



Public Rights to Fish and Hunt On Lakes and Streams: A Primer for Michigan's Indian Tribes

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Purpose of this Report

This report is meant to assist members of the five Indian Tribes who are political successors to signatories of the 1836 Treaty of Washington.¹ Those Tribes are: Bay Mills Indian Community; Sault Ste. Marie Tribe of Chippewa Indians; Grand Traverse Band of Ottawa and Chippewa Indians; Little River Band of Ottawa Indians; and Little Traverse Bay Bands of Odawa Indians.

The 2007 Consent Decree governing inland fishing and hunting rights for the five Tribes says that Tribal members may fish and hunt on lands and waters that are open to the public. Therefore, the three questions that need answering are:

- (1) What lakes and streams does the public have a right to use?
- (2) How does the public access a lake or stream?
- (3) What fishing hunting and activities are allowed on a lake or stream?

Having answers to these questions should help Tribal members exercise their fishing and hunting rights under the 1836 Treaty and the Consent Decree. Because this report is a primer on the rights of the public to access Michigan's inland lakes and streams for fishing and hunting, it may be useful for others as well.

About the Authors

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More information about the firm can be found at www.envlaw.com.

A note about format

The goal of this report is to provide practical information for a general audience. Therefore, to the extent possible it is written with a minimum of legal jargon. For lawyers and other interested parties, the endnotes of this report contain detailed legal annotations to support and elaborate on the points made.

What lakes and streams does the public have a right to use?

There are two main categories of public access to an inland lake or stream: (1) the common law public trust doctrine; and (2) public access sites and access points.

Category 1: Lakes and streams protected by the public trust

Background of the public trust doctrine

The public trust doctrine says that certain natural resources are owned by the state and held in trust for the people.² Therefore, the public's right to use these natural resources for certain traditional activities is protected from interference by private parties.³ In Anglo-American legal history, the public trust doctrine is almost 2,000 years old.⁴ In other cultures it may be even older. In state law, the public trust doctrine was passed down from the European legal system to the American legal system and then to Michigan when it became a state.⁵

In Michigan, the public trust doctrine has been applied to the Great Lakes,⁶ the shores of the Great Lakes,⁷ and navigable inland lakes⁸ and streams.⁹ These are the natural resources for which there is a recognized right of public use under state law. With respect to navigable inland lakes and streams, the beds of these water bodies are owned by the adjacent property owners.¹⁰ However, those property owners' use of the water is subordinate to the traditional activities protected by the public trust.¹¹ In the case of a conflict between traditional, protected public uses and private uses, the public uses prevail.¹² For inland lakes and streams, the traditional activities that are protected by the public trust are bathing, swimming, wading, fishing, and boating, including the temporary anchoring of boats.¹³ (More about this at page 7, below.)

What makes a stream public?

What determines whether inland streams are navigable and therefore public? A historical test called the log-float test.¹⁴ The log-float test arose in Michigan in the 1850s in response to the widespread use of rivers for moving saw logs.¹⁵ The log-float test says that a stream is navigable if it is capable of floating an unspecified number of commercial-sized saw logs.

A stream may have enough water to float logs at certain times of the year, and not enough water to float them at other times.¹⁶ Older cases say this means the stream would only be public during the times of year when there was enough water to pass the log-float test.¹⁷ More recent cases suggest that if a stream has enough water to pass the log-float test at some times during the year, it is navigable and public all year round.¹⁸

In order to be navigable, the stream must be capable of floating the logs in its natural state.¹⁹ If a dam must be used to raise the water levels to flood stage so that the logs can be flushed downstream when the dam is detonated,

the stream does not pass the log-float test.²⁰ However, if natural obstacles such as fallen trees must be removed from the stream in order to float logs down it, the stream will still pass the log-float test.

While something of an anachronism, the log-float test remains the law today.²¹ Attempts to expand the scope of navigable waters to those which can be floated in a kayak or canoe have so far been rejected.²² The issue is still debated, however, and may be reviewed by the courts again.²³

How does one determine whether a stream passes the log-float test? The courts recognize four methods:

1. finding evidence that logs were historically floated on the stream;
2. comparing the water body to other streams that have been found to be navigable by the courts;
3. determining if the water body has already been found navigable by a court; or
4. conducting a demonstration test by floating logs down the stream.²⁴

What makes an inland lake public?

Most inland lakes will float commercial-sized saw logs. Therefore, whether an inland lake is public is not determined by the log-float test.²⁵ Instead, it is determined by a combination of two other factors:

- (1) whether the lake has inlet and outlet streams, and if so whether those streams are navigable under the log-float test; and
- (2) whether the property along the lake is owned by one person or by multiple owners.²⁶

In deciding whether a lake is public when there are not both inlet and outlet streams that pass the log-float test, the key question is whether there is a theoretical reason *besides* recreation to navigate it. Is the lake on the way to somewhere, or is there a place on the lake (for example, a commercial destination) where someone might have a reason (besides recreation) reason to go? If the answer is yes, the lake in most cases is navigable and therefore public. To illustrate, if the lake is surrounded by private property and has no inlet or outlet stream, the lake is private.²⁷ If the lake has an inlet and an outlet but neither of these is navigable under the log-float test, the lake is private. If the lake has a navigable inlet *or* a navigable outlet, but not both, and the land around the lake is owned by a single owner, the lake is private. If the lake has a navigable inlet *and* a navigable outlet, the lake is public.

The question that has not been answered is what happens when the lake has a navigable inlet or a navigable outlet, but not both, and the land around the lake is owned by multiple owners. We believe the better argument is that such a lake should be public, but the courts have not decided the issue one way or another.²⁸ Regardless whether the public trust doctrine applies, public access may otherwise exist.

