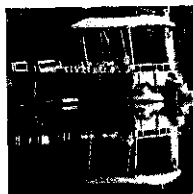
Michigan Water Law: A General Review

By Nyal D. Deems



Michigan is a water wonderland. Bordered by four of the five great lakes, with more than 10,000 inland lakes and innumerable rivers and streams, ponds, marshes, wetlands and other natural and man-made bodies of water, Michigan has more registered boats than any other state. Our waters provide a large fishing and hunting resource, and lure millions of tourists each year to various resorts, campgrounds, cottages and other locales.

Public and private demand for access to the water is constantly increasing. The Department of Natural Resources (DNR) seeks to enhance public access not only for citizens of the state but for the tourists who are attracted to our water resources. In addition, developers constantly seek water and frontage for use in industry or to enhance resort, retail and commercial development.

At one time, waterways were important for transportation and power. As other power sources and more convenient transportation methods were found, waterways and waterfronts fell into disuse, often becoming undesirable areas. More recently, many of those areas have become desirable and valuable for recreation, leisure use, and esthetic purposes in enhancing the quality of life in urban areas.[1]

With the increased demand for frontage and access to water its value has increased dramatically. This has led to many efforts to buy frontage and develop it for specific projects. That goal is often at odds with the desire of the DNR to preserve and protect large segments of the state's water resources for access to the general public. These and other issues have made water law and riparian rights more and more prevalent in real estate transactions and litigation, as conflicting groups seek to define riparian, ownership, access, and flowage rights, and similar issues. This article reviews some of the more common of these issues under Michigan law.

Riparian Rights

"Riparian" (derived from the Latin for the bank of a river or stream) denotes an interest in a body of water. Shoreline property adjacent to lakes or ponds is sometimes referred to as littoral (meaning "near the shore") property. Often, however, as in this article, riparian is used interchangably to refer both to lakefront and riverfront property.

Riparian rights pass with ownership of land bordering on water. They are not alienable, severable, divisible, or assignable apart from the land that includes, or is bounded by, a natural water course.[2] Land includes riparian rights only if it actually touches the water as the result of natural conditions.[3]

Riparian rights are fixed as of the date of the original government survey or as soon thereafter as a reliable survey delineates the body of water.[4] Properties that do not border on water, but have easement access to it, are not riparian, and have only the rights conveyed by the easement,[5] subject to a reasonable use limitation.[6]

Riparian owners own the submerged land under the body of water to the middle of the stream or inland lake, regardless of navigability; who owns the shoreline owns to the center, even when a sandbar or unsurveyed island lies between the shoreline and what would otherwise be the center. If a surveyed, separated island exists, there will be two centers, between the island and each shore.[7] A description stating that the purchaser has received title "to the shore" or "along the shore" conveys a riparian title and the owner of the shoreline will own the submerged land to the middle of the lake or stream.[8] Thus, to reserve or exclude ownership of the submerged land, the conveyance must explicity reserve that interest.

Plat or survey lines drawn along the shore do not exclude riparian rights from the shoreline owners,[9] nor does a meander line restrict those rights.[10]

When a subdivider intends either to grant or reserve some form of the riparian use for all units within the

subdivision, the wording to reserve or make the grant must be very explicit. For example, a developer might have 400 feet of water frontage, and the subdivided land, including the waterfront, might comprise 20 lots, of which only five are waterfront lots. To create joint use of the waterfront, the developer reserves a strip across the entire waterfront for the joint use of all lot owners. A number of cases have involved instances of a common beach, waterfront park, or "promenade" created by the developer, but when the common share has been challenged by waterfront unit owners, the courts have been reticent to actually vest riparian rights in cumulative ownership. Instead, the tendency has been to confine riparian rights to lots adjacent to the waterfront with some form of easement right vested in the back lots.[11]

Riparian rights can be generally categorized as (1) the right to use the water for such purposes as bathing, domestic use, and fishing; (2) rights of wharfage or dockage; (3) the right of access to navigable water; and (4) the right to accretions.[12] Riparian rights grant the owner access to the entire waterway for their exercise.[13] When government owns, and permits access to, shore property, the public has the same riparian rights.

