

# University of Michigan Journal of Law Reform

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Volume 1

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1968

## The Trend in Water Law Development

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### Recommended Citation

Jerome Maslowski, *The Trend in Water Law Development*, 1 U. MICH. J. L. REFORM 131 (1968).

Available at: <https://repository.law.umich.edu/mjlr/vol1/iss1/10>

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# THE TREND IN WATER LAW DEVELOPMENT

*Jerome Maslowski \**

The basis of public and private rights in the waters of the State of Michigan is grounded principally in the common law. There has been a scarcity of statutory law on the subject and it is only within the last ten years that any statutes have been enacted which seek to delineate public and private rights.<sup>1</sup>

## *Current Surface Water Law*

The waters of the State of Michigan are the Great Lakes and the inland lakes and streams. There is some variance in the principles that apply to these waters, as is apparent from the common law and the recent statutes that have been passed. In general, the distinction between the two is found in the fact that the State owns the bottomland of the Great Lakes whereas the bottomland of inland waters is owned by riparians, with the State having a trust interest in the waters themselves. The trust interest exists in both the bottomland and the waters of the Great Lakes.

For practical purposes the ownership of bottomland is immaterial insofar as the exercise of the public interest is concerned. The fact that private parties may own the bottomland does not prevent the exercise of the same public rights on inland waters as on the Great Lakes.<sup>2</sup>

The origin of the difference in treatment between the Great Lakes and inland waters can be traced to the common law distinction between tidal and non-tidal waters, it having been held that public rights existed only in tidal waters. Michigan follows this rule in general, but distinguishes between navigable and nonnavigable waters instead of between tidal and non-tidal waters.<sup>3</sup> The first Michigan pronouncement concerning submerged lands is found in an 1843 chancery case, *La Plaisance Bay Harbor Co. v. City of Monroe*,<sup>4</sup> in which it was held that title to submerged lands of the Great Lakes was in the State.

Subsequently, ownership of bottomlands was considered again in *Lorman v. Benson*,<sup>5</sup> a case involving the right to cut ice on the Detroit River.

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<sup>1</sup> Great Lakes Submerged Lands Act. MICH. COMP. LAW § 322.701-11 (Supp. 1961); The Inland Lakes and Streams Act. MICH. COMP. LAW § 281.731-47 (Supp. 1961).

<sup>2</sup> *Hall v. Wantz*, 336 Mich. 112, 57 N.W. 2d 462 (1953), (surface of inland waters subject to public use); *Kavanaugh v. Baird*, 241 Mich. 240, 217 N.W. 2 (1928), *rev'd on other grounds*, 253 Mich. 631, 235 N.W. 871 (1931).

<sup>3</sup> See also *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926).

<sup>4</sup> *Walk*, Ch. 155 (Mich. 1843).

<sup>5</sup> 8 Mich. 18 (1860).

In that case the Michigan Supreme Court determined that ownership of the soil under the Detroit River rested with the owner of the adjacent bank. This is the foundation of the rule in Michigan that the beds of streams are owned privately. Although the Court found that ownership of the bed was in the riparian owner, it was careful to point out that the public rights in general are the same whether the soil of the bed is owned privately or publicly.

The rule of *Lorman v. Benson*, *supra*, was subsequently extended to inland lakes in *Rice v. Ruddiman*,<sup>6</sup> a case involving Muskegon Lake. There the Court held that title of bottomlands was in private hands. The Michigan Supreme Court again considered public rights in 1884, and in *Lincoln v. Davis*,<sup>7</sup> held that the State had the right to control private structures in public waters. In addition, in 1896 the rule that the State holds in fee the soil lying beneath the waters of the Great Lakes was confirmed in *People v. Silberwood*.<sup>8</sup> The principles set forth in this case were repeated in *People v. Warner*.<sup>9</sup>

Since these cases legislation has declared State ownership or provided a measure of control of Great Lakes submerged lands. By Act 66, Public Acts of 1891,<sup>10</sup> the legislature set aside lands belonging to the State of Michigan in Wildfowl Bay in Huron County. In Act 171, Public Acts of 1899,<sup>11</sup> it made provisions for the protection of certain submerged lands.<sup>12</sup> In 1913 the legislature passed the St. Clair Flats Act, Act 326, Public Acts of 1913,<sup>13</sup> providing for the leasing of the surveyed lands of the St. Clair Flats. Also, in 1955, the legislature passed Act 247, Public Acts of 1955 as since amended.<sup>14</sup> The latter Act is probably the most comprehensive Great Lakes submerged lands legislation which has been passed to date.

