes the elevations of each of the Great Lakes to determine the ordinary high water mark; regulates oil drilling, mineral rights, dredging and filling; construction occurring up to the ordinary high water mark; and development of marinas.

### **U. Inland Lakes and Streams**

Part 301, Inland Lakes and Streams, MCL 324.30101 et seq; MSA 13A.30101 et seq., specifically regulates inland waters. The Part defines "Inland lake or stream" as:

[A] natural or artificial lake, pond or impoundment; a river, stream or creek . . . or any other body of water which has definite banks, a bed and visible evidence of a continued flow or continued occurrence of water, including the St. Marys, St. Clair and Detroit rivers. It does not include the Great Lakes, Lake St. Clair and a lake or pond that has a surface area of less than 5 acres.

The Part is intended to protect riparian rights and the public trust in these lakes and streams. The Part primarily regulates certain water-oriented construction operations, such as marinas, docks, canals, bridges, dredging, filling and impoundments. The Part also establishes a working definition for the term "ordinary high water mark," and has been used to establish and define certain riparian rights.

#### **V. Wetland Protection**

In 1979, the Michigan Legislature enacted the Goemaere-Anderson Wetland Protection Act. This statute is now found in Part 303, 1994 PA 451, MCL 324.30301 et seq., MSA 13A.30301 et seq..

MCL 324.30301(g) defines a wetland as "land characterized by the presence of water at a frequency and duration sufficient to support and that under normal circumstances does support wetland vegetation or aquatic life and is commonly referred to as a bog, swamp, or marsh . . . ."

In simpler terms, a wetland is a site so influenced by the presence of water that the only plants and animals to survive are those specifically adapted to a wet environment. Places that are only wet for short periods in early spring, after hard rains, etc., but do not contain aquatic plants or animals, are not deemed to be wetlands.

MCL 324.30304 requires a permit from the DNR to:

- a. Deposit or permit the placing of fill material in a wetland.
- b. Dredge, remove, or permit the removal of soil or minerals from a wetland.
- c. Construct, operate, or maintain any use or development in a wetland, or
- d. Drain surface water from a wetland.

The public is instructed to fill out a Joint Permit Application form (R4506) and submit such directly to the Department of Environmental Quality (DEQ), Land and Water Management Division. Permits are necessary for any of the above listed activities in a wetland which is: (a) contiguous to the Great Lakes and their connecting waterways, or contiguous to any inland lake, stream, river, or pond; and (b) noncontiguous wetlands of five acres in size or larger in the following counties: Muskegon, Ottawa, Kent, Berrien, Calhoun, Kalamazoo, Jackson, Washtenaw, Wayne, Monroe, Ingham, Livingston, Oakland, Macomb, St. Clair, Genesee, Saginaw, and Bay.

The statute requires the DEQ to conduct an inventory of wetlands. These inventory maps are considered public documents and are available for review at the respective county register of deeds.

A local municipality may also regulate wetlands in a manner consistent with the statute. However, in some cases the municipality's scope of authority may be broader than that of the DEQ. If a municipality has enacted a local wetlands ordinance then it is also required to compile an inventory of all wetlands located within the municipality. Interested landowners should first contact their local officials to determine if the municipality has imposed wetlands regulations.

The Part does provide for certain uses and activities to be conducted in a wetland area without the necessity of obtaining a permit. These uses include fishing, trapping, hunting, swimming, boating, hiking, grazing of animals, farming, lumbering and a variety of other enumerated low-impact uses.

MCL 324.30316 states that: "A person who violates this act is guilty of a misdemeanor, punishable by a fine of not more than \$2,500.00." This penalty provision also empowers the district or circuit court to order the restoration of the wetland to its original condition prior to violating the act. People v Keeth, 193 Mich. App. 555; 484 NW2d 761 (1992).

Persons with specific questions about the Wetlands Protection Program should contact the Land and Water Management Division, DEQ, at (517) 373-1170.

