THE LEGAL RIGHTS OF THE PUBLIC IN THE FORESHORES OF THE GREAT LAKES

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INTRODUCTION

In recent years the shorelines of the Great Lakes have become the focus of increasing demand and concern. The demand comes from both the public and the private spheres. The public is seeking access to the waters for recreational purposes, while the private competition for purchase of shoreline property is intense. Problems of erosion, pollution, and wetland protection are of public concern and a matter for legislative action. The legislative mandate includes both awareness of present constituencies and responsibility for future generations. The various interests and concerns converge on the wet beach or foreshore, the area between ordinary high water mark and ordinary low water mark.

Although there is considerable variation in the physical features of different wet beaches of the Great Lakes, their ownership and use are governed by relatively uniform legal principles. The purpose of this article is to summarize those principles. On the ocean shores the water touches both of these marks daily. On the Great Lakes, water levels change as the result of a small tide, the action of the winds and waves, and seasonal and yearly precipitation variations.

On either the landward or lakeward side of the wet beach, the rights of the public and the littoral owner are well established. The foreshore is of particular interest because it is the area where public and private rights and responsibilities overlap and occasionally clash. Analysis of rights to the wet beach is therefore particularly appropriate.

Definition of the "public." The rights of three distinct "publics" are the focus of this article. One is the federal government as owner of a navigational servitude over the surface of the waters of the Great Lakes. The second is the state government as holder, in a trust capacity, of title to the submerged lands under navigable waters and to the foreshore. The state's rights include the power to regulate the use of those waters and lands. The beneficiaries of the state's trust are the third "public," the people who use the waters for fishing, navigation, or other recreational or commercial purposes. They include commercial and private boating and fishing interests, the swimmer, the ice fisherman, the wader, the photographer, and everyone else who uses the Great Lakes.

Water law and property law. The wet beach is conceptually the place where private and public rights meet. It is also the area where the concepts of land use, water law, and property law intersect. Water law has its origins in property law. While property law is concerned with questions of ownership and title, water law emphasizes questions of use, since historically the notion of water rights has been that of usufruct, recognizing that water is not easily captured and enclosed in usable quantities.

Variations based on types of water bodies. Issues regarding public rights in the foreshores of the Great Lakes involve international law, federal law, and the laws of eight different states. They differ from inland navigable lakes and oceans -- obvious from physical characteristics of size and juxtaposition alone. Principles of law derived from other types of water bodies may not be applicable to the Great Lakes. Variations also exist among the laws of the several Great

Lakes jurisdictions. The differences may reflect differences in the type of water bodies prevalent within each of the respective jurisdictions. For example, New York has extensive ocean frontage, Pennsylvania water law relates primarily to rivers, and Wisconsin's water law is concerned largely with inland navigable lakes.

Historical base. United States laws relating to the foreshores and submerged lands originated in English common law. Public rights in these areas can be traced to rights of the English Crown in "that ground that is between ordinary high-water mark and low-water mark."[1] A full discussion of the English antecedents is found in an article by Deveney.[2] It is sufficient for our purposes to note the three categories of interests in coastal areas identified by Hale and his modern counterparts:

1. The "jus privatum" - public rights and title, held by private individuals, the Crown, a state, or the federal government for proprietary purposes.

2. The "jus regium" or royal right - the power of the king to regulate water resources for the public welfare, now the "police power" of the state, federal, and local governments in the United States.

3. The "jus publicum" - rights of the general public, narrowed in Hale's conception to "an interest in navigation and a public right to have

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1. Sir Matthew Hale, "De Jure Maris er Brachiorum ejusdem" (Concerning the Law of the Sea and its Arms) (1666), found in the Appendix to Hale's Essay on the "Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm," p. ix. (Stevens & Hayes, Law Publishers, London, 1875).

2. Deveney, "Title, Jus Publicum, and the Public Trust: An Historical Analysis," 1 Sea Grant Law J. 13, at 41 ff (1976).

navigable rivers and the ports of the kingdom free of nuisances."[3] In its modern formulation the "jus publicum" comprises rights reserved to the general public under the "public trust doctrine" discussed here later.