Act 247 provides for the control of filling and dredging; for the conveyance of filled lands, filled without authority prior to the Act, to private persons; and for the conveyance and lease of unfilled submerged lands for public purposes. This Act gives some of the authority which formerly rested primarily in the legislature to the Department of Conservation. The authority of this Department in the past to sell and lease lands was limited and, in general, no conveyances or leases were made by that De-

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<sup>6</sup> 10 Mich. 125 (1862).

<sup>7</sup> 53 Mich. 375, 19 N.W. 103 (1884).

<sup>8</sup> 110 Mich. 103, 67 N.W. 1087 (1896).

<sup>9</sup> 116 Mich. 228, 74 N.W. 705 (1898).

<sup>10</sup> MICH. COMP. LAW § 317.271-74 (1948).

<sup>11</sup> MICH. COMP. LAW § 317.291-97 (1948).

<sup>12</sup> This act set aside the submerged and swamp lands bordering on the Great Lakes and bayous thereof belonging to the State of Michigan as a public hunting and shooting ground.

<sup>13</sup> MICH. COMP. LAW § 322.401-29 (1948), as amended by Act 215, PUBLIC ACTS 1949. MICH. COMP. LAW §§ 322.402, 427-28 (Supp. 1961).

<sup>14</sup> MICH. COMP. LAW § 322.701-11 (Supp. 1961).

partment as indicated by the special acts passed by the legislature conveying areas of Great Lakes bottomlands.<sup>15</sup>

The State does not own the bottomland of the inland waters but does have a public trust in the waters of the navigable streams and inland lakes;<sup>16</sup> consequently, the State interest must be preserved. In the past such interest was preserved through the application of common law principles. However, recently the Michigan Legislature enacted the Inland Lakes and Streams Act,<sup>17</sup> which protects the State interest in public waters of the streams and inland lakes.<sup>18</sup>

Riparian rights are always qualified by the public interest, whether the waters are the Great Lakes or inland.<sup>19</sup> Riparian rights in Michigan have been set forth in *Hilt v. Weber*,<sup>20</sup> and have been defined as follows:

- A. The right to use the water for general purposes, such as bathing, domestic use, etc.
- B. The right to wharf out to navigable waters.
- C. The right of access to navigable waters.
- D. The right to accretions.

All riparian owners have a right to make reasonable use of the entire surface of the body of water for such purposes as navigation, fishing, and other purposes consistent with the public trust.

Riparian rights in Michigan are always subject to the rule of reasonable use laid down by the Michigan Supreme Court. This rule was first enunciated in *Dumont v. Kellogg*,<sup>21</sup> and has continued to be the rule for the State of Michigan. This reasonable rule has been repeated in various cases,<sup>22</sup> the most recent of which is *Hoover v. Crane*,<sup>23</sup> involving use of waters for irrigation purposes.

<sup>15</sup> MICH. COMP. LAW § 317.241 (1948), (Conveyed 88.35 acres of bottomland to Detroit Edison at Harbor Beach, Lake Huron). Act 8, PUBLIC ACTS 1955 (Ex. Sess.), MICH. STAT. ANN. 13.790(271-77), (Conveyed 52.80 acres to Albitibi Corporation at Alpena, Lake Huron). Act 36, PUBLIC ACTS 1956, MICH. STAT. ANN. § 13.790 (281-287), (Conveyed 950 acres to Consumers Power Co. at mouth of Saginaw River, Lake Huron). Act 11, PUBLIC ACTS 1959, (Conveyed 63 acres to Consumer Power Co. at Port Sheldon, Lake Michigan). Act 31, PUBLIC ACTS 1959, (Conveyed 40.51 acres to Detroit Edison at Lagoona Beach, Lake Erie). Act 84, PUBLIC ACTS 1962, (Conveyed 15 acres to National Gypsum Co. near Tawas City, Lake Huron).