## APPENDIX A

### NAVIGABLE WATERS OF THE UNITED STATES IN U.S. ARMY ENGINEERING DISTRICT, DETROIT, 1981

In administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, the Army Corps of Engineers exercises jurisdiction over the waterways listed below, from their mouths to the heads of navigation as follows:

**NAME OF WATERWAY ..... HEAD OF NAVIGATION**

Au Gres River.....U.S. 23 bridge 2.8 miles above mouth.  
 Au Sable River.....Foote Dam 7 miles above mouth.  
 Bad River.....Upper City Limits of St. Charles.  
 Belle River.....2800 ft. above northern limits of Marine City.  
 Betsie River.....Head of Betsie Lake at Frankfort, 1.3 miles above mouth.  
 Betsie Lake.....Navigable throughout.  
 Black River.....Beach Road 7 miles above mouth.  
 (St. Clair County)  
 Black River.....Head of Black Lake (Lake Macatawa) at Holland, 5.75 miles from Lake (Ottawa County).....Michigan.  
 Black River.....Michigan Central R.R. bridge at South Haven, 2.5 miles above mouth. (Van Buren County)  
 Black River .....Navigable 950' upstream from mouth.  
 (Gogebic County)  
 Burt Lake .....Navigable throughout.  
 Carp River..... Dam at Leland, 400' above mouth.  
 (Leelanau County)  
 Cedar River..... 0.3 miles above mouth.  
 Charlotte River .....Country road bridge 1/3 mile above mouth.  
 Cheboygan River .....Navigable throughout.  
 Clinton River..... Gratiot Ave. Hwy. bridge, Mt. Clemens.  
 Crooked Lake .....Navigable throughout.  
 Crooked River..... Navigable throughout.  
 Detroit River..... Navigable throughout.  
 Ecorse River .....Jefferson Avenue-Biddle Street bridge 400' above mouth.  
 Galien River..... Whittaker Street bridge at New Buffalo, 0.25 mile above mouth.  
 Grand River .....Fulton Street bridge at Grand Rapids, 40 miles above mouth.  
 Huron River .....U.S. 24 bridge at Flat Rock.  
 Indian River..... Navigable throughout  
 Includes Inland Route .....Upper end of Crooked Lake, Conway.  
 Kalamazoo River.....Dam at Allegan, about 31.5 miles above mouth.  
 Kalamazoo Lake .....Navigable throughout.  
 Kawkawlin River .....Michigan Central R.R. bridge at Kawkawlin, about 4 miles above mouth.  
 Lac LaBelle River .....Navigable throughout incl. canal to Lake Superior.  
 Keweenaw Waterway .....Navigable throughout incl. Portage Lake, Torch Lake and Torch Canal.  
 Lake Betsie..... Navigable throughout.  
 Lake Charlevoix .....Navigable throughout.  
 Lake Erie .....Navigable throughout.  
 Lake Huron .....Navigable throughout.  
 Lake Macatawa .....Navigable throughout.  
 Lake Michigan .....Navigable throughout.  
 Lake St. Clair..... Navigable throughout.  
 Lake Superior .....Navigable throughout.  
 La Plaisance Creek .....La Plaisance Road bridge.  
 Leelanau River .....(Carp River) Dam at Leland 400' above mouth.  
 Little Lake .....Navigable throughout.  
 Manistee Lake .....Navigable throughout.  
 Manistee River .....Including Manistee Lake, 5.6 miles from Lake Michigan.