Navigability. The extent of public rights in water bodies depends upon their status as navigable in fact or in law. While navigability in England referred solely to tidal waters washed by the ebb and flow of the tide, navigability in this country has several meanings. For the purpose of determining title, navigability depends on whether the water body was in fact navigable at the time statehood was acquired. Under the common law as it was imported from England title to all the submerged lands under navigable waters to ordinary high water mark was vested in the crown. When the original thirteen colonies became independent, they acquired the title rights previously held by the King.[4] Under the "equal footing" doctrine, states later admitted to the Union acquired rights to the submerged lands equal to those belonging to the original thirteen states.[5] Title vested to ordinary high water mark[6] of all waters navigable in

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3. Deveney, see note 2, supra, at p. 46.

4. Shively v. Bowlby, 152 U.S. 1, 18, 26 (1893).

5. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); United States v. Utah, 283 U.S. 64, 75 (1930).

6. There are some exceptions to the general rule where the original states by laws and usage allowed riparian owners rights and privileges below ordinary high water mark. Shively, see note 4, supra, at p. 18. Massachusetts Ordinance of 1641, passed in 1647. In Opinion of the Justices, 313 N.E.2d 561 (1974), the Supreme Judicial Court of Massachusetts considered the question of the public right of passage and held that it did not exist as the riparians had been granted title to "mean low water mark or 100 rods from the mean high water line, whichever was the lesser measure," under the ordinance. Its purpose was to encourage riparian construction of wharves where the distance between ordinary high and low water marks was considerable. The public rights of fishing, fowling, and navigation were expressly reserved. Because the public right of passage was not specifically mentioned, the court held it had not been reserved under the ordinance.

fact at the time the state entered the Union. The Great Lakes were navigable at the time each of the eight states entered the Union.

The determination of navigability is also important for purposes of regulation of navigable waters. The "navigational servitude" reaches to the ordinary high water mark of all bodies of water that are navigable in fact at the time of the regulation.[7] The navigational servitude emanates from the commerce clause of the United States Constitution.[8] The federal regulatory power exercised by the federal government under the navigational servitude is superior to any rights of use a littoral owner may have below ordinary high water mark. When the regulation affects the use of land below that point, the government need not compensate the owner under the "just compensation" clause of the Constitution.[9]

State standards for defining navigable waters for purposes of ownership and state regulation are comparable to those under federal law.[10]

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7. The Daniel Bell, 10 Wall 557, 563. (1870).
   > ... Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or in unity with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by waters.

8. United States Constitution, Article I, Section 8.

9. Ibid., Fifth Amendment; United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 596-7 (1941), modified 313 U.S. 543 (1941); United States v. Chandler-Dunbar Power Co., 229 U.S. 53, 73-74 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269, 275-6 (1897).

10. Pigorsh v. Fahner, 386 Mich. 508 (1972); Lamprey v. State, 52 Minn. 181, 198-200 (1893); State ex rel Brown v. Newport Concrete Co., 336 N.E.2d 453 (1975).

The Public Trust Doctrine

The navigable waters of the several states are impressed with a public trust. In order to understand this concept, it is necessary to consider the nature of the resource involved. Although water law is derived in great measure from property law, ownership of water cannot be viewed in the same light as title to land. As anyone who has flown over the middle and western portions of the United States can readily appreciate, the range and township lines laid out by the United States government surveyors in the nineteenth century are intact, permanent boundaries. The meander lines, however, used by the surveyors for tracing out the edges of bodies of water, have only a random relationship to the present limits of these waters. "Ownership" of water is best defined in terms of use. On a non-navigable lake, for example, the surrounding land owners hold title to the lake in pie-shaped wedges extending from their shorelines to the center of the lake. One cannot prevent the fish from swimming out of a segment. All the littoral owners have a right to use the entire water body for purposes of boating, fishing, swimming, and taking water for domestic use.

The public enjoys similar rights of use in navigable waters. The essence of the public trust doctrine has been described as follows:

> "Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaption to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct - an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies."[11]

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11. Sax, Joseph, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471, 485 (1970).