<sup>16</sup> The nature of this interest is indicated later in this article.

<sup>17</sup> Note 1 *supra*.

<sup>18</sup> Under the Act, "lake or stream" or "water" meant any navigable inland lake or stream wholly or partly within that State, including the St. Mary's, St. Clair and Detroit rivers.

<sup>19</sup> *Hall v. Wantz*, *supra* note 2; *Kavanaugh v. Baird*, *supra* note 2.

<sup>20</sup> 252 Mich. 198, 233 N.W. 159 (1930).

<sup>21</sup> 29 Mich. 420 (1874).

<sup>22</sup> *Phillips v. Village of Armada*, 155 Mich. 260, 118 N.W. 541 (1908); *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich. 279, 215 N.W. 325 (1927); *City of Battle Creek v. Goguac Resort Ass'n.*, 181 Mich. 241, 148 N.W. 441 (1914).

<sup>23</sup> 362 Mich. 36, 106 N.W. 2d 563 (1960).

Until 1967 there was no statutory law regulating irrigation. In that year the legislature passed a bill authorizing the establishment of irrigation districts which might utilize the waters of the Great Lakes.<sup>24</sup> It would seem that the use of waters by the irrigation districts would be subject to the common law rule of reasonable use.

The matters of filling and dredging have now been taken care of by the appropriate Great Lakes Act and Inland Waters Act. These Acts give the State a nucleus of statutory law. They do not, however, represent a solution to all the water problems of the State.

One of the most difficult problems confronting the State is the matter of canal development. The issue of whether or not a developer can connect channels to navigable waters of the State was raised recently in *Thompson v. Enz*.<sup>25</sup> The Circuit Court decided that the developer had no right to dig a canal and connect it with the waters of Gun Lake. The Court of Appeals reversed and held that the digging of canals was a proper riparian use. The case was then appealed to the Michigan Supreme Court where three opinions were rendered.

Justices Black, Kavanaugh, Souris and Adams held that the Court of Appeals should be reversed and the case remanded for proofs to determine whether or not the digging of artificial channels would cause an injury to the riparian owners.

Justices Dethmers and Kelly concurred in the reversal, but maintained that the Circuit Court's judgement should be affirmed without remand. Justices O'Hara and Brennan voted for affirmance of the Court of Appeals.

All the Justices were of the opinion that whether or not canals should be permitted was a question of fact dependent on whether or not injury would be caused. No proofs to this effect had been taken in the trial court.<sup>26</sup>

Questions of injury to waters are difficult to determine and require highly technical proof. Adequate legislation should help the State to deal with the problem.

In the 1967 session the legislature had under consideration bills to regulate the digging of channels which would give the Department of Conservation the authority to issue permits under appropriate conditions.<sup>27</sup>

We have indicated that waters are generally subject to reasonable use by the riparian owners. In the case of navigable waters such reasonable

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<sup>24</sup> Senate Bill 222.

<sup>25</sup> 379 Mich. 667 (1968).

<sup>26</sup> The Court, however, refused to enter an order of remand. The Supreme Court order reads as follows: "This cause having been brought to this Court by appeal from the Court of Appeals, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court that the judgment of the Court of Appeals be [sic] and the same is hereby reversed. It is further ordered that plaintiffs may tax costs." Case File, *Thompson v. Enz*, Office of Clerk of Supreme Court, Lansing, Mich.

<sup>27</sup> House Bill 2571 to regulate channels connected to inland waters; House Bill 2689 to regulate channeling.

use is limited by public use. Private use is always subject to public use.<sup>28</sup> The problems of public use and private use are generally being resolved in the State of Michigan by additional statutes which clarify and supplement the common law.

Basic rules which should be kept in mind as they exist in Michigan indicate that riparian use of navigable waters is always subject to the paramount considerations of public use. This has been well established by *Collins v. Gerhardt*.<sup>29</sup> In that case the Court had to decide whether a fisherman wading in the Pine River was a trespasser. Fences had been strung across the Pine River by a private owner to restrain fishermen from wading in the stream where it crossed his property. The Court upheld the public right to fish this portion of the stream, stating with eloquence and emphasis at 49:

So long as water flows and fish swim in the Pine River, the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the State. In this right they are protected by a *high, solemn and perpetual trust*, which it is the duty of the State to forever maintain. (Emphasis original.)