Michigan recognizes the right of any citizen to full access to all bodies of navigable water for the exercise of riparian rights. In practical terms this usually means recreational swimming, boating and fishing. In Michigan navigability is determined by application of the "floating log" test! If the body of water once floated commercial logs or is currently deep enough to float logs of commercial size, it is likely to be deemed navigable. Other determining factors include the isolation of geographic placement of the body of water, however.[14]

In the same sense, the establishment of public access to a body of water by the state or a local government is presumptively subject to a reasonableness standard. Some lakes are obviously too small to be opened up to the full spectrum of public use. Presumably review of this factor is incorporated into a governing unit's establishment of the public access. Similarly, the DNR periodically restricts certain riparian rights to the use of a lake to avoid having the various uses interfere with one another. Thus, motor boats and sail boats may be restricted to certain use times so that they will not interfere with each other. Upon request, the DNR will review the types of uses on a lake and may establish appropriate governing regulations.[15]

Intensified use of lake frontage may be enjoined if it places an unreasonable burden on other riparians.[16] The burden may be judged by its effect either upon all riparians or upon riparians in the immediate vicinity. For example, in *Three Lakes Association v Kessler*,[17] the court enjoined certain riparian uses of a parcel when an inland association bought lake frontage. The trial court found that full exercise of riparian rights by the entire association would unreasonably infringe upon the adjoining landowners. This standard does not prevent a riparian owner from reasonably expanding the use of the waterway. For example, in *Tobias v Tobias*,[18] the court refused to enjoin a riparian owner from permitting others to fish on a lake when the fishing initiated from that property did not unreasonably infringe on fishing by other riparians.

Hunting and trapping are not considered incident to the use of riparian interests, and hence the public does not have a right to use a waterway to trap and hunt.[19] Similarly, sand, gravel, or any minerals within the submerged land are owned solely by the party with title to the submerged land. The common use granted to others with riparian or access rights includes only those rights associated with the use of the water itself, not the right to take items from the submerged land.

Several terms are often used to discuss the movement of land along a waterway. An *accretion*, or an *alluvion*, is a gradual buildup of dry land caused by the force of the water. An *avulsion* is a sudden perceptible change in the land caused by water action, as when a river cuts a new channel. A *reliction* is a gradual increase in land caused by the withdrawal of the water, as when a lake or stream recedes.

The right to land gained through accretion or reliction (alluvial property) is a basic riparian right. An accretion belongs to the land where the accretion begins.[20] Property created by filling done by a third person is treated the same as natural alluvial property.[21]

Claims of the United States in Navigable Waters

The United States retains a paramount right of navigation in all waters that the federal government ►

designates as "navigable."[22] This includes the Great Lakes, all rivers that can be traveled on by vessels and certain lakes that open into the Great Lakes.[23] The paramount right of the United States to use the water for navigation includes the right to use the land on either side of the waterway to facilitate navigation without compensation to the owner.[24]

Riparian rights along a navigable body of water (except the Great Lakes) remain to the owners of the shoreline, including the ownership of the submerged property. The riparian owner, however, may not impair the navigability of the waterway. For example, a dock or wharf may extend into the waterway only to the point of navigable use. Hence, although no dock or wharf will be permitted on a channel, such as where the Grand River empties into Lake Michigan in Grand Haven, a dock or wharf will be permitted upstream along the same river in a part of the channel not subject to navigable use. Further, construction of any structure in a navigable body of water requires a Corps of Engineers permit so that the potential impact upon navigation can be reviewed. Indeed, any construction that may affect any water flowing into a navigable body of water is subject to scrutiny by the Corps under the navigation clause of the U.S. Constitution. This broad jurisdiction permits the Corps to review applications for permits involving fill on creeks and rivers far upstream from the navigable waterway. However, such review is usually performed in conjunction with the DNR's permitting process when it reviews proposed development in or along the waterway.