It was judged important that these public rights be protected and preserved.[12] The public trust doctrine is lodged in the representatives of the people - the state legislatures. These representatives are trustees of the public's rights below ordinary high water mark and they may not abrogate their responsibility.[13]

The public trust doctrine, as it developed in England, applied only to the oceans and their outlets; as noted earlier, salt waters were considered to be prima facie navigable. In the United States the public trust doctrine applies to fresh navigable waters as well. In the Illinois Central Railroad v. Illinois case, the U.S. Supreme Court found no distinction between the waters of the Great Lakes and the oceans:

> "The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters . . . a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of these, and that the lands are held by the same right in the one case as in the other, and subject to the same trust and limitations."[14]

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12. Martin v. Waddell, 41 U.S. 367 (1842).

13. Shively, see note 4, supra.

14. Illinois Central Railroad v. Illinois, 146 U.S. 387, 436-7 (1892).

The public trust on the Great Lakes extends over the entire surface of the water and the submerged lands up to the point of ordinary high water mark. The states may not relinquish control of the trust.[15] In the Illinois Central case the state legislature gave the railroad company one square mile of Lake Michigan bottomland bordering on the central business district of the City of Chicago. Four years later, in 1873, a new legislature attempted to recover the land. The Supreme Court held:

> "The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, of the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation by the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grant in disregard of a public trust, under which he was bound to hold and manage it."[16]

The submerged lands of the Great Lakes, including the foreshore to ordinary high water mark at times of low water, are trust lands, which state legislatures have only a limited power or authority to alienate. Any alienation of public trust lands must take into account the responsibility of successive legislatures and generations of the public. Illinois Central is an example of an alienation which was so overreaching as to be an example of a violation of this trust. The land was important as a site for harbor development for the Port of Chicago. In

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15 Ibid. at p. 453.

16. Ibid. at p. 460.

alienating the land, the legislature not only gave up a valuable resource, but also diminished its power to plan for and regulate commerce at the Chicago port.

Lesser grants for value have been disallowed as a violation of the public trust. In one case United States Steel agreed to purchase 194.6 acre of Lake Michigan bottom land for the construction of a steel mill. The steel company contended that the plant would create employment and would, therefore, constitute a benefit to the public. The court found the public benefit of only incidental value and too remote, so concluded that the sale would violate the state's trust.[17]

The foreshores are clearly within the protection of the public trust. Whether the trust is absolute or can be alienated by a state legislature under some circumstances, despite Illinois Central, is yet to be determined. At least one writer believes that interests in public trust lands may be alienated, and that the permissibility of such alienation will depend upon the application of four criteria taken from other public trust cases:

> First, has the public property been disposed of at less than market value under circumstances which indicate that there is no very obvious reason for the grant of a subsidy?
>
> Second, has the government granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses to that private interest?
>
> Third, has there been an attempt to reallocate diffuse public uses either to private uses or public uses which have less breadth?
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> The fourth guideline that courts use in determining whether a case has been properly handled at the administrative or legislative level is to question whether the resource is being used for its natural purpose - whether, for example, a lake is being used "as a lake."[18]

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17. People ex rel Scott v. Chicago Park District, 360 N.E.2d 773 (1976).

18. Sax, see note 11, supra, at 562-5.

It is submitted, then, that a state legislature might make a finding that a particular stretch of foreshore is no longer useful for the purposes for which it is impressed with the public trust. The judiciary would not overturn the action of the legislature in authorizing the release of the land from the trust where it appeared that market value had been paid for the land or that there was a reason for a subsidy in an amount equal to the difference between the price paid for the foreshore and the reasonable market value. Illinois Central makes clear that responsibility for the trust rests with the legislature and that only it might be able to alienate the trust.

Title to the Foreshore

The chief competitor of the public for rights to the foreshore is the littoral property owner. The competition is for both ownership rights and user rights. Problems of title will be examined first, followed by a review of user rights from the perspectives of both the littoral owner and the public.