Category 2: Lakes and streams for which there are public access sites

Access sites on inland lakes

An owner of property on an inland lake owns the lake bed from the shoreline to the center of the lake.²⁹ The ownership of land on the lake and the corresponding ownership of the bed are what give the owner riparian rights.³⁰ A property owner on an inland lake who has riparian rights is called a riparian owner or a littoral owner. ³¹ A riparian or littoral owner has the right to use the water over the entire lake bed, not just the water over the part of the bed that he or she owns.³²

When there is a public access site or public access point on the lake, members of the public gain some (but not all) of the rights that riparian owners have.³³ A person who can enter the lake using an access site or access point may use the whole surface of the lake.³⁴ Once on the lake, such a person may bathe, swim, fish, and temporarily anchor a boat on the lake.³⁵ More details about what uses can and cannot be made by the public are found at page 10. More details on what is and is not a public access site or access point are found in the following section.

Access points on streams

Access points on streams are more of a gray area than those on lakes. Just like with lakes, the discussion starts with the rights of riparian owners. However, no case in Michigan has decided whether a riparian owner on a stream that is *not* navigable has the right to use the entire surface of the stream like a riparian owner on a lake does. For this reason, it is not clear whether an access point on a stream that is *not* navigable gives the public any rights to wade, float, or fish the stream other than from the access point itself. Of course, if the stream is navigable, the public rights discussed in the section on public trust would apply.

What makes an inland lake or stream public?

Type of water	Characteristics	Public or not?
stream	navigable with an access point	public
stream	navigable with no access point	not public
stream	not navigable with an access point	not public
stream	not navigable with no access point	not public

What makes an inland lake or stream public? cont...

inland lake	navigable inlet and navigable outlet	public
inland lake	(1) navigable inlet <u>or</u> navigable outlet, but not both (2) property around the lake owned by more than one owner or lake contains a commercial destination	status uncertain; arguably public
inland lake	(1) no navigable inlet or navigable outlet (2) no access site or access point on lake	not public
inland lake	(1) access site or access point on lake (2) property around the lake owned by more than one owner	most likely public

How does the public access a lake or stream?

There are several legal ways to access a lake or stream from the land. These include road ends, bridges, areas dedicated to public use in some plats, private and public access sites, and undeveloped lands that are not posted under the Recreational Trespass Act. We summarize the rules on each of these types of access in this section.

Road ends

A road that ends at the edge of a navigable lake or stream provides public access to the water.³⁶ Such a road does not necessarily need to be improved and maintained to provide public access. The road can be a two-track or even a trail, as long as it originated through a written deed, easement, or plat document that makes it public.³⁷ A road to the water creating public access can also originate through a long history of use, but in that case the road must be improved and maintained by a local governmental unit.³⁸

Members of the public who access the water from a road end can use the surface of the water for boating (including anchoring temporarily), fishing, and swimming.³⁹ A local governmental unit can install a dock or ramp at the road end to assist with getting boats on the water.⁴⁰ Whether other activities, such as sitting on the shore or picnicking, are allowed depends on the circumstances; these are discussed in the section on plats, below. Local

units of government have the legal right to regulate docks and boats by local ordinance.⁴¹ Local governments also sometimes pass ordinances regulating the mooring of boats.⁴² However, it is doubtful that such ordinances could be enforced against Tribal members exercising Treaty-reserved hunting or fishing rights.⁴³

Bridges

A bridge is essentially a road that enters and exits the water. Therefore, if the law treats a bridge as a road end it should allow for public access. There is not direct legal authority in Michigan on this question, but there is some indirect authority to suggest that a bridge should be treated as an access point.⁴⁴

Roads Along the Water

Roads along the water are different than roads that end at the water. Roads along the water sometimes provide public access to the water, as well as activities typical of a beach area such as picnicking and lounging, and sometimes do not, depending on the scope of the road's dedication.⁴⁵ (See the section on plats, below).

The owner of the land across the road from the water is usually found to own the riparian rights to the water across from his or her lot.⁴⁶ This is true even if there is a strip of land between the right-of-way and the water.⁴⁷ If the fee in the road is owned by the governmental unit instead of just an easement, there is an argument that the private land owner across the road from the water does not have riparian rights.⁴⁸

Plats

Historically, public access areas were sometimes created when the owners of large tracts of land on the water platted that land into subdivisions. Frequently the subdivisions had streets or alleys leading to the water, and in some cases strips of land along the water. The plats sometimes have language written into them saying these areas are “dedicated to the use of the public,” or similar language. These dedications are often found to create public access to the water.

Whether platted streets or strips of land along the water create public access is determined by the intent of the person who platted the subdivision.⁴⁹ As with any legal document, intent is determined from the text of the document if the document is unambiguous.⁵⁰ If the document is ambiguous, then the circumstances existing at the time of the dedication – such as historical use – can be relevant to intent.⁵¹ Circumstances existing after the dedication (such as historical use after the subdivision already existed) are not relevant.⁵²

Platted road ends dedicated simply “to the use of the public” have been found to be ambiguous enough to allow historical evidence to be introduced about intent.⁵³ Without historical evidence, however, a platted road end will usually be found to allow public access to the water, including temporary mooring, swimming, and fishing; but not beach activities or permanent mooring.⁵⁴

Private Land with Permission

A private landowner with riparian rights can give permission to other people to use his or her land to access a lake or stream.⁵⁵ The access by the other people must be a reasonable use of the land owner's riparian rights.⁵⁶ Too many people, or too much disturbance, can be unreasonable; and if so it can be legally prohibited.⁵⁷

Public Land

Members of the public have the right to access navigable lakes and streams from public land, including municipal parks. The Michigan Department of Natural Resources has the authority to manage state-owned public land, and to acquire and build public access sites.⁵⁸ When the government owns land on a lake or stream, it has the same riparian rights as any other land owner (though it also has regulatory powers).⁵⁹ While no court in Michigan has ruled on the issue, courts in other states have found mismanaged or overused public access sites to be an unreasonable use of the government's rights as a riparian landowner, and put limits on the use of those sites.⁶⁰ In Michigan, DNR public access sites are subject to local zoning regulation.⁶¹ Access sites on tribal lands may or may not be subject to local zoning, depending on the circumstances.⁶²

Recreational Trespass

The right to fish in navigable waters does not carry with it the right to trespass on the land of a riparian owner.⁶³ However, the Recreational Trespass Act allows a person to cross private property that is not posted or fenced in order to access a lake or stream.⁶⁴ It is not legal, however, to enter or remain on farm property or a wooded area connected to farm property for this purpose.⁶⁵ Even on fenced or posted property or farm property, a person who is wading or floating a navigable stream may step onto and walk along the riverbanks to avoid a hazard or obstruction.⁶⁶ The burden of proof is on the person entering the private property to show that it was necessary.⁶⁷

What hunting and fishing activities are allowed on a lake or stream?