Types of Waterways

Michigan's waterways have two classifications: the Great Lakes, and inland lakes and streams.

The Great Lakes

Title to the Great Lakes rests in the state subject to the right of navigation of the United States. A riparian owner on the Great Lakes owns only to the ordinary high-water line of the lake.[25] Title to Great Lakes submerged lands is held by the state, and the "law of the sea" (admiralty law) applies on the Great Lakes.[26] With the exception of the ownership of submerged lands, the riparian rights of owners on the Great Lakes are the same as those on navigable streams. The ordinary high-water mark for each of the Great Lakes is set by statute.[27] The ordinary high-water mark is an elevation or datum line set by an official survey for each of the lakes. The state owns title up to that line. Where the water has receded (relicted), additional shoreline is created. Shoreline beyond the ordinary high-water mark is still subject to the state's title, but the adjacent riparian owner has the right to exclusive use of the beach, as would a riparien owner of an inland lake where reliction occurred. The reverse can happen when the water level rises above the ordinary high-water mark, as currently exists on all the Great Lakes bordering Michigan. In this instance, the shoreline owner continues to own to the ordinary high-water mark even though some of the land is submerged. However, ownership of the submerged land is subject to riparian usage by all other parties having access to the Great Lakes and, indeed, is also subject to the navigational servitude of the United States. The use of the submerged land is somewhat restricted, but ownership is not lost.

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Inland Lakes and Streams

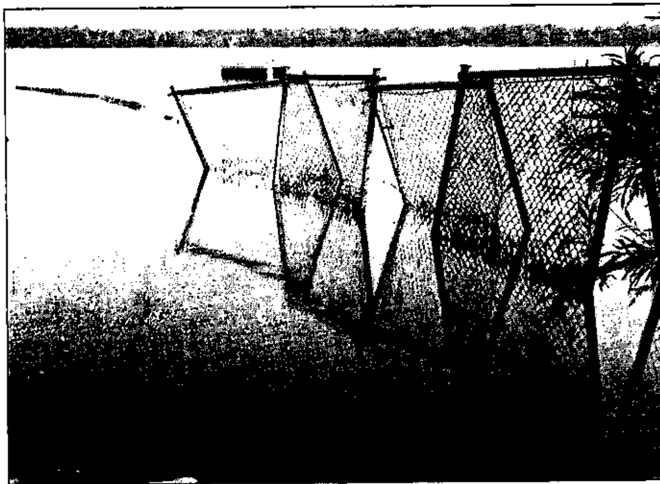
Michigan's inland waterways are governed by the same rules of law whether they are rivers, streams, lakes, or ponds, large or small.[28] The same rules concerning riparian rights and ownership to the center of the waterway apply. If the property is separated from a lake or river solely by a public street or highway, the owner of the property on the other side of the street or highway has riparian rights in the body of water.[29] In every other instance, however, the property must actually touch the water to be riparian. An easement will not give riparian rights. Riparian owners may permit lessees or licensees to use the waterway for riparian purposes, so long as the use does not interfere unreasonably with the rights of other riparian owners.[30]

Division of Submerged Lands Among Riparian Owners

When considering recreational uses of a waterway, the division of submerged lands is not a crucial issue. Use of the water is common to all riparian owners, and no individual ownership of the water is recognized. However, there are times when its importance increases. At the turn of the century the division of a lake was the subject of much litigation by the ice industry. Various companies sought to establish title to the ice upon the lake as part of their commercial enterprise.[31] Since the advent of refrigeration, however, the ownership of ice has not been litigated with great frequency. More recently, issues involving ownership of submerged land have become important. Examples are when a party wishes to build a dock out into the water, or when oil, gas, or other minerals are found beneath the waterway. In the oil and gas instance, for example, a party who owns property along a shoreline has a greatly enhanced claim to a proportionate distribution of oil or gas royalties by virtue of ownership of the submerged lands beneath which ►

the mineral resource lies. Thus, discovery of minerals under a waterway often calls for intricate negotiations to develop the equations to divide the property. Similarly, a party who wishes to build a dock must determine how the boundary line extends out into the waterway to avoid building on a neighbor's land.