In considering the ownership of the bottomland the Court said at 48:

It is immaterial who owns the soil [under] our navigable rivers. The trust remains. From the beginning title was impressed with this trust for the preservation of the public right of fishing and other public rights, . . .

This rule was followed in *Attorney General ex rel. Director of Conservation v. Taggart*.<sup>30</sup>

Whether or not the public trust applies depends on whether or not the waters are navigable. Many of the early cases said that a stream was navigable if it actually floated logs or if the public had made a commercial use of the stream.<sup>31</sup>

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<sup>28</sup> See the dissent of Justice Morse in *Sterling v. Jackson* where he said: "The right to bathe in its cool depths, to feast the eye upon its lovely landscapes of water, wood, and meadow, as I lie dreamily in my *fastened* canoe or *anchored* boat; the right to bask in the glad sunshine, to look up into the blue sky, to breathe in the pure air; the right to hear the gentle murmur of the wind, to listen to the music of the singing birds, or even to note the ripple of its waters as they beat upon the shores of the riparian owner; and the right to fill and gladden every sense with the joy and beauty of nature, — is mine; and the proprietor of the soil under the bed of the stream has no authority or power to drive me away. For these things are free, and God had ordered it so." 69 Mich. 488, 535, 37 N.W. 845 (1888).

<sup>29</sup> 237 Mich. 38, 211 N.W. 115 (1926).

<sup>30</sup> 306 Mich. 432, 11 N.W. 2d 193 (1943).

<sup>31</sup> For cases dealing with floatability see: *Moore v. Sanborne*, 2 Mich. 519 (1853); *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 335 (1875); *Stofflet v. Estes*, 104 Mich. 208, 62 N.W. 347 (1895); *Cole v. Dooley*, 137

The foregoing cases also indicate that, "The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use. . .," *Moore v. Sanborne*.<sup>32</sup> Therefore, it seems to us that if a stream is presently in use or may in the future be used for any public purpose, then it is subject to the State's paramount public trust.

In *Burt v. Munger*,<sup>33</sup> the Court indicated that riparian owners are entitled to the use of the entire surface of a body of water. This, of course, is now subject to modification by the Inland Lakes and Streams Act,<sup>34</sup> permitting filling and dredging under permit from the State. This may also be permitted in the Great Lakes under the Great Lakes Submerged Lands Act.<sup>35</sup> There is a certain amount of control over canal construction in that permits must be secured under the Inland Lakes and Streams Act<sup>36</sup> to connect inland canals to the particular body of water involved, as all canal connections will require a certain amount of dredging into the body of water.<sup>37</sup> This act also permits the building of bridges over navigable lakes thus doing away with the prohibition found in *Morgan v. Kloss*.<sup>38</sup>

Although the law in relation to canals is somewhat confused, it may be said that some facets of canal construction have been settled. For example, in 1960, the Attorney General held that a canal which was dug on land of a Great Lakes riparian owner was open to the public as long as it permitted the flow of public water and the passage of public fish.<sup>39</sup> He held that the public has the right to fish in navigable waters. He also cited the rule that:

[P]ublic waters over private lands are not susceptible of private ownership and therefore do not admit of trespass. Such waters are much like air over private property, when the air is used for public purposes. Riparians who induce water to flow over their lands may not curtail the public rights in such water . . . .<sup>40</sup>

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Mich. 419, 100 N.W. 561 (1904); *Collins v. Gerhardt*, *supra* note 3; and Attorney General *ex rel.* Director of Conservation v. Taggart, *supra* note 30. Navigation also includes boating for recreational purposes: see *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W. 2d 748 (1957).

<sup>32</sup> 2 Mich. 519, 525 (1853).

<sup>33</sup> 314 Mich. 659, 23 N.W. 2d 117 (1946).

<sup>34</sup> Note 1 *supra*.