As above, we divide our discussion of what activities are allowed on a lake or stream depending on the legal basis providing access to a particular water body: (1) the common law public trust doctrine; or (2) public access sites.

Category 1: Lakes and streams protected by the public trust

Recall from above that navigable inland lakes and streams are impressed with the public trust, and as such are natural resources for which there is a right of public access under state law. While the beds of these water bodies are owned by the adjacent shoreline owners, those private owners' use of the water is subordinate to the traditional activities protected by the public trust.

In the case of both navigable lakes and navigable streams, the public has a right to boat, swim, and fish on these water bodies.⁶⁸ Along with the right to fish under the public trust doctrine comes the right to wade⁶⁹ and temporarily anchor boats⁷⁰ on privately-owned bottom lands. Michigan law has never decided whether the public trust allows fishing on navigable inland lakes and streams with nets that touch privately-owned bottom lands (for example, by using removable impoundment nets). There is a good argument that the public trust does include that right.⁷¹ Regardless whether the general public may utilize such fishing nets, property rights reserved by the Tribes in the 1836 Treaty both predate and inform Michigan common law regarding fishing activities under the 2007 Consent Decree.⁷²

The public does not have the right to trap on private bottom lands of a navigable lake or stream.⁷³ However, an argument has recently emerged that the public does have the right to hunt while floating over private bottomlands on the surface of a navigable inland lake or stream.⁷⁴

Category 2: Lakes and streams for which there are public access sites

If there is a public access site on a lake or stream, then the members of the public who use that site have the same rights to use those waters as does a private owner of shoreline property.⁷⁵ This includes the rights to boat, fish, and swim. It also includes the right to hunt and trap.⁷⁶ The right to trap only extends to that area of the lake or stream that is adjacent to the public access site or other public lands. It would not likely apply to public access gained by road ends, except perhaps over the bottom lands within the extension of the road end.⁷⁷

The same is true of access gained through recreational trespass. It would appear that public access via a trespass would not qualify as a "site." Thus the trespasser would only have the right to boat, fish, and swim (but not trap and perhaps not hunt) on the water body that he or she had trespassed to gain access to, and only if that lake or stream was also navigable. As yet, however, this question has not been addressed directly by a court.⁷⁸

Legal Annotations

1. In the Treaty of Washington signed March 28, 1836, 7 Stat. 491 (“1836 Treaty”), the Indian Tribes reserved usufructuary rights in inland portions of the ceded territory that are confirmed in docket entry 1799 filed November 2, 2007 in the litigation captioned *United States, et al. v. Michigan, et al.*, United States District Court for the Western District of Michigan File No. 2:73-CV-26 (“Consent Decree”). Section VII, pages 13-15, delineates the categories of lands and waters upon which Tribal members may exercise these “Treaty rights”:

VII. LANDS AND WATERS ON WHICH TRIBAL MEMBERS MAY EXERCISE INLAND ARTICLE 13 RIGHTS

Except as otherwise provided below, Tribal members may exercise Inland Article 13 Rights, to the extent defined in Paragraph 6.2, on the following lands and Waters within the boundaries of the 1836 Ceded Territory, as depicted in Appendix A, provided that the Tribes shall not exercise Inland Article 13 Rights in disputed areas lying generally between the Ford and Escanaba Rivers in the Upper Peninsula or on the Thunder Bay Peninsula in Alpena County unless and until the dispute as to such areas is resolved by mutual agreement of the Parties or Court order:

(a) Public lands and Waters that are open to the public under federal or State law for the particular activity (e.g., Hunting, Fishing, Trapping or Gathering), notwithstanding any species, season, method or use limitations in federal or State law, provided that in State, county and municipal parks, State wildlife refuges, formally designated State wildlife research areas, and formally designated State fisheries research areas, Tribal regulations shall only permit Hunting and Fishing in such areas where and at such times when the parks, refuges, and research areas are open to the public for Hunting and Fishing, and shall be no less restrictive than other State regulations limiting Hunting and Fishing in such areas, and provided further that such limitations shall not apply to a new or expanded park, wildlife refuge or wildlife or fisheries research area if the creation or expansion of the area was intended to limit treaty harvesting opportunities, and provided further that the State shall consult with the Tribes before creating a new or expanding an existing State park, wildlife refuge, wildlife research area or fisheries research area and shall attempt to avoid or minimize any adverse impact on the exercise of the Tribes’ rights under this Decree as a result of such designation or expansion;

(b) Private lands and Waters that are required to be open to the public under federal or state law for the particular activity, such as Hunting and Fishing (but not Gathering) on lands enrolled in the State's [Commercial Forest Act] CFA program, notwithstanding any species, season, method or use limitations in federal or state law, provided that, in the interests of social harmony, the Tribes or their members shall obtain permission from a CFA landowner in order to Hunt or Fish on his or her CFA lands outside State seasons and methods if the CFA landowner owns, in the aggregate, less than 1,000 acres in the CFA program, and provided further that generally applicable provisions of State law regarding the liability of CFA landowners arising from the activities of hunters or fishers on CFA lands, and generally applicable provisions of the CFA program allowing CFA landowners to limit access to CFA lands subject to active timber harvesting operations shall apply to Hunting and Fishing by Tribal members on CFA lands, and provided further that nothing herein shall be construed to authorize the use of snowmobiles, all-terrain vehicles, or other motor vehicles on CFA lands if such use is otherwise prohibited under applicable law;