As stated previously, the general rule is that ownership is to the center of an inland waterway. The center is easy to determine if the waterway is a circular lake or pond; the boundaries create wedges, in a pie-like division. If the waterway is not circular, or if a river is involved, a threadline (centerline) must be designated that follows the center of the river or, in an oblong lake, between two end points where the lake forms a semicircle. Thus for property along rivers or oblong lakes, the property line on shore extends out to the threadline (centerline) of the waterway. Exceptions may exist when property boundaries are defined by a survey line, such as a



section line, or if the property was conveyed with a specific reservation of a "submerged" interest, such as an island in a river. Absent such exceptions, ownership will be to the center of the body of water.

The general rule in Michigan has been that the submerged boundary line between adjoining riparian owners is determined by extending a line from the boundary on the shore to the threadline so as to meet the threadline at a right angle.[32] Be aware that this rule may cause the property line, as extended into the waterway, to take a different course or direction than the boundary on the shore.

A different theory of division of ownership interests may govern when the issue involves reliction on a lake, under the doctrine of proportional ownership. When the shoreline of a body of water recedes, the owners of the property along the water are entitled to a just proportion of land between the old and new shorelines.[33] The doctrine of proportional ownership maintains the status of riparian ownership. Without the rule, the process of reliction could eventually cause a riparian owner's interest to diminish or disappear because of changing property lines. The proportional rule of ownership of land gained by reliction preserves riparian rights. The basis for determining the proportion is the original shoreline as shown in the government, or first reliable, private survey.[34]

When a waterway expands and encroaches upon property, the owner of that fee then simply owns additional submerged land. No change of title occurs.[35] It is doubtful that a party whose entire property becomes submerged is divested of the fee.[36]

Easements to Waterways

Developers often increase access to a waterway by retaining easements to the water for the benefit of interior lots. This enhances the value of those lots and permits the developer to advertise an entire plat or subdivision as having "water access." The easement does not convey anything to the interior lot owners except limited use access to the waterway, unless the easement document states otherwise.[37]

Easements and grants of ingress, egress, and access give the interior lot owners access to the water for swimming purposes, but do not grant riparian rights. Without frontage on the waterway, a party does not have riparian rights.[38] Thus, interior lot owners should not presume that they have a right to boating, docking, or mooring unless those activities are specifically conveyed in the words of the easement. Furthermore, permissive use of water by an interior lot owner for purposes of anchoring boats, docks, slides, etc., even over a long period of time, is not likely to ripen into a prescriptive right since such use is rarely adverse or hostile.[39]