The limits of littoral ownership on the Great Lakes for purposes of title have been explored in Michigan. The lands in the Great Lakes region were settled to a large extent under federal land grant programs.[19] Federal surveyors divided the territory by range and township lines into sections. Meander lines were drawn around bodies of water for purposes of calculating the areas of the various grants. Although the meander lines were approximations of the boundaries between water and land that existed in the mid-nineteenth century, they very quickly ceased to be accurate boundaries. The deeds to shoreline property are even less specific. The lakeward boundary is often described simply as "Lake Michigan." In some cases title was said to extend to

19. Swamp Lands Act of 1850, 43 U.S.C. Sec. 982 et seq.

the water line,[20] to the high water mark,[21] to the low water mark,[22] or even to the lowest water mark.[23] But where the water had receded from the meander line, as it had in many cases, the effect of this rule was to withdraw from the owner his littoral rights. In order to establish a consistent and workable rule, the court in Hilt v. Weber[24] adopted the "movable freehold" theory, which for purposes of title placed the littoral owner's lakeward boundary at the water's edge, wherever the water was at any particular moment. The theory preserved rights for those who continued as littoral owners from the date of the original surveys. The theory has been interpreted by the Michigan Attorney General to mean the low water mark[25]; and by the court in one case as the high water mark.[26] The Hilt decision did not consider nor affect public rights. The limits of title are important only for determining the status of littoral ownership and the rights inherent in that status.

The title issue was recently refined in Michigan in McCardel v. Smolen.[27] The plaintiffs were given littoral rights on an inland navigable lake, even though their lands were separated from the water's edge by an undeveloped boulevard. In the original plat, the boulevard had been dedicated to the public

20. People v. Warner, 116 Mich 228 (1898).

21. State v. Venice of America Land Co., 160 Mich 680 (1910).

22. People v. Silberwood, 110 Mich 103 (1896).

23. La Porte v. Menacon, 220 Mich 684 (1922).

24. Hilt v. Weber, 252 Mich 198 (1930).

25. 1943-1944 AG Mich 743-744.

26. People ex rel Director of the Department of Natural Resources v. Murray, 54 Mich App 685 (1974).

27. McCardel v. Smolen, 71 Mich App 560 (1976).

in fee. Because the plat explicitly set forth the uses of the boulevard to the exclusion of all others, including riparian rights, these were given to the adjacent landowners. Although the case involves an inland lake, it is likely that the holding on the title issue would apply equally to the Great Lakes.

Use of the Foreshore: Littoral Rights

Traditionally, littoral rights have consisted of the right to accretion, the right of access to navigable waters, the right to wharf out, and the right to use the water for domestic purposes.

Accretion is the process by which sand and gravel are deposited on the shoreline, adding to the area of land. Denied a right to accretion, the landowner could be deprived of littoral status. The courts have considered it fair for the owners to gain in this way as they may lose land to erosion on other occasions. A littoral owner deprived of accretions through the action of another owner who has in some way influenced the flow of the water, may bring an action to protect his right to accretion.[28] If the federal government were to interfere with the natural process, however, the littoral owner would not have a cause of action.[29] (In Meyer the right abridged was that to subsurface drainage.) The navigational servitude allows governmental regulatory actions for purposes of navigation. Compensation for exercise of those regulatory powers is not necessary unless and until the littoral owner's rights are affected above the ordinary high water mark.[30]

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28. Freeland v. Pennsylvania Railroad Co., 197 Pa 529 (1901).

29. United States v. Meyer, 133 F.2d 387 (1940).

30. See note 9, supra.

The littoral owner's right to mine sand and gravel from the foreshore has been upheld.[31] Sand and gravel as normal components of the foreshore are to be distinguished, however, from unusual mineable substances that happen to be found in the foreshore area. The right to mine iron ore below the low water mark was denied and would have been permitted on the wet beach, but not below, only upon a finding that the mining did not interfere with the public's right to navigate and use the area for other public purposes.[32]

The littoral owner's right of access to the water is along the entire length of the shoreline and no permanent obstructions will be tolerated.[33] If, however, a member of the public sets up an umbrella on the wet beach of the ocean, where a public right of passage is permitted, and does not interfere with the owner's access to navigable waters, the sunbather may remain.[34] The distinction is both (1) in the permanence of the interference with access, and, if the interference is only transitory, (2) whether there is in fact an obstruction to access. If a boat is moored in the wet beach area in a manner preventing access to navigable waters, the public right to moor on the wet beach depends on the permanence of the interference.[35] Temporary mooring is an incident of navigation and, therefore, permissible. Longer mooring, even it if is not an inconvenience to the littoral owner, constitutes a trespass. When the purpose for mooring vessels in front of the littoral owner's land is to make temporary repairs or to protect a ship in danger of foundering in a storm,