(c) Lands and Waters owned by a Tribe, a Tribal member or the spouse of a Tribal member;

(d) Other private lands and Waters owned by non-Tribal members, with permission from the owner or authorized lessee, provided that, in the case of private Waters, i.e., a non-navigable Lake with no public access or a non-navigable stream segment on a parcel or parcels of private property, the grant of permission by a riparian owner does not violate the Michigan common law rights of any other riparian owners, and provided further that, except for special needs subsistence or ceremonial permits, which shall be limited in number, the Tribes shall restrict Hunting and Trapping on such lands and Waters in a manner consistent with State seasons and methods, and provided further that, during State seasons, permission shall be implied on lands and Waters open to the public for Hunting and Fishing under the Michigan Recreational Trespass Act, Mich. Comp. Laws, § 324.73101 et seq., as now in force or hereafter amended, and provided further that, when permission is not implied, the Tribes shall require their members to possess written evidence of permission from the landowner or authorized lessee, or the name and phone number of the landowner or authorized lessee from whom they obtained permission, while Hunting on such lands; and

(e) All other Waters that are open to the public for Fishing under federal or State law notwithstanding any species, season,

method or use limitations in federal or State law, including such Waters open to the public that are accessible through public rights-of-way and public road crossings or otherwise accessible to Tribal members by permission granted by the landowner or authorized lessee, but only for purposes of Fishing in such Waters, provided that Tribal members exercising Fishing rights within the scope of subparagraph (a) of Paragraph 6.2 of this Decree shall not place Impoundment Nets on privately owned bottom lands if doing so is in violation of the Michigan common law riparian rights of the private bottom land owner.

Nothing herein shall be construed as recognizing a right to Fish on private Waters not open to the public except those owned by a Tribe, a Tribal member or the spouse of a Tribal member or on which permission is obtained from a riparian owner as provided in subparagraph (d) of this Section VII (Lands and Waters on Which Tribal Members May Exercise Article 13 Rights).

Information about the Consent Decree and the Tribes' Treaty-reserved rights is available at the following web sites: www.envlaw.com and www.michigan.gov/dnr/0,1607,7-153-10364_44983---,00.html.

2. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452, 36 L. Ed. 1018, 13 S.Ct. 110 (1892); *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005); *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 412-413, 105 N.W.2d 143, 149 (1961).

3. *Id.* Studies of the public trust doctrine include Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Wilkinson, *The Headwaters of the Public Trust Doctrine: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Env'tl. L. Rev. 425 (1989); and Olson, *Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources in Michigan*, 1975 Det. C.L. Rev. 161.

4. The earliest known formulation of the public trust doctrine was by the Roman Emperor Justinian:

By the law of nature, these things are common to mankind: "the air, running water, the sea, and consequently the shores of the sea."

Institutes of Justinian, 2.1.1, 529 A.D.

5. The Michigan Supreme Court described the history as follows:

It will be helpful to recall that Michigan was carved out of the Northwest Territory; that the Territory was ceded to the United States by Virginia; that the United States held this territory in trust for future states to be created out of it; that the United States held the waters of navigable rivers and lakes and the soil under them in trust for the people, just as the British crown had formerly held them in trust for the public uses of navigation and fishery; that when Michigan entered the union of states, she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the state in its sovereign capacity, impressed with a perpetual trust to secure to the people their rights of navigation, fishing, and fowling.

Collins v. Gerhardt, 237 Mich. 38, 45-46, 211 N.W. 115 (1926).

6. See the cases cited in note 2, *supra*.

7. *Glass v. Goeckel*, *supra* note 2.

8. *Bott v. Natural Resources Commission*, 415 Mich. 45, 327 N.W.2d 838 (1982).

9. *Attorney General v. Taggart*, 306 Mich. 432, 440, 11 N.W.2d 193 (1943).

10. *Thies v. Howland*, 424 Mich. 282, 380 N.W.2d 463 (1985) (lakes); *Nedtweg v. Wallace*, 237 Mich. 14, 208 N.W. 51 (1926) (streams). See also, Michigan Land Title Standard 24.2.

11. *Nedtweg v. Wallace*, *id.*, 237 Mich. at 20:

The riparian proprietor has private rights to the thread of the river but such rights are subordinate, at all times, to the public rights of navigation and other rights inherent in the people.

12. *Collins v. Gerhardt*, *supra* note 5, 237 Mich. at 49.

13. *McCardel v. Smolen*, 71 Mich. App. 560, 566, 250 N.W.2d 496 (1977), *aff'd*, 404 Mich. 89, 95-96, 273 N.W.2d 3 (1978).

14. *Bott v. Natural Resources Commission*, *supra* note 8.

15. *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209 (1853). The original test for navigability arguably was broader than the log-float test, defining navigable streams as those which could be used by the public for some public purpose:

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 and hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. In one instance, perhaps, boats can only be used profitably, from the nature of the product to be transported--whilst, in another they would be utterly useless. Upon many of our streams, although of sufficient capacity for navigation by boats, they are never seen--whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly, we find that a capacity to float rafts and logs in those States where the manufacture of lumber is prosecuted as a branch of trade, is recognized as a criterion of the public right of passage and of use, upon the principle already adverted to, that such right is to be ascertained from the public necessity and occasion for such use.

2 Mich. at 525-26.

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

17. *Id.*; see also *People v. Summer School of Painting at Saugatuck, Inc.*, 105 Mich. App. 550, 307 N.W.2d 87 (1981).

18. The Michigan Supreme Court in *Bott* said that *Collins* partially overruled *Thunder Bay River Booming Co.* and made seasonally-navigable streams public all year round:

It is apparent that at first the [navigational] servitude was considered limited to the commercial flotation of logs and all activity incident thereto and existed only during the periods when such flotation could be carried on. *Collins* expanded the permissible use of the public as an incident of the navigational servitude to include fishing and declared the servitude to be permanent....