<sup>35</sup> Note 1 *supra*.

<sup>36</sup> Note 1 *supra*.

<sup>37</sup> The Inland Lakes and Streams Act only applies to navigable waters, so that its requirements must be viewed in that light. A similar permit would be required under The Great Lakes Submerged Lands Act (note 1 *supra*), where a connection is made with Great Lakes waters.

<sup>38</sup> 244 Mich. 192, 221 N.W. 113 (1928). That case indicated that bridging over inland lakes could be accomplished only by special act of the legislature.

<sup>39</sup> Attorney General's Opinion No. 3320, [1959-1960] MICH. ATT'Y GEN. BIENNIAL REP.: Part II at 70.

<sup>40</sup> *Id.* at 71.

Although this ruling was related to the Great Lakes, it would be expected that similar reasoning would apply where a canal connected to an inland waterway.

Other than *Thompson v. Enz*, *supra*, the only canal case that has ever been decided in Michigan is *Ruggles v. Dandison*,<sup>41</sup> where the Court said at 340-341:

If the water of the lake touches plaintiffs' property, because of an artificial channel which was dug by plaintiffs from their property, through the bog land to the lake, they can acquire no riparian rights by virtue of this fact. . . .

To summarize, it may be said that at the present time, before there can be any filling and dredging in the State of Michigan, statutory permission must be secured under the appropriate Great Lakes Act or Inland Water Act. There is no specific statutory law governing the construction of canals, although canal construction may be restrained by injunction because it may cause an unreasonable diversion of water or because it may introduce pollutants resulting from house construction on the canals.<sup>42</sup>

It is expected that eventually adequate canal legislation will be passed. Irrigation rights are now being delineated by the passage of the Great Lakes Irrigation Act providing for the irrigation districts heretofore mentioned.

### *A Look at the Future*

The demands of industry, recreation and farming are heavy on the waters of the State of Michigan and the common law is not adequate to solve the problems created by these demands. There is a great need for additional legislation.

The Inland Lakes and Streams Act<sup>43</sup> is a good example of necessary legislation. It sets forth respective rights of the riparian owner and the state with respect to filling and dredging. It represents a first step towards needed statutory reform in this constantly changing field of water use. A list of additional legislation both necessary and helpful would contain the following:

1. An amendment to the Inland Lakes and Streams Act to provide for control of upland channels excavated from shores of navigable inland lakes and streams. Such an amendment is now pending before the Michigan Legislature as House Bill 2571.<sup>44</sup>
2. An amendment to the Great Lakes Submerged Lands Act to provide for control of upland channels excavated from the shores of one of

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<sup>41</sup> 284 Mich. 338, 279 N.W. 851 (1938).

<sup>42</sup> The Department of Conservation does require a permit for dredging to connect a canal to a lake or stream.

<sup>43</sup> Note 1 *supra*.

<sup>44</sup> House Bill 2571 has been sent to the Governor for signature.

the Great Lakes. An amendment designed to accomplish these objectives is now pending in the Legislature as House Bill 2689.<sup>45</sup>

Beyond these two steps there is a need for statutory definition of what constitutes public or navigable waters. It is inappropriate to suggest in this article what form that definition should take. To state the case for a particular definition involves a lengthy statement of background which must be covered in another article at another time.

Another specific statutory reform which is urgently needed is one regulating the use of inland waters for irrigation in order to achieve an appropriate balance between public and private rights. This topic is also an appropriate subject for a separate article.

Passage of individual statutes will not, however, satisfy our needs; what is required in the final analysis is a complete water code. To draft such a code is a task that could well be assigned to a special study committee whose members would have a broad understanding of the needs of the entire Great Lakes area and who would undertake a complete review of existing legislation. Such a code is desirable as a means of avoiding the present necessity of ferreting out conclusions (conclusions as to which there is sometimes substantial difference of opinion) on the basis of the decisions of the Michigan Supreme Court or the Court of Appeals.

Each passing year makes the solution of some of these problems more difficult and complex. It is earnestly hoped that the legislature may see fit to appoint a specially qualified committee to undertake such a task without delay.

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<sup>45</sup> House Bill 2689 has now been enacted into law.