Manistique River .....Upper end of lumber slips at Manistique, 3/4 mile above mouth.  
Maumee River .....Fort Wayne - Hosey Dam.  
Menominee River .....From its mouth upstream 1.86 miles to but not incl. the Interstate Highway bridge (U.S. 41).  
Mona Lake .....Navigable throughout.  
Mullet Lake..... Navigable throughout.  
Muskegon Lake .....Navigable throughout.  
Muskegon River .....M-37 Hwy. bridge, 39-1/4 mile above mouth (33 miles from the head of .....Muskegon Lake).  
North Bar Lake .....Navigable throughout incl. connection to Lake Michigan.  
Ontonagon River .....Milwaukee R.R. bridge 0.76 mile above mouth.  
Ottawa River .....Detroit & Toledo Shore Line bridge about 3 miles upstream.  
Paw Paw River .....Paw Paw Ave., Benton Harbor, 2 miles above mouth.  
Pentwater Lake .....Navigable throughout.  
Pentwater River .....Head of Lake, 2-1/4 miles from Lake Michigan  
Pere Marquette.....Lake Navigable throughout.  
Pere Marquette River .....Head of Pere Marquette Lake 3 miles from Lake Michigan.  
Pigeon River .....Upper Village limits of Caseville.  
Pine River .....M-25 bridge, 1/2 mile above mouth.  
(Arenac County)  
Pine River .....Detroit Port Huron R.R. bridge - 3 miles above mouth.  
(St. Clair County)  
Pine River .....Upper end of both arms, Charlevoix Lake, 15 miles above mouth.  
(Charlevoix County)  
Pinnebog River .....Junction with creek, 1/2 mile above mouth.  
Portage Lake .....Navigable throughout.  
Raisin River .....M.C. R.R. bridge at Monroe - 2 1/2 mile above mouth.  
Rouge River .....M.C. R.R. bridge at Dearborn (Junction bridge).  
Saginaw River .....Navigable throughout.  
St. Clair River .....Navigable throughout.  
St. Joseph River .....Dam at Berrien Springs 24.7 miles above mouth.  
St. Mary's River .....Navigable throughout.  
Sebewaing River .....Pere Marquette R.R. bridge 1/2 mile above mouth.  
Shiawassee River .....Junction with Bad River.  
Spring Lake .....Navigable throughout.  
Sturgeon River .....50 miles above mouth.  
(Baraga & Houghton Counties)  
Tahquamenon River .....Lower Falls, about 16 miles north of mouth.  
Thunder Bay River .....Dam near upper city limits of Alpena.  
Tittabawassee River .....Dam in Midland.  
Traverse River .....Navigable 4,500' upstream of mouth.  
Waiska River .....D.S.S. & A.R.R. bridge 3/4 mile above mouth.  
White Lake .....Navigable throughout.  
White River .....Head of White Lake, 6 8 mile from Lake Michigan.  
All Federal navigation projects are navigable waters of the United States to upstream and/or landward limit of project.

It should be understood that this merely represents the views of the Department since the jurisdiction of the United

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States can be conclusively determined only through judicial proceedings.

**APPENDIX B**  
**WATERS ADJUDICATED NAVIGABLE BY THE**  
**MICHIGAN SUPREME COURT**

The following lakes and streams or portions of streams have been adjudicated navigable by the Michigan Supreme Court. In some of these particular cases, the Court did not declare which sections were navigable, but merely stated per se that the stream was navigable. In all instances, however, predicated on a precedent established by a majority opinion of the Supreme Court in Collins v Gerhardt, 237 Mich 38; 211 NW 115 (1926) which held that the people had the common right of fishing in any part of a navigable stream (Pine River) subject only to the restraints and regulations imposed by the State, we should deem these streams in their entirety as open to fishing to the public until challenged in court. Of course in exercising this right, people cannot go upon the uplands of riparian owners.

### **STREAMS**

Black River, Emmet County, down to mouth from Black Lake

Gainer v Nelson, 147 Mich 113; 110 NW 511 (1907).

Cheboygan River, Cheboygan County, entire river

Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880).

Crooked River, Emmet County,

Gainer v Nelson, 147 Mich 113; 110 NW 511 (1907).

Davis Creek, Saginaw County, downstream from Sec. 19, T13N R5E

Crane v Valley Land Co., 203 Mich 353; 169 NW 18 (1918).

Fox Creek, Wayne County,

Lepire v Klenk, 169 Mich 243; 134 NW 1119 (1912).

Grand River, Kent County, downstream from Grand Rapids

Grand Rapids Booming Co. v Jarvis, 30 Mich 308 (1874).

Indian River, Emmet County, entire river

Gifford v McArthur, 55 Mich 535; 22 NW 28 (1885); Gainer v Nelson, 147 Mich 113; 110 NW 511 (1907).

Kalamazoo River, Allegan County, downstream from Sec. 15 and 16, T3N R16W

Sewers v Hacklander, 219 Mich 143; 188 NW 547 (1922).

Muskegon River, Roscommon County, downstream from Houghton Lake

Clay v Penoyer Creek Improvement Co., 34 Mich 204 (1876); Stone v Roscommon Lumber Co., 59 Mich 24; 26 NW 216 (1886); Witheral v Muskegon Booming Co., 68 Mich 48; 35 NW 758 (1888).

Pine River, Lake County, wherever potentially capable of use for floatage purposes

Collins v Gerhardt, 237 Mich 38; 211 NW 115 (1926).

Pine River, St. Clair County, from the NE 1/4, of Section 7, T6N R16E to mouth Moore v Sanborne, 2 Mich 520 (1853).

Pere Marquette, North Branch, Lake County, downstream from land owned by Elizabeth Bauman in 1887

Bauman v Pere Marquette Boom Co., 66 Mich 544; 33 NW 538 (1887).