Bott v. Natural Resources Commission, *supra* note 8, 415 Mich. at 70, n.22.

19. *Moore v. Sanborne*, *supra* note 15, 2 Mich. at 523-524; *Thunder Bay River Booming Co. v. Speechly*, *supra* note 16, 31 Mich. at 4.

20. *Id.*

21. *Bott v. Natural Resources Commission*, *supra* notes 8 and 18.

22. *Id.*

23. *Id.* For arguments that the test for navigability should include canoes and kayaks, see Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 Wayne L. Rev. 9 (1999), and Strom, Peter W. and Strom, Paul L., "Stream Fishing Law in Michigan: Let's Redefine Navigability," Michigan Bar Journal, May, 1990, p. 390.

24. *Bott v. Natural Resources Commission*, *supra* note 8, 415 Mich. at 72, n.27.

25. *Id.*, 415 Mich. at 63, n.13.

26. *Id.*, 415 Mich. at 64.

27. *Id.*, 415 Mich. at 71.

28. Our position on this issue is based on the following reasoning from *Bott*:

The precept that a servitude will not be extended beyond the purpose for which it was granted explains the holding in *Winans* that a small inland dead-end lake is not open to the public, although there is a navigable means of access, if all the surrounding land is in unified ownership. In such a case, no ship can dock, and logs cannot be floated to or from the land without the permission of the owner. Where the owner objects, no use can be made of a right of passage, and, hence, there is no servitude for navigation although there is a navigable means of access to the dead-end lake.

415 Mich. at 64.

29. *Bauman v. Barendregt*, 251 Mich. 67, 231 N.W. 70 (1930); see also *Hall v. Wantz*, 336 Mich. 112, 114, 57 N.W.2d 462 (1953).

30. *Thompson v. Enz*, 379 Mich. 667, 677-679, 154 N.W.2d 473 (1967).

31. *McCardel v. Smolen*, *supra* note 13, 404 Mich. at 93, n.3; *Thies v. Howland*, *supra* note 10, 424 Mich. at 288, n.2.

32. *Beach v. Hayner*, 207 Mich. 93, 173 N.W. 487 (1919); *Burt v. Munger*, 314 Mich. 659, 23 N.W.2d 117 (1946).

33. The cases are not very clear on whether a lake with an access site must also be navigable in order for the public to enjoy the rights given by an access site over the whole lake as opposed to over only part of it. The only comments on this issue from the Michigan Supreme Court that we are aware of suggest that, if the lake has an access site, it is not also necessary to demonstrate navigability in order for members of the public to exercise public use rights:

Plaintiffs, in their brief in this Court, state that they have never argued that the general public does not have a right of navigation on the waters of Higgins Lake and that they “take no exception whatsoever” to the Attorney General’s argument that the public has a right to navigate and to exercise the incidents of navigation on waters of this state which are capable of being navigated by oar or motor-propelled craft, small craft, so long as members of the public have lawful means of access to such waters.

The Court of Appeals stated: “Assuming lawful access, that portion of the lower court’s order which prohibited the defendants from ‘bathing, swimming, * * * (temporarily) anchoring boats or similar activities’ must be vacated (deletion and addition by the Court of Appeals).”

The public, as plaintiffs acknowledge, may lawfully enter the waters of Higgins Lake from the points where the other streets of the subdivision terminate at the water’s edge, and may use the waters in front of plaintiffs’ lots, provided they have so or otherwise lawfully gained access, for bathing, swimming and temporarily anchoring boats.

McCardel v. Smolen, *supra* note 13, 404 Mich. at 96 (footnotes omitted).

34. *Id.*

35. *Id.* *Bott v. Natural Resources Commission*, *supra* note 8, tried to suggest that fishing was the only public right that had been solidified by the Michigan Supreme Court’s prior decisions, and that whether the public had a right to “general boating and water recreation” was an open question. 415 Mich. at 66. However, *Thies v. Howland*, *supra* note 10, 424 Mich. at 288, stated that members of the public had all the rights listed in *McCardel*

v. Smolen. Recently the Michigan Supreme Court noted that “navigational servitude” is rooted in the public trust doctrine. *Glass v. Goeckel*, *supra* note 2, 473 Mich. at 687, n.15. See Michigan Land Title Standard 24.3, Comment A.

36. *Backus v. Detroit*, 49 Mich. 110, 13 N.W. 380 (1882); *McCardel v. Smolen*, *supra* note 13, 404 Mich. at 96; *Thies v. Howland*, *supra* note 10, 424 Mich. at 295; *Jacobs v. Lyon Township* (after remand), 199 Mich. App 667, 502 N.W.2d 382 (1993).

37. The common law definition of “highways” in Michigan is broad. In *Burdick v. Harbor Springs Lumber Co.*, 167 Mich. 673, 679, 133 N.W. 822 (1911), the Michigan Supreme Court defined highways this way:

The term ‘highway’ is the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway.

In *Petition of Carson*, 362 Mich. 409, 107 N.W.2d 902 (1961), an abandonment case, the court determined that an unimproved “sandy path which leads over a hill to Lake Michigan” was a public highway. The Michigan Supreme Court said:

A highway is a way open to all the people. This court has adopted this definition of the term: “A highway is a public way open and free to any one who has occasion to pass along it on foot or with any kind of vehicle.” “A street is a highway in a city or town, used by the public for the purpose of travel, either by means of vehicles or on foot.”

The trial court did not err in considering that the use of the area as a footpath constituted a contemplated use as a roadway.

362 Mich. at 412 (citation omitted).

38. MCL 221.20 is the highway-by-user statute. An illustrative case is *Boone v. Antrim County Board of Road Commissioners*, 177 Mich. App. 688, 694, 442 N.W.2d 725 (1989).

39. *Thies v. Howland*, *supra* note 10, 424 Mich. at 288; *Jacobs v. Lyon Township*, *supra* note 36.