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31. Sloan v. Biemiller, 34 Ohio St. 492 (1878).
32. State v. Korrer, 127 Minn. 60 (1914).
33. Tiffany v. Town of Oyster Bay, 192 App Div 126, 182 NY Supp 738, (1897), modified 234 NY 15 (1922).
34. Johnson v. May, 189 App Div 196, 178 NY Supp 742 (1919).
35. Wall v. Pittsburgh Harbor Co., Ltd., 152 Pa 427 (1893).

the littoral owner has no cause of action. One court extended this rule to cover the construction of vessels.[36]

The right of access to the water at navigable depths and the right to wharf out are related. A simple mode of access is generally sufficient when the littoral owner wishes to bathe or use small water craft. When commercial access is desired, the shoreline is rarely deep enough to permit the vessels to land for purposes of taking on or discharging cargo or passengers. The littoral owner has a right to build a wharf between high and low water marks,[37] and to charge for the use of the facility.[38] The construction of a wharf is an aid, rather than an impediment to navigation. A wharfboat moored to the shore is equivalent, for legal purposes, to a wharf. Interference with a wharf cannot be abated unless it constitutes a direct trespass touching the wharf.[39] The construction of a wharf requires a federal permit,[40] and may require state permission as well.[41] Large commercial wharves may aid, but also may interfere with, navigation and are, therefore, subject to federal regulation.

The state interest derives from the state ownership of the bottomlands under the navigable waters. Although state legislatures have occasionally granted title in the bottom lands to the littoral owners, the submerged lands

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36. Pollock v. The Cleveland Ship Building Co., 56 Ohio St. 655 (1897).

37. Barnes v. The Midland R.R. Terminal Co., 193 NY 378 (1908).

38. Ensminger v. People ex rel Trover, 47 Ill 384 (1868).

39. Sherlock v. Bainbridge, 41 Ind 35 (1872).

40. Rivers and Harbors Act of 1899, 33 U.S.C. 403.

41. Obrecht v. National Gypsum Co., 361 Mich 399 (1960); Great Lakes Submerged Lands Act, MSA Sec. 13.700 (1-15), MCLA Sec. 322.701-15; New York Environmental Conservation Law, Sec. 15-0503; Illinois Statutes 19 Sec. 65.

under the Great Lakes are vested in the respective states. In Illinois the right to wharf out into Lake Michigan is no longer a littoral right.[42]

If a littoral owner is allowed to wharf out, a natural extension of the doctrine would be to permit the filling out to navigable waters. Where the river bank is very steep, filling has been upheld.[43] Where the proposed filling, however, would be detrimental to public rights, it has not been permitted (e.g., where the filling would have retarded the flow of a river, increasing the accumulation of pollutants).[44] In Tiffany,[45] where the owner filled the foreshore along the ocean, the court ruled that the fill interfered with the public right of navigation at high water and the right of public passage at low water. The fill was not used to build a wharf; it was an attempt to increase the upland area the entire length of the shoreline.

If the littoral owner's land is diminished by a flood control project, he is entitled to compensation for the land taken above high water mark.[46] The Minnetonka case is somewhat inconsistent with rulings in the other Great Lakes states that the littoral owners on inland navigable lakes have title to the low water mark.

At times, littoral owners have tried to assert an exclusive right to fish in the waters off their lands. Their claims were rejected on the ground that

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42. Revell v. People, 177 Ill 468 (1898); Gordon v. Winston, 181 Ill 338 (1899); Cobb v. Commissioners of Lincoln Park, 202 Ill 427 (1903); Commissioners of Lincoln Park v. Fahrney, 250 Ill 256 (1911).