Pere Marquette, Little South Branch, Newaygo County, downstream from Sec. 5 and 6 of Home Township

Rushton ex rel. Hoffmaster v Taggart, 306 Mich 432; 11 NW2d 193 (1943).

Portage River, St. Joseph County, from Parkville, below Portage Lake, upstream through Portage Lake and up Bear Creek to Portage Lake Station to old Grand Rapids & Indiana R.R.

Taylor v Indiana & Michigan Electric Co., 184 Mich 578; 151 NW 739 (1915).

Rouge River, Wayne County, 15 miles upstream from mouth

Township Bd. of Ecorse v Board of Sup'rs of Wayne County, 75 Mich 264; 42 NW 831 (1889).

St. Joseph River,

Attorney General v Hallden, 51 Mich App 176; 214 NW2d 856 (1974).

Sturgeon River, Baraga County, downstream from land owned by Philip G. Baumgartner in 1899

Baumgartner v Sturgeon River Boom Co., 120 Mich 321; 79 NW 566 (1899).

Souwesconning Creek, Bay County, downstream from Section 8, T13N R5E

Arnold v Brechtel, 174 Mich 147; 140 NW 610 (1913).

Thunder Bay River, Alpena County, downstream from Trowbridge Dam (3 miles upstream from Broadwell Mill of 1875)

Thunder Bay River Booming Co. v Speechly, 31 Mich 336 (1875).

Tobacco River, downstream from old Beaverton Dam (confluence of North, South, and Middle Branches of Tobacco)

Pratt v Brown, 106 Mich 628; 64 NW 583 (1895).

Tahquamenon River, Chippewa County, 12 miles upstream from mouth

Hughes v Hughes, 197 Mich 690; 164 NW 435 (1917).

Tittabawassee River, Gladwin County, Edenville to mouth

Watts v Tittabawassee Boom Co., 47 Mich 540; 11 NW 377 (1882); Watts v Tittabawassee Boom Co., 52 Mich 203; 17 NW 809 (1883).

West Branch Creek, Alcona County, 5 miles up from Hubbard Lake

Butterfield v Gilchrist, 53 Mich 22; 18 NW 542 (1884).

### **LAKES**

Black Lake, Emmet County,

Gifford v McArthur, 55 Mich 535; 22 NW 28 (1885).

Burt Lake, Cheboygan County,

Gifford v McArthur, 55 Mich 535; 22 NW 28 (1885).

Crooked Lake, Emmet County,

Gifford v McArthur, 55 Mich 535; 22 NW 28 (1885).

Diamond Lake, Cass County,

Morgan v Kloss, 244 Mich 192; 221 NW 113 (1928).

Eagle Lake, Cass County,

Park Trustee for Cass County v Wendt, 361 Mich 247; 105 NW2d 138 (1960).

Gogebic Lake, Gogebic-Ontonagon County,

Douglas v Bergland, 216 Mich 380; 185 NW 819 (1921).

Hubbard Lake, Alcona County,

Butterfield v Gilchrist, 53 Mich 22; 18 NW 542 (1884).

Long Lake, Barry County,

Commissioner of Highways of Hope Tp. v Ludwick, 151 Mich 498; 115 NW 419 (1908).

Mullet Lake, Cheboygan County,

Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880); Gifford v McArthur, 55 Mich 535; 22 NW 28 (1885); Gainer v Nelson, 147 Mich 113; 100 NW 511 (1907).

Muskegon Lake, Muskegon County,

Witheral v Muskegon Booming Co., 68 Mich 48; 35 NW 758 (1888); Jones v Lee, 77 Mich 35; 43 NW 855 (1889).

Narrin Lake, Oakland County,

Kerley v Wolfe, 349 Mich 350; 84 NW2d 748 (1957).

Portage Lake, St. Joseph County,

Stofflet v Estes, 104 Mich 208; 62 NW 347 (1895).

Thornapple Lake, Barry County,

Cole v Dooley, 137 Mich 419; 100 NW 561 (1904).

White Lake, Muskegon County,

Hall v Wantz, 336 Mich 112; 57 NW2d 462 (1953).

Pere Marquette Lake, Mason County,

Pere Marquette Boom Co. v Adams, 44 Mich 403; 6 NW 857 (1880).

Pickerel Lake, Emmet County,

Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880).