40. *Thies v. Howland*, *id.*, 424 Mich. at 296; *Jacobs v. Lyon Township*, *id.*

41. *Square Lake Hills Condominium Ass'n v. Bloomfield Township*, 437 Mich. 310, 471 N.W.2d 321 (1991).

42. See *Jacobs v. Lyon Township*, *supra* note 36.

43. Local units of government have no power of their own; they derive all of their authority from the State of Michigan. *Clements v. McCabe*, 210 Mich. 207, 215-16, 172 N.W. 722 (1920) (citation omitted):

The governmental authority known as “police power” is concededly an inherent attribute of state sovereignty. It only belongs to subordinate governmental divisions when and as conferred by the state either through its Constitution or constitutionally authorized legislation.

Michigan’s statehood in 1837 was subordinate to the property rights reserved by the Tribes in the 1836 Treaty. *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep’t of Natural Resources*, 971 F. Supp. 282, 288-91 (W.D. Mich. 1995), *aff’d*, 141 F.3d 635, 638-41 (6th Cir. 1998), *cert. denied*, 454 U.S. 1124 (1998):

[U]nder the Supremacy Clause [Art. VI, cl. 2] of the United States Constitution, treaties override any conflicting state or local laws.

Id., 141 F.3d at 641 (citation omitted). Therefore, any power a local unit of government may have to restrict activities such as boat mooring by ordinance derives from State power that is subordinate to Treaty fishing and hunting rights.

44. MCL 224.18 requires that before abandoning a road that terminates at or crosses a lake or stream, the county road commission must offer to give the road to the township. The use of the word “crosses” in the statute suggests that a bridge would be included in the concept of a road.

According to one case, the purpose of the requirement is to allow the township to preserve “access and ingress/egress to the stream.” *Acer Paradise, Inc. v. Kalkaska County Road Commission*, 262 Mich. App. 193, 195, 684 N.W.2d 903 (2004). The case also says that “[n]othing in the statutory language indicates that such access be limited to one side of a stream or lake; thus, access may be attained from either side of the stream in this case.” *Id.*, 262 Mich. at 203, n.4.

45. *McCardel v. Smolen*, *supra* note 13, 404 Mich. at 96-97 (footnotes omitted):

The public, as plaintiffs acknowledge, may lawfully enter the waters of Higgins Lake from the points where the other streets of the subdivision terminate at the water's edge, and may use the waters in front of plaintiffs' lots, provided they have so or otherwise lawfully gained access, for bathing, swimming and temporarily anchoring boats.

There remain the questions whether the public i) may lounge and picnic on the boulevard and ii) has a right, via the boulevard, of access to and from the water for swimming and boating.

Lounging and picnicking on this wide boulevard, activities which need not involve use of the water, are not riparian or littoral rights. We agree with the Court of Appeals that "(t)hose activities are in no way directly related to a true riparian use of the waters of Higgins Lake; even assuming that the defendants choose to lounge and picnic on the boulevard because of the lake's proximity. In that context ... the only 'use' of the water is the enjoyment of its scenic presence."

Just as clearly, access to and from the water is a riparian or littoral right. Assuming, *Arguendo*, that the plaintiffs own the riparian or littoral rights as an incident of front lot ownership, it does not follow necessarily that the public does not have the right to enter and leave the water from the boulevard. The question to which the parties have devoted most of their attention in this litigation (ownership of the riparian or littoral rights) is, again, not dispositive. The question whether the public has the right to enter and leave the water from the boulevard, like the question whether they may lounge and picnic on the boulevard, depends, rather, on the scope of the dedication.

On remand the trial court in *McCardel* found that the scope of the dedication of the boulevard in that case did include beachfront uses, and the Court of Appeals affirmed in an unpublished opinion. The most significant factor to the trial court was the large width of the boulevard (over 100 feet), which suggested uses beyond mere passage were intended.

For a contrary view:

The rule that a road commencing or terminating at another road is intended to furnish a passage from and to the latter applies to a road terminating at a navigable river or other body of navigable water, and the terminus may be presumed to have

been intended for a public landing as an incident to the highway. But the dedication of a highway along the shore of navigable waters outside of towns and cities does not carry with it a right to land vessels indiscriminately on such highway, and to use it as a public landing place to discharge and receive freight and passengers. The presumption that the road is intended to furnish passage to the water does not apply in such case....

39 Am Jur 2nd, Highways, Streets, and Bridges, § 256, p. 644.

46. *Croucher v. Wooster*, 271 Mich. 337, 344, 260 N.W. 739 (1935); *Thies*, *supra* note 10, 424 Mich. at 295.

47. *Meridian Township v. Palmer*, 279 Mich. 586, 589, 273 N.W. 277 (1937).

48. *Thies v. Howland*, *supra* note 10, 424 Mich. at 290-91 (quoting 78 Am. Jur. 2d, Waters, § 273, p. 716):

While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway or street is in the owner of the land, riparian rights remain in such owner.

49. *McCardel v. Smolen*, *supra* note 13, 404 Mich. at 97; *Thom v. Rasmussen*, 136 Mich. App. 608, 612, 358 N.W.2d 569 (1984); *Jacobs v. Lyon Township*, 181 Mich. App. 386, 387-88, 448 N.W.2d 861 (1989), *vacated*, 434 Mich. 922, 455 N.W.2d 715 (1990); *after remand*, 199 Mich. App. 667, 502 N.W.2d 382 (1993).

50. *Little v. Kin*, 468 Mich. 699, 700, 664 N.W.2d 749 (2003). (“*Little II*”)

51. *Dobie v. Morrison*, 227 Mich. App. 536, 540, 575 N.W.2d 817 (1998); *Bang v. Forman*, 244 Mich. 571, 576, 222 N.W. 96 (1928).

52. *Higgins Lake Property Owners Ass’n v. Gerrish Township*, 255 Mich. App. 83, 103; 662 N.W.2d 387 (2002).