Dams and Flowage Rights

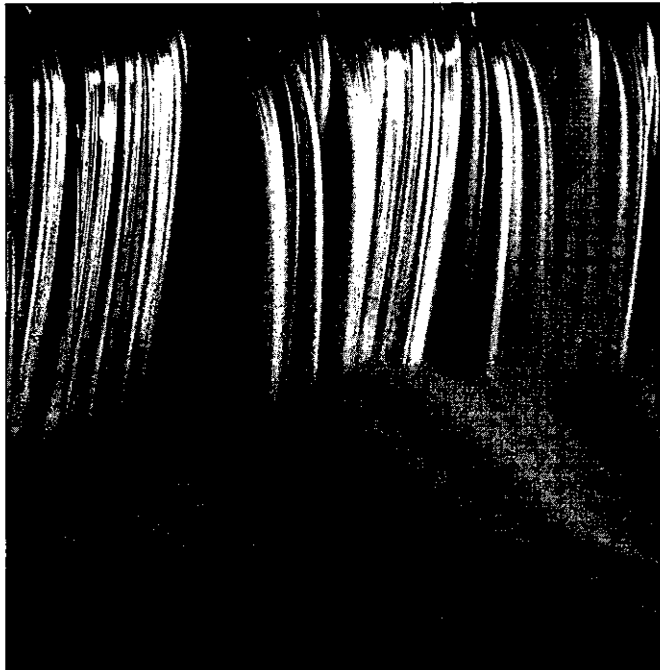
Dams

Generally, a permit to build a dam, and thereby impound water, must be obtained from the DNR under the Inland Lakes and Streams Act of 1982 (ILSA).[40] Other permits and reviews may be required by the county drain commissioner under the Soil Erosion and Sedimentation Control Act of 1972 (SESCA)[41] and the Army Corps of Engineers under its authority over any navigable waters.[42] There is some indication under ILSA that if a dam existed on a waterway before 1966, a state permit to impound water is not necessary to operate it once again.[43]

A party purchasing property downstream from a dam should make certain that the DNR has made regular inspections of the dam to ensure its safety and compliance with the act.[44] Many small dams on rivers and streams were constructed or are maintained inadequately and are subject to washouts in heavy rains or spring thaws. The DNR is charged with controlling dam construction, maintenance, and safety, but a purchaser may desire to make an independent investigation of an upstream dam before buying the property rather than rely solely upon the government's inspection reports. ►

Flowage Rights

A flowage right is the right to impound water and use the force of its flow for power. Years ago this was important for mills and other enterprises. Today flowage rights are sought to create millponds to power dams for electricity or to enlarge a waterway and increase its shoreline. Anyone purchasing property on a river or stream should investigate the possibility that flowage rights may exist in downstream owners that permit impoundments that flood upstream land. Just because an inspection of the property reveals no impoundment of water on the parcel does not guarantee that no flowage rights exist. Flowage rights may not be in use, but non-



use, even for a lengthy period, may not extinguish them.[45] On the other hand, flowage rights acquired by prescription (*i.e.*, by long-continued usage) can be lost if they are not used sufficiently for 15 years.

Generally, prescriptive flowage rights to a waterway can be created only through continuous use that interferes with the exercise of a common right by other riparian owners. Thus, if water flows across upland property either constantly or at sufficiently frequent intervals over a period of 15 years or more, prescriptive flowage rights may arise.[46] In contrast, fishing or swimming in a lake will not create prescriptive rights. Unfortunately, some Michigan decisions suggest that irregular use of flowage over a period of time might be sufficient to create a prescriptive right across the property.[47] Further, if an upland owner becomes aware of a dam being built or renovated downstream, the owner should investigate immediately and protest if flowage is likely to occur. Otherwise, the doctrine of estoppel may prevent a subsequent objection.[48]

A review of title will usually show whether flowage rights encumber the property. However, flowage rights often date from the nineteenth century, and, therefore, are not revealed by an inspection of marketable title. Although the 40-Year Marketable Title Act extinguishes most claims not reflected in record title within the last 40 years, easements, including flowage rights, may exist under that act if clearly observable indications exist of the use of the easement (flowage upon the upstream property).

If intermittent uses are an exception to the 40-Year Marketable Title Act, old flowage rights can continue even though there is not a true continuing presence of the easement upon the property. This exception appears to be outside the intent of the act, but it has not yet been completely litigated in the appellate courts. Generally, when a flowage right is claimed by prescription or under an old conveyance, the mere existence of a dam downstream, without clearly observable evidence of regular and consistent use of the flowage on the upstream property, should not create the requisite notice to maintain the downstream dam owner's claim to flowage.[49]

Purchasing Land for Development

If you represent a purchaser who intends to buy property in a floodplain or along a waterway, you should make sure that your client has or will receive all the necessary permits and approvals before purchasing. Make the purchase contingent upon their receipt and require the seller to assist in acquiring them.