## **APPENDIX C WATERS INDICATED NAVIGABLE BY THE MICHIGAN SUPREME COURT**

The Michigan Supreme Court, by either judicial notice\* or direct reference, in opinions rendered during the period 1843-1930, indicated the following streams and lakes as having floated logs on a commercial basis during the early Michigan lumbering era.

\* Judicial notice is the assumption or recognition of the existence of a fact of which the court has judicial knowledge or to which it can readily acquire knowledge without formal introduction of evidence.

### **STREAMS**

Au Gres River, East Branch, St. Clair County,

Keystone Lumber & Salt Manuf'g Co. v Jenkinson, 69 Mich 220; 37 NW 198 (1888).

Au Gres River, West Branch, Arenac County,

Shaw v Bradley, 59 Mich 199; 26 NW 331 (1886).

Au Gres River, Bay County,

Johnson v Cranage, 45 Mich 14; 7 NW 188 (1880).

Au Sable River, Otsego County, downstream from lands owned by Pack Woods & Co., Selling & Hanson, H.W. Sage Co., Wright & Davison in 1888,  
Pack v Circuit Judge of Iosco County, 70 Mich 135; 38 NW 6 (1888).  
Au Sable River, Iosco County, 30 miles upstream from mouth  
Au Sable River Boom Co. v Sanborn, 36 Mich 358 (1877).  
Backus Creek, Roscommon County, Mud Lake to Houghton Lake  
McDonald v Boeing, 80 Mich 415; 45 NW 362 (1890).  
Betsey (Betsie) River, Benzie County, near head of river  
Crane Lumber v Bellows, 117 Mich 482; 76 NW 67 (1898);  
Bellows v Crane Lumber Co., 119 Mich 424; 78 NW 536 (1899);  
Bellows v Crane Lumber Co., 126 Mich 476; 85 NW 1103 (1901).  
Black Creek, Kent County, upstream to Flat Creek  
Tuttle v White, 46 Mich 485; 9 NW 528 (1881).  
Black River, St. Clair County,  
Ames v Port Huron Log Driving & Booming Co., 11 Mich 139 (1863).  
Black River, St. Clair County, downstream to mouth from lands owned by Black River Stream Mill Company in 1859  
Ames v Port Huron Log Driving & Booming Co., 6 Mich 265 (1859).  
Black River, Upper, Otsego County, downstream to Black Lake from lands owned by John Davis in 1885 in vicinity of "Chandler's Dam"  
Davis v Ladu, 58 Mich 226; 24 NW 871 (1885).  
Black River, Otsego County,  
Gainer v Cheboygan River Boom Co., 86 Mich 112; 48 NW 787 (1891).  
Brown Creek, Alcona County, seasonably navigable  
Butterfield v Gilchrist, 53 Mich 22; 18 NW 542 (1884).  
Butterfield Creek, Alcona County, seasonably navigable  
Butterfield v Gilchrist, 53 Mich 22; 18 NW 542 (1884);  
Butterfield v Gilchrist, 63 Mich 155; 29 NW 682 (1886).  
Cedar Creek, Muskegon County,  
Boyce v Martin, 46 Mich 239; 9 NW 265 (1881);  
Appleman v Myre and Certain Logs Owned by Wood, 74 Mich 359; 42 NW 48 (1889).  
Chippewa River, Isabella County, 12 miles west of Mt. Pleasant downstream  
Hall v Tittabawassee Boom Co., 51 Mich 377; 16 NW 770 (1883);  
Duplanty v Stokes, 103 Mich 630; 61 NW 1015 (1895).  
Chippewa River, Isabella County,  
Woodin v Wentworth, 57 Mich 278; 23 NW 813 (1885);  
Hudson v Feige, 58 Mich 148; 24 NW 863 (1885);  
Wooden v Mt. Pleasant Lumber & Manufg Co., 106 Mich 412; 64 NW 329 (1895).  
Chippewa River, Saginaw County, Charles Sterling and Co. lands downstream  
Hance v Tittabawassee Boom Co., 70 Mich 227; 38 NW 228 (1888).  
Chippewa River, Bay County, main stream  
Edson v Gates, 44 Mich 253; 6 NW 645 (1880).  
Chippewa River, Bay County,  
Watts v Tittabawassee Boom Co., 52 Mich 203; 17 NW 809 (1883).  
Clam River, Missaukee County, 6 miles above Falmouth to Muskegon River  
Koopman v Blodgett, 70 Mich 610; 38 NW 649 (1888).  
Clinton River, Macomb County, meandered upstream to Section 19, T3N R12E  
Goff v Cogle, 118 Mich 307; 76 NW 489 (1898).  
Coldwater River, Isabella County,  
Hall v Tittabawassee Boom Co., 51 Mich 377; 16 NW 770 (1883).  
Comstock Creek, Alcona County, seasonably navigable  
Butterfield v Gilchrist, 53 Mich 22; 18 NW 542 (1884).  
Dead River, Marquette County, from Boyce Creek downstream  
Michigan Land & Iron Co. v Cleveland Sawmill & Lumber, 109 Mich 164; 66 NW 953 (1896).  
Escanaba River, Branch of, Marquette County, Section 24 and 25, T44N R28W downstream  
McGregor v Ross' Estate, 96 Mich 103; 55 NW 658 (1893).