53. *Dobie v. Morrison*, *supra* note 51.

54. *Higgins Lake Property Owners Ass’n v. Gerrish Township*, *supra* note 52.

55. *Thompson v. Enz*, 379 Mich. 667, 685-87, 154 N.W.2d 473 (1967); *Little v. Kin*, 249 Mich. App. 502, 513, 644 N.W.2d 375 (2002).

56. *Thompson v. Enz*, *id.*

57. *Id.*

58. MCL 324.503(1) states:

The department shall protect and conserve the natural resources of this state [and] provide and develop facilities for outdoor recreation.... The department has the power and jurisdiction over the management, control, and disposition of all land under the public domain, except for those lands under the public domain that are managed by other state agencies to carry out their assigned duties and responsibilities. On behalf of the people of the state, the department may accept gifts and grants of land and other property and may buy, sell, exchange, or condemn land and other property, for any of the purposes contemplated by this part.

The DNR also has the following powers and duties:

(a) To acquire, construct, and maintain harbors, channels, and facilities for vessels in the navigable waters lying within the boundaries of the state of Michigan.

(b) To acquire, by purchase, lease, gift, or condemnation the lands, rights of way, and easements necessary for harbors and channels....

* * *

(h) To charge fees for both daily and seasonal use of state-operated public access sites....

MCL 324.78105.

59. *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000) (dicta).

60. See, e.g., *Botton v. State*, 69 Wash. 2d 751, 420 P. 2d 352 (1966).

61. *Burt Township v. Dep't of Natural Resources*, 227 Mich. App. 252, 576 N.W.2d 170 (1997); *aff'd*, 459 Mich. 659, 593 N.W.2d 534 (1999).

62. See 25 CFR §1.4.

63. *Michigan United Conservation Clubs v. Board of Trustees of Michigan State University*, 172 Mich. App. 189, 431 N.W.2d 217 (1988); *Delaney v. Pond*, 350 Mich. 685, 86 N.W.2d 816 (1957); *Douglas v. Bergland*, 216 Mich. 380, 185 N.W. 819 (1921).

64. MCL 324.73102(1).

65. MCL 324.73102(2).

66. MCL 324.73102(3).

67. *People v. Gatski*, 260 Mich. App. 360, 677 N.W.2d 357 (2004).

68. *Thies v. Howland*, *supra* note 10, 424 Mich. at 288.

69. *Glass v. Goeckel*, *supra* note 2, 473 Mich. at 696 (citing *Attorney General v. Taggart*, *supra* note 9, 306 Mich. at 435 & 443).

70. *Thies v. Howland*, *supra* note 10, 424 Mich. at 288.

71. The Consent Decree says “Tribal members exercising Fishing rights within the scope of subparagraph (a) of Paragraph 6.2 of this Decree shall not place Impoundment Nets on privately owned bottom lands if doing so is in violation of the Michigan common law riparian rights of the private bottom land owner.” Consent Decree, *supra* note 1, Section VII(e).

The public's right to fish under the public trust is generally described as an incident of the public's right to the use of the surface, and not the bottom lands, of navigable lakes and streams. See *Bott v. Natural Resources Commission*, *supra* note 8, and *Higgins Lake Property Owners Ass'n v. Gerrish Township*, *supra* note 52, 255 Mich. App. at 103-104. It is lawful, however, to moor a water craft temporarily to the bottom lands of a navigable inland lake. *Thies v. Howland*, *supra* note 10, 424 Mich. at 288.

Although the issue has never been addressed by the Michigan courts, by analogy it would be lawful to use nets to catch fish if they were only temporarily attached to the bottom lands of a navigable inland water body. The question turns on whether temporary anchoring of nets is an activity “incident to” or “inherent in” the exercise of a traditional public trust activity. *Hall v. Wantz*, 336 Mich. 112, 116-17, 57 N.W.2d 462 (1953) (“incident to”); *Thies v. Howland*, *supra* note 10, 424 Mich. at 288 (“incident to”); *Glass v. Goeckel*, *supra* note 2, 473 Mich. at 698:

We can protect traditional public rights under our public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights.

Finally, in *Lincoln v. Davis*, 53 Mich. 375, 19 N.W. 103 (1884), the Michigan Supreme Court held that the public trust provides for the use of removable trap nets to catch fish in the Great Lakes. The *Lincoln* case is interesting because the court wrongly assumed that the bottom lands were owned by the adjacent landowners, in the way the bottom lands of inland lakes are owned by the adjacent landowners. So it is possible that the reasoning of *Lincoln* would apply to the case of an inland lake. It is unlikely, however, that it would be lawful to *permanently* affix such nets to the bottom lands of a navigable lake or stream in order to catch fish. Cf. *Hall v. Wantz*, *supra*, 336 Mich. at 119.

72. Federal case law recognizes the Tribes' rights under the 1836 Treaty both to access traditional fishing grounds and also to access opportunities secured by a consent decree. "Treaty-reserved rights to access traditional fishing areas and catch fish are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Natural Resources*, 971 F. Supp. 282, 288-91 (W.D. Mich. 1995), *aff'd*, 141 F.3d 635, 638-41 (6th Cir. 1998), *cert. denied*, 454 U.S. 1124 (1998). Michigan's statehood in 1837 was subordinate to these property rights reserved by the Tribes in the 1836 Treaty, which include easements impacting privately-owned bottom lands. Michigan could not achieve statehood in 1837 until the United States obtained legal title from the Indian Tribes to more than 13 million acres ceded in the 1836 Treaty. *Id.*, 141 F.3d at 637. Unlike an ordinary land transaction in which the seller conveys all of the rights in the property being sold, the Indians reserved a right to fish when they conveyed title to the land ceded in the 1836 Treaty. *United States v. Michigan*, 471 F. Supp. 192, 212-13 and 253-59 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). "Title to almost all the land in Michigan is derived from the United States, which once owned the land." Cameron, *Michigan Real Property Law*, n.8 at page 456. Subsequent conveyances by the State of title to bottom lands of inland navigable waters within the cession area were subject to the Tribes' preexisting property rights (including easements, or *profits a prendre*) reserved in the 1836 Treaty.