43. Zug v. Commonwealth, 70 Pa 138 (1871).

44. People ex rel Director of Conservation v. Babcock, 38 Mich App 336 (1972).

45. See note 33, supra.

46. In re Minnetonka Lake Improvement, 56 Minn 513 (1894).

the right to use navigable waters is a public one, shared by all members of the public.[47]

In summary, a littoral owner has the right to accretions that pile up on his shore, be they sand, gravel, or seaweed. At both high and low water he has the right of access to the water along the entire length of his shoreline. A permanent or excessive obstruction to the right of access is a trespass, even if the owner of the shoreland is not inconvenienced. If the access is impeded in only a transitory way, the court will then consider whether the owner has, in fact, been injured. Wharfing out to navigable waters for purposes of navigation is an extension of the access doctrine. This is not an absolute right and may be regulated by the federal and state governments. Trespass to a littoral owner's wharf must be actual; mere obstruction is not a violation of his rights. He may be permitted to fill, rather than building a wharf, if the purpose of the fill is to gain access to navigable waters and the public right to navigate is not compromised. Littoral owners have no greater right to use the waters and the fish than any other member of the public. For purposes of the fifth and fourteenth amendments to the United States Constitution and the parallel state guarantees, the littoral owner's title ends at the high water mark. Assuming they do not create a permanent or even a temporary obstruction, nothing in existing case law denies the members of the general public a right of public passage along the foreshore.

Littoral rights are also limited by the rights of other owners. Where a wharf and a wharfboat were located so close together that boats attempting to land interfered with each other, the court held that the rights to the location were equal and that by such interference they did not violate each others'

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47. Lincoln v. Davis, 53 Mich 375 (1894).

rights unless there was in fact a trespass.[48] Where a wharf obstructed access to a neighboring beach, the court held that the wharf was permissible if it did not obstruct public passage along the foreshore.[49] Adjacent littoral owners in a Great Lakes case objected to a large commercial wharf that produced noise, smoke, dust, and bilge water to their detriment. Because the wharf had already been constructed, the court would not enjoin its use, but damages were awarded.[50] As noted above, a littoral proprietor may not interfere with the deposit of accretions on another littoral owner's shore.[51] In each case the court did not decide absolutely in favor of one party or the other, but tried to accommodate both sides.

Use of the Foreshore: Public Rights

The public rights to the foreshore vary with the level of the water. When the water stands at high water mark or above high water mark, the public has the right to use the entire surface of the navigable water body for purposes of navigation and the incidents of navigation. Where the littoral proprietor wishes to make use of the foreshore, this use must give way to the superior public right of navigation at high water. Consequently, a littoral owner may not mine the foreshore if it interferes with the public right,[52] or to fill the wet beach, raising it above the ordinary high water mark and thereby extending the upland.[53]

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48. See note 39, supra.
49. See note 37, supra.
50. Obrecht, see note 41, supra.
51. See note 28, supra.
52. See note 32, supra.
53. See note 33, supra.

At high water, the public rights associated with navigation include the right to fish, to float logs, and to seek refuge when the ship is in peril, whether precipitated by natural causes or mechanical breakdown. The right to temporarily moor a ship in the foreshore at high water has been adjudged to be only a slight variation of the common law right to seek refuge "in extremis."[54] The floating of logs is analogous to commercial navigation.[55]

Littoral owners and members of the public have identical fishing rights.[56] The right to fish extends over the entire surface of a navigable body of water, whether or not the entire water body is in fact navigable.[57] The fisherman need not be fishing from a boat. Even if both sides of a navigable river are in single ownership, the fisherman is free to wade the stream, and the riparian may not interfere with that right.[58]

Where the water is at any level below ordinary high water mark, the law is unsettled with regard to public rights to the wet beach. It is clear that where members of the public have access to navigable waters on either inland waterways or the Great Lakes, they may cross the foreshore to the water. Access is obtained through public lands and from roads. If a highway runs perpendicular to the shoreline, the public users of the highway enjoy littoral benefits and consequently have a right of access.

If the road parallels the shoreline, the result hinges on the proximity of the road to the present shoreline. A Michigan court held that, where the dry

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54. See note 36, supra.

55. Lorman v. Benson, 8 Mich 19 (1860); Pursell v. Stover, 110 Pa 43 (1885).

56. See note 47, supra.

57. Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139 (1917).