Escanaba River, Delta County, downstream from first main branch in Marquette County  
Escanaba Boom Co. v Two Rivers Mfg. Co., 118 Mich 454; 76 NW 980 (1898).

Flat River, Montcalm County, seasonably navigable  
Middleton v Flat River Boom Co., 27 Mich 533 (1873).

Flat River, Muskegon County,  
Hopkins v Sanford, 41 Mich 243; 2 NW 39 (1879).

Flint River, Lapeer County, seasonably navigable  
Richards v Johnson, 46 Mich 297; 9 NW 423 (1881).

Flint River, Lapeer County, downstream to mouth from Columbiaville  
Richards v Peters, 70 Mich 286; 38 NW 278 (1888).

Flint River, Genesee County,  
Loranger v City of Flint, 185 Mich 454; 152 NW 251 (1915).

Garlic River, Marquette County, downstream from Sauk's Head Lake; dam built in 1904 to aid in driving logs  
Kreig v Kaufman, 206 Mich 622; 173 NW 338 (1919).

Grand River, Kent County,  
Grand Rapids Booming Co., v Jarvis, 30 Mich 308 (1899).

Iron River, Marquette County, from Lake Independence to mouth  
Hall v Nester, 122 Mich 141; 80 NW 982 (1899).

Little Muskegon River, Mecosta County, to mouth from the SE 1/4 of the SE 1/4, of Section 25, T13N R10W  
Grand Rapids & Indiana Ry. Co. v Village of Morley, 166 Mich 66; 131 NW 135 (1911).

Looking Glass River, Shiawassee County, meandered  
Harris v Boutwell, 156 Mich 455; 122 NW 179 (1909).

Main Creek (West Branch), Alpena County, downstream from Butterfield Creek  
Buterfield v Gilchrist, 63 Mich 155; 29 NW 682 (1886).

Manistee River and tributaries,  
Manistee Nav. Co. v Louis Sands Salt & Lumber Co., 174 Mich 1; 140 NW 565 (1913).

Manistee River, Manistee County,  
Manistee River Imp. Co. v Sands, 53 Mich 593; 19 NW 199 (1884);  
Manistee Navigation Co. v Filer & Sons, 185 Mich 302; 151 NW 1025 (1915).

Manistee River, South Branch of Manistee County, downstream from lands owned in 1877 by R.G. Peters  
Peters v Gallagher, 37 Mich 406 (1877).

Manistique River, Schoolcraft County,  
Manistique Lumbering Co. v Witter, 58 Mich 625; 26 NW 151 (1886).

Maple River, Emmet and Cheboygan County, 30 miles upstream from mouth  
Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7, 5 NW 998 (1880).

Muskegon River, Roscommon County, downstream to mouth from Houghton Lake  
Coburn v Muskegon Booming Co., 72 Mich 134; 40 NW 198 (1888);  
Darrah v Gow, 77 Mich 16; 43 NW 851 (1889).

Ocqueoc River, Presque Isle County,  
Ocqueoc Imp. Co. v Mosier, 101 Mich 473; 59 NW 664 (1894).

Pere Marquette River, Mason County,  
Pere Marquette Boom Co. v Adams, 44 Mich 403; 6 NW 857 (1880);  
Seaton v Pere Marquette Boom Co., 84 Mich 178; 47 NW 560 (1890).

Pere Marquette River, Little South Branch,  
Lane v Pere Marquette Boom Co., 62 Mich 63; 47 NW 560 (1886).

Pere Marquette River, "Middle Branch", Mason County, downstream from Section 15, T17N R12W  
Hayes v Stockwell, 73 Mich 366; 41 NW 324 (1889).