Tribal rights reserved in the 1836 Treaty "included an easement of access over the land surrounding these traditional fishing grounds, even were the land to have been privately owned." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Natural Resources*, *supra*, 141 F.3d at 639 (citations omitted). The technical legal terminology for such an easement is *profit a prendre*. *Id.*, 141 F.3d at 639, n.9. The Tribes retain *profits a prendre* to take fish from the waters within the territory ceded in the 1836 Treaty. *Id.*; see also *United States v. Michigan*, *supra*, 471 F. Supp. at 276: "The Indians reserved such an interest in land [*profit a prendre* or easement] by the Treaty of 1836." Michigan law recognizes that *profits a prendre* include "the right to kill and take as his own game on another's land, [and] fish in waters thereon,..." *St. Helen Shooting Club v. Mogle*, 234 Mich. 60, 68, 207 N.W. 915 (1926). Therefore riparian property rights recognized by Michigan common law likewise may be

imbued with tribal easements of access including the temporary anchoring of fishing nets on privately-owned bottom lands, consistent with the proposition that tribal “fishers have an easement of access ... reasonably necessary for meaningful ... fishing from traditional sites.” *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep’t of Natural Resources*, *supra*, 971 F. Supp. at 290 (citations omitted); *see* 141 F.3d at 639.

73. It is unlawful to attach traps, temporary or permanent, to the bottom lands of a navigable inland lake to catch fur-bearing animals. *Johnson v. Bughorn*, 212 Mich. 19, 29, 179 N.W. 225 (1920). The right to such trapping is a property right held by the adjacent riparian owner, who also owns the bottom lands of the lake or stream. *Id.* *See also Sewers v Hacklander*, 219 Mich. 143, 151, 188 N.W. 547 (1922).

74. *Glass v. Goeckel*, *supra* note 2, lists hunting as one of the traditionally recognized public trust uses:

Our courts have traditionally articulated rights protected by the public trust doctrine as fishing, hunting, and navigation for commerce or pleasure.

473 Mich. at 695 (citations omitted). While *Glass* does not draw any distinctions between Great Lakes and inland water bodies, there certainly is an argument that *Glass*’ dicta on hunting was only meant to apply to hunting over the publicly-owned bottom lands of the Great Lakes. This argument would be based on prior cases that did draw distinctions between hunting over privately owned bottom lands and those owned by the public. *See, e.g., Sterling v. Jackson*, 69 Mich. 488, 37 N.W. 845 (1888):

Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another’s land but by consent of the owner. It will be conceded that the owner of lands in this state has the exclusive right of hunting and sporting upon his own soil * * * The defendant claims that he had the right to shoot the wild fowl from his boat because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position which, considered in the abstract, is quite forcible, and if applied to waters where there is no private ownership of the soil thereunder would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long

as that license continued he could navigate the waters with his vessel and do all things incident to navigation. He could seek the shelter of the bay in a storm and cast his anchor therein; but he had no right to construct a “hide,” nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of this bay, but they were an abuse of such license.

69 Mich. at 497. That said, the cases that decline to recognize a public right to hunt from water overlying private bottom lands all precede *Collins v. Gerhardt*, *supra* note 5, the case that recognized a public right to fish on inland water bodies in 1926. See *Sterling v. Jackson*, 69 Mich. 488, 37 N.W. 845 (1888); *Hall v. Alford*, 114 Mich. 165, 72 N.W. 137 (1897); *Ainsworth v. Hunting and Fishing Club*, 153 Mich. 185, 116 N.W. 992 (1908) and 159 Mich. 61, 123 N.W. 802 (1909); and *Sewers v. Hacklander*, 219 Mich. 143, 151, 188 N.W. 547 (1922).

In *Collins*, the Michigan Supreme Court stated that it was deciding for the first time that a public fishing right existed in water overlying private bottom lands. The Court quoted with approval an Arkansas case that said the rights to hunt and fish inhere in the public’s rights:

The common right of hunting and fishing in such navigable waters is not reserved to the public as a right attached and incident to the right of navigation, but it is one that inheres in the public in our state because the state, in trust for the public, is the owner of the soil in navigable waters to high-water mark, and the common right of hunting and fishing is incident to such ownership, as well as the other common right of navigation.

237 Mich. at 50-51 (quoting *State v. Parker*, 132 Ark. 316 200 S.W. 1014 (1917)). Therefore, the combination of *Collins* and the *Glass* dicta could be used to argue for a public right to hunt while floating over private bottomlands on a navigable inland lake or stream. This right would have an as-yet-undetermined relationship to Tribal members’ Treaty rights.

75. *Bott v. Natural Resources Commission*, *supra* note 8, 415 Mich. at 57; *McCardel v. Smolen*, *supra* note 13, 404 Mich. at 96.

76. While there are no court decisions that have held this point directly, it is a logical conclusion that the public has such rights based upon the case law holding that the rights to hunt and trap on lakes and streams are held by the adjacent shoreline property owners. See *St. Helen Shooting Club v. Mogle*, *supra* note 72, 234 Mich. at 64-65 (hunting); and *Johnson v. Bughorn*, *supra* note 70, 212 Mich. at 29 (trapping). Presumably, if the public owns shoreline

property on a lake or stream then the public likewise has the right to hunt and trap over the adjacent bottom lands on that water body.

77. *Jacobs v. Lyon Township*, 188 Mich. App. 386, 448 N.W.2d 861 (1989) (before remand), says that road ends are held by the government in “qualified fee,” for road purposes only, and not in fee simple. Because they are not held in fee simple, the court reasoned, road ends only provide access to the water (and uses incidental to access), not the full array of property rights that would be associated with fee ownership of the land.

78. *People v. Gatski*, 260 Mich. App. 360, 677 N.W.2d 357 (2004).