58. Collins v. Gerhardt, 237 Mich 38 (1926); Attorney General ex rel Director of Conservation v. Taggart, 306 Mich 432 (1943).

land between the highway and the water was composed of fill deposited by the road commission to prevent erosion, the area from which the public could have access to the beach extended to the water, and fences preventing such access should be removed.[59] If, however, due to accretion the road easement is some distance from the water's edge, the littoral owner's territory will have been increased and the public will not have a right of access.[60]

McCardel presented a variation of the problem of defining and extending public uses. The original plat dedicated to the public a boulevard along the shore of an inland lake. Unlike the common situation, where a highway is constructed on an easement, the public held title to the boulevard in fee. The court held the public had the right to lounge and picnic on the boulevard and to use it as a means of access to the water. The court recognized the right of the public to the enjoyment of the "scenic presence" of the water, a right supported by the privilege of access from the boulevard.[61] The holding explicitly extended recreational use of water from swimming, fishing, boating, and water skiing to aesthetic enjoyment.

Only one Great Lakes case addressed the right of public passage, traditionally viewed as one of the incidents of navigation.[62] In this case the owner of shore property had exercised his right of wharfing out by filling out to navigable waters. Later, the State of Minnesota condemned the land for purposes of constructing a highway. The court held that the state had to pay for the

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59. Cass County Park Trustees v. Wendt, 36 Mich 247 (1960).

60. Meridian Township v. Palmer, 279 Mich 586 (1937).

61. See note 27, supra.

62. State v. Slotness, 289 Minn 485 (1971).

land taken between ordinary high and ordinary low water mark, because highway use is not an incident of navigation.

The courts have consistently recognized the right of public passage along the ocean foreshore in coastal states. Under applicable law in those states, whether title extends to ordinary high or ordinary low water mark, the shore owner's rights are subject to the public right of passage.[63]

Pennsylvania and New York are the only Great Lakes states bordering on the ocean. Although Pennsylvania courts have not had an opportunity to speak on the issue, in New York the courts have recognized a right of passage along the foreshore. The public has the right to pass and repass, to fish, to hunt, to bathe, and to navigate on the foreshore.[64] As long as they do not interfere with the littoral owner's right of access, members of the public have the right to set up an umbrella or blanket on the foreshore.[65] The owner of ocean shoreland who exercises his right of access and wharfing out to the detriment of the public right of passage will be restrained.[66]

The right of public passage along the foreshores of the Great Lakes has not been confirmed by the courts. The Wisconsin Justice Department and Department of Natural Resources state there is no right of public passage on the foreshores of the Great Lakes. Public agencies in Michigan agree.[67] These opinions are

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63. Comment, Waters and Watercourses -- Right of Public Passage Along Great Lakes Beaches, 31 Mich. L. Rev. 1134 (1933).

64. People v. Brennan, 142 Misc. 225 (1931).

65. See note 34, supra.

66. See note 37, supra.

67. Communication from the Office of the Attorney General for the State of Michigan and Booklet entitled, "What you need to know about the Great Lakes Submerged Lands Act," printed by the Michigan Department of Natural Resources.

based on the holding in Doemel v. Jantz[68], despite the fact that it applied to the shores of an inland lake, not of the Great Lakes. In Doemel, a member of the public who walked on the land of a littoral owner was treated as a trespasser. The court reasoned that the owner held title to the low water mark. As noted earlier, rights of title and use of the foreshore are not synonymous. Although title may vest to the low water mark on inland navigable lakes and rivers on the Great Lakes, the navigational servitude extends to ordinary high water mark. Under the equal footing doctrine, the Submerged Lands Act, and the public trust doctrine, states hold title to the submerged lands under the waters of the Great Lakes to the ordinary high water mark. For purposes of assuring a shore owner that he will not lose his littoral rights when the water is below ordinary high water mark, the Michigan "movable freehold" theory is useful.[69] It does not, however, give the littoral owner anything more than that. It does not authorize him to bar public passage along the foreshore.

The Great Lakes have some characteristics of inland lakes and some characteristics of the oceans. Their waters are fresh and their tides are minimal. Yet, they are comparable in size to the Irish Sea and support international commerce. Ships that ply the Great Lakes weigh in the thousands of tons, unlike the pleasure craft measured in pounds that travel inland lakes. From the perspective of size, use, and importance, the law of the Great Lakes foreshore should logically follow ocean precedent and not that of inland lakes.