At the outset, have your client check with the local township or municipality and county to determine whether the proposed improvement will comply with all relevant ordinances. If a purchaser anticipates moving any earth within 500 yards of a waterway, a soil and sedimentation permit must be obtained from the county drain commissioner.[50]

Review the requirements of the National Flood Insurance Program concerning the insurability of property in a floodplain.[51] As a general rule, insurance for such property is available only through this program and only if the construction meets its requirements. This usually means that construction must be above the 100-year floodplain. The program permits "removal" of property that is in the 100-year floodplain by placing fill upon it, thereby raising it to an appropriate height. As noted above, this type of fill requires approval from the county drain commissioner under SESCA.

Any construction within a floodplain also requires a permit from the DNR under the Water Resources Commission Act.[52] The DNR must review the construction to ensure it will not pollute or pose a danger to any natural environments that are otherwise being protected. ILSA[53] and the Wetlands Act[54] may also place restrictions upon the development.

A Corps permit is required to ensure that no impairment of a navigable body of water occurs. Do not ►

underestimate what might constitute a navigable body of water. The Corps has authority over any waterway that leads to a navigable waterway.[55] This means that development upon a creek that leads to a navigable waterway is likely to require a Corps permit.

Summary

When addressing real estate transactions that involve water frontage or water access, do not overlook the impact of water law issues on the transaction. Involvement in a purchase, sale or financing of a parcel with water frontage requires a review of the water and riparian issues that may be involved. In many areas the explicit division of the property and the rights that go with it are not clear. The potential ownership and usage issues must be investigated at the time of the transaction. Subsequent litigation is always a poor substitute for preventive review. ■