Pigeon River, Otsego County, 40 miles upstream from mouth  
Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880).

Pine River, Bay County,  
Watts v Tittabawassee Boom Co., 52 Mich 203; 17 NW 809 (1883).

Pine River, Chippewa and Mackinac County,  
Doyle v Pelton, 134 Mich 398; 96 NW 483 (1903).

Pinnebog River, Huron County,  
Williamson v Haskell, 50 Mich 364; 15 NW 512 (1883).

Rainy River, Presque Isle County, 30 miles upstream from mouth

Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880).  
Rifle River, Arenac County, 12 miles upstream from mouth  
McDonell v Rifle Boom Co., 71 Mich 61; 38 NW 681 (1888).  
Rifle River, Bay County,  
Chapman v Keystone Lumber & Salt Co., 20 Mich 358 (1870).  
Salmon Trout River, Marquette County,  
Haughton v Busch, 101 Mich 267; 59 NW 621 (1894).  
Shiawassee River, Shiawassee County, meandered stream  
Oliver v Olmstead, 112 Mich 483; 70 NW 1036 (1897).  
Sturgeon River, Baraga and Houghton County,  
Bellaire v Worcester Lumber Co., 177 Mich 222; 143 NW 63 (1913).  
Sturgeon River, Otsego County, 70 miles upstream from mouth  
Nelson v Cheboygan Slack-Water Nav. Co., 44 Mich 7; 5 NW 998 (1880).  
Sturgeon River, West Branch, Cheboygan County,  
Noyes v Hillier, 65 Mich 636; 32 NW 872 (1887).  
Tahquamenon River, Chippewa County,  
La Vasser v Chesborough Lumber Co., 190 Mich 403; 157 NW 74 (1916).  
Thunder Bay River, Alpena County, downstream from Section 31 and 32, T32N R7E,  
Huggett v Case, 61 Mich 480; 28 NW 670 (1886).  
Thunder Bay River, North and South Branch,  
Huggett v Case, 61 Mich 480; 28 NW 670 (1886).  
Thunder Bay River, South Branch  
Holcomb v Alpena Power Co., 215 Mich 382; 184 NW 587 (1921).  
Tittabawassee River and tributaries (Pine, Chippewa and Tobacco downstream to Saginaw River)  
Hall v Tittabawassee Boom Co., 51 Mich 377; 16 NW 770 (1883).  
Tittabawassee River, Gladwin County, from tributary at Edenville to mouth of Tittabawassee  
Watts v Tittabawassee Boom Co., 52 Mich 203; 17 NW 809 (1883).  
Tittabawassee River, Isabella County,  
Two Hundred Thousand Feet of Logs v Sias, 43 Mich 356; 5 NW 414 (1880).  
Tittabawassee River, Saginaw County,  
Kroll v Nester, 52 Mich 70; 17 NW 700 (1883).  
Tobacco River, Main River and North, Middle and South Branch  
Watts v Tittabawassee Boom Co., 52 Mich 203; 17 NW 809 (1883);  
Pratt v Brown, 106 Mich 628; 64 NW 583 (1895).  
Torch River, downstream from Antrim - Kalkaska County line,  
Attorney General v Board of Supervisors of Kalkaska and Antrim, 120 Mich 357; 79 NW 567 (1899).  
Town Line Creek, Clare and Roscommon County,  
Darrah v Gow, 77 Mich 16; 43 NW 851 (1889).  
West Branch (Main Creek), Alpena County, downstream from Butterfield Creek  
Butterfield v Gilchrist, 63 Mich 155; 29 NW 682 (1886).  
White River, Muskegon County,  
White River Log & Boom Co. v Nelson, 45 Mich 578; 8 NW 587 (1881);  
Mann v White River Log & Booming Co., 46 Mich 38; 8 NW 550 (1881).  
White River, Newaygo County,  
Macumber v White River Log & Booming Co., 52 Mich 195; 17 NW 806 (1883).  
Whitefish River, Delta County, downstream from Sections 21 and 28 T41N R21W,  
Garth Lumber & Shingle Co. v Johnson, 151 Mich 205; 115 NW 52 (1908).  
Yellow Dog River, Marquette,  
Hall v Nester, 122 Mich 141; 80 NW 982 (1899).  
**LAKES**  
Betsey (Betsie) Lake, Benzie County,  
Crane Lumber Co. v Bellows, 117 Mich 482; 76 NW 67 (1898).  
Crystal Lake, Benzie County,  
Crane Lumber Co. v Bellows, 117 Mich 482; 76 NW 67 (1898).  
Hubbard Lake, Alcona County,  
Holcomb v Alpena Power Co., 215 Mich 382; 184 NW 587 (1921).