The analogy of the Great Lakes to the oceans is strengthened by federal

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68. Doemel v. Jantz, 180 Wis 225 (1923).

69. See note 24, supra.

legislation made applicable to the Atlantic, Pacific, Gulf, and Great Lakes coastlines, but not including inland navigable waterways.[70]

The custom of foot passage incident to navigation in the Great Lakes region is a long-standing one. The Northwest Ordinance enacted by the United States Congress in 1787 gave written expression to this custom in the following:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other states that may be admitted into the conference, without any tax, impost, or duty therefore.

As a matter of tradition, public passage has been allowed for access to the water for bathing, fishing, boating, and logging. There is also a right to land a boat "in extremis" and proceed from it by foot. Logging workers visit the shore sporadically to break up log jams and ensure a smooth flow of timber downstream to the saw mills. This type of transitory human presence along the Great Lakes foreshores is also felt when fishermen walk ashore to avoid water they cannot wade and voyagers portage around falls or rapids.[71]

Legislative enactments support public rights in and around water bodies. Thus, Illinois law provides:

> (The) Department of Transportation shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois, subject only to the paramount authority of the Government of the United States with reference to the navigation of such stream or streams, and the laws of Illinois, but nothing in this Act contained shall be construed or held to be any impairment whatsoever of the rights of the citizens of the State of Illinois to fully and in a proper

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70. Federal Statutes on marine sanctuaries, 16 U.S.C. 1431 et seq., estuarine areas, 16 U.S.C. 1221 et seq., and beach erosion, 33 U.S.C. 426a, and the Coastal Zone Management Act, 16 U.S.C. 1451 et seq.

71. Minnesota Statutes 160.06.

manner enjoy the use of any and all of the public waters of the State of Illinois, and the jurisdiction of said Department of Transportation shall be deemed to be for the purpose of preventing unlawful and improper encroachment upon the same, or impairment of the rights of the people with reference thereto, and every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged, and protected by the Department of Transportation.[72]

In Minnesota, on state lands bordering measured lakes and other public water courses,

> . . . a strip two rods in width, the ordinary high water mark being the water side boundary thereof, and the land-side boundary thereof being a line drawn parallel to the ordinary high water mark and two rods distant landward therefrom, hereby is reserved for public travel thereon, and wherever the conformation of the shore line or conditions require, the commissioner shall reserve a wider strip for such purposes.[73]

Although the statute deals only with a two-rod strip above ordinary high water mark, we may assume a public right of passage in the foreshore. The importance of public access has also been recognized by legislatures in New York and Wisconsin, and by the federal government through coastal zone management.[74]

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72. 19 Illinois Statutes 73.

73. Minnesota Statutes 92.45.

74. New York Environmental Conservation Law 15-0103 (5) and 15-1103; Wisconsin 236.16 (3); 16 U.S.C. 1454 (b) (7).

Conclusion

Title to the submerged lands under the Great Lakes up to ordinary high water mark is held by the individual states in trust for the public. Public control of the foreshores for purposes of regulation extends to ordinary high water mark. The United States Army Corps of Engineers has the power to grant or withhold permits for dredging, filling, or the construction of wharves and dams in waters that are deemed navigable for federal purposes. The federal "navigational servitude" also gives the federal government regulatory powers under the Commerce Clause. State interest in the foreshores stems from state ownership of the bottom lands up to ordinary high water mark. A number of state and federal statutes regulate different aspects and uses of the Great Lakes foreshore, generally designating ordinary high water mark as the landward boundary for this control. Public title and regulation do not vary with the level of the water, as do rights and uses enjoyed by the general public in the foreshore.

The public is free to navigate commercially or for recreation, to swim, and to fish over the entire surface of the water, even above ordinary high water mark. However, when the foreshore is exposed, the rights of the general public are limited to a right of passage. A strong case can be made for confirmation of the public's right of passage along the foreshore, despite the absence of a clear and convincing judicial decision on the issue. Public passage includes the right to pass and repass over the foreshore, to lounge and recline upon it, and to bathe, hunt, fish, and enjoy the aesthetic pleasures of the water from it. The right of public passage is limited, however, by a superior littoral right of access to navigable waters the entire length of the littoral land.