Footnotes

1. An example is the current effort to open up the spring running through downtown Kalamazoo which has been encompassed under concrete and coverts for years.
2. *Thompson v Enze,* 379 Mich 667, 154 NW2d 473 (1967).
3. *See Ruggles v Dandison,* 284 Mich 338, 279 NW 851 (1938).
4. *Booker v Wever,* 42 Mich App 368, 202 NW2d 439 (1972).
5. *See Turner Subdivision Property Owners Association v Schneider,* 4 Mich App 388, 144 NW2d 848 (1966).
6. *Pierce v Riley,* 35 Mich App 122, 192 NW2d 377 (1971).
7. *See Lorman v Benson,* 8 Mich 18 (1860).
8. *See Bauman v Barendregt,* 251 Mich 78, 231 NW 70 (1930).
9. *See Watson v Peters,* 26 Mich 508 (1873).
10. A meander line is simply a survey line showing the approximate boundary of a body of water. It gets its name because it meanders along the actual shore. A meander line used as part of a description in a conveyance from the United States or the state does not designate any retention of ownership by the United States or the state so long as the government has conveyed the property to a private individual without an express reservation of the submerged ownership and riparian interest. *See Pere Marquette Boom Co v Adams & Lord,* 44 Mich 403, 6 NW 857 (1880).
11. *See Thies v Howland,* 424 Mich App 282, 380 NW2d 463 (1986).
12. *See Pierce v Riley,* 35 Mich App 122, 192 NW2d 377 (1971).
13. Thus, any riparian owner may use any portion of the water's surface, or the water beneath the surface, for general enjoyment so long as the person does not unreasonably interfere with the use of other riparian owners. Boating, swimming, fishing, water skiing, ice skating, and diving are among the many uses of the water available to a riparian owner.
14. *See Bott v Natural Resources Commission,* 415 Mich 45, 327 NW2d 838 (1982); *Allegan Prosecutor v Summer School of Painting at Saugatuck Inc.,* 105 Mich App 550, 307 NW2d 87 (1981), remanded 417 Mich 914, 330 NW2d 854 (1983). Thus, a littoral landowner of all land surrounding a small inland lake, or a lake at the end of a chain of lakes, may be found to have the sole right to use the lake, even though there may be channel access. In such cases the court may find the body of water not to be navigable, either because a shallow approach channel cannot float logs of commercial size or because of the private nature of the lake and its surroundings. *See Bott, supra.*
15. MCLA § 281.1022; MSA § 18.1287(22).
16. *See Pierce, supra.*
17. 91 Mich App 371, 285 NW2d 300 (1979).
18. 45 Mich 263, 75 NW2d 802 (1956).
19. *See Hall v Wantz,* 336 Mich 112, 57 NW2d 462 (1953).
20. *See Tenant v Recreation Development Corporation,* 72 Mich App 183, 249 NW2d 348 (1976).
21. *Williamson v Crawford,* 108 Mich App 460, 310 NW2d 419 (1981).
22. *United States v Chicago,* M, St P & P RR, 312 US 492, 61 S Ct 772, 85 L Ed 1064 (1941).
23. *See, e.g., Douglas v Bergland,* 216 Mich 380, 185 NW 819 (1921) (Lake Gogebic is navigable).
24. *See Scranton v Wheeler,* 113 Mich 565, 71 NW 1091 (1897), *aff'd,* 179 US 141, 21 S Ct 48, 45 L Ed 126 (1900).
25. *Donohue v Russell,* 264 Mich 217, 249 NW 830 (1933).
26. *Hilt v Wever,* 252 Mich 198, 233 NW 159 (1930).
27. *Great Lakes Submerged Lands Act,* PA 1955, No. 247, MCLA § 322.701 *et seq.*
28. *See Bauman v Barendregt,* 251 Mich 67, 231 NW 70 (1930).
29. *See Sheridan Drive Association v Woodlawn Back Property Owners Association,* 29 Mich App 64, 184 NW2d 107 (1970).
30. *Burt v Munger,* 314 Mich 659, 23 NW2d 117 (1946).
31. *See Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co,* 102 Mich 227, 60 NW 681 (1894).
32. *Clark v Campau,* 19 Mich 325 (1869). This rule of law has been applied through the years. *e.g., Hanson v Way Estate,* 25 Mich App 469, 181 NW2d 537 (1970).
33. *Weisenburger v Kirkwood,* 7 Mich App 283, 151 NW2d 889 (1967).
34. *Booker v Wever,* 42 Mich App 368, 202 NW2d 439 (1972).
35. *See Hilt v Weber,* 252 Mich 198, 233 NW 159 (1930).
36. *See Klais v Danowski,* 373 Mich 262, 129 NW2d 414 (1964).
37. *See McCardel v Smolen,* 404 Mich 89, 273 NW2d 3 (1978).
38. *See Delaney v Pond,* 350 Mich 685, 86 NW2d 816 (1957).
39. *See Swartz v Sherston,* 299 Mich 423, 300 NW 148 (1941).
40. MCLA 281.951, *et seq.;* MSA 11.475(1), *et seq.*
41. MCLA 282.101 *et seq.;* MSA 13.1820(1) *et seq.*
42. 33 USC 401, *et seq.*
43. MCLA 281.954(a); MSA 11.475(4)(a).
44. MCLA 281.131, *et seq.;* MSA 11.421, *et seq.*
45. *See Tebbel v Spencer Electric Light & Power Co,* 173 Mich 136, 138 NW 1073 (1912).
46. *See Stidham v Algonquin Lake Comm Ass'n,* 133 Mich App 94, 748 NW2d 46 (1984).
47. *See Walton Cranberry Co v Seamon,* 171 Mich 98, 137 NW 147 (1912).
48. *Stuart v Detroit Finnish Cooperative Summer Camp Association,* 277 Mich 144, 269 NW 122 (1936).
49. *See Rush v Sterver,* 143 Mich App 672 (1985).
50. MCLA 282.113; MSA 13.1820(13); Mich Admin Code R 323.1701-1714. The statute is designed to control erosion and pollution of waterways.
51. 42 USC 4001, *et seq.*
52. MCLA 323.1, *et seq.;* MSA 3.521, *et seq.*
53. MCLA § 281.951, *et seq.;* MSA § 11.475, *et seq.*
54. MCLA § 281.701, *et seq.;* MSA § 11.401, *et seq.*
55. 33 USC 401, *et seq.*