Independence Lake, Marquette County,  
Hall v Nester, 122 Mich 141; 80 NW 982 (1899).  
Ives Lake and stream connecting it with Pine Lake, Marquette County,  
Haines v Gibson, 115 Mich 131; 73 NW 126 (1897).  
Mud Lake, Roscommon County,  
McDonald v Boeing 80 Mich 415; 45 NW 362 (1890).  
Pine Lake and connecting stream to Lake Superior, Marquette County,  
Haines v Gibson, 115 Mich 131; 73 NW 126 (1897).  
White Lake, Muskegon County,  
Mann v White River Log & Boom Co., 46 Mich 38; 8 NW 550 (1881).  
Nichols Lake, Newaygo County, Lake in Section 27, T16N R13W, logs were put into lake  
Brigham v Martin, 103 Mich 150; 61 NW 276 (1894).

## **APPENDIX D WATERS DECLARED NAVIGABLE BY MICHIGAN LOCAL ACTS AND GENERAL STATUTES**

During the period 1837-1907, the Michigan Legislature by local act or general statute authorized construction on certain navigable streams provided that locks, sluices or slides were erected for the passage of boats, canoes, rafts or other watercraft and logs. The following streams should, therefore, be deemed navigable in law downstream to their mouths from the following indicated Legislature-authorized dam locations.

Brule River, T41N R32W, Iron County, L.A. 1907  
Carp River, Section 9, T30N R12W, Leelanau County, Laws 1859  
Cass River, Section 24, T11N R7E, Tuscola County, L.A. 1887  
Cedar River, T4N R1E, Ingham County, Laws 1841  
Chippewa River, Section 10, T14N R4W, Isabella County, L.A. 1893  
Clinton River, Section 10, T2N R12E, Macomb County, Laws 1849  
Flat River, Section 30, T10N R8W, Montcalm County, Laws 1845  
Flint River, Section 17, T8N R8E, Lapeer County, Laws 1837  
Grand River, Section 28, T1N R2W, Ingham County, Laws 1843  
Huron River, Section 31, T2S R5E, Washtenaw County, Laws 1843  
Kalamazoo River, Section 26, T2S R6W, Calhoun County, Laws 1837  
Looking Glass River, Section 8, T5N R3W, Clinton County, Laws 1837-38  
Menominee River, Section 12, T40N R30W, Dickinson County, L.A. 1907  
Paw Paw River, Section 10, T3S R15W, Van Buren County, Laws 1847  
River Raisin, Section 21, T7S R5E, Lenawee County, Laws 1844  
Red Cedar River, Section 25, T4N R1W, Ingham County, Laws 1842  
Shiawassee River, Section 30, T6N R4E, Shiawassee County, Laws 1842

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Thornapple River, Section 15, T4N R10W, Barry County, Laws 1837

## **APPENDIX E WATERS ADJUDICATED NON-NAVIGABLE BY THE MICHIGAN SUPREME COURT**

### **STREAMS**

Little Portage River, St. Joseph County,  
Mathewson v Hoffman, 77 Mich 420; 43 NW 879 (1889).  
Sturgeon River, East Branch, Dickinson County, T42, 43, 44N R29, 28W  
Keystone Lumber & Salt Co. v Jenkinson, 69 Mich 220; 37 NW 198 (1886).  
Thread River, Genesee County,  
Burroughs v Whitman, 59 Mich 279; 26 NW 491 (1886).

### **LAKES**

Conover Lake, Newaygo County,  
Putnam v Kinney, 248 Mich 410; 227 NW 741 (1929).

Prouse Lake, Leelanau County,  
Manny v Prouse, 248 Mich 655; 227 NW 685 (1929).  
Winan's Lake (Pleasant Lake), Livingston County,  
Pleasant Lake Hills Corporation v Eppinger, 235 Mich 174; 209 NW 152 (1926).

Note: Recent public access to these lakes may alter non-navigable classification. A comprehensive listing of all public boat launching areas is contained within the [Michigan Public Boat Launch Directory](#) published by the DNR Parks and Recreation Division.